

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

SUE ANN DOLQUIST,

Plaintiff,

vs.

Case No. 03-2150-KHV

HEARTLAND PRESBYTERY, and
LEAWOOD PRESBYTERIAN CHURCH,

Defendants.

DEFENDANT LEAWOOD PRESBYTERIAN CHURCH'S
REPLY BRIEF IN SUPPORT OF ITS
MOTION TO DISMISS OR FOR SUMMARY JUDGMENT
BASED ON THE MINISTERIAL EXCEPTION

1. On April 1, 2004, Defendant Leawood Presbyterian Church filed its Motion to Dismiss or for Summary Judgment and supporting Brief relying solely on the “ministerial exception” to federal employment nondiscrimination legislation.¹ On April 23, 2004, Plaintiff, Rev. Sue Ann Dolquist, filed her Suggestions in Opposition to Leawood Presbyterian Church’s Motion to Dismiss or for Summary Judgment. This brief is in reply to Plaintiff’s Suggestions in Opposition, filed April 23, 2004.

2. There are hundreds of reported decisions, federal and state, where a plaintiff has sued a church alleging employment discrimination, various torts, breach of contract, or some combination of these three. In many of these reported decisions the church asserts the First Amendment as a defense. The federal courts in this general area of Constitutional law have

¹Defendant, Leawood Presbyterian Church, continues to maintain that the nature of Plaintiff’s alleged employment discrimination implicates religious matters and thus is not actionable under the church autonomy doctrine. But for purposes of the “ministerial exception,” which is the subject of this Motion, it matters not whether the nature of the alleged employment discrimination is characterized as “religious” or “secular.” The autonomy doctrine is the subject of a separate Motion to Dismiss or for Summary Judgment Based on Church Autonomy.

arranged these types of claims or causes of action according to the character of the plaintiff suing the church. The claims or causes of action fall into three types: (a) those claims or causes of action where a minister has sued the church which had employed him or her;² (b) those claims or causes of action where a non-ministerial employee has sued the church which had employed him or her;³ and (c) those claims or causes of action where a so-called “third-party” (*i.e.*, someone attending the church or receiving pastoral counseling) has sued the church where he or she had some dealings.⁴

The doctrine of church autonomy has its strictest application to the first type of claim or cause of action, namely, where a minister, such as Plaintiff Rev. Dolquist, is suing the church, such as Leawood Presbyterian Church, which had previously employed him or her. This greater scrutiny makes sense, in the oft-quoted words of *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), because: “The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.” *Id.* at 558-59 (dismissing for First Amendment reasons a Title VII claim by female minister against her church alleging sex discrimination in her salary and benefits). This three-

²*See, e.g., Schmoll v. Chapman University*, 83 Cal. Rptr. 2d 426, 429 n.4 (Cal. App. 1999) (dismissing for First Amendment reasons claim by female chaplain against religious college alleging sex discrimination resulting in constructive discharge, as well as retaliation against her for reporting alleged sexual harassment of students by faculty), explaining why a non-ministerial employee suing the church is treated differently from a minister suing the church.

³*See, e.g., Smith v. Raleigh District of the North Carolina Conference of the United Methodist Church*, 63 F. Supp.2d 694 (E.D.N.C. 1999) (permitting Title VII claims for sexual harassment brought by a church receptionist and a pastor’s secretary, both non-ministerial employees).

⁴*See, e.g., Van Osdol v. Vogt*, 908 P.2d 1122, 1132 n.17 (Colo. 1996) (distinguishing cases involving so-called third-party claims from claim by female minister brought against her church).

part typology assists greatly in quickly focusing on the far fewer number of cases that are most like the one before this Court. First Amendment concerns are at their highest with the first type of case. Reverend Dolquist's claim is of the first type.

3. The ministerial exception is applicable only to the first type of cases. It prohibits a minister of religion from suing his or her church for employment discrimination. The exception applies not only to Title VII of the Civil Rights Act of 1964, but also to claims filed under the Age Discrimination in Employment Act,⁵ the Americans with Disabilities Act,⁶ and other federal civil rights legislation.⁷ Whatever the protected class or protected basis of the employment nondiscrimination legislation, the ministerial exception applies and bars the claim.⁸

4. The principle undergirding the ministerial exception is that any and all claims between a minister and her church that involve allegations of employment discrimination necessarily implicate the First Amendment.⁹

⁵See, e.g., *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991) (applying ministerial exception to employment discrimination claim brought under the Age Discrimination in Employment Act of 1967).

⁶See, e.g., *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (applying ministerial exception to employment discrimination claim brought under the Americans with Disability Act).

