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SCHOOL PERSONNEL AND EMPLOYMENT LAW: A LEGAL ANALYSIS FOR TODAY'S ELEMENTARY AND SECONDARY CATHOLIC SCHOOLS

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Diocesan central office staff, principals, pastors, and other chief executive officers face personnel and hiring decisions regularly. Dismissal of employees and nonrenewal of contracts often result in protracted litigation. This article reviews recent case law in a variety of employment issues, including dismissal or firing of contracted employees, nonrenewal of contracts, racial discrimination, age discrimination, disability discrimination, sex or gender discrimination, sexual harassment, and the right of workers to organize. The author concludes with an appeal to Catholic leaders to stay well informed of ongoing developments in employment law and calls for the implementation of arbitration to avoid costly litigation.

During the past 60 years, an enormous change has taken place in the law of the workplace and personnel. Between 1935 and 1965, the only major employment law was the National Labor Relations Act (NLRA). Enacted in 1935 and amended in 1947 and 1959, the NLRA focused on the rights of employees to organize into unions and to bargain collectively. By the early 1960s, however, it had become clear that providing individuals with the right to organize and bargain collectively could not address all personnel problems.

Various legal manifestations for protecting workers from unjust treatment came to fruition. Most federal labor laws are contained in four major Congressional Acts: Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act of 1967, the Age Discrimination in Employment Act of 1967, and the Occupational Safety and Health Act (1970). Each of these historic, national employment initiatives has been amended by supplementary statutes bearing distinctive titles and purposes, such as the Americans With

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Disabilities Act of 1990, the Drug-Free Workplace Act of 1988, the Pregnancy Discrimination Act of 1978, or separate legislation, such as the Family and Medical Leave Act of 1993. How are our Catholic elementary and secondary schools affected by these laws? The following discussion will review how Catholic elementary and secondary schools walk the narrow line between religious freedom and legal responsibilities to their employees.

CATHOLIC SCHOOLS AND GOVERNMENT REGULATION

The role of government in the regulation of employment within the Catholic school is pervasive. It runs the gamut from reporting, withholding, and payment of taxes to governmental labor regulations and employee benefit laws, and premiums for governmentally sponsored initiatives under threat of severe penalties including loss of tax-exempt status. The extent of today's regulatory activity by federal and state governments makes conflict almost inevitable.

Religious schools, whether they are legally a part of a local church congregation, separately incorporated and autonomous, or part of an educational organization of a larger church association or diocese, are private organizations. While it is clear that they perform a public benefit in fulfilling a secular educational task and they may receive federal or state aid in the operation of that task, the schools themselves are private, not public, agencies. Yet, in the law of labor and employment and personnel, religious schools relegate these private privileges. The National Labor Relations Board, the Equal Employment Opportunity Commission (EEOC), federal and state Occupational Safety and Health Administration, and state Industrial Relations Commissions do not hesitate to investigate and enforce their regulations in what they long ago decided were the "secular" activities of religious organizations (Bassett, 1997).

Some legislation provides express exemptions for Catholic Church institutions, such as the Civil Rights Act of 1964, Title VII, Section 702, which exempts religious organizations from Title VII's prohibition of religious discrimination in employment. Catholic schools are included under the coverage of some but not all of the above-referenced employment legislation. To understand the impact of government upon the administration of religious schools, one must recognize the constitutional issues of free exercise and entanglement in church affairs under the First Amendment of the U.S. Constitution.

The U.S. Supreme Court has clearly interpreted the First Amendment in *Cantwell v. Connecticut* (1940) and *Everson v. Board of Education* (1947) to mean that government may not hinder or burden the free exercise of religion without a strong, indeed compelling, nonreligious motive and government may not aid religion unless, among other things, the purpose and primary

effect of the aid are secular.

Catholic churches and religiously affiliated organizations like Catholic schools are unique institutions in the United States. They operate in some ways like trusts, unincorporated associations, or nonprofit corporations, but in other ways they are quite different. The religious nature of these institutions causes some states to recognize the difference and to designate special incorporating statutes for religious societies, as California does in its Corporation Code Sections 9110-9690.

The relationships between individual employees within the Catholic school structure are similarly unique. Discernment of the boundaries between public authority in employment and religious freedom and Church rules for the school itself is very difficult. The Church school is regulated by two entirely different systems of law: the civil law, cognizable by the secular courts to the extent that civil law affects relevant activity; and the internal religious rules, the *Code of Canon Law* (Canon Law Society, 1983), based on belief and tradition that lie beyond the jurisdiction of the civil courts. Regarding issues such as employment contracts for hiring and discharge of Catholic school employees, the question of whether such employment relates to doctrinal matters or matters essentially of internal discipline is more problematic than such actions taken in connection with those who administer the Catholic doctrine. All Catholic schools are subject to the bishop in matters of faith and in all other matters prescribed by the Code of Canon Law (Shaughnessy, 1991). Thus, school employees are bound to their bishop and Canon law in their employment relationships with the school. Yet, civil courts will not allow religious institutions to evade legal responsibilities by invoking church law. It is a difficult balancing act.

