No. 19-2142

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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|---|---|
| SANDOR DEMKOVICH, | ) |
| | ) |
| | ) |
| Plaintiff-Appellee, | ) |
| | ) |
| -vs- | ) |
| | ) |
| ST. ANDREW THE APOSTLE PARISH, CALUMET CITY, and THE ARCHDIOCESE OF CHICAGO, | ) |
| | ) |
| | ) |
| Defendants-Appellants. | ) |

**Appeal from the United States District Court**
**for the Northern District of Illinois,**
**Eastern Division, Case No. 16-cv-11576**
**The Honorable Edmond Chang, Judge Presiding**

# APPELLANTS ST. ANDREW THE APOSTLE PARISH, CALUMET CITY AND THE ARCHDIOCESE OF CHICAGO'S BRIEF AND SHORT APPENDIX

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**ORAL ARGUMENT REQUESTED**

# CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Attorney's Printed Name: Alexander D. Marks

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## JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of Illinois, Eastern Division, had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the matter in controversy arose under the laws of the United States, including that the Plaintiff-minister's complaint alleged causes of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et. seq*, and Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §12112 *et. seq*.

The Court of Appeals has jurisdiction over this matter pursuant to 28 U.S.C. §1292(b) and its order dated May 31, 2019 [App. Dkt. 4], granting Appellants' F.R.A.P. 5 petition for permission to appeal pursuant to certification, in response to the district court's order dated May 5, 2019 [Dkt. 73][1], certifying a question for review. Appellants St. Andrew the Apostle Parish, Calumet City and the Archdiocese of Chicago (collectively the "Archdiocese") filed their petition for permission to appeal on May 15, 2019 [App. Dkt. 1].

## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The Establishment and Free Exercise Clauses of the First Amendment protect the internal affairs of religious groups from governmental interference. These protections are at their height in the context of a religious group's relationship with its ministers. Courts have long recognized a "ministerial exception," holding that these protections bar a minister's employment discrimination claims including, specifically, claims arising from the hiring or firing

[1] Unless otherwise noted, all references are to the district court docket. References to the short appendix are labeled "SA-0__."

of a minister because "the authority to select and control who will minister to the faithful is the church's alone." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC et al.,* 565 U.S. 171, 194-195 (2012). The issue presented here is whether the ministerial exception bars a minister's hostile work environment discrimination claim against his religious employer.

**STATEMENT OF THE CASE**

St. Andrew the Apostle Parish ("St. Andrew") is a parish of the Archdiocese of Chicago. St. Andrew is led by its pastor, Rev. Jacek Dada. [SA-03]. Plaintiff was the "Music Director, Choir Director, and Organist" at St. Andrew. [*Id.*] Following his termination, on December 22, 2016, Plaintiff filed a complaint alleging employment discrimination based on, among other claims, (1) sex, sexual orientation, and marital status under Title VII, 42 U.S.C. §2000e et seq., and (2) disability (diabetes) under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112 et seq. [SA-01]. On September 29, 2017, the district court dismissed Plaintiff's complaint in its entirety, finding that he "was a minister for the purposes of the ministerial exception." [Dkt. 15, p. 7].

Given leave to amend, Plaintiff conceded both that he was a minister and that his employment discrimination claims arising from his termination were barred under *Hosanna-Tabor,* 565 U.S. 171. Instead, Plaintiff alleged that the same conduct, *i.e.*, comments by Father Dada, his pastor and thereby his supervising minister, about his same-sex marriage and his weight, constituted an actionable "hostile work environment"—*i.e.*, a form of discrimination based on sex

or disability—which, in Plaintiff's view, was independently actionable and not subject to the ministerial exception. [Dkt. 16].[2]

Specifically, Plaintiff alleged that Father Dada made inquiries regarding Plaintiff's same-sex marriage, became hostile toward him as his wedding date approached, and harassed Plaintiff and made repeated comments regarding the wedding. Plaintiff further alleged that Father Dada made repeated comments regarding Plaintiff's diabetes and metabolic syndrome, including allegedly harassing remarks about Plaintiff's weight–often urging Plaintiff to "walk Dada's dog to lose weight, " telling Plaintiff he needed to "lose weight because Dada did not want to preach at his funeral, " and complaining about the cost of keeping Plaintiff on the parish's health insurance plans. [SA-04-5].

On November 27, 2017, the Archdiocese again moved to dismiss based on the ministerial exception and the First Amendment. On September 30, 2018, the district court granted the Archdiocese's motion as to Plaintiff's sex, sexual orientation, and marital status hostile work environment claims, but denied dismissal of Plaintiff's disability discrimination hostile work environment claim. The district court held that the ministerial exception did not apply to the latter

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[2] The Seventh Circuit has not yet expressly decided that the ADA permits a hostile work environment claim but, instead, in both published and unpublished decisions, has assumed there is such a claim under the ADA. *See, e.g., Shott v. Rush Univ. Med. Ctr.*, 652 Fed.Appx. 455, 458 (7th Cir. 2016); *Lloyd v. Swiftly Transp., Inc.*, 552 F.3d 594, 603 (7th Cir. 2009); *Mannie v. Potter*, 394 F.3d 977, 982 (7th Cir. 2005). The Court need not reach the question in this appeal; the Archdiocese's position is that *any* claim by a minister arising under employment discrimination statutes is barred by the ministerial exception. However, the Archdiocese reserves the right to challenge the existence of ADA hostile work environment claims in this or other litigation.

claims, both because it did not believe that the ministerial exception applies, *per se*, to all employment discrimination claims by ministers and, specifically, because the district court contended that the Archdiocese offered no religious justification for the alleged discrimination such as would trigger a risk of entanglement. [SA-001-29].

On October 25, 2018, the Archdiocese moved to reconsider. [Dkt. 40]. On March 6, 2019, facing the issuance of discovery, the Archdiocese filed an interlocutory appeal pursuant to the collateral order doctrine. [Case No. 19-1413]. On March 22, 2019, having been informed by the district court that an order denying the motion to reconsider would be forthcoming, the Archdiocese moved to certify a question for appeal pursuant to 28 U.S.C. § 1292(b). [Dkt. 64]. On March 25, 2019, the district court denied the Archdiocese's motion to reconsider [SA-030-31]. On May 5, 2019, the district court granted the Archdiocese's motion to certify and stay the litigation. [SA-032-35]. On May 31, 2019, this Court dismissed the Archdiocese's collateral order appeal, but granted the Archdiocese's petition for permission to appeal. [App. Dkt. 4].

## SUMMARY OF THE ARGUMENT

The district court erred in denying dismissal of Plaintiff's disability discrimination hostile work environment claim pursuant to the ministerial exception. Plaintiff concedes that he is a minister suing his religious employer for discrimination, but the district court held that the ministerial exception does not apply, *per se*, to all employment discrimination claims. Instead, following two obsolete Ninth Circuit cases that are in tension with this Court's precedent and

with *Hosanna-Tabor*, the district court erroneously held that the ministerial exception applies only to *claims* involving "tangible" employment actions or where the religious employer offers a religious justification for its actions that would require the court to make religious determinations. But it is the *employment position*, not the claim, that is dispositive in determining whether the ministerial exception applies. The district court's approach is contradicted not only by a more recent Tenth Circuit case (which relies on this Court's precedents for its reasoning), but by the reasoning of the Supreme Court in *Hosanna-Tabor*, 565 U.S. at 194 (focusing on claims "misses the point of the ministerial exception"), and other federal appellate precedents recognizing the right of churches to discipline clergy free from government interference.

The district court's decision strips protection from the actual employment relationship between a minister and a religious employer, rendering the ministerial exception a dead letter. If only the beginning and end of the employment relationship are covered by the ministerial exception, but not the middle, then plaintiffs will simply plead around the doctrine, as this plaintiff has attempted to do. The core First Amendment principle that "civil authorities have no say over matters of religious governance" will be lost. *Korte v. Sebelius*, 735 F.3d 654, 678 (7th Cir. 2013). Courts will be forced to "get dragged into a religious controversy" that the First Amendment structurally forbids (and protects) them from deciding. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), *rev'd on other grounds Hosanna-Tabor*, 565 U.S. 171. And churches will find their internal

ministerial relationships deformed by the incentives this new approach creates, pressured into firing ministers quickly instead of shepherding them into better ministerial performance. *See, e.g., Rayburn v. Gen. Conf. of Seventh-Day Adventists*,772 F.2d 1164, 1171 (4th Cir. 1985) ("[t]here is a danger that churches, wary of [agency] or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments.").

The district court's distinction is also entirely arbitrary, since the question of whether a position is ministerial depends on how the job itself is *done*. Which is part of the reason why the ministerial exception has always been understood to extend beyond merely "hiring and firing." As *Hosanna-Tabor* explained, "[t]he exception instead ensures that the authority to select *and control* who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone." 565 U.S. at 194-95 (internal citation omitted, emphasis added); *accord id.* at 201 (Alito, J., joined by Kagan, J., concurring) ("A religious body's control over [ministers] is an essential component of its freedom to speak in its own voice").

Plaintiff's claim arises solely by virtue of his employment by the Archdiocese *as a minister*. It has no independent existence under tort law or criminal law, but exists solely as a product of his ministerial employment. The district court's decision, refusing to dismiss an employment-based discrimination claim, disregards the established precedent of this Court, and adopts an argument rejected by the First, Third, Sixth, Eighth, and Tenth Circuits. While not addressing a hostile

work environment claim in particular, this Court has made clear that "[t]he 'ministerial exception' applies without regard to the type of claims being brought." *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 700, 703 (7th Cir. 2003). The Tenth Circuit has specifically found that a "hostile work environment claim" does, like other employment claims, "implicate a church's spiritual functions" and make the ministerial exception applicable. *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1245 (10th Cir. 2010). Further, other federal appellate courts have likewise found the ministerial exception applies to bar claims relating to treatment during a minister's time of employment (*i.e.*, not solely hiring and firing, but also including performance). *See, e.g.*, *Petruska v. Gannon Univ., et al.*, 462 F.3d 294, 308 (3d Cir. 2006) (rejecting minister complaint about position restructuring); *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1576-78 (1st Cir. 1989), (applying ministerial exception to reject contract and tort claims; important consideration is not a claim's basis in contract, tort, or nondiscrimination law, but rather its "substance and effect" on the church's freedom to select and control its leadership); *Kaufmann v. Sheehan*, 707 F.2d 355, 357 (8th Cir. 1983) (refusing amendment to claim failure of internal due process; claim involved "inherently religious issues"); *Ogle v. Church of God*, 153 F. App'x 371, 373 (6th Cir. 2005) (claims including invasion of privacy and defamation "implicate[d] the Church of God's internal disciplinary proceedings," and therefore the ministerial exception).

