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## ***LAWFUL RELIGIOUS DISCRIMINATION?***

### **THE MINISTERIAL EXCEPTION'S ALMIGHTY SPILLAGE OVER THE GRAYER NON-MINISTERIAL AREAS**

*Oliver Encarnacion*

#### **I. INTRODUCTION**

In response to historical societal movements producing differential treatment of race, gender, and sexual orientation, courts across the nation have both granted and refused exceptions for religious groups from civil rights laws against such discrimination.<sup>1</sup> While Title VII of the Civil Rights Act of 1964 (“Title VII”) protects against discrimination based on race, religion, gender, and national origin, the First Amendment’s “Ministerial Exception” shields churches from the prohibition of discrimination based on religion under that statute and any other enactments.<sup>2</sup> Likewise, Title VII grants much broader exceptions through §702 to allow certain religious groups under particular circumstances to do the same.<sup>3</sup>

This Note will accept the Ministerial Exception, recognizing that the constitutional freedom of any institution deemed a “church” to select ministers or clergy without interference from the government or Title VII’s restrictions is, to a great extent, logical and acceptable.

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<sup>1</sup> Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 781 (2007)

<sup>2</sup> 42 U.S.C.A. §§ 2000e, 2000e-1 (West 2014).

<sup>3</sup> *Id.* § 2000e-1(a).

Otherwise, such intrusion could potentially trample upon religious rights.

Rather, this Note addresses the often arbitrary application of Title VII's exceptions regarding employment decisions by other religious organizations, not churches, affecting other positions, not ministerial, within the religious organization. Part II of this Note provides a basic description and background of the Ministerial Exception and Title VII's statutory exceptions, laying out their application requirements, constitutional grounds, and scope of immunity. Part II also addresses and highlights the differences that distinguish them.

Part III examines how the impact of the Ministerial Exception's absolute immunity on the operation of Title VII exceptions' partial immunity in effect allows religious organizations to discriminate on a basis other than religion, particularly sex. This is despite the fact that such discrimination is explicitly prohibited, unless such discrimination is justified as "a bona fide occupational qualification reasonably necessary to the normal operation of that" religious organization.<sup>4</sup> In other words, even though a religious organization may be able to consider an applicant or employee's religion without violating Title VII, such organization may in effect violate the statute by considering the individual's sex, for instance, under the guise of religion.<sup>5</sup>

## **II. MINISTERIAL EXCEPTION VS. STATUTORY EXCEPTIONS**

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<sup>4</sup> *Id.* §§ 2000e-1(a), 2000e-2(e)(1); *see also* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166-67 (4th Cir.1985).

<sup>5</sup> *Id.* § 2000e-1(a).

A. *The Ministerial Exception: Absolute Protection Granted by the Constitution*

The Ministerial Exception is a constitutional doctrine rooted in both the Free Exercise Clause and the Establishment Clause.<sup>6</sup> It applies primarily to churches' selection of ministers, granting a protection afforded by the First Amendment of the Constitution.<sup>7</sup> The Supreme Court long recognized that the "freedom to select the clergy" has "federal constitutional protection as part of the free exercise of religion against state interference,"<sup>8</sup> but that right was most absolutely and clearly stated in the Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. Perich*, which made clear that the right is absolute.<sup>9</sup> In its quest to protect religious organizations' right to choose spiritual leaders, the Exception, where applicable, trumps all federal and state anti-discrimination laws.<sup>10</sup> Thus, if a defendant is deemed a church and the position at issue is ministerial, the right is absolute, both at the federal and state level, and little can be done to redress religious discrimination against employees.<sup>11</sup>

Since Title VII's statutory nondiscriminatory requirements may interfere with the constitutional freedom specific to clergy, the Ministerial Exception, as a constitutional and thus unyielding protection, reconciles Title VII with the First Amendment by allowing religious

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<sup>6</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 707 (2012).

<sup>7</sup> *Id.* at 697; U.S. CONST. amend. I.

<sup>8</sup> *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). For an analysis of the extent to which the judiciary may decide religious disputes see CYNTHIA BROUGH, CONG. RESEARCH SERV., APPLICATION OF RELIGIOUS LAW IN U.S. COURTS: SELECTED LEGAL ISSUES 2 (2011), available at <https://www.fas.org/sgp/crs/misc/R41824.pdf>.

<sup>9</sup> 132 S. Ct. at 706.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

organizations to select clergy without regard to any of Title VII's restrictions.<sup>12</sup> If, however, the Ministerial Exception does not apply either because the employer is not a church or the position at issue is not ministerial, the inquiry as to whether any discrimination protection applies branches out to any of the other potentially viable statutory exceptions. Thus, employment decisions regarding other positions within the organization may still have to comply with Title VII's statutory requirements.

*I. The U.S. Supreme Court's attempt to set the tone and lay the framework for the Ministerial Exception through Hosanna-Tabor Lutheran Church and School v. Perich*

When the Supreme Court first faced the potential for impermissible review of ecclesiastical decisions, it avoided the issue.<sup>13</sup> In *Ohio Civil Rights Commission v. Dayton Christian Schools*, decided in 1985, the plaintiff, a pregnant teacher, was married.<sup>14</sup> However, when she became pregnant, the Dayton Christian Schools decided not to renew her teaching contract.<sup>15</sup> The schools' sponsoring churches adhered to the view that a mother of young children should not work outside the home.<sup>16</sup> The teacher retained a lawyer who informed the school that it was violating federal and state anti-discrimination law.<sup>17</sup> The school then fired the teacher for

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<sup>12</sup> 42 U.S.C.A. § 2000e-1(a) (West 2014); *see also* McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir.1972) (holding that Congress left to the judiciary the task of deciding how Title VII applies to religious organizations. The judiciary's response, first articulated by the Court of Appeals for the Fifth Circuit was to create a "ministerial exception," which exempted the employment relationship between churches and their ministers from Title VII); Little v. Wuerl, 929 F.2d 944, 947-49 (3d Cir.1991) (subjecting religious employer to a claim of religious discrimination would raise substantial questions under the Religion Clauses); *Kedroff*, 344 U.S. at 116; *Rayburn*, 772 F.2d at 1167 ("perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines").

<sup>13</sup> *See generally* *Ohio Civil Rights Comm'n v. Dayton Christian Schs.*, 477 U.S. 619 (1985).

<sup>14</sup> *Id.* at 623.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

violating its practice of Biblical Chain of Command, a belief that all disputes involving members of the church should be resolved within the church.<sup>18</sup>

Following this action, the teacher filed a sex discrimination complaint with the Ohio Civil Rights Commission.<sup>19</sup> The school then filed its own lawsuit in federal court, arguing that its free exercise of religion prohibited the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from investigating discrimination claims at the school.<sup>20</sup> Even though the school lost in the district court, the Sixth Circuit reversed, and the Supreme Court affirmed.<sup>21</sup> But the Court did not reach the merits of the claim, instead concluding that the federal courts should not have interfered in the ongoing state proceedings.<sup>22</sup>

When the Supreme Court reviewed *Hosanna-Tabor* almost thirty years later, it recognized the Ministerial Exception for the first time.<sup>23</sup> In *Hosanna-Tabor*, the EEOC brought an action against a Lutheran church on behalf of a “called” teacher, alleging that the church’s school fired the teacher in retaliation for threatening to file an Americans with Disabilities Act (“ADA”) lawsuit following a “proposed release” (i.e. discharge) allegedly due to a narcolepsy diagnosis and symptoms.<sup>24</sup> The teacher claimed unlawful retaliation under both the ADA and state law.<sup>25</sup> The District Court for the Eastern District of Michigan granted summary judgment in favor of the congregation and subsequently denied reconsideration, but the Sixth Circuit vacated

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<sup>18</sup> *Id.*

<sup>19</sup> *Dayton*, 477 U.S. at 623-24.

