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The Changing Legal Landscape for Clergy

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INTRODUCTION

The sexual scandals rocking the Catholic Church[1] and the resulting liability issues[2] should be a wake up call for all clergy. Clergy need to be aware that they are not insulated from legal liability under a variety of circumstances. This article is meant as a supplement and update on some of the more obvious areas of potential liability that face most clergy.[3] We strongly advise that clergy carefully review, with a competent legal advisor, his or her particular situation and the best methods to reduce and protect their potential legal exposure. Moreover, it is our belief that courses in seminaries and programs for ordained ministers, priests, and rabbis should be offered on a regular basis to provide spiritual leaders with legal updates. Clerics need to become more aware of the legal minefields so that they can better protect themselves and their religious communities.

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[1] *See* Terry Golway, *The Nation: Calculation vs. Conscience, The Church Breaks With the Faithful*, N.Y. TIMES, Mar. 17, 2002, at 1; Walter V. Robinson & Matt Carroll, *The Geoghan Papers*, THE BOSTON GLOBE, Jan. 24, 2002, at A1.

[2] *See* Robinson & Carroll, *supra* note 2.

[3] *See generally* Arthur Gross Schaefer & Darren Levine, *No Sanctuary From the Law: Legal Issues Facing Clergy*, 30 LOY. L.A. L. REV. 177 (1996) (addressing legal issues currently facing clergy).

I. CREATE A LEGALLY CONSCIOUS ENVIRONMENT

A. Find Competent Legal Advisors

"Clergy must establish good relations with a legal counsel and become more aware of the legal environment,"[4] and realize that the best legal advice is always preventative. "The best time to call a lawyer is before there is a problem."[5] No attorney is an expert in all legal areas; clergy should therefore not rely on a single legal advisor to deal with every issue that may arise.[6] It would be prudent to have at least a legal specialist in employment, business, and tort issues whom the clergy can call when needed. As laws change, it would be wise to plan periodic meetings with legal advisors to get updates and to share any issues that have arisen.

B. Review Your Insurance Coverage

Religious institutions should be familiar with the various forms of clergy malpractice insurance policies offered by the insurance industry. The cost of defending a lawsuit or criminal charge can be enormous. A key issue is whether the insurance company will advance funds to pay for legal defense needs such as depositions, expert witnesses, investigations, and other pre-trial costs. Ideally, clergy should seek situations where the insurance company would agree to front the money necessary for pre-trial expenses. In less advantageous situations, clergy will need to submit money on legal costs, and hope that the insurance company will reimburse or indemnify.

Another key issue involves the payment of legal fees. There are three possible outcomes in a judicial process: victory, defeat, or settlement. Generally, clergy will get full reimbursement if they win.[7] When there is a settlement or the cleric loses, the requirement for reimbursement is less clear.[8] Terms under an insurance contract should be clarified before any dispute arises, as legal fees can easily run into the tens of thousands of dollars, a sum which is usually beyond the means of most religious

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[4] *Id.* at 214.
[5] *Id.*
[6] *Id.*
[7] Gross Schaefer & Levine, *supra* note 4, at 212.
[8] *Id.*

institutions and their clergy.

In addition to legal fees, there could be judgments, fines, and/or penalties. If the cleric is acting in good faith and in the best interests of the institution, insurance will usually cover these additional costs within the coverage limits. Check over your coverage to review deductibles limits and what types of actions may be covered.[9] Additional considerations should include the right to approve legal counsel appointed by the insurance company and the duty of the insurer to defend the clergyperson.

C. Creating Preventative Measures

Clergy and religious institutions may also be well advised to become educated about preventative measures in order to reduce legal exposure. Taking time to create both a checklist and policies to ensure consistent and fair practices will save time, minimize legal liability, and make certain that important information and procedures are not forgotten. Here is a basic checklist of needed items:

An employee handbook that clearly states policies for vacation, sick leave, evaluation, and discipline procedures;

Sexual harassment policies with clear procedures for responding to complaints; and

Procedures for dealing with suspicions of child and elder abuse (These procedures may include steps required to comply with related local or state laws for reporting suspected abuse).[10]

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[9] Manzo, Peter B., "Obligations and Possible Liabilities of Directors of Non-profit Public Benefit of Religious Corporations," presented at the *Legal Issues Facing those with Pastoral Responsibilities Conference* at Loyola Marymount University, Los Angeles, California on November 18, 1993 (available on file at Loyola of Los Angeles Law Review).

[10] For example, the California Penal Code provides that:

> [A] mandated reporter shall make a report to an agency . . . whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect. The mandated reporter shall make a report to the agency immediately or as soon as is practically possible by telephone, and the mandated reporter shall prepare and send a written report thereof within 36 hours of receiving the information concerning the incident. The mandated reporter may include with the report any non-privileged documentary evidence

D. Special Preventative Measure: Arbitration

One preventative measure for the clergy is use of alternative dispute resolution ("ADR") agreements wherever possible in dealings with employees, members, and business transactions. Arbitration, one form of ADR, may be particularly suitable for religious institutions to circumvent the necessity of expensive and cumbersome legal resolutions (and frequent confrontations with intrusions on the exercise of religion). When certain standards are included, the California Supreme Court favors arbitration agreements as a method of business dispute resolution and will usually enforce them as a condition for employment.[11] Use of arbitration in lieu of the court system may readily resolve most employment related disputes with religious institutions.

