WEBER GALLAGHER
SIMPSON STAPLETON
FIRES & NEWBY LLP

EMPLOYMENT PRACTICES UPDATE

SPRING 2012

HOSANNA-TABOR: SUPREME COURT RECOGNIZES THE MINISTERIAL EXCEPTION AS A BAR TO EMPLOYMENT DISCRIMINATION LAWSUITS

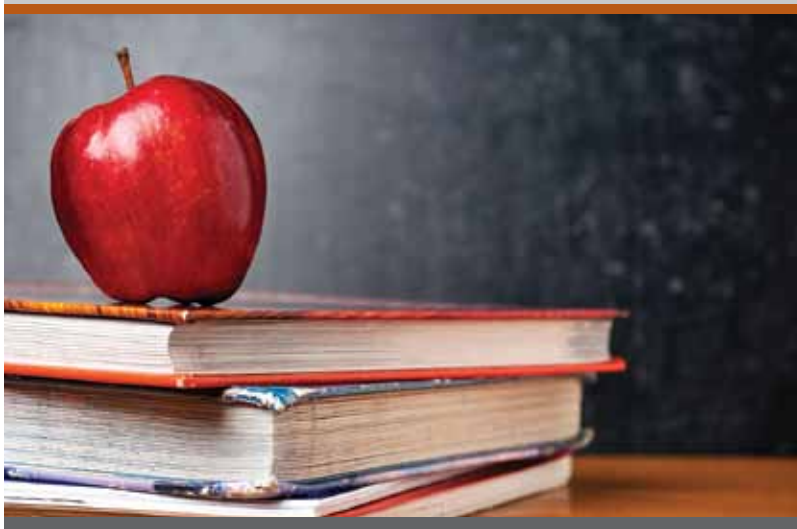
On January 11, 2012 in the case of *Hosanna-Tabor Evangelical Lutheran Church & School* v. EEOC, the U.S. Supreme Court addressed whether the Establishment and Free Exercise Clauses of the First Amendment bar a minister from filing an employment discrimination suit against a religious employer. This bar, more commonly known as the "ministerial exception," is rooted in the First Amendment's Establishment Clause and Free Exercise Clause. Prior to Hosanna-Tabor, the Supreme Court had never formally recognized the ministerial exception.

The case involved Cheryl Perich who started at Hosanna-Tabor as a "lay" teacher in 1999. Hosanna-Tabor later asked Perich to become a "called" teacher. Called teachers are considered called to their vocation by God. To qualify as a called teacher Perich was required to complete a colloquy program which required obtaining additional religious education and endorsements.

In 2004, Perich developed narcolepsy and was out of work on disability in the Fall. In January 2005, Perich's doctor cleared her to return to work. Perich informed the school's principal that she was ready to teach, but the principal voiced concerns about her health and student safety. The issue went before the school board who requested Perich resign from her position, and in return, the school would contribute to her health insurance costs.

Perich declined the school's offer and reported for work on February 22, 2005. When Perich was asked to leave, she refused unless she received written documentation that she had reported to work. Later the same day, Perich was informed that she would likely be terminated from her position. Perich responded that she had hired an attorney and intended to assert her legal rights.

IN THIS ISSUE...



The school board eventually rescinded Perich's call to teach due to "insubordination and disruptive behavior." The board concluded that Perich had damaged her relationship with Hosanna-Tabor "beyond repair" by "threatening to take legal action" instead of trying to resolve the dispute within the church.

Following her termination, Perich filed a charge with the EEOC asserting that she had been unlawfully terminated by Hosanna-Tabor in violation of the Americans with Disabilities Act (ADA). She later filed a lawsuit in federal court. Perich's case was dismissed at the district court level on a motion for summary judgment. The district court agreed with Hosanna Tabor's argument that Perich was a minister of the church and her suit was barred by the ministerial exception. In its opinion, the district court stated "Hosanna-Tabor treated Perich like a minister and held her out to the world as such long before this litigation began."

Perich filed an appeal with the Sixth Circuit which vacated the district court's decision, finding that the ministerial exception did not apply and Perich's discrimination claims should be decided on the merits. In its decision, the Sixth Circuit pointed to the fact that Perich's duties as a "lay" and "called" teacher were identical.