When it comes to issues of governmentally regulated labor-management relations in churches and religious institutions, an "on-the-one-hand versus on-the-other-hand" rationale arises. Catholic schools are the manifold expressions of religion privileged under the U.S. Constitution. If exemption from state employment laws is made for the churches, that is a benefit that can be construed by way of assistance or subsidy of religion, which brings into play the prohibition of the Establishment Clause. On the other hand, the regulation and control of employment decisions implied in union recognition and antidiscrimination laws can be a severe burden put upon churches' freedom to manage their internal affairs autonomously.

Government involvement in the employment practices and policies of religious institutions occurs on two levels. It precedes and accompanies employment decisions with a dossier of federal and state statutes enforced by reporting, compliance, and financial penalties. It also follows the employment relationship into civil courts on the issues of wrongful terminations, unfair practices, or employment discrimination based on either contract or tort claims. A wrongful termination case grounded in claims of sexual dis-

crimination, for example, can involve concurrent federal and state jurisdictions and end in a verdict of damages that are financially devastating for the church school.

Specific involvement of schools in employment law ranges from discharge cases, alleging breach of contract, wrongful discharge or discrimination on the basis of race, sex, religion, age, national origin, pregnancy, sexual orientation or marital status, to damages for sexual harassment or retaliation. It may involve equal pay and benefit cases, Fair Labor Standards practices, collective bargaining, and the role of unions and federal or state employment agencies. In the area of employment law, the sphere of church autonomy is diminishing. Generally, courts will take jurisdiction where doctrine is not at stake. The realm of protection from judicial scrutiny is only what is required by faith and the discipline of faith (Bassett, 1997).

As civil courts debate the involvement of government in Catholic school employment questions, Catholic schools themselves should balance Church teachings on labor-management relations as stated in "The Canonical Standards in Labor-Management Relations" (1987) with the employment of school personnel.

The Catholic Church has a long tradition of seeking justice for workers. In 1891, Pope Leo XIII wrote *Rerum Novarum,* in which he provided guidelines for equity in bargaining and exchange. In the 1931 encyclical *Quadragesimo Anno,* Pope Pius XI supported Pope Leo's defense of worker rights. Pope John XXIII in 1961 wrote *Mater et Magistra,* supporting workers' rights to full participation in industry decision-making. In other Church documents, including the Vatican Council II document *Gaudium et Spes* (1966b) and Pope Paul VI's encyclicals *Populorum Progressio* (1967) and *Octagesima Adveniens* (1971), human rights and the dignity of human persons are systematically defined for all levels of society. Pope John Paul II's 1979 encyclical *Redemptor Hominis* urges all people to work for justice in labor practices. The Second Vatican Council directly affirmed the basic equality of all persons since all are created in God's likeness; it concluded that every type of discrimination, whether social or cultural, whether based on sex, race, color, social condition, language, or religion, must be overcome and eradicated as contrary to God's intent.

When Catholic school personnel issues arise, they do not neatly categorize themselves as clearly legal or illegal, right or wrong. When issues are juxtaposed against government statutes, regulations, public policies, and our own Catholic mission, Catholic schools can be lacking a clear avenue to travel. Implementation is a more complex process, one which demands the exercise of prudence and a sense of the Church's role of proclaiming and modeling the Kingdom of God in this world.

DISMISSAL AND NONRENEWAL OF CONTRACTS

Most cases involving Catholic school personnel, specifically elementary and secondary teachers, deal with teacher dismissals or the nonrenewal of employment contracts (Shaughnessy, 1991). Employment contracts are generally enforced on their terms. If there is a breach, it is remedied by standard compensatory damages. Although Constitutional protections such as due process are afforded public school teachers but not granted to Catholic school teachers, both sets of teachers are protected by contract law.

Wrongful termination occurs without just cause before completion of the task or before the contracted service period has been completed. Wrongful discharge is generally a breach of contract, while an illegal discharge is a violation of the law based upon discriminatory motive or for an illegal purpose, such as retaliation for filing an unfair labor practice complaint. Note that wrongful termination occurs during the running of an employment contract. It is clearly distinguishable from a failure to renew a contract, the renewal of which may or may not be subject to contract law.

When the school discharges an employee, the employee may bring suit. A court will analyze the terms of the employment contract and consider the nature of the work or activity for the employment. If the activity is "religious" and termination was based on religious motives, such as expressed belief or conduct inconsistent with the church's own faith or ethical norms, in most cases the decision of the church school has been upheld. Relevant cases are *Christine Madsen v. Robert Erwin* (1985), which involved a lesbian writer for the *Christian Science Monitor,* and *O'Connor Hospital v. Superior Court* (1987), which involved a priest who was a chaplain at a Catholic hospital.

The First Amendment deference rules ordinarily disallow courts from scrutinizing a church's religious judgments in breach of contract actions involving ministers and persons employed for religious roles in the church. In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos* (1987), Justice Brennan wrote in the Supreme Court concurring opinion that the courts should not second-guess the church's qualifying judgment by attempting to decide, against the church's judgment, what is and what is not a "religious" or "similar" activity.