To ensure enforceability by the religious institution, there are certain prerequisites for arbitration agreements. For example, the California Supreme Court has established the standards for agreements used in California.[12] The agreement must be clear and unambiguous regarding: (1) how the arbitrator(s) is/are selected; (2) whether legal tools for discovery are allowed; (3) written awards, (4) the religious institutions agreement to pay costs of arbitration, and (5) types of relief available.[13] Agreements should be properly communicated to employees of the religious institution, job applicants, and other intended parties *before* any possible disputes may arise. The arbitration agreements must clearly indicate the parties to the agreement and whether or not the individuals are signing the

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the mandated reporter possesses relating to the incident.
CAL. PENAL CODE § 1116 (Deering Supp. 2003).

[11] *See* Armendariz v. Foundation Health Psychcare Servs., Inc., 6 P.3d 669, 687–89 (Cal. 2000) (stating that, "California law, like federal law, favors enforcement of valid arbitration agreements"); Federal Arbitration Act, 9 U.S.C. § 2 (2000)(stating that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part of thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

[12] *See Armendariz*, 6 P.3d at 682.

[13] *Id.*

agreement in their own personal capacity and/or on behalf of the religious institution. Lastly, the agreement may not be unfairly skewed in favor of the religious institution and clergy relationship.[14] Often, a three arbitrator system is utilized: one selected by the head clergy, another selected by the other party, and the third "neutral" arbitrator selected by the other appointed arbitrators. The use of arbitration by religious institutions, as in private industry, can often prevent litigation.

II. COUNSELING RELATED ISSUES

Religious institutions may lower the risks of counseling ministry misconduct by simply exercising reasonable precautions. Unless they also employ credentialed and/or licensed secular counselors, the religious institution should offer only spiritual counseling. And, to reduce potential claims of misconduct, all counseling sessions must be conducted only on church/synagogue premises, during normal working hours, and when others are present. Any notes and records taken during a counseling session should be secured and kept strictly confidential. Should misconduct occur, such as an incident of child molestation, and come to the attention of clergy, legal requirements of mandated reporting must be followed immediately.[15]

A. Background Checks

In connection with potential claims of negligence, background checks should automatically be conducted and documented on everyone in the institution who is engaged in counseling, or may be acting in a counseling role such as youth counselors. This exercise of duty of care should extend to professional background checks on employees, volunteers, and independent contractors. Such measures would significantly reduce the possibility of negligent hiring, supervision and retention of employees and/or volunteers whose workplace behavior may cause harm to others. A religious institution will not be held liable for negligent hiring unless it knows or had

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[14] *See id* at 691–92 (indicating that the court would not enforce arbitration agreements that are unfairly one-sided in favor of the employer).

[15] *See* CAL. PENAL CODE §§ 11165.7, 11165.9, 11166.

reason to know that an "undue risk of harm" would exist.[16]

B. Confidential Communication

In many states, clergy and the congregant are given the right to hold their communications privileged.[17] Within the backdrop of privileged communication for various professionals, clergy have often asserted a clergy-congregant privilege.[18] The Supreme Court has captured the reason that clergy privilege exists.[19] The Court noted, "priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."[20] With the exception of communication made to a Catholic Priest in the confessional, however, most religious establishments do not require their clergy to keep communication with congregates confidential.[21]

It is fundamental that counseling ministry must be trusted to keep secrets, albeit that some secrets pose moral and legal dilemmas. Limits of the clergy-congregant privilege have been defined judicially and statutorily in a patchwork manner.[22] For

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[16] *Roman Catholic Biship of San Diego v. Superior Court*, 50 Cal. Rptr. 2d 399 (1996) held employer not liable for negligent hiring unless it knows or had reason to know that an undue risk of harm would exist. Church was not liable for hiring priest who sexually molested a minor where there was no established history of such conduct.

[17] *See, e.g.*, CAL. EVID. CODE §§ 1031–34 (Deering Supp. 2003).

[18] *See, e.g.*, State v. Martin, 959 P.2d 152, 155 (Wash. Ct. App.1998) (where the clergy privilege was claimed to protect statements made to a pastor by a man accused of murder).

[19] *See* Trammel v. United States, 445 U.S. 40 (1980).

[20] *Id.* at 51.

[21] *See* Gross Schaefer & Levine, *supra* note 4, at 180; Mark Henry, *Penitent: Admission of Crime Creates Difficult Choice for Clerics*, L.A. TIMES, May 31, 1986 at 3, 5 (noting that "[t]he Roman Catholic and Episcopal churches view confession as a sacrament and therefore confidential, but most other clergy develop their own guidelines"). For example, California Law only affords this privilege where, "under the discipline or tenets of his *or her* church, denomination, or organization, [the clergyperson] has a duty to keep *those* communications secret." CAL. EVID. CODE § 1032 (Deering Supp. 2003).

