EMPLOYING CO-RELIGIONISTS: LEGAL UPDATE AND BEST PRACTICES

Nathaniel Taylor & Abby St. Hilaire

1. INTRODUCTION

Churches and ministries face increasing litigation over religious-based employment practices that used to enjoy broad statutory protection. This seminar will explore the current state of the law and give best practices for protecting the right to make religious-based employment decisions.

2. WHAT IS HAPPENING?

Religious organizations are being sued for enforcing Christian lifestyle expectations for employees. Examples include:

Billard v. Charlotte Catholic High Sch., No. 3:17-cv-00011, 2021 U.S. Dist. LEXIS 167418, 2021 WL 4037431 (W.D.N.C. Sep. 3, 2021). Substitute teacher at Catholic school fired for same-sex marriage; sues for sex discrimination under Title VII following *Bostock v. Clayton County*. Summary judgment entered for employee; U.S. District Court rejects defenses of 702/703 exemption and church autonomy. Defendants did not assert ministerial exception. School and diocese appeal to Fourth Circuit; oral argument took place September 20, 2023.

Fitzgerald v. Roncalli High School, Inc., 73 F.4th 529 (7th Cir. 2023). Guidance counselor at Catholic school fired for same-sex marriage; sues for sex discrimination and other theories. Court denies 702/703 exemption but eventually grants defendants' motion for summary judgment on ministerial exception. Plaintiff appeals to Seventh Circuit, which affirms.

Starkey v. Roman Catholic Diocese of Illinois, 41 F.4th 931 (7th Cir. 2022). Guidance counselor at Catholic school fired for same-sex marriage; sues for sex discrimination and other theories. Court denies judgment on pleadings; eventually grants summary judgment on ministerial exception. Plaintiff appeals to Seventh Circuit, which upholds district court.

Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060 (Wash. 2021). Applicant for legal aid attorney with rescue mission turned down due to same-sex relationship. Sues under Washington Law Against Discrimination. Trial court dismisses based on statutory exception and plaintiff appeals. Washington Supreme Court holds that the statutory exception for religious employers violates the state constitution's privileges & immunities clause unless plaintiff is a minister, and remands. Defendant petitions for certiorari, which is denied. Justice Alito and Thomas concur in denial, noting that

federal constitutional defenses not addressed in the Washington Supreme Court's opinion and therefore not yet ripe. 142 S. Ct. 1094 (2022). Plaintiff dismisses the suit.

Rinedahl v. Seattle Pacific University, King County Superior Court (Washington 2021). Applicant for nursing professor position at Christian university not hired; was informed he was ineligible for employment due to same sex marriage. Judge rejects constitutional defenses on cross motions for summary judgment; case settled.

Thorp v. New Life Church on the Peninsula, No. 53680-3-II, 2021 Wash. App. LEXIS 375, 2021 WL 689192 (Ct. App. Feb. 23, 2021). Accountant for church terminated for co-habiting with boyfriend; sues for sex and marital status discrimination and outrage. Trial court dismisses based on statutory exception; plaintiff appeals. Dismissal upheld on grounds that "marital status" does not include cohabitation under Washington Law Against Discrimination.

Gonzalez v. World Relief, Spokane County Superior Court (Washington 2022). Legal aid job offer revoked due to same sex marriage; sues for sexual orientation discrimination under the Washington Law Against Discrimination. Case settled within one month of filing.y

Richardson v. NW. Christian Univ., 242 F. Supp. 3d 1132 (D. Or. 2017). Exercise science instructor at Christian college got pregnant while unmarried; refused to stop cohabiting and terminated. Summary judgment entered for plaintiff on marital status discrimination claim; summary judgment denied on ministerial exception and ecclesiastical abstention. Case settled.

Butler v. St. Stanislaus Kostka Cath. Acad., 609 F. Supp. 3d 184 (E.D.N.Y. 2022). Job offer for teacher at Catholic school revoked due to "violation of Catholic faith and morals." Teacher alleges sexual orientation discrimination. Court grants summary judgment on ministerial exception, *but also* holds that church autonomy would provide greater protection even if ministerial exception didn't apply. Appeal dismissed (possibly a settlement).