<sup>20</sup> *Id.* at 624-25.

<sup>21</sup> *Id.* at 625, 629.

<sup>22</sup> *Id.* at 625.

<sup>23</sup> 132 S. Ct. at 706.

<sup>24</sup> *Id.* at 700-01.

<sup>25</sup> *Id.* at 701.

and remanded.<sup>26</sup> However, the Supreme Court reversed, first recognizing the Ministerial Exception operated as an affirmative defense to conduct that would otherwise violate the statute and then holding that a “called” teacher is a “minister” within the Ministerial Exception.<sup>27</sup>

Since the members of a religious group put their faith in the hands of their ministers, the Supreme Court held that 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.<sup>28</sup> 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.<sup>29</sup> By imposing an unwanted minister, the state infringes upon the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.<sup>30</sup> It also infringes the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.<sup>31</sup>

#### a) Ministerial Employees

Given the Ministerial Exception's constitutional nature, circuit courts across the nation recognized the Exception long before *Hosanna Tabor*.<sup>32</sup> However, the circuit courts had differed

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<sup>26</sup> 582 F. Supp. 2d 881, 884 (E.D. Mich. 2008), *vacated*, 597 F.3d 769 (6th Cir. 2010), *rev'd*, 132 S. Ct. 694, 710 (2012).

<sup>27</sup> *Hosanna-Tabor*, 132 S. Ct. at 707-710.

<sup>28</sup> *Id.* at 706.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; *see also* U.S. CONST. amend. I.

<sup>31</sup> *Hosanna-Tabor*, 132 S. Ct. at 706.

<sup>32</sup> *See, e.g.*, *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303-04 (3d Cir. 2006); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000); *Combs v. Central Texas Annual Conf. of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999); *Hollins v. Methodist Healthcare*, 474 F.3d 223, 226 (6th Cir. 2007); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003); *Scharon v. St. Luke’s Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004); *Bryce v. Episcopal Church*, 289 F.3d 648 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000); *EEOC v. Catholic Univ. Of Amer.*, 83 F.3d 455 (D.C. Cir. 1996)).

on the scope of the Exception, particularly in regards to which employees qualify as ministerial employees.<sup>33</sup> Pragmatically, “churches” and “ministers” are both terms of art. While the definitions of church and minister have been judicially defined, many employees working for religiously-affiliated employers are not considered ministers.<sup>34</sup> *Hosanna Tabor* declined to “adopt a rigid formula for deciding when an employee qualifies as a minister,” deciding only the status of the employee in the case before it.<sup>35</sup> Although the Supreme Court has not identified a definitive standard, it considered four factors that may be relevant to determining whether an employee is ministerial: (1) the formal title given to the employee by the religious institution; (2) the substantive actions reflected by the title (i.e., the qualifications required to be granted such a title); (3) the employee’s understanding and use of the title; and (4) the important religious functions performed by the employees holding that title.<sup>36</sup>

Although the Court did not set out a specific test, the Court noted in *Hosanna-Tabor* that (1) the Church held out Perich, a “called teacher” — different from “lay” or “contract” teachers who are not required to be trained by the Synod or even to be Lutheran — to be a minister, (2) the Church had a ceremony and the congregation was involved in her investiture, (3) Perich had significant religious training as a prerequisite, (4) Perich held herself out to be a minister and even took a special tax deduction applicable only to members of a ministry, and (5) her duties involved significant religious teaching activities.<sup>37</sup> Based on that, the Court decided that Perich met the standards of the Ministerial Exception.<sup>38</sup> However, the Court was careful to note that the

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<sup>33</sup> *Id.*

<sup>34</sup> *Hosanna-Tabor*, 132 S. Ct. at 706.

<sup>35</sup> *Id.* at 707.

<sup>36</sup> *Id.* at 708.

<sup>37</sup> *Id.* at 700, 708-09.

<sup>38</sup> *Id.* at 709.



term "minister" was misleading because the Exception also applies to religions that do not label their spiritual leaders "ministers."<sup>39</sup>

Moreover, the Court refused to address the "parade of horrors" that the EEOC presented in its arguments against a broad Exception.<sup>40</sup> The EEOC and Perich claimed that recognizing the Ministerial Exception in employment discrimination suits would confer on religious employers "unfettered discretion" to violate employment laws by protecting such organizations from liability for actions such as hiring children or aliens not authorized to work in the United States and retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial.<sup>41</sup> *Hosanna-Tabor*, on the other hand, argued that the Exception had been recognized in the lower courts for forty years and, because it applied only to suits by or on behalf of ministers themselves, had not given rise to the dire consequences that the EEOC and Perich predicted.<sup>42</sup> Focusing solely on the employment discrimination suit before it, brought on behalf of a minister, challenging her church's decision to fire her, the Supreme Court construed its holding narrowly by ruling only that the Ministerial Exception bars suits of that nature.<sup>43</sup> In other words, the Supreme Court avoided deciding the applicability of the Exception under other circumstances.<sup>44</sup>

#### *B. Title VII and its Statutory Exceptions*

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<sup>39</sup> *Id.* at 711-12 (Alito, J., concurring).

<sup>40</sup> *Hosanna-Tabor*, 132 S. Ct. at 710.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

## 1. Title VII's Prohibition of Discrimination and Exceptions

Title VII makes it illegal for an employer to discriminate against someone on the basis of race, color, religion, national origin, or sex or to retaliate against a person because the person complained about discrimination, filed a charge, or participated in an employment discrimination investigation or lawsuit.<sup>45</sup> Employers with fewer than fifteen employees are exempt.<sup>46</sup>

While prohibiting employment discrimination on other grounds, sections 702 and 703 of Title VII include several much broader exceptions for religious organizations, regardless of whether the organization is a “church” or the employee a “minister.”<sup>47</sup> Through §702, religious organizations have been granted congressional permission to discriminate based on religion.<sup>48</sup> In other words, Title VII’s prohibition against religious discrimination does not apply to “a religious corporation, association, educational institution, or society with respect to the employment, i.e., hiring and retention, of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”<sup>49</sup> However, the exception is limited on its face to allowing such employers to hire and retain “individuals of a particular religion.”<sup>50</sup> The Supreme Court has unanimously upheld the constitutionality of exceptions allowing a religiously affiliated not-for-profit entity to make employment decisions based on religion, even if the position is related to a

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<sup>45</sup> 42 U.S.C.A. § 2000e (West 2014).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* §§ 2000e-1, 2000e-2(e)(2).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* § 2000e-1(a).