[22] *See Trammel*, 445 U.S. at 51 (stating, "[t]he privileges between priest and penitent . . . limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."); Keenan v. Gigante, 47 N.Y.2d 160, 166, 390

example, California Evidence Code section 1032 states:

> '[P]enitential communication' means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to clergyman who, in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications and, under the discipline or tenets of his church, denomination, or organization, has a duty to keep such communications secret.[23]

Most states have similar statutes defining the limits of clergy-penitent privilege, generally requiring ordination or licensing for protection.[24]

Usually, a penitent's communications to a clergy, and even non-ordained persons acting on behalf of the religious institution, e.g. deacons and elders, are made with an expectation of protected confidentiality. Breach of duty to maintain confidentiality may give rise to actionable negligence.[25]

N.E.2d 1151, 1154, 417 N.Y.S.2d 226, 229 (1979) (noting, "[t]he priest-penitent privilege arises not because statements are made to a clergyman. Rather, something more is needed. There must be 'reason to believe that the information sought required the disclosure of information under the cloak of the confessional or was in any way confidential' for it is only confidential communications made to a clergyman in his spiritual capacity which the law endeavors to protect." (quoting Puglisi v. Pignato, 26 A.D.2d 817, 874, 274 N.Y.S.2d 213, 214 (1st Dep't 1966))); CAL. EVID. CODE §§ 1031–34 (Deering 2003) (describing statutory definition of penitent privilege, and defining a "penitential communication" as "a communication made in confidence, in the presence of no third person . . . , *to a member of the clergy* who . . . is authorized or accustomed to hear *those* communications and, under the discipline or tenets of his *or her* church, denomination, or organization, has a duty to keep *those* communications secret") (italics as in original).

[23] CAL. EVID. CODE §§ 1031–34 (Deering 2003).

[24] For an accepted legal definition of "ordained minister," see *Buttecali v. United States*, 130 F.2d 172, 174 (5th Cir. 1942), where the court stated that,

> [a] duly ordained minister, in general acceptation, is one who has followed a prescribed course of study of religious principles, has been consecrated to the service of living and teaching religion through an ordination ceremony under the auspices of an established church, has been commissioned by that church as its minister in the service of God, and generally is subject to control or discipline by a council of the church by which he was ordained.

Id.

[25] *See* Alexander v. Culp, 705 N.E.2d 378, 381 (Ohio Ct. App. 1997) (holding

An understanding by clergy of this duty to safeguard communications made in confidence is essential in order to avoid negligence lawsuits.[26] However, these privileges are not absolute.[27]

In many cases, especially in federal court, such professionals may be compelled to disclose privileged information regarding their client.[28] Further, "most states require psychiatrists, psychologists, and social workers to report to the authorities when their clients have threatened acts of physical harm to themselves or to a third person."[29] Revelations during counseling may expand the duty to require further efforts by the religious institution beyond mere encouragement of repentance.[30] When counseling ministry recognizes the need for greater specialized professional support, particularly when there are warning signs of potential physical or mental harm to the penitent and others, a legal duty to take appropriate steps arises.[31] It could be argued that this duty to disclose information should apply to a clergy person who learns in a confidential communication that a congregant threatens to harm a third

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that the plaintiff stated a cause of action for common law negligence after a minister disclosed information told in confidence during a divorce proceeding).

[26] Gross Schaefer & Levine, *supra* note 4, at 203–04.

[27] *Id.* at 179–80.

[28] *See* Tarasoff v. Regents of Univ. of California, 551 P.2d 334, 349–51 (Cal. 1976).

[29] Gross Schaefer & Levine, *supra* note 4, at 180.

[30] *See id.* at 179–83.

[31] *See Tarasoff*, 551 P.2d at 339–40, 347. Here, defendant psychotherapists counseled a student who expressed his desire to murder another student. After detaining the student for several days, he was released and proceeded to commit the crime. The court found that:

> [W]hen a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances . . . . [T]he public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.

Id.

party. Furthermore, the responsibility to warn may apply not only to a government authority, but also to the potential victim.[32] Effectively, this translates into the clergy person being responsible to inform the authorities as well as the actual victim, if the victim's potential perpetrator led the clergy person to believe that he or she would commit the crime.

C. Referring Congregants

To avoid liability, care must be exercised by clergy and the religious institution's employees when referring congregants and others to outside professionals. For example, referral procedures should require several recommended professionals or "referral pools" from which the congregant would make the final choice. However, it is critical from both an ethical and legal standpoint that the clergy have personal knowledge as to the skill and background of the individual referrals. This may mean that the clergy have met and reasonably checked out the professional's reputation before making any referral.

Trained counseling ministry should be the only party authorized to make referrals. Furthermore, caution should be exercised in providing referral services. Since a person in need of a referral is relying on the special relationship with and judgment of the counseling minister, recommended referrals should be required to have their own liability insurance. It may be legally prudent to have congregants who receive referrals sign an acknowledgement of receipt and understanding of a written disclaimer that the religious institution does not accept liability and is to be held harmless for any actions taken by the outside professional.[33]

D. Mandatory Reporting

The standard for clergy mandatory reporting is when there is a "reasonable" belief that crime is being committed, especially

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[32] *Id.* at 349.

[33] An example of such a disclaimer is available at the web site www.christianphysicians.org. These referral services offered to Christian organizations and individuals require acknowledgment of the disclaimer: "I understand and agree to hold christianphysicians.org harmless in the case of any malpractice or any other liability."

child abuse.[34] The moment that a hunch becomes reasonable belief is when the clergy person should initiate their "reporting procedure." Each state has its own specific rules, but the general rule appears to follow New Hampshire,[35] "any . . . person having reason to suspect that a child has been abused or neglected" to report their findings—including clergy.[36] When made aware of a potential child molestation case,[37] your first phone call should be to an attorney who is knowledgeable about reporting requirements. The next phone call should be placed to the state agency that receives reports of child abuse. Cover this ground first, before raising the issue with the alleged perpetrator.[38]

While many clergy may desire to handle issues of child molestation by keeping the matter private and working with the perpetrator, such an action may very well violate the clergy's duty of mandatory reporting and subject the clergy, as well as the clergy's institution, to significant legal consequences.[39]

It has now been well established that child abuse must legally be reported to a state agency.[40] But what about spousal or elder abuse? These are serious crimes as well and yet most jurisdictions have no mandated reporting requirement. The clergy person must answer this moral question for him or herself and decide in the face of potentially serious legal ramifications whether or not they will report such crime. We believe that, regardless of protected communication, the clergy person has a moral obligation to report such specific acts of violence to the proper authorities in order to protect the victims. Only after this has been done, should the clergy person enter the involved individuals into counseling.