3. WHY IT MATTERS

The credibility of religious teaching is based on the conduct of the person teaching:

> When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters. Religious teachings cover the gamut from moral conduct to metaphysical truth, and both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers. A religion can- not depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses. For this reason, a religious body's right to self-

> governance must include the ability to select, and to be selective about, those who will serve as the very "embodiment of its message" and "its voice to the faithful. A religious body's control over such "employees" is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world.

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 201, 132 S. Ct. 694, 713, 181 L.Ed.2d 650, 671 (2012) (Alito, J, concurring) (cleaned up).

See also various policy arguments of amici on the cert petition in *Woods v. Seattle's Union Gospel Mission*.
https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public\21-144.html

4. BLACK-LETTER LAW

4.1 Federal Law—Title VII

(A) Applies to employers with 15 or more employees.

"Employer" . . . has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . " 42 U.S.C.A. § 2000e.

(B) Prohibits discrimination on the basis of sex, which includes sexual orientation and gender identity.

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-2.

"Sex" encompasses sexual orientation and gender identity. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1754, 207 L.Ed.2d 218, 249 (2020). Pregnancy discrimination is sex discrimination. 42 U.S.C. 2000e(k).

(C) Title VII religious exemptions.

42 USC 2000e-1(a) ("702 exemption")

> This title shall not apply to an employer with respect to the employment of aliens outside any State, or *to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion* to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 USC 2000e-2(e) ("703 exemption")

> Notwithstanding any other provision of this title . . . (2) *it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.*

Religious employers are generally unsuccessful trying to use the 702 and 703 exemptions to justify discrimination on the basis of protected class other than religion, even when offering a religious justification. *See E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (sex discrimination); *Billard. But see Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc.*, 450 F.3d 130 (3d Cir. 2006) (refusing to apply Title VII on constitutional avoidance grounds where religious justification offered for purported sex discrimination). For an argument that 702 should apply when it touches on another protected class, see Judge Easterbrook's concurrence in *Starkey*, 41 F.4th at 945.

4.2 State employment discrimination laws.

Approximately half the states list sexual orientation or gender identity as a protected class. All have religious exemptions of varying scope. *See* Petition for Writ of Certiorari, *Seattle's Union Gospel v. Woods*, No. 21-144 (2021), at 202a (50 state survey as of 2021).

Washington state has a broad religious exemption that completely excludes religious nonprofits from the definition of employer. RCW 49.60.040(11) ("'Employer' . . . does

not include any religious or sectarian organization not organized for private profit."). But the Washington Supreme Court in *Woods* held that the religious exemption violated the privileges and immunities clause of the Washington Constitution.

5. WHY NONE OF JUSTICE GORSUCH'S SOLUTIONS IN *BOSTOCK* WORK.

5.1 *Bostock* decision and Justice Gorsuch's suggestions.

Bostock held that "sex" under Title VII encompassed sexual orientation and gender identity. Faced with concern that the *Bostock* ruling would infringe on religious liberty, Justice Gorsuch offered potential solutions while punting to another day.

> Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society. But worries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage. As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations. § 2000e–1(a). This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 188, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, codified at 42 U.S.C. § 2000bb et seq. That statute prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. § 2000bb–1. Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. See § 2000bb–3.
>
> But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too.

Bostock v. Clayton Cnty., 207 L. Ed. 2d 218, 140 S. Ct. 1731, 1753–54 (2020). But none of these suggestions are suitable for protecting the freedom of religious nonprofits to impose faith and faith-based conduct standards on employees.

5.2 The 702 and 703 exemptions have been rejected where religious belief intersects with another protected class.

Courts have been loath to read the 702 or 703 exemptions as permitting discrimination on the basis of sex or sexual orientation even when a religious justification is offered. See section 4.1(C) above.