The Supreme Court unanimously recognized the ministerial exception and held that under the First Amendment, religious institutions are free to choose and dismiss their leaders without government interference. In support of its decision, Chief Justice John G. Roberts Jr. pointed to the Free Exercise and Establishment Clauses of the First Amendment. The Free Exercise Clause "protects a religious group's right to shape its own faith and mission through its appointments" and the Establishment Clause "prohibits government involvement in such ecclesiastical decisions."

The Supreme Court went on to determine that the ministerial exception applied to Perich, and as a result, she was barred from filing an employment discrimination suit against Hosanna-Tabor. In reaching this conclusion, the Supreme Court examined Perich's extensive religious training, her duties as a called teacher, and the fact she held herself out as a minister of the church. Although the Supreme Court took these facts into account, it refrained from applying a "rigid formula" regarding when an employee qualifies as a minister. In a concurrence, Justice Clarence Thomas wrote that it was not for the courts to decide who qualifies as a minister and that such determinations should be left in the hands of religious institutions. He wrote,

> "The question whether an employee is a minister is itself religious in nature, and the answer will vary widely . . . Judicial attempts to fashion a civil definition of 'minister' through a bright-line test or multifactor analysis risk disadvantaging those religious groups whose beliefs, practices and membership are outside of the 'mainstream' or unpalatable to some."

The Supreme Court emphasized that while the enforcement of employment discrimination laws is of great importance, so is the need to provide protection to religious groups so that they may freely practice their beliefs.

Advice:

The public response to the Supreme Court's decision has varied. Many religious groups celebrate the decision as a victory in protecting their First Amendment rights. Others voice concern that the sweeping decision has provided religious employers with unfettered discretion to violate employment laws. Although the Supreme Court's decision was broad in scope, it did include limitations. The Court emphasized that it did not decide whether the ministerial exception barred other types of suits, such as breach of contract actions or tortious conduct. In the wake of this decision, all religious institutions should review their employment practices to ensure maximum protection in light of the Supreme Court's new guidance.

RETALIATION CLAIMS FILED IN THE EEOC CONTINUED TO RISE IN 2011

For the second year in a row, there were more retaliation claims filed with the Equal Employment Opportunity Commission (EEOC) than for any other kind of discrimination. There were 37,334 charges of retaliation filed with the EEOC constituting in 2011, 37.4% of all discrimination claims.

Retaliation is prohibited under both federal and state discrimination laws. Federal statutes such as Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Equal Pay Act, the Americans with Disabilities Act (ADA), and, the Genetic Information Nondiscrimination Act have all been interpreted to prohibit employers from taking adverse employment action against an employee who asserts his or her rights under the act.

In addition to these federal statutes, the United States Department of Labor has recently released three new fact sheets concerning the prohibition of retaliation under (i) the Fair Labor Standards Act (FLSA), (ii) the Family and Medical Leave Act (FMLA), and (iii) the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

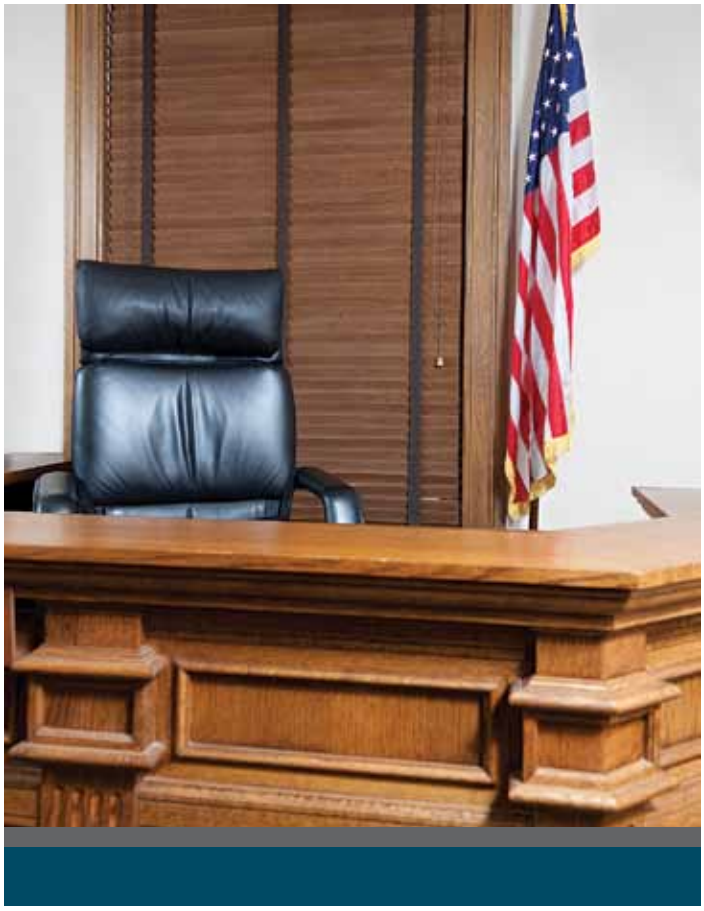
The fact sheet concerning the FLSA emphasizes that employees who complain about wages and hours are protected from retaliation regardless of whether the complaint was made orally or in writing.