III. RECENT IMPORTANT EMPLOYMENT LAW CASES

There are several recent judicial decisions that help to

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[34] *See, e.g.*, N.H. REV., STAT. ANN. § 169-C:29 (2001); W. VA. CODE § 49-6A-2 (2001).

[35] *See* N.H. REV., STAT. ANN. § 169-C:29 (2001).

[36] *See id.* ARK. CODE ANN. § 12-12-518; W. VA. CODE § 49-6A-2 (Lexis 2001).

[37] The government considers a person "aware" when they have reasonable belief of past, present, or future child abuse.

[38] *See* Gross Schaefer & Levine, *supra* note 4, at 183–84 (containing a detailed list of considerations and specific appropriate steps).

[39] *See, e.g.*, CAL. PENAL CODE §§ 11165.7, 11166 (Deering Supp. 2002).

[40] *See, e.g., id.* §§ 11165.7, 11165.9, 11166.

identify areas where religious institutions and the clergy community may be vulnerable to employment related liability.

A. Discrimination in Religious Employment

Title VII of the Civil Rights Act of 1964[41] covers institutions with 15 or more employees[42] and outlaws discrimination in employment on the basis of race, color, religion, sex, or national origin.[43] "Employers are prohibited from making employment decisions based on these distinctions. The Act provides for compensatory and punitive damages in cases of intentional discrimination."[44] Similarly, most states also have constitutional provisions or code sections which prohibit discrimination in employment activities based on sex, race, creed, color, or national or ethnic origin.[45]

However, religious institutions generally can legally discriminate in favor of a particular religion.[46] Exemption from Title VII discrimination claims exists even in the hiring of non-clergy who perform secular work at religious institutions.[47]

The Equal Employment Opportunity Commission added some clarity to the application of the *freedom-of-religion* provision as related to potential discrimination claims against religious institutions and the clergy community:

> Title VII of the Civil Rights Act of 1964, §§ 702(a), 703(e)(2) provides [Title VII] shall not apply to a religious corporation, association, education institution, or society with respect to the employment of individuals of a particular religion

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[41] 42 U.S.C. §§ 1981–2001 (2000).

[42] *Id.* at § 2000e.

[43] *Id.* at § 2000e-2(a).

[44] 42 U.S.C. § 1981a(b) (2001).

[45] *See, e.g.*, CAL. CONST., art. I, § 8 (1999) ("A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.").

[46] *See* Little v. Wuerl, 929 F.2d 944, 949–50 (3d Cir. 1991).

[47] *See* Corporation of Presiding Bishops of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330, 339 (1987) (noting that a sixteen-year employee of a secular non-profit corporation was discharged because he did not qualify for certification that he was a member of the church and able to attend its temples, the Court found that the religious exemption under Title VII applied to a secular non-profit employer who participated in religious activities).

> to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Religious educational institutions may employ individuals 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 religious corporation, association, or society, or if the curriculum of such educational institution is directed toward the propagation of a particular religion.[48]

In other words, Title VII does permit religious societies to grant preferences in favor of members of their religion.

B. Sexual Harassment

The best way to avoid a formal harassment complaint is to take steps to make sure harassment does not occur in the first place. Training may prevent harassment in a religious institution's workplace. Training in the proper handling of a grievance, which may fall short of legal harassment, may resolve the issue and preclude the need for judicial resolution.

A primary preventative step is to educate all employees (including clergy and supervisors) about what constitutes workplace harassment. There are two types of illegal workplace harassment: "hostile work environment," and "quid pro quo."[49]

The successful defense of any workplace harassment claim (religious or secular) relies greatly upon the ability to prove that

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[48] *See* Feldstein v. Christian Science Monitor, 555 F.Supp. 974, 976 (Mass. Dist. Ct. 1983).

[49] *See* U.S. Equal Employment Opportunity Comm'n, 29 C.F.R. § 1604.11 (2003) (stating that sexual harassment is present both when, "submission to or rejection of such [sexual] conduct by an individual is used as the basis for employment decisions affecting such individual," and when, "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment"); *see also* Burlington Indus. v. Ellerth, 524 U.S. 742, 751 (1998) (explaining that cases based on threats that are carried out are *quid pro quo* cases, as distinguished from unfulfilled threats that are nevertheless severe and pervasive enough to create a hostile work environment); Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (holding that an employer's sexually suggestive comments and offensive touching were sufficiently severe and pervasive to alter the conditions of employment, creating a hostile work environment).

all employees were trained—and tested—on the use of various vehicles available to them for reporting incidents of harassment.[50] Therefore, training must also include (a) learning the scope of the prohibition against harassment (e.g. prohibition extends to not only employees, but also vendors and other third parties on the religious institution's premises), and (b) understanding procedures for investigating and responding to an initial grievance, including potential harassment by supervisors.[51]

