


9-18-2021

Does the Ministerial Exception Protect a Minister's Humiliating Comments?

Yiting Feng

Follow this and additional works at: <https://scholarship.law.slu.edu/lawjournalonline>

 Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), and the [Religion Law Commons](#)

Does the Ministerial Exception Protect a Minister's Humiliating Comments?

Yiting Feng*

It is always difficult to draw the line in determining whether the government is interfering with the freedom of religion. On July 9, 2021, the Seventh Circuit Court of Appeals made a difficult decision. The majority opinion supported a religious organization's right to raise a ministerial exception as an affirmative defense against its employee's hostile work environment claim. This article explains my disagreement with the majority opinion.

The ministerial exception is derived from the freedom of religion principle. The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."¹ From the Establishment Clause and the Free Exercise Clause flows the ministerial exception, which "ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone."²

The plaintiff, Demkovich, was a minister in a Catholic Church.³ Reverend Dada made belittling, humiliating, and derogatory comments against the plaintiff and later fired the plaintiff. The Seventh Circuit had a *de novo* review. The Seventh Circuit first concluded two principles from two important cases that applied the ministerial exception, *Hosanna-Tabor* and *Our Lady of Guadalupe*. First, the rationale from the cases involved was that allegations of discrimination in termination can be expanded. The protected interest of a religious organization in its ministers covers the entire employment relationship, including hiring, firing, and supervising

* J.D. Candidate, May 2022, Saint Louis University School of Law

¹ U.S. CONST. amend. I.

² *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 194–95 (2012).

³ *Demkovich v. St. Andrew the Apostle Par.*, No. 19-2142, 2021 U.S. App. LEXIS 20410, at *972, *973 (7th Cir. July 9, 2021).

in between.⁴ Second, the ministerial exception prevents civil intrusion and excessive entanglement.⁵ The court then considered Demkovich's hostile work environment claims.⁶

1. Incorrect application of *Hosanna-Tabor*.

The Supreme Court has not decided on whether the ministerial exception bars lawsuits other than those regarding the firing of a minister.⁷ The Supreme Court case of *Hosanna-Tabor v. EEOC* was about an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her.⁸ But in *Demkovich*, the hostile work environment claim is based on the fact that Reverend Dada repeatedly subjected the plaintiff to derogatory comments and demeaning epithets showing a discriminatory animus toward his sexual orientation and involved not only the firing but also the interaction between the plaintiff and the Reverend Dada. Firing a minister is different from verbally abusing the minister. Therefore, the application of the ministerial exception here is not a requirement.

The Seventh Circuit applied *Hosanna* because it believed that what Reverend Dada did was supervising⁹ the plaintiff and allowing the plaintiff's hostile work environment suit due to such supervision will intrude upon the freedom of religion. However, supervision, even within a religious organization, cannot avoid the courts' regulation if criminal or personal tort liability is involved. The Seventh Circuit reasoned that

⁴ *Id.* at 976–77.; See *Hosanna-Tabor*, 565 U.S. at 188, 194–96.

⁵ See, e.g., *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049, 2060–61, 2069 (2020); *Hosanna-Tabor*, 565 U.S. at 187–89.

⁶ *Demkovich*, 2021 U.S. App. LEXIS 20410, at *977. To succeed on a hostile work environment claim, Demkovich must show: (1) unwelcome harassment; (2) based on a protected characteristic; (3) that was so severe or pervasive as to alter the conditions of employment and create a hostile or abusive working environment; and (4) a basis for employer liability.

⁷ *Hosanna-Tabor*, 565 U.S. at 196.

⁸ *Id.*

⁹ *Demkovich*, 2021 U.S. App. LEXIS 20410, at *979.

Reverend Dada had the freedom to supervise the plaintiff because the freedom of religion includes the freedom among the entire employment relationship, including hiring, firing, and supervising in between.¹⁰ However, there is a precondition that the supervision should not violate neutral, generally applicable standards that would be enforceable on behalf of a non-ministerial employee.¹¹ The majority admitted that no court has held that the ministerial exception protects against criminal or personal tort liability.¹²

Moreover, Reverend's Dada's verbal abuse is tortious harassment instead of appropriate supervision. Here, it seems that the majority's opinion allows the church's supervision to be exercised by repeatedly making discriminatory comments against the plaintiff since it ruled that what Reverend Dada did is supervision. The definition of supervision is lacking in the majority's opinion. The majority simply held that it is not the court's job to decide the scope of supervision.¹³ But why can the court interfere when criminal or tortious conduct is involved? The court will still look into the nature of the alleged conduct instead of avoiding all inquiries at the beginning of a suit. As the dissenting opinion explained, the Supreme Court noted that a hostile work environment is not a permissible means of exerting control over employees and accomplishing the mission of the religious organization.¹⁴ The conduct plaintiff alleged here is classic tortious harassment.¹⁵

2. Allowing hostile work environment claims will not intrude upon the freedom of religion.

a. No religious organization's internal doctrine is involved.