<sup>50</sup> *Id.*

non-religious activity of the organization.<sup>51</sup>

In addition, faith-based service providers are also eligible for the exception as long as they fit within the definition.<sup>52</sup> However, if such organizations receive government funding, the funds cannot be used to advance the organization's religious practices.<sup>53</sup> Furthermore, in the context of Title VII, the exceptions in Sections 702 and 703 for religious organizations, unlike the Ministerial Exception rooted in the Constitution, are not absolute because the exceptions do not allow qualifying organizations to discriminate on any other basis forbidden by Title VII (i.e., race, color, sex/gender, and national origin).<sup>54</sup> Thus, although a religious organization may consider an employee or applicant's religion without violating Title VII, the organization may still violate Title VII if it considers the individual's race, color, national origin, or sex.<sup>55</sup>

Moreover, the exceptions in Title VII appear to apply only with respect to employment decisions regarding hiring and firing of employees based on religion.<sup>56</sup> Once an organization decides to employ an individual, the organization may not discriminate on the basis of religion regarding the terms and conditions of employment, including compensation, benefits, privileges, etc.<sup>57</sup> In other words, religious organizations that decide to hire individuals with other religious beliefs cannot later choose to discriminate against those individuals with regard to wages or other benefits that the organization provides to employees.<sup>58</sup>

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<sup>51</sup> Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 333 (1987).

<sup>52</sup> *Id.*

<sup>53</sup> Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).

<sup>54</sup> 42 U.S.C.A. § 2000e-1(a) (West 2014); Rayburn, 772 F.2d at 1166–67.

<sup>55</sup> See E.E.O.C. v. Pac. Press Pub. Ass'n, 676 F.2d 1272, 1276 (9th Cir. 1982); E.E.O.C. NOTICE, N-915, September 23, 1987.

<sup>56</sup> E.E.O.C. NOTICE, N-915, September 23, 1987.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

a) Religious Organizations

Problematic enough, the statute does not particularly define “religious corporation, association, educational institution, or society,”<sup>59</sup> and there is no definitive judicial standard to determine whether an organization qualifies for the exception. To illustrate the confusion, the Court of Appeals for the Ninth Circuit in one case issued three opinions, each applying a different standard, a situation that does more than highlight the varied understanding of the scope of such exception.<sup>60</sup>

However, the court later amended its decision and issued a majority opinion adopting four criteria that a religious organization must satisfy to qualify for the exception.<sup>61</sup> The court’s standard would recognize that an entity is not subject to Title VII “if it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.”<sup>62</sup> The Supreme Court declined to review the case, leaving lower courts without a uniform standard to apply.<sup>63</sup> Despite the lack of a uniform standard, lower court decisions have generally appeared to agree upon several factors relevant to deciding whether an organization qualifies for the exception.<sup>64</sup>

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<sup>59</sup> 42 U.S.C.A. § 2000e-1(a) (West 2014).

<sup>60</sup> *See Spencer v. World Vision, Inc.*, 619 F.3d 1109 (9th Cir. 2010).

<sup>61</sup> *See Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011).

<sup>62</sup> *Id.* at 724.

<sup>63</sup> *Spencer v. World Vision, Inc.*, 132 S. Ct. 96 (2011).

<sup>64</sup> *See* Footnote 32.

To qualify as a “religious” organization permitted to engage in religious discrimination, an entity must be owned or significantly controlled by an established religious group.<sup>65</sup> An organization may be deemed religious, even if not directly affiliated with a religious group, as long as it is organized for a religious and ethical purpose and is primarily engaged in pursuing that purpose, holds itself out to the public as engaging in that defined purpose, and refrains from significant commercial enterprises.<sup>66</sup>

(1) Religious Educational Institutions: Schools and Universities

Another exception in Title VII, §703(e) (2), applies specifically to religious educational institutions.<sup>67</sup> It allows such institutions “to hire and employ employees of a particular religion if [the institution] is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular [organization], or if the curriculum of [the institution] is directed toward the propagation of a particular religion.”<sup>68</sup>

In *Killinger v. Samford Univ.*, the Eleventh Circuit held that educational institutions connected to an organized religion claiming the exception will be analyzed in terms of 1) the extent of the relationship of the school to an organized religious group, 2) the history and stated mission of the school, 3) the funding and administrative influence on the institution by a religious order, 4) the religious orientation of its curriculum, and 5) the religious affiliation of its

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<sup>65</sup> *LeBoon v. Lancaster Jewish Cmty. Cntr. Ass’n.*, 503 F.3d 217, 226 (3d Cir. 2007).

<sup>66</sup> *Spencer*, 633 F.3d at 742.

<sup>67</sup> 42 U.S.C.A. § 2000e-2(e)(2) (West 2014).

<sup>68</sup> 42 U.S.C.A. § 2000e-2(e)(2) (West 2014).

students and faculty.<sup>69</sup>

The Eleventh Circuit reasoned that seven percent of the school's funding from the church was sufficient to make the educational institution "religious."<sup>70</sup> Merely being founded by a religious organization and maintaining a formal yet distant identification to the specific religion, however, is not sufficient to make an educational institution "religious," especially when the school's modern mission, goals, activities, finance, direction, and curriculum are predominantly secular.<sup>71</sup>

(2) "Bona Fide Occupational Qualification"

Another exception provided in Title VII allows employers to discriminate on the basis of religion, sex, or national origin if those factors are "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."<sup>72</sup>

However, this exception based on bona fide occupational qualifications has been construed narrowly.<sup>73</sup> Accordingly, courts have deemed valid discriminatory qualifications to arise only in situations where religion plays an extremely significant part of the work environment, including, for example, jobs where employee safety is threatened because of the employee's religious

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<sup>69</sup> 113 F.3d 196, 198-201 (11th Cir. 1997).

<sup>70</sup> *Id.* at 201.

<sup>71</sup> *E.E.O.C. v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993).

<sup>72</sup> *Id.* § 2000e-2(e)(1).

<sup>73</sup> *See Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

affiliation.<sup>74</sup>

b) Commercial Entities Not Entitled to the Exception

While this immunity has not been held to apply to corporations and purely secular businesses in a religious discrimination context under Title VII, the Supreme Court may consider that it does. In *EEOC v. Townley Eng. & Mfg. Co.*,<sup>75</sup> a purely secular for-profit business required its employees to attend employer-organized religious services; nevertheless, the Ninth Circuit held that a purely secular for-profit business is not a “religious organization.”<sup>76</sup> As a result, a secular for-profit entity is thereby not entitled to discriminate on the basis of religion merely because of its owners’ individual religious beliefs.<sup>77</sup>

However, the Supreme Court held in the notorious recent case *Burwell v. Hobby Lobby Stores, Inc.* that the religious beliefs of a closely held for-profit company's owners trumped the personal rights of its women employees.<sup>78</sup> More specifically, the Court ruled that “person” within the meaning of the Religious Freedom Restoration Act (RFRA)<sup>79</sup>’s protection of a person’s exercise of religion includes for-profit corporations, even though the RFRA itself does not define “person.”<sup>80</sup> The Supreme Court relied on the Dictionary Act’s definition of “person” to reach that conclusion.<sup>81</sup> The Court further stated in *Burwell* that it has entertained RFRA claims brought by

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<sup>74</sup> See *Kern v. Dynallectron Corp.*, 577 F.Supp. 1196, 1199-1200 (N.D. Tex. 1983) (allowing an employer to require that helicopter pilots convert to Islam in order to be hired for air surveillance over Mecca because Saudi Arabian law prohibited any non-Muslim from entering the holy area, a violation punishable by death), *aff’d*, 746 F.2d 810 (5th Cir. 1984).

<sup>75</sup> *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> 134 S. Ct. 2751, 2775 (2014).