The fact sheet concerning the FMLA provides examples of prohibited conduct, which include using an employee's request for or use of FMLA leave as a negative factor in employment actions such as hiring, promotions, or disciplinary actions.

The fact sheet concerning the MSPA stresses that migrant and agricultural workers may not be "intimate[d], threaten[ed], restrain[ed], coerce[d], blacklist[ed], discharge[d]" or discriminated against in any other manner for exerting rights under the MSPA.

It is important for employers to understand what constitutes retaliation in light of the growing number of retaliation claims and the expansion of laws prohibiting retaliation. To establish a retaliation claim, an employee must show that:

1. he/she engaged in protected activity under a federal or state discrimination statute,
2. he/she suffered an adverse employment action, and
3. there was a causal link between the protected activity and the adverse employment action



There are two types of protected activity under federal discrimination statutes. The first kind of protected activity is "participation" activity. Participation activity includes filing a charge of discrimination with the EEOC and/or state agency, testifying against an employer regarding charges of discrimination, assisting another employee in his or her discrimination lawsuit, or participating in an investigation, proceeding, or hearing resulting from an alleged violation of state or federal discrimination laws. Protected activity can also include requesting a reasonable accommodation based on religion or disability.

The second type of protected activity is "opposition" activity. Opposition activity can include complaining about discrimination, threatening to file a charge of discrimination, picketing discrimination, or refusing to obey orders which are believed to be discriminatory. The degree of protection provided by the courts for opposition activity is less certain than the unqualified protection applied to participation activity. For example, the courts have found that opposition activity that is disloyal or excessively disruptive may not be protected.

Advice:

Employers need to be mindful of what activities are protected, particularly in light of the Department of Labor's new facts sheets regarding the FLSA, the FMLA, and the MSPA.

FEDERAL COURT FINDS LACTATION IS NOT RELATED TO PREGNANCY

On February 2, 2012, a Texas federal court dismissed the EEOC's claim on behalf of Donnicia Venters alleging that Venters was terminated after requesting accommodations to pump breast milk. In its Complaint, the EEOC averred that Venters' employer, Houston Funding, engaged in unlawful employment practices under Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991. The district court disagreed, holding that "[f]iring someone because of lactation or breast-pumping is not sex discrimination."

Venter first began working for Houston Funding as an account representative in 2006. She became pregnant in the spring of 2008. Houston Funding was aware of Venters' pregnancy, but had no policy regarding maternity leave. On December 1, 2008, Venters left work pursuant to the company's practice of allowing open-ended leave for surgeries and other medical issues. Venters gave birth ten days later.

Soon after giving birth, Venters spoke with the company's Vice-President regarding when she would return to work. Venters responded that her return date would depend on her doctor's recommendation.

On January 9, 2009, Venters' recovery was complicated by an infection of her cesarean incision. Venters remained in contact with her colleagues at Houston Funding throughout her recovery. According to cell phone records, Venters spoke to her various colleagues from January 7, 2009 to February 6, 2009, totaling 115 minutes of conversation. Venters did not speak with the V.P. during this time period.

On February 10, 2009, the V.P. and several other Houston Funding employees met to discuss Venters' future employment. It was decided that Venters would be terminated effective February 13, 2009.

