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In a Landmark Decision, the Supreme Court Exempts "Churches" From Most Employment Discrimination Statutes Affecting "Ministers"

Written by: Gregory W. McClune

The First Amendment of the United States Constitution (U.S. Const. amend. I) (http://tinyurl.com/3cduz4v) provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This short sentence containing what is known as the Establishment Clause and the Free Exercise Clause, has been the source of a large body of law and scholarly commentary.

In *Hosanna-Tabor Evang. Luth. Church v. EEOC*, 565 U.S. ____, (No. 10-553) (2012) (http://tinyurl.com/895374g), which has been described as the most significant religious liberty decision of the last two decades, the U.S. Supreme Court last week handed down a decision surprising in both the breadth of its sweep and the unanimity of its conclusions. The Court's opinion, written by Chief Justice Roberts, concluded that "both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." Although this so-called "ministerial exception" had been endorsed by most of the federal courts of appeal, the Supreme Court was addressing the issue for the first time.

Cheryl Perich had been a teacher at the school in Redford, Michigan, that was operated by a Lutheran synod. She claimed that she had been fired from her position as a teacher at the school because she had threatened an employment discrimination claim based on a disability, namely, narcolepsy. (Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U.S.C. §12101 et seq.) (http://www.ada.gov/pubs/adastatute08.htm). Ms. Perich argued that she was employed as a teacher and taught mostly secular subjects, although she occasionally also taught religious classes and attended chapel with her class.

The Court noted courts of appeal that have addressed the issue have uniformly recognized the existence of the "ministerial exception" have applied the First Amendment to preclude application of employment discrimination legislation to claims concerning the employment relationship between a religious institution and its ministers. The Court commenced its opinion stating that it agreed there was such an exception. By imposing an "unwanted minister on a church, the state was interfering with the group's right to shape its own faith and mission through its appointments." Moreover, the Court concluded that granting the state the power to intervene in such decisions would violate the Establishment Clause which prohibits government involvement in such ecclesiastical decisions.

Endorsement of a "ministerial exception" by the Supreme Court seemed very probable. The question in the minds of court watchers was how broadly would the Court would apply this exception? The answer is quite broadly. Rejecting arguments by the EEOC (Brief for the Fed. Resp't in Opp'n, *Hosanna-Tabor Evang. Luth. Church v. EEOC*) (http://tinyurl.com/6wr6bzg) and the Obama administration, the Court concluded that it will look at a number of broad factors in determining whether an employee is a "minister," and will not be guided by a "stop watch." Justice Alito, in a concurring opinion, wrote that the "exception" should apply to any "employee" who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or "serves as a messenger or teacher of its faith."

Although characterized as the "ministerial exception" in the opinions of the federal courts, and now the Supreme Court, the exception clearly extends to a much broader category of employees than what would commonly be regarded as "ministers" of religion. In the words of the Chief Justice, Ms. Perich's job duties, although predominantly secular, nonetheless "reflected a role in conveying the church's message and carrying out its mission." If an employee falls into this broad category, state, federal, and other employment discrimination statutes and regulations are probably inapplicable to employment decisions affecting such employees. Moreover, once an employee has been classified as a "minister," the amount of time devoted to pure religious activities seems to be of little concern.

Given the broad scope of this decision, and its unanimity, we can expect religious organizations will now be claiming exemption from employment discrimination laws in more instances than has happened in the past and with greater success.

How Employers Faced With Potential False Claims Act Liability May Avoid Liability for Whistleblower Retaliation

Written by: Michael B. McCollum

Under the False Claims Act (http://tinyurl.com/72mma9c), a private whistleblower can bring suit on behalf of the federal government to

recover funds fraudulently obtained from the government. *See* 31 U.S.C. § 3730. It is not uncommon for the whistleblower, who can keep up to 30 percent of the government's total recovery, to be an employee of the defendant. Often, depending on how far along an investigation or lawsuit is, because lawsuits brought under the False Claims Act are initially filed under seal, the company may not even know the identity of the whistleblower for some time. Recently, a wide spectrum of companies — from manufacturing and construction to health care and banking have found themselves grappling with these issues, as they are confronted for the first time with False Claims Act investigations or lawsuits, in many instances instigated by their own employees.