<sup>79</sup> 42 U.S.C.A. § 2000bb *et seq.*

<sup>80</sup> 134 S. Ct. at 2768-69.

<sup>81</sup> *Id.* at 2768.

nonprofit corporations because a nonprofit corporation can be a “person” within the meaning of RFRA, so the argument cannot be made that RFRA does not reach closely held for-profit corporations.<sup>82</sup> In other words, in Justice Alito's words in the majority opinion, “[n]o known understanding of the term ‘person’ includes some but not all corporations.”<sup>83</sup>

The Court, however, suggested that its holding did not apply to publicly traded corporations because of the difficulty of ascertaining the “beliefs” of such corporations and because it is highly unlikely that such sort of corporate giants will even assert RFRA claims.<sup>84</sup> Likewise, the Court clarified that this ruling did not necessarily apply to other aspects of health coverage such as transfusions, medications derived from pigs, anesthesia, pills coated with gelatin, or vaccinations that might be objectionable to a religious owner.<sup>85</sup> Lastly, *Burwell* seemed to suggest that closely held corporations may not discriminate in hiring based on "religion," but the majority's list of off-limits discrimination does not include sexual orientation.<sup>86</sup>

## 2. Constitutionality of Exempting Entities from the Prohibition of Discrimination on Account of Religion

In *Corp. of the Presiding Bishop v. Amos*, an employee at a non-profit gymnasium, affiliated with the Church of Jesus Christ of Latter Day Saints, challenged the validity of one of the religious discrimination exceptions granted by Title VII.<sup>87</sup> The employee, a janitor, was

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<sup>82</sup> *Id.* at 2769.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 2773-75.

<sup>85</sup> *Id.* at 2805.

<sup>86</sup> *Id.* at 2783.

<sup>87</sup> 483 U.S. at 331.



terminated from employment because he was not a member of the Mormon Church.<sup>88</sup> Arguing that his activities were merely that of a janitor in a gymnasium open to the public and therefore non-religious, he claimed that the Exception was unconstitutional for favoring religion in violation of the Establishment Clause.<sup>89</sup> The Court concluded that Congress passed the religious exception contained in §702 for the purpose of “alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions.”<sup>90</sup>

The Court further recognized that Congress intended the exceptions under Title VII to cover “all activities of a religious employer.”<sup>91</sup> The Supreme Court rejected the argument that the exception did not apply to a janitor position because, as Justice Brennan posited, “determining that certain activities are in furtherance of an organization’s religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.”<sup>92</sup>

While the question of the constitutionality of §702 as applied to for-profit activities of religious organizations was not addressed in *Amos*,<sup>93</sup> *Burwell* may have implicitly resolved that question when the Supreme Court upheld a for-profit corporation's free exercise of religion.<sup>94</sup> In that case, the Supreme Court held that a contraceptives mandate under the Patient Protection and Affordable Care Act (ACA) substantially burdened the exercise of religion and thus violated the constitutional and statutory protections of religious freedom of for-profit, closely held

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 339.

<sup>91</sup> *Id.*

<sup>92</sup> *Amos*, 483 U.S. at 342-43 (Brennan, J., concurring).

<sup>93</sup> *Id.* at 339.

<sup>94</sup> 134 S. Ct. at 2769.

corporations and individuals who owned or controlled the corporations.<sup>95</sup> The Court determined that such action contravened the employers' religious beliefs by forcing them to provide health insurance coverage for what they sincerely viewed as abortion-inducing drugs and devices, as well as related education and counseling.<sup>96</sup> Since the Supreme Court drew no distinction between for-profit and nonprofit organizations with respect to the free exercise of religion, such a distinction may no longer govern the Title VII exceptions.

### **III. TITLE VII EXCEPTIONS: WHEN IS DISCRIMINATION BASED ON RELIGION AS OPPOSED TO, SAY, SEX?**

Civil rights groups have focused on the narrow question of whether religious organizations can use religion as a basis for employment decisions without encroaching upon potential intersections between racial, genders or sexuality related issues.<sup>97</sup> Arguably, the exceptions granted for the prohibition of religious discrimination by Title VII can serve as a shield for religious organizations from being obligated to hire and retain employees who do not share the same religious denomination as the institution. The premise is reasonable in theory; however, it can be wide reaching in practice and inimical to the purpose of Title VII's enactment.

It is one thing to allow religious entities to discriminate based on "religion" and another to grant them broad discretion to define what constitutes "religious" matters, considering how there are nearly as many ways to interpret the Bible and other religious texts as there are people on

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<sup>95</sup> *Id.* at 2779.

<sup>96</sup> *Id.*

<sup>97</sup> *See, e.g., Pedreira v. Kentucky Baptist Homes for Children, Inc.*, 186 F. Supp. 2d 757, 763 (W.D. Ky. 2001).

earth. Although religious institutions are allowed to discriminate based only on “religion,” these institutions can still possibly successfully discriminate based on sex. For instance, although it was decided almost three decades before *Hosanna-Tabor* and did not resolve a Title VII claim, *Madsen v. Erwin*<sup>98</sup> serves to illustrate the dilemma as to whether discrimination is “religious” (legal) or based on sex (illegal).

In *Madsen*, which involved the Boy Scouts' exclusionary policies, the plaintiff was employed as a sportswriter for the Christian Science Monitor, a church-published newspaper.<sup>99</sup> When the plaintiff was terminated because of her sexual orientation, she sued, claiming constitutional, statutory, and common law claims.<sup>100</sup> The court held that the plaintiff's civil rights claims under both the federal and state constitutions could not constitutionally proceed --not because she was a minister, but because entanglement of the defendants in such litigation would involve the court in a review of an essentially ecclesiastical procedure, which is impermissible under the Establishment Clause of the First Amendment.<sup>101</sup> Otherwise, the court added, if Madsen were allowed to collect damages from defendants as a result from being discharged for being gay, the defendants would be penalized “for their religious belief that homosexuality is a sin for which one must repent.”<sup>102</sup>

However, the court in *Madsen* allowed the plaintiff to proceed with her claims for defamation, interference with advantageous relations, interference with employment contract,

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<sup>98</sup> 481 N.E.2d 1160 (Mass. 1985).

<sup>99</sup> *Id.* at 1161.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1166.

<sup>102</sup> *Id.*

invasion of privacy, and infliction of emotional distress.<sup>103</sup> The *Madsen* court treated the plaintiff's tort claims differently because “clergymen may not with impunity defame a person, intentionally inflict serious emotional harm on a parishioner, or commit other torts” and then claim immunity from liability under the First Amendment's religion provisions.<sup>104</sup> Since the alleged torts constituted conduct outside of the constitutional constraints, they were subject to regulation.<sup>105</sup> Since *Hosanna-Tabor* did not reach broader questions of tort liability, it is not clear whether this aspect of *Madsen* survives, even aside from the question of whether the newspaper was sufficiently church-related and whether a sportswriter could be viewed as a minister.<sup>106</sup>

In any event, , the majority in *Madsen* established that the position involved a religious activity run by the church and that “‘homosexuality is a deviation from the moral law’ as expounded by Christian Science, and that it is expected that every employee of the Church will uphold the Church's requisite standard of sexual morality.”<sup>107</sup> Relying upon doctrinal entanglement concerns and a broad view regarding church autonomy, the court further found that the church's decision to fire the plaintiff was a religious decision made by a church as an employer.<sup>108</sup>

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<sup>103</sup> *Madsen*, 481 N.E.2d at 1167.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* But see *Higgins v. Maher*, 258 Cal. Rptr. 757 (Cal. Ct. App., 1989) (involving an action for wrongful termination by a Roman Catholic priest, in which the court also dismissed allegations of defamation, invasion of privacy, and intentional and negligent infliction of emotional distress). In *Higgins*, the torts “occurred as inseparable parts of a process of divestiture of priestly authority,” and, therefore, were “too close to the peculiarly religious aspects of the transaction to be segregated and treated separately as civil wrongs.” *Id.* at 761.

