

THURSDAY

FRIDAY

TUESDAY

WEDNESDAY

TODAY

Feedback | FAQ

Previous

Next

Bookmark Reprints

NEWS

RULINGS

VERDICTS

Discriminating in the name of religion

Erwin Chemerinsky is dean and distinguished professor of law at the University of California, Irvine, School of Law.



Few would deny that religious institutions should be able to decide who will be their ministers and require that they be of that faith. The U.S. Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 2012 DJDAR 374 (Jan. 10, 2012), was not at all surprising in holding that the

First Amendment bars suits brought on behalf of ministers against their churches, claiming termination in violation of employment discrimination laws. But a closer examination of the facts and holding shows that it is a troubling decision, especially if it is seen as opening the door to allowing religious institutions a broader exemption from anti-discrimination laws.

The case involved a small school in Redford, Mich. that was part of the Hosanna-Tabor Evangelical Lutheran Church and offered a "Christ-centered education" to students in kindergarten through eighth grade. The school employed two kinds of teachers: "called" and "lay." A called teacher must satisfy certain academic requirements, including by completing a "colloquy" at a Lutheran college or university. A teacher who meets the specified requirements may be called by a congregation and once called, receives the formal title, "Minister of Religion, Commissioned." By contrast, "lay" teachers do not have this training and are not required even to be Lutheran.

Cheryl Perich began as a lay teacher for Hosanna-Tabor in 1999. She then completed her colloquy and the school asked her to be a called teacher. Perich accepted and received a "diploma of vocation" designating her a commissioned minister. Perich taught kindergarten for several years before she was assigned the fourth grade. She taught secular subjects, such as math, language arts, social studies, science, gym, art, and music. She also taught a religion class four days a week, led the students in prayer and devotional exercises each day. She attended chapel services each week and led them about twice a year.

In 2004, she became ill and took disability leave. In February 2005, she returned to work, but the school told her that they had filled her position with a lay teacher. On the first day that she was medically cleared to return, she came to the school and was told that there was no position for her and that she should leave. She refused to do so until given documentation that she had presented herself for work. She was then fired. The school rescinded her call for "insubordination and disruptive behavior," as well as the damage she had done to her "working relationship" with the school by "threatening to take legal action."

Perich filed a claim with the Equal Employment Opportunity Commission alleging a violation of the Americans with Disabilities Act on the ground that she was fired based on her disability and in retaliation for considering legal actions against her employer. The EEOC sued and Hosanna-Tabor asserted the "ministerial exception" as its defense. The federal district court ruled in favor of the school, but the 6th U.S. Circuit Court of Appeals reversed.

SPECIAL REPORT

20 Under 40

Plus: Five Associates to Watch in 2012



Thursday, January 19, 2012

U.S. Supreme Court High court upholds copyright law for foreign works

The U.S. Supreme Court upheld a copyright law Wednesday that gives legal protection to millions of works by foreign authors that had been available for use free of charge.

Bankruptcy

A financial fall for prominent LA litigator

A plaintiffs' lawyer who played a leading role in the \$660 million sexual abuse settlement with the Roman Catholic Archdiocese of Los Angeles in 2007 has filed for bankruptcy protection following lengthy divorce proceedings.

Real Estate

Lawyers see signs of thawing in real estate market

For the first time in several years industry optimism has some hard evidence behind it, according to the latest semiannual report by the Allen Matkins/UCLA Anderson Forecast.

Real Estate Deals

RoganLehrman LLP, a general practice firm, and Trope & DeCarolis, LLP, a family law firm, both leased space on the 13th floor at 12121 Wilshire Blvd., a 14-story, 310,000-square-foot building at the Northwest corner of Wilshire Boulevard-Bu

Law Practice

Client conflicts keep eight Rutter Hobbs lawyers from joining Greenberg Glusker

A group of eight Rutter Hobbs & Davidoff Inc. lawyers slated to join Greenberg Glusker Fields Claman & Machtinger LLP last week as part of a 19-lawyer transaction haven't yet joined the Los Angeles firm.

