LEGAL ISSUES FACING PRIVATE RELIGIOUS SCHOOLS

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Many increasingly difficult legal issues involve private religious schools. Of the many statutes that intersect with religious interests, some of the most important are RFRA, Title VII, Title IX, and the ADEA. The focal point of these statutes is Title VII, as both Title IX and the ADEA borrow from the Title VII framework. For example, the ADEA does not apply to internal religious activities, which is similar to Title VII's ministerial exception. Additionally, RFRA acts as another layer of protection to religious interests in addition to Title VII, by making it more difficult for the government to burden religion. In each of the Acts, a major theme is the intricate distinction between the secular and the religious, as in each case the courts are willing to review sufficiently secular claims (except certain Title VII claims, such as Amos, infra). Notably, the tension between the Free Exercise Clause and the Establishment Clause affects this difficult distinction. The leading cases for each of these statutes are briefly summarized below, while additional cases are included in the appendix.

I. RFRA

The Religious Freedom Restoration Act ("RFRA" or "the Act"), 42 U.S.C.A. § 2000bb-bb4 (1994) has as its primary purpose the reversal of the holding in Employment Division v. Smith, 494 U.S. 872 (1990)(holding that a generally applicable law--if facially neutral--can be applied to religious conduct despite the Free Exercise Clause). If RFRA is upheld by the Supreme Court, government conduct that substantially burdens religion will have to meet the

pre-Smith compelling interest test. The lower federal courts that have considered RFRA are split on its constitutionality, though a majority of the courts have upheld it.

Commentators overwhelmingly support both the policy and constitutionality of RFRA, though a few have argued that the Act violates the constitutional principle of separation of powers. These commentators argue that Congress does not have authority to overturn a specific constitutional holding of the Constitution's ultimate interpreter, the Supreme Court. Recently, the Supreme Court decided to consider the constitutionality of the Act through the recent Fifth Circuit case, Flores v. City of Boerne, Tex., 73 F.3d 1352 (5th Cir. 1996). Though the case does not involve a private religious university, Flores will determine whether or not RFRA can be used by any religious organization to protect its religious interests. (A copy of an amicus brief filed in the Flores case will be distributed). Besides the Flores case, several other important RFRA cases involving issues for private religious institutions have been decided.

A. Flores v. City of Boerne, Tex.

Flores involves a city's enactment of an ordinance that made a Catholic church part of an historic district. The ordinance prevented the church from expanding its building, despite evidence that the building was too small to accommodate Mass-going church members. The church claimed that the city's historic district ordinance violated its religious freedom under RFRA; nevertheless, the federal district court struck down RFRA as unconstitutional. The district court claimed that Congress does not have the enumerated power in the Constitution to regulate *all* religious liberty. Therefore, to regulate religious liberty where the Supreme Court had made a constitutional judgment violated the separation of powers. Flores v. City of Boerne, 877 F. Supp. 355 (1995).

Reversing the district court, the Fifth Circuit held that Congress had power to regulate religious liberty--by extending the free exercise of religion--under section 5 of the Fourteenth Amendment. Furthermore, the judgment the Supreme Court made in Smith only established the least amount of constitutional protection that *must* be granted to religious liberty. That Congress decided to protect religion further than the Supreme Court's constitutional minimum for free exercise, the court decided, does not violate the constitution. Similarly, the court held that the Act does not violate the Establishment Clause (at the other end of the spectrum). The statute demonstrates that RFRA is only to reach the limits permitted by the Establishment Clause. 42 U.S.C.S. § 2000bb-4.

B. E.E.O.C. v. Catholic University of America

E.E.O.C. v. Catholic University, 83 F.3d 455 (D.C. Cir. 1996), was decided after the Fifth Circuit's decision in Flores. This case is important to religious universities, as it defines the complex intersection between RFRA, the First Amendment, and a Title VII sexual discrimination claim. In Catholic University, a nun was denied tenure, and brought a claim for sexual discrimination that allegedly occurred in the tenure process. The court first considered whether or not the nun's teaching duties fit within the ministerial exception to Title VII (her duties included the teaching of church canons). The ministerial exception, the court explained, recognizes the university's free exercise rights under the First Amendment despite a generally applicable law against sexual discrimination. The court decided that, considering the nun's teaching duties, the ministerial exception applied.