It is well established that employers have a duty to protect against sexual harassment in the workplace.[52] In light of the string of sexual misconduct cases against clergy, a standard of care may now extend to religious institutions when acting as an employer.[53]

Part of the general duty to protect against sexual harassment includes a duty to investigate complaints of employees.[54] When clergy conduct investigations, they need to be aware of other legal issues such as potential employment torts like emotional distress,[55] defamation,[56] and invasion of privacy[57]

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[50] *See Burlington*, 524 U.S. at 765 (stating that "when no tangible employment action is taken," an affirmative defense is available to the employer, subject to proof by a preponderance of the evidence). This defense requires that the employer show that he had exercised reasonable care to prevent and correct the behavior, and that the employee unreasonably failed to take advantage of any preventive or corrective measures provided by the employer. *Id.*

[51] *See generally* Myers, Donald W., D.B.A., *2003 U.S. Master Human Resources Guide*, CCH Inc., Appendices 2 and 3, at 1103-111 (setting forth comprehensive harassment-free policy and procedure, respectively).

[52] *See Burlington*, 524 U.S. at 756, 759 (acknowledging that an employer may be liable for both the negligent and intentional torts of their employees, and that an employer is negligent when it knew or should have known about the conduct and failed to stop it).

[53] Often, the clergy is held to the standard "fiduciary duty." *See* F.G. v. MacDonell, 696 A.2d 697, 703–04 (N.J. 1997); 60 BROOK. L. REV. 1421, 1424 n.10 (1995).

[54] *Silva v. Lucky Stores, Inc.* 65, Cal. App 4th 256 (1998) held that evidence of good faith investigation is established when employer has a written policy and procedures stating how sexual harassment allegations are confidentially and immediately investigated, and that witnesses – if any – and complainant and alleged harasser are interviewed in private areas by a trained individual designated as investigator. (See also similar case, *Barrett v. Omaha National Bank*, 726 F.2d 424 (8th Cir. 1984))

[55] *See* Flanagan v. Ashcroft, 316 F.3d 728, 729–30 (7th Cir. 2003) (dismissing an employee's claim of negligent infliction of emotional distress, and holding that an employer's investigation had not been "egregious," "unprofessional," or conducted in a "hostile and accusatory manner.")

which harm the accused. In *Malik v. Carrier Corp.*,[58] for example, an employee was investigated for sexual harassment on the job, and was terminated by his employer. The employee sued for emotional distress damages allegedly caused by the investigation.[59] The court held that the employer had a duty to investigate the sexual harassment complaint and handle the matter properly.[60] In this case, the employer was not held liable, but this case illustrates that liability may be imposed upon an employer if its response to a sexual harassment complaint is not conducted properly.

The creation of a sexual harassment policy, whether mandated or not, creates procedures that will help to properly investigate complaints and promote a more "harassment-free" work environment.[61] The policy needs to be distributed, posted, and discussed so that its existence and importance will be apparent.[62]

When there is a complaint, it is important to take the report seriously and consult legal counsel throughout the process. Many sexual harassment lawsuits can be avoided if accusations are dealt with professionally and promptly.[63] Procedures set out in the institution's policy should be carefully followed. Acting quickly and in a confidential manner is critical to ensure that both the complainant and the accused are treated fairly. Remember that a charge of harassment shall not, in and of itself, create the presumption of wrongdoing.[64] Be certain to document

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[56] *See* Hayden v. Schulte, 97-0422 (La. App. 4 Cir. 1997).

[57] *See* Higgins v. Maher, 258 Cal. Rptr. 757, 761 (Cal. Ct. App. 1989).

[58] 202 F.3d 97 (2d Cir. 2000).

[59] *Id.* at 100.

[60] *Id.* at 105.

[61] *See* Shaw v. Autozone, Inc., 180 F.3d 806, 809–12 (7th Cir. 2000) (holding that defendant's harassment policy, which advocated a "harassment-free work environment," was enough to establish that they had exercised reasonable care to prevent sexual harassment).

[62] *Id.* at 811 (dismissing the employee's assertion that she had never seen the company's sexual harassment policy because she received a copy of it, was required to read and comply with it as a condition of her employment, and had signed an acknowledgment stating that she understood the policy and procedures, and thus had had constructive knowledge of the policy).

[63] *See* Arthur Gross Schaefer & Muriel Finegold, *Creating a Harassment Free Workplace*, RISK MANAGEMENT, Feb. 1995, at 55.

[64] *See* Sowers v. Kemira, Inc., 701 F. Supp. 809, 822, 825 (S.D. Ga. 1988) (asserting that, "once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason [for acting thusly] . . . [w]hile a burden of production is imposed on the defendant,

the individual interviews with the complaining employee, the accused, and appropriate witnesses. If the employer concludes that harassment has occurred, the employer should take immediate action to end the problem. Disciplinary action may include reprimands, demotion, suspension, or termination. Moreover, it is also important to console the victim and determine what else the institution could do to make it become a safer environment. Lastly, it is critical to sensitize the staff with regard to sexual harassment by holding meetings, seminars, or discussions with videos and oral presentations in order to educate them about the subject on a periodic basis.