Closely allied to the ministerial exemption is employment of a teacher within an elementary or secondary school associated with a church. Here the position may be determined not only on the basis of adherence to the religion of the sponsoring church but also conduct consistent with its teachings. Because the faculty and staff in church-related schools serve a pervasively religious pedagogical and exemplary role, their job description is always at least partially doctrinal, and their service in the schools is central to the ministry of the church (Bassett, 1997).

In *Lemon v. Kurtzman* (1971), the Supreme Court reiterated the religious nature of parochial primary and secondary schools: "religious authority necessarily pervades the school system" (p. 602). Religious schools are a vital part of the mission and ministry of the churches that operate them. The schools are not only academic; they provide what the public schools cannot, namely, instruction in academic and scientific knowledge and skills along with the teaching of religious doctrine and discipline in an atmosphere of religious values. As such, appointment to any and all staff positions in religious primary and secondary schools bears closely upon the intimate relationship between a church and its ministerial or religious mission. The courts should not second-guess the essentially religious decisions made upon the qualifications of any teacher or staff member of a parochial school.

Case law, on constitutional grounds, runs toward a generally hands-off stance where religious preferences are exercised even in institutions that are semi-independent and for curricular and staff positions not directly aimed toward the propagation of a particular religion. In *Little v. Wuerl* (1990), the Third Circuit upheld a Catholic school's decision not to retain a teacher who had remarried contrary to the canon law of the Catholic Church. The court believed the decision for nonrenewal of her contract was based upon internal Church discipline within the context of a religious school, and thus, was privileged.

A Montana case similar to *Little* (1990) was *Miller v. Catholic Diocese of Great Falls* (1986), in which the court dismissed a wrongful discharge suit of a parochial school teacher on First Amendment grounds. The court would not entertain a wrongful discharge suit brought by a former lay teacher in a parochial school, discharged, according to the diocese, for inadequate disciplining of her students. The court viewed the teacher's disciplinary methods as important to the religious purpose of the school.

In *Larsen v. Kirkham* (1980/1983), a Mormon business school determined that a Mormon teacher was not sufficiently involved in ecclesiastical activities and discharged her. The District Court held that her religious discrimination claim was barred by Section 703(e), the religious exemption clause in Title VII, and that this exemption did not violate the Establishment Clause. The Mormon Church was permitted to discriminate on religious grounds among its own members without violating Title VII.

In *Gabriel v. Immanuel Evangelical Lutheran Church, Inc.* (1994), an Illinois court of appeals refused to distinguish a contract obligation of a rescinded offer for a parochial kindergarten teaching position from the underlying ecclesiastical decision made by the Church on the qualifications of a parochial school teacher and dismissed the suit.

When the Archdiocese of Newark decided to replace a parochial school principal, the First Amendment protections of the Church won over a breach of contract complaint in *Sabatino v. St. Aloysius Parish* (1996). In this case

the archdiocese had decided to reorganize its parochial school system and close two schools. The plaintiff had been principal of one of the schools that were closed. The court of appeals held that a principal performs a ministerial religious role in a school. The Church's choice of a nun instead of a laywoman to promote its religious mission was protected by the First Amendment.

A case involving a lawsuit by a Protestant teacher against the Catholic Diocese of Kalamazoo, *Porth v. Roman Catholic Diocese of Kalamazoo* (1995), was filed when her teaching contract was not renewed. The trial court issued a judgment for the diocese, confirming that the decision not to renew Porth's contract was based on her religious faith because the diocese had decided that year to hire a Catholic-only faculty. The court held that if the school were forced to hire non-Catholic teachers, the burden would constitute an unacceptable interference with religion in violation of the Establishment Clause.

Catholic schools must recognize that courts can and do decide that religious employment contracts are for an activity entirely secular in nature, thereby subjecting the churches to liability for illegal terminations based on religious discrimination. Despite *Serbian E. Orthodox Diocese v. Milivojevich* (1976), in which the Supreme Court articulated the notion that religious ministerial hirings are thought to be "religious in nature," some courts have held in the contrary, indicating that the First Amendment's protection in religious employment matters is not absolute.

In *Reardon v. LeMoyne* (1982), an often-cited New Hampshire case involving four women religious in conflict with the diocesan office, an appeals court found that the doctrine of separation of church and state did not preclude jurisdiction in nondoctrinal contract matters. The court wrote:

> Religious entities, however, are not totally immune from responsibility under civil law. In religious controversies involving property or contractual rights outside the doctrinal realm, a court may accept jurisdiction and render a decision without violating the first amendment.... It is clear from the foregoing discussion that civil courts are permitted to consider the validity of non-doctrinal contractual claims which are raised by parties to contracts with religious entities. This requires the courts to evaluate the pertinent contractual provisions and intrinsic evidence to determine whether any violations of the contract have occurred, and to order appropriate remedies, if necessary. (pp. 431-432)

In *Reardon* (1982), the employment contracts specified terms of employment including compensation, employee duties and responsibilities, rules regulating dismissal and rights of appeal, and rules for contract modification. The sisters alleged breach of contract due to their contractual right to a hearing prior to dismissal or termination. The school argued that nonrenewal did

not require the hearing procedure.

