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Does USERRA Apply to Religious Institutions?

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Q: I am a parish minister and a chaplain in the Army Reserve. I was mobilized and deployed to Iraq for almost two years. When I left, the church found another minister to fill in on an interim basis. The congregation was so pleased with the interim minister that they offered him the job on a permanent basis. When I was released from active duty, I promptly applied for re-employment, but the church denied my application. When I suggested that the Uniformed Services Employment and Reemployment Rights Act (USERRA) gave me the legal right to re-employment, the church hired a lawyer. The lawyer sent me a letter, stating unequivocally that USERRA does not apply to religious institutions, as employers. Is the attorney correct?

A: Unfortunately, yes. The First Amendment of the United States Constitution provides, in pertinent part, that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Supreme Court has held that a labor-management statute shall be deemed to apply to a religious institution, as an employer, only if there is clear evidence that Congress actively considered that the law would apply to religious institutions and affirmatively decided that it should apply. *See Catholic Bishop of Chicago v. National Labor Relations Board,* 440 U.S. 490 (1979). There is nothing in USERRA's text or legislative history that indicates that Congress ever considered such application, so the law simply cannot be applied to religious institutions.

I have mentioned in previous articles that while I was employed as an attorney for the United States Department of Labor (DOL), between 1982 and 1992, I largely drafted, with one other DOL attorney (Susan M. Webman), the interagency task force work product that became USERRA when Congress enacted it in 1994.

Susan Webman and I, and the other members of the interagency task force, were aware of this issue in the mid-1980s, when we were drafting what became USERRA, because of the case of *Cohen v. Reconstructionist Rabbinical College,* Civil Action No. 82-0325 (E.D. Pa. Oct. 1, 1987). Rabbi Cohen was an instructor at the Reconstructionist Rabbinical College, an institution devoted to the training of rabbis. Cohen was also a Reservist. When the college fired him, he filed suit (through DOL and the Department of Justice), asserting that the firing violated the Veterans' Reemployment Rights (VRR) law, precursor of USERRA. The college filed a motion to dismiss the case, based on *Catholic Bishop of Chicago,* and the District Court granted the motion.

The interagency task force considered and rejected the idea of including text in what became USERRA, explicitly showing a congressional intent to apply this law to religious

institutions as employers. Our concern was that including such language would raise constitutional issues and delay or perhaps prevent the enactment of the reform legislation we were proposing. We were also concerned that, in the final analysis, we would not be able to help persons like you, even if we convinced Congress to include an explicit expression that the law would apply to religious institutions. Including such language would solve the statutory construction problem raised by *Catholic Bishop of Chicago,* but it would not solve the underlying constitutional problem.

Title VII of the Civil Rights Act of 1964 is the federal statute that outlaws employment discrimination based on race, color, sex, religion, or national origin. Congress clearly anticipated that Title VII would apply to religious institutions, as employers, because Congress gave religious institutions a partial exemption. (There is a provision in Title VII that the law does not forbid a religious institution from preferring adherents of that religion in employment.) By giving religious institutions a partial exemption, Congress ironically made Title VII applicable to religious institutions at all [SAM—something is missing here].

This partial exemption solves the *Catholic Bishop of Chicago* problem, but it does not solve the underlying constitutional problem. It has been held that the Free Exercise Clause of the First Amendment bars a Title VII suit by a minister against a church. *See Rayburn v. General Conference of Seventh Day Adventists,* 772 F.2d 1164, 1167-69 (4th Cir. 1985), *cert. denied,* 478 U.S. 1020 (1986); *McClure v. Salvation Army,* 460 F.2d 553, 558-61 (5th Cir.), *cert. denied,* 409 U.S. 896 (1972). *See also Minker v. Baltimore Annual Conference, United Methodist Church,* 699 F. Supp. 954 (D.D.C. 1988) (Free Exercise Clause bars Age Discrimination in Employment Act suit by minister against church.).

Congress could amend USERRA to make it apply explicitly to churches and other religious institutions, as employers. Such an amendment would help Reservists and National Guard members who are employed by churches as secretaries, janitors, etc. Such an amendment would not help Reservists and National Guard members who are employed as *ordained ministers.* There is simply no way to reach folks like that, without running afoul of the Free Exercise Clause of the First Amendment. Of course, the church might respond to non-judicial remedies—like members withholding contributions so long as the church leadership refuses to reinstate the veteran returning from Iraq.

This issue began to come up more frequently shortly after September 11, 2001. Altogether, I have heard from more than 50 Reserve Component chaplains who have lost their jobs because of mobilization and who have no remedy. Up to this point, I have not written about this issue in the Law Review column because I did not want to tip off these religious employers that when push comes to shove they really do not have to worry about USERRA enforcement. I decided to write the article now because the major denominations have become well aware of *Catholic Bishop of Chicago.* I want to get the word out to Reserve Component chaplains, most of whom work for religious institutions, so they realize that they do not have enforceable USERRA rights, and should

plan accordingly.

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