APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant (09-1134),

CHERYL PERICH,
Intervenor Plaintiff-Appellant (09-1135),

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant-Appellee.

Nos. 09-1134/1135

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 07-14124—Patrick J. Duggan, District Judge.

Argued: October 6, 2009

Decided and Filed: March 9, 2010

Before: GUY, CLAY, and WHITE, Circuit Judges.

COUNSEL

ARGUED: Dori K. Bernstein, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., James E. Roach, VERCRUYSSE MURRAY & CALZONE PC, Bingham Farms, Michigan, for Appellants. Deano C. Ware, DEANO C. WARE, P.C., Redford, Michigan, for Appellee.

ON BRIEF: Dori K. Bernstein, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., James E. Roach, VERCRUYSSE MURRAY & CALZONE PC, Bingham Farms, Michigan, for Appellants. Deano C. Ware, DEANO C. WARE, P.C., Redford, Michigan, for Appellee.

CLAY, J., delivered the opinion of the court, in which GUY, J., joined. WHITE, J. (pp. 19-22), delivered a separate concurring opinion.

OPINION

CLAY, Circuit Judge. Plaintiffs, Equal Employment Opportunity Commission ("EEOC") and Cheryl Perich, appeal from the district court's order granting summary judgment in favor of Defendant Hosanna-Tabor Evangelical Lutheran Church and School ("Hosanna-Tabor") in this action alleging discrimination in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12117(a) (the "ADA"). For the reasons set forth below, we **VACATE** the district court's order and **REMAND** the case for further proceedings consistent with this opinion.

BACKGROUND

This case arises out of Perich's employment relationship with Hosanna-Tabor, which terminated

Perich from her teaching position on April 11, 2005. Hosanna-Tabor, an ecclesiastical corporation affiliated with the Lutheran Church-Missouri Synod (the "LCMS"), operates a church and school in Redford, Michigan. The school teaches kindergarten through eighth grades. The faculty consists of two types of teachers: (1) "lay" or "contract" teachers, and (2) "called" teachers. Contract teachers are hired by the Board of Education for one-year renewable terms of employment. Called teachers are hired by the voting members of the Hosanna-Tabor church congregation upon the recommendation of the Board of Education, Board of Elders, and Board of Directors. Called teachers are hired on an open-ended basis and cannot be summarily dismissed without cause. They can also apply for a housing allowance on their income taxes provided that they are conducting activities "in the exercise of the ministry." (Dist. Ct. R.E. 25 Ex. Q).

To be eligible for a "call," a teacher must complete the colloquy classes required by the LCMS, which focus on various aspects of the Christian faith. After completing the colloquy, a teacher receives a certificate of admission into the teaching ministry, and the Michigan District of the LCMS places the teacher's name on a list that can be accessed by schools that need teachers. Once selected by a congregation, a called teacher receives the title of "commissioned minister."

In July 1999, Hosanna-Tabor hired Perich as a contract teacher to teach kindergarten on a one year contract from August 15, 1999 to June 15, 2000. After Perich completed the required colloquy classes at Concordia College in February 2000, Hosanna-

Tabor hired Perich as a called teacher on March 29, 2000. Perich continued teaching kindergarten until the end of the 2002-2003 year. She taught fourth grade during the 2003-2004 school year, and she was assigned to teach third and fourth grades for the 2004-2005 school year. From the time she was hired as a called teacher until her termination, Perich was listed as a commissioned minister in the LCMS. At least once during her tenure, Perich claimed the housing allowance on her income taxes.

After Perich was hired as a called teacher, her employment duties remained identical to the duties she performed as a contract teacher. Perich taught math, language arts, social studies, science, gym, art, and music. Language arts instruction included reading, English, spelling, and handwriting. Music instruction included secular music theory and playing the recorder, using the same music book as the local public school. During the 2003-2004 school year, Perich taught computer training as well.

Perich also taught a religion class four days per week for thirty minutes, and she attended a chapel service with her class once a week for thirty minutes. Approximately twice a year, Perich led the chapel service in rotation with other teachers. Perich also led each class in prayer three times a day for a total of approximately five or six minutes. During her final year at Hosanna-Tabor, Perich's fourth grade class engaged in a devotional for five to ten minutes each morning. In all, activities devoted to religion consumed approximately forty-five minutes of the seven hour school day.

Hosanna-Tabor's website indicates that the school provides a "Christ-centered education" that helps

parents by "reinforcing bible principals [sic] and standards." Hosanna- Tabor describes its staff members as "fine Christian role models who integrate faith into all subjects." Perich valued the freedom a sectarian school afforded to "bring God into every subject taught in the classroom." (Dist. Ct. R.E. 37 Ex. 1 ¶ 23). However, Perich taught secular subjects using secular textbooks commonly used in public schools, and she can only recall two instances in her career when she introduced religion into secular subjects.

Furthermore, Hosanna-Tabor does not require teachers to be called or even Lutheran. Non-Lutheran teachers have identical responsibilities as Lutheran teachers, including teaching religion classes and leading chapel service. Members of the custodial staff and at least one teacher who worked at Hosanna-Tabor were not Lutheran.

At a church golf outing in June 2004, Perich suddenly became ill and was taken to the hospital. She underwent a series of medical tests to determine the cause. Perich's doctors had not reached a definitive diagnosis by August, and Hosanna-Tabor administrators suggested that Perich apply for a disability leave of absence for the 2004-2005 school year. The principal of Hosanna-Tabor, Stacy Hoeft, informed Perich that she would "still have a job with [Hosanna-Tabor]" when she regained her health. (Dist. Ct. R.E. 24 Ex. 6). Perich agreed to take a disability leave and did not return to work at the beginning of the 2004-2005 school year. Throughout her leave, Perich regularly provided Hoeft with updates about her condition and progress.

On December 16, 2004, Perich informed Hoeft by email that her doctor had confirmed a diagnosis of narcolepsy and that she would be able to return to work in two to three months once she was stabilized on medication. On January 19, 2005, Hoeft asked Perich to begin considering and discussing with her doctor what she might be able to do upon return. Perich responded the same day that she had discussed her work day and teaching responsibilities with her doctor, and he had assured her that she would be fully functional with the assistance of medication. Perich reiterated this sentiment with additional explanation on January 21, 2005.

Also on January 21, 2005, Hoeft informed Perich that the school board intended to amend the employee handbook to request that employees on disability for more than six months resign their calls to allow Hosanna-Tabor to responsibly fill their positions. Such resignations would not necessarily prevent reinstatement of these employees' calls upon their return to health. Perich had been on disability for more than five months when she received this email.

On January 27, 2005, Perich wrote to Hoeft that she would be able to return to work between February 14 and February 28, 2005. Hoeft responded with surprise, because Perich had indicated a few days before that she had been unable to complete her disability forms because of her condition. Hoeft expressed concern that Perich' s condition would jeopardize the safety of the students in her care. Hoeft also indicated that Perich would not be teaching the third and fourth grades upon return, because the substitute teacher had a contract

that ran through the end of the school year.[1] Furthermore, she indicated that the third and fourth grade students had already had two teachers that year and having a third would not provide a good learning environment for them.

Three days later, at the annual congregational "shareholder" meeting, Hoeft and the school board expressed their opinion that it was unlikely that Perich would be physically capable of returning to work that school year or the next. Consequently, the congregation adopted the Board's proposal to request that Perich accept a peaceful release agreement wherein Perich would resign her call in exchange for the congregation paying for a portion of her health insurance premiums through December 2005. On February 7, 2005, the Board selected Chairman Scott Salo to discuss this proposal with Perich.

On February 8, 2005, Perich's doctor gave her a written release to return to work without restrictions on February 22, 2005. The next day Salo contacted Perich to discuss her employment. Perich instead requested to meet with the entire school board. At the meeting on February 13, 2005, the Board presented the peaceful release proposal, and Perich responded by presenting her work release note. The Board continued to express concerns about Perich's

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[1] In November 2004, the Board of Directors began making plans to fill Perich's position. The Board first decided to combine three grades into one classroom with one teacher and one part time teaching assistant. In response to teacher and parent complaints concerning the stress of teaching three grades with one teacher, the Board hired a long-term substitute for Perich. Hoeft notified Perich of the Board's decision on January 10, 2005.

ability to supervise students for the entire day. Perich explained that, as of her doctor's release on February 22, 2005, she would no longer be eligible for disability coverage and would be required to return to work. The Board, however, continued to request that Perich resign and asked her to respond to the peaceful release proposal by February 21, 2005.

Shortly after 9:00 p.m. on February 21, 2005, Perich emailed Hoeft to confirm that she had decided not to resign from her position and that she planned to return to work in the morning. When Perich reported to work on February 22, 2005, the school did not have a job for her. Because the school handbook states that failure to return to work on the first day following the expiration of an approved medical leave may be considered a voluntary termination, Perich refused to leave school grounds until she received a letter acknowledging that she appeared for work. Perich received a letter signed by Hoeft and Salo, which said that Perich had provided improper notification of her return to work and asked that she continue her leave to allow the congregation a chance to develop a possible plan for her return. Perich took the letter and left the premises.

Later that day, Perich spoke with Hoeft over the phone. Hoeft told Perich that she would likely be fired, and Perich told Hoeft that she would assert her legal rights against discrimination if they were unable to reach a compromise. Perich asked Hoeft to transmit that information to the Board. Perich also sent Hoeff an email stating that her doctor had reaffirmed that she was healthy and ready to return to work. Following the Board's meeting on February 22, 2005, Salo sent Perich a letter describing Perich's

conduct as "regrettable" and indicating that the Board would review the process of rescinding her call based on her disruptive behavior. (Dist. Ct. R.E. 22 Ex. B).

On March 19, 2005, Salo sent Perich a follow-up letter stating that, based on Perich's insubordination and disruptive behavior on February 22, 2005, the Board would request rescinding Perich's call at the next voter's meeting on April 10, 2005. The letter also stated that Perich had "damaged, beyond repair" her working relationship with Hosanna-Tabor by "threatening to take legal action," and it laid out the voting procedure by which the congregation could depose a called minister. (Dist. Ct. R.E. 24 Ex. 1). Finally, the letter again proposed the peaceful release offer and gave Perich until April 8, 2005 to accept the offer.

On March 21, 2005, Perich's lawyer sent a letter to Hosanna-Tabor's lawyer stating that Hosanna-Tabor's actions amounted to unlawful discrimination. The letter asked Hosanna-Tabor to respond seeking an amicable resolution to the matter, or else Perich would be forced to bring a lawsuit or file a complaint with the EEOC. On April 10, 2005, the congregation voted to rescind Perich's call. The next day, Salo informed Perich of her termination.

On May 17, 2005, Perich filed a charge of discrimination and retaliation with the EEOC alleging that Hosanna-Tabor had discriminated and retaliated against her in violation of her rights under the ADA. On September 28, 2007, the EEOC filed a complaint against Hosanna-Tabor in the United States District Court for the Eastern District of Michigan alleging one count of retaliation in

violation of the ADA. Perich moved to intervene on March 11, 2008; she was granted leave and filed her own complaint on April 10, 2008, which added a cause of action under Michigan's Persons with Disabilities Civil Rights Act, M.C.L. §37.1201(b) (the "PDCRA"). Perich and Hosanna-Tabor each filed motions for summary judgment on July 15, 2008. On October 23, 2008, the district court granted summary judgment in favor of Hosanna-Tabor, dismissing the claim on the grounds that the court could not inquire into her claims of retaliation because they fell within the "ministerial exception" to the ADA. Perich timely sought reconsideration pursuant to Federal Rule of Civil Procedure 59(e) on November 6, 2008, which was denied on December 3, 2008. Perich and the EEOC timely filed notices of appeal on January 30, 2009.

DISCUSSION

I. Standard of Review

This Court reviews *de novo* a district court's order of dismissal for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). See *Hollins v. Methodist Healthcare, Inc.,* 474 F.3d 223, 225 (6th Cir. 2007) (citing *Moir v. Greater Cleveland Reg 'l Transit Auth.,* 895 F.2d 266, 269 (6th Cir. 1990)). Although the district court issued its decision in the context of a summary judgment motion, the court dismissed Perich's claim based on a lack of subject matter jurisdiction and did not reach the merits of the claim. In addition, this Circuit has treated the "ministerial exception" as jurisdictional in nature and an appropriate ground for a motion to dismiss pursuant to Rule 12(b)(1). *See id. See also Rweyemamu v. Cote,* 520 F.3d 198, 206 (2d Cir. 2008)

(noting that the circuits have taken different approaches in applying the ministerial exception, with the Third, Tenth, Ninth, and First Circuits treating the exception as an affirmative defense under Rule 1 2(b)(6),[2] the Sixth and Seventh Circuits interpreting the exception as jurisdictional under Rule 12(b)(1),[3] and the Eleventh and Fifth Circuits treating it as a mandate to interpret the discrimination laws not to apply to claims between ministers and their churches[4]). Accordingly, this Court should review the claim using the same analysis as it does for an order entered pursuant to Rule 12(b)(1).

In response to a Rule 12(b)(1) motion, the plaintiff bears the burden of proving jurisdiction. *Hollins,* 474 F.3d at 225. Furthermore, "unlike Rule 12(b)(6) analysis, under which the existence of genuine issues of material fact warrants denial of the motion to dismiss, 'the court is empowered to resolve factual disputes when subject matter jurisdiction is challenged.'" *Id.* (quoting *Moir,* 895 F.2d at 269). If the district court makes its jurisdictional ruling based on the resolution of both legal and factual disputes, this Court reviews the legal findings under

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[2] *See, e.g.*, *Petruska v. Gannon Univ.,* 462 F.3d 294, 302 (3d Cir. 2006); *Bryce v. Episcopal Church in the Diocese*, 289 F.3d 648, 654 (10th Cir. 2002); *Bollard v. Cal. Province of the Soc 'y of Jesus,* 196 F.3d 940, 951 (9th Cir. 1999); *Natal v. Christian & Missionary Alliance,* 878 F.2d 1575, 1578 (1st Cir. 1989).

[3] *See. e.g.*, *Hollins,* 474 F.3d at 225; *Tomic v. Catholic Diocese of Peoria,* 442 F.3d 1036, 1039 (7th Cir. 2006).