C. Wrongful Termination Attributable to Violation of Public Policy

Terminating the employment of a worker is never a pleasant experience, and unfortunately, clergy often find themselves as part of the dismissal procedure. Moreover, terminating employees can be a virtual legal minefield with many hidden obstacles from past, present and future actions that can easily explode into a lawsuit. Religious institutions may be liable for wrongful discharge of an employee based on violations of public policy.[65] Violations of public policies include terminations of employees because of absences for jury duty,[66] seeking workers' compensation,[67] and voting.[68] Examples of remedies in the California state court system available for such wrongful terminations are front and back pay damages for pain and suffering, and punitive damages.[69]

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the burden of persuasion always remains with the plaintiff.").

[65] *See* ROBERT E. WILLIAMS & ELIZABETH REESMAN, EQUITY AT WORK: A MANAGER'S GUIDE TO FAIR EMPLOYMENT LAWS AND PRACTICE 53 (3d ed. 2001) (noting that, with respect to employment-at-will, when an employee is discharged "for a purpose that is contrary to an established public policy," the employer "can be sued for wrongful discharge").

[66] *Id.*

[67] *Id.*

[68] *See* Bowman v. State Bank of Keysville, 331 S.E.2d 797, 801 (Va. 1985).

[69] *See* CAL. LAB. CODE §§ 132a, 230, 2929, and 6310 (1991) (stating that "front pay" refers to prospective wages lost while not working due to wrongful termination, and "back pay" refers to wages and work performed); *see also* Dyer v. Workers' Comp. Appeals Bd., 28 Cal. Rptr. 2d 30, 35 (Cal. Ct. App. 1994) (stating that the government code forbids discrimination based upon disability, and if the Personnel Board makes a finding of discrimination, they are empowered to require that the employee be reinstated, with or without back pay).

In *D'Sa v. Playhut, Inc.*,[70] the California Court of Appeals held that a suit for wrongful termination may proceed against an employer who fired an employee for refusing to sign an agreement that contained a covenant not to compete.[71] Generally, the covenant is illegal in California, and firing an employee for not signing such agreement violates public policy.[72] Therefore, religious institutions in California generally may not fire employees, including clergy, who refuse to sign an agreement containing a covenant not to compete.

While it is not easy to terminate an employee, it may be legally dangerous to continue using the services of an employee for which you have valid grounds for dismissal.[73] Should the employee act in such a manner to cause injury to a third party or other employees, the religious institution and the supervisor could be liable for negligent supervision.[74] The choice between keeping or firing an employee is not always an easy decision, especially when both options may be fraught with problematic legal and ethical consequences.[75]

D. Employment-At-Will Attacks

The at-will employment concept generally means that an employee can voluntarily quit at any time, and the employer may terminate the employee for any reason or no reason.[76] Although codified in many states,[77] this common law concept

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[70] 102 Cal. Rptr. 2d 495 (Cal. Ct. App. 2000).

[71] *Id.* at 497.

[72] *Id.*

[73] *See* Robert A. Destro, *Developments in Liability Theories and Defenses*, 37 CATH. LAWYER 83, 108–10 (1996) (explaining that a diocese and/or bishop who fails to terminate a priest who develops a sexual relationship with a parishioner may be held liable for such failure "under theories of breach of fiduciary duty, negligent supervision, and vicarious liability").

[74] *Id.* at 110 (discussing theories of liability).

[75] Beyond the legal considerations, there are many ethical issues relating to employment decisions. While there are many good sources, the use of an ethics decision model may help clarify the ethical considerations and alternative responses to an employer's decision. For a copy of a decision model developed for religious institutions in the Union of American Hebrew Congregations, write: Dr. Arthur Gross Schaefer, Loyola Marymount University, College of Business, MS8385, One LMU Drive, Los Angeles, CA 90045-2659.

[76] *See* WILLIAMS & REESMAN, *supra* note 65, at 51 (discussing at-will employment).

[77] *See, e.g.*, CAL. LAB. CODE § 2922 ("An employment, having no specified term, may be terminated at the will of either party on notice to the other.").

essentially does not apply in many employment situations due to the large list of legal exceptions. Exceptions where at-will employment does not apply include defamation,[78] breach of covenant of good faith and fair dealing,[79] express or implied contract,[80] and fraudulent misrepresentation.[81]

E. Defamation Attributable to Publication of Inaccurate Report to Police

An employer must be cautious with the use of negative information about its employees. Even though an employer may have a qualified privilege to share evidence of an employees' wrongdoing with police, the failure of the employer to properly check its own records may be found to be malice, and sufficient for the crime of slander per se.[82] Therefore, religious institutions must be cautious when exercising a duty to report potential crimes of employees or others to law enforcement, e.g. sexual abuse.

F. Age Discrimination

The Age Discrimination in Employment Act prohibits both for-profit and non-profit employers from discriminating against persons based on their age.[83] However, this only applies to employees other than clergy who are at least 40 years of age.[84]

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[78] *See* WILLIAMS & REESMAN, *supra* note 65, at 54–55 (explaining that discharged employees may recover damages under the theory of defamation).

[79] *See id.* at 53 (explaining that in some states there is an "implied covenant of good faith and fair dealing" which prohibits employers from terminating employees "in bad faith or with malice").

[80] *See id.* at 52 (explaining that employees and employers may create exceptions to the at-will doctrine, either expressly or impliedly).

[81] *See id.* at 55 (explaining that discharged employees may be able to recover damages from their employer under the theory of fraudulent misrepresentation).

[82] *See* Boyd v. Nationwide Mutual 208 F.3d 406, 408–09 (2d Cir. 2000) (holding that while a defendant's failure to investigate is not enough to establish actual malice, it can establish common law malice when there is sufficient doubt as to the defendant's good faith).

