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Religious Discrimination in Institutions and Services

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RELIGIOUS DISCRIMINATION IN INSTITUTIONS AND SERVICES

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As you will note from your programs, the topic for this hour is "Religious Discrimination in Institutions and Services." There will probably be contraception, sterilization, and all those other delightful subjects. However, we will be talking about religious discrimination per se—across the board, let us say—rather than with respect to any particular type of operation within the institution.

By way of introduction, I am Vince Allred of the Office of General Counsel and the gentleman on my right, I am sure you know, is J.P. Darrouzet, attorney-at-law, of Austin, Texas. Actually, Bud should have allowed us two or three hours for this discussion instead of 45 minutes. However, we have to make the best of our 45 minutes. This is the way we will work it: I will go on first and give you, hopefully, a few highlights on the Constitutional aspects, some statutory provisions and, if the remaining time permits, a bit about implementing regulations. Then J.P. will take over and in his inimitable manner . . . well, let's put it this way: I'll put you to sleep and he will wake you up.

The subject may be considered under two general aspects.

A. *Constitutional*

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[1]

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."[2]

The forgoing Constitutional provisions are couched in terminology of state action, and such state action should seem a necessity to bring either

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[1] U.S. CONST. amend. I.

[2] U.S. CONST. amend. XIV, § 1.

provis'on into play. The threshold question therefore is whether such state action is present. While we do not know of any definite judicial pronouncements relative to state action where religious discrimination or preference is alleged, the question has arisen relative to discriminations allegedly founded on race, discipline, and sex, in sectarian institutions.

1. Race

In *Green v. Connolly*[3] it was held that tax exemption, under Section 501(c)(3),[4] should be denied to any nonpublic school which discriminated on the ground of race relative to its student admission policy.

The schools involved were not sectarian institutions. However, the Internal Revenue Service has applied the doctrine to parochial schools of the Catholic Church and certification of a racially non-discriminatory policy is necessary for listing a parochial school in the Official Catholic Directory, as you will note from checking the Annual Group Ruling for 1972.[5]

2. Discipline

In *Bright v. Isenbarger*,[6] the court refused to interfere with explusion of a student by a Catholic high school, the student alleging that such expulsion had been for an insufficient cause and without notice or hearing. It was urged that the school was inbued with state action because of exemption from property and income tax, extension to its students of the benefits of public transportation and the lunch program, and its qualification under the state's compulsory education law.

It is highly interesting that the district court gave serious consideration to the effect on sectarian institutions of decisions finding state action relative to racial discrimination. The Court of Appeals weighing on this point said:

> The district court observed that only 'state action' is within the prohibitions of the Fourteenth Amendment and held that the plaintiffs had failed to demonstrate the requisite governmental involvement. In so holding, the district court reasoned that the 'state action' doctrine was developed in response to efforts to eliminate racial discrimination. 314 F. Supp. at p. 1392. Accordingly, it thought that there might be a less demanding standard of what constitutes sufficient state involvement where there are allegations of racial discrimination. 314 F. Supp. at 1394. We find it unnecessary to decide whether state action cases not involving attacks on racial discrimination require a more demanding standard of what constitutes sufficient state involvement. In this case the state played no role in defendants' expulsion of

[3] 330 F. Supp. 1150 (D.C. Cir.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971).
[4] INT. REV. CODE OF 1954, § 501(c)(3).
[5] IRS, TENTATIVE CUMULATIVE LIST OF ORGANIZATIONS, (pub. no. 78) (1972).
[6] 314 F. Supp. 1382 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971).

> plaintiffs. Furthermore, as the district court pointed out, other, more nebulous, relationships between Indiana and this Catholic high school were insufficient to warrant attributing the expulsions of plaintiffs in any way to the actions of the state (Footnote omitted).[7]

3. Sex—*McClure v. Salvation Army*[8]

Mrs. McClure, a former commissioned officer of the Salvation Army, filed an action alleging violation of the Civil Rights Act of 1964, Title VII, Section 703(a)[9] because her pay had been less than that of male officers doing similar work. Very briefly, section 703(a) prohibited an employer engaged in commerce from discriminating against any employee "because of such individual's race, color, religion, sex, or national origin."[10]

The Court of Appeals found that Title VII was applicable to a religious organization such as the Salvation Army. Even though the Salvation Army was not actually engaged in commerce, its operations, employing as it did 3,000 persons, with an annual payroll of seven million dollars, and the extent of its property holdings, would constitute it an "employer" engaged in "industry affecting commerce," so as to bring it within the law.[11]

However, it held that Mrs. McClure in her capacity of a commissioned officer of the Salvation Army held a position equivalent to that of a minister of religion.[12]

For this reason, it found that Congress had no constitutional power to regulate her relationship to the Salvation Army. It said, in part:

> . . . [I]n addition to injecting the State into substantive ecclesiastical matters, an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment. . . . We find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.[13]

As will be noted, the Court of Appeals would subject a religious organization to Title VII in respects other than concerning its relations to its ministers of religion, suggesting a constitutional prohibition against any interference with such relation.

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[7] 445 F.2d at 413.

[8] 460 F.2d 553 (5th Cir.), *cert. denied due to untimely filing*, 409 U.S. 896, 1050 (1972).

[9] 42 U.S.C.A. § 2000(e)-2(a) (relating to equal employment opportunities).

[10] *Id.*

[11] 42 U.S.C.A. § 2000(e)-(b), *referred to in* 460 F.2d at 557.

[12] 460 F.2d at 555, 560.

[13] *Id.* at 560.