Furthermore, the court held RFRA as constitutional, following the Fifth Circuit's precedent in Flores. This holding is important for private religious universities, as it requires the

government to meet a higher burden of proof in applying Title VII to religious organizations. Before, Smith applied Title VII to religious organizations, since Title VII is a generally applicable law (assuming no ministerial function is involved, and the discrimination is not religious, see infra). With RFRA, however, a substantial burden on the free exercise of religion--through Title VII or anywhere else, must be justified with a compelling interest. 42 U.S.C.A. 2000bb-1.

C. University of Great Falls v Montana Federation of Teachers

The University of Great Falls litigation (pending before the National Labor Relations Board (NLRB)) shows how RFRA applies to private religious universities that would otherwise be subject to the National Labor Relations Act (NLRA), 29 U.S.C.A. §§ 151-169 (1996). In University of Great Falls, the Regional Director held that the NLRA applies to religious universities that negotiate with instructors, since the negotiations do not seriously bring religious freedoms into question. Since RFRA requires a "substantial" burden on religion, therefore, it doesn't apply. 42 U.S.C.S. 2000bb-1(b).

Amicus briefs were filed before the NLRB (by "The Association of Southern Baptist Colleges and Schools" ("ASBCS") and "Loma Linda University"), contending that a substantial burden could be shown, and therefore the government must demonstrate a compelling interest as set forth in RFRA. The ASBCS brief claimed that compelled bargaining interferes with its ability to set policies in pursuit of its religious interests. For example, the NLRA would disallow religious limits on academic freedom, since the Act permits opinions that "dissent" from religious beliefs. Similarly, Loma Linda objected to application of the NLRB to religious universities. Loma Linda argued that since the Seventh Day Adventist's beliefs preclude

recognition of unions, a substantial religious belief is burdened, and therefore no compelling interest can be justified (as required by RFRA).

D. Other Sources

Though many cases under RFRA have been decided, few circuit opinions have made direct holdings on the constitutionality of RFRA. Therefore, further reading on RFRA would best be from the legislative history (which fully explains Congress' view of Smith and its intent in passing RFRA) or law review articles. The leading authority on RFRA (who will also argue Flores before the Supreme Court) is Douglas Laycock. For example, see Religious Liberty as Liberty, 7 J. Contemp. Legal Issues 313 (1996); RFRA, Congress, and the Ratchet, 56 Mont. L. Rev. 145 (1995). For an argument for the constitutionality of RFRA based on congressional authority, see Rex E. Lee, The Religious Freedom of Restoration Act: Legislative Choice and Judicial Review, 1993 B.Y.U.L. Rev. 73. For criticism of congressional authority in enacting RFRA, see Marci A. Hamilton, The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment, 16 Cardozo L. Rev. 357 (1994).

II. Title VII (Employment Discrimination)

In Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987), the Supreme Court held--specifically on Establishment Clause grounds--that religious groups were permitted to discriminate religiously in employment according to the exemption provided in Title VII--provided the employment serves a non-profit purpose. The congressional exclusion does not make the profit/nonprofit distinction. Because of the profit/nonprofit distinction, and also other

requirements to qualify for the exemption--for example, whether the institution is sufficiently connected to a religion--private religious universities face important issues under Title VII. The Killinger and Missouri Synod, infra, cases bring some of these issues into focus.

