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CATEGORY: 1.1.1.3-USERRA and Religious Institutions

The Ordinance and the Ordained: USERRA does not afford protection to clergy as it does to other employees.

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***Schleicher v. The Salvation Army,* 518 F.3d 472 (7th Cir. 2008).**

Schleicher v. The Salvation Army, 518 F.3d 472 (7th Cir. 2008). In September 2005, ROA published my Law Review 185, titled "Does USERRA Apply to Religious Institutions?" In the article, I expressed the opinion that, because of Supreme Court precedent applying the "religion clauses" of the Constitution's First Amendment, churches, synagogues, seminaries, and other religious institutions are exempt from enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA). Despite the passage of three years, I continue to receive lots of inquiries about Law Review 185 (available online at www.roa.org/law_review). Most of the inquiries come from Reserve Component chaplains who (when not on active duty) work as ministers of churches and other religious institutions.

The first two clauses of the First Amendment read as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Under Supreme Court precedent, a three-pronged test is used to judge the constitutionality of government action that has been challenged under these clauses. First, the government action must have a secular purpose. Second, the government action must not have the effect of advancing or impeding religion and the free exercise of religion. Third, the government action must not present an unacceptable risk of the entanglement of government agencies with religious entities.

Schleicher involved two ordained ministers (a married couple) of the Salvation Army, a distinctly religious institution. They received no salary—only a "living allowance" of $150 per week each—for their duties performed in a religious-based rehabilitation community. They performed both religious duties and commercial duties as managers of a thrift shop operated by the Salvation Army. They sued, contending that the Salvation Army had violated the minimum wage rules of the Fair Labor Standards Act, in that the number of hours spent in the commercial activities (running the thrift shop) multiplied by the minimum wage far exceeded $150 per week. The Salvation Army dismissed them as officers for having sued.

In an opinion written by Circuit Judge Richard A. Posner, the U.S. Court of Appeals for the Seventh Circuit held that the "ministerial exception" mandated by the First Amendment precluded the plaintiffs from prevailing, either for the non-payment of the minimum wage or for the retaliatory dismissal from the ordained ministry of the Salvation Army.

The ministerial exception is alive and well, and I believe it applies to USERRA, just as it applies to the Fair Labor Standards Act, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and other statutes that regulate the relationship between employers and employees.

There is simply no way to apply USERRA or any statute to the "pervasively religious relationship between a member of the clergy and his religious employer." *DeMarco v. Holy Cross High School,* 4 F.3d 166, 171-72 (2nd Cir. 1993), citing *Scharon v. St. Luke's Episcopal Presbyterian Hospital,* 929 F.2d 360, 363 (8th Cir. 1991); *Minker v. Baltimore Annual Conference of United Methodist Church,* 894 F.2d 1354, 1356-58 (D.C. Cir. 1990). If you are a chaplain in the Reserves and a parish minister in civilian life, and if you sue your church or synagogue asserting that its failure to reemploy you violates USERRA, your case probably will be summarily dismissed.