

THE THIRD CIRCUIT ADOPTS A BROAD READING OF THE 'MINISTERIAL EXCEPTION'

By M. Trevor Lyons

On Sept. 6, 2006, the Third Circuit on rehearing found that a former chaplain's Title VII lawsuit asserting sexual discrimination and retaliation against Gannon University would interfere with the Catholic diocesan college's right to determine who would perform its spiritual functions, and therefore the suit was barred by application of the ministerial exception. Generally, the ministerial exception exempts religious institutions from the coverage of federal anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964. Specifically, courts have by and large been unwilling to apply federal anti-discrimination laws to the relationship between ministerial personnel and their church because doing so would potentially violate the establishment and free exercise clauses of the First Amendment.

In this case, on May 23, 2006, a divided panel had previously held that Lynnette Petruska, a former chaplain alleging sex discrimination, could proceed with her Title VII claim against Gannon University. Specifically, the late Senior Circuit Judge Edward R. Becker, writing for the majority, had stated:

While several of our sister circuits have opined that the employer's reasons are irrelevant to the ministerial exception,...we conclude that these reasons make all the difference. The Constitution protects religious exercise, and we decline to turn the Free Exercise Clause into a license for the free exercise of discrimination unmoored from religious principle. We therefore conclude that under the Free Exercise Clause the ministerial exception will not bar Title VII claims by ministerial employees when an employment decision is not motivated by religious belief, religious doctrine, or church regulation. This version of the ministerial exception also comports with the Establishment Clause because courts will not be forced to consider religious questions, a process that would entangle the government in religious affairs.¹

The majority opinion, however, was strongly criticized by Judge D. Brooks Smith, who noted that by focusing on the reasons for alleged discrimination, the majority had effectively refused to recognize any ministerial exception, and had placed the Third Circuit at odds with every other federal court of appeals to

consider the issue. Judge Smith further noted that because an institution cannot speak for itself, a religious institutions' decision regarding who will communicate its message is by its very nature a religious decision.

Judge Becker, however, died on May 19, 2006, after the case had been distributed to the full court but before the opinions were filed. Gannon subsequently petitioned for rehearing *en banc* or, in the alternative, for rehearing before a reconstituted panel. Because of the unique chain of events surrounding Judge Becker's passing, the court granted Gannon's request for rehearing by a reconstituted panel. On rehearing, the Third Circuit reversed itself. Judge Smith, the author of the prior dissenting opinion, wrote for the majority, stating: "Today, we join seven of sister circuits in adopting the exception and hold that it applies to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions."²

Petruska's Allegations of Sexual Harassment

Petruska was initially hired by Gannon University in 1997, as a director of social concerns. She was subsequently appointed Gannon's first female chaplain in 1999. Prior to accepting the chaplain position, however, Petruska's complaint asserts that she sought assurances from Gannon's president, David Rubino, that she would not be replaced when the Reverend Nicholas Rouch, Gannon's former chaplain, returned from study in Rome. Petruska asserts that she requested these assurances because of: 1) her perception of a policy or practice of gender discrimination at Gannon; 2) her knowledge that the position of chaplain had been promised to Rouch upon his return; and 3) her perception that Bishop Donald Trautman, chair of Gannon University's Board of Directors, had a reputation for not being able to work with women, and for removing women from leadership positions.

Rubino alleged assured Petruska that any decisions regarding her tenure as chaplain would be based solely upon her performance, and not her gender.

Several months after Petruska's appointment as chaplain, however, Rubino was forced to take a leave of absence when he admitted to having a sexual affair with a female subordinate, and thereafter another female employee accused him of sexual harassment. Petruska was instrumental in bringing the allegations of harassment to the attention of Bishop Trautman and Gannon's provost,

Thomas Ostrowski. Rubino was eventually forced to resign, and Ostrowski was appointed acting president. Petruska alleges that Ostrowski then began a campaign to conceal Rubino's misconduct.

In addition, Petruska also served on the university's sexual harassment committee during the time that the university was in the process of revising its sexual harassment policy. Although Gannon's legal counsel advocated limiting the time within which grievances could be filed, Petruska opposed this proposal and ultimately prevailed in having the university adopt her view. Likewise, Petruska also was involved in preparing a report that criticized Gannon's discrimination and harassment policies. Despite a request from Gannon's president, the committee that prepared the report refused to modify portions critical of the university. Petruska also challenged the propriety of a decision of the university to allow a former priest accused of sexual misconduct with a student to return to Gannon's campus.

Petruska's Allegations of Retaliation

In July 2000, Rouch, the former chaplain returned from Rome. According to Petruska, Bishop Trautman then told Ostrowski, still serving as Gannon's acting president, to place the chaplain's division under Rouch, thus making Petruska Rouch's subordinate. Ostrowski refused.

Ostrowski, however, did approach Petruska about the plan and asked her how she would respond if the chaplain division were placed under Rouch. According to Petruska, Ostrowski conceded that this proposed action was being taken solely because of her gender. Petruska further asserts that Ostrowski later made it clear that Bishop Trautman and Rouch would never allow her to remain chaplain at Gannon because she was a woman.

Shortly thereafter, Ostrowski was allegedly told that once a new president was appointed Trautman intended to "clean house" by removing three high-ranking female university officials. Shortly thereafter, Antoine Garibaldi was appointed Gannon's president. Upon becoming president, Garibaldi required that Petruska obtain Rouch's approval for all of the important decision previously made by the chaplain.

In Aug. 2002, Garibaldi notified Petruska that he had decided to restructure the university, that she would be removed from the president's staff, and that the chaplain division would report

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to Rouch. The effect of this decision was to make Rouch Petruska's boss.