On appeal, the diocesan authorities urged the New Hampshire Supreme Court to apply the deference rule and deny jurisdiction. Instead, the state Supreme Court adopted the neutral principles approach and ordered the trial court to extend jurisdiction over all parties. The court concluded that it would be "unfair and illogical" to deny the sisters access to the civil courts on non-doctrinal matters when they voluntarily entered into civil contracts.

The court authorized the trial court to construe the language of the contract on the meaning of dismissal and nonrenewal according to the ordinary principles of contract law, including "extrinsic evidence of dismissal practices at the Sacred Heart School and elsewhere within the diocese" (*Reardon*, 1982, p. 433). It empowered the trial court to rule on the sufficiency of "any secular reasons for nonrenewal or dismissal" but warned that contractual grounds involving doctrinal judgments were "beyond the judicial sphere of authority." The court concluded:

> While we recognize the difficulty of the trial court's task, we believe that this task can be facilitated by keeping in mind the distinction between non-doctrinal matters, wherein jurisdiction lies, and matters involving doctrine, faith, or internal organization which are insulated from judicial inquiry. (*Reardon*, 1982, p. 433)

The *Reardon* (1982) court chose to apply neutral principles of contract law to resolve the case, although, consistent with the Supreme Court's strictures, it warned against extensive inquiry into internal church affairs. In *Tollefson v. Roman Catholic Bishop* (1990), a California Court of Appeals completely avoided the religious deference rule to construe a written, terminal contract on its own terms, affirming summary judgment against the plaintiffs who filed an action for wrongful termination from a Catholic high school. The court did not note the religious affiliation of the school or the specifically religious nature of the assistant principal's role in it.

In *Hajny v. Church of Saints Peter and Paul* (1994), two teachers sued the church for wrongful termination and defamation of character. The teachers had served the church's school on one-year contracts since the 1970s. When asked the reasons for their termination, the pastor indicated poor attitudes and insubordination. Subsequently, the pastor offered similar explanations to parishioners who inquired about the discharge. The Minnesota Court of Appeals dismissed the wrongful termination charge on a finding that the parish had followed Archdiocesan policies, so no breach of contract occurred. The court allowed the defamation action to go forward, however, finding the pastor was not privileged to make the defamatory statements. The point here is the court decided strictly on contract grounds, using the contract itself and incorporating the terms of the express church policies.

It appears that in today's civil courts a judge will decide the terms of a written church-school employment contract on grounds of "neutral principles."

In *Elmora Hebrew Center, Inc. v. Fishman* (1987), the New Jersey Superior Court stated:

> Courts do not necessarily refrain from jurisdiction in every case where a church or synagogue and its ministers, rabbis or congregation may be involved in a dispute, because not every application to the court involves protected First Amendment rights or values. (p. 417)

The court cited Supreme Court case *Presbyterian Church v. Mary Elizabeth Blue Hall Memorial Presbyterian Church* (1969), and went on to state that while it shouldn't interfere in matters of faith, dogma, and polity, it could resolve civil disputes provided a justifiable controversy is present. *Elmora* (1987) was a case in which a board of trustees of a temple sought to discharge its rabbi. Of great significance is the New Jersey statement of a methodology for the trial courts to handle conflicts of this nature:

> It is imperative, in order to avoid unconstitutional entanglements of civil and religious issues and to preserve the right to civil adjudication of secular disputes, for a trial court to specify which issues are religious and therefore to be settled by religious authority and which issues are civil and to be resolved by the court. For example, only a religious authority may be able to decide the scope of duties of an "orthodox Rabbi"; but a civil court can certainly determine the term of a contract or non-religious conditions of employment. Thus, when faced with cases such as this, trial courts initially should entertain full briefing and argument by the parties as to what issues are "religious" and what are "civil"; and as to what is the proper authority to decide "religious" questions. By providing complete and clear rulings on such questions before referral to any religious tribunal, a trial court will provide the parties and appellate courts with a clear record for informed review of any possible first amendment issues. (*Elmora*, 1987, p. 419)

In *Welter v. Seton Hall University* (1992), two Catholic nuns were dismissed by Seton Hall University where they were professors and administrators. They sued for various torts and for wrongful termination. The trial judge dismissed Seton Hall's motion for summary judgment grounded in the First Amendment. The judge found that there was no action against Seton Hall by the Roman Catholic Church or its tribunals, but rather, it was an action by an educational institution to remove its teachers, and the issue did not constitute a religious question, despite the University contention that the terminations were religiously motivated. Seton Hall admitted it had failed to abide by the employment contract's provision governing termination. The New Jersey

Supreme Court reversed the Appellate Division who reversed the trial court, and held the plaintiffs performed non-ministerial functions as mathematics teachers and thus there was no incorporation of Roman Catholic doctrine even though the plaintiffs were nuns and employed by a college run by the Newark Archdiocese.