[4] *See, e.g.*, *Gellington v. Christian Methodist Episcopal Church, Inc.,* 203 F.3d 1299, 1302-04 (11th Cir. 2000); *McClure v. Salvation Army,* 460 F.2d 553, 560 (5th Cir. 1972).

a *de novo* standard and the factual findings under a clearly erroneous standard. *See Gordon v. Gorno Bros., Inc.,* 410 F.3d 879, 881 (6th Cir. 2005); *RMI Titanium Co. v. Westinghouse Elec. Corp.,* 78 F.3d 1125, 1135 (6th Cir. 1996).

Perich argues that no facts relevant to the determination of subject matter jurisdiction were in dispute and, thus, this Court should review *de novo* all of the district court's findings. Hosanna-Tabor argues the district court made a number of factual findings in determining that the court had no subject matter jurisdiction, including Hosanna-Tabor's status as a "religious institution" and Perich's status as a "minister" and "ministerial employee." Thus, according to Hosanna-Tabor, this Court should review these factual findings under the clearly erroneous standard.

The district court made both factual and legal findings in determining whether the court had subject matter jurisdiction. The district court's determinations concerning Perich's primary duties throughout her work day were factual. Accordingly, this Court must accept these factual findings unless they are clearly erroneous. *See EEOC v. Sw. Baptist Theological Seminary,* 651 F.2d 277, 283 (5th Cir. 1981) (indicating that the district court's factual findings in support of its decision of which employees are ministers "must be accepted unless clearly erroneous"). However, its decision as to whether Perich classified as a ministerial employee remains a legal conclusion subject to *de novo* review. See *Starkman v. Evans,* 198 F.3d 173, 176 (5th Cir. 1999) ("[t]he status of employees as ministers . . . remains a legal conclusion for this court").

II. The ADA's Application to Religious Organizations

The ADA generally prohibits an employer with fifteen or more employees from discriminating against a qualified individual with a disability on the basis of that disability in regard to all conditions of employment. *See* 42 U.S.C. § 12111(5), § 12112(a). The retaliation provision of the ADA prohibits employers from "discriminat[ing] against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge . . . under [the ADA]." 42 U.S.C. § 12203(a).[5] Title I of the ADA includes an exception–known as the "ministerial exception"–which allows religious entities to give "preference in employment to individuals of a particular religion" and to "require that all applicants and employees conform to the religious tenants of such organization." 42 U.S.C. § 12113(d).

However, the legislative history makes clear that Congress intended the ADA to broadly protect employees of religious entities from retaliation on the job, subject only to a narrowly drawn religious exemption. The House Report provides the following illustrative hypothetical example:

> [A]ssume that a Mormon organization wishes to hire only Mormons to perform certain jobs. If a

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[5] Perich also brought a claim under the PDCRA, a Michigan law which essentially tracks the ADA. Resolution of a plaintiff's ADA claim would generally resolve her PDCRA claim as well. *See Cassidy v. Detroit Edison Co.,* 138 F.3d 629, 634 n.3 (6th Cir. 1998). In view of how closely the anti- retaliation provision of the PDCRA tracks the anti-retaliation provision of the ADA, resolving Perich's ADA claim also resolves her PDRCA claim.

> person with a disability applies for the job, but is not a Mormon, the organization can refuse to hire him or her. However, if two Mormons apply for a job, one with a disability and one without a disability, the organization cannot discriminate against the applicant with the disability because of that person's disability.

H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 76-77 (1990). *See also* 29 C.F.R. Pt. 1630, App. § 1630.16(a) ("Religious organizations are not exempt from title I of the ADA or [these regulations]. A religious [entity] may give a preference in employment to individuals of the particular religion, and may require that applicants and employees conform to the religious tenants of the organization. However, a religious organization may not discriminate against an individual who satisfies the permitted religious criteria because that individual is disabled. The religious entity, in other words, is required to consider qualified individuals with disabilities who satisfy the permitted religious criteria on an equal basis with qualified individuals without disabilities who similarly satisfy the religious criteria.").

III. The Ministerial Exception

The ministerial exception is rooted in the First Amendment's guarantees of religious freedom. *Hollins,* 474 F.3d at 225.

A. Interference in Church Governance

As applied by this Circuit, the doctrine "precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees, based on the institution's constitutional right to be free from

judicial interference in the selection of those employees." *Id. See generally Serbian E. Orthodox Diocese for the United States & Can. v. Milivojevic,* 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976); *Lewis v. Seventh Day Adventists Lake Region Conference,* 978 F.2d 940 (6th Cir. 1992).

As the Fifth Circuit noted in *McClure v. Salvation Army*, one of the first cases to analyze the ministerial exception, "[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose." 460 F.2d at 55 8-59. *See also Rayburn v. Gen. Conference of Seventh-Day Adventists,* 772 F.2d 1164, 1167-68 (4th Cir. 1985) ("The right to choose ministers without government restriction underlies the well-being of religious community . . . for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrine both to its own membership and to the world at large.").

While the ministerial exception was first applied in the context of suits brought against religious employers under Title VII, see *McClure*, 460 F.2d at 560, the exception has been extended to suits brought against religious employers under the ADA.[6] *See, e.g., Hollins,* 474 F.3d at 225; *Werft* v. *Desert Sw. Annual Conference of United Methodist Church,* 377 F.3d 1099, 1100 (9th Cir. 2004); *Starkman,* 198 F.3d at 175.

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[6] Courts have also extended the ministerial exception to suits brought under the ADEA, the common law, and state law. *See Hollins*, 474 F.3d at 225 (citing cases).

For the ministerial exception to bar an employment discrimination claim, two factors must be present: (1) the employer must be a religious institution, and (2) the employee must be a ministerial employee. *Hollins,* 474 F.3d at 225.

To qualify as a religious institution under the first prong, the employer need not be a traditional religious organization, such as a church, diocese, or synagogue, nor must it be an entity operated by a traditional religious organization. *Id.* Rather, a religiously affiliated entity is considered a religious institution if its "mission is marked by clear or obvious religious characteristics." *Id.* at 226 (citing *Shaliehsabou* v. *Hebrew Home of Greater Wash., Inc.,* 363 F.3d 299, 310 (4th Cir. 2004)). This Circuit has applied the ministerial exception to a religiously affiliated hospital, and it has explicitly approved of applying the doctrine to religiously affiliated schools and corporations. *Id.* at 225.

To determine whether an employee is ministerial under the second prong, this Circuit has instructed courts to look at the function, or "primary duties" of the employee.[7] *Id.* at 226 (applying the exception to a resident in a Methodist Hospital's clinical pastoral education program). As a general rule, an employee

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[7] At least one other circuit has found that this approach is too rigid, adopting a standard that considers both the employee's primary function and the nature of the dispute to determine whether analyzing the claim would entangle the court in religious doctrinal disputes. *Rweyemamu,* 520 F.3d at 208. However, this Circuit has adopted a standard that focuses on the primary duties of the employee to determine whether that employee should be classified as ministerial. See *Hollins,* 474 F.3d at 226.

is considered a minister if "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." Id. (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations,* 79 COLUM. L. REV. 1514, 1545 (1979)). *See also Rayburn,* 772 F.2d at 1169. In extending the ministerial exception beyond ordained ministers, this Circuit has instructed courts to look at the function of the plaintiff's employment position rather than the fact of ordination. *Hollins,* 474 F.3d at 226. Other circuits have further instructed that courts must "determine whether a position is important to the spiritual and pastoral mission of the church." *See, e.g., Rayburn,* 772 F.2d at 1169.

The parties in the instant case do not dispute that "religious institutions" include religiously affiliated schools and that Hosanna-Tabor meets this requirement. Thus, the first requirement under the ministerial exception is present, and the primary issue is whether Perich served as a ministerial employee.

The question of whether a teacher at a sectarian school classifies as a ministerial employee is one of first impression for this Court. However, the overwhelming majority of courts that have considered the issue have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception. *See, e.g., Redhead v. Conference of Seventh Day Adventists,* 440 F. Supp. 2d 211, 221-222 (E.D.N.Y. 2006) (holding that a

teacher at a Seventh Day Adventist elementary school does not classify as a ministerial employee because her teaching duties were primarily secular and her daily religious duties "were limited to only one hour of Bible instruction per day"); *Guinan v. Roman Catholic Archdiocese of Indianapolis,* 42 F. Supp. 2d 849, 854 (S. D. Ind. 1998) (holding that a fifth grade teacher who taught at least one class in religion per term and organized Mass once a month at a religious elementary school was not a ministerial employee); *DeMarco v. Holy Cross High Sch.,* 4 F.3d 166, 172 (2d Cir. 1993) (holding that applying the ADEA to a math teacher at a religious high school would not result in excessive entanglement under the Establishment Clause); *Dole v. Shenandoah Baptist Church,* 899 F.2d 1389, 1392, 1397 (4th Cir. 1990) (holding that teachers at a religious school who integrated biblical material into traditional academic subjects should be considered lay teachers for purposes of the ministerial exception); *EEOC v. Fremont Christian Sch.,* 781 F.2d 1362, 1370 (9th Cir. 1986) (holding that teachers at a church owned and operated school do not fulfill the function of a ministerial employee). *But see Clapper* v. *Chesapeake Conference of Seventh Day Adventists,* No. 97 CV 2648, 1998 WL 904528, at *1, 7 (Dec. 29, 1998) (holding that a former elementary school teacher at a school whose primary purpose was the salvation of each student's soul through indoctrination into Seventh Day Adventist theological beliefs classified as a ministerial employee).

By contrast, when courts have found that teachers classify as ministerial employees for purposes of the exception, those teachers have generally taught primarily religious subjects or had a

central role in the spiritual or pastoral mission of the church. *See, e.g., EEOC v. Catholic Univ. of Am.,* 83 F.3d 455, 463-65 (D.C. Cir. 1996) (holding that a nun whose primary duties were to teach canonical law at Catholic University and who was "entrusted with instructing students in the 'fundamental body of ecclesiastical laws' that governs the Church's sacramental life, defines the rights and duties of its faithful and the responsibilities of their pastors, and guides its administration" was a ministerial employee); *Sw. Baptist,* 651 F.2d at 283-84 (holding that seminary faculty were ministerial employees given that they served as "intermediaries between the [Baptist] Convention and the future ministers of many local Baptist churches," "instructed the seminarians in the 'whole of religious doctrine,' and [taught] only religious oriented courses").

The district court's factual determinations concerning Perich's primary duties throughout her work day were not clearly erroneous. The record supports the finding that Perich's employment duties were identical when she was a contract teacher and a called teacher and that she taught math, language arts, social studies, science, gym, art, and music using secular textbooks. Furthermore, the record indicates that Perich taught a religion class four days per week for thirty minutes and that she attended a chapel service with her class once a week for thirty minutes. Perich also led each class in prayer three times a day for a total of approximately five or six minutes. The record also indicates that Perich seldom introduced religion during secular discussions. Approximately twice a year, Perich led the chapel service in rotation with other teachers. However, teachers leading chapel or teaching

religion were not required to be called or even Lutheran, and, in fact, at least one teacher was not. In all, the record supports the district court's finding that activities devoted to religion consumed approximately forty- five minutes of the seven hour school day.

However, given these factual findings relating to Perich's primary duties, the district court erred in its legal conclusion classifying Perich as a ministerial employee. Perich spent approximately six hours and fifteen minutes of her seven hour day teaching secular subjects, using secular textbooks, without incorporating religion into the secular material. *Cf. Clapper,* 1998 WL 904528, at *2 (finding that an elementary school teacher's primary duties were religious where he taught the Bible's story of creation in science class and the influence of religion on the events of history in social studies class). Thus, it is clear that Perich's primary function was teaching secular subjects, not "spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Hollins,* 474 F.3d at 226. (internal citation omitted) *See also EEOC v. Miss. Coll.,* 626 F.2d 477, 485 (5th Cir. 1980) ("The College's faculty and staff do not function as ministers. The faculty members are not intermediaries between a church and its congregation. They neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine.").

The fact that Perich participated in and led some religious activities throughout the day does not make her primary function religious. *See Guinan,* 42 F. Supp. 2d at 852 (finding that although the teacher

did participate in some religious activities, "it cannot be fairly said that she functioned as a minister or a member of the clergy"). This is underscored by the fact that teachers were not required to be called or even Lutheran to conduct these religious activities, and at least one teacher at Hosanna-Tabor was not Lutheran. *See* at 852-53 ("the secular nature of [the teacher's] position is underscored by the fact that [the church] did not require teachers at [the school] to be Catholic, and, as a matter of fact, some were not Catholic").

In addition, that Hosanna-Tabor has a generally religious character–as do all religious schools by definition–and characterizes its staff members as "fine Christian role models" does not transform Perich's primary responsibilities in the classroom into religious activities. *See Miss. Coll.,* 626 F.2d at 485 ("That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern."). This is underscored by the fact that Perich can only recall twice in her career when she introduced the topic of religion during secular discussions.[8] *Cf. Clapper,* 1998 WL 904528, at *7 (finding that an elementary school teacher's primary duties were religious where the academic curriculum in traditionally secular subjects "incorporate[d] the teachings of the Seventh-day

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[8] While Defendant cites a quote from Perich in which she says that the educational ministry is special "because the teacher can bring God into every subject," the record supports the district court's finding that only twice did Perich bring religion into otherwise secular subjects.

Adventist Church whenever possible"). Similarly, Perich's extra religious training as a result of completing her colloquy did not affect the duties she performed in the classroom on a daily basis. *See Guinan,* 42 F. Supp. 2d at 850 (finding that a teacher whose training as a Catechist permitted her to teach religion classes was not a ministerial employee).

In finding that Perich was a ministerial employee, the district court relied largely on the fact that Hosanna-Tabor gave Perich the title of commissioned minister and held her out to the world as a minister by bestowing this title upon her. However, the *title* of commissioned minister does not transform the *primary duties* of these called teachers from secular in nature to religious in nature. *See Sw. Baptist,* 651 F.2d at 285 (holding that certain employees, "though considered ministers by the Seminary, are not ministers" under the ministerial exception). The governing primary duties analysis requires a court to objectively examine an employee's actual job function, not her title, in determining whether she is properly classified as a minister. In this case, it is clear from the record that Perich's primary duties were secular, not only because she spent the overwhelming majority of her day teaching secular subjects using secular textbooks, but also because nothing in the record indicates that the Lutheran church relied on Perich as the primary means to indoctrinate its faithful into its theology. *See Clapper,* 1998 WL 904528, at *7 (warning that courts should examine not only the relative quantity of time an employee spends on religious versus secular activities, but also "the degree of the church entity's reliance upon such employee to indoctrinate persons into its theology"). By contrast, in *Clapper,* the

defendant schools envisioned their teachers as having a primarily religious role. The teachers were required to be "tithe paying members of the Seventh-day Adventist Church and are expected to participate in church activities, programs, and finances." See *Clapper,* 1998 WL 904528, at *2. The Fourth Circuit observed that "[t]he purpose of this requirement is obvious–the Chesapeake Conference desires to insure that the minds of its youth are shaped by model members of the Seventh-day Adventist faith." *Id.* at *7.

