

## WHO IS A MINISTER? SIXTH CIRCUIT FURTHER REFINES THE TEST USED TO DECIDE WHEN THE “MINISTERIAL EXCEPTION” APPLIES IN EMPLOYMENT-LAW CASES

In *Conlon v. InterVarsity Christian Fellowship/USA*,<sup>1</sup> the United States Court of Appeals for the Sixth Circuit provided additional direction for the use of the ministerial exception. This exception precludes application of employment-discrimination laws if the employer is a religious institution and the employee qualifies as a minister. “The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”<sup>2</sup> In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Supreme Court of the United States—in a unanimous decision—clarified the ministerial as an exception to federal employment statutes that regulate conditions of employment, hiring, and firing.<sup>3</sup> The ministerial exception is an affirmative defense that religious entities may invoke in employment-discrimination cases.<sup>4</sup> In *Hosanna-Tabor*, the Court used four factors to identify which employees qualify as ministers covered by the exception,<sup>5</sup> but it left open which entities may exert the exception as a defense and how those factors should be balanced. Lower courts have been left to determine these issues.

In *Conlon*, the Sixth Circuit addressed the application of the ministerial exception asserted by a Christian organization against a claim of employment discrimination.<sup>6</sup> Here, the court applied the *Hosanna* factors to ultimately determine if Alyce Conlon—a “spiritual director”—qualified as a “minister.”<sup>7</sup> Conlon worked for InterVarsity Christian Fellowship (IVCF), “an evangelical campus mission,” from 1986 to December of 2011, when she was fired.<sup>8</sup>

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1. *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829 (6th Cir. 2015).

2. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 703 (2012).

3. *Id.* at 706.

4. *Id.* at 709 n.4.

5. *Id.* at 707–09.

6. *Conlon*, 777 F.3d 829.

7. *Id.* at 835.

8. *Id.* at 832.

From 2004 through 2011, she served as a spiritual director for IVCF staff members and obtained a certification in Spiritual Direction.<sup>9</sup> In March of 2011, Conlon and her husband began considering divorce, and she reported the marital issues to her supervisor as required by IVCF policy.<sup>10</sup> In May of 2011, Conlon's supervisor put her on paid leave, providing her an opportunity to repair her marriage.<sup>11</sup> But when IVCF determined that Conlon had not made progress in reconciling with her husband, her employment was terminated on December 20, 2011.<sup>12</sup>

Following her termination, Conlon filed complaints with both the federal Equal Employment Opportunity Commission and the Michigan Department of Civil Rights and eventually filed suit in the United States District Court for the Western District of Michigan.<sup>13</sup> She alleged gender discrimination in violation of both Title VII of the Civil Rights Act of 1964 and Michigan's Elliot-Larsen Act.<sup>14</sup> The District Court dismissed the case after IVCF asserted the ministerial exception.<sup>15</sup> Conlon appealed to the Sixth Circuit.<sup>16</sup> The Sixth Circuit considered four issues: 1) whether IVCF is an organization that can assert the ministerial exception, 2) whether Conlon qualifies as a minister, 3) if IVCF could and did waive its right to assert the ministerial exception, and 4) how the ministerial exception interacts with state law, such as the Elliot-Larsen Act.<sup>17</sup>

First, the Sixth Circuit analyzed other decisions to determine whether IVCF is qualified to assert the ministerial exception. In *Hosanna-Tabor*, the employer was a church with a subsidiary school, so the Court did not evaluate which entities constituted a religious group that could assert the ministerial exception.<sup>18</sup> The Sixth Circuit previously created a standard to evaluate which organizations can invoke the ministerial exception. "[A]n employer need not be a traditional religious organization such as a church, diocese, or synagogue, or an entity operated by a traditional religious

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9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 832–36.

18. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 695 (2012).

organization.”<sup>19</sup> In *Hollins v. Methodist Healthcare, Inc.*, the court ruled that a Methodist hospital was “clearly” a religious organization. IVCF is not a church.<sup>20</sup> IVCF is a Christian organization whose purpose is to support Christianity at colleges and universities by establishing “witnessing communities of students and faculty who follow Jesus as Savior and Lord.”<sup>21</sup> Because IVCF has a religious purpose and mission, the Sixth Circuit ruled that IVCF is a religious group that can raise the ministerial exception as an affirmative defense.<sup>22</sup>

In *Hosanna-Tabor*, the terminated employee bringing the discrimination claim was a teacher at the church’s subsidiary school.<sup>23</sup> To determine if the teacher was a minister, the Supreme Court listed four factors to consider: (1) the formal title given by the employer, (2) the substance reflected in that title, (3) the employee’s use of the title, and (4) the employee’s religious functions performed for the employer.<sup>24</sup>

Applying the *Hosanna-Tabor* factors, the Sixth Circuit first concluded that although Conlon did not maintain the title “minister,” her title of “spiritual director” or “Spiritual Formation Specialist” conveyed a religious meaning similar to that of pastor, reverend, or rabbi.<sup>25</sup> This factor favored IVCF.

Second, the court found that IVCF provided no evidence of the substance of Conlon’s certification in Spiritual Direction. Because the teacher in *Hosanna-Tabor* had obtained a “significant degree of religious training followed by a formal process of commissioning,” her title’s substance reflected formal vestment in religion and theology.<sup>26</sup> Here, IVCF failed to prove such substance in Conlon’s title as “spiritual director.”

Third, the Sixth Circuit evaluated how Conlon used her ministerial title.<sup>27</sup> In *Hosanna-Tabor*, the teacher had an active public role and her religious function was recognized by students and parents. Unlike that teacher, Conlon had no such public connection

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19. *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007), *abrogated in part by Hosanna-Tabor*, 132 S. Ct. 694.

20. *Conlon*, 777 F.3d at 833.

21. *Id.* at 829.

22. *Id.* at 837.

23. *Hosanna-Tabor*, 132 S. Ct. at 700.

24. *Id.* at 707–09.

25. *Conlon*, 777 F.3d at 834.

26. *Hosanna-Tabor*, 132 S. Ct. at 707.

27. *Conlon*, 777 F.3d at 835.

since she worked internally with IVCF employees.<sup>28</sup> Thus, IVCF provided no evidence to show that Conlon held herself out as a religious figure or minister.<sup>29</sup>

Lastly, the Sixth Circuit considered the religious functions Conlon performed for IVCF. In *Hosanna-Tabor*, the Supreme Court decided that the teacher's responsibilities included "leading others toward Christian maturity."<sup>30</sup> Here, Conlon's duties included assisting others to cultivate "intimacy with God," and the court deemed this a ministerial function that met this factor.<sup>31</sup>

Because the Supreme Court in *Hosanna-Tabor* refused to rule upon the necessity of any particular factor or set of factors,<sup>32</sup> the Sixth Circuit had to decide how to rule where only two of the four factors were present. Here, the court held "that where both factors—formal title and religious function—are present, the ministerial exception clearly applies."<sup>33</sup> Although the Sixth Circuit noted that the decision would not instruct whether only one factor alone was enough, the court found the presence of these two factors sufficient. Thus, the court allowed IVCF to assert the ministerial exception against Conlon as "spiritual director."

Next, Conlon argued that IVCF waived its right to assert the ministerial exception as an affirmative defense.<sup>34</sup> In *Hollins*, the Sixth Circuit had analyzed a claim that the hospital waived the ministerial exception, indicating that a waiver is possible.<sup>35</sup> But *Hollins* was decided before *Hosanna-Tabor*. In this case, the court relied on *Hosanna-Tabor*, where the Supreme Court dictated that no situation allows a church to "explicitly waive this protection."<sup>36</sup> Because both the Establishment Clause and the Free Exercise Clause absolutely bar government involvement or interference with a religious group's decisions regarding ministers, a religious group cannot waive the exception and allow the court to essentially appoint a minister.<sup>37</sup> Thus, any waiver by IVCF was barred.<sup>38</sup>

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28. *Id.*

29. *Id.*

30. *Hosanna-Tabor*, 132 S. Ct. at 708.

31. *Conlon*, 777 F.3d at 835.

32. *Hosanna-Tabor*, 132 S. Ct. at 708.

33. *Conlon*, 777 F.3d at 835.

34. *Id.* at 836.

35. *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007), *abrogated in part by Hosanna-Tabor*, 132 S. Ct. 694.

36. *Id.*

37. *Hosanna-Tabor*, 132 S. Ct. at 705.