[83] 29 U.S.C. §§ 621 *et seq.* (1967). The ADEA, enforced by the federal Equal Employment Opportunity Commission (EEOC), protects those persons, at least 40 years old, from age discrimination.' This prohibition of age discrimination applies to companies consisting of at least 20 employees. Failure to comply with the ADEA may require employers to provide compensation for affected employees.

[84] *See, e.g., Minker v. Baltimore Annual Conference of the United Methodist Church*, 699 F. Supp. 954, 955 (D.D.C. 1988), *aff'd*, 894 F.2d 1354 (1990) (stating

In *Kimel v. Florida Board of Regents*,[85] the United States Supreme Court concluded that allowing individuals to sue state employers under the federal Age Discrimination in Employment Act ("ADEA")[86] exceeds Congress' Fourteenth Amendment power to abrogate the states' immunity.[87] This decision may make it more difficult to sue a religious institution in federal court for age discrimination under the ADEA. If, however, the state court of jurisdiction has its own age discrimination law, then a religious institution would likely be subject to an age discrimination complaint under such state law.

In *Reeves v. Sanderson Plumbing Products, Inc.*,[88] the United States Supreme Court held that in order for plaintiff/appellant, who was 57 years old at the time, to prove disparate treatment under the ADEA, he had to demonstrate that his age actually motivated the employer's decision to fire him.[89] Although the defendant/employer was able to establish a nondiscriminatory reason for the firing, the plaintiff was able to show that the defendant's nondiscriminatory reasons were merely a pretext for discrimination.[90] This decision may make it more difficult for covered religious institutions to defend against age discrimination suits by older employees who are terminated. Religious institutions, as defendants in age discrimination suits, would have to establish solid nondiscrimination reasons to overcome a plaintiff's argument such reasons were merely a pretext. In other words, an employee may win an age discrimination claim against a religious institution if the jury believes the employer's explanation was merely a cover for discriminatory intent, even if the employee offers no direct evidence that the employer actually intended to discriminate.

A contrary ruling was rendered in *Guz v. Bechtel National Inc.*.[91] Here, the California Supreme Court made clear that, in California, an employer may win an age discrimination suit without having to go to trial if (1) the employer has strong evidence of legitimate reasons for the allegedly discriminatory

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that "courts must refrain from resolving essentially ecclesiastical disputes").

[85] 528 U.S. 62 (2000).

[86] 29 U.S.C. §§ 621 *et seq.* (1967).

[87] *Kimel*, 528 U.S. at 67.

[88] 530 U.S. 133 (2000).

[89] *Id.* at 146–47.

[90] *Id.* at 153–54.

[91] 8 P.3d 1089 (Cal. 2000).

actions and (2) the employee has only weak or circumstantial evidence of discriminatory motive.[92] The plaintiff had 21 years of service with employer but this fact did not imply a contract right that preempts the employment-at-will doctrine.[93]

G. Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") prohibits discrimination against qualified persons with mental or physical disabilities, including AIDS and other "grave" diseases. Religious institutions may be immune from discrimination complaints based on disability. Therefore, it is important to know what constitutes a qualified disability under the ADA and equivalent state statutes.

In *McAlindin v. County of San Diego*,[94] an employee filed suit against his employer for discrimination based on disability. The plaintiff/employee suffered from anxiety and panic disorders and took a leave of absence based on "stress."[95] The employer advised its employee to return to work within a couple of months to preserve his job. The court held that the employees' job was protected under the ADA because interacting with others is a "major life activity."[96] The ADA provides that a disability is an impairment that *substantially* limits a major life activity.[97] California expands the definition of disability for the purpose of protection against discrimination.[98]

The ADA, however, applies only to private sector employers with 15 or more employees. Although not subject to the ADA, religious institutions should still be cautious before terminating an employee for excessive absences because other related federal

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[92] *Id.* at 1118–19.

[93] *Id.* at 1110 (where the court asserted that the, "mere existence of an employment relationship affords no expectation, protectible [sic] by law, that employment will continue, or will end only on certain conditions, unless the parties have actually adopted such terms").

[94] 192 F.3d 1226 (9th Cir. 1999).

[95] *Id.* at 1231.

[96] *Id.* at 1230.

[97] *Id.*

[98] *See* A.B. 2222, 1999-2000 Gen. Assem., Reg. Sess. (Cal. 2000) (statute prohibiting discrimination based on disability). This statute has been interpreted by the courts as expanding beyond ADA the definition of a qualified disability to include even correctable impairments, e.g., nearsightedness. *But see* Sutton v. United Airlines, 527 U.S. 471, 481–89 (1999) (holding that nearsightedness is not a disability because it is a condition that can be corrected).

and state laws such as the California Family Rights Act may apply.[99]

Note that a recent United States Supreme Court case, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[100] clarified the standard for determining a qualified "disability" under the ADA. The Court stated, "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term."[101] Williams lost the suit because, although she did establish that she was unable to perform manual tasks associated only with her job, she failed to establish that her impairment prevented or restricted her from performing tasks that are of central importance to most people's daily lives.[102]

H. Proper Use of Volunteer Labor[103]

Volunteers are not protected under workers compensation insurance while performing services for non-profit organizations, as they are not considered employees,[104] although some carriers will provide coverage for volunteers at a premium.[105] Therefore, non-profit organizations should only use volunteer workers in activities that provide a low risk of injury. Your insurance carrier may define the limitations placed on volunteer activities. Since accidents may happen, it is best to develop guidelines,

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[99] *See* fact sheet, *Family and Medical Leave Act, the Americans With Disabilities Act and Title VII of the Civil Rights Act of 1964 (2001)*, prepared by the Equal Employment Opportunity Commission's Office of Legal Counsel (providing technical guidance, including that the ADA's reasonable accommodation obligation requires an employer to provide leave to employees who need to care for someone who is ill); *see also* CAL. GOV'T CODE § 12945.2 (2003).