<sup>106</sup> *Hosanna-Tabor*, 132 S.Ct. at 710.

<sup>107</sup> *Madsen*, 481 N.E.2d at 1164.

<sup>108</sup> *Id.* at 1165 (quoting *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976)). The court distinguished a previous case, *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985), stating that the result in that case “did nothing to burden or punish the foundation's exercise of religious beliefs or to exact a penalty for religious beliefs.” *Id.* at 1166. But see *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1642

More recently and in a Title VII context, the employer in *Boyd v. Harding Academy of Memphis, Inc.*,<sup>109</sup> a religious school affiliated with the Church of Christ, claimed that termination of the employee, a preschool teacher, was based on her violation of the organization's policy against extra-marital sex, stemming from the New Testament's proscription of pre-marital sex. On the other hand, the employee who filed the action claimed that the action was unlawful sex discrimination based on her unwed pregnancy.<sup>110</sup> The court held that the termination did not violate Title VII because the employer's decision was based on a violation of its faith-based policy, not the resulting pregnancy.<sup>111</sup>

The District Court for the Western District of Tennessee held that Title VII exempted religious entities as long as the religious employer made its employment decision upon a religious basis or criteria.<sup>112</sup> The court reasoned that the employer's reliance on statements that an assistant in the school made to the director about the plaintiff possibly being pregnant, which, if true, would mean that the plaintiff engaged in sex outside of marriage, did not establish that the school's proffered nondiscriminatory reason for her termination was a pretext for gender discrimination.<sup>113</sup>

In another case, a teacher claimed violations of Title VII, alleging that the employer, a religious group, unlawfully discriminated against her when it terminated her from a teaching

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(1996) (arguing that the court should have considered whether the plaintiff's job as a writer for the Monitor was connected to the Church's religious activity).

<sup>109</sup> 887 F. Supp. 157, 158 (W.D. Tenn. 1995) *aff'd*, 88 F.3d 410 (6th Cir. 1996).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 162.

<sup>112</sup> *Id.* at 160; see also 42 U.S.C.A. §2000e-1 (West 2014).

<sup>113</sup> *Boyd*, 887 F. Supp. at 162.

position for being pregnant and unmarried.<sup>114</sup> The court found that a genuine issue of material fact existed as to whether the employer fired the employee because she violated the school's religious code, or because of her gender and pregnancy.<sup>115</sup> In that case, *Redhead v. Conference of Seventh-day Adventists*, the Eastern District Court of New York reasoned that, although the suit was brought against a school operated by a religious organization, the nature of the dispute was not such that its resolution would inevitably run afoul of the Establishment Clause by impermissibly entangling the court in matters of religious doctrine because the teacher was not a clergy member and her duties at the school were primarily secular.<sup>116</sup> Thus, the action was not barred by the ministerial exception to Title VII.<sup>117</sup>

Unlike Redhead, the teachers in *Boyd* were required to be Christians and preference was given to Church of Christ members.<sup>118</sup> Moreover, the teacher in that case was aware of the expectations because she knew that the Harding Academy was a church-related school and indicated on her employment application that she had a Christian background and believed in God.<sup>119</sup>

A. *Courts' attempt to draw the line between religion and sex in Little and Geary*

As these cases illustrate, courts have issued decisions in opposite directions. In *Little v. Wuerl*, the Third Circuit ruled that a Catholic school could refuse to renew the contract of a non-

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<sup>114</sup> *Redhead v. Conference of Seventh-day Adventists*, 566 F. Supp. 2d 125, 128 (E.D.N.Y. 2008) (finding that the Ministerial Exception did not apply when the employer, Conference of Seventh-Day Adventists, argued that the court lacked jurisdiction because of the Ministerial Exception and claimed that the employee was lawfully terminated for violating church doctrine).

<sup>115</sup> *Id.* at 139.

<sup>116</sup> *Id.* at 132.

<sup>117</sup> *Id.*

<sup>118</sup> *Boyd*, 887 F. Supp. at 158.

<sup>119</sup> *Id.*

Catholic teacher whose divorce and remarriage did not conform to Catholic norms.<sup>120</sup> The Court reasoned that "the permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."<sup>121</sup>

Two years later, the same Court held in *Geary v. Visitation of the Blessed Virgin Mary Parish School* that the religious exception did not provide a shield against an age discrimination claim by a "lay" teacher who was fired by a church-operated Catholic school for allegedly marrying a divorced man.<sup>122</sup> While the Third Circuit determined that the First Amendment may prohibit application of the Age Discrimination in Employment Act ("ADEA") to a religious organization if there is a significant risk that the First Amendment would be infringed, the Court concluded that application of the ADEA to the lay faculty of a religious school does not present a significant risk of entanglement.<sup>123</sup> To reach that determination in *Geary*, the Third Circuit reasoned that the ADEA's inquiry is only whether the school discriminated against Geary on the basis of age, and further, whether the School canceled Geary's insurance in retaliation for her suit.<sup>124</sup> While *Hosanna-Tabor* clearly means that religious employers are exempt from Title VII, the ADEA, and the ADA as long as they claim the aggrieved employee is a "minister," the Third Circuit's reasoning in *Geary* highlights that this is so when the constitutional protections of the First Amendment are implicated, but not because the ADEA provides statutory religious

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<sup>120</sup> 929 F.2d at 951; *see also Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 269 (N.D. Iowa 1980) (interpreting § 2000e-1(a) to allow religious institutions to give hiring preferences to members of the faith, but not to engage in other forms of discrimination in the case of an unmarried pregnant teacher fired by a Catholic school). "Indeed, to construe section 2000e-1 to exempt all forms of discrimination in sectarian schools would itself raise first amendment problems since it would imply the government's preference of sectarian schools over nonsectarian schools." *Dolter*, 483 F. Supp. at 269.

<sup>121</sup> *Little*, 929 F.2d at 951.

<sup>122</sup> 7 F.3d 324, 325 (3d Cir. 1993); *see also Dolter*, 483 F. Supp. at 269.

<sup>123</sup> *Geary*, 7 F.3d at 326-27, 328 (quoting *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979)).

<sup>124</sup> *Id.* at 328.

exceptions like those that Title VII provides on top of the Ministerial Exception.