This district court held the ministerial exception did not apply because (1) the claim allegedly involved an intangible, rather than tangible, employment action,

and (2) the Archdiocese offered no religious justification for the alleged discrimination. Neither of those two factors affect application of the ministerial exception and, instead, impermissibly limit the exception's broad protections from government interference with the church-minister relationship and invite the court to make the prohibited determination of what is, and is not of religious significance to the religious employer. In particular, the Archdiocese need not offer a religious justification for the ministerial exception to apply. *Hosanna-Tabor*, 565 U.S. at 194; *Alicea-Hernandez*, 320 F.3d at 703. Rather, it is "*the very process of inquiry*" into the claim that violates both religion clauses. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (emph. added).

The district court further erred in concluding that it could adjudicate this case without entangling itself with the hierarchical governance of this Catholic parish and without making religious determinations. *See, e.g., Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113 (3d Cir. 2018) (adjudicating minister's claim for breach of contract would necessarily require addressing religious questions and thus was barred by ministerial exception)

First, as noted above, the district court's approach defeats the purpose of the ministerial exception, requiring the Archdiocese to litigate a claim involving a form of employment discrimination arising by virtue of the Archdiocese's employment of Plaintiff *as a minister*, existing solely as a product of a constitutionally privileged religious decision to select Plaintiff as a minister. *Alicea-Hernandez*, 320 F.3d 698; *Skrzypczak*, 611 F.3d 1238. Second, it forces courts to second-guess whether a

minister's supervision over a subordinate minister was "religious," or whether the religious work environment was appropriate. Such debate, in the context of a church's control over its ministers, usurps the church's right to set its own standards for ministry and embroils the courts in inherently religious questions. *See, e.g., McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013) ("the First Amendment . . . forbids the government to make religious judgments"); *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 708 (1976) (secular courts not equipped nor permitted to substitute their judgment for that of a church on the question of what is of religious significance to that church). The discovery necessary to resolve Plaintiff's claim will likewise subject a superior minister to an interrogation about his words to and demeanor toward a subordinate minister concerning the subordinate's *fitness for ministry*.

The intrusion into the church-minister relationship implicated by Plaintiff's claims is both a usurpation of the Archdiocese's right to govern its own hierarchical polity and a prohibited establishment of the district court's determination of what constitutes religiously significant actions to "control" a subordinate minister. Indeed, the fact that the district court failed to recognize Father Dada's comments (which related literally to the plaintiff's fitness to minister) as an exercise of ecclesiastical governance underscores the purpose of the ministerial exception and the reason it should be applied *per se* in employment discrimination cases once the plaintiff is found to be a minister: to remove such determinations from the secular eye of government officials.

For these and the additional reasons below, the district court erred and its ruling denying dismissal of Plaintiff's disability discrimination hostile work environment claim should be reversed.

## STANDARD OF REVIEW

The district court certified a pure question of law, which is dispositive of its ruling denying the Archdiocese's Rule 12(b)(6) motion to dismiss. [Dkt. 73]. Accordingly, the *de novo* standard of review is proper. *See Slaney v. Int'l Amateur Ath. Fed'n*, 244 F.3d 580, 597 (7th Cir. 2001) (*de novo* standard of review applies to ruling on Rule 12(b)(6) motion to dismiss); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 400 (8th Cir. 1987) ("we review *de novo* the questions of law certified by the district court pursuant to 1292(b)"); *see also Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 833 (6th Cir. 2015) (application of the ministerial exception presents a "pure question of law" that a court must decide "for itself.").

## ARGUMENT

### I. Plaintiff's Hostile Work Environment Claim Arises Entirely Under Employment Discrimination Statutes, Thereby Requiring Application Of The Ministerial Exception.

#### A. Ministerial Exception Overview.

As the Supreme Court unanimously recognized in *Hosanna-Tabor*, 565 U.S. 171, and as this Court has long recognized, the ministerial exception is a fundamental First Amendment protection against government intrusion into the relationship between a religious group and its ministers. *Alicea-Hernandez*, 320 F.3d at 698; *Tomic*, 442 F.3d 1036. As explained in *Hosanna-Tabor*, the protections provided by the ministerial exception run in two directions, to both the church and

the state. The ministerial exception protects religious bodies from interference in their internal governance, and it protects the state from becoming entangled in religious questions and religious groups' internal affairs. *Tomic*, 442 F.3d 1036

The ministerial exception prohibits *any entanglement* in a religious group's governance or discipline of its ministerial employees. The Supreme Court in *Hosanna-Tabor* explained, "[t]he exception instead ensures that the authority to select *and control* who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone." 565 U.S. at 194-95 (internal citation omitted, emphasis added); *see also Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.2d 1299, 1304 (11th Cir. 2000) (emph. added) ("the exception … continues a long-standing tradition that churches are to be free from government interference in matters of church *governance and administration*.") The right to self-governance includes not only selecting who will be a minister and speak on its behalf, but also how a church supervises, manages, disciplines, and even communicates with that minister in his/her work environment. *See Milivojevich*, 426 U.S. at 725 ("the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government"); *Catholic Bishop*, 559 F.2d at 1123-24 (*aff'd N.L.R.B.*, 440 U.S. 490) (N.L.R.B. 's exercise of jurisdiction over church-operated schools would interfere with internal governance of ministerial employees' terms and conditions of employment).

This Court has made clear that the dispositive question in cases like this one is whether a religious organization's employee's position was ministerial, thereby

requiring application of the exception: "The only question is that of the appropriate characterization of her *position*." *Alicea-Hernandez*, 320 F.3d at 703 (emph. added); *see also Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 657 (7th Cir.), *cert. denied*, 139 S. Ct. 456, 202 L. Ed. 2d 348 (2018) ("As a preliminary matter, we must confirm that the school is a religious institution entitled to assert protection under the ministerial exception"). As this Court held, once the exception is found to apply, it is "applied without regard to the type of claims being brought," *id.*, and therefore bars claims relating to, among other things, "poor office conditions," "exclusions from management meetings and communications," and "denial of resources necessary for her to perform [plaintiff's] job." 320 F.3d at 703.

Thus, there is a bright line test and it is simple: once the employee is found to be a ministerial employee (conceded here [Dkt. 15, p. 7]), the ministerial exception bars all claims arising out of the employment discrimination statutes. *McClure v. The Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972) ("application of the provisions of Title VII to the employment relationship existing between … a church and its minister would result in an encroachment by the state into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.")

This Court has not yet had the opportunity to apply the ministerial exception to an employment discrimination claim brought as a hostile work environment claim. However, as stated above and explained more fully below, in *Skrzypczak*, 611 F.3d 1238, the Tenth Circuit has held that a hostile work environment claim, which

is a form of employment discrimination claim, is barred by the ministerial exception as a matter of law: "[t]he types of investigations a court would be required to conduct in deciding [hostile work environment] claims brought by a minister could only produce by [their] coercive effect the very opposite of that separation of church and State contemplated by the First Amendment." *Id.* (citing *McClure*, 460 F.2d at 560). The Tenth Circuit found that allowing inquiry into a hostile work environment claim would "infringe on a church's right to select, manage, and discipline [its] clergy free from government control and scrutiny by influencing it to employ ministers that lower its exposure to liability rather than those that best further [its] religious objective[s]." *Id.* at 1245 (internal citations omitted). Numerous other appellate circuits have rejected similar attempted end-runs around the ministerial exception. *See, e.g.*, *Petruska*, 462 F.3d at 308 (rejecting minister's complaint about position restructuring); *Natal*, 878 F.2d at 1576-78 (applying ministerial exception to reject contract and tort claims); *Kaufmann*, 707 F.2d at 357 (refusing amendment to claim failure of internal due process; claim involved "inherently religious issues"); *Ogle*, 153 F. App'x at 373 (claims including invasion of privacy and defamation "implicate[d] the Church of God's internal disciplinary proceedings," and therefore the ministerial exception). The ministerial exception is intended to protect religious employers from government interference in their relationships with their ministers. Plaintiff's attempt to maneuver around the ministerial exception here, if permitted, would hollow out the exception, rendering it toothless and incentivizing future

plaintiffs to plead around the doctrine, while permitting courts to scrutinize every aspect of a church's discipline of its clergy.

### B. The Ministerial Exception Applies As A Matter Of Law To A Minister's Hostile Work Environment Claim.

Plaintiff's disability discrimination claim arises solely by virtue of his employment by the Archdiocese as a minister. It has no independent existence under tort law[3] or criminal law, but exists solely as a product of his ministerial employment. Indeed, a hostile work environment claim is just one form of employment discrimination claim. This alone requires the application of the ministerial exception because the government cannot commandeer the Archdiocese's selection of a minister as a basis to impose statutory duties or penalties. Any discrimination claim based solely on church-minister employment relationship interferes in the church's control over the minister's performance and is therefore barred by the ministerial exception.

Moreover, by definition, any review of Plaintiff's claim will require an intrusive examination of the "conditions" of a religious workplace and thus a "searching and therefore impermissible inquiry" into the administration and governance of a Catholic parish. *Milivojevich*, 426 U.S. at 723. This intrusion into a "religious thicket," *id.* at 719, is best illustrated by the elements of Plaintiff's

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[3] Indeed, tort claims arising from the same set of facts as discrimination claims are preempted. *See, e.g., Quantock v. Shared Marketing Services*, 312 F.3d 899, 905 (7th Cir. 2002) (invoking preemption where IIED claim was supported by the same factual allegations as set forth in Title VII harassment claim); *Smith v. Chicago School Reform Bd. of Trustees*, 165 F.3d 1142, 1151 (7th Cir. 1998) (holding IHRA preempted state law tort claims based on theories of racial discrimination).

claim. As the district court noted [SA-016], a claim for hostile work environment only arises where the "harassment was severe or pervasive so as to alter the *conditions of employment* and create a hostile or abusive working environment." (Emph. added). In response, a defendant may assert an affirmative defense when it "exercised reasonable care to prevent and correct" the action, and the employee "failed to take advantage of any preventive or corrective opportunities." [SA-016-17]. Each of those elements requires a court's scrutiny of the church's (a) "governance and administration," *Gellington*, 203 F.2d at 1304, (b) "employment relationship", *McClure* 460 F.2d at 560, and (c) "control" over, *Hosanna-Tabor*, 565 U.S. at 194-95, along with (d) the workplace conditions of, *Catholic Bishop*, 559 F.2d at 1123-24 (*aff'd N.L.R.B.*, 440 U.S. 490), a ministerial employee.

