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By Arthur S. Leonard

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Sandor Demkovich (left) and Frank Hattula got married in 2014 in an Episcopal church.
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A 10-judge (en banc) bench of the Chicago-based US Court of Appeals for the 7th Circuit ruled on July 9 by a vote of 7-3 that the religion clauses of the First Amendment of the US Constitution give churches total immunity from hostile environment claims by their ministerial employees. Rejecting a decision by a three-judge panel of the court that Sandor Demkovich, the gay former Music and Choir Director and Organist at St. Andrew the Apostle Parish in Calumet City, Illinois, could bring a hostile environment claim against the church under the Civil Rights Act of 1964 and the Americans with Disabilities Act, the en banc court held that allowing such claims would violate the religious autonomy of the church protected by the religion clauses of the

First Amendment. Judge Michael Brennan, appointed by President Donald Trump, wrote the court's opinion.

Lex Pe'er Horwitz, Thank You For Coming Out (While Staying In)

Thank You for Coming Out

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The Seventh Circuit is among the most Republican-dominated of the federal appeals courts. Of the 11 active members of the Court, eight were appointed by Republican presidents (four by Trump). President Joe Biden's first appointee to the court, Judge Candace Jackson-Akiwumi, was only recently confirmed by the Senate and did not participate in this case. One of President Trump's appointees recused himself, and a senior (retired) judge appointed by Ronald Reagan, Joel Flaum, who was the dissenter on the three-judge panel, was entitled under Seventh Circuit rules to participate.

Judge David Hamilton, appointed by Barack Obama, wrote the panel decision and the dissenting opinion, joined by Judge Ilana Rovner, a moderate appointed by George HW Bush in 1992, who was the other member of the three-judge panel majority. Judge Diane Wood, appointed by Bill Clinton, joined the dissent.

Demkovich was hired in September 2012. His supervisor was Reverend Jacek Dada, a priest who is the church's Pastor. According to Demkovich, who has various physical disabilities, Dada was constantly subjecting him to verbal abuse because of his sexual orientation and his disabilities, adversely affecting his physical and mental health. In 2014, after Illinois had legislated to allow same-sex marriages, Demkovich let the church know that he planned to marry his same-sex partner. Dada told him that he had to resign from the church because his marriage would violate Catholic doctrine. When Demkovich refused to resign, Dada fired him.

Demkovich sued the St. Andrew church and the Archdiocese of Chicago under Title VII of the Civil Rights Act and the Americans with Disabilities Act, claiming that his discharge was unlawful discrimination because of his sexual orientation and disabilities. The church moved to dismiss the case, citing the "ministerial exception" under the First Amendment, and the district court granted the motion, determining that Demkovich was a "ministerial employee" under the Supreme Court's 2012 decision, Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC. In Hosanna-Tabor, an ADA case involving a school teacher, the Supreme Court ruled that it would violate the First Amendment to allow a ministerial employee to challenge their discharge in a federal court, because religious institutions have an absolute right under the Free Exercise Clause to decide whom to employ as ministers without any interference from the courts. Under Hosanna-Tabor, the district court's decision to dismiss Demkovich's unlawful discharge claims was undoubtedly correct.

Demkovich came back to court with an amended complaint, alleging that he was unlawfully subjected to a hostile environment by Dada, his supervisor, because of his sexual orientation and disabilities. Again, the church invoked the "ministerial exception" and moved to dismiss. District Judge Edmond E. Chang decided that Hosanna-Tabor, a discharge case, did not necessarily apply to a hostile environment claim, drawing a distinction, as the San Francisco-based Ninth Circuit Court of Appeals had previously done in a similar situation, between tangible and intangible employment actions, finding that the exception applied only to the former.

Judge Chang held that the proper approach in a hostile environment case was to balance the church's religious freedom concerns with the employee's statutory anti-discrimination rights, taking into account the nature of the employer's conduct and the reasons for it. Based on this "balancing of rights," Chang dismissed the sexual orientation claim but refused to dismiss the disability claim, distinguishing between hostility that could be motivated by religious doctrine and hostility that had no basis in religious doctrine. But Chang then certified a request by the church to have the court of appeals consider the issue before the case went further. Last summer, the Supreme Court issued another ministerial exception decision, Our Lady of Guadalupe School v. Morrissey-Berru, which took a broader view of the definition of a ministerial employee in the context of religious schools. This case also involved two teacher discharges, allegedly in violation of the ADA and the Age Discrimination in Employment Act.

