Published on *The National Law Review* https://natlawreview.com

Fourth Circuit Holds Firm Against Expansion of Religion-Based Defenses to Discrimination (US)

Article By:

Laura Lawless

What happened in the interim that ended this beloved educator's decorated teaching career? In 2014, shortly after North Carolina recognized same-sex marriage, Mr. Billard posted on his personal Facebook page that he and his partner of fourteen years were engaged to be married.

Lonnie Billard was a well-loved and decorated drama and English teacher at Charlotte Catholic High School (CCHS) in Mecklenburg County, North Carolina. He was named Teacher of the Year in 2012 after serving the Catholic high school's students for eleven years.

Two years later, CCHS told Mr. Billard he was not welcome back as a teacher.

CCHS has never denied why it fired Mr. Billard: his plans to marry violated the Mecklenburg Diocese's policy against teachers engaging in conduct contrary to the moral teachings of the Catholic faith. Mr. Billard filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging sex discrimination in employment. The EEOC issued a notice of right to sue. Mr. Billard sued in federal court. He won and was awarded stipulated damages.

If that were the end of the story, although a frustrating one for Mr. Billard and his husband, the case would hardly be newsworthy. Why the case warrants attention is the defense that CCHS did *not* assert, and why.

The 'Ministerial Exception'

Throughout the second half of the twentieth century, a judicially crafted concept known as the "ministerial exception" emerged among federal appellate courts: Religious institutions may discriminate in their treatment of certain employees, notwithstanding Title VII, provided that the employee plays a vital ministerial employment role or is involved in ecclesiastical matters. Indeed, *ministerial* exception is a misnomer because the exception is not limited to those employees holding titles of independent religious significance (*e.g.,* priest, pastor, rabbi, imam), but also applies to employees holding important positions within churches and other religious institutions. The Supreme Court recognized the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). Although the Court refused to answer directly the question of

who is and is not a minister, it found on the facts of the case before it that a “called teacher” with the title of “Minister of Religion, Commissioned” fit the bill.

Hosanna-Tabor was binding law when Mr. Billard filed suit in 2017. CCHS’s obvious defense to Mr. Billard’s allegations of sex discrimination was that he, as a Catholic school teacher engaged to teach his students in accordance with diocesan mission, fell within the ministerial exception, but in an unusual turn of events, CCHS waived this argument. In fact, CCHS stipulated with Mr. Billard that it would not argue that his job duties qualified him for the ministerial exception. Why? CCHS *claims* that it waived the ministerial exception defense because it wanted to avoid the burden of discovery around the issue of whether Mr. Billard’s role was sufficiently ministerial. (More on that below.) Since CCHS waived the best defense available to it and unequivocally admitted why it fired Mr. Billard, it’s no wonder he prevailed.

The Appeal

On appeal, CCHS propounded four affirmative defenses it had advanced without success at the trial court level – none of which included the ministerial exception. First, CCHS asserted two First Amendment-based defenses: the “church autonomy” doctrine and freedom of association. The trial and appellate courts quickly disposed of both theories, concluding that CCHS’s “church autonomy” argument was another way of trying to dress up the ministerial exception and, as to freedom of association, the courts found “no precedent for privileging a right of expressive association over anti-discrimination laws.” CCHS also asserted a statutory defense under the Religious Freedom Restoration Act (RFRA), but the courts made quick work of this too, finding that the RFRA does not apply to suits between private parties.

But CCHS’s fourth and final argument, and by far its most controversial, was that the trial court should have exonerated it under Title VII’s religious exemption. This notion, which is different than the First Amendment-inspired ministerial exception and derives from the plain text of Title VII, exempts certain religious organizations from Title VII’s non-discrimination strictures “with respect to the employment of individuals of a particular religion.” 42 U.S.C. § 2000e-1(a). For instance, a Baptist church may favor hiring a Baptist minister or liturgical worship leader over a Methodist or Lutheran candidate, regardless of their respective qualifications. But the religious exemption has only ever been applied as a defense to claims of *religious* discrimination. Seeking to overturn decades of precedent, CCHS argued in *Billard* for an unprecedented expansion of the exemption, one that would permit religious organizations to discriminate even on the basis of sex, race or national origin as long as religious belief motivated the employment decision. At oral argument before the Fourth Circuit Court of Appeals, CCHS conceded that its proffered interpretation of the religious exemption would permit discrimination against not only the relatively small number of employees of religious institutions with a claim to ministerial status, but also the hundreds of thousands of groundskeepers, custodians, bus drivers, musicians and administrative personnel that work for such institutions but whose duties are non-ecclesiastical.

An interpretation like that for which CCHS called would seriously erode protections against discrimination. For instance, under CCHS’s interpretation of the religious exemption, if a religious employer asserted as a principle of its faith that women should not work outside the home, it should be permitted to discriminate on the basis of sex. Likewise, under CCHS’s reading of the exemption, a religious employer asserting a faith-based reason for preferring one race over another would be exempt from Title VII consequences. And, to close the loop, if a religious employer held as a religious tenet that being gay or marrying one’s gay partner was a moral lapse, then it should be permitted to discriminate on the basis of sexual orientation.

The Fourth Circuit balked at CCHS's statutorily ungrounded argument for an expansion of the religious employer exemption. The text of Title VII is ambiguous and exempts religious organizations "with respect to the employment of individuals of a particular religion"; it does not protect discrimination *against* individuals *because of* religion. The appellate court was also unimpressed by CCHS's attempt to force a determination on these grounds by earlier waiving the ministerial exception. Therefore, the Fourth Circuit set aside the parties' waiver and found *sua sponte* (meaning on the Court's own initiative), that CCHS was not liable for discrimination for terminating Mr. Billard because he was, notwithstanding his secular teaching subjects, "a messenger of CCHS's faith."

The Fourth Circuit explained that it was constrained to reach this outcome based on developing jurisprudence interpreting the ministerial exception. In the years since Mr. Billard filed suit, the Supreme Court expanded on *Hosanna Tabor* in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, finding in 2020 that two secular subject teachers at religious schools were nonetheless ministers within the ministerial exception as they were entrusted with educating and forming students in the school's faith. (Notably, CCHS was represented by The Becket Fund for Religious Liberty. The Becket Fund was also lead counsel in *Our Lady of Guadalupe*, a fact which raises a few questions about the plausibility of CCHS's explanation for waiving the ministerial exception. The Becket Fund claims to be a "leader[ ] in the fight for religious liberty … at home and abroad," and has fought against COVID-19 mandates, contraception care and LGBT and unmarried parent foster and adoption rights.)

The appellate court's decision undoubtedly provides little comfort to Mr. Billard, who is now spending his retirement with his husband whom he married in May 2015. But even though the Fourth Circuit reversed judgment in his favor and instructed the trial court to enter judgment in CCHS's favor on the grounds that the ministerial exception protected the school, it at least rejected CCHS's request for unfettered license to discriminate on any basis so long as it articulated a faith-based motive for doing so. As CCHS proved victorious and therefore lacks grounds to appeal to the Supreme Court, for now, religious employers remain insulated from civil interference with decisions about the appointment and removal of persons in positions of theological significance—even high school drama teachers—but may not use purported religious beliefs to justify discrimination on other grounds.

National Law Review, Volume XIV, Number 134