Here, it would be impossible to examine whether Plaintiff's work environment was "hostile" without scrutinizing his working conditions, including his relationship with his pastor and religious superior, Father Dada. *See, e.g., Gomez v. Evangelical Luther. Church in Am.*, 2008 WL 3202925, *3, n.1 (M.D. N.C. Aug. 7, 2008) ("Because Plaintiff must show that the harassment 'was sufficiently severe or pervasive to alter the conditions of employment,' inquiry into the conditions of employment and, therefore, church doctrine in general, is unavoidable." (internal citations omitted)). Indeed, the discovery necessary to resolve Plaintiff's claim will subject a superior minister to an interrogation about his words to and demeanor toward a subordinate minister concerning the subordinate's *fitness for ministry*. Discovery will necessarily entail similar

depositions of parish personnel and parishioners regarding the pastor's style of ministry and the relative merits of his words, further compounding the constitutional violation by allowing the creation of a record of different views about clergy discipline by people who lack ecclesiastical authority.

Similarly, by necessity, any examination of any affirmative defense to this claim—*e.g.,* whether the Archdiocese exercised reasonable care to address the alleged behavior or if Plaintiff unreasonably failed to take advantage of corrective opportunities (notably Plaintiff did not allege he ever complained to the Archdiocese)—will require inquiry into constitutionally protected subject matter, including Plaintiff's working conditions, the Archdiocese's investigation into any complaints of harassment, and any disciplinary and supervisory actions taken by the Archdiocese, including the decision-making process behind any decisions made or alleged inaction. *Hosanna-Tabor*, 565 U.S. at 205 (Alito, J., joined by Kagan, J., concurring) ("In order to probe the *real reason* for respondent's firing, a civil court—and perhaps a jury—would be required to make a judgment about church doctrine.")

This is precisely the kind of granular entanglement with the terms and conditions of ministerial employment prohibited by this Court and by the Supreme Court in *Catholic Bishop,* 559 F.2d at 1123-24 (*aff'd N.L.R.B.*, 440 U.S. 490) ("If a bishop, for example, should refuse to renew all lay faculty teacher contracts because he believed that the union had adopted policies and practices at odds with the religious character of the institutions, or because he wanted to replace lay teachers with religious-order teachers who had become available, under ecclesiastical law he

would have the right if not the duty to take that action. Yet, under the National Labor Relations Act, he might well be found guilty of an unfair labor practice"); *see also Milivojevich*, 426 U.S. at 719 (warning against courts' wading into a "religious thicket"). The Supreme Court in *Hosanna-Tabor* upheld the same principle, stating: "a religious body's right to self-governance must include the ability to select … those who will serve as the very embodiment of its message and its voice to the faithful. A religious body's control over such 'employees' is an essential component of its freedom to speak in its own voice…." 565 U.S. at 201 (Alito, J., joined by Kagan, J., concurring) (internal citations omitted).

The ministerial exception is meant to keep the courts out of the church-minister relationship. This is not only to prevent courts from deciding explicitly religious questions (although that would be a *per se* First Amendment violation), but also to protect religious organizations from government interference in internal ecclesiastical governance, and to enable religious organizations to decide freely, without fear of secular penalty, who shall act in ministerial roles. *Hosanna-Tabor,* 565 U.S. at 194-195 ("exception … ensures that the authority to select and control who will minister to the faithful —a matter 'strictly ecclesiastical,'—is the church's alone"). Claims by ministers which require the court to intrude into the terms and conditions of employment, or to upend the constitutionally protected hierarchical polity adopted by a church, directly entangle the court in religious questions (in violation of the Establishment Clause) and directly threaten the church's right to self-governance (in violation of the Free Exercise Clause).

The application of the ministerial exception does not depend upon the artful pleading of a plaintiff; it prohibits courts from hearing claims founded upon the church-minister relationship no matter how they are dressed up. Otherwise, the ministerial exception would lose all force because plaintiffs could simply deconstruct an employment claim into separate segments (which, together, still depend on the church-minister employment relationship). Rather, the analysis is simple: was the employee a "minister" of a religious organization and, if so, does his nondiscrimination claim exist only by virtue of federal employment discrimination statutes? If, as here, the answer to each question is "yes," a court's analysis must end because "[p]ersonnel decisions by church affiliated institutions affecting [ministerial employees] are *per se* religious matters[.]" *Scharon v. St. Luke's Episcopal Presby. Hosps.,* 929 F.2d 360, 363 (8th Cir. 1991).

Tellingly, the district court dismissed the remainder of Plaintiff's hostile work environment claims, finding that evaluation of the nature of the harassment and possible affirmative defense asserted by Defendants would "*require an examination of the Church's employment practices*." [SA-025 (emph. added)]. There is no basis to draw any distinction simply because the alleged harassment related to the Plaintiff's weight. The constitutional violation arises from the scrutiny of the ministerial employment relationship (*the position*) not the substance of Father Dada's communications with Plaintiff (*the claim*). The district court's proposed approach, examining on a "case by case" basis whether excessive entanglement would occur from judicial analyzing of ministerial interactions between a church

and its priests, infringes upon the Church's constitutionally protected right to internal governance without government oversight because it is "*the very process of inquiry*" that violates the First Amendment. *Catholic Bishop*, 440 U.S. at 502.

### C. The District Court Erred By Improperly Engrafting New Elements Onto The Ministerial Exception, Which Are Not Required For Its Application.

The district court erred in circumscribing the holding in *Alicea-Hernandez*, 320 F.3d 698. [SA-008-11]. In so doing, it engrafted two new elements onto the ministerial exception—requiring (1) a tangible employment action and (2) religious justification for the alleged discrimination—that are not required for its application.

#### i. The Ministerial Exception Applies Regardless Of Whether The Action Taken Relating To A Minister's Employment Is Tangible Or Intangible.

First, the ministerial exception applies regardless of whether the employment action taken is tangible or intangible. This Court, in *Alicea*, drew no distinction. Instead, it held: "The only question is that of the appropriate characterization of [the] position," and, once the exception is found to apply, it is "applied without regard to the type of claims being brought." *Id.* at 703.

In so ruling, this Court cited *McClure*, 460 F.2d 553, for the "rationale" underpinning the broad application of the ministerial exception. 320 F.3d at 703. In *McClure*, the court held that "application of the provisions of Title VII to the *employment relationship* existing between … a church and its minister would result in an encroachment by the state into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First

Amendment." 460 F.2d at 560 (emph. added). The court noted that the types of areas a civil court could not review included "a minister's salary [and] his place of assignment and his duty." *Id.* The court's discussion in no way differentiated between tangible and intangible employment actions; instead it included all aspects of the "employment relationship." *See also Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (Title VII claims are "not limited to 'economic' or 'tangible discrimination,'" but rather "cover more than 'terms' and 'conditions in the narrow contractual sense.'")

Consistent with *Alicea-Hernandez* and *McClure*, the Supreme Court in *Hosanna-Tabor* explained that the exception "ensures that the authority to select *and control* who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone." *Id.* at 194-95 (emph. added). The right of "control" again does not necessarily involve tangible employment actions (whatever that means). For example, if the Archdiocese decided that its ministers needed to be physically fit, for health and/or aesthetic appearances, a civil court could not second guess that determination. This is consistent with the ministerial exception's origin—the prohibition against government interference with a church's relationship with its ministerial employees. *See, e.g., Kedroff v. St. Nicholas Cathedral of Russian Orth. Church,* 344 U.S. 94, 107 (1952) (recognizing that the Free Exercise Clause of the First Amendment prohibits regulation of "church administration, the operation of churches [or] appointment of clergy").

Importantly, a hostile work environment claim is just one form of employment discrimination claim. To be actionable, it must rise to the level of altering a "term, condition, or privilege of employment. " *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). Thus, whether deemed tangible or intangible, any hostile work environment claim necessarily requires court scrutiny of a minister's "term, condition or privilege of employment," and thus necessarily interferes with a church's right to "control" the terms, conditions or privileges" of a minister's employment.

**ii. The Archdiocese Need Not Provide Religious Justifications For Its Actions.**

Second, the district court incorrectly held the ministerial exception did not apply because the Archdiocese offered "no religious justification" for its alleged harassing conduct. [SA-26].[4] As the Supreme Court stated in *Hosanna-Tabor,* that argument "misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,' is the church's alone." 565 U.S. at 194-195. This is because as this Court held in

[4] The district court dismissed the hostile work environment claims based on Father Dada's alleged comments relating to the plaintiff's intention to enter into a same sex marriage on the ground that such statements were arguably based on the Catholic Church's doctrine concerning marriage, and that the court could not become entangled in interpreting such doctrine. [SA-022-25]. As shown above, the district court misunderstood the basis of the ministerial exception, which is to prevent courts from interfering in the relationship between a church and its ministers, regardless of whether the alleged infraction involves explicitly religious conduct.

*Alicea-Hernandez*, "It is … not our role to determine whether the Church had a secular or religious reason for alleged mistreatment of [a ministerial employee]." 320 F.3d at 703. The ministerial exception is a constitutionally mandated protection *arising from* the religious organization's broader right to self-government, and not solely as a means to prevent a court from making explicit doctrinal determinations. Indeed, the rule against religious judgments is a distinct form of church autonomy protection, one that absolutely bars judicial involvement. *See Myhre v. Seventh-Day Adventist Church Reform Movement Am. Union Int'l Missionary Soc'y*, 719 F. App'x 926, 929 (11th Cir. 2018) (per curiam) (courts lack jurisdiction to decide "claims requir[ing] an examination of doctrinal beliefs and internal church procedures"); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 n.4 (2017) ("targeting religious beliefs as such is never permissible").