After *Welter* (1992), the New Jersey Supreme Court in *Alicia v. New Brunswick Theological Seminary* (1992) did find a clear ministerial function in a theology professor's teaching assignment in a seminary, so deferred to the Church's decision to terminate employment.

One can see that civil courts will scrutinize Catholic school employment contracts to ensure that the provisions of the contract have been followed. While a Catholic school employment contract may be far less involved than a public school contract, it is nonetheless an employment contract reviewed by civil courts of law.

In turn, Catholic educators must be familiar with all federal employment laws and regulations and respective state laws governing the workplace. These laws can guide in developing diocesan and school policies.

EMPLOYMENT DISCRIMINATION

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 and the Civil Rights Act of 1991, prohibits employment discrimination on account of race, color, religion, gender, and national origin.

Antidiscrimination law involves shared federal and state jurisdiction. Overlapping statutes create overlapping jurisdictions. However, in Title VII, Section 706, the federal law provides that the federal EEOC defer to a state antidiscrimination agency if the state agency wants to take jurisdiction. The objectives of most state and municipal antidiscrimination statutes are the same as Title VII.

Religious institutions such as churches, conventions, and associations of churches are exempt from Title VII Sections 702 and 703 for religious preferences. Catholic schools can discriminate on the basis of religion, and Catholic teachers can be given preference in hiring. However, Catholic schools cannot discriminate on the basis of race, color, gender, national origin, age, or disability. There are no exemptions from discrimination for these classifications. Federal antidiscrimination legislation can affect Catholic schools because the government has a compelling interest in the equal treatment of all citizens.

RACIAL DISCRIMINATION

The limited exemption of churches and religious organizations found in Section 702 is not available against a charge of racial discrimination. As a result, a number of cases alleging racial discrimination have been brought against religious schools, not only under the Civil Rights Act of 1964, but also under the Civil Rights Act of 1866.

The Supreme Court has described as "compelling" the government's interest in the elimination of racial discrimination in education. In *Bob Jones University v. United States* (1983), the Supreme Court upheld a decision by the Internal Revenue Service to deny tax-exempt status to a private, nonprofit school engaged in racially discriminatory practices in relation to its student body. It stated:

> The government interest at stake here is compelling. As discussed, the Government has a fundamental, overriding interest in eradicating racial discrimination in education...that governmental interest substantially outweighs whatever burden denial of tax benefits places on the school's exercise of its religious beliefs. (*Bob Jones*, 1983, p. 604)

So diametrically opposed to public policy are racially discriminatory practices, Catholic schools can lose tax-exempt status under Section 501 (c)(3), as well as the incentives provided by Section 170 of the Internal Revenue Code in allowing deductibility of gifts.

In addition to public policy, there is a long tradition of abhorrence and condemnation of racism in any internal relationships within the Church. Pope Paul VI, for example, in *Octagesima Adveniens* (1971) deplored all discrimination on account of race, origin, color, culture, sex, or religion and urged that all should be equal before the law. The U.S. Bishops reiterated the condemnation of racial discrimination in all respects in the pastoral letters of 1979 entitled *Brothers and Sisters to Us* (National Conference of Catholic Bishops) and of 1986 entitled *Economic Justice for All: Catholic Social Teaching and the U.S. Economy* (United States Catholic Conference).

AGE DISCRIMINATION

Age discrimination laws prohibit discrimination against all workers aged 40 years and older in any phase of employment. The Age Discrimination in Employment Act of 1967 (ADEA) was added to the Fair Labor Standards Act of 1967 and is patterned after Title VII. When the ADEA was enacted in 1967, only workers between the ages of 40 and 65 were protected. In 1978, the upper age limit was extended to 70. Effective January 1, 1987, the maximum age limit was removed altogether. The statute renders unlawful refusal to hire, discharge, or other discriminatory acts against any individual with

respect to compensation, terms, conditions, or privileges of employment because of age. The underlying restrictive practices were stereotypical perceptions that older workers were unsuitable for employment.

Because the statute and its legislative history are silent about whether religious organizations are within the definition of "employer," there is no consensus in the federal courts as to the applicability of the Age Discrimination Act to religious organizations.

In *Cochran v. Saint Louis Preparatory Seminary* (1989), the court held the ADEA does not apply to a church-operated school because the application of ADEA to the seminary would give rise to "serious constitutional questions" such as a state's entanglement with the religious mission of such institutions. The court expressed concern that the claim will implicate the involvement of the EEOC in its investigatory and enforcement capacity. It would call into question the employer's rationale as to whether the employment decision was pretextual or made in good faith.

In *Lakaszewski v. Nazareth Hospital* (1991), the court rejected the defendant's request for an exemption from ADEA. In *Soriano v. Xavier University Corporation* (1988), the court held that enforcement of the age discrimination law does not entangle nor endanger the religion clauses of the First Amendment, especially in light of the relatively narrow focus of the ADEA.