Furthermore, the district court in the instant case found that the primary duties of called teachers are identical to those of contract teachers, who do not have the title of minister, and at least one contract teacher who taught at the school was not Lutheran. Given the undisputed evidence that all teachers at Hosanna-Tabor were assigned the same duties, a finding that Perich is a "ministerial" employee would compel the conclusion that all teachers at the school–called, contract, Lutheran, and non-Lutheran–are similarly excluded from coverage under the ADA and other federal fair employment laws. However, the intent of the ministerial exception is to allow religious organizations to prefer members of their own religion and adhere to their own religious interpretations. Thus, applying the exception to non-members of the religion and those whose primary function is not religious in nature would be both illogical and contrary to the intention behind the exception.

B. Interpretation of Church Doctrine

In addition to being motivated by the concern of government interference in church governance, the

ministerial exception is also motivated by the concern "that secular authorities would be involved in evaluating or interpreting religious doctrine." *Tomic,* 442 F.3d at 1039 (quoting *Combs v. Central Texas Annual Conference of United Methodist Church,* 173 F.3d 343, 350 (5th Cir. 1999)).

In the instant case, Hosanna-Tabor has attempted to reframe the underlying dispute from the question of whether Hosanna-Tabor fired Perich in violation of the ADA to the question of whether Perich violated church doctrine by not engaging in internal dispute resolution. However, contrary to Hosanna-Tabor's assertions, Perich's claim would not require the court to analyze any church doctrine; rather a trial would focus on issues such as whether Perich was disabled within the meaning of the ADA, whether Perich opposed a practice that was unlawful under the ADA, and whether Hosanna-Tabor violated the ADA in its treatment of Perich. As Plaintiff notes, the LCMS personnel manual, which includes EEOC policy, and the Governing Manual for Lutheran Schools clearly contemplate that teachers are protected by employment discrimination and contract laws. In addition, none of the letters that Hosanna-Tabor sent to Perich throughout her termination process reference church doctrine or the LCMS dispute resolution procedures.

Furthermore, this Court would not be precluded from inquiring into whether a doctrinal basis actually motivated Hosanna-Tabor's actions. *See, e.g., Geary v. Visitation of Blessed Virgin Mary Parish Sch.,* 7 F.3d 324, 329 (3d Cir. 1993) (finding that the First Amendment did not preclude the court from "determin[ing] whether the religious reason

stated by [the school] actually motivated the dismissal"); *DeMarco,* 4 F.3d at 171 (noting that a court can conduct an "inquiry . . . directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action" without "calling into question the value or truthfulness of religious doctrine").

CONCLUSION

Because the ministerial exception does not bar Perich's claims against Hosanna- Tabor, we **VACATE** the district court's order entering summary judgment on behalf of Defendant and **REMAND** with instructions that the district court make a finding on the merits of Perich's retaliation claim under the ADA.

CONCURRENCE

HELENE N. WHITE, Circuit Judge, concurring. I agree that the ministerial exception[1] does not bar this ADA action. I write separately because I read the relevant cases as more evenly split than does the majority.

As the majority notes, whether a teacher at a sectarian school is properly characterized as a ministerial employee is an issue of first impression for this Court.[2] A number of courts have concluded

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[1] It is worth clarifying that "the ministerial exception" is fundamentally distinct from the statutory exceptions in federal antidiscrimination laws like the ADA and Title VII. See Douglas Laycock, *A Syllabus of Errors,* 105 Mich. L. Rev. 1169, 1181-82 (2007) (book review). The statutory exception to the ADA allows religious entities to "giv[e] preference in employment to individuals of a particular religion" and to "require that all applicants and employees conform" to the organization's religious tenets. 42 U.S.C. § 12113(d). The statutory exception only covers religious discrimination, but it applies to any employee of a religious entity. *See* Laycock at 1182. In contrast, the ministerial exception is a separate judge-made exception rooted in the First Amendment designed to allow religious organizations to hire and fire religious leaders according to any criteria they choose. *See id.* at 1181; *Hollins v. Methodist Healthcare, Inc.,* 474 F.3d 223, 225 (6th Cir. 2007). The ministerial exception is broad – it covers any kind of discrimination – but applies only to religious leaders, or those whose duties are "ministerial." *See* Laycock at 1182.

[2] Courts have struggled in determining the proper application of the ministerial exception to teachers at religious schools. A student note points out that application of the primary-duties test has created split authority in several areas, including regarding parochial school teachers. *See* Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test,* 121 Harv. L. Rev. 1776, 1788 (2008). And several courts have recognized the lack of uniformity in this

that parochial school teachers are not ministerial employees for purposes of the exception. *See, e.g., DeMarco v. Holy Cross High Sch.,* 4 F.3d 166, 171-72 (2d Cir. 1993); *EEOC v. Fremont Christian Sch.,* 781 F.2d 1362, 1370 (9th Cir. 1986); *Redhead v. Conf. of Seventh-Day Adventists,* 440 F. Supp. 2d 211, 22 1-22 (E.D.N.Y. 2006); *Guinan v. Roman Catholic Archdiocese of Indianapolis,* 42 F. Supp. 2d 849, 852-54 (S.D. Ind. 1998); see also *Dole v. Shenandoah Baptist Church,* 899 F.2d 1389, 1396-97 (4th Cir. 1990).[3] In contrast, courts have found teachers to be ministerial employees where the teachers have

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area. *See Rweyemamu v. Cote,* 520 F.3d 198, 208 (2d Cir. 2008) ("Circuit courts applying the ministerial exception have consistently struggled to decide whether or not a particular employee is functionally a 'minister.'"); *Coulee Catholic Sch. v. Labor and Indus. Rev. Comm.,* 768 N.W.2d 868, 881 (Wis. 2009) (explaining contrasting ways in which courts have interpreted primary-duties test); *Weishuhn v. Catholic Diocese of Lansing,* 756 N.W.2d 483, 492-93 (Mich. App. 2008) (listing cases in which ministerial exception has been applied to teachers, and cases in which it has not). *See also* Petition for Writ of Certiorari, *Archdiocese of Washington v. Moersen,* 128 S. Ct. 1217, 2007 WL 2681957 at *15 (No. 07-0323) (Sept. 7, 2007) ("teachers at church-related schools have been included within the ministerial exception by some courts and excluded by others"). The Supreme Court has declined to weigh in on the issue. See *Moersen,* 128 S. Ct. 1217 (2008) (mem.); *The Ministerial Exception, supra,* at 1776 n.3 (noting certiorari denials in 2006 and 2007).

[3] The majority cites *Dole* for the original proposition that parochial school teachers are not ministerial employees for purposes of the ministerial exception. However, *Dole* addresses whether a specific statutory exception applies. See *id.* at 1396-97. (evaluating whether teachers are ministers for purposes of statutory exception from the definition of "employees" in the Fair Labor Standards Act).

taught religious subjects and/or had a key role in the religious mission of the church. *See Clapper v. Chesapeake Conference of Seventh Day Adventists,* 166 F.3d 1208, 1998 WL 904528, at *1, 7 (4th Cir. Dec. 29, 1998) (unpublished); *EEOC v. Catholic Univ. of Am.,* 83 F.3d 455, 463-65 (D.C. Cir. 1996); *EEOC v. Southwestern Baptist Theological Seminary,* 651 F.2d 277, 283-84 (5th Cir. 1981); *Coulee Catholic Sch. v. Labor and Indus. Rev. Comm.,* 768 N.W.2d 868 (Wis. 2009).

Of these cases, four present situations similar to that here — plaintiff teachers who taught primarily secular subjects at a religious school and court decisions turning on a primary-duties analysis. Two plaintiffs were not found to be ministerial employees. *See Redhead,* 440 F. Supp. 2d at 22 1-22 (teacher at Seventh-day Adventist elementary school teaching secular subjects and daily Bible study not a ministerial employee because teaching duties were "primarily secular" and religious duties "were limited to only one hour of Bible instruction per day and attending religious ceremonies with students only once per year"); *Guinan,* 42 F. Supp. 2d at 852-53 (fifth-grade teacher teaching mostly secular courses along with one class in religion and organized Mass once a month not a ministerial employee; secular nature of the teaching position demonstrated by the fact that some teachers were not Catholic). Two plaintiffs were found to be ministerial employees. *See Clapper,* 1998 WL 904528, at *1, *7 (elementary school teacher teaching traditional academic curriculum who also led students in prayer and taught the Bible on a daily basis is a ministerial employee; court rejected argument that only one of teacher's thirteen responsibilities was explicitly

religious, relying on the fact that the church's code made clear that the "the primary purpose of the Seventh-day Adventist elementary education" is the redemption of students' souls through belief in and adherence to Seventh-day Adventist beliefs); *Coulee,* 768 N.W.2d at 88 1-82 (in applying primary-duties test, state supreme court eschewed quantitative analysis of time spent on tasks in favor of functional approach focusing on whether organization has a fundamentally religious mission and how important or closely tied the employee's work is to the fundamental mission, concluding plaintiff's teaching Catholic doctrine and practice to students four days a week occupied a role "of high importance and closely linked to the mission of the school – the inculcation of a Christ-centered concept of life.").

Perich's daily duties resemble to some extent those of the plaintiffs in each of these cases, including those in which the courts found the plaintiffs' "primary duties" to be ministerial in nature. Tipping the scale against the ministerial exception in this case is that, as the majority points out, there is evidence here that the school itself did not envision its teachers as religious leaders, or as occupying "ministerial" roles. HosannaTabor's teachers are not required to be called or even Lutheran to teach or to lead daily religious activities. The fact that the duties of the contract teachers are the same as the duties of the called teachers is telling. This presence (or lack) of a predominantly religious yardstick for qualification as a teacher is a key factor in decisions finding the ministerial exception applicable and those finding it inapplicable alike. *See Clapper,* 1998 WL 904528 at *2, *7 (4th Cir. 1998) (applying ministerial exception) (noting

that teachers are required to be "tithe paying members of the Seventh-day Adventist Church and are expected to participate in church activities, programs, and finances" and "The purpose of this requirement is obvious-the Chesapeake Conference desires to insure that the minds of its youth are shaped by model members of the Seventh-day Adventist faith."); *Coulee,* 768 N.W.2d at 891 (applying ministerial exception) (court found that the plaintiff teacher was "required to live, embody, and teach Catholicism in her role as a teacher consistent with the mission of the school" where teacher was required to "engage in Catholic worship, model Catholic living, and impart Catholic teaching," even though not required to be a Catholic); *Guinan,* 42 F. Supp. 2d at 852-53 (S.D. Ind. 1998) (ministerial exception does not apply) ("the secular nature of [the teacher's] position is underscored by the fact that the Archdiocese did not require teachers at [the school] to be Catholic and, as a matter of fact, some were not Catholic.")

By this measure, even courts that have found ministerial plaintiffs who have daily schedules that have roughly the same ratio of religious to non-religious activities as Perich would find that the ministerial exception should not apply here.

For the reasons above, I concur.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant,

and

CHERYL PERICH,
Plaintiff/Intervenor,

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant.

Case No. 07-14124
Honorable Patrick J. Duggan

OPINION AND ORDER

At a session of said Court, held in the U.S. District Courthouse, Eastern District of Michigan, on October 23, 2008.

PRESENT: THE HONORABLE
PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

This action arises from Plaintiff/Intervenor Cheryl Perich's ("Perich") employment relationship with Defendant Hosanna-Tabor Evangelical Lutheran Church and School ("Hosanna-Tabor"). Hosanna-Tabor officially terminated Perich from her teaching position on April 11, 2005. On May 17, 2005, Perich filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that Hosanna-Tabor had discriminated and retaliated against her in violation of the Americans with Disabilities Act ("ADA"). The EEOC brought suit against Hosanna-Tabor for retaliation against Perich on September 28, 2007. Perich later intervened as a plaintiff raising the same federal retaliation claim as the EEOC and adding a second retaliation claim under Michigan state law. Presently before the Court are Hosanna-Tabor's motions for summary judgment on all claims as well as Perich's motion for summary judgment which has been joined by the EEOC. The motions have been fully briefed and a hearing was held on September 25, 2008. For the reasons set forth below, the Court grants Hosanna-Tabor's motions for summary judgment.

I. Factual and Procedural Background

Hosanna-Tabor is a religious school that teaches kindergarten through eighth grades. Hosanna-Tabor's faculty consists of two types of teachers: "lay" or "contract" teachers and "called" teachers. A contract teacher is hired by the Board of Education for a one year term and must renew the contract each year to continue in Hosanna-Tabor's employment. In contrast, a called teacher is hired by the voting members of the Hosanna-Tabor Lutheran Church congregation on the recommendation of the Board of Education, Board of Elders, and Board of Directors. To be eligible for a "call," a teacher must complete "colloquy" classes as required by the Lutheran Church-Missouri Synod that focus on various aspects of the Christian faith. After completing the colloquy, the teacher receives a certificate of admission into the teaching ministry and the Michigan District of the Lutheran Church-Missouri Synod will assist the teacher in finding employment by placing the teacher's name on a list of teachers that is distributed to schools in need.

Once selected by a church congregation, a called teacher obtains the title of "commissioned minister." Called teachers are hired on an open ended basis and cannot be summarily dismissed without cause. Finally, called teachers have the opportunity to claim a special housing allowance on their income taxes provided they are conducting activities "in the exercise of ministry." (Def.'s Mot. for Partial Sum. J., Ex. Q.)

In July 1999, Hosanna-Tabor hired Perich as a contract teacher to teach kindergarten for the upcoming school year. Perich had previously been employed at other Lutheran schools and had already begun pursuing her "call" by attending colloquy classes at Concordia College. Perich completed her colloquy in February 2000 and received her call from the Hosanna-Tabor Lutheran Church on March 29, 2000.[1] From then until her termination, Perich was listed as a commissioned minister in the Lutheran Church-Missouri Synod. At least once during this time, Perich claimed the housing allowance on her taxes.

