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Tenth Circuit Rules That Religious Employers May Not Use the Collateral Order Doctrine To Immediately Appeal Rulings on the Ministerial Exception to Title VII Claims

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The court held in a 2-1 decision that it lacked jurisdiction to consider, on interlocutory appeal, orders preliminarily denying a religious employer summary judgment on the "ministerial exception" defense to Title VII racial discrimination claims, because a jury must first resolve genuine issues of disputed fact.

In *Tucker v. Faith Bible Chapel International*, 36 F.4th 1021, 2022 U.S. App. LEXIS 15605 (10th Cir. June 7, 2022), the U.S. Court of Appeals for the Tenth Circuit held in a 2-1 decision that it lacked jurisdiction to consider, on interlocutory appeal, orders preliminarily denying a religious employer summary judgment on the "ministerial exception" defense to Title VII racial discrimination claims, because a jury must first resolve genuine issues of disputed fact. The court reasoned that such orders are not analogous to qualified immunity defenses, do not conclusively determine the disputed question of minister status, and can be effectively reviewed and corrected through an appeal after final judgment. Id. at *52-54.

Procedural Background

Faith Christian Academy is a religiously affiliated K-12 school. Id. at *6. Faith Christian hired Tucker to teach high school science. Id. Later, Tucker also held the dual title of Director of Student Life and chaplain, a position which involved planning weekly Chapel Meetings. Id.

In January 2018, Tucker held a session on race and faith that received criticism from some students and their parents. Id. Though Faith Christian initially praised the presentation, it removed Tucker from his Director position, and he no longer conducted the weekly Chapel Meetings. Id. Faith Christian subsequently fired Tucker from his teaching position. Id. at *7. Tucker then filed a complaint with the Equal Employment Opportunity Commission and sued Faith Christian alleging a Title VII retaliation claim

and a Colorado common law claim for wrongful termination in violation of public policy. Id.

Faith Christian "moved to dismiss the action under Fed. R. Civ. P. 12(b)(6), asserting the ministerial exception." Id. at *8. The district court converted the motion to one for summary judgment under Fed. R. Civ. P. 56, and after limited discovery on the ministerial exception, it denied the motion. Id. The court ruled that there remained a question of material fact regarding Tucker's status as a "minister." Id. at *9. Faith Christian moved for reconsideration, and when that motion was also denied, it appealed both denials under 28 U.S.C. §1291 and the collateral order doctrine. Id.

Faith Christian sought "to justify an immediate appeal first by making the novel argument that the 'ministerial exception' not only protects religious employers from liability on a minister's employment discrimination claims, but further immunizes religious employers altogether from the burdens of even having to litigate such claims." Id. at *3-4. In other words, it sought to convert the "ministerial exception" into a semi-jurisdictional limitation on the court's authority to hear Title VII claims, drawing an analogy between the decision to deny Faith Christian summary judgment on its "ministerial exception" defense and immediately appealable decisions to deny government officials qualified immunity from suit under 42 U.S.C. §1983. Id. at *4.

The Ministerial Exception

The "ministerial exception" is an offshoot of the church autonomy doctrine that protects religious employers from employment discrimination claims brought by their ministers. Id. at *11. The justification for the exception lies in the First Amendment, the interpretation of which protects the autonomy of religious organizations in "the selection of the individuals who play certain key roles." Id. at *10-11 (citation omitted). The ministerial exception "operates as an affirmative defense to an otherwise cognizable [employment discrimination] claim," but only where the claims are "asserted by a minister." Id. at *11-12.

To apply the exception, a court must first determine whether the claimant alleging employment discrimination qualifies as a "minister." Id. at *12. This inquiry is fact-intensive, looking to the "specific circumstances of a given case." Id. It is possible for a religious employer to succeed on summary judgment, though the employer carries the initial burden to establish that the employee's position "involved responsibilities that furthered the core of the spiritual mission of the [organization]." Id. at *15 (citation omitted). The burden then shifts to the claimant to "bring forward specific facts showing a genuine issue for trial." Id. If a claimant raises a central issue that "is directly disputed and the facts underlying that question have not yet been developed," as Tucker did, then a summary judgment motion predicated on the "ministerial exception" will not succeed. Id. at *19.

