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Justices Poised To Reshape Employer Religious Bias Issues

By **Sarah Schanz** (February 19, 2020, 5:08 PM EST)

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Ecclesiastes 3:1 states: "For everything there is a season, a time for every activity under heaven."[1] Now is apparently the time for religious issues in employment law.

In its current term, the U.S. Supreme Court could hear three cases concerning religion under Title VII. Religious discrimination by secular employers and the potential exemption of religious employers from discrimination claims are often overlooked in analyses of employment discrimination.

If it agrees to hear Patterson v. Walgreen Co.,[2] the court will reconsider what constitutes undue hardship. Title VII mandates accommodating religious practices up to the point of undue hardship, so this case would revisit when an employer must provide an accommodation in response to an employee's sincerely held religious practice or observance.

Our Lady of Guadalupe School v. Morrissey-Berru[3] and St. James School v. Biel[4] will return the court to its nonstatutory ministerial exception, a doctrine which exempts religious organizations from all claims of employment discrimination by employees when such employees are deemed ministers.

Today is a good time for a refresher on these recurring issues.

What amounts to undue hardship?

Title VII prohibits employment discrimination on the basis of religion. In addition, it requires more than just nondiscrimination: An employer may not refuse to reasonably accommodate an employee's religious beliefs or practices, unless the accommodation would impose an undue hardship on the employer.

In Trans World Airlines Inc. v. Hardison in 1977, the Supreme Court held that anything "more than a de minimis cost" to the employer is an undue hardship.[5] There, accommodating an employee's request to not work on Saturdays for religious reasons amounted to an undue hardship because an employer is not required to accommodate an employee's religious observance at the expense of other employees; otherwise, weekends off would be assigned according to employees' religious beliefs.[6]

This de minimis test is now at issue. In his amicus brief urging the Supreme Court to grant review in Patterson, the solicitor general stated that the existing de minimis standard is contrary to the plain meaning of undue hardship, and inconsistent with the approach

Congress expressly took in a related statute, the Americans with Disabilities Act, which defines "undue hardship" as an action requiring significant difficulty or expense.

Similar to the facts in Hardison, petitioner Darrell Patterson is a Seventh-day Adventist whose religion prohibits him from working between sundown Friday and sundown Saturday. Walgreens fired Patterson after he refused to work an emergency shift on a Saturday, and refused to look for another position within the company that might be able to better accommodate his lack of availability on Saturdays.

In its decision affirming the decision of the U.S. District Court for the Middle District of Florida, the U.S. Court of Appeals for the Eleventh Circuit relied significantly on Hardison when it discussed whether Walgreens would face an undue burden. Citing Hardison, the appellate court held that promising Patterson that he would never have to work on Saturdays would have posed an undue hardship for Walgreens' business operations; the customer care center where Patterson worked operates seven days a week and sometimes requires emergency training for its employees.[7]

If it agrees to hear the case, in addition to reconsidering the meaning of undue hardship, the Supreme Court will also resolve: (1) whether an accommodation that merely lessens or has the potential to eliminate the conflict between work and religious practice is reasonable per se, or if an accommodation must fully eliminate the conflict in order to be reasonable; and (2) whether speculation about possible future burdens is sufficient to meet the employer's burden in establishing undue hardship.

This, in short, could be a major case for Title VII compliance for all employers.

Who qualifies as a minister to invoke the ministerial exception?

The ministerial exception is a court-created doctrine that, by reason of the First Amendment, prohibits all claims of employment discrimination against religious organizations by their ministers. This doctrine was first recognized in 2012 by the U.S. Supreme Court in Hosanna-Tabor Evangelical Lutheran Church and School v. U.S. Equal Employment Opportunity Commission, as a means of ensuring that churches and other religious organizations have the exclusive authority to select and retain those that it engages as "minister[s] to the faithful."[8]

There, the Supreme Court held that Cheryl Perich, a teacher at Hosanna-Tabor Evangelical Lutheran Church and School could not bring a claim of disability discrimination because she qualified as a minister.[9] Perich was responsible for teaching both religious and secular classes and leading students in prayer and devotional exercises. She was also a commissioned minister and underwent substantial religious training to become a commissioned minister.