After receiving her call, Perich's employment continued unchanged in form from her time as a contract teacher. During her years with Hosanna-Tabor, Perich taught math, language arts, social studies, science, gym, art, and music. In addition, Perich taught a religion class for thirty minutes a day four days a week and attended a chapel service with her class for about thirty minutes once a week. About twice a year, Perich led the chapel service in rotation with other teachers. Hosanna-Tabor does not require that teachers leading chapel or teaching religion be "called" or even Lutheran. Perich also led her classes in prayer three times a day for a total of five or six minutes and, at least during her final year as a teacher at Hosanna-Tabor, Perich's class engaged in a devotional for five to ten minutes each morning. In all, however, activities devoted to

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[1] The parties have not indicated what classes Perich took to complete her colloquy but agree that she took courses at Concordia College that satisfied the requirements for called teachers set forth by the Lutheran Church-Missouri Synod.

religion consumed only about forty-five minutes of the seven-hour school day.

Nonetheless, Hosanna-Tabor's website indicates that it provides a "Christ-centered education" that helps parents by "reinforcing biblical principals [sic] and standards." Hosanna-Tabor also characterizes its staff members as "fine Christian role models who integrate their faith into all subjects." Perich notes, however, that secular school subjects were taught with textbooks commonly used in public education and that she can only recall twice in her career when she introduced the topic of religion during otherwise secular discussion.

Perich's employment with Hosanna-Tabor went without incident for several years. In the summer of 2004, however, Perich became suddenly ill at a Hosanna-Tabor golf outing. As her doctor struggled to find the right diagnosis, Perich agreed with Hosanna-Tabor administrators that it would be best that she go on disability leave for the 20042005 school year. Perich officially went on disability leave in August. During the period she was on disability, Perich provided regular updates to Hosanna-Tabor's principal, Stacy Hoeft.

On December 16, 2004, Perich informed Hoeft via email that her doctor had finally confirmed a diagnosis of narcolepsy and that she would be able to return to work in two to four months once she was stabilized on medication. On January 10, 2005, Hoeft informed Perich of Hosanna-Tabor's decision to hire a substitute teacher to work in Perich's absence. Until that time, another teacher had been teaching three grade levels at once to cover for Perich but the arrangement was no longer feasible. In anticipation

of the 2005-2006 school year, Hoeft requested on January 19 that Perich begin considering and discussing with her doctor what she would be able to do upon return. Perich responded the same day that she would be fully functional with the assistance of medication. Perich reiterated this sentiment with additional explanation on January 21.

Also on January 21, Hoeft informed Perich of the school board's intent to amend the employee handbook to request that employees on disability for more than six months resign their calls to allow Hosanna-Tabor to responsibly fill their positions. Such resignations would not prevent employees from later pursuing reinstatement of their calls upon return to health. Perich had been on disability for over five months at the time she received this email.

On January 27 Perich informed Hoeft that she would be able to return to work between February 14 and February 28. Hoeft responded with surprise to Perich's email because, only days before, Perich had disclosed that she was unable to fill out her disability forms because of her condition. Hoeft feared that Perich's condition would jeopardize the safety of the students in her care. Hoeft also expressed concern about forcing students to adjust to a third teacher in one academic year. Three days later at a voter's meeting for the Hosanna-Tabor Church, school administrators opined that Perich would not be able to return to teaching that school year or the next. Based on this and other considerations, the congregation voted to request that Perich accept a peaceful release agreement wherein Perich would resign her call in exchange for the congregation paying for a portion of her health insurance

premiums for the remainder of the calendar year. On February 7, the school board selected Scott Salo, chairman of the board, to discuss this proposal with Perich.

On February 8 Perich's doctor gave her a written release to return to work without restrictions on February 22. The next day, Salo contacted Perich to arrange a meeting to discuss her employment. Perich instead requested to meet with the entire school board and the meeting was scheduled for February 13. At that meeting, the board presented the peaceful release proposal and Perich responded by presenting her work release note. Despite the doctor's note, the board remained concerned about Perich's ability to supervise students for an entire school day. Perich explained that she needed to return to work because, as of her doctor's release on February 22, she would no longer be eligible for disability coverage. The board, however, continued to request that Perich resign and asked her to email her decision by February 21.

Shortly after nine at night on February 21, Perich emailed Hoeft to inform her that she would not resign from her position and would be at school to resume her job in the morning. The next day there was no job for Perich to return to upon her arrival at Hosanna-Tabor. Perich, however, refused to leave school grounds until she received a letter acknowledging that she appeared for work because the Hosanna-Tabor employee handbook states that failure to return to work on the first day following the expiration of an approved medical leave is viewed as a voluntary termination. Perich subsequently received a letter from Hoeft and Salo indicating that

she had provided improper notification of her return to work and requesting that she continue her leave. Perich then left the premises.

Hoeft and Perich spoke again that day over the phone; Hoeft indicated that Perich would likely be fired and Perich indicated that she would assert her legal rights against discrimination and asked Hoeft to pass that information along to the boards. Perich also emailed Hoeft and stated that her doctor had reaffirmed that she was healthy and ready to work. In a letter dated February 22, however, the Board of Education described Perich's conduct as "regrettable" and indicated that they would be reviewing the process of rescinding her call on account of her disruptive behavior.

On March 19, the Board of Education sent Perich a second letter stating that they would request that her call be rescinded at the voter's meeting of the Hosanna-Tabor Church on April 10. The cited reasons for this action included Perich's "insubordination and disruptive behavior" on February 22. The board also felt that Perich had "damaged beyond repair" her working relationship with Hosanna-Tabor by "threatening to take legal action." The Hosanna-Tabor Constitution and By-Laws allow the congregation to depose a "Pastor or duly Called Professional Minister" for, among other reasons, "[w]illful neglect of official duties without cause" or "[e]vident and protracted incapacity to perform the functions of the sacred office." Three-fourths approval of the voting members present at a meeting is required for such action. After informing Perich of this procedure, the March 19 letter went on to reinstate the peaceful release offer originally

proposed on February 13. Perich was given until April 8 to accept the offer.

On March 21 Perich's legal counsel sent a letter to Hosanna-Tabor's legal counsel suggesting that Hosanna-Tabor's actions amounted to unlawful disability discrimination. Perich's counsel implored Hosanna-Tabor to seek a peaceful resolution to the matter before Perich was forced to file a complaint with the EEOC or institute a law suit. Nonetheless, on April 10, 2005, the voting members of the Hosanna-Tabor Lutheran Church congregation voted to rescind Perich's call. Perich was informed by letter the next day. Perich responded by filing a charge of discrimination and retaliation with the EEOC on May 17.

On September 28, 2007, the EEOC filed a complaint against Hosanna-Tabor alleging one count of retaliation in violation of the ADA. Perich moved to intervene on March 11, 2008. Perich's motion was granted on April 10, 2008, and Perich filed a complaint against Hosanna-Tabor on the same day. Perich's complaint includes one count of retaliation under the ADA and one count of retaliation under Michigan's Persons with Disabilities Civil Rights Act ("PDCRA"). Presently before the Court are motions for summary judgment from all parties on all counts. The issues presented include the applicability of the "ministerial exception," the timeliness of Perich's PDCRA claim, and the existence of direct and circumstantial evidence of retaliation by Hosanna-Tabor because Perich threatened legal action.

II. Standard of Review

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. See *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986).

The movant has an initial burden of showing "the absence of a genuine issue of material fact." *Id.* at 323. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. *See Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). To demonstrate a genuine issue, the non-movant must present sufficient evidence upon which a jury could reasonably find for the non-movant; a "scintilla of evidence" is insufficient. See *Liberty Lobby,* 477 U.S. at 252, 106 S. Ct. at 2512.

The court must accept as true the non-movant's evidence and draw "all justifiable inferences" in the non-movant's favor. *See id.* at 255. The inquiry is whether the evidence presented is such that a jury applying the relevant evidentiary standard could

"reasonably find for either the plaintiff or the defendant." *See id.*

III. The "Ministerial Exception"

Along with its prohibition of discrimination on the basis of race, color, religion, sex, and national origin, Title VII of the Civil Rights Act of 1964 contains a "ministerial exception" allowing religious employers to prefer members of their own faith for certain positions. 42 U.S.C. §§ 2000e-1(a) to 2000e-1(a). Although this exception specifically allows discrimination only on the basis of religion, courts have interpreted the First Amendment to require that religious employers be permitted even more liberty in their employment decisions and have therefore extended the exception to discrimination against other protected classes. *See, McClure v. Salvation Army,* 460 F.2d 553, 560 (5th Cir. 1972); *Hollins v. Methodist Healthcare, Inc.,* 474 F.3d 223, 225 (6th Cir. 2007). The same reasoning makes the ministerial exception applicable to claims made under the ADA. *Hollins,* 474 F.3d at 225. Furthermore, the Michigan Court of Appeals recently acknowledged that the ministerial exception, as understood in federal law, applies to discrimination claims made against religious employers in Michigan. *Weishuhn v. Catholic Diocese of Lansing,* — N.W.2d —, 279 Mich. App. 150, 2008 Mich. App. LEXIS 1073, at *1 (Mich. Ct. Appl. May 22, 2008).

Where the ministerial exception applies, it deprives federal courts of subject matter jurisdiction and bars the plaintiff's claims. *Hollins,* 474 F.3d at 224-25. The exception does not apply, however, to all claims made against religious employers. "In order for the ministerial exception to bar an employment

discrimination claim, the employer must be a religious institution and the employee must have been a ministerial employee." *Id.* at 225. For purposes of the ministerial exception, "religious institutions" includes religiously affiliated schools, *see id.,* and the parties do not dispute that Hosanna-Tabor meets this requirement. Therefore, the primary issue is whether Perich served as a ministerial employee.

A. Ministerial Employees

An employee's status under the ministerial exception is a legal conclusion that rests with the court. *Starkman v. Evans,* 198 F.3d 173, 176 (5th Cir. 1999). Although the exception most clearly applies to clergy and ordained ministers, it is not limited to such employees. *Hollins,* 474 F.3d at 226; *Rosati v. Toledo, Ohio Catholic Diocese,* 233 F. Supp. 2d 917, 921 (N.D. Ohio 2001). To determine if other employees fall within the exception, courts consider whether "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Hollins*, 474 F.3d at 226 (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists,* 772 F.2d 1164, 1169 (4th Cir. 1985)). Accordingly, an employee may be considered ministerial, although not ordained, depending on the function and actual role of his or her position in the religious institution. *Id.; Starkman,* 198 F.3d at 176-77 (5th Cir. 1999). "This approach necessarily requires a court to determine whether a position is important to the spiritual and

pastoral mission of the church . . . ." *Rayburn,* 772 F.2d at 1169.[2]

Despite widespread consensus about how to identify ministerial employees, the courts remain sharply divided about what positions fit the criteria. *See* Note, *The Ministerial Exception to Title VII: The*

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[2] At the September 25, 2008, hearing on these motions, defense counsel asserted that this Court need not apply the "primary duties" test to the present case because Perich's position as a "Commissioned Minister" automatically makes her a ministerial employee. Plaintiff's counsel countered that there is a distinction between "ordained" and "commissioned" ministers and that the exception applies automatically only to the former.

Ordained or not, interference with a religious institution's employment decisions regarding what they have labeled "commissioned" ministers threatens the religious freedom guaranteed by the First Amendment. In Rayburn, the Fourth Circuit explained, "The right to choose ministers without government restriction underlies the well-being of religious community," and further held, "Where the values of state and church clash or where there is a differing emphasis among priorities or as to means in an employment decision of a theological nature, the church is entitled to pursue its own path without concession to the views of a federal agency or commission." 772 F.2d at 1167, 1171 (emphasis added). It is this Court's opinion, then, that Hosanna-Tabor is entitled deference in its decision to treat Perich as a minister even though the EEOC argues otherwise.

Nonetheless, this Court acknowledges that it was the *Rayburn* Court that first used the primary duties test and that the only other known case to deal with a "commissioned" minister did the same. *Rayburn,* 772 F.2d at 1169; *Clapper v. Chesapeake Conference of Seventh Day Adventists,* No. 97-2648, 166 F.3d 1208 (table), 1998 WL 904528 (4th Cir. Dec. 29, 1998). Therefore, this Court proceeds with an analysis of the primary duties test but considers Perich's title relevant to identifying the precise contours of her "primary duties."

Case for a Deferential Primary Duties Test, 121 Harv. L. Rev. 1776, 1787-88 (2008) ("[J]udicial evaluations of the role of employees–from parochial school teachers to church organists–has not created any discernibly consistent pattern." (footnotes omitted)); Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis,* 2 Nev. L.J. 86, 115 ("Applying these guidelines to specific cases has not yielded consistent results."). In fact, there are courts on both sides of the issue when it comes to elementary school teachers in religious schools.

Several courts considering the employment status of teachers in religious schools have concluded that, when those teachers primarily teach secular subjects, the ministerial exception does not apply. *Redhead v. Conference of Seventh Day Adventists,* 440 F. Supp. 2d 211, 221-22 (E.D.N.Y. 2006); *Guinan v. Roman Catholic Archdiocese of Indianapolis,* 42 F. Supp. 2d 849, 854 (S.D. Ind. 1998). *Redhead* and *Guinan* involved fifth grade elementary school teachers whose daily schedules included teaching religion but who primarily taught secular subjects. *Redhead,* 440 F. Supp. 2d at 214; *Guinan,* 42 F. Supp. 2d at 850, 852. Beyond teaching religion for one hour a day, Redhead attended a worship service with her students only once a year. 440 F. Supp. 2d at 214. Guinan, meanwhile, organized Mass for the students once a month and was only permitted to teach religion by virtue of the fact that she qualified as a "catechist"–meaning she was a "teacher of Christianity."[3] 42 F. Supp. 2d at 850. Despite their

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[3] Guinan, in particular, qualified as a Catechist because she attended a Catholic college and took eighteen hours of theology.

religious responsibilities, the *Redhead* and *Guinan* courts refused to find that the women were "ministerial" employees. The *Guinan* court explained its decision by noting that "[t]he vast majority of Guinan's duties involved her teaching secular courses," that "the Archdiocese did not require teachers at [the school] to be Catholic," and that "the application of the ministerial exception to non-ministers has been reserved generally for those positions that are, at the very least, close to being exclusively religious based . . . ." *Id.* at 852-53. The Redhead court similarly focused on the fact that Redhead's religious activities "were limited to only one hour of Bible instruction per day and attending religious ceremonies with students only once per year." 440 F. Supp. 2d at 221.