⁷See, e.g., *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974) (applying ministerial exception to claims under 42 U.S.C. §§ 1981-83, 1985-86).

⁸The ministerial exception is also applicable to state legislation prohibiting employment discrimination. See, e.g., *Schmoll v. Chapman University*, 83 Cal. Rptr. 2d 426 (Cal. App. 1999) (dismissing state employment discrimination claim by chaplain at religious university).

⁹See *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (“the First Amendment protects the act of a[n employment] decision rather than the motivation behind it”); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1356-57 (D.C. Cir. 1990) (the “determination of ‘whose voice speaks for the church’ is *per se* a religious matter We cannot imagine an area of inquiry less suited to a temporal court.”); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir. 2000) (“[T]he ministerial exception to Title VII is robust where it applies The exception precludes any

5. The U.S. Circuit Courts of Appeal have been clear that the First Amendment concern that gave rise to the ministerial exception is two-fold. As the Fifth Circuit stated in *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999):

The first concern is that secular authorities would be involved in evaluating or interpreting religious doctrine. . . . The second quite independent concern is that in investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal. . . . This second concern alone is enough to bar the involvement of the civil courts.

Id. at 350. In *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000), the Eleventh Circuit said:

In addressing the [minister]'s claim, the court noted that the "Supreme Court has recognized that government action may burden the free exercise of religion" in two ways [1] "by interfering with a believer's ability to observe the commands or practices of his faith, and [2] by encroaching on the ability of a church to manage its internal affairs." . . . The court then noted that the ministerial exception was developed, in part, to protect churches from the second type of government interference.

Id. at 1302-03 (quoting from *EEOC v. Catholic University*, 83 F.3d 455, 460 (D.C. Cir. 1996)).

See also, Simpson v. Wells Lamont Corp., 494 F.2d 490, 493-94 (5th Cir. 1974) (noting that First Amendment concerns are two-fold, the first is avoiding disputes over doctrine and the second is judicial noninterference with a church's governance of its ministers).

6. Plaintiff has attempted to circumvent the ministerial exception by focusing on

inquiry whatsoever into the reasons behind a church's ministerial employment decision."); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2003) ("It is therefore not our role to determine whether the Church had a secular or religious reason for the alleged mistreatment of Alicea-Hernandez."); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 363 (8th Cir. 1991) ("Personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts . . . This is precisely the kind of judicial second-guessing of decision-making by religious organizations that the Free Exercise Clause forbids.").

only the first of the two concerns that gave rise to the exception. In this regard, she follows in the footsteps of many other unsuccessful plaintiffs in characterizing their claim as raising “secular issues” as opposed to matters of “religious doctrine.”

Rather than indulge in this game of dissecting the terms and conditions of a minister’s job duties so as to separate the “secular” from the “religious” (such parsing itself being a matter of church/state entanglement¹⁰), the U.S. Circuit Courts of Appeal have cut to the heart of the matter and repeatedly said that it does not matter whether the lawsuit entails “religious questions” because all employment discrimination lawsuits between a church and its minister fall under the exception. *See Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703-04 (7th Cir. 2003) (dismissing female minister’s Title VII claim of sex and national origin discrimination filed against the church where she was employed; plaintiff alleged she was fired because of her complaints about mistreatment as a woman and a Hispanic, both wholly “secular” motivations); *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343, 345 n.1, 350 (5th Cir. 1999) (dismissing female minister’s Title VII claim of sex and pregnancy discrimination filed against the church where she was employed; plaintiff alleged she did not receive compensation equal to men and was denied benefits to cover expenses of her pregnancy, both matters not “requiring an evaluation of church doctrine”); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303 (11th Cir. 2000) (dismissing male minister’s claim of retaliation because he had helped a female co-minister who was a victim of sexual harassment by high church officials; plaintiff alleged to only be helping a victim of sexual harassment, a matter “not based on issues of church doctrine or ecclesiastical law”); *Starkman v. Evans*, 198

¹⁰*EEOC v. Catholic University*, 83 F.3d 455, 465-67 (D.C. Cir. 1996) (in a case of the first type, finding that process of EEOC investigation, followed by civil litigation with its extensive discovery and then jury trial, adds up to excessive entanglement).

F.3d 173, 175 (5th Cir. 1999) (dismissing claim by church's Choirmaster and Director of Music suing because of disability discrimination and for retaliation; plaintiff alleged to be suing over denial of health-related accommodations, a dispute not based on "religious grounds").