Determining that IVCF could assert the ministerial exception as a defense against Conlon, the Sixth Circuit dismissed her federal employment-discrimination claim. The Sixth Circuit then only had to decide whether the ministerial exception applied to Conlon's state-law claim under the Elliot-Larsen Act. While the court held that Michigan law already recognized the ministerial exception,<sup>39</sup> it further reasoned that the protections, rights, and defenses found in the First Amendment to the United States Constitution also apply to Michigan through incorporation under the Fourteenth Amendment.<sup>40</sup> Therefore, for the same reasons, Conlon's state-law claim is also barred.

In *Conlon*, the Sixth Circuit filled in some of the gaps left by the Supreme Court in *Hosanna-Tabor*. Where the formal-title and religious-function factors are met, the Sixth Circuit will hold that the employee is a minister, although they fail to elaborate further. Because the Supreme Court has provided little guidance on which organizations can assert the ministerial exception, the Sixth Circuit continues to define a religious group under the *Hollins* test. Lastly, these cases only answer the question of application of the ministerial exception to federal and state employment law. While both the Supreme Court in *Hosanna-Tabor* and the Sixth Circuit in *Conlon* suggest that the Establishment and Free Exercise Clauses bar all government interference with religious groups, lower courts continue to struggle when deciding whether the exception applies to tortious conduct<sup>41</sup> or contract claims.<sup>42</sup> Outside of the Sixth Circuit, other

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38. *Conlon*, 777 F.3d at 836.

39. *Id.* (citing *Weishuhn v. Catholic Diocese of Lansing*, 756 N.W.2d 483, 497 (Mich. Ct. App. 2008)).

40. *Id.*

41. *See, e.g., Doe v. Corp. of Catholic Bishop of Yakima*, 957 F. Supp. 2d 1225, 1232 (E.D. Wash. 2013) (noting that *Hosanna-Tabor* dealt solely with a terminated employee's claims of employment discrimination and "did not intend to immunize all aspects of hiring and supervision of ministers from tort liability"); *Givens v. St. Adalbert Church*, No. HHDCV1260324595, 2013 WL 4420776, at \*7–9 (Conn. Super. Ct. July 25, 2013) (stating that *Hosanna-Tabor* only recognizes the ministerial exception under employment-discrimination statutes, so courts may continue to exercise subject matter jurisdiction over civil actions for sexual abuse by priests); *Erdman v. Chapel Hill Presbyterian Church*, 286 P.3d 357 (Wash. 2012) (finding a negligent-hiring claim is barred, but not claims involving abuse).

42. *See, e.g., Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668 (N.D. Ill. 2012) (holding that the reasons for termination—religious or economic—are immaterial to the application of the ministerial exception); *Reese v. Gen. Assembly of Faith Cumberland Presbyterian Church in Am.*, 425 S.W.3d 625 (Tex. App.

courts are still defining what constitutes a “religious group”<sup>43</sup> and how the *Hosanna-Tabor* factors should be applied to decide who is a “minister.”<sup>44</sup> For the time being, the Sixth Circuit has answered some of those questions in *Conlon*.

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2014) (noting that awarding any monetary damages, even for breach of contract, for termination of a minister would violate the ruling in *Hosanna-Tabor*). *But see* *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878 (Wis. 2012) (finding that *Hosanna-Tabor* does not explicitly bar a ministerial employee’s suit to enforce an employment contract because the ministerial exception applies when “an executive branch government agency attempt[s] to enforce government employment discrimination laws or regulations” against a religious organization).

43. *See, e.g.*, *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991) (finding a hospital acted as a religious institution because it had “substantial religious character”). *But see* *Penn v. N.Y. Methodist Hosp.*, No. 11-CV-9137(NSR), 2013 WL 5477600 (S.D.N.Y. Sept. 30, 2013) (holding that a religiously affiliated hospital failed to prove itself a religious institution).

44. *See, e.g.*, *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012) (finding that a music director fits the factors to be considered a minister—even without evaluation of title—because, in the church’s determination, he played an integral role in the liturgical assembly); *Mills v. Standing Gen. Comm’n on Christian Unity & Interreligious Concerns*, 986 N.Y.S.2d 60 (App. Div. 2014) (ruling that the Associate General Secretary of Dialogue and Interfaith Relations was a “minister” under the *Hosanna-Tabor* factors).