

LAW REVIEW 1206

January 2012

Supreme Court Endorses the Ministerial Exception

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1.1.1.3—USERRA and Religious Institutions

Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 565 U.S. _____ (United States Supreme Court January 11, 2012).

In Law Review 185 (September 2005) and Law Review 0859 (December 2008), I wrote about the “ministerial exception” under all employment discrimination laws, including the Uniformed Services Employment and Reemployment Rights Act (USERRA). Because of this exception, many Reserve Component (RC) chaplains and some RC members in other specialties do not have enforceable reemployment rights against religious institutions (churches, synagogues, mosques, seminaries, church schools, etc.) as employers. If there was any doubt about this conclusion, that doubt was removed by this very recent unanimous Supreme Court decision).

The First Amendment of the United States Constitution provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Of the 13 federal appellate courts, 12 have found that there is a ministerial exception, mandated by the First Amendment, to federal and state employment discrimination laws. The issue has not arisen in the United States Court of Appeals for the Federal Circuit, and given the specialized and limited jurisdiction of that court it is unlikely that this issue would ever arise in that court.

Chief Justice John Roberts wrote a scholarly 22-page decision, and was joined by all eight of his colleagues. After noting that all the circuit courts except the Federal Circuit had found a ministerial exception to exist, Chief Justice Roberts wrote:

We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According to the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

The ministerial exception is not limited to the principal minister of the congregation. In this case, the Supreme Court reversed the 6th Circuit^[1] which had held that the ministerial exception did not apply to Ms. Cheryl Perich, a “called teacher” and “Minister of Religion, Commissioned” of the Lutheran Church-Missouri Synod. She started as a “lay

teacher." After completing a six-year period of study, she was promoted to this "commissioned" status. She spent most of each school day teaching secular subjects to elementary school students, but she spent about 45 minutes of each day teaching religion and leading the students in prayer. Chief Justice Roberts' opinion stated that the distinction between secular and religious employees "is not one that can be resolved by a stopwatch."

The majority of RC chaplains do not have enforceable USERRA rights, because they work for religious institutions.^[2] This is not a problem that Congress can solve by amending USERRA. It would be necessary to amend the First Amendment, and of course that is entirely out of the question. The services should be careful not to overpromise USERRA protections. If you are in this category, you must accept that there is no remedy if your religious institution employer refuses to reemploy you when you return from service or fires you when it becomes clear that you are likely to be mobilized. I invite your attention to Law Review 0940 (October 2009) for some practical suggestions as to how to get along with a religious institution employer while serving in the National Guard or Reserve.

It should also be noted that Employer Support of the Guard and Reserve (ESGR) can contact your employer and try to persuade the employer to comply with USERRA. I suggest that you call ESGR at 800-336-4590.

[1] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from federal district courts in Kentucky, Michigan, Ohio, and Tennessee.

[2] Some RC chaplains work for secular employers, like the United States Department of Veterans Affairs or a state prison system. The ministerial exception does not apply to them.