The *Guinan* opinion also relied on the Second Circuit's analysis in *DeMarco v. Holy Cross High School.* 4 F.3d 166 (2d Cir. 1993). Although it discusses the issue in the context of the First Amendment rather than specifically defining the "ministerial exception," *DeMarco* presents one of the few circuit court opinions to address the application of employment discrimination laws to teachers at religious schools. Ultimately the court concluded that analyzing a Catholic high school math teacher's age discrimination claim would not violate the First Amendment even though that teacher was responsible for leading students in prayer and taking them to Mass. *Id.* at 172. Important to the decision, however, was the fact that the defense asserted by the school–that DeMarco failed to begin class with

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42 F. Supp. 2d at 850 n.2. The threshold requirements for a Catechist, however, were not explored by the court.

prayer and attend Mass with his students–only required resolution of a factual dispute:

> Given that the religious duties that DeMarco allegedly failed to carry out are easily isolated and defined, we are confident that the able district judge will be able to focus the trial upon whether DeMarco was fired because of his age or because of failure to perform religious duties, and that this can be done without putting into issue the validity or truthfulness of Catholic religious teaching.

Id. Adjudication of this type of factual dispute, according to the Second Circuit, does not result in excessive entanglement of government and religion. *Id.*[4]

In sharp contrast to the aforementioned cases, however, is the Fourth Circuit's unpublished opinion in *Clapper v. Chesapeake Conference of Seventh Day Adventists,* No. 97-2648, 166 F.3d 1208 (table), 1998 WL 904528 (4th Cir. Dec. 29, 1998). There, the Fourth Circuit focused on the school's mission of obtaining "the salvation of each student's soul

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[4] The Third Circuit came to a similar conclusion in *Geary v. Visitation of the Blessed Virgin Mary Parish School.* 7 F.3d 324, 330 (3d Cir. 1993) ("A conclusion that the religious reason did not in fact motivate dismissal would not implicate entanglement since that conclusion implies nothing about the validity of the religious doctrine or practice and, further, implies very little even about the good faith with which the doctrine was advanced to explain the dismissal."). The Third Circuit went on to warn, however, that "the First Amendment dictates that a plaintiff may not challenge the validity, existence or 'plausibility' of a proffered religious doctrine, and we caution that the ADEA would not apply in such a case." *Id.*

through his or her indoctrination in Seventh-day Adventist theological beliefs." *Id.* at *1. In accord with this mission, the school's education code required "that the beliefs and practices of every teacher employed by the Chesapeake Conference be in complete harmony with the beliefs and practices of the Seventh-day Adventist Church." *Id.* at *2. Teachers were required to be tithe paying members of the church, were expected to participate in church activities, and were paid up to thirty percent of their salaries by church tithes.[5] Additionally, the education code required teachers to "[l]ook upon Christian teaching as a holy vocation" and awarded "a 'Commissioned Ministry of Teaching Credential' to its full-time elementary school teachers who, although they may not have undergone formal ministerial training, have demonstrated great experience and spiritual commitment to the Church." *Id.* at *3.

Like the case before this Court, the plaintiff in *Clapper* had obtained his Commissioned Ministry of Teaching Credential and engaged in various religious activities with his students throughout the school day. *Id.* Clapper's daily routine included leading his students in prayer three times a day and any time upon request, conducting worship for about ten minutes a day, teaching Bible as part of the school

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[5] At the September 25, 2008, hearing, defense counsel indicated that up to 50% of Hosanna-Tabor's funding–which is then used to pay teacher salaries–comes directly from the tithes and offerings of church members. Although there is no particular reason to doubt this statement, the Court cannot find support for it in the record and therefore does not place heavy reliance upon it.

curriculum, and engaging the students in the practice of witnessing, "which encourages them to apply their faith in a practical way." *Id.* When appropriate, Clapper also integrated church theology into the secular portions of the academic curriculum. *Id.*

Based on these facts, the Fourth Circuit concluded that Clapper was a ministerial employee and, therefore, that his employment discrimination claim was barred by the ministerial exception. *Id.* at *8. The court was not persuaded by Clapper's "attempts to downplay the ministerial nature of his former teaching positions at [the school] by asserting that the time he spent instructing his students in Bible and leading them in worship constituted only 10.6 percent of his work week." *Id.* at *4. The court refused to reduce the primary duties test to "a purely quantitative test" but rather opined that:

> While the relative quantity of time an employee of a religious entity spends directly teaching and spreading the faith, providing church governance, supervising a religious order, or supervising or participating in religious ritual and worship is important in determining whether those activities are the primary duties of such employee, the degree of the church entity's reliance upon such employee to indoctrinate persons in its theology is equally important.

Id. at *7. Ultimately the court held that "[w]hat is of constitutional significance is whether, in the total mix of circumstances, enforcement of Clapper's action would substantially infringe upon the Chesapeake Conference's right to choose its spiritual leaders." *Id.* With this focus in mind, the court

concluded that Clapper's claims could not proceed. *Id.*

Still other cases, though not specifically concerning elementary teachers in religious schools, provide guidance in the analysis of Perich's employment status. Based on the use of the primary duties test to identify ministerial employees, courts have made it clear that "application of the [ministerial exception] depends on the function of the position and not on categorical notions of who is or is not a minister." *Rosati,* 233 F. Supp. 2d at 921.

Nonetheless, this understanding of the rule has generally been used to extend application of the exception to employees who lack official ministerial titles or ordination, not to support holdings that "ministers" are not ministerial employees. *See, e.g., Rayburn,* 899 F.2d at 1168-69. The Seventh Circuit, however, recognized in dicta a possible need for the latter use of the rule where a church uses the title as mere subterfuge; in those cases, the designation will not provide protection from employment discrimination laws. See *Tomic v. Catholic Diocese of Peoria,* 412 F.3d 1036, 1039 (7th Cir. 2006) ("[I]f to avoid having to pay minimum wage to its janitor a church designated all its employees 'ministers,' the court would treat the designation as a subterfuge.").

Finally, the defense asserted by Hosanna-Tabor was analyzed in dicta in another Seventh Circuit case. Although *Schleicher v. Salvation Army* involved ordained ministers alleging violations of the Fair Labor Standards Act ("FLSA"), the court resorted to a hypothetical retaliation claim to explain why it could not apply the FLSA to the ministers:

> If they charged retaliation, and the Salvation Army replied that they had been fired because their filing a suit seeking to enforce wage and overtime claims was inconsistent with their religious obligations as ministers and was thus an independent and adequate ground for firing them, the court would have to explore the doctrines of the Salvation Army that define the role of its ministers. Blocking such inquiries–such entanglements of the secular courts in religious affairs–is one of the grounds on which the ministers exception was devised as a rule of interpretation of employment laws that do not make explicit reference to religious organizations.

518 F.3d 472, 474 (7th Cir. 2008). By asserting that Perich's threats to pursue legal action were inconsistent with the Lutheran Church-Missouri Synod's belief that Christians should not sue Christians in secular courts, Hosanna-Tabor brought the *Schleicher* hypothetical to life.

B. Perich's Employment Status

Considering the circumstances of Perich's employment in light of the foregoing case law, she must be considered a ministerial employee. Factually, Perich's employment situation most closely resembles that of the commissioned minister in *Clapper* and, unlike *DeMarco*, the validity of Hosanna-Tabor's reason for terminating Perich cannot be disposed of by mere factual inquiry. To the contrary and as Schleicher warned, analysis of Hosanna-Tabor's particular defense requires some exploration of religious doctrine in violation of the First Amendment. *See Rayburn*, 772 F.2d at 1169 ("To subject church employment decisions of the

nature we consider today to Title VII scrutiny would also give rise to 'excessive government entanglement' with religious institutions prohibited by the establishment clause of the First Amendment."). Furthermore, there is no indication that Hosanna-Tabor uses the title "commissioned minister" as subterfuge to avoid employment litigation. Hosanna-Tabor does not give the title to just any teacher and the fact that teachers at Hosanna-Tabor need not be Lutheran, even when it comes to teaching religion, does not strip the commissioned minister title of meaning. That Hosanna-Tabor distinguishes between "lay" and "called" teachers by awarding the commissioned minister title suggests that the school values the latter employees as ministerial even if some courts would not.

On the whole, the commissioned minister certificate in this case represents a give-and-take relationship overseen by the Lutheran Church-Missouri Synod. In exchange for completing additional classes in Lutheran theology and obtaining the approval of a voting congregation, teachers are awarded the various employment benefits of being "called." Included in these benefits is an employment relationship that appears to be governed by the same rules as the church applies to its ordained ministers. (*See* Def.'s Mot., Ex. C (quoting Hosanna-Tabor's Constitution and By-Laws as applicable to "Pastors" and "duly Called Professional Ministers").) A called teacher is also listed in a directory of qualified teachers put forth by the Lutheran Church-Missouri Synod to assist schools in need. Furthermore, the Lutheran Church-Missouri Synod publishes an annual roster of commissioned ministers that includes called

teachers. Put simply, this is not a case where the defendant seeks to prove ministerial status after the fact merely to avoid liability. Hosanna-Tabor treated Perich like a minister and held her out to the world as such long before this litigation began.

The separation of church and state in the United States has made federal courts inept when it comes to religious issues;[6] the inquiry into the value of an employee in furthering a religious institution's sectarian mission is no different.[7] The lack of clarity in federal court cases regarding elementary school teachers should not hinder churches from valuing teachers as important spiritual leaders and deciding who will fill those positions as ministerial employees, subject, of course, to inappropriate uses of the title "minister" as subterfuge. For these reasons, it seems prudent in this case to trust Hosanna-Tabor's

characterization of its own employee in the months and years preceding the events that led to litigation. Because Hosanna-Tabor considered Perich a "commissioned minister" and the facts surrounding Perich's employment in a religious school with a sectarian mission support this characterization, the Court concludes that Perich was a ministerial employee. If, on these circumstances, the Court were to conclude otherwise, it would risk "infring[ing] upon [Hosanna-Tabor's] right to choose its spiritual leaders." *Clapper,* 1998 WL 904528 at *7.

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[6] *Rweyemamu v. Cote*, 520 F.3d 198, 204-05 (2d Cir. 2008) (explaining the history of the ministerial exception); Rayburn, 772 F.2d at 1167-68.

[7] Note, *supra,* at 1787 ("[C]ourts face difficulty in distinguishing religious from nonreligious activities.").

Because Perich was a ministerial employee of Hosanna-Tabor, this Court can inquire no further into her claims of retaliation. Under the circumstances, "the free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content." *Rayburn,* 772 F.2d at 1169. Because no further analysis may be made, the remainder of the issues raised by the parties in their respective briefs for summary judgment are moot.

Accordingly,

IT IS ORDERED that Defendant's motions for summary judgment are **GRANTED.** A judgment consistent with this opinion will issue.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
Omar Weaver, Esq.
James E. Roach, Esq.
Deano C. Ware, Esq.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant,

and

CHERYL PERICH,
Plaintiff/Intervenor,

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant.

Case No. 07-14124
Honorable Patrick J. Duggan

OPINION AND ORDER

At a session of said Court, held in the U.S. District Courthouse, Eastern District of Michigan, on December 3, 2008.

PRESENT:
THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

On September 28, 2007, Plaintiff Equal Employment Opportunity Commission ("EEOC") filed this lawsuit against Defendant Hosanna-Tabor Evangelical Lutheran Church and School ("Hosanna-Tabor") alleging a retaliation claim in violation of the Americans with Disabilities Act ("ADA"). The suit arises from Hosanna-Tabor's termination of Cheryl Perich ("Perich") from a teaching position on April 11, 2005. On April 10, 2008, the Court granted Perich's motion to intervene as a plaintiff. Perich asserted a claim of retaliation under the ADA and Michigan's Persons with Disabilities Civil Rights Act ("PDCRA").

In July 2008, each of the parties submitted motions for summary judgment. The motions were fully briefed and this Court held a motion hearing on September 25, 2008. On October 23, 2008, the Court issued an Opinion and Order ("Opinion") granting Hosanna-Tabor's motions for summary judgment and dismissed the EEOC's and Perich's complaints. Presently before the Court is Perich's Amended Motion for Reconsideration and Hosanna-Tabor's Motion for Attorney Fees, Litigation Expenses and Costs. Each motion will be addressed in turn.

I. Perich's Motion for Reconsideration

Eastern District of Michigan Local Rule 7.1(g)(3) provides that a motion for reconsideration should be granted only if the movant demonstrates that the court and the parties have been misled by a palpable defect and that a different disposition of the case must result from correction of that defect. "A palpable defect is one which is obvious, clear, unmistakable, manifest, or plain." *Fleck v. Titan Tire Corp.*, 177 F. Supp. 2d 605, 624 (E.D. Mich. 2001). Furthermore, "the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication." E.D. Mich. LR 7.1(g)(3).

In support of her motion for reconsideration, Perich alleges that the Court made two factual mistakes and misapplied the relevant law. In the October 23, 2008, Opinion, the Court concluded that Perich was a ministerial employee of Hosanna-Tabor and, as such, that the Court lacked jurisdiction over the case pursuant to the ministerial exception. Perich asserts that, in arriving at this conclusion, the Court relied on evidence not in the record regarding Hosanna-Tabor's mission and whether Perich was paid with tithes from members of Hosanna-Tabor's church congregation. Furthermore, Perich argues that the Court misapplied, or completely disregarded, the primary duties test that determines whether employees who are not "ministers" are nonetheless "ministerial."

A. Alleged Factual Errors

Perich's motion mischaracterizes and exaggerates the facts that the Court "relied upon" in its

determination that Perich was a ministerial employee. Perich complains that the Court inappropriately accepted statements on Hosanna-Tabor's "purported website" as a statement of the school's mission and then used those statements to "underpin" its conclusion that Perich was a ministerial employee. Perich misunderstands the Court's reference to the statements on the website. Although the Court quoted language from the website in its statement of facts, the language was never identified as Hosanna-Tabor's "mission"[1] and was presented merely to highlight the existence of a factual dispute between the parties. In fact, the website language—which suggests that Hosanna-Tabor is primarily dedicated to sectarian activities—was sandwiched between Perich's contrasting experience and perception regarding the day-to-day operation of the school.[2]

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[1] Although defense counsel referred to the quoted language in his brief as Hosanna-Tabor's mission statement, (Hosanna-Tabor's Mot. for Summ. J. at 12), the Court was skeptical that the language on the website represented the school's official "mission statement."

See http://www.hosannatabor.org/school.htm. For this reason, the Court intentionally refrained from identifying anything on the website as a "mission statement."

