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Where Faith Abides, Employees Have Few Rights

By DIANA B. HENRIQUES

J. Jeffrey Heck, a lawyer in Mansfield, Ohio, usually sits on management's side of the table. "The only employee cases I take are those that poke my buttons," he said. "And this one really did."

His client was a middle-aged novice training to become a nun in a Roman Catholic religious order in Toledo. She said she had been dismissed by the order after she became seriously ill — including a diagnosis of breast cancer.

In her complaint, the novice, Mary Rosati, said she had visited her doctor with her immediate supervisor and the mother superior. After the doctor explained her treatment options for breast cancer, the complaint continued, the mother superior announced: "We will have to let her go. I don't think we can take care of her."

Some months later Ms. Rosati was told that the mother superior and the order's governing council had decided to dismiss her after concluding that "she was not called to our way of life," according to the complaint. Along with her occupation and her home, she lost her health insurance, Mr. Heck said. Ms. Rosati, who still lacks health insurance but whose cancer is in remission, said she preferred not to discuss her experience because of her continuing love for the church.

In court filings, lawyers for the diocese denied her account of these events. If Ms. Rosati had worked for a business or almost any secular employer, she might have prevailed under the protections of the Americans With Disabilities Act. Instead, her complaint was dismissed in December 2002 by Judge James G. Carr of the United States District Court for the Northern District of Ohio, who decided that the order's decision to dismiss her "was an ecclesiastical decision" that was "beyond the reach of the court" because "the First Amendment requires churches to be free from government interference in matters of church governance and administration."

Legislators and regulators are not the only people in government who have drafted special rules for religious organizations. Judges, too, have carved out or preserved safe havens that shield religious employers of all faiths from most employee lawsuits, from laws protecting pensions and providing unemployment benefits, and from laws that give employees the right to form unions to negotiate with their employers.

Some of these exemptions are rooted in long traditions, while others have grown from court decisions over the last 15 years. Together, they are expanding the ability of religious organizations — especially religious schools — to manage their affairs with less interference from the government and their own employees.

The most sweeping of these judicial protections, and the one that confronted the novice nun in Toledo, is called the ministerial exception. Judges have been applying this exception, sometimes called the church autonomy doctrine, to religious employment disputes for more than 100 years.

As a rule, state and federal judges will handle any lawsuit that is filed in the right place in an appropriate, timely manner. But judges will almost never agree to hear a controversy that would require them to delve into the doctrines, governance, discipline or hiring preferences of any religious faith. Citing the protections of the First Amendment, they have ruled with great consistency that congregations cannot fully express their faith and exercise their religious freedom unless they are free to select their own spiritual leaders without any interference from government agencies or second-guessing by the courts.

To do otherwise would be an intolerable government intrusion into employment relationships that courts have called “the lifeblood” of religious life and the bedrock of religious liberty, explained Edward R. McNicholas, co-chairman of the national religious institutions practice in the Washington, D.C., office of Sidley Austin, a law firm with some of the country’s largest religious organizations among its clients.

Judges have routinely invoked the ministerial exception to dismiss lawsuits against religious employers by rabbis, ministers, cantors, nuns and priests — those “whose ministry is a core expression of religious belief for that congregation,” as Mr. McNicholas put it.

But judges also have applied the exception to dismiss cases filed by the press secretary at a Roman Catholic church, a writer for The Christian Science Monitor, administrators at religious colleges, the disgruntled beneficiaries of a Lutheran pension fund, the overseer of the kosher kitchen at a Jewish nursing home and a co-founder of Focus on the Family, run by the conservative religious leader James C. Dobson. Court files show that some of these people were surprised to learn that their work had been considered a “core expression of religious belief” by their employer.

Religious employers have long been shielded from all complaints of religious discrimination by an exemption that was built into the Civil Rights Act of 1964 and expanded in 1972. That historic exemption allows them to give preference in hiring to candidates who share their faith. In recent years, some judges have also refused to interfere when religious groups have dismissed lesbians, unwed mothers and adulterous couples, even if they profess the same faith, because they have violated their

employers' religious codes.

A federal court decision has given religious broadcasters an exemption from some of the fair-hiring requirements of the Federal Communications Commission, even when they are hiring secretaries and receptionists. Two other decisions, one in federal court affecting a Mormon church and the other in a state court of appeals case involving a Roman Catholic nursing home, affirmed the right of religious employers to dismiss employees whose faith changed after they were hired.