The Collateral Order Doctrine

Article III Courts possess "jurisdiction [over] appeals from all final decisions of the district courts." Id. at 21 (quoting 28 U.S.C. §1291). They may also

exercise jurisdiction over certain interlocutory orders amid ongoing litigation. Id. at *21-22. Immediate review of these interlocutory orders is permitted under the collateral order doctrine, *Cohen v. Beneficial Indus. Loan*, 69 S. Ct. 1221 (1949), if they "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." Id. (citation omitted). But such interlocutory appeals are generally disfavored as their proliferation would delay proceedings, increase litigation costs, and obfuscate the trial process. Id. at *22.

Over time, "the Supreme Court has issued increasingly emphatic instructions that the class of cases capable of satisfying this 'stringent' test should be understood as 'small,' 'modest,' and 'narrow." Id. at *23 (citation omitted). In cases where the interlocutory appeal involves "the issue of whether there exists genuinely disputed fact questions," the appeal is generally outweighed by the "cost of disrupting the ordinary course of litigation." Id. In addition, when considering whether to apply the collateral order doctrine, the Tenth Circuit's "focus is not on whether an immediate appeal should be available in a particular case, but instead … whether an immediate appeal should be available for the category of orders at issue[.]" Id. at *26 (emphasis in original).

The Court Applies the 'Cohen' Test and Rejects the Qualified Immunity Analogy

The Tenth Circuit defined the category of orders under consideration as "orders preliminarily denying a religious employer summary judgment on the 'ministerial exception' defense because there exist genuinely disputed issues of fact that a jury must first resolve." Id. at *27. After applying the three-part *Cohen* test, the circuit court held that this category of orders satisfies only one of the three requirements for immediate review under the collateral order doctrine. Id. at *27-54.

As to the first *Cohen* requirement, that the category of orders being appealed conclusively determine the disputed question, the circuit ruled against Faith Christian. Id. at *53. It reasoned that because the district court denied summary judgment on the basis that "a jury must resolve the genuinely disputed fact question of whether Tucker was a 'minister,'" the lower court "clearly [contemplated] further factual proceedings to resolve that disputed issue of fact." Id. at *53.

By contrast, the Tenth Circuit ruled that the district court's order satisfied the second *Cohen* requirement, which mandates that the appeal resolve an important issue completely separate from the merits of the action. Id. at *28. It explained that the order denying summary judgment on the "ministerial exception" raised a significant First Amendment issue. Id.

The circuit court concluded by ruling that Faith Christian failed to satisfy the third requirement, that the order be effectively unreviewable on appeal from a final judgment. Id. at *33. The circuit court rejected Faith Christian's attempts at analogizing the "ministerial exception" to qualified immunity. Id. The court explained that qualified immunity "protects government officials not only from liability, but also from the burdens of litigation itself." Id. It

acts as “an immunity from suit” that is “effectively lost if a case is erroneously permitted to go to trial.” Id. (citation omitted).

While the Tenth Circuit has previously acknowledged similarities between “a religious employer's First Amendment defenses” and qualified immunity, the function of qualified immunity is to protect “the public's interest in a functioning government.” Id. at *34-35. The court determined that this public interest is not transferable to private parties and that the “ministerial exception” does not create immunity from suit. Id. at *35-36. Accepting Faith Christian's argument would immunize private religious organizations “from even litigating a Title VII claim,” which the circuit court described as an “unprecedented extension of immunity.” Id. at *36. The circuit court therefore dismissed the appeal for lack of jurisdiction. Id. at *54.

The Dissent

The dissenting opinion, however, concluded that the circuit court had jurisdiction under the collateral order doctrine. Id. at *55. It reasoned that, because the “ministerial exception” stems from the Religion Clauses of the First Amendment, it “bars courts from considering employment disputes between religious bodies and their ministers.” Id. at *54-55. In other words, the dissent would have held that the “ministerial exception protects religious bodies from the suit itself—unlike most affirmative defenses that protect only against liability.” Id. at *57. Therefore, under Cohen, the collateral order doctrine would be satisfied because “[t]he district court's decision conclusively determines the religious body's immunity from suit … [and by] defer[ring] consideration to the end of the case, the religious body would lose its protection from the trial itself.” Id. at *75.

Stephen Masciocchi and Tina Van Bockern are attorneys in Holland & Hart's Denver office. Steve leads the appellate group at Holland & Hart and assists clients with high-stakes federal and state appeals and class actions. Tina helps clients appeal federal agency regulations, decisions, and orders, as well as unfavorable trial court judgments in a variety of substantive areas.