The three-judge Seventh Circuit panel ruled in 2020 that Demkovich should be allowed to litigate both of his hostile environment claims, finding that the reasoning behind Hosanna-Tabor did not require a dismissal in a case such as this, following the lead of the Ninth Circuit. The church then petitioned the Seventh Circuit for rehearing en banc. The Seventh Circuit vacated the panel decision, heard arguments before a panel of 10 judges earlier this year, and issued its July 9 decision holding that Judge Chang should have dismissed the case completely.

In his opinion for the court, Judge Brennan, while acknowledging that the Supreme Court's two precedents, Hosanna-Tabor and Guadalupe, both involved discharges of religious school teachers, found various statements in those decisions that he said could be construed to have embraced more general principles that the courts should not be interfering in any personnel-related disputes between religious institutions and their ministerial employees. He drew two "principles" from the Supreme Court's decisions: "The protected interest of a religious organization in its ministers covers the entire employment relationship, including hiring, firing,

and supervising in between. Second, we cannot lose sight of the harms — civil intrusion and excessive entanglement — that the ministerial exception prevents. Especially in matters of ministerial employment, the First Amendment thus 'gives special solicitude to the rights of religious organizations,'" quoting from Hosanna-Tabor.

Brennan pointed out that in a hostile environment case, discovery could be wide-ranging, and would involve an inquiry into the reasons why, in this case, the priest in charge was treating the music director — both ministerial employees because of the role they play in the religious life of the church — in a particular way. To the majority of the en banc court, this would raise the specter of judicial interference in matters of religion, regardless of whether the claim arose under Title VII or the ADA. The court found that a central theme of the Supreme Court and lower federal court rulings involving discrimination claims by ministerial employees was that churches must enjoy autonomy in making personnel decisions about their ministerial employees, whether they could be characterized as tangible or intangible actions.

"Demkovich's hostile work environment claims challenge a religious organization's independence in its ministerial relationships," wrote Brennan. "A judgement against the church would legally recognize that it fostered a discriminatory employment atmosphere for one of its ministers." While the employment discrimination statutes have been interpreted to hold employers liable for fostering a discriminatory employment atmosphere, Brennan wrote that the Supreme Court's ministerial exception cases "teach that ministerial employment is fundamentally different." And, he continued, "Just as a religious organization 'must be free to choose those who will guide it on its way,' so too must those guides be free to decide how to lead a religious organization on that journey," once again quoting from the Hosanna-Tabor opinion.

Judge Hamilton's dissent began by noting that the Supreme Court's ministerial exception cases all involved discharge decisions, not hostile environment claims, and that federal circuit court and state courts are "split on the question before us," noting not only the Ninth Circuit's prior rulings, but also several district court decisions. He insisted that "the majority's rule draws an odd, arbitrary line in constitutional law," and argued that "the line between tangible employment actions and hostile environment fits the purposes of the ministerial exception."

He accused the majority of departing "from a long practice of carefully balancing civil law and religious liberty," and pointed out the severe consequence of holding that religious employers would be immune from any liability for mistreating their employees under anti-discrimination laws. "We know that people who exercise authority within churches can be all too human," he wrote. "Casebooks and news reports tell us of cases of sexual harassment by ministers, sometimes directed at parishioners, sometimes at non-ministerial employees, and sometimes at other (typically less senior) ministers. In briefs and oral argument, defendants have acknowledged that a religious employer could be held civilly liable for a supervisor's criminal or tortious conduct toward a ministerial employee… Such cases would not violate the supervisor's or

the employer's First Amendment rights. If criminal or tort cases do not, then it is hard to see why a statutory case based on the same conduct would necessarily violate the First Amendment, whether or not the supervisor claims a religious motive."

"The hostile environment claims before us present a conflict between two of the highest values in our society and legal system: religious liberty and non-discrimination in employment," wrote Hamilton. "The Supreme Court has not answered this question, nor does the First Amendment itself. Circuits and state courts are divided. For the reasons explained above and in the panel majority, I submit that the majority's absolute bar to statutory hostile environment claims by ministerial employees is not necessary to protect religious liberty or to serve the purposes of the ministerial exception."

The next step for Demokovich could be to file a petition for review with the Supreme Court. Depending on the details of his factual claims, he might try to pursue a state court tort suit for intentional infliction of emotional distress against Jacek Dada individually, but it is possible that it would be barred by the state statute of limitations, since all the conduct at issue took place in 2012-2014.