More recently, the court in *De Marco v. Holy Cross High School* (1992) stated that not only is the Act silent in reference to religious organizations, in this case a Catholic high school, problems of enforcement, particularly where discharge may have mixed religious and secular motives, bring the government too closely into the internal decision making of the Church itself. In *Powell v. Stafford* (1994), a teacher of theology in a Catholic high school sued to renew his employment alleging violation of the ADEA. The U.S. District Court dismissed on First Amendment grounds. Here the court concluded that the teacher was a ministerial employee because he taught theology in a religious high school.

Yet other courts have found no First Amendment violations. In *Gallo v. Salesian Society, Inc.* (1996), an age discrimination suit against a parochial high school was held as not violating the Free Exercise or Establishment Clause protections of the school. The case involved an English teacher. Since there was no evidence offered of the religious content of the course in English, the court denied that her position was ministerial. Thus, no inquiry into faith, morals, or religious polity was required to resolve the issue of sex and age discrimination. In *Sacred Heart School Board v. Labor & Industry Review Committee* (1990), a lay teacher brought an age discrimination claim after discharge from a Catholic parochial school. The state agency claimed the religious reasons were pretextual. The court agreed and held that the agency investigation could go forward. See also *Geary v. Visitation of the Blessed Virgin Mary Parish School* (1993).

DISABILITY DISCRIMINATION

The Americans with Disabilities Act (ADA) of 1990 is the most significant disability legislation passed in American history. It prohibits disability-based discrimination in application procedures, hiring, advancement or discharge of employees, employee compensation, job training, or other terms, conditions, and privileges of employment. The ADA is intended to eliminate employment decisions based upon subjective perceptions, irrational fears, patronizing attitudes, or stereotypes. It is far more comprehensive than a "hire the handicapped" law (Bassett, 1997). In effect, the ADA gives to the disabled equal opportunity protections similar to those provided by the Civil Rights Acts prohibitions against discrimination based on race, sex, and religion. Note that the ADA does not require preferential treatment or require employers to recruit persons with disabilities. The Act specifically envisions case-by-case judicial review of general standards by the use of objective criteria.

For churches and religious organizations as employers, the ADA presents serious compliance challenges and possible legal claims for discrimination. The Catholic school is then prohibited as an employer from discriminating against "a qualified individual with a disability" because of that disability. A school may be guilty of discrimination not only if it intentionally discriminates against the disabled, but also if it refuses to make a reasonable accommodation for an otherwise qualified individual.

The Supreme Court decided three cases on June 22, 1999, that clarify, at least in part, what is required to state a disability claim under the ADA: *Sutton v. United Air Lines, Inc.* (1999), *Murphy v. United Parcel Services, Inc.* (1999), and *Albertsons Inc., v. Kirkingburg* (1999).

These cases focused on what plaintiffs must show in order to be considered "disabled" under the Act, or to show that an employer "regarded" them as disabled. They do not refer directly to any other aspects under the ADA, such as the notion of reasonable accommodation.

The ADA defines a disability as follows: 1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual (examples of life activities include caring for oneself, walking, seeing, talking, learning, performing manual tasks, and working); 2) a record of such an impairment; or 3) being regarded as having such an impairment (Sec. 12102 (2)).

While the EEOC provides guidance in its *Technical Assistance Manual* (1991), Catholic educators should be aware that case law is gradually developing clearer standards for application of the ADA to accompany EEOC guidelines. Catholic educators should nevertheless recognize certain statutory defenses to legal challenges alleging disability-based discrimination: undue hardship of accommodation, direct threat to safety or health of others, and religious entity preference.

In *Kent v. Roman Catholic Church of the Archdiocese of New Orleans d/b/a St. Ann School* (1997), the federal district court granted summary judgment to the school on an ADA claim involving a parochial school teacher. The teacher asked to be reinstated to her teaching position upon her return from a leave of absence qualifying for disability benefits, but was informed that there was no longer a position available, as the slot had been given to the teacher who had replaced her during her absences. Her allegations of discrimination under the ADA, though disputed by the school, were sufficient to proceed to trial. Under the ADA, the plaintiff had to show: 1) that she suffered from a disability, 2) that she was otherwise qualified for her job, 3) that she was subject to an adverse employment action, and 4) that she was replaced by a nondisabled person or treated less favorably than nondisabled employees. The school offered nondiscriminatory reasons (unexcused absences, poor teaching record, and the superior performance of her replacement) to rebut the prima facie case, so the burden shifted to the teacher under the ADA to prove that these reasons were merely a pretext for discrimination. She was not able to offer material evidence to substantiate the pretext, so the court upheld the grant of summary judgment to St. Ann's School and its principal.

In *Gosche v. Calvert High* (1998), Gosche, a Catholic school music teacher on leave for depression, had filed suit alleging discrimination against her on the basis of sex and disability for the nonrenewal of her contract. The school had determined she had violated her contract to "reflect the values of the Catholic Church...by word and example" (p. 871) when it was discovered she was sexually involved with a married man, the father of three children in the Catholic school. The court held that a religious school could make adherence to the moral standards of the Church a requirement of continued employment and so granted summary judgment for the Catholic high school. In doing so, it avoided any prima facie analysis of the alleged ADA violation. In other words, since the teacher was in breach of contract, any promise of continued employment was extinguished and any pending ADA claims failed.