A. Killinger v. Samford University

In Killinger, a fired professor (Dr. Killinger) brought a religious discrimination claim against Samford University under Title VII. The lower court upheld Samford University's right to religiously discriminate in hiring based on both Title VII and RFRA, infra. Killinger v. Samford, 917 F. Supp. 773 (N.D. Ala. 1996). Currently, the case is pending before the 11th Circuit. Killinger v. Samford University, No. 96-6238 (11th Cir. 1996).

The Killinger case raises issues related to private religious universities that have not been reviewed--at least in one case--by a circuit court. First, Dr. Killinger held theological and philosophical positions contrary to Samford University's positions. Second, Samford University not only made promises to Dr. Killinger of its intention to create diversity on its divinity faculty, but it was also under a similar obligation (through a bequest) to recruit faculty with diverse views. Third, the nature of the relationship between Samford University and the Baptist church had become attenuated, causing Dr. Killinger to question whether the school qualified for the exemption to Title VII for religious discrimination, where a school is in substantial part "owned, supported, controlled, or managed by a particular religion." 42 U.S.C.A. 2000e-2(e)(1994).

The district court applied the Title VII exemption, holding that it would not question Samford University's explanation of its religious mission and purpose. Samford's explanation of its mission must be accepted, *even if Dr. Killinger is right*--that Samford University had only a distant connection to the Alabama Baptist Convention. Furthermore, the court said that it was

not competent to decide otherwise, as RFRA provided additional support to the policy behind Title VII's exemption. (Note that the district court considered RFRA even though Samford University had not argued it before the court).

B. In re Applications of Lutheran Church-Missouri Synod

A unique case associated with Title VII's religious preference exemption is coming up through the administrative channels for review. In re Applications of Lutheran Church-Missouri Synod, No. 94-10 F.C.C. (1995). This case concerns the extent Amos applies to religious employers with employees otherwise under the jurisdiction of the FCC. A pre-Amos case, King's Garden v. F.C.C., 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974) and the FCC have declined to allow a religious exemption to religious employers under Title VII. They have argued that (religious) employers that use the airwaves are public trustees. Therefore, the rights to the airwaves are not vested, and the religious hiring preference exception to Title VII does not apply.

In Missouri Synod, the N.A.A.C.P. has argued that the religious station is using the Title VII religious preference hiring exemption as a pretext for racial discrimination. With the additional claim of racial discrimination, the case presents difficult issues for both the courts and private religious universities. The first issue to be resolved is whether Amos overruled King's Garden, requiring the F.C.C. to honor the Title VII exemption. The second issue, if King's Garden is no longer good law, is whether the Missouri Synod station did use the exemption as a pretext for racial discrimination.

C. Other Sources

For a thorough and recent treatment of Title VII issues for religiously affiliated

universities, see Robert John Araujo, "The Harvest is Plentiful, but the Laborers are Few": Hiring Practices and Religiously Affiliated Universities, 30 U. Rich. L. Rev. 713 (1996). Araujo gives seven other law review articles that deal with religious groups and religious employment discrimination (n.30); see e.g. Ralph D. Mawdsley, Religious Educational Institutions: Limitations and Liabilities under ADEA and Title VII, 89 Educ. Law Rept. 19 (1994); Joanne C. Brant, "Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate, 21 Hastings Const. L.Q. 275 (1994); Ralph D. Mawdsley, Are Non-Church Controlled Educational Institutions Still Entitled to Title VII Religious Exemptions?, 87 Educ. Law. Rept. 1 (1994); Scott McClure, Religious Preferences in Employment Decisions: How Far May Religious Organizations Go, 1990 Duke L.J. 587.

III. Title IX (Prohibition on Gender Discrimination in Education)

Title IX, 42 U.S.C. § 1681, though it extends broadly in education, has had a major effect on athletics. Specific regulations require educational institutions to disclose, for example, the number of athletic programs for females and the number for males. See 60 Fed. Reg. 61424 (1995)(to be codified at 34 C.F.R. pt. 668). Title IX specifically applies to private and public institutions, if the institution receives federal funding. Most of the difficult issues in Title IX, therefore, apply to both public and private institutions, whether secular or religious. Therefore, this section will briefly summarize two Title IX cases that come from secular schools.