"These are very difficult cases because they pull at some very fundamental heartstrings," said Steven C. Sheinberg, a lawyer at Outten & Golden, specializing in employment law. "There's our belief that employees should be free of discrimination in their work, versus our belief that religious organizations should be free to hire people who best help them fulfill their religious mission, without the intrusion of government."

Employees at religious institutions face other risks as well, thanks to pension law exemptions granted by Congress and upheld by the courts. Religious employers are exempt from Erisa, the federal pension law that establishes disclosure requirements and conflict-of-interest restrictions for employee pension plans. That exemption has given rise to several cases in which workers at religious hospitals found that their pensions had vanished because of practices that would not have been allowed under Erisa's rules.

A related exemption frees religious employers from participating in the Pension Benefit Guaranty Corporation, the government-run insurance program that provides a safety net for corporate pension plans. And some significant court decisions in labor disputes in the last several years have made it easier for religious schools and colleges to resist collective bargaining efforts.

But for Mr. Heck, the question of whether these workplace exemptions are fair to religious employees was crystallized by the case of Ms. Rosati, the novice nun in Toledo.

He said the doctor involved in her case had been prepared to testify under oath on Ms. Rosati's behalf. The doctor "had quite a vivid memory about these events." In fact, Mr. Heck said, the doctor had cautioned the nuns who accompanied Ms. Rosati that it would be virtually impossible for the ailing novice to get affordable insurance anywhere else if she were dropped from the diocesan health.

Lawyers for the diocese disputed Ms. Rosati's account of that visit and denied that health reasons were the causes of her rejection by the order, the Sisters of the Visitation of Holy Mary, which is covered by the diocesan health plan. For the court "to even begin to inquire into that decision-making process, we believe, crosses the line set by the First Amendment," said Gregory T. Lodge, a lawyer for both the Toledo diocese and the order, which operates under papal authority.

“I understand and absolutely appreciate that in matters of religion, the state has no business meddling,” Mr. Heck said. “It would be unthinkable for a judge to be able to say, ‘Hey, I don’t like the way you’re interpreting the Book of Luke.’ ”

But what religious principle is offended when an employee simply grows old or becomes ill, he asked. If the answer is “none,” he continued, judges should be more willing to “look behind the curtain.”

Exemptions From Employee Suits

For 28 days last May, Lynette M. Petruska, a former nun who now lives in St. Louis, thought she had finally found judges willing to listen to her complaint against Gannon University, a coeducational Catholic college in downtown Erie, Pa. As it turned out, she was wrong.

Ms. Petruska was educated in Catholic schools from kindergarten to college commencement, graduated at the top of her law school class and practiced law for several years before deciding to become a nun. In 1999, as she was working toward taking her final vows, she became the first woman to serve as Gannon’s chaplain.

Three years later she was demoted and, according to her complaint, effectively forced out. In her lawsuit, she said this action was in response to her having notified the administration of a case of sexual misconduct by a senior university official, resisted efforts to cover up that case and opposed proposals to weaken campus policies on sexual harassment. In 2004, she sued, accusing the university administration of forcing her out simply because she was a woman and because she had opposed the sexual harassment others experienced on campus.

Gender bias claims against religious employers have generally been dismissed under the ministerial exception. But some judges across the country have been less quick to dismiss cases where sexual harassment or abuse of an employee is involved. And unlike many other plaintiffs, Ms. Petruska claimed that her supervisor had actually acknowledged to her that she was being demoted solely because of her sex, not because of any religious doctrine.

Judge Sean J. McLaughlin of the United States District Court for the Western District of Pennsylvania nevertheless ruled that Gannon was protected by the First Amendment and the ministerial exception from any court interference in its choice of chaplain. Gannon itself argued that it had many women in leadership positions and that Ms. Petruska had resigned simply because she was unhappy with a staff reorganization. But its fundamental argument was that it would be unconstitutional for the court to second-guess these disputed decisions.

“You may ask, ‘Why should these decisions go unquestioned?’ The reason is plain and simple: The

First Amendment protects a church's right to freely exercise its religion," said Evan C. Rudert, a lawyer for the university. "And that includes organizing itself as it chooses and selecting those who it believes will serve best as its leaders — without interference from the courts."

Then, last May, in a decision that caused considerable comment in legal circles around the country, a federal appeals court panel reversed the trial judge's decision.