### D. The Tenth Circuit Correctly Held That The Ministerial Exception Bars Hostile Work Environment Claims As A Matter Of Law, And The District Court Incorrectly Relied On Earlier Ninth Circuit Decisions To The Contrary.

In *Skrzypczak*, 611 F.3d 1238, a former employee brought an action against a church, alleging gender discrimination and hostile work environment claims under Title VII. The Tenth Circuit affirmed dismissal of all claims, including the hostile work environment claim: "[While] a hostile work environment claim brought by a minister does not implicate a church's spiritual functions … we believe that allowing such a claim may … involve gross substantive and procedural entanglement with the Church's core functions, its polity, and its autonomy." *Id.* at

1245 (internal citations omitted). In particular, the court noted that "[t]he types of investigations a court would be required to conduct in deciding [hostile work environment] claims brought by a minister could only produce by [their] coercive effect the very opposite of that separation of church and State contemplated by the First Amendment." *Id.* (citing *McClure*, 460 F.2d at 560). The Tenth Circuit explicitly followed this Court, adopting the bright line test set forth "in *Alicea-Hernandez*," finding it "provides greater clarity in the exception's application…." *Skrzypczak*, 611 F.3d at 1245.

Other courts have similarly held that the ministerial exception bars sexual harassment and hostile work environment claims. *See Ogugua v. Archdiocese of Omaha,* 2008 WL 4717121 (D. Neb. Oct. 22, 2008) (dismissing claim of sexual harassment as factually entwined and related to adverse employment actions, which the court could not review without excessive government entanglement with religion); *Gomez*, 2008 WL 3202925 (hostile work claim barred by ministerial exception); *Preece v. Covenant Presbyterian Church*, 2015 WL 1826231, *7 (D. Neb. April 22, 2015) ("defendant's treatment of the plaintiff in relation to his sexual harassment allegation clearly implicates an internal church decision and management … [and] the court finds [that] claim is factually entwined and related to the plaintiff's other claims.") "The type of claim is irrelevant because *any Title VII action* brought against a church by one of its ministers will improperly interfere with the church's right to select and direct its ministers free from state

interference." *Preece*, 2015 WL 1826231, *7 (emphasis added, internal citations omitted).

In *Hosanna-Tabor*, the Supreme Court employed the same reasoning that undergirds this Court's holding in *Alicea-Hernandez*. Indeed, the distinction made by the Supreme Court was not between different types of employment discrimination claims, but rather between employment discrimination claims and other types of claims that are not dependent upon the employment discrimination statutes: "The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that a ministerial exception bars such a suit. We express no view on whether the exception bars *other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers*." *Id.* at 196 (emph. added). Thus, while ministerial employees may be able to bring certain claims based on religion-neutral common law rights, ministerial employees may not bring statutory claims that would not exist but for the church-minister employment relationship.

The district court rejected the Tenth Circuit's approach in *Skrzypczak*, declining to apply the ministerial exception as a matter of law to this employment discrimination claim. Instead the district court relied on two Ninth Circuit decisions which predate *Hosanna-Tabor*. [SA-18-20]. In *Bollard v. Cal. Province of The Society of Jesus*, 196 F.3d 940 (9th Cir. 1999), a former Jesuit novice brought a Title VII claim alleging that he was sexually harassed while training to become a

member of the Society of Jesus. The court did not apply the ministerial exception because it believed that such sexual harassment claims did not require it to address explicitly religious questions, and because the Defendant "did not offer a religious justification for the harassment [] allege[d]." *Id.* at 947. The court further held there was no risk of procedural entanglement because "[n]othing in the character of [the] defense will require a jury to evaluate religious doctrine or the 'reasonableness' of the religious practices followed within the … order." *Id.* at 950.

Similarly, in *Elvig v. Calvin Presby. Church*, 375 F.3d 951 (9th Cir. 2004), an ordained minister brought sexual harassment and retaliation claims under Title VII against a church and her supervisor. The court found that the sexual harassment claims alleging termination of employment, and claims based on all other tangible employment actions were barred by the ministerial exception (*id.* at 960-961), but the claim for hostile work environment could proceed because the court believed that it would only involve a "restricted, secular inquiry." *Id.* at 963.[5]

Without the benefit of *Hosanna-Tabor,* the Ninth Circuit improperly focused on whether the claim would involve a seemingly secular inquiry, rather than adhering to the ministerial exception's broader prohibition against government interference with the church-minister relationship. *See Milivojevich*, 426 U.S. at

[5] The dissents in *Bollard* and *Elvig* criticized the majorities for ignoring the inevitable entanglement in church internal governance that would result in either case. *See Bollard*, 211 F.3d at 1332 (Wardlaw, J., Kozinski, J. O'Scannlain, J., and Kleinfeld, J., dissenting) ("resolution of Bollard's sexual harassment claims will require the judicial branch to delve into religious matters outside the judiciary's province); *Elvig*, 375 F.3d at 973 (Trott, J., dissenting) ("[T]he process about to come under secular legal scrutiny is inextricably intertwined with the Church's religious tenants… .")

708 ("the fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes"); *Catholic Bishop*, 559 F.2d at 1123 (*aff'd N.L.R.B.*, 440 U.S. 490) ("the very threshold act of certification of the union necessarily alters and impinges upon the religious character of all parochial schools. No longer would the bishop be the sole repository of authority as required by church law.") The Ninth Circuit also imposes legal duties and penalties on the two religious organizations arising solely from their decisions to employ the respective plaintiffs as ministers, rather than from the general common law duties that all citizens owe each other. The district court's reliance on these Ninth Circuit decisions thus, as stated above, "misses the point of the ministerial exception." *Hosanna-Tabor*, 565 U.S. at 193-194.

This Court rejected the same argument in a case involving the appellant, Catholic Bishop. In *Alicea–Hernandez,* this Court stated: "It is … not our role to determine whether the Church had a secular or religious reason for alleged mistreatment of Alicea-Hernandez. The only question is that of the appropriate characterization of her position. ." 320 F.3d at 703; *see also Catholic Bishop*, 440 U.S. 490 (First Amendment entanglement concerns prevented N.L.R.B. jurisdiction over secular terms and conditions of teachers at church-sponsored schools).[6]

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[6] *See also Young v. Northern Ill. Conf. of Un. Meth. Church*, 21 F.3d 184, 186 (7th Cir. 1994) ("[T]he free exercise clause of the First Amendment protects *the act of the decision* rather than a motivation behind it.") (citing *Rayburn v. General Conf.*

As shown above, the weight of authority supports the Tenth Circuit's approach in *Skrzypczak* which, in turn, was based on this Court's reasoning in *Alicea-Hernandez*. *Bollard*, *Elvig* and the district court's decision in this case are inconsistent with these authorities, and with the principles enunciated by the Supreme Court in *Catholic Bishop*, *Milivojevich* and *Hosanna Tabor*. Civil courts have no place in the disciplinary relationship between a church and its minister.

### E. The District Court's Ruling Results in Arbitrary and Inconsistent Results.

The district court's narrowing of the ministerial exception—requiring (a) a tangible employment action and (b) religious justification—not only runs afoul of the exception's aim (the church's right to self-governance) but yields the arbitrary and inconsistent results *Skrzypczak* warned against. 611 F.3d at 1245 (relying upon *Alicea*). For example, under the district court's framework, a minister's harassment complaint, if resulting in a "tangible" employment action, would be barred by the ministerial exception, but if the minister never complained of the mistreatment, he would preserve his right to sue for hostile work environment, even though both examples might involve the identical subject matter and the identical First Amendment concerns. *See, e.g, DeClue v. Central Ill. Light Co.*, 223 F.3d 434, 437

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*of Seventh Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)) (emphasis in original); *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801 (4th Cir. 2000) ("The church need not, for example, proffer any religious justification for its decision, for the Free Exercise Clause protects the act of a decision rather than a motivation behind it.") (internal citations omitted); *Combs v. Cent. Tex. Annual Conference of United Methodist Church,*173 F.3d 343, 350 (5th Cir.1999) (holding in allowing employment related claims "secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal").

(7th Cir. 2000) (hostile work environment harassment merely a form of discrimination relating to "terms or conditions of employment"). Alternatively, a minister's sexual orientation harassment claim would be barred, but if the same minister's harassment involved sex discrimination only, his claim would not be subject to the exception, despite judicial scrutiny involving exactly the same "examination of the Church's employment practices." The district court's decision permits a minister to parse out claims, turning the holding in *Hosanna-Tabor* on its head, and incentivizing churches to simply terminate, rather than discipline, ministers.

## II. Even If The Ministerial Exception Does Not Apply *Per Se* To All Hostile Work Environment Discrimination Claims, The Pastor's Communications To A Subordinate Minister In This Case Were Explicitly Religious, Such That Adjudication Will Violate the Ministerial Exception.

The district court held that Father Dada's statements (relating to the plaintiff's weight and health) leading to an alleged hostile work environment were not explicitly religious and, therefore, not subject to the ministerial exception or other First Amendment barrier. [SA0-25-28]. As noted above, the ministerial exception applies nonetheless because it is undisputed that the plaintiff is a ministerial employee and that his claim is brought pursuant to an employment discrimination statute, irrespective of whether the conduct at issue is allegedly religious.

Independently, and in the alternative, the district court erred even under its own test, by failing to consider the explicit religious nature of the interactions between the plaintiff and Father Dada. Indeed, the alleged facts forming the basis

of Plaintiff's hostile work environment claim cannot be scrutinized – in discovery or on the merits – without interfering with the Archdiocese's right to hierarchically control its subordinate ministers, decide the qualifications for ministry, select ministers according to its own religious standards and generally control the "work environment" of a Catholic parish. The fact that the district court was unable to perceive the pastor's statements as an exercise of hierarchical control over a subordinate minister illustrates why the Supreme Court has rejected the requirement of a religious justification in ministerial exception cases. *Hosanna-Tabor,* 565 U.S. 171. The "very process" of parsing what is, and what is not religious is, itself, fraught with the danger of violations of both the establishment and free exercise clauses. *Catholic Bishop*, 440 U.S. at 502.