A. Cohen v. Brown University

Cohen v. Brown University, 991 F.2d 898, shows the extent of Title IX's application. In Cohen, Brown University decided to demote several of its men's and women's programs to

intercollegiate club status. Student athletes from the women's gymnastics and volleyball teams then brought a class action suit against Brown University, alleging the athletic program had violated Title IX. The district court gave preliminary injunctive relief, ordering not only the restoration of the two women's programs, but also that Brown University not eliminate any existing women's programs until the matter was adjudicated. The later district court decision, after a full trial, found Brown University in violation of Title IX, and ordered a restructuring of its athletic program. Cohen v. Brown University, 879 F. Supp. 185, 210-11 (D.R.I. 1995). At the circuit court level, however, the court allowed Brown University to fashion its own remedy--a different result than in the Roberts case, infra.

The difficulty of the Cohen case is that many universities will decide not to add women's athletic programs, for fear that a court will not allow the university to retract the program--even if the university can show budgetary constraints.

B. Roberts v. Colorado State University

Roberts v. Colorado State University, 998 F.2d 824 (10th Cir. 1993), shows the conflict that Title IX's "substantial proportionality" requirement has had on college athletics. Roberts concerned gender disparity in athletic programs at Colorado State Unviversity (CSU), which presents salient facts. In the 1970's, CSU created 11 women athletic teams and cut the number of men's teams to 10. In the 80's, the school instituted budged cuts, which left nine teams for women and eight teams for men. The United State's Department of Education's Office of Civil Rights (OCR) approved this ratio, and determined the CSU had achieved Title IX compliance.

In 1991-92, CSU decided to further reduce its athletic programs, cutting the men's baseball program (55 members) and the women's softball program (18 members). Both the

district court and the Tenth Circuit disallowed the cut and ordered CSU to reinstate the women's softball program. The courts imposed a somewhat draconian solution to the problem, as they not only gave specific directions on and interpretations of Title IX, but also denied CSU an opportunity to give input on possible remedies. This problem is explained fully in an amicus brief--probably the best source for Title IX, through 1993--submitted in the Roberts case (to be distributed). Other Title IX cases are found in the appendix.

C. Other Sources

Many law review articles have been written analyzing Title IX. See, e.g., Douglas P. Ruth, Title VII and Title IX ?: Is Title IX the Exclusive Remedy for Employment Discrimination in the Education Sector?, 5 Cornell J.L. & Pub. Policy 185 (1996); Jill Mulderink, Comment, Par for the Female Course: "Cohen v. Brown University" Mandates an Equal Playing Field in Intercollegiate Athletics, 22 J.C. & U.L. 111 (1995); George Davidson & Carla Kerr, Title IX: What is Gender Equity?, 26 Vill. Sports & Ent. L. F. 25 (1995); Walter Connolly, Jr. & Jeffrey Adelman, A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios, U. Det. Mercy L. Rev. 845 (1994).

IV. The Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA), passed in 1967, was intended to prevent "arbitrary age discrimination in employment." 29 U.S.C.A. 621(b) (1994). The Act raises First Amendment questions whenever a religious organization terminates an employee over forty years old. Nevertheless, it should be noted that to the extent the person over forty is a member of a different religion, the Title VII exemption--allowing religious discrimination--will

apply. As the cases analyzing this intersection have followed an extremely important case, that case (Catholic Bishop) is summarized, while specific cases are found in the appendix.