Other courts have suggested that gender-neutral policies, such as a policy against premarital sex by an employee, if applied in a gender-neutral way, avoids potential clashes between a religious employer's religious views and the obligation to avoid sex discrimination.<sup>125</sup>

### *B. Pregnancy and Lawful Religion Discrimination*

The most serious controversies have probably arisen from the treatment of pregnancy by religious groups in the employment context.<sup>126</sup> The Supreme Court itself has had trouble seeing discrimination on the basis of pregnancy as an instance of sex discrimination.<sup>127</sup> In *Geduldig v. Aiello*, decided in 1974, the Court, composed of all male justices at the time, reasoned that the two classes of pregnant and non-pregnant persons do not perfectly track gender, as there can be non-pregnant women and non-pregnant men.<sup>128</sup>

As a response, Congress promptly amended Title VII to include pregnancy-based discrimination as a forbidden ground under the Pregnancy Discrimination Act;<sup>129</sup> hence, employers cannot lawfully discriminate on the basis of pregnancy, childbirth, or related medical

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<sup>125</sup> See *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 344, 359-60 (E.D.N.Y. 1998) (holding that a sectarian private institution "has the right to employ only teachers who adhere to the school's moral code and religious tenets," but a factual determination would be necessary to see if even a neutral policy against non-marital sex could be discriminatory as applied since it may be easier for a school to discover and penalize the sexual activities of female employees).

<sup>126</sup> Minow, *supra* note 1, at 802.

<sup>127</sup> See *Gen. Elec. v. Gilbert*, 429 U.S. 125, 127-28 (1976); *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974).

<sup>128</sup> 417 U.S. at 496-97.

<sup>129</sup> Pub. L. No. 110-325, 122 Stat. 3553 (2008).



conditions.<sup>130</sup> Therefore, employment actions based on religiously-inspired ideas about pregnancy could potentially trigger the protection against pregnancy discrimination.<sup>131</sup>

However, the statutory amendment could neither alter the constitutional interpretation nor address potential tensions between gender and pregnancy anti-discrimination law in regards to the exception for religious employers who use religion in employment.<sup>132</sup> Thus, when an unmarried female employee of a religious organization becomes pregnant, a religious employer may seek to terminate the employment relationship not because of the pregnancy per se but because the individual engaged in non-marital sexual relations, which is contrary to religious teachings, or because the individual is no longer an adequate role model.<sup>133</sup>

In one case, a teacher at a Catholic school lost her job after she became pregnant and indicated that she did not plan to marry the father.<sup>134</sup> The teacher's termination followed a positive performance review in which her supervisors praised her superior teaching ability and her "high degree of professionalism."<sup>135</sup> The matter became one of contract terms since the teacher had signed a contract accepting the rule in the school's personnel handbook stating that "a teacher is required to convey the teachings of the Catholic faith by his or her words and actions,

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<sup>130</sup> 42 U.S.C.A. § 2000e(k) (West 2014).

<sup>131</sup> *See Id.* §§ 2000e(k), 2000e-1(a).

<sup>132</sup> Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L. REV. 715, 742 (1998).

<sup>133</sup> *See, e.g.,* Chambers v. Omaha Girls Club, 629 F. Supp. 925, 929 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987) (holding that an employment rule that requires termination of employees who get pregnant out of wedlock is not a violation of Title VII); *see also* Vigars v. Valley Christian Ctr. of Dublin, Cal., 805 F. Supp. 802, 805-08 (N.D. Cal. 1992).

<sup>134</sup> John Leo, *The Case of Michelle McCusker*, TOWNHALL.COM (Dec. 5, 2005), [http://townhall.com/columnists/johnleo/2005/12/05/the\\_case\\_of\\_michelle\\_mccusker/page/full](http://townhall.com/columnists/johnleo/2005/12/05/the_case_of_michelle_mccusker/page/full).

<sup>135</sup> *Catholic School Cannot Discriminate Against Unwed Pregnant Teacher, EEOC Rules*, NEW YORK CIVIL LIBERTIES UNION (Oct. 11, 2016), <http://www.nyclu.org/news/catholic-school-cannot-discriminate-against-unwed-pregnant-teacher-eeoc-rules>.

demonstrating an acceptance of Gospel values and the Christian tradition.”<sup>136</sup> However, the teacher did not file any claim under Title VII or any other anti-discrimination law, leaving this particular case as a mere illustration of how the arbitrary nature of religious protections can deprive thousands of teachers, doctors, nurses, and many other professionals of critical employment protections. While the case did not reach the courts, the decision came in the form of a ruling from the EEOC.<sup>137</sup> The EEOC issued a notice, finding that the school, St. Rose of Lima in Rockaway Beach, New York, was engaging in unlawful pregnancy discrimination by firing Michelle McCusker.<sup>138</sup>

While, in theory, the exception allowing religious employers to discriminate on the basis of religion does not permit discrimination on the basis of gender or pregnancy per se, a court could accept a defense that compliance with the Christian tradition is a bona fide occupational requirement.<sup>139</sup> For instance, in *Chambers v. Omaha Girls Club*, a case that came before the District Court in Nebraska involving a discrimination claim brought by an unmarried counselor that became pregnant, the Omaha Girls' Club successfully defended against it on the theory that she was supposed to provide a role model to adolescent girls.<sup>140</sup> The Eighth Circuit affirmed the decision and later denied rehearing the case.<sup>141</sup> In *Vigars v. Valley Christian Center of Dublin, Cal.*, on the other hand, the District Court for the Northern District of California denied a summary judgment motion and called for a trial to determine whether the religious school fired

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<sup>136</sup> Leo, *supra* note 116.

<sup>137</sup> *Catholic School Cannot Discriminate Against Unwed Pregnant Teacher, EEOC Rules, supra* note 117.

<sup>138</sup> *Id.*

<sup>139</sup> See 42 U.S.C.A. §§ 2000e-1(a), 2000 e-2(e) (West 2014) (stating that "it shall not be an unlawful employment practice to hire and employ employees ... on the basis of... sex ... in those certain instances where ... sex ... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise").

<sup>140</sup> 629 F. Supp. at 943, 951-52.

<sup>141</sup> 834 F.2d 697 (8th Cir. 1987); 840 F.2d 583 (8th Cir. 1988).

the librarian because she was pregnant out of wedlock or because she had an adulterous affair.<sup>142</sup> Even though both would seem to violate a Christian lifestyle based upon “a widely recognized and sincerely held belief that extramarital sex is a sin,” the court reasoned that, while childbirth out of wedlock would be an impermissible reason in violation of the Pregnancy Discrimination Act, adultery, otherwise, would be a ground that the Christian school could use to ensure compliance with a Christian lifestyle.<sup>143</sup> After all, the court posited, adultery is inconsistent with “the religious values of the church and school.”<sup>144</sup>

However, defendants, a parochial school run by the church, originally asserted in their motion to dismiss that plaintiff, the teacher, was fired “for the sin of being pregnant out of wedlock,” as she was “pregnant without benefit of marriage,” but later asserted in their summary judgment motion that she was fired because “the school learned that she was involved in an adulterous relationship (i.e., sexual relations with her ‘new’ husband before she was divorced from her ‘old’ husband),” and the resulting pregnancy was evidence of that adulterous relationship.”<sup>145</sup>

### *C. Sexual Orientation & Gender Identity Discrimination: Gender Discrimination?*

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<sup>142</sup> 805 F. Supp. at 810 (denying summary judgment to a Christian school that fired a librarian who got pregnant out of wedlock and holding that such firing was per se sex discrimination).

<sup>143</sup> *Id.* at 805-806.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 804.

