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A Professional Liability PARADOX: Why Ministers Can't Sue, But Can Be Sued

Robert G. Chadwick, Jr. | *Seltzer Chadwick Soefje & Ladik, PLLC*

In 1984, two employees of an Oregon alcohol and drug treatment facility were fired for using peyote, a controlled substance under Oregon law, during a Native American Church ceremony. They sought unemployment compensation benefits from the Employment Division, Department of Human Resources of Oregon. Their claim was denied because they were deemed to have engaged in work-related misconduct.

This simple unemployment benefits ruling started a six-year dispute ultimately decided by the U.S Supreme Court in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). The fired employees argued the ruling violated the First Amendment to the U.S. Constitution which provides, in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …"

In an April 17, 1990 opinion, Justice Antonin Scalia wrote for a 6-3 majority:

> "Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now."

He reiterated: "The right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"

As with many Supreme Court opinions, *Smith* answered one question only to raise new ones. These questions included: (1) Can ministers be sued for malpractice under professional negligence laws? (2) Can ministers recover for employment decisions which violate federal, state and local anti-discrimination laws?

Professional Malpractice

The first question has been analyzed by state and federal courts with inconsistent results. Two federal appellate decisions nonetheless embraced legal concepts allowing professional malpractice claims to be brought against ministers.

In *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994), a church member brought action against a minister alleging improper counseling conduct. The minister was allegedly held out to be a person qualified to provide psychological counseling to members of his congregation.

On appeal from a 12(b)(6) dismissal in favor of the minister by the U.S. District Court for the Northern District of Illinois, the Seventh Circuit reversed in a December 16, 1994 opinion. The court acknowledged that a claim for clergy malpractice is not justiciable "because the evaluation of such a complaint 'would require the court to extensively investigate and evaluate religious tenets and doctrines.'"

The court then noted the plaintiff's allegations differed from a claim for clergy malpractice:

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Professional Liability Defense Federation
PO Box 588 • Rochester, IL 62563-0588
309-222-8947

Sandra J. Wulf, CAE, IOM, Managing Director
sandra@pldf.org

Sara Decatoire, CAE, IOM, Deputy Director
sarad@pldf.org

Editors

> "… [I]f a complaint alleges that the psychological services that were provided were 'secular' in nature, or that the provider held himself out to be providing the services of a psychological counselor, the negligence claim cannot be characterized as one for clergy malpractice. Tort claims for behavior by a cleric that does not require the examination of religious doctrine are cognizable. [citations omitted]. Under these circumstances, the claim is for professional malpractice by a psychological counselor, not clergy malpractice."

In *Sanders v. Casa View Baptist Church*, 134 F.3d 331 (5th Cir. 1998, *cert. denied*, 525 U.S. 868 (1998)), two parishioners/church employees brought counseling malpractice and breach of fiduciary claims against a church minister alleging he engaged in sexual relationships with them during marital counseling. They alleged the minister had held himself out as having the education and experience of a professional marriage counselor.

On appeal from a jury verdict in favor of the plaintiffs in the U.S. District Court for the Northern District of Texas, the Fifth Circuit affirmed in a February 11, 1998 opinion. In doing so, the court noted the problems presented by a clergy malpractice claim:

> "[S]uch a claim requires definition of the relevant standard of care. Defining that standard could embroil courts in establishing the training, skill, and standards applicable for members of the clergy in a diversity of religions with widely varying beliefs. Furthermore, defining such a standard would require courts to identify the beliefs and practices of the relevant religion and then to determine whether the clergyman had acted in accordance with them."

The Fifth Circuit agreed a clergy malpractice claim runs afoul of the First Amendment: "… [T]o recognize a claim for clergy malpractice would require courts to identify and apply the teachings of a particular faith, thereby making the judiciary responsible for determining what conduct and beliefs are part of a particular religion."