But in coming to this conclusion, the Hosanna-Tabor court did not adopt clear guidelines for subsequent courts to follow to determine which employees qualify as a minister and thus are covered by the exception. This ambiguity paved the way for the circuit split that exists today on the application of the ministerial exception, and for the forthcoming Supreme Court review of Our Lady of Guadalupe v. Morrissey-Berru and St. James School v. Biel.

Both such cases involve claims of employment discrimination by teachers at Roman Catholic schools in the Los Angeles Archdiocese. Agnes Morrissey-Berru taught fifth grade at Our Lady of Guadalupe School. When her contract to teach was not renewed, she filed a lawsuit alleging age discrimination. Similarly, Kristen Biel sued St. James School for disability discrimination when the school did not renew her teaching contract.

While Morrissey-Berru had meaningful religious responsibilities as a teacher, including

teaching Catholic values and leading students daily in prayer, the U.S. Court of Appeals for the Ninth Circuit reasoned that Morrissey-Berru did not have any formal religious credentials or training, she did not hold herself out as a minister, and her title of teacher was secular.[10] Therefore, the Ninth Circuit found that the ministerial exception did not bar Morrissey-Berru's age discrimination claim.[11]

Similarly, the Ninth Circuit held that the ministerial exception also did not bar Biel's claim of disability discrimination.[12] Biel taught all academic subjects, including a religion class. Yet, Biel did not have formal ministerial credentials, and there were no religious requirements to be a fifth grade teacher.[13] Indeed, as a fifth grade teacher, Biel did not present herself as, nor did the school hold her out to be, a minister.[14]

In both cases, the Ninth Circuit seemingly limited Hosanna-Tabor to its precise facts. This is inconsistent with the approach taken by other circuits, where the factors relied upon in Hosanna-Tabor were considered, but the courts did not treat them as strict elements of the exception.

Morrissey-Berru and Biel have been consolidated for purposes of briefing and oral argument before the court. For secular employers, these cases have only passing interest, as the potential of extending minister status to closely held corporations with deep-seated religious convictions under the Supreme Court's 2014 opinion in Burwell v. Hobby Lobby Stores Inc. is remote. For religious employers, however, these combined cases will define how broadly their exemption from the discrimination laws will be.

Once upon a time, employment lawyers focused on statutes and their immediate cases. But, increasingly, constitutional issues have required employment lawyers to turn their attention to broader issues, such as whether Patterson is weaponizing the First Amendment to expand the scope of Title VII, or whether Our Lady of Guadalupe and St. James Schools are doing so to limit the scope of such employment discrimination statutes.

This will be a term with religion writ large.

Correction: A previous version of this article misstated the status of the petition for certiorari in Patterson v. Walgreen. The error has been corrected.

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[1] Ecclesiastes 3:1.

[2] Patterson v. Walgreen Co., 727 F. App'x 581, 584 (11th Cir. 2018), 2019 WL 1231743 (U.S. March 18, 2019) (No. 18-349).

[3] Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460 (9th Cir. 2019),cert. granted, 2019 WL 6880698 (U.S. Dec. 18, 2019) (No. 19-267).

[4] Biel v. St. James Sch., 911 F.3d 603 (9th Cir. 2018),cert. granted,2019 WL 6880705 (U.S. Dec. 18, 2019) (No. 19-348).

[5] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

[6] Id.

[7] Patterson at 589.

[8] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C. , 565 U.S. 171 (2012).

[9] Id.

[10] Morrissey-Berru at 461.

[11] Id.

[12] Biel at 611.

[13] Id. at 608.

[14] Id. at 609.