For four weeks, the prevailing law in Pennsylvania, New Jersey, Delaware and the Virgin Islands — the jurisdiction of the United States Court of Appeals for the Third Circuit — was that "employment discrimination unconnected to religious belief, religious doctrine, or the internal regulations of a church is simply the exercise of intolerance, not the free exercise of religion."

Appellate Judge Edward R. Becker wrote that opinion; his colleague on the three-judge panel, Judge D. Brooks Smith, filed a stinging dissent. A few days later, Judge Becker died. On June 20, in a rare move, the Third Circuit granted Gannon's routine request to have the case reconsidered and named Judge Smith to the new three-judge panel that would do so.

On Sept. 6, the new panel swept the earlier decision away, unequivocally restoring the protections for religious employers that it had put in doubt. As Judge Smith put it, the ministerial exception "applies to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions."

Ms. Petruska, who has left her order and returned home to work at her old law firm, describes herself as a feminist who is "committed to peace and freedom." She has a long history of putting her words into action — she has been arrested at protest marches, most recently at an antiwar rally the day before the Iraq war began, she said. She plans to appeal the ruling against her.

"I think this issue needs to be decided by the Supreme Court," she said. And she has hopes that the justices will agree with Judge Becker that, absent some grounding in religious doctrine, sex discrimination by religious employers is wrong.

No Recourse On Age Bias

Add age discrimination to that wish list, the Rev. John Paul Hankins says.

At 73, Mr. Hankins can look back on 50 years in a loving marriage, 40 years as a minister in the United Methodist Church — and 3 years as the plaintiff in an uphill court fight over his denomination's mandatory retirement policy.

Eight months after he turned 70, that policy forced Mr. Hankins to leave his pulpit in the historic

Stony Brook Community Church in Stony Brook, N.Y., where he had served for 37 years. He loved his flock and the feeling was mutual: the congregation withheld part of its annual contribution to the regional church that year to express its dismay.

“He had served for many, many years and wanted to continue to serve, and his congregation wanted that, too,” said David S. Warren, a professor of computer science at Stony Brook University who had been a member of the congregation for more than 25 years but who left because of how Mr. Hankins was treated.

Mr. Hankins said he was suing because age discrimination is almost as hateful and senseless to him as the racial segregation and bias against women that used to be “mandatory policies” of his church.

“I feel, and have long felt, that discrimination in any form has no place in the life of a faith community,” he said.

Under the federal age discrimination law, most employees of all but the smallest businesses can sue if they are forced to retire for no other reason than that they reached a certain birthday; increasingly, government and academic employees have the same protection. But Mr. Hankins knows his complaint will probably never come to trial simply because he is a clergy member trying to sue his church. Indeed, court rulings around the country suggest that if he had been forced out at any age and for almost any reason — for a deceptive reason, or even for no reason at all — he would face the same judicial roadblock.

“I never, ever thought that the last years of my ministry would be involved in a fight like this,” Mr. Hankins said.

Lawrence H. McGaughey, the lawyer for the regional Methodist governing body and its bishop, acknowledged that there is a movement in the church to eliminate the retirement rule opposed by Rev. Hankins. But if the rule is ultimately changed, it should be the church’s decision, not a court’s, he said.

“Any private employer would feel the same way — they’d like to be able to make these decisions without having to face the courts,” Mr. McGaughey said. “But the difference is the First Amendment.”

He continued: “We’re talking about worship here. Are you going to go into church and have someone standing there who was ordered to be there by the courts? There are certain things a government just cannot do in this country.”

In September 2003, a federal trial judge on Long Island ruled that Mr. Hankins’s complaint was barred by the ministerial exception. Last February, a federal appeals court panel sent the case back,

directing the trial judge to decide the case by applying a 1993 federal law, the Religious Freedom Restoration Act, rather than the ministerial exception doctrine. But there was little in the instructions to the trial court to encourage Mr. Hankins.

He nevertheless thinks his complaint will eventually help his church see that its mandatory retirement rule is unfair.

“I don’t need to win the case,” Mr. Hankins said. “I feel the movement of history at work here, I really do. Ideas find their feet, and start to walk.”

State judges have been equally reluctant to interfere in disputes between religious employers and their staff members — to the sad frustration of Rabbi Isaac H. Celnik of Albuquerque.

Rabbi Celnik, one of the youngest men ever ordained in Conservative Judaism, was just 30 when he was hired in 1971 as the spiritual leader of Congregation B’nai Israel. Eight years later, he entered into a 30-year contract with the synagogue, an arrangement his congregation endorsed by a margin of almost nine to one, he said.