[2] The Opinion reads:

> In all, however, activities devoted to religion consumed only about forty-five minutes of the seven-hour school day.
>
> Nonetheless, Hosanna-Tabor's website indicates that it provides a "Christ-centered education" that helps parents by "reinforcing biblical principals [sic] and standards." Hosanna-Tabor also characterizes its staff members as "fine Christian role models who integrate their faith into all subjects." Perich notes, however, that secular school

That the Court ultimately granted Hosanna-Tabor's motion for summary judgment does not mean that the Court accepted the statements on the website as accurate and true. Indeed, the Court assumed for purposes of the motion that Perich's description of her daily activities was accurate. And while the Court did refer to Hosanna-Tabor's "secterian mission" in rendering its decision, Perich mistakenly assumes that this was a reference to the website. In fact, the Court discerned that Hosanna-Tabor has a secterian mission based on the school's undisputed status as a religious institution. *See Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225-26 (6th Cir. 2007) ("[A] religiously affiliated entity is considered a 'religious institution' for purposes of the ministerial exception whenever that entity's mission is marked by clear or obvious religious characteristics." (internal quotation omitted)). Perich has failed in the present motion to establish that the Court's assumption that a religious institution has a secterian mission amounts to palpable error.

Perich also takes issue with the Court's reference to defense counsel's argument that Hosanna-Tabor paid Perich with money received from its tithing church members. At the September 25, 2008, motion hearing, defense counsel assured the Court that such evidence was contained in the record. The Court, however, could find no such evidence and included a

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> subjects were taught with textbooks commonly used in public education and that she can only recall twice in her career when she introduced the topic of religion during otherwise secular discussion.

(Opinion at 4.)

statement to that effect in the Opinion to ensure that all parties were aware that the argument had gone unsupported. Removing the footnote in the Opinion that deals with this issue would not change the outcome of the case. Therefore, Perich is not entitled to relief on this ground.

B. The Primary Duties Test

In the second portion of her motion for reconsideration, Perich attempts to relitigate her interpretation of the primary duties test. Although Perich argues that the Court's Opinion disregarded the primary duties test adopted by the Sixth Circuit in *Hollins v. Methodist Healthcare, Inc.*, the Opinion expressly rejected defense counsel's argument that the primary duties test is irrelevant to this case. (Opinion at 11 n.2.) Perich's real disagreement with the Opinion is that it did not adopt the method she advocated for determining primary duties—adding up minutes an employee spends on secular activities and comparing that to the number of minutes spent on religious activities. Rather, the Court adopted a broader view of the primary duties test that considered the entire employment relationship, not just a time-log. Perich's arguments in her motion for reconsideration are merely a continuation of the arguments she made prior to the Opinion and are therefore insufficient to warrant relief on the present motion.[3]

In sum, Perich has failed to identify a palpable

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[3] Perich's motion also states that the Court "misread" *Clapper v. Chesapeake Conference of Seventh-Day Adventitsts*, No. 97-2648, 166 F.3d 1208 (table), 1998 WL 904528 (4th Cir. Dec. 29, 1998). The Court has reviewed Clapper and disagrees.

defect that affected the disposition of this case. Therefore, Perich's motion for reconsideration must be denied.

II. Hosanna-Tabor's Motion for Attorney Fees, Litigation Expenses, and Costs

Also before the Court is Hosanna-Tabor's motion for attorney fees, litigation expenses, and costs based on 42 U.S.C. § 12205. That section of the ADA provides, "the court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs." In exercising its discretion, however, the Court must consider the Supreme Court's holding that an award of attorney's fees to a prevailing defendant is only appropriate "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 700 (1978).[4]

As noted in the Court's Opinion, this case presented an issue about which other courts have divided and the Sixth Circuit has yet to address. (Opinion at 12.) Although Hosanna-Tabor prevailed on its motions for summary judgment, plaintiffs' arguments were not unreasonable, frivolous, or without foundation. Furthermore, the Court did not detect any indication that either of the plaintiffs

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[4] Although Christiansburg considered the language of the attorney's fee provision in Title VII, 42 U.S.C. § 2000e-5(k), the language is almost identical to that found in the ADA. As a result, other courts have extended *Christiansburg's* holding to claims for attorney's fees under the ADA. See *Adkins v. Briggs & Stratton Corp.,* 159 F.3d 306, 307 (7th Cir. 1998).

proceeded in bad faith. Therefore, Defendant is not entitled to attorney's fees.

Accordingly,

IT IS ORDERED that Perich's Amended Motion for Reconsideration is **DENIED**.

IT IS FURTHER ORDERED that Hosanna-Tabor's Motion for Attorney Fees, Litigation Expenses and Costs is **DENIED**.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
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James E. Roach, Esq.
Deano C. Ware, Esq.

APPENDIX D

Nos. 09-1134/1135

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant (09-1134),

CHERYL PERICH,
Intervenor Plaintiff-Appellant (09-1135),

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant-Appellee.

FILED
June 24, 2010
LEONARD GREEN, Clerk

ORDER

BEFORE: GUY, CLAY, and WHITE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX E

The Americans with Disabilities Act, 42 U.S.C. §§ 12111 and 12203, provides in relevant part as follows:

§ 12111. Definitions

As used in this subchapter:

. . .

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

. . .

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

(i) the United States, a corporation wholly

owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

. . .

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

APPENDIX F

The Michigan Persons with Disabilities Civil Rights Act, §§ 37.1201 and 37.1602, provides in relevant part as follows:

§ 37.1201. Definitions

Sec. 201. As used in this article:

. . .

(b) "Employer" means a person who has 1 or more employees or a person who as contractor or subcontractor is furnishing material or performing work for the state or a governmental entity or agency of the state and includes an agent of such a person.

§ 37.1602. Prohibited Practices

Sec. 602. A person or 2 or more persons shall not do the following:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Equal Employment Opportunity Commission,
Plaintiff,
v.
Hosanna-Tabor Evangelical Lutheran
Church and School, Defendant,

and

Cheryl Perich, Plaintiff/Intervenor
v.
Hosanna-Tabor Evangelical Lutheran
Church and School, Defendant.

Case No. 2:07-CV-14124
Hon. Patrick J. Duggan
Mag. Judge Steven D. Pepe

COMPLAINT

Plaintiff/Intervenor Cheryl Perich, by and through her attomeys Vercruysse Murray & Calzone, P.C., submits its following Complaint against defendant Hosanna-Tabor Evangelical Lutheran Church and School.

JURISDICTION

1. The Equal Employment Opportunity Commission ("EEOC") has filed a lawsuit against defendant Hosanna-Tabor Evangelical Lutheran Church and School ("Hosanna-Tabor") asserting

retaliation in violation of the Americans with Disabilities Act of 1990 ("ADA").

2. Pursuant to Section 706(f)(I) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(I), Perich has a right to intervene as a plaintiff in this lawsuit asserting retaliation in violation of the Americans with Disabilities Act of 1990 ("ADA").

3. Accordingly, this Court has jurisdiction over Perich's ADA claim.

4. Pursuant to 28 U.S.C. § 1367, this Court has supplemental jurisdiction over Perich's state law claims.

STATEMENT OF FACTS

5. In 1999, intervenor plaintiff Cheryl Perich began her employment with defendant Hosanna-Tabor as a grade school teacher.

6. In the summer of 2004, Perich became ill and underwent a number of medical tests to determine the cause. The principal, Stacey Hoeft, informed Perich that she should go out on a disability leave, but she would "still have a job with us" when she returns.

7. In or about December, 2004, a neurologist determined that Perich was suffering from narcolepsy, and was able to successfully treat Perich utilizing drugs.

8. In January, 2005, Perich informed Hoeft that she would be able to return work in the last two weeks of February, 2005. Shortly thereafter, Hoeft informed a co-worker that "I'm not a doctor, but as sick as she's [Perich] been I don't think that she'll be back this year and probably not next year."

9. On or about January 30, 2005, a meeting was held between the Board and certain members of the congregation. During that meeting, the Board and the congregation decided to ask Perich to resign if Hosanna-Tabor was willing to partially pay her medical insurance for a limited time.

10. On February 8, 2005, Perich's neurologist released Perich to return to work without restrictions effective February 22, 2005, which is prior to the expiration of Perich's disability leave.

11. On February 10, 2005, Scott Salo, the President of the School Board for Hosanna-Tabor, called Perich to meet with her to discuss her job and her medical insurance. Perich requested a meeting with the Board to plead that she had been released to work and she was able to do so. Salo later informed Perich that the Board would meet with her on February 13, 2005.

12. Perich's meeting with the Board took place as scheduled on February 13, 2005. At the beginning of the meeting, Salo gave Perich a written proposal wherein Perich would resign if the Church paid part of her medical insurance for a limited time. In response, Perich provided the Board with a copy of the return to work signed by her neurologist and informed the Board that she was willing and able to return to her job.

13. The Board, however, chose to reject her doctor's decision that Perich could return to work without restrictions. Board member Kurt Ostrander opined that he "wouldn't drive if I were you, not even if the doctor says you can." Board member Sheila Simpson informed the Board that "I have a

medical background and I know that you have to be without symptoms for at least three months before you can be sure that the medicine is working well enough that you won't have symptoms again. If I were a parent who has a child in this school, I'd want you to be without symptoms for 6 months with no episodes for 6 months or maybe even a year before I'd want my child in your class."

14. Perich responded that the Board's decision to reject her doctor's authorization to return to work would cause a real problem because she was no longer eligible for disability insurance coverage since she could work. The Board's response was that "[a]ll you have to do is call your doctor and tell them that your employer has a rule that you have to be symptom free for three months before you can return to work. He'll take his copy of the return to work slip out of your file and change things in his file to say that you can come back later. I know doctors."

15. The next day, February 14, 2005, Perich spoke with Board member Jim Pranske and told him that she thought it would be against the law to ask her doctor to falsify her return slip. Pranske told Perich that she should ask her doctor, and if he refuses, all she can do is to resign from her employment.

16. On February 22, 2005, Perich went to the school to report to work upon the expiration of her disability leave. Hoeft told Perich to go home, saying "I'm not the only person that doesn't want you here. Parents have told me that they would be uncomfortable with you in the building." That same day, Salo sent Perich a letter directing her not to

return to the school.

17. Later that day, Hoeft called Perich and informed her that she would most likely be fired. Perich responded that she had been talking to an attorney and would assert her legal rights against discrimination even though she had been trying to work out the issue with Hoeft and the Board.

18. On March 19, 2005, Salo sent Perich a letter informing her that they were going to have a vote to terminate her employment. As stated by Salo, "We are also requesting this because we feel that you have damaged, beyond repair, the working relationship you had with the Administration and School Board by threatening to take legal action against Hosanna-Tabor Lutheran Church and School."

19. On or about April 10, 2005, Hosanna-Tabor terminated her employment.

20. On or about May 17, 2005, Perich filed a Charge of Discrimination with the EEOC, alleging that the Hosanna-Tabor terminated her employment because it regarded Perich as being disabled in violation of the American Disabilities Act ("ADA") and in retaliation for threatening legal action against Hosanna-Tabor to oppose its acts against Perich in violation of the ADA.

21. On or about September 28, 2007, the EEOC filed its Complaint against Hosanna- Tabor alleging that it unlawfully retaliated against Perich in violation of Section 503(a) of the ADA, 42 U.S.C. § l2203(a), which is currently pending before the Court.

COUNT I
RETALIATION IN VIOLATION OF THE AMERICANS WITH DISABILITIES ACT

22. Plaintiff incorporates by reference the allegations set forth in paragraphs 1-21 above, as if restated word for word herein.

23. Hosanna-Tabor is an employer that is a covered entity under Section 101(2) of the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12111(2).

24. Hosanna-Tabor engaged in unlawful employment practices at its Redford, Michigan facility in violation of Section 503(a) of the ADA, 42 U.S.C. § 12203(a), including but not limited to terminating Perich's employment in retaliation for threatening to file an ADA lawsuit against Hosanna-Tabor and opposing Hosanna-Tabor's unlawful acts.

25. The unlawful employment practices and retaliating against Perich were intentional.

26. The unlawful employment practices and retaliating against Perich were done with malice or with reckless indifference to the federally protected rights of Perich.

COUNT II
RETALIATION IN VIOLATION [sic]
MICHIGAN'S PERSONS WITH DISABILITIES CIVIL RIGHTS ACT

27. Plaintiff incorporates by reference the allegations set forth in paragraphs 1-26 above, as if restated word for word herein.

28. Hosanna-Tabor is an "employer" as defined

under Michigan's Persons With Disabilities Civil Rights Act ("PDCRA"), M.C.L. § 37.1201(b).

29. Pursuant to the PDCRA, an employer is prohibited from retaliating or discriminating against a person because the person has opposed a violation of this Act. MCL §37.1602(a).

30. Hosanna-Tabor terminated Perich's employment by retaliating against her for opposing Hosanna-Tabor's violations of the PDCRA.

RELIEF

Wherefore, Cheryl Perich asks the Court to enter judgment against Hosanna- Tabor for its unlawful acts, including but not limited to the following request for relief:

A. Grant a permanent injunction enjoining its defendant, its officers, successors, assigns, and all persons in active concert or participation with it from engaging in retaliation and any other employment practice which discriminates on the basis of a disability.

B. Order defendant to institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices.

C. Award Perich the amount of her losses, including but not limited to her lost earnings and benefits and to reinstate Perich to the position from which she was terminated with pay and benefits equal to that which she would have attained had she not been terminated or providing Perich with

appropriate front pay in lieu of reinstatement.

D. Award Perich whole by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices as set forth above.

E. Award Perich whole by providing compensation for past and future non-pecuniary losses resulting from the unlawful employment practices as set forth above, including but not limited to mental and emotional distress.

F. Award Perich punitive damages for defendant's malicious and reckless conduct. G. Grant such other further and/or other relief that is just under the circumstances.

I. Award Perich her attorney fees incurred in brining this action against defendant.

Respectfully submitted,
VERCRUYSSE MURRAY & CALZONE, P.C.

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Dated: March 11, 2008

APPENDIX H

HANDBOOK
OF
THE LUTHERAN CHURCH MISSOURI SYNOD
2004 EDITION

[available online at
http://www.lcms.org/graphics/assets/
media/LCMS/2004Handbook.pdf]

2004
Constitution, Bylaws, and Articles of Incorporation
as amended by the 2004 national convention
10–15 July 2004

1333 S. Kirkwood Road, St. Louis, MO 63122
Telephone: (314) 965-9000

1.10 Dispute Resolution of the Synod

Preamble

1.10.1 When disputes, disagreements, or offenses arise among members of the body of Christ, it is a matter of grave concern for the whole church. Conflicts that occur in the body should be resolved promptly (Matt. 5:23-24; Eph. 4:26-27). Parties are urged by the mercies of God to proceed with one another with "the same attitude that was in Christ Jesus" (Phil. 2:5). In so doing, individuals, congregations, and various agencies within the Synod are urged to reject a "win- lose" attitude that typifies secular conflict. For the sake of the Gospel, the church should spare no resource in providing assistance.