The entirety of Plaintiff's claims arise from statements Father Dada made to him in the exercise of Father Dada's ecclesiastical authority as his religious superior, and thus constitute the hierarchical discipline of a superior minister over a subordinate minister. Plaintiff alleges that Father Dada "repeatedly encouraged [him] to walk Dada's dog to get some exercise to lose weight," and told him that "he needed to lose weight because [Dada] didn't want to have to preach at [his] funeral," and that his weight and diabetes made it cost prohibitive for the parish to include him on its health insurance plans. [SA-04-05]. The district court's recognition of a claim arising from such statements, or any attempt to determine Father Dada's intent by making the statements, constitutes a direct interference with the Archdiocese's right to oversee, discipline and have unfettered communications with

its own ministers. The constitution accords a church broad discretion and autonomy in its discipline of clergy. *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., joined by Kagan, J., concurring) ("A religious body's control over [ministers] is an essential component of its freedom to speak in its own voice"); *Milivojevich*, 426 U.S. at 713 (a court must accept the decisions of the highest judicatories of a religious organization on matters of discipline to avoid interfering with the free exercise of religion). The district court's scrutiny of Father Dada's statements necessarily would constitute government interference with the Archdiocese's "management" of its minister. *See, e.g.*, *Preece*, 2015 WL 1826231, *7 ("defendant's treatment of the plaintiff in relation to his sexual harassment allegation clearly implicates an internal church decision and management"; "The type of claim is irrelevant because any … action brought against a church by one of its ministers will improperly interfere with the church's right to select and direct its ministers free from state interference."); and *Gomez*, 2008 WL 3202925, *2, n.1 (any analysis of harassment claims would "unavoidabl[y]" "inquir[e] into the conditions of employment" (internal citations omitted)). This is precisely the kind of granular entanglement with the terms and conditions of ministerial employment prohibited by this Court and the Supreme Court in *Catholic Bishop*, 559 F.2d at 1123-24 (*aff'd N.L.R.B.*, 440 U.S. 490) (N.L.R.B.'s exercise of jurisdiction over church-operated schools would interfere with internal governance of ministerial employees' terms and conditions of employment).

The district court's contention that the Archdiocese could raise an affirmative defense under *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (employer must demonstrate it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and employee unreasonably failed to take advantage of any preventive or corrective opportunities) [SA-016] only confirms the constitutional infirmity of the district court's approach. A religious organization would not have policies prohibiting a superior minister from directing or guiding a subordinate minister with regard to his health, weight, physical appearance or anything else that might impact his fitness to minister. Such comments would be viewed not as harassment, but as the proper formation of a member of the clergy. Thus, there would be no need for preventative or correctional opportunities other than the subordinate minister complying with the direction of the hierarchical superior. The district court's approach would interfere with that constitutionally protected hierarchical control. *See, supra.*, *Catholic Bishop*, 440 U.S. at 502. Moreover, as noted above, the district court's failure to perceive that its argument was, itself, a usurpation of the Archdiocese's hierarchical ecclesiastical authority only makes more evident the "religious thicket" into which it has tread. *Milivojevich*, 426 U.S. at 719.

## CONCLUSION

For all of the foregoing reasons, the district court erred in denying the Archdiocese's motion to dismiss. Accordingly, this Court should reverse the district court's decision and dismiss the remainder of Plaintiff's claims.

Respectfully submitted,
St. Andrew the Apostle Parish, Calumet City, and the Archdiocese of Chicago,

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One of their attorneys

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PROOF OF SERVICE

The undersigned, an attorney, states that he caused a copy of the foregoing APPELLANT Brief and Short Appendix to be served upon all counsel of record via the 7th Circuit Court's electronic filing system.

s/ Alexander D. Marks

## CIRCUIT RULE 30(D) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) are included in the appendix.

s/Alexander D. Marks
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| SANDOR DEMKOVICH,<br><br>Plaintiff,<br><br>v.<br><br>ST. ANDREW THE APOSTLE PARISH, CALUMET CITY; and, THE ARCHDIOCESE OF CHICAGO,<br><br>Defendants. | ) | No. 1:16-cv-11576<br><br>Judge Edmond E. Chang |

MEMORANDUM OPINION AND ORDER

Plaintiff Sandor Demkovich brings this suit against St. Andrew the Apostle Parish in Calumet City, Illinois, and the Archdiocese of Chicago. He alleges employment discrimination based on: (1) sex, sexual orientation, and marital status under Title VII, 42 U.S.C. § 2000e *et seq.*; the Illinois Human Rights Act, 775 ILCS 5/2-101 *et seq.*; and the Cook County Human Rights Ordinance, Cook County, Ill., Code of Ordinances § 42-30 *et seq.*; and (2) disability under the Americans with Disabilities Act, 42 U.S.C. § 12112 *et seq.*, and the Illinois Human Rights Act, 755 ILCS 5/1-102 *et seq.*[1] R. 16, Am. Compl. ¶ 1.[2] In the original complaint, Demkovich alleged that Reverend Jacek Dada, pastor of St. Andrew Parish, fired

[1]This Court has subject matter jurisdiction over Demkovich's federal claims under 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3), and supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367(a). The defense argument on the "ministerial exception" is an affirmative defense, not an argument for lack of subject matter jurisdiction. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 195 n.4 (2012).

[2]Citations to the record are noted as "R." followed by the docket number and the page or paragraph number.

Demkovich because he entered into a same-sex marriage and because of his disabilities (diabetes and a metabolic syndrome). R. 1, Compl. ¶¶ 41, 51, 63, 77, 89.

In September 2017, the Court dismissed the complaint (though without prejudice) on the grounds that the discrimination and wrongful-termination claims were barred by the First Amendment's "ministerial exception." R. 15, Opinion (Sept. 29, 2017). Demkovich then filed an amended complaint, alleging much of the same discriminatory conduct, but modifying his claims to challenge the *hostile work environment*, rather than the firing itself. Am Compl. at 9-15. In contrast to the original complaint, which sought relief arising from the firing,[3] he now seeks damages caused by the emotional distress, mental anguish, and physical ailments he allegedly suffered from the hostile work environment. *Id.* The Amended Complaint thus does not seek relief for any adverse *tangible* employment action, but rather for the damages caused by the alleged discriminatory insults and remarks. The Archdiocese (for convenience's sake, this Opinion will collectively refer to the two Defendants that way) now moves to dismiss the Amended Complaint, again arguing that the ministerial exception bars the claims. R. 21, Defs.' Supp. Mot. Dismiss. For the reasons discussed below, the Court first holds that the ministerial exception does not categorically bar hostile work environment claims that do not seek relief for a tangible employment action. Instead, those types of claims (like the one presented here) must be evaluated on a case-by-case basis for excessive intrusion on the religious institution's First Amendment rights. Based on that analysis, the

[3]He originally sought reinstatement, back pay, front pay, fringe benefits, compensatory damages, and punitive damages, all arising from the firing. Compl. at 7-14.

Archdiocese's motion is granted on the claims based on sex, sexual orientation, and marital status, but denied on the disability claims.

## I. Background

For the purposes of this motion, the Court accepts as true the allegations in the Amended Complaint. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Demkovich worked as the "Music Director, Choir Director and Organist" for the Archdiocese of Chicago and St. Andrew Parish in Calumet City from September 2012 until his firing in September 2014. Am. Compl. ¶¶ 8-9. Demkovich's immediate supervisor was Reverend Jacek Dada, who was St. Andrew's pastor. *Id.* ¶¶ 10-11.

Reverend Dada knew that Demkovich was gay and that he was engaged to another man. Am. Compl. ¶ 13. During Demkovich's two years of employment at St. Andrew, Dada made remarks that reflected animus based on Demkovich's sex and sexual orientation, including calling Demkovich and his partner "bitches." *Id.* ¶¶ 15-16.[4] In July 2013, Dada asked Demkovich when he planned to marry his partner, and Demkovich responded that the wedding would be sometime in 2014. ¶ 17. Demkovich alleges that the abusive and harassing behavior became increasingly hostile as the wedding date approached. *Id.* ¶ 18. Dada repeatedly confronted and harassed other St. Andrew's staff members, parish members, and cantor and choir members, both in person and on the phone, demanding information about Demkovich's upcoming

[4]The Amended Complaint also lists instances of abusive and harassing behavior committed by Reverend Dada and other St. Andrew's staff members based on female staff members' sex, and African-American and Mexican-American community members' national origin or race. Am. Compl. ¶ 14. Those allegations do not directly bear on Demkovich's specific claims.

wedding ceremony. *Id.* ¶¶ 19, 23. Dada also recruited other St. Andrew's staff members to help him gather information about the wedding. *Id.* ¶ 20. The individuals that were harassed or contacted about Demkovich's wedding told Demkovich what Dada was doing and reported that Dada's behavior was distressing and causing them anxiety. *Id.* ¶ 24. Dada allegedly referred to Demkovich's wedding as a "fag wedding." *Id.* ¶ 22.

Demkovich married his partner in September 2014. Am. Compl. ¶ 27. In the forty-eight hours before the wedding, a St. Andrew's employee told Demkovich that Reverend Dada intended to ask for Demkovich's resignation because of the marriage. *Id.* ¶ 25. Another employee told Demkovich that Reverend Dada had informed his staff that he had already fired Demkovich. *Id.* ¶ 26. After the wedding, Dada demanded that another staff member sign a statement swearing she attended Demkovich's wedding, and when she declined to sign it, Dada told her that he had already fired Demkovich. *Id.* ¶¶ 28-30. Four days after the wedding, Reverend Dada asked Demkovich to resign because of the marriage. Am. Compl. ¶¶ 31-32. When Demkovich refused to resign, Dada fired him and said, "Your union is against the teachings of the Catholic church." *Id.* ¶ 33.

On the disability-discrimination claims, Demkovich alleges that he was frequently harassed because of his diabetes and a metabolic syndrome. Am. Compl. ¶¶ 34-35. Reverend Dada made harassing remarks about Demkovich's weight, often urging him to walk Dada's dog to lose weight, and telling Demkovich that he needed to lose weight because Dada did not want to preach at his funeral. *Id.* ¶¶ 35-36. Dada

also repeatedly complained about the cost of keeping Demkovich on the parish's health and dental insurance plans because of his weight and diabetes. *Id.* ¶ 37. In 2012, when Demkovich declined a dinner invitation from Dada because he did not have his insulin with him, Dada asked if Demkovich was diabetic and told him that he needed to "get his weight under control" to help eliminate his need for insulin. *Id.* ¶ 38.