Then the medical problems began. In 1996, Rabbi Celnik was told he was in the early stages of Parkinson’s disease; in April 2000, his wife, Peggy, was told she had breast cancer. In October 2000, he said, the president of the congregation’s governing board at the time suggested he retire on disability.

But the rabbi did not consider himself disabled and did not want to retire, he said. He had two young children and a wife whose treatment required continuing health insurance. He “loved the work, and loved the congregation,” he said. Indeed, when the synagogue’s cantor resigned a month after the retirement discussion, Rabbi Celnik proposed, and the board agreed, that he would take on the cantor’s duties as well, he said.

But the relationship deteriorated as he tried to negotiate retirement terms that would provide him and his family with adequate financial security. In January 2002, after those negotiations faltered, he was dismissed; in 2003, he sued. But last February, the state’s court of appeals dismissed his case, based on the ministerial exception, also called the church autonomy doctrine.

“We are sympathetic to Rabbi Celnik’s struggles with Parkinson’s and the manifestation of the disease after so many years of service,” the chief judge wrote. But he ruled that the dispute “is precisely the type of religious debate that the church autonomy doctrine is intended to protect from judicial review.”

The congregation’s current president, Alan M. Chodorow, declined to discuss the details of the dispute.

“I do not want to talk about anything that might impair our search for reconciliation and forgiveness” with Rabbi Celnik, he said. “But I will say that we believe strongly in the separation of church and state, and that the state should not have any part in choosing our spiritual leaders.”

But Mr. Chodorow said that he was sympathetic to the situation that this freedom for congregations created for employees and that he believed that religious institutions have to provide other protections by contract. Although clergy members in many faiths work without formal contracts, the model contract in wide use within Conservative Judaism provides that rabbis and cantors can terminate the agreement without cause and seek binding arbitration to resolve disputes, he said.

The church autonomy doctrine “takes away certain rights and this is put in specifically for the purpose of preserving rights,” Mr. Chodorow said.

Rabbi Celnik and his wife continue to struggle with the financial and physical burdens of his deteriorating health and her second episode of cancer. “They don’t teach this in rabbinical school,” the rabbi said in a recent interview. Teach what? Mrs. Celnik answered before he could: “Don’t get old. Don’t get sick.”

Mr. McNicholas, the Sidley Austin lawyer, acknowledged that some “unjust and sinful” treatment has been protected from litigation by the ministerial exception. But he argued that “the openness of the religious process” would remedy those situations, making it possible for a clergy member dismissed by one congregation to find a home in another.

But what if they are sick? “That’s harder — and very troubling,” Mr. McNicholas said. “But if you have a judge deciding it, that’s just too much intervention in the process of deciding the hiring issues” at religious institutions. “There’s no easy answer.”

Protections Against Unionization

The University of Great Falls, in Montana, has a tidy urban campus, a bold crucifix-topped chapel, a master’s program in criminal justice and, according to one student’s Internet posting, a cafeteria that serves pretty good spaghetti.

What the small Roman Catholic college doesn’t have is a faculty union.

It wasn’t for lack of trying. In 1995, the Montana Federation of Teachers, which had unionized most of the public universities in Montana, asked the National Labor Relations Board to recognize it as the collective bargaining agent for the teaching staff at Great Falls.

“Some of the faculty members there traveled in circles that included professors at the other schools,”

recalled James McGarvey, who was president of the Montana Federation of Teachers at the time. (It has since merged with the Montana Education Association.) Teachers at those other campuses had better pay and more favorable work rules, and some professors at Great Falls had expressed interest in seeing whether the federation could help them as well, according to Mr. McGarvey. “We felt we had a pretty strong showing,” he said.

J. C. Weingartner, a union lawyer who worked on the campaign, said that while “pay did come into it, it wasn’t what got it started.” That spark was discontent among some professors over the president’s appointing members to an important advisory council who “did not reflect the views of the majority of the faculty” in negotiations with the administration, he said. “So they felt their interests would be better served with collective bargaining.”

The university, which has a new management team today, declined to comment on the long legal battle.

But when the labor board held a hearing on the union’s request, the university’s lawyers argued that the board had no jurisdiction because the university was a religious institution, and to force it to negotiate with the union would violate its religious liberty.

The university based its case largely on a 1979 decision in which the United States Supreme Court ruled that the labor board’s jurisdiction did not extend to religious schools. After that decision, which resulted in what is called the Catholic Bishop doctrine, the board began case-by-case examinations to determine whether the schools that came before it were sufficiently religious — whatever their faith — to be exempt from its jurisdiction.