1.10.1.1 The Holy Scriptures (1 Cor. 6:1-7) urge Christians to settle their differences by laying them before the "members of the brotherhood." Therefore, the Synod, in the spirit of 1 Corinthians 6, calls upon all parties to a disagreement, accusation, controversy, or disciplinary action to rely exclusively and fully on the Synod's system of reconciliation and conflict resolution. The use of the Synod's conflict resolution procedures shall be the exclusive and final remedy for those who are in dispute. Fitness for ministry and other theological matters must be determined within the church. Parties are urged, in matters of a doctrinal nature, to follow the procedures as outlined in Bylaw section 1.8.

1.10.1.2 The words of Jesus in Matthew 18:15-20 provide the basis for church discipline for the local congregation. The same passage also grants Christ's guidance to all Christians in seeking to settle other disputes, many of which fall outside the purview of church discipline involving the congregation. In either case, the steps of Matthew 18 should be applied lovingly in both formal and informal settings. The parties and others attempting to effect resolution of a dispute must always remain mindful that the church has been given the "ministry of reconciliation" (2 Cor. 5:18). Hence, conflict resolution in the church is to lead to reconciliation, restoring the erring member in a spirit of gentleness (Gal. 6:1). Its aim is to avoid the adversarial system practiced in society.

1.10.1.3 The heart and center of all Christian conflict resolution is the justification of the sinner through grace in Christ Jesus. Biblical reconciliation of persons in conflict begins with God's truth that we are all sinners who have been reconciled to God through the death and resurrection of Christ Jesus. Christ's "ministry of reconciliation" is one of the church's foremost priorities.

1.10.1.4 Christian conflict resolution seeks to resolve disputed issues in a manner pleasing to God. Those in conflict are urged to proceed prayerfully in good faith and trust. Disputes are more likely to be resolved harmoniously if those involved in the conflict recognize one another as redeemed children of God.

1.10.1.5 Christians involved in conflict must always stand ready to ask for or extend forgiveness in accordance with Scripture. As the church endeavors to help bring about peace, truth, justice, and reconciliation, it always seeks to do so with a proper distinction between Law and Gospel, that is, in the context of God's judgment and mercy. We are ever to be mindful that it is God who judges the hearts of sinful men and grants His gracious word of forgiveness to us all.

1.10.1.6 When there is repentance and reconciliation, the body of Christ rejoices in its oneness with Christ and with one another.

Purpose

1.10.2 This procedure is established to resolve, in a God-pleasing manner, disputes that involve as parties, (1) members of the Synod, (2) the Synod itself, (3) a district or an organization owned and controlled by the Synod, (4) persons involved in excommunication, or (5) lay members of congregations of the Synod holding positions with the Synod itself or with districts or other organizations owned and controlled by the Synod. It shall be the exclusive remedy to resolve such disputes that involve theological, doctrinal, or ecclesiastical issues except those covered under Bylaw sections 2.14-2.17 and except as provided in Bylaw 1.10.3. It is applicable whether the dispute involves only a difference of opinion without personal animosity or is one that involves ill will and sin that requires repentance and forgiveness. No person or

agency to whom or to which the provisions of this dispute resolution process are applicable because such person or agency is a member of the Synod may render these provisions inapplicable by terminating that membership.

Exceptions

1.10.3 This chapter provides evangelical procedures to remedy disputes only and does not set forth procedures for expulsion from membership (Constitution, Art. XIII and Bylaw sections 2.14–2.17) nor does it set forth procedures for board of regents' supervision of faculty and administration as specified in Bylaws 3.8.2.7.5–3.8.2.7.9 and 3.8.3.8.5–3.8.3.8.9. While Christians are encouraged to seek to resolve all their disputes without resorting to secular courts, this chapter does not provide an exclusive remedy for the following matters, unless such matters involve theological, doctrinal, or ecclesiastical issues, including those arising under the divine call of a member of the Synod:

(a) Disputes concerning property rights (e.g., real estate agreements, mortgages, fraud, or embezzlement); and

(b) Disputes arising under contractual arrangements of all kinds (e.g., contracts for goods, services, or employment benefits).

Definition of Terms as Used in This Bylaw Section 1.10

1.10.4 In order to communicate effectively and avoid misunderstanding, it is critical that terms be carefully defined:

(a) Administrator: The secretary of a district or of the Synod or an appointee (Bylaw 1.10.6) who manages the dispute resolution process but who does not take leadership, declare judgments, advise, or become involved in the matter in dispute.

(b) Appeal Panel: Three district presidents selected according to these bylaws to determine whether the decision of a Dispute Resolution Panel should be reconsidered or reviewed.

(c) Blind draw: Selection of names according to the procedures set forth in the Standard Operating Procedures Manual.

(d) Complainant: A party and/or parties to a dispute who initiate an action to settle a conflict under the provisions of the Synod's dispute resolution process.

(e) Dispute Resolution Panel: Three persons who are reconcilers selected according to these bylaws and one person who is a nonvoting hearing facilitator selected according to these bylaws, who shall hear matters in dispute between parties and assist in reconciliation or provide for a resolution of the dispute by rendering a final decision.

(f) Face-to-face: A meeting face-to-face, in person, between the parties in dispute following the guidelines of Matthew 18:15. E-mail, regular mail, fax, or telephone call (or any combination thereof) does not satisfy this requirement. (Note: Failure to conduct a face-to-face meeting within 30 days or within such

extension as may be established by the involved ecclesiastical supervisors shall result in dismissal if the fault lies with the accuser or movement to the next stage if the fault lies with the accused.)

(g) Formal: Efforts to resolve the dispute toward reconciliation beginning with the formal reconciliation meeting.

(h) Hearing facilitator: One selected according to these Bylaws and trained to serve as a facilitator for hearings before panels.

(i) Informal: All efforts toward reconciliation prior to the formal reconciliation meeting.

(j) Party and/or parties to a dispute or the matter (Party to the matter in dispute): A "party and/or parties to a dispute" is either a complainant or a respondent. A reconciler, panel member, hearing facilitator or ecclesiastical supervisor is not a "party and/or parties to a dispute."

(k) Persons involved: "Persons involved" includes the complainant, the respondent, the administrator of the process, the ecclesiastical supervisor, a reconciler, panel members, the hearing facilitator, a witness, an advisor, or any others involved in the dispute resolution process.

(l) Reconciler: As used in this chapter, a member of The Lutheran Church—Missouri Synod or of an LCMS congregation who is appointed to be available to assist parties to a dispute with a view toward reconciling them or enabling them to adjust or settle their dispute

and who has completed the Synod's training program. A reconciler does not judge or take sides but rather, with the help of God, assists both parties to find their own resolution to the dispute.

(m) Reply of Respondent: A written response issued by a party to a dispute containing factual assertions that answer a complainant's statement of the matter in dispute.

(n) Respondent: One who is named party to a dispute brought by a complainant.

(o) Review Panel: Three reconcilers selected according to these Bylaws and one person who is a nonvoting hearing facilitator selected according to these Bylaws who shall give a final hearing when the determination of the Appeal Panel is that a decision of the Dispute Resolution Panel should be reconsidered or reviewed.

(p) Statement of the Matter in Dispute: A written concise statement containing factual assertions involving contended or conflicted issues between one or more parties. The statement may also contain a request for the type of relief to be granted.

(q) Witness: A person called to give testimony regarding facts to a dispute before a Dispute Resolution Panel. A reconciler appointed to assist parties in dispute resolution or a person called upon by a reconciler at the formal reconciliation meeting shall not testify as a witness before a Dispute

Resolution Panel in the same dispute.

Informal Efforts toward Reconciliation; Consultation

1.10.5 Before any matter is submitted to the formal reconciliation process,the parties involved in a dispute must meet together, face-to-face, in a good-faith attempt to settle their dispute according to the scriptural mandate of Matthew 18:15 and may involve the informal use of a reconciler. And further, before any matter is submitted to the formal reconciliation process, the complainant must meet and consult with his or her ecclesiastical supervisor to seek advice and also so that it can be determined whether this is the appropriate bylaw procedure (Bylaw section 1.10) or whether the matter falls under Bylaw sections 1.8, 2.14, 2.15, 2.16, 2.17, or Bylaws 3.8.2.7.9 and 3.8.3.8.9. In regard to this consultation:

(a) The district president shall inform the district president of the respondent that a consultation is underway. He may also seek advice from the vice-presidents of his own district or from the district president of the respondent. The district president may also ask for an opinion of the Commission on Constitutional Matters (CCM) and/or the Commission on Theology and Church Relations (CTCR). The district president must follow any opinion received from either the CCM or the CTCR, which shall be rendered

within 30 days or such additional time as the district president may allow.

(b) The district president shall require the complainant to follow the correct bylaw provision under the circumstance, if any, and shall provide evangelical supervision, counsel, and care to the party or parties.

(c) If Bylaw section 1.10 applies, the district president shall require the complainant to carry out the mandate of Matthew 18:15 face-to- face with the respondent if the complainant has not already done so as set forth above. The reputation of all parties is to be protected as commanded in the Eighth Commandment. The goal throughout is always one of reconciliation, of repentance and forgiveness, even if the following proceedings are carried out.

Formal Efforts toward Reconciliation

1.10.6 If either party is of the opinion that informal reconciliation efforts have failed, such party, in consultation with his or her ecclesiastical supervisor, shall submit a request to the administrator of the dispute resolution process, the secretary of the Synod or district, or an appointee, as appropriate, that a reconciler be appointed to assist in seeking reconciliation. Such request shall be accompanied by

(a) a written statement of the matter in dispute; and

(b) a written statement setting forth, in detail, the informal efforts that have been made to achieve reconciliation.

If the secretary of the Synod or district is a party to the matter in dispute, has a conflict of interest, or serves as a witness, then the President of the Synod or the district president, as appropriate, shall appoint an administrator of the process in the matter.

1.10.6.1 The administrator shall promptly select the reconciler in the manner hereinafter set forth and then notify the parties to the dispute as to the name and address of the reconciler. He or she shall also forward to the chosen reconciler and the respondent the statement of the matter in dispute and the written statement of the informal reconciliation efforts.

1.10.6.2 If the reconciler determines that informal reconciliation efforts have been inadequate, the reconciler shall direct the parties to engage in further informal reconciliation efforts. Such additional time shall not exceed 60 days.

1.10.6.3 If informal reconciliation efforts do not resolve the matter, the reconciler shall direct the respondent to submit to the reconciler and the complainant a written reply responding to the statement of the matter in dispute. The reconciler shall simultaneously arrange a formal reconciliation meeting with the parties to the dispute. Such meeting shall be scheduled by the reconciler at the earliest reasonable date possible, at a location which will minimize travel for the parties to the dispute.

1.10.6.4 At the formal reconciliation meeting, the reconciler shall listen to the facts as presented

by the parties to the dispute and seek to reconcile their differences on the basis of Christian love and forgiveness. With the approval of the reconciler, each party may, in the manner described in Matthew 18:16, bring one or two persons to the meeting "so that every matter may be established by their testimony." Such meeting shall not be open to the public, nor shall any formal record be made thereof. The reconciler may draw upon persons and resources that the reconciler deems necessary to assist in the reconciliation process.

1.10.6.5 Upon conclusion of the formal reconciliation meeting or meetings, the reconciler shall prepare a written report which contains the actions of the reconciler, the issues that were resolved, the issues that remain unresolved, and whether reconciliation was achieved. Attached to the report shall be

(a) the statement of the complainant as to informal reconciliation efforts;

(b) the statement of the matter in dispute; and

(c) any reply by the respondent.

No information shared in confidence shall be included in the report. The report and the attachments shall be forwarded to the parties to the dispute and the secretary of the Synod or district as appropriate.

Procedure of a Dispute Resolution Panel

1.10.7 If the parties with the assistance of the reconciler have been unable to achieve

reconciliation, the complainant shall notify the Secretary of the Synod within 30 days after receiving the report from the reconciler if the matter is to be presented to a Dispute Resolution Panel.

1.10.7.1 If the complainant requests the formation of a Dispute Resolution Panel, the Secretary of the Synod, or his representative, shall, within 21 days, select such a panel in the prescribed manner and then forward to each panel member a copy of the report of the reconciler with its attachments.

1.10.7.2 Each Dispute Resolution Panel shall have a nonvoting hearing facilitator who will serve as chairman of the panel. Within 30 days after the appointment of the panel, the hearing facilitator shall confer with the parties and the Dispute Resolution Panel for the purpose of choosing a location and a date for the formal hearing of the matter.

1.10.7.3 The formal hearing before the Dispute Resolution Panel, conducted by a hearing facilitator, shall take place within 60 days after the date of final selection of the hearing facilitator, unless there is unanimous consent by the panel members for a short delay beyond such 60 days for reasons the panel deems appropriate.

1.10.7.4 The following rules for the Dispute Resolution Panel shall apply:

(a) The hearing shall be private, attended only by the parties and one adviser of each party's choice, should any party desire one. This

adviser shall not address the panel or participate in the discussion at the hearing. Witnesses who can substantiate the facts relevant to the matter in dispute may be called before and address the panel. The administrator of the process shall not attend the hearing or serve as a witness. The panel shall establish the procedure to be followed in the hearing and the relevancy of evidence so that each party shall be given an opportunity fully to present its respective position. In performing its duty, the panel shall continue efforts to reconcile the parties on the basis of Christian love and forgiveness.

(b) Within 60 days after the final hearing, the panel shall issue a written decision that shall state the facts determined by the panel and the reasons for its decision.

(c) The panel shall forward a copy of its decision to

(1) each party to the matter in dispute;

(2) the Secretary of the Synod;

(3) the President of the Synod; and

(4) the president of the respective district.

(d) Subject to request for review or appeal (contemplated or pending), the final decision of a Dispute Resolution Panel shall

(1) be binding upon the parties to that dispute;

(2) have no precedential value;

(3)be carried out by the appropriate

person, group, or member of the Synod; and

(4)be publicized as deemed appropriate under the circumstances by the district president or the President of the Synod.