The United States workforce includes an estimated 5.4 million lesbian, gay, bisexual, and transgender ("LGBT") persons.<sup>146</sup> No federal statute explicitly prohibits employment discrimination on the basis of sexual orientation or gender identity.<sup>147</sup> Thus, employers discriminate against LGBT workers with broad immunity from detrimental effects.<sup>148</sup> In fact, numerous studies have confirmed that LGBT-related employment discrimination is rampant.<sup>149</sup> Lesbian, gay, and bisexual ("LGB") individuals experience sexual orientation-based employment discrimination at staggering rates: 8% to 17% have been fired or denied employment, 7% to 41% have been verbally or physically harassed by coworkers, and 10% to 19% have been unfairly compensated in terms of pay or benefits.<sup>150</sup>

Transgender persons experience gender identity-based employment discrimination at even greater rates: 47% have been fired or denied employment, 78% have been verbally or physically harassed by coworkers, and 7% have been physically assaulted at work.<sup>151</sup>

### 1. EEOC's Decisions Regarding *Gender Identity*

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<sup>146</sup> MOVEMENT ADVANCEMENT PROJECT, HUMAN RIGHTS CAMPAIGN & CTR. FOR AM. PROGRESS, *A BROKEN BARGAIN: DISCRIMINATION, FEWER BENEFITS AND MORE TAXES FOR LGBT WORKERS 2* (2013), available at <http://www.lgbtmap.org/file/a-broken-bargain-full-report.pdf>.

<sup>147</sup> See Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277 (2014) (noting that a handful of courts perceive LGBT-related employment discrimination as actionable sex discrimination under Title VII of the Civil Rights Act of 1964).

<sup>148</sup> See Chad A. Readler, *Local Government Anti-Discrimination Laws: Do They Make a Difference?*, 31 U. MICH. J.L. REFORM 777, 778 (1998) (noting that local nondiscrimination ordinances are often poorly publicized and weakly enforced).

<sup>149</sup> See S. REP. NO. 113-105, at 14-18 (2013) (discussing studies conducted between 2008 and 2013 that documented instances of sexual orientation or gender identity discrimination).

<sup>150</sup> Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, THE WILLIAMS INSTITUTE (July 2011), <http://williamsinstitute.law.ucla.edu/research/workplace/documented-evidence-of-employment-discrimination-its-effects-on-lgbt-people/>.

<sup>151</sup> JAIME M. GRANT ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 56-58* (2011).

The EEOC has found that lesbian, gay, and bisexual individuals alleging sex-stereotyping are asserting sex discrimination claims under Title VII.<sup>152</sup> In support of its decision, the Commission relied on a number of notable cases, including the Supreme Court's decision in *Price Waterhouse v. Hopkins*, which found that discrimination against an individual for failing to conform to gender-based stereotypes violates Title VII.<sup>153</sup>

Therefore, stereotyping that imposes burdens based on different gender characteristics is forbidden.<sup>154</sup> In *Price Waterhouse*, the Court accepted the concept that “gender stereotyping” is a form of “sex” discrimination.<sup>155</sup> In that case, the plaintiff, a female employee, was denied a promotion to a partnership in defendant's accounting firm.<sup>156</sup> In making their evaluations, decision-makers made comments such as “overcompensated for being a woman,” “a lady shouldn’t use such foul language,” and “she was a macho,” and made recommendations that she should “walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>157</sup> The court reasoned that the plaintiff was being evaluated on the basis of outward characteristics typically associated with the respective sexes, and that such gender “stereotyping” constituted sex discrimination.<sup>158</sup> Similarly, in *Lewis v. Heartland Inns of America, L.L.C.*, a hotel admissions desk clerk was dismissed because she had a “tomboyish” rather than a “pretty, Midwestern girl” appearance.<sup>159</sup> The Eighth Circuit held that such a

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<sup>152</sup> *Veretto v. U.S. Postal Service*, E.E.O.C. Appeal No. 0120110873 (July 1, 2011); *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649 (Dec. 20, 2011).

<sup>153</sup> 490 U.S. 228, 250 (1989)

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 231-32.

<sup>157</sup> *Id.* at 235.

<sup>158</sup> *Id.* at 250.

<sup>159</sup> 591 F.3d 1033, 1036 (8th Cir. 2010).

stereotype constituted sex discrimination.<sup>160</sup>

Likewise, discrimination against an individual because that person is transgender (known as “gender identity discrimination”) is also discrimination because of sex and is therefore covered under Title VII.<sup>161</sup> In its determination in the 2012 case of *Macy v. Holder*, the EEOC reversed the Department of Justice's (“DOJ”) determination that claims of gender identity discrimination are ineligible for adjudication under the Executive Order 1614 process and instead held “that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition.”<sup>162</sup>

Significantly, because *Macy* was decided by the full Commission rather than its Office of Federal Operations, the decision is binding on all executive departments and federal agencies notwithstanding the fact that Executive Order 11478 does not explicitly include gender identity among its protected classes.<sup>163</sup> Consequently, federal employees who suffer an adverse employment action because of their gender identity now have the same enforcement rights as their colleagues who are discriminated against on the basis of race, color, religion, gender, national origin, disability, or age.<sup>164</sup>

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<sup>160</sup> *Id.* at 1040.

<sup>161</sup> *Macy v. Department of Justice*, E.E.O.C. Appeal No. 0120120821 (April 20, 2012).

<sup>162</sup> *Id.* at 5-6.

<sup>163</sup> Advocate Contributors, *Op-Ed: Why We Still Need a Fully Inclusive ENDA*, THE ADVOCATE (Apr. 27, 2012, 4:00 AM), <http://www.advocate.com/politics/commentary/2012/04/27/oped-why-we-still-need-fully-inclusive-enda>; Chris Geidner, *Transgender Breakthrough*, METRO WEEKLY (Apr. 23, 2012), <http://www.metroweekly.com/news/?ak=7288>.

<sup>164</sup> Alex Reed, *REDRESSING LGBT EMPLOYMENT DISCRIMINATION VIA EXECUTIVE ORDER*, 29 ND J. L. ETHICS & PUB POL'Y 133, 160 (2015).

## 2. *Sexual Orientation* Discrimination

Recently, the Commission also issued a potentially groundbreaking decision finding that discrimination based on "sexual orientation" can be brought under Title VII even without any further showing of sex stereotyping.<sup>165</sup> In so ruling, the Commission rejected several circuit court decisions that held that Title VII does not include protection from discrimination based on sexual orientation.<sup>166</sup> The Commission held, "[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex."<sup>167</sup> In reaching its conclusion, the Commission held "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. 'Sexual Orientation' as a concept cannot be defined or understood without reference to sex."<sup>168</sup>

While the EEOC has pronounced that sexual orientation falls under sex and is thus covered under Title VII, the Obama Administration recently announced support for amending the Civil Rights Act through the Equality Act to protect LGBT people in particular.<sup>169</sup> The legislation would amend the Civil Rights Act of 1964 by expanding it to include bans on discrimination based on sexual orientation and gender identity in employment, housing, public

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<sup>165</sup> Complainant v. Foxx, E.E.O.C., Appeal No. 0120133080 (July 16, 2015).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> David Badash, *Obama Administration Announces Support For Amending Civil Rights Act To Protect LGBT People*, THE NEW CIVIL RIGHTS MOVEMENT (Nov. 10, 2015, 2:06 PM), <http://www.thenewcivilrightsmovement.com/davidbadash-obama-administration-announces-support-for-amending-civil-rights-act-to-protect-lgbt-people>.

accommodations, public education, federal funding, credit, and the jury system.<sup>170</sup>