SEX OR GENDER DISCRIMINATION

Title VII prohibits sex discrimination in employment. It does permit a school to consider an applicant's gender where sex is a bona fide occupational qualification (BFOQ) reasonably related to the performance of the job. In practice, there is only a small range of jobs in which the BFOQ will be permitted, as courts have imposed a very stringent evidentiary burden on organizations seeking to impose gender restrictions. Catholic schools, for example, can specify sex as a condition of employment only if the school has a tradition of being single sex and only teachers of that sex have been hired (Shaughnessy, 1991).

One interesting case regarding sex discrimination in a Catholic school is *Dolter v. Wahlert High School* (1980), in which the district court rejected a claim for a religious organization exemption under the separation of church and state during a challenge involving wrongful termination based on sexual discrimination. Here Dolter, an unmarried pregnant Catholic English teacher, was discharged from a Catholic high school for engaging in premarital sex. The court determined sex discrimination because the principal who rescinded the teacher's contract had knowledge that male faculty members had engaged in premarital sex but had not disciplined them. The court acknowledged that Dolter's terminated contract would have been upheld if the school's position on premarital sex had been fairly applied.

PROTECTIONS FROM SEXUAL HARASSMENT

Sexual harassment is a violation of Section 703 of Title VII of the Civil Rights Act. While not expressly mentioned in Title VII, it is implied in the prohibition against sexual discrimination in working conditions. Courts were initially reluctant to declare sexual harassment illegal for fear of a flood of litigation. Since the mid-1970s both federal decisional law and the guidelines of the EEOC proscribe such conduct. Note, sexual harassment claims under Title VII have been applied to homosexual as well as heterosexual contexts. See *Joyner v. AAA Cooper Transportation* (1983) and *Mogilefsky v. Superior Court* (1993).

The Supreme Court in *Meritor Savings Bank v. Vinson* (1986) recognized two types of sexual harassment which are actionable under Title VII: 1) conditioning employment benefits on sexual favors, and 2) creating a hostile or offensive working environment. The essentials of the tort constituting violation of Section 703 are "unwelcome sexual conduct" and "condition of employment." Employer liability occurs when the employer knew or should have known of the sexual harassment and failed to take immediate and appropriate corrective action to stop it. The EEOC provides *Guidelines on Discrimination Because of Sex* (1980). A Catholic school has an affirmative duty to eradicate hostile and offensive work environments. It should investigate complaints immediately and thoroughly and take appropriate corrective actions to stop the harassment.

There are no exemptions for churches and religious organizations for sexual harassment. There have been a number of lawsuits against churches and religious organizations for employer liability in sexual harassment situations. In *Nigrelli v. Catholic Bishop of Chicago* (1995), a laywoman sued the Archdiocese of Chicago, alleging that the pastor did not renew her contract as principal of a parish school because she failed to acquiesce to the sexual advances of the pastor. The Illinois court of appeals permitted the case to go forward on the grounds that the allegation involved a question of fact and credibility, not directly one of religious practice.

In *Harris v. Forklift Systems, Inc.* (1993), the Supreme Court reaffirmed the principle that for sexual harassment to be unlawful it must create an environment that a "reasonable person" would find abusive. This standard prevents hypersensitive employees from barraging schools and courts with complaints.

RIGHT TO ORGANIZE

Under the Taft-Hartley Act and its amendments, including the National Labor Relations Act, employees are guaranteed the right to organize and to bargain collectively with their employers. To implement the Act, Congress created the National Labor Relations Board (NLRB), with general authority to supervise the collective bargaining process. The jurisdiction of the NLRB is limited to employees and enterprises involved in commerce. Though there was no direct exemption of churches in the Act, the NLRB had not assumed jurisdiction over employees of churches under what is called the "worthy cause" exemption (Laycock, 1981).

In the mid-1960s a nationwide initiative by the National Association of Teachers and state teachers unions turned to organizing teachers in private elementary and secondary schools. Church authorities in Chicago and Fort Wayne, Indiana, strenuously resisted formation of bargaining units in Catholic schools. The NLRB asserted jurisdiction over the religiously sponsored schools because the religious organization was not completely religious but rather religiously associated. When Church leaders refused to recognize the authority of local bargaining units, the Board filed unfair labor practices suits in federal courts. These cases were consolidated in 1979 as *National Labor Relations Board v. The Catholic Bishop of Chicago*, and went before the Supreme Court on the issue of the Board's jurisdiction over employees of parochial schools. In a 5-4 decision, the Supreme Court held that assertion of jurisdiction by the NLRB was impermissible, both because it was not intended by Congress and because such intimate involvement of the Board with church-related schools would be fraught with problems under the Free Exercise clause of the First Amendment. The Court rejected the Board's claim that it could exercise jurisdiction in religious schools without entanglement in ecclesiastical affairs. Citing *Lemon* (1971), the Court noted the important role played by teachers in shaping education in a church-operated school.