Reconsideration of a Dispute Resolution Panel Decision

1.10.8 Within 30 days after receiving the decision of the Dispute Resolution Panel, any party to the dispute or the President of the Synod, if a question of doctrine or practice is involved (Constitution, Art. XI B 1-3), may appeal the decision. The President may also request that an opinion of the Commission on Constitutional Matters or the Commission on Theology and Church Relations be obtained.

1.10.8.1 Such appeal shall be mailed to the Secretary of the Synod, each member of the Dispute Resolution Panel, and the other parties to the dispute and shall be accompanied by a written memorandum stating the basis of the request.

1.10.8.2 Within 30 days after receipt, an Appeal Panel shall be selected in the prescribed manner, and the Secretary of the Synod shall send the appeal to each panel member.

1.10.8.3 Within 30 days after its formation, the Appeal Panel shall issue its written decision in response to the request for reconsideration.

1.10.8.4 If an appeal is granted, the Secretary of the Synod, or his representative, shall, within 21 days, select a Review Panel in the prescribed

manner. The Review Panel shall generally decide the issue on the record without further formal hearing but may follow the procedure used by a Dispute Resolution Panel if deemed necessary.

1.10.8.5 The final decision of the Review Panel shall

(a) be binding upon the parties to that dispute and not be subject to further appeal;

(b) have no precedential value;

(c) be carried out by the appropriate person, group, or member of the Synod; and

(d) be publicized as deemed appropriate under the circumstances by the district president or the President of the Synod.

Congregation's Right of Self-Government

1.10.9 The congregation's right of self-government shall be recognized. However, when a decision of a congregation is at issue, a Dispute Resolution Panel may review the decision of the congregation according to the Holy Scriptures and shall either uphold the action of the congregation or advise the congregation to review and revise its decision. If the congregation does not revise its decision, the other congregations of the Synod shall not be required to respect this decision, and the district involved shall take action with respect to the congregation as it may deem appropriate.

District Reconcilers

1.10.10 Within three months after conventions of the Synod, each district board of directors shall appoint a district roster of four reconcilers, no more than two of whom shall be pastors, from a list supplied by the circuit counselors of the district.

1.10.10.1 The term of service shall be six years, renewable without limit. They shall be people "of good reputation, full of the Holy Spirit and wisdom" (Acts 6:3). Vacancies for an unexpired term shall be filled in the same manner by the district board of directors within 30 days following their occurrence. The district board of directors may add to the district roster of reconcilers a reconciler who moves into the district from the district where appointed.

1.10.10.2 One of the four shall be chosen by blind draw according to the procedures set forth in the Standard Operating Procedures Manual (hereafter referred to as the SOPM) by the secretary of the district to serve as reconciler in the following situations arising in the district:

(a) Procedural questions involved in excommunication cases;

(b) Cases in which a member of the Synod shall have been removed from the position that such member holds in a congregation that is a member of the Synod;

(c) Cases in which a person, whether or not a member of the Synod, is removed from the position which the person holds in the district;

and

(d) Cases involving differences between congregations within the same district or between a congregation and its district.

1.10.10.3 The members of the district roster of reconcilers of all the districts shall comprise the Synod's roster of reconcilers. One member of the Synod's roster of reconcilers shall be chosen by blind draw according to the SOPM by the Secretary of the Synod in all disputes except those

(a) enumerated in Bylaw 1.10.10.2; or

(b) cases under Article XIII of the Constitution, which shall follow the procedure for terminating membership set forth in Bylaw sections 2. 14-2. 17.

Special Considerations for Reconcilers

1.10.11Limitations on holding multiple offices do not apply to reconcilers.

1.10.11.1 If a reconciler moves from the district where appointed, such reconciler shall remain as a member of the Synod's roster of reconcilers until the term of service of the reconciler expires.

1.10.11.2 If all of the district reconcilers are unavailable for a particular matter, the secretary of the district shall request that a reconciler from another district be chosen in the prescribed manner by the secretary of the other district.

Hearing Facilitators

1.10.12 After the training of the reconcilers and in consultation with the appropriate district presidents, the Secretary of the Synod shall identify 25 of the reconcilers who exhibit skills in the proper conduct of a fair and impartial hearing to comprise the Synod's roster of hearing facilitators, who shall be trained for such purpose.

(a) The term of service shall be six years, renewable without limit.

(b) Any vacancies for an unexpired term shall be filled in the same manner as described above as needed and as requested by the Secretary of the Synod.

1.10.12.1 Limitations on holding multiple offices do not apply to hearing facilitators.

1.10.12.2 If a hearing facilitator moves from the district where nominated, such hearing facilitator, if on the roster of hearing facilitators, shall remain as a member of the Synod's roster of hearing facilitators until the term of service of the hearing facilitator expires.

1.10.12.3 A hearing facilitator shall not serve as a reconciler or as a voting member of a panel.

Dispute Resolution Panels

1.10.13 The Synod's roster of reconcilers shall comprise the list from which dispute resolution panel voting members will be selected.

1.10.13.1 Each Dispute Resolution Panel shall consist of three voting members, at least one of whom shall be a pastor and one a layperson.

(a) Nine names shall be selected by a blind draw from the dispute resolution roster.

(b) No member of a panel shall be from the district in which the dispute arose or, if it is a Synod question, from any district in which a party holds membership.

(c) The list shall be mailed simultaneously to each party, who shall be entitled to strike three names and return the list to the Secretary of the Synod within one week.

(d) The Secretary of the Synod shall correct any problem with the panel from the remaining names by blind draw according to the SOPM. In the event that additional names are needed, three names will be selected in the manner set forth above and those names submitted to each party who shall have a right to strike one. In the event that there is more than one remaining, the secretary shall determine the final member by a blind draw according to the SOPM from the remainder.

1.10.13.2 The hearing facilitator shall be selected as follows:

(a) Three names shall be selected by a blind draw according to the SOPM from the hearing facilitator roster.

(b) No hearing facilitator shall be from the district in which the dispute arose or from any district in which a party holds membership.

(c) The list shall be mailed simultaneously to each party, who shall be entitled to strike one name and return the list to the Secretary of the Synod within one week.

(d) The Secretary of the Synod shall correct any problem with the panel from the remaining names by blind draw according to the SOPM. In the event that additional names are needed, three names will be selected in the manner set forth above and those names submitted to each party, who shall have the right to strike one. In the event that there is more than one remaining, the Secretary shall determine the final member by a blind draw according to the SOPM from that remainder.

1.10.13.3 The hearing facilitator shall conduct the hearing, shall serve as chairman of the panel, and may draw upon persons and resources that he deems necessary for conducting a hearing in a fair and equitable manner.

1.10.13.4 The Dispute Resolution Panel shall select its own secretary from its members.

Appeal Panels

1.10.14 The Appeal Panel shall be made up of three district presidents who shall be trained for such service.

(a) One district president shall be selected by the complainant, one selected by the respondent, and the third selected by the two appeal panel members so selected.

(b) If the two appeal panel members cannot agree on a third, the Secretary of the Synod

shall select the third member by blind draw according to the SOPM from the remaining district presidents.

Review Panels

1.10.15 Review Panel members shall be selected from the Synod's roster of reconcilers.

1.10.15.1 Each Review Panel shall consist of three voting members, at least one of whom shall be a pastor, and at least one layperson.

(a) Nine names shall be selected by a blind draw according to the SOPM from the roster of reconcilers of the Synod.

(b) No member shall be from the district in which the dispute arose, or, if it is a Synod question, from any district in which a party holds membership.

(c) The list shall be mailed simultaneously to each party, who shall be entitled to strike three names and return the list to the Secretary of the Synod within one week.

(d) The Secretary of the Synod shall correct any problem with the panel from the remaining names by blind draw according to the SOPM. In the event that additional names are needed, three names will be selected in the manner set forth above and those names submitted to each party who shall have the right to strike one. In the event that there is more than one remaining, the Secretary shall determine the final member by a blind draw according to the SOPM from that remainder.

1.10.15.2 The hearing facilitator shall be selected as follows:

(a) Three names shall be selected by a blind draw according to the SOPM from the hearing facilitator roster.

(b) No hearing facilitator shall be from the district in which the dispute arose or from any district in which a party holds membership.

(c) The list shall be mailed simultaneously to each party, who shall be entitled to strike one name and return the list to the Secretary of the Synod within one week.

(d) The Secretary of the Synod shall correct any problem with the panel from the remaining names by blind draw according to the SOPM. In the event additional names are needed, three names will be selected in the manner set forth above and those names submitted to each party, who shall have the right to strike one. In the event that there is more than one remaining, the secretary shall determine the final member by a blind draw according to the SOPM from that remainder.

1.10.15.3 The hearing facilitator shall conduct the hearing, shall serve as chairman of the panel, and may draw upon persons and resources that he deems necessary for conducting a hearing in a fair and equitable manner.

1.10.15.4 The Review Panel shall select its own secretary from its members.

Disqualification

1.10.16 The standard for disqualification of a reconciler or panel member or hearing facilitator shall be actual partiality or the appearance thereof.

1.10.16.1 Any party and/or parties to a dispute shall have the right to request disqualification of a reconciler, panel member, or hearing facilitator. If that individual does not agree to the disqualification, the decision shall be made by a separate three-member panel of reconcilers drawn for that purpose according to the SOPM.

1.10.16.2 In the event that a reconciler, panel member, or hearing facilitator is disqualified, another individual shall be chosen by blind draw according to the SOPM.

1.10.16.3 An individual who has served as a reconciler in a matter shall not be a member of the Dispute Resolution Panel in the same matter.

Decisions

1.10.17 The Dispute Resolution Panel, Appeal Panel, or Review Panel shall issue a decision based on a majority vote of the panel.

(a) A majority of the panel members shall be involved in all stages of the decision-making process.

(b) The hearing facilitator shall serve as an advisor to the panel on the form but not the substance of the decision.

(c) In the event that a majority decision cannot be reached, a new panel shall be formed immediately in accordance with the Bylaws and the matter reheard.

Rules of Procedure

1.10.18 Reconcilers, Dispute Resolution Panels, Appeal Panels, and Review Panels shall be governed in all their actions by Holy Scripture, the Lutheran Confessions, and the Constitution and Bylaws of the Synod.

1.10.18.1 The following rules of procedure shall be followed:

(a) In the interest of promoting the reconciliation process, any member of the Synod, officer of a congregation, or officer of any organization owned or controlled by the Synod shall, when called upon by a Dispute Resolution Panel, Appeal Panel, or Review Panel to do so, testify or produce records related to the dispute. Each party and/or parties to a dispute shall assume its/their own expenses. The expenses of reconcilers, Dispute Resolution Panels, and Review Panels shall be borne by the Synod, except for those that arise under Bylaw 1.10.10.2, which shall be borne by the district.

(b) No party and/or parties to a dispute nor anyone on the party's behalf shall either directly or indirectly communicate with the reconciler, the hearing facilitator, or any member of the Dispute Resolution Panel, Appeal Panel, or Review Panel without the

full knowledge of the other party to the dispute.

(c) While the matter is still undecided or while an appeal is contemplated or pending, publicity shall not be given to the issues in the matter by any of the persons involved during any part of the procedures outlined in this bylaw. However, at his discretion and as needs dictate in order to "promote and maintain unity of doctrine and practice" (Constitution, Art. XI B 3) and in order to provide counsel, care, and protection to all the members of the Synod (Constitution, Art. III 8, 9), the President of the Synod or the district president in consultation with the President of the Synod, as the case may be, may properly advise or inform the involved congregation(s) and/or the district or the Synod as to the status of the process.

(d) Any party and/or parties may seek, at its/their own personal expense, the assistance of individuals familiar with the issues involved in the dispute. They may actively participate in research and the preparation of necessary documents. At the hearing, however, each party may have an adviser present but must represent itself, with no public participation by the adviser. Any reconciler or hearing facilitator shall not serve as an adviser. If a party and/or parties is a board or commission of the Synod or its districts, it shall be represented by its chairman or designated member.

(e) A Dispute Resolution Panel, Appeal Panel, or Review Panel shall determine the number of witnesses necessary for a full and complete understanding of the facts involved in the dispute. It shall question parties and witnesses directly and shall also permit the parties to do so.

(f) All Dispute Resolution Panel, Appeal Panel, or Review Panel records of disputes in which a final decision has been rendered by the Dispute Resolution Panel, Appeal Panel, or Review Panel shall be placed in the custody of Concordia Historical Institute. All such records shall be sealed and shall be opened only for good cause shown and only after permission has been granted by a Dispute Resolution Panel, selected by blind draw for that purpose.

(g) If any part of the dispute involves a specific question of doctrine or doctrinal application, each party shall have the right to an opinion from the Commission on Theology and Church Relations. If it involves questions of constitution or bylaw interpretation, each party shall have the right to an interpretation from the Commission on Constitutional Matters. The request for an opinion must be made through the Dispute Resolution Panel or Review Panel, which shall determine the wording of the question(s). The request for an opinion must be made within four weeks of the final formation of the Dispute Resolution Panel or Review Panel. If a party does not request such an opinion within the designated

time, such a request may still be made to the Dispute Resolution Panel or Review Panel that shall, at its discretion, determine whether the request shall be forwarded. The Dispute Resolution Panel or Review Panel shall also have the right, at any time, to request an opinion from the Commission on Theology and Church Relations or the Commission on Constitutional Matters. Any opinion so requested shall be rendered within 30 days or such greater time as the Dispute Resolution Panel may allow. When an opinion has been requested, the time limitations will not apply until the opinion has been received by the parties. Any opinion received from the Commission on Theology and Church Relations and the Commission on Constitutional Matters must be followed by the Dispute Resolution Panel or Review Panel.

(h) Any member participating in this bylaw procedure who intentionally and materially violates any of the requirements in this bylaw or is persistent in false accusations is subject to the disciplinary measures as set forth in the appropriate Bylaw sections 2.14-2.17. Any member of the Synod who has personal factual knowledge of the violation shall inform the appropriate district president as the ecclesiastical supervisor. Violations of the prohibition against publicity while a matter is still undecided or while an appeal is contemplated or pending (Bylaw 1.10.18.1 (d) above) by any persons involved are specifically included as a violation subject to the same disciplinary measures set forth in the Bylaws.

In consultation with the Secretary of the Synod and the Council of Presidents, the Commission on Constitutional Matters shall amend as necessary the Standard Operating Procedures Manual that serves as a comprehensive procedures manual for Bylaw section 1.10, Dispute Resolution of the Synod.