As discussed earlier, the original complaint sought relief for Demkovich's *firing*. Compl. ¶¶ 41, 51, 63, 77, 89. The Court granted the Archdiocese's motion to dismiss, agreeing that the ministerial exception barred Demkovich's claims, but allowed Demkovich to amend his complaint. R. 15, Opinion at 2, 15 (citing Fed. R. Civ. P. 15(a)). Demkovich then filed this Amended Complaint, this time alleging claims of discrimination based on a hostile work environment. Am. Compl. ¶¶ 51, 62, 73, 86, 99. The Archdiocese moves to dismiss, again invoking the ministerial exception. Defs.' Suppl. Mot. Dismiss.

## II. Legal Standard

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This short and plain statement must "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The Seventh Circuit has explained that this rule "reflects a liberal notice pleading regime, which is intended to 'focus litigation on the merits of a claim' rather than on technicalities that might keep

plaintiffs out of court." *Brooks v. Ross*, 578 F.3d 574, 580 (7th Cir. 2009) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)).

"A motion under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief may be granted." *Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). These allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Factual allegations—as opposed to mere legal conclusions—are entitled to the assumption of truth. *Iqbal*, 556 U.S. at 678-79.

As explained in the prior Opinion, the ministerial exception is actually an affirmative defense, *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 195 n.4 (2012), and is neither an exception to subject matter jurisdiction nor an issue of the adequacy of the claim. R. 15, Opinion at 4. The Court has already held that Demkovich is a "minister" for purposes of the exception. *Id.* at 7, 11. He does not now dispute his status as a minister, but rather contends that the exception does not apply to his hostile work environment claims, which seek relief only for harassment that did not result in a tangible employment action. *See* R. 23, Pl.'s Resp. Br. at 2.

## III. Analysis

### A. Scope of the Ministerial Exception

In light of Demkovich's concession (for purposes of this dismissal motion) that he is a "minister" under the ministerial exception, the primary question is whether the ministerial exception bars claims for a *hostile work environment*—rather than for refusals-to-hire or for firings—under Title VII and the ADA. Put even more precisely, Demkovich is *not* seeking damages arising out of a tangible employment action (like the firing). Instead, he seeks damages for the hostile work environment created by the alleged discriminatory remarks and insults of Reverend Dada. The Supreme Court's most thorough (and recent) case on the ministerial exception does not directly answer whether the exception applies to a hostile-environment claim that is limited to the harassment itself, rather than a tangible employment action. Instead, the case involved a claim for wrongful *termination*. *Hosanna-Tabor*, 565 U.S. at 188, 196 (applying ministerial exception to a disability-discrimination claim for wrongful termination). Having said that, *Hosanna-Tabor* might contain a clue about the exception's applicability to harassment claims. In describing the purpose of the ministerial exception, the Supreme Court explained that the exception "ensures that the authority to *select and control who will minister* to the faithful—a matter strictly ecclesiastical—is the church's alone." *Id.* at 194-95 (emphasis added) (cleaned up).[5] That description of the exception's purpose focuses on the church's exclusive

[5]This opinion uses (cleaned up) to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 JOURNAL OF APPELLATE PRACTICE AND PROCESS 143 (2017).

authority to choose who will be its ministers. Under that reasoning, hiring and firing decisions cannot be challenged by ministers. But scrutinizing only whether a church has *harassed* one of its ministers, without inquiring into any tangible employment action, does not necessarily undermine the purpose of the exception, at least as described in *Hosanna-Tabor*. Still, *Hosanna-Tabor* presented the Supreme Court only with the question of a minister's firing, so that case cannot be taken as directly deciding the issue. It is time to examine appellate court authority for an answer.

**1. Seventh Circuit**

The Archdiocese contends that in *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2003), the Seventh Circuit held that *any* claim brought by a minister against a church is barred by the ministerial exception. Def.'s Suppl. Mot. Dismiss at 2, 7. That is an overbroad reading of the opinion.[6] It is true that, on first glance and taken out of context, there is a sentence in the opinion that could be read in that sweeping way: "The 'ministerial exception' applies without regard to the type of claims being brought." *Alicea-Hernandez*, 320 F.3d at 703. But the context of this sentence makes all the difference. First, it is not at all clear that the employee in the case even presented a hostile-environment claim at all, let alone a hostile-environment claim independent of a tangible employment action. The

[6]Although *Alicea-Hernandez* does not apply as broadly as the Archdiocese contends, it is worth noting that Demkovich offers a meritless basis for distinguishing it. Specifically, Demkovich argues that *Alicea-Herndandez* does not apply because it characterized the ministerial exception as a problem with subject matter jurisdiction, rather than an affirmative defense. Pl.'s Resp. Br. at 10. True, the opinion used the wrong label for the exception, but that label had no effect on the opinion's reasoning and its application of the exception. The remainder of *Alicea-Hernandez* remains intact.

complaint was brought *pro se*, and as quoted by the Seventh Circuit, the employee alleged:

> I was subjected to prolonged humiliation and emotional stress of working under *unequal and unfair conditions of employment*; was excluded from management meetings, training and information required for me to perform my duties; was ordered evicted from the premises and replaced by a male Hispanic with less competence and experience in Hispanic communication.

320 F.3d at 702 (emphasis added).[7] Alicea-Hernandez's complaint thus sought damages for various tangible employment actions, including conditions that prevented her from performing her job, rather than damages arising from racist or sexist remarks.[8] So the Seventh Circuit was not presented with the sort of claim advanced by Demkovich: a hostile-environment claim that does *not* complain of a tangible employment action.[9]

There is another reason to reject the idea that *Alicea-Hernandez* was addressing intangible hostile-environment claims when the opinion stated that the ministerial exception "applies without regard to the type of claims being brought."

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[7]*See also id.* at 700 ("She bases these claims on allegations of poor office conditions, the Church's attempts to prevent her from rectifying those conditions, exclusion from management meetings and communications, denial of resources necessary for her to perform her job, and constructive discharge and subsequent replacement by a less qualified male who received a higher salary and a more significant title for the same position.").

[8]It is true that the district court opinion stated that the employee complained she was "harassed," 2002 WL 598517, at *1 (N.D. Ill. Apr. 18, 2002), but there is no further description of the complaint's allegations of the misconduct in the opinion, because the district court concluded that she was complaining about the Church's policies (the Seventh Circuit later disagreed with that characterization of the complaint, 320 F.3d at 702).

[9]To be sure, another court and at least one scholar have read *Alicea-Hernandez* just as broadly as the Archdiocese does here. *See, e.g.*, *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1245 (10th Cir. 2010); Rosalie Berger Levinson, *Gender Equality vs. Religious Autonomy: Suing Religious Employers for Sexual Harassment After Hosanna-Tabor*, 11 STAN. J. CIV. RTS. & CIV. LIBERTIES 89, 95 (2015). But this Court disagrees, as detailed in the text.

320 F.3d at 703. That statement was made specifically in response to the employee's argument that the applicability of the ministerial exception depends on "the nature of her claims and whether the discrimination in question was exclusively secular." *Id.* The opinion goes on to respond, "Here she is mistaken. The 'ministerial exception' applies without regard to the type of claims being brought." *Id.* The crucial point comes next: to explain the rejection of the argument, the Seventh Circuit relied on and quoted from a Fourth Circuit decision, *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 802 (4th Cir. 2000). Its reliance on that case demonstrates that the Seventh Circuit was only rejecting the employee's argument that courts must examine whether the employer is advancing a secular or a religious *motive* for the employment decision. Specifically, *Alicea-Hernandez* quoted, in pertinent part:

> The exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision. The church need not, for example, proffer any religious justification for its decision, for the Free Exercise Clause protects the act of a decision rather than the motivation behind it.

*Alicea-Hernandez*, 320 F.3d at 703 (cleaned up) (quoting *Roman Catholic Diocese*, 213 F.3d at 802). The Fourth Circuit decision too did not address whether the ministerial exception applies to non-tangible hostile-environment claims. *See Roman Catholic Diocese*, 213 F.3d at 798, 802. So when the Seventh Circuit stated, immediately following the quote of the Fourth Circuit decision, that to "rule otherwise would enmesh the court in endless inquiries as to whether each discriminatory act was based in Church doctrine or simply secular animus," 320 F.3d at 703, the meaning of the prior pronouncement is clear: the ministerial exception applies "without regard

to the type of claims" means that the exception applies even if the employee claims that the discrimination was motivated by a secular reason, rather than a religious doctrine. That holding accurately predicted *Hosanna-Tabor*, 565 U.S. at 188-89 (a church cannot be made "to accept or retain an unwanted minister," no matter the reason), but the holding does not go so far as to address a discrimination claim that does *not* target whether a minister is selected or retained.

**2. Claims that Do Not Challenge a Tangible Employment Action**

So the question of whether the ministerial exception applies to claims that do not challenge a tangible employment action remains open in this Circuit. To figure out whether the exception applies to those sorts of claims, it would help to examine the two extremes of discrimination claims brought by employees against their religious employers, because the principles and rationale for the two extremes will provide guidance on the right answer. On one end of the spectrum, as noted earlier, the Supreme Court has made clear that the selection or retention of a minister is completely off-limits to the courts. *Hosanna-Tabor*, 565 U.S. at 194-96. The choice of *who* will minister to the congregation is absolutely protected by the First Amendment. *Id.* at 194-95. But the Supreme Court did not decide, as also discussed earlier, whether the exception applies outside a challenge to a minister's selection or retention. *Id.* at 196 ("The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on

whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.").

Inching away now from the extreme of selection and retention of ministers, other *tangible* employment actions taken against ministers should also be covered by the ministerial exception. Although the Supreme Court has not weighed in on that issue, other federal courts have adopted that principle. *See, e.g.*, *Young v. N. Illinois Conference of United Methodist Church*, 21 F.3d 184, 184, 187 (7th Cir. 1994) (minister's claims for denial of promotion, as well as termination, was barred); *see also Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1301, 1304 (11th Cir. 2000) (minister's retaliation and constructive discharge claims, based on reassignment to a church 800 miles away with a substantially reduced salary, were barred by ministerial exception); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 457 (D.C. Cir. 1996) (minister's claim for denial of tenure at the Catholic University of America was barred); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1164-65, 1171 (4th Cir. 1985) (minister's claim for denial of pastoral position was barred); *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972) (claims for "the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church" were barred).