¹⁰ See *id.*; *Hosanna-Tabor*, 565 U.S. at 188, 194–96.

¹¹ *Demkovich*, 2021 U.S. App. LEXIS 20410, at *994 (Hamilton, J., dissenting).

¹² *Id.* at 982.

¹³ *Id.* at 979.

¹⁴ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

¹⁵ *Demkovich*, 2021 U.S. App. LEXIS 20410, at *991 (Hamilton, J., dissenting).

The circuit here supported its argument that a religious organization should be free to decide how to lead the organization based on the reasoning from *Hosanna* that a religious organization “must be free to choose those who will guide it on its way.”¹⁶ The reason *Hosanna* said this was because the fact was about the firing of a minister and the reason to fire the minister was her violation of the Lutheran doctrine. The doctrine is that disputes should be resolved internally.¹⁷ Here, Demkovish’s claim was about the hostile work environment created by the derogatory comments against the plaintiff made by Reverend Dada and such comment had no discernible connection with the terms of his employment¹⁸ nor the faith or doctrine. Unlike *Hosanna*, where the church’s internal doctrine was involved, the church here did not even raise any religious doctrine to justify the Reverend’s behavior.

b. Making the belittling and humiliating comments is not a matter of faith and doctrine.

The Seventh Circuit said that allowing the plaintiff’s claim would harm a church’s independent authority in matters of faith and doctrine,¹⁹ and Reverend Dada’s supervision of Demkovish is such a matter.²⁰ A church’s independence on matters of faith and doctrine requires the authority to select, supervise, and remove a minister without interference by secular authorities.²¹ The function of such independence is letting a “wayward minister’s preaching, teaching, and counseling not contradict the church’s tenets” and not “lead the congregation away from the faith.”²² But the belittling and humiliating comments made by Reverend Dada were not preaching, teaching, nor counseling but simply expressing his personal opinion against his coworker during the work. Such judgment does not

¹⁶ *Hosanna-Tabor*, 565 U.S. at 196.

¹⁷ *Id.* at 205.

¹⁸ *Demkovich*, 2021 U.S. App. LEXIS 20410, at *973.

¹⁹ *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2055.

²⁰ *Demkovich*, 2021 U.S. App. LEXIS 20410, at *979.

²¹ *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060.

²² *Id.*

require the court to investigate the organization's internal doctrine nor faith. The church should bear the burden to prove that making such comments derives from its doctrine or faith.

c. The court's concern of excessive state entanglement has no basis.

The Seventh Circuit feared that allowing Demkovich's claim without ministerial exception makes "every step" that the church took in internally responding to the behavior of Reverend Dada legally relevant.²³ The assumption was raised from the dissenting opinion of a Ninth Circuit case involving a female minister having a sexual harassment claim against a church, a presbytery, and her supervisor²⁴. However, there is no evidence that suggests that the court will need to inquire about the church's internal doctrine or faith.

Asking the religious organization to disclose the communication between the ministers is not asking them to follow the government's lead to supervise the organization. Thus, a showing is absent that the circumstances of Demkovich's case will require excessive entanglement between civil and religious realms.²⁵

d. The significance of a minister's legal status will not be demeaned by a secular standard asking a minister not to make belittling nor humiliating comments upon others during the work.

The Seventh Circuit here emphasized a minister's legal status and reasoned that such status' significance let the religious organization be free to decide how to lead the organization.²⁶ The members of a religious group put their faith in the hands of their ministers.²⁷ Actually, supervision based on inappropriate verbal bullying will derogate from the

²³ *Demkovich*, 2021 U.S. App. LEXIS 20410, at *983.

²⁴ *Id.* See *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 953 (9th Cir. 2004).

²⁵ *Demkovich*, 2021 U.S. App. LEXIS 20410, at *994 (Hamilton, J., dissenting).

²⁶ *Id.* at 978.

²⁷ *Hosanna-Tabor*, 565 U.S. at 188.

significance of a minister's status and from the significance of its function as a "lifeblood" and "backbone" between a church and minister. In this case, Reverend Dada is more likely tearing down, instead of building, the congregation.

The ministerial exception should not cover the hostile work environment claim because it does not require the court to investigate the religious doctrine, and humiliation is not a part of supervision that a legal organization, whether religious or not, should exercise.

Edited by Alex Beezley