[100] 534 U.S. 184 (2002).

[101] *Id.* at 198.

[102] *Id.* at 187.

[103] The information discussed in this section appeared in an earlier article drafted by the author. Schaefer, *supra* note 4, at 197–98.

[104] *See* Charles Robert Tremper, *Compensation for Harm from Charitable Activity*, 76 CORNELL L. REV. 401, 416 (1991) (explaining that general liability insurance policies do not typically include volunteers).

[105] *See Martinez v. Workers' Comp. Appeals Bd.*, 544 P.2d 1350, 1351 (Cal. 1976) (involving an employer that had successfully obtained workers' compensation insurance covering volunteers).

which will limit the potential for accidents and in turn, limit the number of liability claims or lawsuits against your organization.

In addition to concerns regarding physical harm to volunteers, there is also a need to properly train, supervise and screen volunteers, especially if they work with children.[106] A religious institution may be liable if one of its volunteer's molests a child or harasses a worker. It is a sure breach of the institution's legal and ethical duties to give a volunteer who has a record of sexual offenses access to children or to allow them to freely move within the institution. Unfortunately, religious organizations must realize that actions done by volunteers, just as the actions of paid workers, may result in legal liability for the institution.

IV. LAWSUITS ARISING FROM CHURCH DISCIPLINE[107]

Clergy-congregation relationships can and do, at times, become temporarily strained. If civil courts are the only effective means to redress disputes after arbitration or disciplinary procedural appeals, then religious institutions should not be allowed to hide behind the U.S. Constitution, or so the argument goes. Clergy should not be denied their basic civil rights and due process for issues not related to religious doctrine, e.g. secular employment activities. Issues that divide a congregation from a minister may have little or nothing to do with religious doctrine (and impliedly little or nothing to do with the religious institution's rules of discipline).

Exactly when the freedom-of-religion provision prevents, or makes it difficult to pursue, important legitimate claims against religious institutions or its clergy is difficult to determine. There is an apparent lack of quantifiable clergy/religious institution litigation statistics. There is no national database that quantifies employment tort actions and criminal cases involving the clergy community. Nonetheless, the trend of broadening the

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[106] *See, e.g.*, Nancy A. Lauten, *Who's Minding the Cradle? Regulatory Reform in the Child Care Industry*, 13 FLA. ST. U. L. REV. 633, 644 (1985) (explaining broad coverage of Florida's child abuse legislation).

[107] *See* OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 488 (3d ed. 1997) (defining "discipline" as follows: "[t]he totality of ecclesiastical laws and customs regulating the religious and moral life of the Church. In this sense it comprises all Church activities not regulated by Divine law, such as the administration of the Sacraments, offices, feasts, devotions, etc.").

reach of employment law, for example, to religious institutions, is evidenced by the publication of books and articles on this subject.[108] Furthermore, there are certainly more lawsuits involving negligent hiring and negligent supervision where a clergy has a history of sexual misconduct, and high profile criminal sexual abuse prosecutions are more prevalent.[109]

There have been court cases involving plaintiff attempts to limit the right of churches to discipline members. These lawsuits typically occur when the discipline amounts to a deliberate and malicious plan to ruin someone, when a church lacks jurisdiction over non-members, or when a church fails to follow its own disciplinary guidelines consistently.[110]

CONCLUSION

Today, more than ever, clergy and employees of religious institutions need to be informed about their obligations to protect against potential legal controversies. The foregoing recent employment law court cases and criminal cases confirm this fact. Leadership in religious institutions certainly should take basic preventative steps, such as training, obtaining appropriate insurance, and staying abreast of changes in discrimination and employment tort laws at both federal and state levels, in an effort to avoid related lawsuits.

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[108] *See, e.g.*, THOMAS F. TAYLOR, SEVEN DEADLY LAWSUITS: HOW MINISTERS CAN AVOID LITIGATION AND REGULATION (1996) (reflecting the broad range of current lawsuits in employment law, including fraud, defamation, child abuse, sexual misconduct, clergy malpractice, invasion of privacy, and undue influence); *see also* David Cazares, *Court Lets Suits Stand Against Two Dioceses: First Amendment Exemption Disallowed in Sexual Abuse Cases*, S. FLA. SUN SENTINEL, Mar. 15, 2002, at 1A (discussing two cases of alleged sexual misconduct of clergy).

[109] *See, e.g.*, State v. Neulander, 801 A.2d 255, 257–58 (N.J. 2002) (where, in a homicide case brought against a former rabbi, the court anticipated such extensive coverage that it sent a written invitation to various specific representatives of broadcast media).

[110] *See, e.g.*, Bates v. Kingdom Hall of the Congregation, No. 9510, 1986 WL 2899, at *1–2 (Ohio Ct. App. Mar. 6, 1986) (holding that the court lacked subject matter jurisdiction to determine whether the church followed its own guidelines in a disciplinary action).