Convinced that she was on the verge of being fired, Petruska tendered her resignation in Oct. 2002. Allegedly, Rouch subsequently repeatedly told Gannon students and staff that a woman would not be considered to replace Petruska.

Petruska filed suit in the district court for the Western District of Pennsylvania, asserting sex discrimination, retaliation and several related state law claims against Gannon, the university's board of directors, and several Gannon officials as individuals. The district court granted Gannon's motion to dismiss Petruska's complaint, concluding that the free exercise and establishment clauses of the First Amendment barred adjudication of her claims. Petruska appealed the dismissal of her complaint to the Third Circuit.

Based upon these facts, Judge Smith determined that there were two questions presented on appeal in this case. First, whether applying Title VII to Gannon's decision to restructure would infringe upon its free exercise rights. Second, whether adjudication of Petruska's Title VII claims would result in unconstitutional entanglement under the establishment clause. Initially, however, there was the threshold question of whether the Third Circuit would even recognize the ministerial exception.

The Third Circuit Adopts the Exception

Judge Smith began by observing that every other federal court of appeals to consider the issue had held that the application of Title VII to the minister-church relationship would violate, or risk violating, the First Amendment, and thus had recognized some version of the ministerial exception. He noted that while several courts had derived the ministerial exception from the doctrine of constitutional avoidance, both the plain text of Title VII and its legislative history foreclosed the possibility of imposing a limiting and constitutionally permissible construction upon the statute.

Specifically, Judge Smith noted that Congress had several times revisited the scope of Title VII's exemption for religious employers, but had refused to extend that exception so as to permit discrimination on the basis of sex under the circumstances presented in this case. Accordingly, Judge Smith explained that the Third Circuit was required to reach the constitutional issue, or whether application of Title VII to the ministerial employment relationship violates the First Amendment. Relying primarily upon precedent from other circuits, including most importantly cases recognizing the inherent difficulty of separating the message from the messenger, and that a religious institution's fate is inextricably bound with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents, Judge Smith

concluded that a federal court's resolution of a minister's Title VII claim would infringe upon First Amendment protections. Therefore, joining seven other federal court of appeals, the Third Circuit reversed its prior opinion and expressly adopted a version of the ministerial exception that preempted any claim the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions. Judge Smith then turned to the particular questions he had previously raised in the context of Petruska's specific claims.

Petruska's Title VII and Related State Law Claims are Barred by the Free Exercise Clause

Initially, Judge Smith simply reiterated the underpinning of the ministerial exception, and applied them to each of Petruska's claim. He began by stating:

...like an individual, a church in its collective capacity must be free to express religious beliefs, profess matters of faith, and communicate its religious message. Unlike an individual who can speak on her own behalf, however, the church as an institution must retain the corollary right to select its voice. A minister is not merely an employee of the church; she is the embodiment of its message. A minister serves as the church's public representative, its ambassador, and its voice to the faithful. Accordingly, the process of selecting a minister is *per se* a religious exercise. As the Fifth Circuit explained: "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." Consequently, any restriction on the church's right to choose who will carry its spiritual message necessarily infringes upon its free exercise right to profess its beliefs. This right is squarely at issue in Petruska's First Amended Complaint.³

Judge Smith further noted that certain of Petruska's claims, particularly those alleging that Gannon's decision to restructure was discriminatory, also implicated a church's right under the First Amendment to decide matters of governance and internal organization. He stated

...Gannon's decisions regarding who to install in those positions [ministerial] and the manner in which their duties would be delivered were decisions about who would perform those constitutionally protected spiritual

functions. Those choices are protected from governmental interference by the Free Exercise Clause.⁴

Finally, Judge Smith noted that Gannon's representation of itself as an "equal opportunity" employer, and its acceptance of federal and state funds, was not a waiver of its First Amendment rights. Judge Smith therefore held that all of Petruska's federal and state law claims, except her breach-of-contract and fraudulent misrepresentation actions,⁵ infringed upon Gannon's freedom to select its ministers, and as a result, were barred by the ministerial exception.

The Court Finds no Violation of the Establishment Clause

Focusing solely on Petruska's surviving breach-of-contract claim, Judge Smith found that the complaint allegations would not unconstitutionally entangle the court in religion. Specifically he relied upon *Geary v. Visitation of the Blessed Virgin Mary Parish School*,⁶ for the proposition that "when the pretext inquiry neither traverses questions of the validity of religious beliefs nor forces a court to choose between parties' competing religious visions, that inquiry does not present a significant risk of entanglement." Because it was not clear whether Petruska's breach-of-contract claim could be decided "without wading into doctrinal waters," Judge Smith refused to dismiss that remaining claim on the face of the Petruska's complaint.⁷ He did, however, indicate that dismissal on summary judgment would be appropriate if Gannon's response to Petruska's allegations raised issues potentially resulting in excessive entanglement.

Endnotes

- ^{1.} *Petruska v. Gannon University*, 2006 WL 1410038 at *7, No.05-1222 (3rd Cir., May 24, 2006).
- ^{2.} *Id.* at *1.
- ^{3.} *Id.* at *5 (internal citations omitted).
- ^{4.} *Id.* at *6.
- ^{5.} Petruska's fraudulent misrepresentation claim was dismissed for failure to plead with the particularity required by Federal Rule of Civil Procedure 9(b), but the district court was urged to afford Petruska an opportunity to file an amended complaint to cure the deficiency.
- ^{6.} 7 F.3d 324, 330 (3rd Cir. 1993).
- ^{7.} *Petruska*, 2006 WL 2548343 at *10.

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