7. While conceding that the ministerial exception bars claims of sex and race discrimination, Plaintiff's Suggestions in Opposition argues that a claim of sexual harassment is different. This makes no sense. The First Amendment concerns of church/state entanglement and judicial interference in internal affairs of church governance do not go away simply because the allegation of employment discrimination is sexual harassment. If "distance" from a church's creed or core religious doctrines were the test, discrimination in the form of denial of pregnancy benefits (*e.g.*, *Combs*) or layoffs of older workers (*e.g.*, *Scharon*) are as "distant from core doctrine" as a claim of sexual harassment. The First Amendment concern here is not doctrine in that narrow sense. The issue is interference in internal church governance and administration, of which the most crucial and sensitive aspect is the employment relationship between a church and its minister.

8. The ministerial exception is different from the doctrine of church autonomy. *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 658 n.2 (10th Cir. 2002). This Motion is solely based on the ministerial exception.¹¹ Accordingly, not appropriate here is Plaintiff's reliance in her Suggestions in Opposition on *Black v. Snyder*, 471 N.W.2d 715 (Minn. App. 1991). Although the state court in *Black* discussed the First Amendment, the church failed to raise the ministerial exception as a defense. *Id.* at 719-21. That was a serious mistake. And it is reason enough for this Court not to rely on *Black*. Unlike the church in *Black*, Leewood

¹¹Leewood Presbyterian Church takes up and distinguishes hostile environment (sexual harassment) cases involving the doctrine of church autonomy in its separate Motion to Dismiss or for Summary Judgment Based on Church Autonomy.

Presbyterian Church has asserted the ministerial exception. Additionally, the state court in *Black* erroneously held that *Oregon Employment Division v. Smith*¹² prevented a Free Exercise Clause defense on behalf of the church. *Id.* at 718-19. The Tenth Circuit, as well as four other Circuit Courts of Appeal, has said that *Smith* is not to be read as overturning the doctrine of church autonomy or ministerial exception. *See Bryce*, 289 F.3d at 656-57 (following holdings in the Fourth, Fifth, Eleventh, and D.C. Circuits to the effect that ministerial exception was not discredited by *Smith*); *EEOC v. Catholic University*, 83 F.3d at 461-63 (analysis of why *Smith* does not overturn ministerial exception).

9. Plaintiff's Suggestions in Opposition cites *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999). *Bollard* is both an outlier and distinguishable.

10. It is not credible that the Tenth Circuit Court of Appeals will reject like decisions in the Fifth, Seventh and Eleventh, only to follow an outlier case from a panel of the Ninth Circuit. Plaintiff's Suggestions in Opposition to Defendant Leawood Presbyterian Church's Motion to Dismiss or for Summary Judgment does not even attempt to distinguish the cases from the other circuits, *Alicea-Hernandez*, *Combs*, *Gillington*, and *Starkman*.

11. *Bollard* is distinguishable in four respects. First, it did not involve the minister of a church. Rather, it involved a person in training in hopes of qualifying for the priesthood. 196 F.3d at 944. A church/cleric relationship protected from interference did not yet exist. Accordingly, the case is like the second type of claim, *to wit*: an employment discrimination claim by a non-minister against his or her church. Indeed, *Bollard* expressly relied on two Ninth Circuit cases, both of the second type, namely non-ministerial employees suing for employment discrimination. 196 F.3d at 947.

¹²494 U.S. 872 (1990) (holding that Free Exercise Clause no long gives rise to strict scrutiny analysis when there is an unintended burden on religious practice).

Second, the panel in *Bollard* relied on a comparison not legitimate here. The panel opinion reasoned that if a tort claim of negligent supervision against a church did not violate the First Amendment, then a statutory claim of employment discrimination by a seminary student did not violate the First Amendment. *Id.* at 947-48. Kansas, however, has never allowed a claim of negligent supervision to be brought against a church, let alone a claim of negligent supervision by a minister against her own church. Perhaps Kansas will only permit a claim of intentional failure to supervise. *See Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997) (*en banc*, holding that First Amendment does not allow tort claims for negligent hiring, supervision, or retention against church for conduct of clergy, but does permit claim of intentional failure to supervise). In any case, this is a matter of state law and thus one which for reasons of comity and federalism this Court should not reach unnecessarily.

Third, *Bollard* found that there would be no excessive entanglement violative of the Establishment Clause because the plaintiff only sought damages. 196 F.3d at 950. But that rationale has already been rejected by this Court,¹³ and properly so.

Fourth, the plaintiff's Title VII claim in *Bollard* was limited to sexual harassment and nothing more. Rev. Dolquist's claim is not so limited. She also claims retaliation arising from her having complained that she was being harassed. But the retaliation claim opens the door to her retention by the Church in the job of minister. The issues of hiring and retention of clergy determine who speaks for the church — an inherently religious question. Many of Rev.