The University of Great Falls did not qualify, the board concluded in February 1996.

For the next seven years, the little Catholic college fought both the federal labor board and the faculty union, keeping lots of lawyers busy and incurring official charges of unfair labor practices in the process. In 2002, it won.

The federal appeals court panel in Washington ruled that a three-prong test should be the labor board’s only standard for determining which schools were religious enough to be exempt from the nation’s collective bargaining laws under the Catholic Bishop decision.

Any school that is nonprofit, has a religious affiliation and presents itself to the public as a religious institution must be exempted from jurisdiction, the court said. And that included the University of Great Falls.

And the court ruled that the labor board's old case-by-case approach had to stop immediately. For the board even to conduct such inquiries raised serious issues of religious freedom, the judges said.

Of course, some casually faithful or broadly tolerant schools that might previously have failed to win a labor board exemption would easily pass the court's new test.

The appellate judges anticipated that complaint, and dismissed it. "If the university is ecumenical and open-minded, that does not make it any less religious, nor N.L.R.B. interference any less a potential infringement of religious liberty," they said.

David Strom, general counsel of the American Federation of Teachers in Washington, doesn't mince words about the impact of the Great Falls decision. "It means that the difficulty of organizing a religiously affiliated college has become enormous."

Although federal statistics show that one of every seven colleges in the country describes itself as a religious institution, it is not clear how far-reaching the Great Falls decision will be. On its face, it would seem likely to reduce any union-driven salary pressures on exempt religious schools, allowing them to maintain more competitive tuition levels. However, some colleges that might be eligible for an exemption under the new rules may already have collective bargaining in place or may not oppose unions as fiercely as the Montana university did.

And the decision limits only the protections of the National Labor Relations Act. But last fall, in a case involving teachers at Catholic schools in Boston, a federal district judge in Massachusetts ruled that part of another federal labor statute called the Taft-Hartley Act could not be applied to church-operated schools without raising First Amendment issues.

Notwithstanding the protracted battle in Great Falls, Catholic institutions are not doctrinally opposed to collective bargaining, said Julie N. Secviar, senior vice president for strategic resources for the Franciscan Sisters of Chicago Service Corporation, which manages Catholic hospitals, nursing homes and retirement communities.

In fact, the ethical health care directives of the United States Conference of Catholic Bishops require "recognition of the rights of employees to organize and bargain collectively without prejudice to the common good."

Next, Exemptions for Hospitals?

At the other end of the spectrum stand the Seventh Day Adventists, a Christian denomination with more than 14 million members worldwide. Like many denominations, it provides global humanitarian

relief and maintains a large network of church schools and colleges, including Loma Linda University in California. But it also operates the largest Protestant nonprofit health care system in the country, with 38 hospitals in 10 states, 23 nursing homes and 44,000 employees.

And not one of those employees is in a union, for a very simple reason: The church believes that collective bargaining "defies Christ's admonitions that behavior must be directed by individual conscience" and "is inherently disruptive" of the church's healing mission, as lawyers for the denomination first explained to the national labor board in 1998.

The lawyers were responding to a petition by the California Nurses Association to represent the nonsupervisory nurses employed at Ukiah Valley Medical Center.

As in the Great Falls case, the lawyers argued that the labor board had no jurisdiction because the hospital was a religious institution and to force it to recognize or bargain with a union would violate its freedom under the First Amendment and the Religious Freedom Restoration Act.

As in the Great Falls case, the labor board ruled otherwise. The next step should have been union balloting, explained Jeffrey A. Berman, the Sidley Austin lawyer who represented the hospital in the case. But the nursing association withdrew its petition and the case ended, he said.

According to the American Hospital Association, about one of every four of its members has a religious affiliation. But the Adventists' problem before the labor board was that hospitals, unlike religious schools, were specifically included in the board's jurisdiction by Congress. The only labor-law accommodation that Adventists have been able to win from Congress was a provision in 1974 allowing church members to pay the equivalent of their union dues to one of several agreed-upon secular charities, according to Mr. Berman.

Adventist hospitals are still waiting for their own Great Falls moment. As Mr. Berman put it, "We're not asking for carte blanche, for the ability to be exempt from all laws — just with respect to what is unique about these hospitals."

Andrew Lehren conducted computer analysis for this series, and Donna Anderson provided online research assistance.

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