Holland & Knight grows in SF with litigator hire

Holland & Knight LLP hired a securities litigation specialist in San Francisco as it continues to expand in California, the firm announced Wednesday.

The Supreme Court unanimously ruled that the First Amendment barred Perich's suit. Chief Justice John G. Roberts Jr. wrote the opinion for the Court and held that both the Establishment Clause and the Free Exercise Clause "bar the government from interfering with the decision of a religious group to fire one of its ministers." The Court stated: "By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According to the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."

A closer examination of the facts and holding shows that it is a troubling decision, especially if it is seen as opening the door to allowing religious institutions a broader exemption from anti-discrimination laws.

At first glance, this holding does not seem troubling. It always has been accepted that the Catholic Church can decide that only men can be priests or that only women can be nuns. Orthodox Jews can decide that only men can be rabbis. But the application of this principle to this case and its potential implications are disturbing.

First, Perich was an elementary school teacher. Her primary responsibilities were teaching secular subjects to kindergarten and then fourth grade students. Lay teachers performed the same tasks; in fact, Perich lost her job because a lay teacher took her place. Taken to its logical conclusion, under the Supreme Court's reasoning a religious institution could exempt itself from employment discrimination laws by designating all of its employees "ministers."

In a concurring opinion, Justice Samuel A. Alito Jr., joined by Justice Elena Kagan, said that the exemption "should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. If a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position."

Second and quite importantly, Perich's firing had nothing to do with religion. This would be a very different case if Hosanna-Tabor had fired Perich because she was not adhering to the faith or not adequately teaching the religion. But she lost her job because of her medical condition and in retaliation for her considering suit under the Americans with Disabilities Act. Although religious institutions need to be given broad latitude in making *religious* choices - that is not what occurred in this case.

Finally, the Supreme Court fails to recognize the compelling government interest in preventing employment discrimination. The underlying issue is how to balance religious freedom against the social interest in equality. The difficult question is where to draw the line. A Catholic Church, of course, can insist that a priest be Catholic, but it should not be able to exclude non-Catholics from being secretaries or janitors.

Chief Justice Roberts concluded his majority opinion by emphasizing the narrowness of the holding: "The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit." It would be deeply unsettling if this narrow holding was seen as opening the door to a broader exemption for religious institution from employment discrimination law or other claims by their employees.

[Previous](#) [Next](#)

Litigation

PETA, others ask that 13th Amendment apply to whales

In 1967, civil rights attorney Philip J. Hirschkop won the landmark case that declared unconstitutional laws banning interracial marriage. Now he has joined PETA in fighting for a 13th Amendment right of orcas.

End to prison receivership in sight--but not quickly

Management of the state prisons' medical and mental health facilities will continue to be in the hands of a federally appointed receiver for the foreseeable future despite an order calling for a transition plan to be drawn up.

Government

Long Beach again delays pot ban vote

The Long Beach City Council for a second time has delayed a vote on whether to ban medical marijuana dispensaries. Council members will revisit the matter on Feb. 14.

Judges and Judiciary

LA judge appointed to Judicial Council

Chief Justice Tani Cantil-Sakauye on Wednesday appointed Los Angeles County Superior Court Judge Emilie H. Elias to the state Judicial Council, the policymaking body of the state courts.

Litigation

Court rejects tribe's claim to Tejon Ranch

A federal court threw out a case Wednesday where a group of American Indians claimed rights to a vast ranch north of Los Angeles that could have stymied a major housing development in the works.

California Supreme Court

Court revives zip code case

A state appellate court has revived a class action against retailer Brookstone for illegally collecting customers' ZIP codes at checkout.

Litigation

Court says judge can decide water storage case

A state appellate court ruled Wednesday that a trial judge does have jurisdiction to decide whether various Southern California water suppliers can divide up water storage space in an important underground water storage basin.

Law Practice

Irell & Manella picks new managing partner

Irell & Manella LLP has selected an intellectual property litigator to serve as the firm's new managing partner.