On February 16, 2009, Venters received approval from her doctor to return to work. She called the V.P. the same day and left him a voicemail informing him that she could return to work. Venters called him again the following day to schedule her return to work. During the conversation, Venters asked whether she could use one of the company's store rooms to pump breast milk. At this point in the conversation, the V.P. told Venters that her position had been filled. He went on to

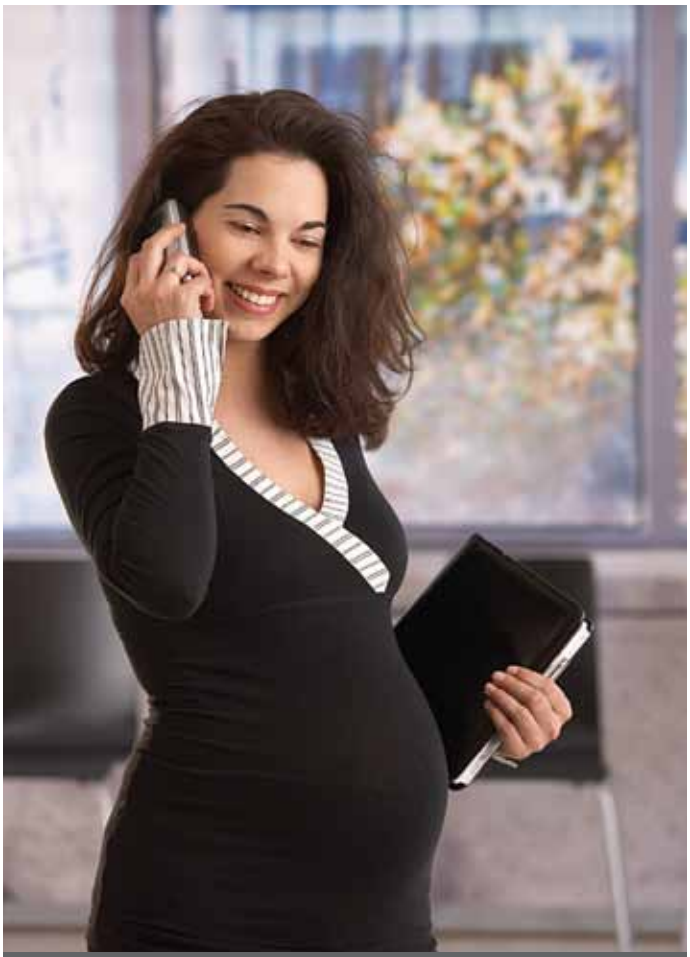
state she had been replaced because the company assumed she had abandoned her position. Ten days later, Venters received a letter from Houston Funding firing her for abandonment.

The district court disagreed with the EEOC's contentions that Venters' termination was motivated by her pregnancy, childbirth, and or a related medical condition. The court noted that Venters' protection under the law had ended at the same time she delivered her daughter on December 11, 2008. The court concluded that discrimination due to lactation was outside the scope of federal employment discrimination laws. *See Cerrato v. Durham*, 941 F. Supp. 388, 393 (S.D.N.Y. 1996).

In response to the court's decision, a Houston Funding spokesperson stated, "We didn't violate the law because there was no law." The EEOC and Venters are considering filing an appeal.

Advice:

Employers should take away several important lessons from the federal court's decision in Houston Funding. First, although the court did not find that Venters was protected by federal employment discrimination laws, there are other laws in place that require employers to provide accommodations for lactation. Specifically the Patient Protection and Affordable Care Act ("PPACA"), which was enacted in 2010, serves as an amendment to the Fair Labor Standards Act and includes provisions that require employers with more than 50 workers to provide new mothers, for up to one year after a child's birth, with "reasonable" time to take unpaid breaks to express breast milk for their nursing children in a private space, other than a bathroom. Second, employers should take time to establish a solid maternity leave policy that complies with state and federal laws. When well-crafted, maternity leave polices have been proven to increase productivity, improve employee retention, and help companies avoid potential lawsuits



NEW "ACTIVE SEARCH" REQUIREMENT FOR RECIPIENTS OF UNEMPLOYMENT COMPENSATION PROVIDES NEW FORUM FOR EMPLOYERS TO CONNECT WITH POTENTIAL APPLICANTS

The unemployment rate in Pennsylvania has continued to decline in the last three months, according to recent reports by the Center for Workforce Information & Analysis. In fact, the Commonwealth of Pennsylvania was almost a full point below the national unemployment rate of 8.5% in December 2011.

Despite these encouraging statistics, the Commonwealth is taking steps to strengthen its workforce. The Commonwealth has enacted a new unemployment compensation ("UC") requirement in an effort to help its almost 500,000 unemployed residents get back to work.