The extension of the ministerial exception to claims that challenge *tangible* employment actions is consistent with the exception's underlying rationale. Those claims, although not directly challenging a selection or retention of a minister, still intrude on a church's internal governance of its minister's employment duties. *See*

*Alicea-Hernandez*, 320 F.3d at 703 ("[A]n investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment.") (quoting *McClure*, 460 F.2d at 560). Tangible employment actions are, by definition, directly related to the church's authority as the employer of the minister. *See Burlington Indus. v. Ellerth*, 524 U.S. 742, 761-62 (1998) (defining tangible employment actions as "a *significant change in employment status*, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits") (emphasis added). As *Ellerth* explained, "[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act." *Id.* at 762. So when a tangible employment action is challenged by a minister, the minister is asking a court to directly regulate the minister's *employment status*, which steps directly on the church's governance of the minister *as a minister*. The ministerial exception applies to claims that challenge a tangible employment action.

On the other end of the spectrum, no First Amendment problem arises when a lay employee (that is, a non-minister) of a religious employer brings an employment claim that is unrelated to any religious belief or doctrine. *See, e.g.*, *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 171-72 (2d Cir. 1993) (lay teacher's Age Discrimination

in Employment Act (ADEA) claim for failure to renew his contract could proceed because the claim did not implicate the religious employer's beliefs or purpose); *E.E.O.C. v. Mississippi Coll.*, 626 F.2d 477, 479-80, 485-86 (5th Cir. 1980) (sex and race discrimination claims brought by lay employee against religious-college employer were not barred by the First Amendment because they did not implicate any religious beliefs); *Morgan v. Cent. Baptist Church of Oak Ridge*, 2013 WL 12043468, at *19-20 (E.D. Tenn. Dec. 5, 2013) (allowing lay employee's sexual harassment and hostile work environment claims to proceed); *Longo v. Regis Jesuit High Sch. Corp.*, 2006 WL 197336, at *5-7 (D. Colo. Jan. 25, 2006) (holding that the non-minister's ADA claims were not barred by the Establishment Clause because the employment decision did not arise from application of religious doctrine); *Smith v. Raleigh Dist. of N. Carolina Conference of United Methodist Church*, 63 F. Supp. 2d 694, 712, 714, 717 (E.D.N.C. 1999) (allowing lay employee's sexual harassment and hostile work environment claims to proceed, as "plaintiffs' claims present[ed] secular, rather than ecclesiastical disputes" that could be resolved "by reference to neutral principles of law" and did not require the court to choose "among competing religious visions"); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849, 850, 853 (S.D. Ind. 1998) (allowing lay teacher's ADEA claim for failing to renew her contract because the claim did not burden the church-employer's religious rights). But when the religious employer offers a religious justification for the challenged conduct, then—generally speaking—the First Amendment protects against the claim, so long as the employer proves that the religious motive is the *actual* motive. *See, e.g.*,

*DeMarco*, 4 F.3d at 170-71; *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 657-59 (10th Cir. 2002) (neither ministerial employee nor her lay partner could sustain sexual harassment claims against church for remarks made about gays, because the remarks were made as part of ecclesiastical discussions on church policy toward gays). Unlike the ministerial exception, however, whether the employer acted on a religious-based motive *is* examined for challenges brought by non-minister employees.

The final point is that there are limits to an employer's invocation of a religious motive for challenged conduct as to non-minister employees. In some situations, even when a religious institution proves that there is a religious motive for the violation of a generally applicable law, a balancing of interests might remove the conduct from First Amendment protection (such as commission of a crime). *See, e.g.*, *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039-40 (7th Cir. 2006) (noting that the "internal-affairs exception [to employment laws] is limited," for instance, "[a] church could not subject its clergy to corporal punishment or require them to commit criminal acts"); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1399, 1392 (4th Cir. 1990) (rejecting religious school's argument that the Fair Labor Standards Act (FLSA) violated a religious belief, because the burden on religion would be limited and no entanglement would arise from enforcing the FLSA); *see also Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877-78 (1990) (individuals must abide a valid or neutral law of general applicability even if it proscribes or requires conduct that is contrary to his religious practice as long as the law does not

violate other constitutional protections). So it is possible that a court may require that, in a case brought by a non-minister, a religious employer comply with a valid or neutral law of general applicability that may burden its religion in certain circumstances.

**B. Hostile Work Environment Claims**

Where, then, should a minister's challenge to a hostile work environment, with no challenge to a tangible employment action, fall on this spectrum? In the hostile-environment case under Title VII, the employee must allege that: "(1) [the employee] was subject to unwelcome harassment; (2) the harassment was based on ... national origin or religion (or another reason forbidden by Title VII); (3) the harassment was severe or pervasive so as to alter the conditions of employment and create a hostile or abusive working environment; and (4) there is basis for employer liability." *Huri v. Office of the Chief Judge of the Circuit Court of Cook Cty.*, 804 F.3d 826, 833-34 (7th Cir. 2015). Although an employer is strictly liable for harassment that results in a tangible employment action, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760-61 (1998), when no tangible action is taken, or when an employee is barred from raising claims as to those tangible actions (as by the ministerial exception), then the employer can raise an affirmative defense, *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 962 (9th Cir. 2004) (collecting cases). The affirmative defense comprises two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee

unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765.

Only two courts of appeals have addressed whether hostile work environment claims brought by a minister are barred by the ministerial exception.[10] The courts have come to opposite conclusions. The Tenth Circuit addressed a minister's claims under Title VII for gender discrimination, disparate impact based on gender, and—importantly—hostile work environment, among other claims. *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1240-41 (10th Cir. 2010) (emphasis added). *Skrzypczak* held that "a hostile work environment claim brought by a minister ... implicate[s] a church's spiritual functions, ... involv[ing] gross substantive and procedural entanglement with the Church's core functions, its polity, and its autonomy." *Id.* at 1245 (cleaned up). But the Tenth Circuit relied in large part on the same overbroad interpretation of *Alicea-Hernandez* as the Archdiocese proposed in this case. As explained earlier in this Opinion, *Alicea-Hernandez* did not address hostile-environment claims that do not challenge a tangible employment action.

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[10]The parties both cite several district and state court decisions that also come to opposite conclusions about whether the ministerial exception bars sexual harassment claims. *Compare* Def.'s Supp. Mot. Dismiss at 6-7 (citing *Preece v. Covenant Presbyterian Church*, 2015 WL 1826231, *7 (D. Neb. Apr. 22, 2015) (plaintiff's sexual harassment claim is factually entwined with plaintiff's other employment claims and is thus barred); *Ogugua v. Archdiocese of Omaha*, 2008 WL 4717121 (D. Neb. Oct. 22, 2008); *Gomez v. Evangelical Luther. Church in Am.*, 2008 WL 3202925 (M.D. N.C. Aug. 7, 2008)) *with* Pl.'s Resp. Br. at 7 n.2 (citing *Nigrelli v. Catholic Bishop*, 1991 WL 36712 at *4 (N.D. Ill. 1991) (holding that "in order to determine if the plaintiff was sexually harassed, the court need not inquire into the doctrines and religious goals of the Catholic Church ... ."); *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1002 (D. Kan. 2004) (holding the ministerial exception did not bar sexual harassment claim, but this decision was decided before *Skrzypczak*, 611 F.3d 1238, which holds the opposite and is controlling in the Tenth Circuit); *Black v. Snyder*, 471 N.W.2d 715, 721 (Minn. Ct. App. 1991) (holding the same). But those opinions are not binding so the Court will engage in its own analysis.

On the other side of the split are two Ninth Circuit cases. In both cases, ministerial employees alleged that they suffered sexual harassment in violation of Title VII. *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 956 (9th Cir. 2004); *Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999). In *Elvig*, an associate pastor alleged that, among other things, the pastor sexually harassed her. 375 F.3d at 953-54. When the associate pastor made a formal complaint to the church, no action was taken to stop the harassment, and the pastor relieved her of certain duties, verbally abused her, and engaged in intimidating behavior. *Id.* In *Bollard*, the plaintiff was a novice of the Jesuit order, and he alleged sexual harassment (among other things) based on the conduct of his superiors, who "sent him pornographic material, made unwelcome sexual advances, and engaged him in inappropriate and unwelcome sexual discussions." 196 F.3d at 944. The novice reported the harassment to his superiors, but no corrective action was taken. *Id.*

In both cases, the Ninth Circuit engaged in an analysis under the Free Exercise Clause and the Establishment Clause of the First Amendment.[11] What the analyses show is that when a minister brings a claim that does not challenge a tangible employment action, then whether the First Amendment bars the claim depends on a *case-by-case* analysis on the nature of the claim, the extent of the intrusion on religious doctrine, and the extent of the entanglement with church governance required by the particular litigation. If the nature of the claim would require that a

[11]In *Elvig*, the court did not explicitly differentiate between the Free Exercise Clause and the Establishment Clause in its analysis. It employed considerations from each, however, and explicitly relied on *Bollard*, which, as discussed in the text, analyzed the novice's sexual harassment claim under each Clause.

court take a stance on a disputed religious doctrine, then that weighs in favor of First Amendment protection for the church. As *Elvig* reasoned, the Free Exercise Clause prevents courts from "deciding among competing interpretations of church doctrine, or other matters of an essentially ecclesiastical nature, ... [meaning] a church must retain unfettered freedom in its choice of ministers because ministers represent the church to the people. Indeed, the ministerial relationship lies so close to the heart of the church that it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decisions." *Elvig*, 375 F.3d at 956 (cleaned up).