Because the False Claims Act also prohibits retaliation against whistleblowers, a company faced with this situation needs to understand how to appropriately respond. The stakes can be even higher if the company not only faces treble damages and additional penalties for the False Claims Act liability, but also liability for retaliation against the whistleblower, which can include reinstatement, twice the amount of back pay plus interest, compensation for special damages, and the whistleblower's attorneys' fees. 31 U.S.C. § 3730(h)(2). Such retaliation claims carry a three-year statute of limitations. 31 U.S.C. § 3730(h)(3).

A recent district court case on a False Claims Act whistleblower retaliation claim sheds valuable light on some of the key issues that need to be considered. *Clinkscales v. Walgreen Co.* (http://tinyurl.com/79ovbyy).

First, it is important to note that the Act is broadly drafted as to who it protects. It protects from retaliation not just actual employees, but also contractors or agents of the company. 31 U.S.C. § 3730(h)(1). It also protects such people from retaliation not just for their own conduct, but for conduct of others "associated" with them. This could conceivably include, for example, conduct by close friends or co-workers or family members.

Second, the conduct must be protected under the False Claims Act. At the outset, the Act specifies that the conduct must be "lawful conduct." Conceivably, therefore, one can imagine situations where the employee might claim that his or her conduct was protected conduct when in fact it was independently unlawful conduct. Stealing confidential information or trade secrets might be one such example. *See U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.* (http://tinyurl.com/6sl6o4r).

The Act also specifies that for conduct to be protected, it must be either "in furtherance of an action" brought under the Act, or more broadly "other efforts to stop 1 or more violations" of the Act. As one could imagine, the question of what might constitute an effort to stop a violation of the Act can sometimes be murky; but in *Clinkscales*, the court articulated some important rules. The employee must actually believe in good faith, or it must be that a reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the government. The court thus distinguished between conduct that "amounts to merely asking how [the employee] could correctly perform a job function" (which is not protected) versus "reporting or attempting to stop misconduct under the [Act]" (which could be protected). Specifically, the court found no protected conduct where the employee never stated he believed the conduct of the defendant was illegal, did not express concerns about that conduct actually creating the potential for fraudulent billing, and did not refuse to complete the task about which he was inquiring. One could imagine that were an employee to make such statements without any good faith belief or reason to make them, no protected conduct would be found.

Third, the employer must have known that the employee had engaged in the protected conduct. In *Clinkscales*, the court found that there was no employer knowledge where the employee had merely asked the employer how to correctly perform the job duty at issue. Rather, to adequately give notice, the employee must have actually "voiced a concern about fraud on the federal government or referenced a *qui tam* FCA action to the employer."

Fourth, the employer must have then taken an adverse employment action against the person because of the protected activity. In *Clinkscales*, the court applied (and noted that several circuits, including the First, Third, Sixth, and Eighth also have applied) the same burden-shifting analysis used under Title VII discrimination claims.

In sum, when confronted with the specter of possible False Claims Act liability, a company needs to carefully take steps to try to minimize its potential exposure to a related retaliation claim. Different courses of conduct are warranted depending on where the company stands, such as if it is conducting its own internal investigation without any government investigation or lawsuit having been initiated, or responding to an investigation or under seal complaint, or litigating in open court a complaint brought by a known whistleblower. The company should first carefully analyze who within the company might have information relating to the potential false claims issues, what precisely that person has communicated regarding these issues, to whom they have communicating this information within the company, and for what purpose those communications were made. The answers to these questions will help shed light on whether any employee has engaged in protected conduct and, if so, how much the company might be deemed to know of this protected conduct. Of course, in making decisions about the employment status of someone who has potentially engaged in protected conduct, the company then should make sure that it does not make any adverse employment decisions regarding that person because of that protected conduct.

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