As of January 1, 2012, the Pennsylvania Department of Labor and Industry ("the Department") is requiring all UC recipients to provide evidence that they are actively searching for work on a weekly basis. Users must apply for at least three jobs per week. Additionally, users must do one of the following activities each week:

- Attend a job fair
- Search for employment opportunities posted online
- Create or post a resume online
- Contact colleagues, former co-workers, or other individuals in the profession to inquire about employment opportunities
- Utilize an employment agency, employment registry or school placement service
- Take a civil service test or other pre-employment examination
- Participate in an employment program or employment activity

To assist UC recipients in fulfilling this new eligibility requirement, the Department has created CareerLink, an online employment system. CareerLink allows users to browse job postings, find training opportunities, obtain vocational rehabilitation, create resumes, and research different professions. CareerLink also monitors and records a user's activity and provides a printable log that can be sent to the Department.

The Secretary for the PA Department of Labor recently stated that the Department has two goals: (1) to connect people without jobs to hiring employers, and (2) help grow hiring processes within the state.

Advice:

The state's new active search requirement may also prove to be advantageous for employers looking to hire. Over 80,000 employers are using CareerLink to post job opportunities and find skilled workers. Job posts can be classified by industry, occupation, and geographic area. In addition to posting want ads, employers can take advantage of CareerLink's other resources. For instance, employers can research emerging and declining industries, as well as modern ways to generate business in a tough economy.

$185,000 VERDICT IN PENNSYLVANIA RACIAL DISCRIMINATION CASE ASSERTED UNDER THE COMMON LAW THEORY OF INTENTIONAL INFLICTION OF EMOTION DISTRESS

After four hours of deliberation, a jury in York County, Pennsylvania awarded $185,000 in a racial discrimination suit filed by an African American nursing assistant who provided in-home medical assistance to a stroke patient. The plaintiff claimed that she was verbally abused by the stroke patient and his wife throughout her one year of employment. The stroke patient and his wife allegedly referred to the patient by ethnic slurs. The plaintiff also alleged that she had developed emotional distress as a result of the couple's abuse.

What is interesting about this case is that the plaintiff did not file a claim under federal discrimination laws, but under the common law tort theory of intentional infliction of emotional distress. The plaintiff would have been unable to successfully pursue her case under federal discrimination laws because

these statutes include numerosity requirements which require that an employer maintain a certain number of employees to apply. For instance, employers who are sued under Title VII can point to the statute's numerosity requirement as a defense if they maintain less than 15 employees.

The Supreme Court of Pennsylvania has not expressly recognized a claim for intentional infliction of emotional defense, but lawsuits filed under this theory have been upheld in the lower courts. Generally, the courts refer to Section 46 of the Restatement (Second) of Torts when evaluating a claim for intentional infliction of emotion distress. Section 46 states:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

At trial, the plaintiff called three other caregivers who testified that they had heard the patient's wife direct ethnic slurs towards the plaintiff. The plaintiff's psychiatrist also testified that working for the couple had exacerbated the plaintiff's preexisting mental health condition, causing her to experience anxiety and panic attacks. The plaintiff's medical records were also admitted into evidence to support her claims.

The defendants denied the plaintiff's allegations and argued that even if they were true, the conduct did not rise to the level of "outrageous" envisioned by the Restatement's authors. In support of this argument, the defendants pointed to the commentary published with Section 46 which states, "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

The jury found in favor of the nursing assistant plaintiff and awarded her $135,000 in compensatory damages and $50,000 in punitive damages.

Advice:

What is significant about this case is that the plaintiff was successful in maintaining a claim akin to a discrimination claim against an employer in a private setting by relying on the tort of intentional infliction of emotional distress. This is an important development for small companies who have previously cited the numerosity requirements of federal statutes as a defense to employment discrimination claims. Additionally, the case is an example of how juries view racial intolerance and that such acts, even in one's home, can be considered "outrageous" and result in liability.

Joseph Goldberg,
Chair of the Employment Practices Liability Group
215.825.7225
jgoldberg@wglaw.com

Tracy A. Walsh,
Vice-Chair of the Employment Practices Liability Group
215.825-7224
twalsh@wglaw.com

Wendi D. Barish,
Partner in the Employment Practices Liability Group and Editor of the ***Employment Practices Update***
215.972.7914
wbarish@wglaw.com

Kimberly A. Brown,
Associate in the Employment Practices Liability Group and Contributing Author to the ***Employment Practices Update***
267.295.3372
kbrown@wglaw.com