5.3 The ministerial exception is ill-suited for protecting all religious-based employment actions.

The ministerial exception is a First Amendment doctrine that prevents courts from intervening in employment disputes involving key personnel. But it is an ill-suited doctrine for allowing religious employers to impose faith and conduct requirements on its workforce.

(A) The scope of the ministerial exception is limited.

The ministerial exception protects "the selection of the individuals who play certain key roles." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). When it applies, it protects *all* employment decisions, not just those motivated by the employer's religious beliefs. For example, in *Our Lady of Guadalupe*, the underlying claims were age and disability discrimination and in each case the employer asserted generic performance problems as justification for the decisions, not religious doctrine. The power of the doctrine necessarily means that courts will feel pressure to limit the positions to which it applies

(B) The ministerial exception is fact-specific and therefore unpredictable.

"In determining whether a particular position falls within the *Hosanna-Tabor* [ministerial] exception, a variety of factors may be important." *Our Lady of Guadalupe*, 140 S. Ct. 2049, 2063 (2020). Referring to its 2012 decision in *Hosanna Tabor*, the Supreme Court stated "Instead, we called on courts to take all relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of the exception." *Id.* at 2067.

The absence of a bright line leads either to self-censorship or credibility-straining prophylaxis. Justice Brennan's concurrence in *Amos* (upholding the 702 exemption from an establishment clause challenge) illustrates the problem:

> What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a

> religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation. A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 343–44, 107 S. Ct. 2862, 2872, 97 L. Ed. 2d 273 (1987) (Brennan, J. concurring).

Following *Hosanna-Tabor*, which considered the position's title relevant, some organizations labeled all their employees as "ministers." But this can run contrary to doctrine in some faith traditions and strains credibility with courts. *See DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000, 1006 (2021) (criticizing the decision to label faculty members as ministers as being driven by legal, not doctrinal, reasons).

(C) The ministerial exception is an affirmative defense, not a jurisdictional bar.

"We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 195 n.4, 132 S. Ct. 694, 709, 181 L. Ed. 2d 650 (2012).

(D) As a consequence of all the foregoing, the ministerial exception cannot be accurately predicted and will almost never get an employer defendant out on a 12(b)(6) motion.

Application of the ministerial exception requires a detailed factual analysis and an employee-plaintiff would never concede its applicability. Therefore any claim will almost inevitably involve some discovery.

5.4 RFRA may not apply.

Congress passed the Religious Freedom Restoration Act (RFRA) in 1992 following *Employment Division v. Smith*, reinstating strict scrutiny when a law burdened religious exercise. But RFRA does not apply to state laws, only the federal government. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Therefore it provides no protection in a claim based on state antidiscrimination law.

Further, in several circuits, RFRA does not apply to suits brought by private plaintiffs (rather than the government). *See, e.g.*, *Gen. Conf. Corp. of Seventh-Day Adventists v.*

McGill, 617 F.3d 402 (6th Cir. 2010); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834 (9th Cir. 1999). Thus RFRA provides not protection against a Title VII claim brought by a private plaintiff rather than the EEOC.

6. THE DANGER—A FAVORABLE 702/703 OR RFRA RULING THAT DOESN'T ADDRESS STATE LAW

In this author's experience, counsel outside of Washington state almost cannot believe what the Washington Supreme Court did in *Woods*. The focus continues to be on the statutory construction of the Title VII exceptions and the scope of the ministerial exception.

This poses a danger. If sexual orientation or gender identity discrimination by a religious nonprofit reaches the Supreme Court in a Title VII case, the result may be a favorable construction of the Title VII exemptions.

But that would permit other blue-state courts to copy the Washington Supreme Court's decision on state law. Consider same-sex marriage. In *Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993), the Hawaii Supreme Court held that the equal protection clause of Hawaii Constitution may provide right to same-sex marriage. It was followed by *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), where the Massachusetts Supreme Court held that the Massachusetts Constitution's Equal Protection and Due Process clauses granted a right to same sex marriage. Eventually the U.S. Supreme Court ruled the same way in *Obergefell*.

