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Religious School Worker Anti-Bias Battle Isn't Over Yet

By **Nancy Shilepsky and Brian MacDonough** (March 29, 2021, 4:53 PM EDT)

Nancy Shilepsky

Brian MacDonough

Read together, the first two clauses of the First Amendment of the U.S. Constitution, the establishment clause and the free exercise clause, establish a bedrock of American values: religious freedom.

In a mere 16 words, the First Amendment guarantees that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The interpretation of those words has led to the development of various doctrines, such as separation of church and state, relied on, for example, to curtail religious practices in public schools, and the ministerial exception, relied on to curtail the application of the laws against discrimination to ministers, including certain employees of religiously affiliated schools.

The scope of those doctrines continues to be the subject of much litigation and scholarly debate.

This article addresses recent developments regarding the application of the exception doctrine in employment discrimination cases involving religious schools.

Our Lady of Guadalupe and DeWeese-Boyd

For example, take Our Lady of Guadalupe School v. Morrissey-Berru.[1]The U.S. Supreme Court on July 8, 2020, held that the plaintiffs, teachers in a Roman Catholic elementary school, could not avail themselves of the laws against employment discrimination because they fell within the ministerial exception.

In so concluding, the high court applied a functional analysis, looking to what the teachers actually did rather than solely at their titles or training. In support of the application of the ministerial exception, the U.S. Supreme Court observed that:

> As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide

> instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities.

In DeWeese-Boyd v. Gordon College[2] though, the Supreme Judicial Court of Massachusetts, applying the functional analysis test of Our Lady of Guadalupe, issued a decision on March 5 regarding college faculty that went the other way.

The Supreme Judicial Court held that although Gordon College, a nondenominational Christian liberal arts college, was a religious institution entitled to certain protections under the law, not all its faculty or other employees were ministers as to whom the laws against discrimination could not be applied.

The Laws Against Discrimination and the Ministerial Exception

As a general rule, an employer may not discriminate because of an employee's protected status, such as race, age, religion, national origin, disability, sex, sexual orientation or because of an employee's opposition to such discrimination.

However, in order to protect religious institutions against interference by civil authorities, as is guaranteed by the free exercise clause, the doctrine of the ministerial exception is applied in appropriate cases — those involving ministers — and effectively denies those falling under the exception the protections of the anti-discrimination laws.

Margaret DeWeese-Boyd, an associate professor of social work at Gordon College, alleged that she was denied promotion because of her gender, her association with LGBT persons, and her opposition to her employer's discriminatory policies and practices.

She sued Gordon College under the anti-discrimination laws. In response, Gordon College alleged that it was not subject to those laws because DeWeese-Boyd served the college as a minister.

As the Supreme Judicial Court noted, to apply the ministerial exception could eclipse, and thereby eliminate, the civil law protections against discrimination. In contrast, a decision to not apply the exception could allow civil authorities to interfere with who is chosen to preach religious doctrine, a violation of the separation of church and state guaranteed under the First Amendment.

Mindful of this potential conflict, the Supreme Judicial Court was forced to disentangle what it identified as a most difficult issue: Gordon College's requirement that all its faculty integrate their Christian faith into their teaching and scholarship, even those of secular disciplines.

As the Supreme Judicial Court noted, if this integration requirement was sufficient to render an employee a minister, the ministerial exception would significantly expand the number of employees falling outside the protections of the anti-discrimination laws.

While recognizing that the parameters of the ministerial exception "remain somewhat unclear," the Supreme Judicial Court applied a functional analysis and concluded that DeWeese-Boyd, like most employees, was not a minister.

Application of the Functional Analysis to College Faculty

In reliance on the reasoning of Our Lady of Guadalupe, the Supreme Judicial Court concluded that, unlike employees in earlier cases, DeWeese-Boyd did not teach classes on religion, pray with her students or attend religious services with them, nor did she ever hold herself out as a minister, lead students in devotional exercises or lead chapel services.

The Supreme Judicial Court rejected, as not dispositive, both DeWeese-Boyd's religious faith and training that were unrelated to or not required by her job, and Gordon College's belated characterization of its faculty as ministers, noting that, in evaluating such characterization, a court need only credit an employer's good faith and honest assertions, and may reject those that are pretextual.

Ultimately, the Supreme Judicial Court concluded that the requirement that Gordon College faculty integrate the Christian faith into their teaching and scholarship was different "in kind, and not in degree" from the religious instruction and guidance at issue in cases in which the ministerial exception was held applicable by the U.S. Supreme Court.

Rejecting Gordon College's assertion regarding the breadth of the ministerial exception, the Supreme Judicial Court distinguished between being a Christian academic and being a minister:

> It is our understanding that the ministerial exception has been carefully circumscribed to avoid any unnecessary conflict with civil law. In sum, we conclude that DeWeese-Boyd was expected and required to be a Christian teacher and scholar, but not a minister. Therefore the ministerial exception cannot apply as a defense to her claims.

What This Means for Employees of Religious Institutions and Others

For now, most employees of a religious institution are likely protected by the laws against discrimination — unless they fall within the ministerial exception, e.g., teachers in religious elementary schools who are expected to lead their students in prayer and teach them the tenants of their religion.

It is, however, anticipated that the U.S. Supreme Court is not done with the balancing of religious freedom and other civil rights.

Indeed, in November 2020, the U.S. Supreme Court heard argument in Fulton v. City of Philadelphia,[3] a case in which the U.S. Court of Appeals for the Third Circuit had ruled that Philadelphia could decline to place children through a Roman Catholic foster care agency that would not accept same-sex couples as foster parents.

In essence, the U.S. Supreme Court is being asked to rule on whether private entities that receive public funding may, in reliance on the assertion of religious freedom, restrict services and participation even if those restrictions run afoul of the civil rights guaranteed others.

The ramifications of the U.S. Supreme Court's decision are anticipated to be far-reaching, potentially putting in jeopardy a host of laws prohibiting discrimination based on a broad range of heretofore protected categories, e.g., race, religion, national origin and gender. The U.S. Supreme Court decision is expected this term.

Nancy S. Shilepsky is a partner, and Brian J. MacDonough is a partner and chair of the employment department, at Sherin and Lodgen LLP.

[1] 140 S. Ct. 2049.

[2] SJC-12988.

[3] No. 19-123.