A. NLRB v. Catholic Bishop

NLRB v. Catholic Bishop, 440 U.S. 490 (1979), gave what has become a fundamental principle of First Amendment interpretation. In Catholic Bishop, the Court decided that the NLRB did not have jurisdiction over two groups of Catholic high schools under the National Labor Relations Act. The three-part inquiry that arises from the Catholic Bishop case applies especially where an act of Congress and the Constitution have separate requirements. The three part test is: 1) the threshold question of whether application of the statute would present a significant risk of infringing the First Amendment, 2) the interpretive rule, that a court should seek a permissible construction of the statute that avoids the risk of infringing the First Amendment, or alternatively, whether there is a clear expression that Congress intended the statute to apply, 3) the court should decide whether the statute applies, and if so, whether it violates the Religion Clauses of the First Amendment. See Geary v. Visit. of the Blessed Virgin Mary Parish School, 7 F.3d 324, 327 (3d. Cir. 1993)(summarizing the three-part test of Catholic Bishop and its application in ADEA cases).

The cases are tangled and fact specific, and the only real bright line is where a church/minister relationship is involved, to which the ADEA will not apply. Cases showing the confusion of the finer issues of the ADEA and the religion clauses are found in the appendix.

B. Other Sources

Several law review articles discuss ADEA issues specific to private religious institutions. See e.g., Whitney Ellenby, Divinity v. Discrimination: Curtailing the Divine Reach of Church

Authority, 26 Golden Gate U. L. Rev. 369 (1996); Ralph D. Mawdsley, Religious Educational Institutions: Limitations and Liabilities under ADEA and Title VII, 89 Educ. Law Rept. 19 (1994).

Appendix of Important Cases

Below is a listing of other important cases that were decided on RFRA, Title VII, Title IX, and/or ADEA grounds. The list of cases is not exhaustive, but nevertheless illustrates the complexity of the statutes as they intersect with the religion clauses. See, e.g., Roxas v. Presentation College, infra.

Bartges v. University of North Carolina, 94 F.3d 641 (4th Cir. 1996)(holding that the University of North Carolina did not violate Title IX when it created a full-time women's coaching position from a part-time position, and did not hire the part-time coach to the new position).

Bob Jones University v. United States, 461 U.S. 574 (1983)(denying tax exempt status to an educational institution that racially discriminated by prohibiting inter-racial dating according to its religious tenets).

Boyd v. Harding Academy of Mephis, Inc., 88 F.3d 410 (1996)(holding that a religious school's decision to terminate a preschool teacher who had become pregnant did not violate Title VII as pregnancy discrimination, where the school had a specific non-extramarital sex policy).

Cochran v. St. Louis Preparatory Seminary, 717 F. Supp. 1413 (E.D. Mo. 1989)(construing the ADEA to exempt a Catholic Seminary that had dismissed a lay faculty member, explaining that the ADEA should not apply to church-operated schools, thereby preventing serious constitutional problems, such as entanglement of the state with religious institutions).

DeMarco v. Holy Cross High School 4 F.3d 166 (2d Cir. 1993)(reasoning that the ADEA applies to a parochial school even though the lay teacher had some religious responsibilities, since the court could easily separate the religious duties from the age discrimination claim).

E.E.O.C. v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993)(finding invalid a Protestant-only hiring policy at a school that was created from a bequest directing a Protestant hiring preference, even though the school had connections to a Protestant religion, and even though the despite the religious practices, such as school prayer).

E.E.O.C. v. Presbyterian Ministries, 788 F. Supp. 1154 (W.D. Wash. 1992)(recognizing that a retirement home, though not requiring employees to be Presbyterian, may require employees to respect the religious traditions of the home--here, a Muslim's religious discrimination claim on not being allowed to wear a head covering at the home was not allowed).

E.E.O.C. v. St. Francis Xavier Parochial School, 928 F. Supp. (D. D.C. 1996)(holding the

parochial school to be an "industry affecting commerce" for purposes of the Americans with Disabilities Act, and therefore subject to judicial review as an employer when the school refused to grant an interview to an applicant in a wheelchair to teach music).

Favia v. Indiana University of Pennsylvania, 7 F.3d 332 (3d Cir. 1993)(upholding preliminary injunction to reinstate women's varsity field hockey and gymnastics programs without modification, pursuant to district court requirement under Title IX).