7. POTENTIAL LEGAL SOLUTIONS

There are a handful of First Amendment arguments other than the ministerial exception that arguably protect the right of a religious nonprofit to impose faith and conduct standards on all employees.

7.1 Co-religionist / church autonomy.

A handful of federal appellate cases hint at a constitutional "co-religionist" or church autonomy exemption that protects religiously-motivated hiring decisions. Most of these are statutory construction cases informed by constitutional principles.

Little v. Wuerl, 929 F.2d 944, 948 (3d Cir. 1991) ("[A]ttempting to forbid religious discrimination against non-minister employees where the position involved has any religious significance is uniformly recognized as constitutionally suspect, if not forbidden.").

Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc., 450 F.3d 130 (3d Cir. 2006). The court held that it must avoid considering a claim for sex discrimination "where a religious institution's ability to 'create and maintain communities composed solely of

individuals faithful to their doctrinal practices' will be jeopardized by a plaintiff's claim of gender discrimination." The First Amendment protection extends beyond ministerial employees if a religious reason for the decision is asserted. Conversely, "[i]f a religious employer does not offer a religious justification for an adverse employment action against a *non-ministerial* employee, it is unlikely that serious constitutional questions will be raised . . . ." *Id.* at 142 (emphasis added).

EEOC v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980). The court held that a non-minister employee could not maintain a complaint for sex discrimination if the employer presented convincing evidence that the employment decision was made on religious grounds; even a pretext inquiry was forbidden.

Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618 (6th Cir. 2000). Title VII claim by a non-minister staff member at a religious college. The Sixth Circuit held that (1) religious groups have a "constitutionally-protected interest . . . in making religiously-motivated employment decisions," id. at 623, and (2) courts cannot "dictate to religious institutions how to carry out their religious missions or how to enforce their religious practices," *id.* at 626.

Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011). Applying 702 exemption to World Vision out of constitutional concerns about making determination of what is or isn't religious. The concurring judge observed that "[i]f the government coerced staffing of religious institutions by persons who rejected or even were hostile to the religions the institutions were intended to advance, then the shield against discrimination would destroy the freedom of Americans to practice their religions." *Id.* at 742.

7.2 Strict scrutiny under *Fulton v. City of Philadelphia*.

Title VII, the Washington Law Against Discrimination, and many other state nondiscrimination laws have various exemptions, such as a small employer exemption. Because these laws are not generally applicable, *Fulton v. City of Philadelphia* and *Tandon v. Newsom*, hold that the law is subject to strict scrutiny (rather than rational basis review under *Smith*).

7.3 Expressive Association.

Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) recognizes an expressive association right, albeit not in an employment context. The Supreme Court rejected this theory in the case of a secular, for-profit law firm. *Hishon v. King & Spalding*, 467 U.S. 69 (1984). And it was rejected in *Billard*.

But this and the general applicability / strict scrutiny arguments were accepted in *Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n*, 571 F. Supp. 3d 571, 585 (N.D. Tex. 2021), *aff'd in part, reversed in part sub nom Braidwood Management, Inc. v. Equal Emp. Opportunity Comm'n*, 70 F.4th 914 (5th Cir. 2023).

8. RECOMMENDATIONS

8.1 Have a robust statement of faith.

Something beyond just the historical creeds; mainline protestants still subscribe to these creeds.

8.2 Have explicitly religious qualifications *and* job duties in all job applications and job descriptions.

This sets up a constitutional argument that there are express religious duties and qualifications, even for inward facing jobs (internal Bible studies and chapel services, discipleship, etc.).

8.3 Have all employees go through religious training.

Training is a factor in ministerial exception cases; requiring employees to through theology or evangelism training helps bolster this defense.

8.4 Be up front about lifestyle qualifications – ideally before even accepting an application.

Almost all litigation comes from a job offer that was extended, or from a current employee where a blind-eye was turned toward disqualification until it became unpalatable.

8.5 Have a pastoral position paper that ties the lifestyle qualifications back to the statement of faith.

Explain *why* you believe what you believe. A logical, coherent, consistent position appears more sincere and less arbitrary or cultural.