The decision of the Supreme Court has been widely analyzed and criticized. The principal point of concern is that the decision falls basically upon the lack of clear intent of Congress, and more importantly, a real concern for the churches' own role in fighting the teachers' unions while at the same time professing to support the right to association of the faithful and the values of unions in general. Since the decision, a number of religious organizations

have been in federal courts to contest the jurisdiction of the NLRB over their employees. Interestingly, in *National Labor Relations Board v. Hanna Boys Center* (1992), a federal court held a bargaining unit of parochial school cooks, cook's helpers, recreational assistants, maintenance workers, and child care workers was found to be within the NLRB's jurisdiction because there was no evidence that the employees were the functional equivalent of teachers. But again, following *NLRB v. Catholic Bishop of Chicago* reasoning, both *National Labor Relations Board v. Bishop Ford Central Catholic High School* (1980/1981) and *Christ the King Regional High School v. Culvert* (1987) resulted in the court denying NLRB jurisdiction.

At the state level, in *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School* (1997), the court held that teachers have a state constitutional right to unionize and required the Catholic Diocese of Camden to bargain collectively with lay elementary school teachers. The court acknowledged that the state had proven a compelling state interest in facilitating good faith collective bargaining, even where there was a substantial burden placed on the free exercise of religion by the pastors of the Diocese.

And in *In re New York State Employment Relations Board v. Christ the King Regional High School* (1995), the Court of Appeals found that the Board's order against the Catholic high school to bargain in good faith with the Lay Faculty Association and to reinstate certain teachers was religiously neutral and had as its goal the improvement of good faith collective bargaining. Since the state law was not to burden religious beliefs or activities, the Court found a minimal burden on free exercise by the State Board's intrusion into the labor practices of a religious school. Also, citing *Christ the King Regional High School v. Culvert* (1987), the Court found that the authority of the Board over religious schools granted by the state legislature did not involve the degree of surveillance necessary to find excessive entanglement under the Establishment Clause. The Court found the Board had no authority to force the parties to agree to specific terms, only to require that they negotiate in good faith.

Where a parochial school appealed an order compelling it to bargain collectively with a union representing certain of its employees, a New York appellate division court held, in *New York Employment Relations Board v. Christian Brothers Academy* (1998), that because the order directed the school to negotiate only on secular issues of rate, wage, and hours of employment, the school's free exercise rights were not burdened, and no excessive entanglement between church and state would result.

This development of case law is consistent with the provisions of Canon law and church policy. In a 1978 statement of the Sacred Congregation for Religious and Secular Institutes entitled *Religious Life and Human Promotion*, it states:

> In principle there does not seem to be any intrinsic incompatibility between religious life and social involvement even at the trade-union level. At times, according to different laws, involvement in trade union activity might be a necessary part of participation in the world of labor; on the other hand, such involvement might be prompted by solidarity in the legitimate defense of human rights. (p. 15)

Their principle is codified in the new *Code of Canon Law* (Canon Law Society, 1983) which recognizes the religious employee's right of association and rights to just compensation, participation, and social welfare.

When a labor-management dispute arises between Catholic schools and its teachers or employees, by virtue of Catholic traditions of justice, Catholic school personnel must be afforded a deeper spiritual commitment in recognizing a basic right of association and autonomy in establishing and directing organizations for their personal benefit. The Second Vatican Council in the *Constitution on the Church in the Modern World* (1966a) wrote:

> Among the basic rights of the human person is to be numbered...the right of freely founding unions for working people. These should be able truly to represent themselves and to contribute to organizing economic life in the right way. Included is the right of freely taking part in the activity of these unions without risk of reprisal. (#68)

A FINAL THOUGHT

Historically, employment policies have been characterized by tension between two often conflicting principles: free markets and freedom of action on the one hand, and considerations of social justice and individual fairness on the other. A standard value underlying our labor market today is fairness through meritocracy: a person should be able to progress as far economically as his or her merit permits. Discrimination in the labor market on the basis of race, gender, religion, age, or disability prevents individuals from advancing economically on the basis of their skills and ability.

While the above analysis of personnel and employment law is intended to clarify existing statutes and case law affecting today's Catholic elementary and secondary schools, it must always be remembered that law and public policy are not static; they are subject to constant change and evolution. Similarly, reasonable people differ regarding the point at which a balance should be struck between the interests of workers and the legitimate concerns of employers.

It is reassuring that most Catholic schools are aware of personnel issues involving discrimination and harassment, and protecting faculty and staff and guaranteeing school policy is applied equally to all. It is not common to see

a Catholic school administrator abandon his or her sense of fairness and justice in the workplace.

But on the other hand, not all dismissal cases are as apparent as in *McGarry v. St. Anthony of Padua Roman Catholic Church* (1998), in which the court found that commission of a criminal act (ordering and receiving drugs on church property) justified dismissal of the employee. Given the unpredictable results in today's civil courts, one should consider having in place a policy that permits final and binding arbitration when personnel disputes arise. Just as commercial arbitration arose as a less expensive alternative to litigation, so employment arbitration can serve the Catholic school and its mission well.

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