Citing the Supreme Court opinion in the *Smith*, however, the Fifth Circuit found two fact patterns which distinguished the case from a claim for clergy malpractice. The first was the nature of the services offered by the minister:

> "The First Amendment difficulties posed by a claim for clergy malpractice are not … present in this case because the duties underlying the plaintiffs' claims for malpractice by a marriage counselor and breach of fiduciary duties are not derived from religious doctrine. That is, because the jury found that [the minister] held himself out as possessing the education and experience of a professional marriage counselor, his counseling activities with the plaintiffs were judged, not by a standard of care defined by religious teachings, but by a professional standard of care developed through expert testimony describing what a reasonably prudent counselor would have done under the same or similar circumstances."

The second fact pattern was the alleged tortious conduct by the minister.

The court observed: "[The minister's] First Amendment arguments …[reflect] the obvious truth that the activities complained of by the plaintiffs were not part of his religious beliefs and practices and he is not so brazen as to now contend otherwise." The Fifth Circuit thus rejected the minister's argument that the plaintiffs' malpractice and breach of fiduciary duty claims were barred by the First Amendment.

On July 16, 2020, the Fifth Circuit revisited and reaffirmed the holding in *Sanders*. In *McCraney v. North American Mission of the Southern Baptist Convention, Inc.*, ___ F.3d ___, 2020 WL 4013074 (5th Cir. July 16, 2020), the court said: "The First Amendment does not categorically insulate religious relationships from judicial scrutiny, for to do so would necessarily extend constitutional protection to the secular components of these relationships," which "would impermissibly place a religious leader in a preferred position in our society."

Employment Discrimination

The second question has likewise been addressed by state and federal courts with inconsistent results. Nevertheless, two Supreme Court decisions embraced an exception to federal anti-discrimination laws for employment decisions affecting ministers.

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), a plaintiff alleged she had been unlawfully terminated by the Hosanna-Tabor Evangelical Church and School because of narcolepsy, in violation of the Americans with Disabilities Act ("ADA"). The plaintiff was a "called" teacher which meant she was also a minister.

The U.S. District Court for the Eastern District of Michigan granted summary judgment in favor of the school, but the Sixth Circuit reversed. The Supreme Court reversed again in a January 11, 2012 unanimous opinion. For the first time, the Court recognized a ministerial exception to federal employment anti-discrimination laws:

> "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 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."

"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."

The EEOC argued forcefully, to no avail, the ADA is a neutral law of general applicability and therefore governed by the principles reaffirmed in *Smith*. The Court responded:

> "It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. [citations omitted]. The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit."

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In *Our Lady of Guadalupe School v. Morrissey-Berru*, and *St. James School v. Biel*, ___ U.S. ___,140 S.Ct. 2049, ___ L.Ed.2d ___ (2020), two elementary school teachers at Roman Catholic schools in the Archdiocese of Los Angeles sued after being dismissed. One teacher alleged she had been demoted as a teacher and replaced with a younger teacher, in violation of the Age Discrimination in Employment Act ("ADEA"). The second teacher alleged she was discharged in violation of the ADA after she requested a leave of absence to obtain breast cancer treatment.

The U.S. District Court for the Central District of California granted summary judgments in favor of the schools, but the Ninth Circuit reversed. The Supreme Court reversed again in a July 8, 2020 7-2 opinion. The Court found that both teachers qualified for the ministerial exemption even though neither held the title of minister:

> "There is abundant record evidence that they both performed vital religious duties. Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility. 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."

Of crucial importance to the Court's decision was the weight afforded to the school's position:

> "In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important."

The Court elaborated: "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."

Final Thought

In 1963, Justice William Brennan wrote in a concurring opinion in *School Dist. of Abington, Tp., Pa. v. Schempp*, 374 U.S. 203 (1963):

> "When John Locke ventured in 1689, 'I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other,' he anticipated the necessity which would be thought by the Framers to require adoption of a First Amendment, but not the difficulty that would be experienced in defining those 'just bounds.' The fact is that the line which separates the secular from the sectarian in American life is elusive. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty."

For ministers, this paradox means they can be sued for professional malpractice even if they can't sue for adverse employment decisions impacting them. ■

About the **AUTHOR**

Robert G. Chadwick Jr. is a managing member of *Seltzer Chadwick Soefje & Ladik, PLLC*, and is based in the firm's Plano office. He is Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization. He may be reached at rchadwick@realclearcounsel.com.