¹³The distinction was rejected by this Court in *Knuth v. Lutheran Church Missouri Synod*, 643 F. Supp. 444, 448 (D. Kan. 1986) (holding that in pastor's claim for breach of contract it makes no difference that only damages were sought). Damage claims alone are chilling to the religious freedom of church organizations. And avoidance of claims for damages disrupts the work of the church, its governance and administration, especially in its relationship to its pastors. "Secular aspects may conceivably exist in the relationship between a minister in the organized church, but the minister plays a particularly sensitive role in any church organization." *Id.* at 448-49.

Dolquist's allegations of retaliation go directly to the issue of her job performance, and hence, retention. In the Pretrial Order, for example, Plaintiff alleges, *inter alia*, she was retaliated against as follows:

Threatening to terminate Plaintiff's employment; threatening Plaintiff with disparity in the terms and conditions of her employment; falsely accusing Plaintiff of engaging in sexually inappropriate behavior including wearing see-through clothing and short skirts; falsely accusing Plaintiff of being involved with a male member of the church in an inappropriate relationship; complaining about Plaintiff's ability to provide meaningful sermons; complaining about Plaintiff's job performance; suggesting that Plaintiff take some course work on pastoral care and related areas; criticizing Plaintiff for not handling the rehiring of John Miller as the Choir Director appropriately, and by failing to handle John Miller appropriately, Plaintiff 'opened up a big can of worms;' and concerns over an accounting scandal that Plaintiff was responsible for.

See Pretrial Order, § 6(a) Plaintiff's Theories of Recovery, Count III Retaliation. Unlike *Bollard*, the "can of worms" over job retention and the attendant entanglement is directly presented here.

12. The ministerial exception is rooted in the Establishment Clause as well as the Free Exercise Clause. Indeed, because the underlying principle is about ordering the relationship between church and state, it is far more easily understood as a rule of law grounded in the Establishment Clause. The Free Exercise Clause is about protecting individual rights, that is, prohibiting religious harm or burdens, whereas the Establishment Clause is about protecting the autonomy of the church as an institution. See *Bryce*, 289 F.3d at 656 ("These courts reason that, unlike *Smith*, the ministerial exception addresses the rights of the church, not the rights of individuals."). That the Free Exercise Clause does not alone, or even principally, undergird the ministerial exception is further demonstrated by the refusal of the U.S. Circuit Courts of Appeal to abandon the ministerial exception following the decision in *Oregon Employment Division v. Smith*. See *Bryce*, 289 F.3d at 656-57, holding that ministerial exception is not overturned by *Smith*.

13. Plaintiff's Suggestions in Opposition cites *McKelvy v. Pierce*, 800 A.2d 840 (N.J. 2002). This makes no sense. First, *McKelvy* was a state law breach of contract claim. The ministerial exception is applicable to statutory employment nondiscrimination claims, not tort or contract claims. Second, *McKelvy* did not involve a minister suing his or her church. Rather, like *Bollard*, in *McKelvy* the individual bringing suit was a student in training for the priesthood. Third, on matters of federal law a state court is hardly authoritative, especially in the face of recent and clear holdings from the Seventh Circuit (*Alicea-Hernandez*), the Fifth Circuit (*Combs*), the Eleventh Circuit (*Gillington*), and yet another in the Fifth Circuit (*Starkman*).

14. Plaintiff's Title VII claims against Leawood Presbyterian Church will not settle. To put the Church through a jury trial where it will have to defend the terms and conditions of the supervision of its clergy is what the First Amendment was designed to prevent. That is the *raison d'être* of the ministerial exception which has its genesis in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). As the court in *McClure* observed, merely entertaining such a lawsuit will produce "an investigation and review of . . . matters of church administration and government . . . [which] could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment." *Id.* at 560.

WHEREFORE Defendant, Leawood Presbyterian Church, respectfully requests that this Court dismiss or grant summary judgment with respect to Count II (Title VII - sexual harassment) and Count III (Title VII - retaliation) of Plaintiff's Second Amended Petition for Damages, and that the Court further remand back to the state trial court the remaining claims against this Defendant that are designated as Count IV (intentional failure to supervise), Count V (negligent infliction of emotional distress), and Count VI (outrage).

Respectfully submitted,

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Certificate of Service

I hereby certify that service of Leawood Presbyterian Church's Reply Brief in Support of Its Motion to Dismiss or for Summary Judgment Based on the Ministerial Exception was accomplished through notice of electronic filing on counsel who are filing users listed below, this 10th day of May, 2004, to:

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