Gargano v. Diocese of Rockville Center, 80 F.3d 878 (2nd Cir. 1996)(construing a claim based on the ADEA and an employment contract from a former teacher at a Diocesan school, and accepting the jury's findings for backpay based on breach of an employment contract as no judicial assessment of religious dogma was required).

Geary v. Visitation of the Blessed Virgin Mary Parish School, 7 F.3d 324 (3d Cir. 1993)(even though the status of a religious institution is not enough in itself to preclude application of the ADEA, where other religious factors apply--here the churches doctrine against marrying a divorced man--*and* are challenged, a court is justified in not hearing the claim as it would entangle the court with the free exercise of religion).

Ivan v. Kent State University, 92 F.2d 1185 (6th Cir. 1996)(applying the burden shifting framework from the Title VII cases to a Title IX case, and finding that the university had not violated Title IX where plaintiff had become pregnant during a M.A./Ph.D. program, where her condition was discussed and performance was criticized, and where she did not continue on the get a Ph.D.).

Kelley v. Board of Trustees, 35 F.3d 265 (7th Cir. 1994)(University of Illinois decision to terminate men's swimming program (which alleged discrimination), while retaining the women's swimming program did not violate Title IX).

Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991)(refusal of Catholic school to rehire teacher who was divorced and remarried).

Maquire v. Marquette University, 814 F.2d 1213 (7th Cir. 1987)(allowing university to hire only Jesuits to a position, and thereby not recognizing a claim of sexual discrimination by plaintiff, who also held views opposing the religious views of the religious group).

Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990)(holding that an ADEA remedy to a claim brought by a Methodist minister against the United Methodist Church would violate the Free Exercise Clause).

Nelson v. Temple University, 920 F. Supp. 633 (E.D. Pa. 1996) (holding that Title IX does not apply to claim against an administrator (individually) of student services at the university, based on his alleged sexual harassment of the university student).

Pime v. Loyola University of Chicago, 803 F.2d 351 (7th Cir. 1986)(upholding a hiring preference to members of a religious order as "reasonably necessary" to the normal operations of the university).

Ritter v. Mount St. Mary's College, 738 F.2d 431 (4th Cir. 1984) (unpublished opinion)(allowing an ADEA claim from an assistant college professor).

Roxas v. Presentation College, 90 F.3d 310 (11 Cir. 1996)(private church-affliated college that denied sabbatical leave to a 54 year old male, Filipino priest held to be outside of the ADEA and Title VII, despite the discrimination claim based on age, race, national origin and gender, since the college's reasons for denial of the application were legitamite, and despite the fact that two younger applicants were accepted).

Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360 (8th Cir. 1991)(disallowing an ADEA suit by a chaplain against a church-affliated hospital).

Siegal v. Truett-McConnell College, No. 94-9376 (11th Cir. 1995)(per curiam)(agreeing with the federal district court, that Truett-McConnell College had a sufficient connection to the Baptist Convention to allow the college to take advantage of Title VII's religious preference hiring exemption in terminating Jewish plaintiff).

Soriano v. Xavier University Corp., 687 F. Supp. 1188 (S.D. Ohio 1988)(deciding that the ADEA, on its face and in its legislative history, does not provide an exemption to religious institutions, especially considering the narrow reach of the ADEA).

Stouch v. Brothers of the Order of the Hermits of St. Augustine, 836 F. Supp. 1134 (E.D. Pa. 1993)(Applying the ADEA to the Order's chef, as culinary concerns do not require entanglement into the Order's religious doctrine).

Vigars v. Valley Christian Ctr., 805 F. Supp. 802 (N.D. Cal. 1992)(school librarian that had become pregnant out of wedlock terminated).

Weissman v. Congregation Shaare Emeth, 839 F. Supp. 680 (E.D. Mo. 1993)(refusing to apply the ADEA, where a Jewish temple administator claimed discrimination from the Congregation that discharged him).