It is possible that the Equal Economic Opportunity Amendments of 1970, enacted since Mrs. McClure filed her action, may have extended the insulation of religious organizations from application of Title VII in respect to religious affiliation of their employees.

Abortion, Sterilization, etc.

All of you are familiar with recent litigation on these areas of conflict between alleged personal right to the services involved and the right of the church-related hospital or other institution to withhold them on the basis of religious orientation. That topic will be discussed at greater length by Mr. Darrouzet.

B. Statutory

1. Civil Rights Act of 1964

This Act is, of course, basic on statutory prohibition against discrimination. While enacted mainly with respect to racial discrimination, it specifically includes prohibitions against discrimination on grounds of race and religion.

Title VI and VII are of concern to religious institutions.

Section 601 of Title VI[14] provides that no person shall, on grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or subjected to discrimination under any program or activity receiving federal financial assistance.

It will be noted that the grounds of prohibitable discrimination are race, color, and national origin. There is no mention of religious preference or discrimination. Therefore, for instance, a Catholic parochial school may not be denied such federal benefits as the school lunch program or participation in ESEA because it extends a preference in enrollment to Catholic children. Title VI has nothing to do with discrimination or preference founded on religion, and is not relevant to the rather specialized presentation which we are making.

Title VII, which concerns Equal Employment Opportunity, has been the occasion of extensive administrative construction.

Section 703(a)(1)[15] makes it an unlawful employment practice to discriminate on the basis of race, color, religion, sex, or national origin.

This broad prohibition was modified by Section 702 of the 1964 Act[16] to the effect that Title VII does not apply to a religious corporation or society with respect to work connected with the carrying on by such corporation or society of its religious activities. The same section provided also

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[14] 42 U.S.C.A. § 2000(d).
[15] 42 U.S.C.A. § 2000(e)-2(a).
[16] 42 U.S.C.A. § 2000(e).

for an exemption of educational institutions with respect to the employment of teaching personnel.

A section which might be considered as reinforcing the foregoing is Section 703(e)(2),[17] also known as the Purcell Amendment, was included in the 1964 Act providing that "it shall not be an unlawful employment practice for a school, college, university, or other educational institution . . . to hire and employ employees of a particular religion if such school, college, university . . . is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society. . . ."[18]

It will be noted that there is a conflict between the two foregoing sections. The broad exemption for all religious corporations and societies in Section 702 was with reference only to their religious activities, while Section 703(e)(2) having reference only to religiously affiliated schools and colleges appears applicable to all employees, even if not engaged in religious activities.

Thus, the question might arise: While a church might undoubtedly consider religious affiliation in selecting its minister of religion, could St. Joseph's church then select an impoverished member of the parish with ten children as its janitor, if application for the position was made at the same time by an affluent atheist who might possess superior technical qualifications for the job?

The Equal Employment Opportunity Act of 1972[19] amended Section 702 to read:

> This title shall not apply to an employer with respect to . . . a religious corporation, association, educational institution, or society, with respect to the employment 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.

It will be observed that this exemption is not limited to "religious activities." No regulations have been published interpreting this 1972 legislation. However, the General Counsel's office of the Equal Employment Opportunity Commission has informed us that several unpublished rulings have upheld the right of a church-related educational institution to make a distinction based on religion, even though the job category does not involve religious activities.

Likewise, the Purcell Amendment remains intact. Based on the foregoing, it has been the opinion of the Office of General Counsel that Catholic institutions are exempt from the religious discrimination provisions of Title VII. We would assume that the courts, on the basis of legislative history, would accept this view.

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[17] 42 U.S.C.A. § 2000(e)-2(e)(2).

[18] *Id.*

[19] Pub. L. No. 92-261, 86 Stat. 103 (1972).

However, as always, questions remain. One of them is the connotation of the expression, "religious corporation, association, educational institution, or society."[20] While we may be certain this would cover a diocese, parish, monastery, or convent, there are categories of organizations where such exemption might be challenged. There is no formal ruling with respect to hospitals, but certainly it is arguable that the spirit and intent of the amendment would extend to a hospital established under religious auspices to perform its functions in pursuance with the religious motivation of its founders. For instance, if the religious order assigns a nun to the position of administrator, there is a strong basis for contending that this is appropriate under the law, even though there might be other applicants seeking the position.

Of concern also is the recently promulgated Executive Order 11246, designed to enforce equal employment opportunity without regard to race, national origin, or creed, with respect to firms contracting with or federally assisted by the government. This regulation is particularly directed to areas of "under-utilization" of persons of particular races, national origins, and creeds. Objection has been made by the USCC that this proposed regulation, while motivated by worthy social consideration, is too broad in its application and would interfere with the religious apostolate of church-related institutions.

2. The Hill-Burton Act

The Hill-Burton Act[21] contains a provision that any facilities constructed through assistance under the Act will be made "available to all persons residing in the territorial area of the applicant."

On the basis of the foregoing the Department of Health, Education and Welfare has issued a regulation prohibiting discrimination against patients on the basis of creed.[22]

As noted, the Act and regulation deal only with admission and treatment of patients, not to employment practices.

We do not know of any attempt having been made to extend the racial pronouncements of *Simkins v. Moses H. Cone Memorial Hospital*[23] to prohibit church-affiliated hospitals from extending employment preference on the basis of religion.

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[20] *Id.*

[21] 42 U.S.C. § 291(c)(e).

[22] 42 C.F.R. § 53.111.

[23] 323 F.2d 959 (4th Cir. 1962), *cert. denied*, 376 U.S. 938 (1964).