It is precisely because the White House is working “to ensure that the legislative process produces something that balances “the bedrock principles of civil rights with the religious liberty that we hold dear in this country” that the much broader exceptions under Title VII should be closely and critically reexamined given that they can easily get in the way as a cover for implicit discrimination on the basis of pregnancy, sexual orientation, or gender identity, which Title VII precisely seeks to prevent.<sup>171</sup>

a) Sexual Orientation and Lawful Religion Discrimination

Unfortunately, because of the relatively few opinions that address sexual orientation anti-discrimination laws in the face of religious objection, the Supreme Court has yet to consider the question.<sup>172</sup> Generally, the lower courts have sided with religious organizations on claims of discrimination based on sexual orientation.<sup>173</sup>

While not a Title VII victory but hopefully persuasive in some way, two gay student groups won their challenge, as a statutory matter, to Georgetown University's refusal to grant them recognition and access to the kind of resources given to other recognized student groups under the local human rights code in *Gay Rights Coalition of Georgetown University Law Center*

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.* See also 42 U.S.C.A. § 2000e (West 2014).

<sup>172</sup> Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 304 (1999).

<sup>173</sup> See, e.g., *Pedreira*, 186 F. Supp. 2d at 762. Besides rejecting claims of sexual orientation discrimination, courts have also protected the rights of religious groups to discriminate on the basis of sexual orientation, freedom of speech, and association. See, e.g., *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 857 (7th Cir. 2006).



*v. Georgetown University*.<sup>174</sup> However, the University did not have to “recognize” the group since that would be a religious endorsement.<sup>175</sup> Subsequently, Congress, having the authority over the District of Columbia, responded by amending the human rights code.<sup>176</sup> As a result, anti-discrimination norms began to judicially trump claims by religious groups.<sup>177</sup> Although claims of discrimination on the basis of sexual orientation have not generated victories for plaintiffs suing religious organizations, neither have they done much to clarify the law.<sup>178</sup>

In *Pedreira v. Kentucky Baptist Homes for Children, Inc.*, a Baptist social service agency in Kentucky, the state's largest provider of services for troubled youth, fired a therapist for being a lesbian.<sup>179</sup> The plaintiff, Alice Pedreira, disclosed her sexual orientation during the hiring interview, and the director assured her that there was no policy against hiring gays or lesbians but that she should be discreet nonetheless.<sup>180</sup> After a photograph showing Pedreira wearing a t-shirt reading “Isle of Lesbos” and posing with her partner, taken before she took the job, appeared at an amateur photo display at the state fair, the agency asked for her resignation.<sup>181</sup> Since she declined to resign, she was fired.<sup>182</sup>

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<sup>174</sup> 536 A.2d 1, 5 (D.C. 1987).

<sup>175</sup> *Id.*

<sup>176</sup> See Nation's Capital Religious Liberty and Academic Freedom Act, Pub.L. No. 100-462, §145, 102 Stat. 2269-14 (1988). See also Matthew J. Parlow, *Revisiting Gay Rights Coalition of Georgetown Law Center v. Georgetown University a Decade Later: Free Exercise Challenges and the Nondiscrimination Laws Protecting Homosexuals*, 9 TEX. J. WOMEN & L. 219, 228-37 (2000).

<sup>177</sup> *Id.*

<sup>178</sup> *Pedreira*, 186 F. Supp. 2d at 762.

<sup>179</sup> *Id.* at 759.

<sup>180</sup> *Interview with Alice Pedreira*, PEOPLE FOR THE AMERICAN WAY, <http://www.insideout.org/documentaries/faith/pop/pedreira.html> (last visited Feb. 20, 2016).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

Pedreira argued that because the agency received much of its revenues from government contracts, the government was illegally funding religiously based employment policies.<sup>183</sup> Therefore, the agency indicated it would refuse further government contracts rather than alter its policies.<sup>184</sup> Still, the court sided with the Kentucky Baptist Homes, reasoning that the agency was allowed to ensure that the conduct of its employees remained consistent with its Christian mission and values.<sup>185</sup> This case raised questions as to how broadly to define an organization's religious tenets as it led to the inquiry of whether “Pedreira's firing [was] a discriminatory dismissal based upon her sexual orientation” or “due to her being unable to uphold the religious mission or principles of her employer.”<sup>186</sup>

#### IV. CONCLUSION

When a religious institution described in §702 and §703 is able to show convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, the EEOC is deprived of jurisdiction to further investigate the matter to determine whether the religious discrimination was a pretext for some other form of discrimination.<sup>187</sup> Yet, discrimination might not be clear on its face, specifically if perpetuated and acted upon to presumably protect the entity's “religious” beliefs and practices and to further its “religious”

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<sup>183</sup> *Pedreira*, 186 F. Supp. 2d at 763.

<sup>184</sup> Mary Leonard, *Judge Sees No Bias in Firing of Lesbian, Ky. Baptist Agency Favored in Ruling*, BOSTON GLOBE (July 25, 2001), <https://www.highbeam.com/doc/1P2-8659871.html>. As a result of Pedreira's suit, Kentucky Baptist Homes, which operates eight residential centers for nearly eight hundred youngsters, threatened to not renew its contract if the state attempted to impose anti-bias rules as a condition for funding. *Id.* “If there was ever a time when we had to choose between our standards for role models for children and public dollars, we will stick by our values,” declared a spokes-person. *Id.* See also David Winfrey & Trennis Henderson, *Kentucky Baptists Establish Committee to Examine Baptist Faith and Message*, BAPTIST2BAPTIST (Nov. 27, 2000), <http://www.baptist2baptist.net/printfriendly.asp?ID=161>.

<sup>185</sup> *Pedreira*, 186 F. Supp. 2d at 761.

<sup>186</sup> AMY E. BLACK ET. AL., OF LITTLE FAITH: THE POLITICS OF GEORGE W. BUSH'S FAITH-BASED INITIATIVES 258 (2004).

<sup>187</sup> *Equal Employment Opportunity Comm'n v. Mississippi Coll.*, 626 F.2d 477, 484-85 (5th Cir. 1980).

mission, even if there is another actual hidden motive. In some cases, an employer may claim that it had a valid discriminatory reason for the discharge based on religion, while the employee claims the discharge is based on some other Title VII prohibition and therefore improper.

Considering how scriptures from which religious precepts have been used to defend slavery, demean women, oppress any number of groups in the past, and even kill people, these statutory exceptions should be re-examined. There should be a more reasonable approach in place or a set of clear factors that courts should be able to consider uniformly. Perhaps it is up to the legislature, not the judiciary, to take more effective action. Arguably, this may raise entanglement concerns. However, some may argue that the exceptions can be waived or denied when their implications have the potential to pose a threat to other protections and liberties granted by Title VII or even the Constitution.

Otherwise, the implication is that an individual removes himself or herself from the protections of the civil rights laws by working for a religious organization even if it is in a non-ministerial capacity. As a consequence, there is no clear distinction as to where permissible religious beliefs end and impermissible political views begin. Such suggestion is not reasonable for an individual, for instance, whose faith and religion has played a fundamental role in shaping his or her concept of identity and personhood and who wants to forge an employment relationship with a religious group but who happens to either become pregnant while single or be a single mother or be gay, lesbian or transgender. How does that person reconcile his or her own free exercise of religion and faith with his or her identity?