If, on the other hand, no religious justification is offered at all (for a non-tangible employment action), then there would be little or no risk of violating the Free Exercise Clause. Indeed, in *Bollard*, the religious order allegedly stated that it actually wanted the novice to *remain* a member of the order, and the order disavowed harassment (as opposed to endorsing it). 196 F.3d at 947. In *Elvig*, the church denied that the harassment occurred at all. 375 F.3d at 963. In the Ninth Circuit's view, the lawsuits thus presented only a narrow secular inquiry. *Elvig*, 375 F.3d at 963-64; *Bollard*, 196 F.3d at 947-48. The Free Exercise Clause did not bar either sexual harassment suit.

Moving on to the Establishment Clause, the Ninth Circuit again concluded that no excessive entanglement would arise from the lawsuits. Courts employ a three-part test to determine whether a statute violates the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary

effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971) (cleaned up). Because Title VII has a secular purpose and its principal effect neither advances nor inhibits religion, the only element at issue is whether applying Title VII to a minister's claim of sexual harassment (without challenging a tangible employment action) would foster an impermissible government entanglement with religion. *Bollard*, 196 F.3d at 948 (citing *E.E.O.C. v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1280-81 (9th Cir. 1982)). If a harassment claim does not challenge the retention of a minister, then (generally speaking) no *substantive* entanglement problem would arise.[12] *Bollard*, 196 F.3d at 949. Courts still must remain wary of potential *procedural* entanglement, because it may be "the very process of inquiry" by the court that may "impinge on rights guaranteed by the Religion Clauses." *Id.* (quoting *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979)). Litigation-procedure entanglement could arise from the length of the proceeding; the involvement of state agencies, the EEOC, and federal courts; the application of tools of discovery to church personnel and records; the remedies that would be imposed; and most importantly, "the potential for

[12]It is not clear that the Supreme Court would divide the entanglement inquiry into "substantive" and "procedural" entanglement. But whatever the label, the considerations are the same. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 232 (1997) ("To assess entanglement, we have looked to the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.") (cleaned up); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. at 502 ("It is not only the conclusions [about religious motivations behind certain decisions] that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of the inquiry leading to findings and conclusions.").

protracted government surveillance of church activities." *Bollard*, 196 F.3d at 949 (cleaned up). The Ninth Circuit ultimately concluded that neither case presented excessive entanglement in light of the secular focus of the claims and the absence of any attempt to obtain any directly employment-related remedy like lost pay. *Id.* at 949-50; *Elvig*, 375 F.3d at 963, 966-68.

The upshot of these cases, as well as the many cases in which non-minister employees successfully bring claims so long as there is no excessive entanglement, is that federal courts have been able to evaluate, on a case-by-case basis, when an employee's particular case would pose too much of an intrusion into the religious employer's Free Exercise and Establishment Clause rights. If a minister's hostile-environment claim does not challenge a tangible employment action and does not pose excessive entanglement with the religious employer, then the ministerial exception should not apply. In that setting, the hostile-environment claim "is no greater than that attendant on any other civil suit a private litigant might pursue against a church." *Bollard*, 196 F.3d at 950; *Elvig*, 375 F.3d at 968. To be sure, the fact that a *minister*, rather than a lay employee, is bringing the claim is relevant to deciding whether the lawsuit poses too great a danger of excessive entanglement. But there is no categorical bar to that narrow category of claims brought by ministers.

**C. Sex, Sexual Orientation, and Marital Status**

Although the ministerial exception does not bar Demkovich's hostile-environment claims (to repeat, he does not challenge a tangible employment action), the Court concludes that litigation over Reverend Dada's alleged harassment based

on Demkovich's sex, sexual orientation, and marital status would excessively entangle the government in religion. To start, the Archdiocese offers a religious justification for the alleged derogatory remarks and other harassment: they "reflect the pastor's opposition, in accord with Catholic doctrine, to same sex marriage." Def.'s Reply Br. at 5. Whether Catholicism in fact dictates opposition to same-sex marriage is *not* subject to court scrutiny. "[O]nce the court has satisfied itself that the authorized religious body has resolved the issue, the court may not question the resolution." *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013); *see also Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 718 (1976) (a court cannot evaluate conflicting testimony in the face of an official Church doctrine); *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660 (7th Cir. 2018) (a court must defer to a religious organization's designation of what constitutes religious activity "where there is no sign of subterfuge"). The Catholic Church's official opposition to gay marriage is commonly known (nor does Demkovich question it), and there is no reason to question the sincerity of the Archdiocese's belief that the opposition is dictated by Church doctrine. This official opposition weighs as an excessive-entanglement concern in this case, because the harassing statements and conduct are motivated by an official Church position (or at least the Archdiocese would defend the case on those grounds). Of course, regulating *how* the official opposition is expressed is not as directly intrusive as outright punishing the Church for holding that position (which a federal court cannot do). But it comes close, and must weigh in favor of barring the claim under the Religion Clauses. *See Bryce*, 289

F.3d at 653, 659 (holding that church employee and her same-sex partner could not bring sexual harassment claims based on allegedly anti-gay statements made by reverend in letters and at church meetings because the church autonomy doctrine, rooted in the Free Exercise Clause and Establishment Clause, gives the church the right "to engage freely in ecclesiastical discussions"); *compare Bollard*, 196 F.3d at 947 (holding "the Free Exercise rationales supporting an exception to Title VII are missing. The [defendant religious employer] do[es] not offer a religious justification for the harassment Bollard alleges … ."); *see also Korte v. Sebelius*, 735 F.3d 654, 679 (7th Cir. 2013) ("[T]he Free Exercise Clause protects not just belief and profession but also religiously motivated conduct.").

The hostile-environment claims based on Demkovich's sex, sexual orientation, and marital status also pose other risks of impermissible entanglement with religion. First, Demkovich's status as a minister weighs in favor of more protection of the Church under the First Amendment. Remember that the Church has absolute say in who will be its ministers. *See Hosanna-Tabor*, 565 U.S. at 188-89. The Archdiocese might very well assert that it has a heightened interest in opposing same-sex marriage amongst those who fulfill ministerial roles. Either the Court would have to accept that proposition as true (thus intensifying the intrusion in regulating how the opposition is conveyed to the Church's ministers) or the parties would have to engage in intrusive discovery on the sincerity of that belief. Indeed, even if the proposition would be accepted as true, the Church itself would have a litigation interest in proving to the jury *why* there is a heightened interest in opposing same-sex marriage

amongst its ministers. That would put the Church in a position of having to *affirmatively* introduce evidence of its religious justification, so the litigation's intrusion would not be just a matter of *responding* to Demkovich's discovery requests. The Church might even wish to offer the views of its congregants on this issue, especially if Demkovich offered evidence from congregants that they would not be offended by a gay music director.

Second, it is easy to foresee how the opposition to same-sex marriage would be litigated in other ways throughout the case. For example, in order to prove that Reverend Dada made the derogatory remarks, Demkovich's attorney naturally would ask Dada about the *motive* to make the alleged remarks. Dada might even be put in a position to reveal whether he agrees with the official Church position, and even the *degree* with which he agrees (or disagrees) with it. No doubt too Demkovich's attorney would want to elicit concessions from Dada that if the remarks were proven to be made, then that would contravene the Church's guidance on how to (or how not to) express the official opposition to same-sex marriage.

Third, discovery over these claims would likely take a prolonged period. The issues described above would themselves consume plenty of time (and possibly subpoenas to congregants and expert testimony), and the Amended Complaint refers to other staff members and congregants. The allegations span a time period of more than one year, at least from July 2013 to September 2014. Am. Compl. ¶¶ 17, 31. So discovery would not be concentrated on a short time period. This factor too points in the direction of concluding that the entanglement with religion will be excessive.

Lastly, because the hostile-environment claim does not challenge a tangible employment action, the Archdiocese could seek to prove an affirmative defense, namely, that the Archdiocese took reasonable care to prevent or to correct harassment and that Demkovich failed to take advantage of the Archdiocese's preventive or corrective efforts. *Ellerth*, 524 U.S. at 765. That too will require an examination of the Church's employment practices, including on preventing sexual-orientation discrimination in particular. Again, Demkovich naturally would try to undermine the genuineness and efficacy of prevention-and-correction efforts on that particular kind of discrimination, raising the specter of intruding on the Archdiocese's religious-based opposition to same-sex marriage. All in all, there are too many circumstances—in this particular case for this particular set of claims—that would result in excessive entanglement with, and intrusion on, the Church's religious doctrine to allow the claims based on sex, sexual orientation, and marital status to move forward. Those claims are dismissed.

**D. Disability**

Moving on to the disability claim, the Court first notes that the Seventh Circuit has not yet expressly decided that the ADA ever permits a hostile work environment claim. Instead, the Seventh Circuit has assumed—in both published and unpublished decisions—that there is such a claim under the ADA. *See, e.g., Shott v. Rush Univ. Med. Ctr.*, 652 Fed.Appx. 455, 458 (7th Cir. 2016); *Lloyd v. Swifty Transp., Inc.*, 552 F.3d 594, 603 (7th Cir. 2009); *Mannie v. Potter*, 394 F.3d 977, 982 (7th Cir. 2005).[13]

[13]Many circuits have affirmatively recognized hostile work environment claims under the ADA, and the circuits that have not explicitly recognized such claims have assumed they

In light of the similarity between Title VII and the ADA in protection against discriminatory workplace conditions, this Court too assumes that the ADA does provide for hostile work environment claims. When analyzing hostile work environment claims under the ADA, the Seventh Circuit has "assumed that the standards for proving such a claim would mirror those established for claims of hostile work environment under Title VII." *Mannie*, 394 F.3d at 982 (citations omitted).

Here, the Archdiocese offers no religious explanation for the alleged disability discrimination. The Archdiocese justifies the comments as "reflect[ing] the pastor's subjective views and/or evaluation of Plaintiff's fitness for his position as a minister." Def.'s Reply Br. at 5. But this is not a *religious* justification based on any Church doctrine or belief, at least as proffered so far by the defense. So the disability claim does not pose the same dangers to religious entanglement as the sex, sexual orientation, and marital-status claims. Nothing in discovery should impose on religious doctrine on this claim. Rather, the inquiry will make secular judgments on the nature and severity of the harassment (and whether it even happened), as well as what, if anything, the Archdiocese did to prevent or correct it.[14] The Religion Clauses do not bar Demkovich from pursing the hostile-environment claims based on disability.

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are a viable theory of recovery when analyzing and rejecting those claims that do not survive summary judgment on other grounds. *Mashni v. Bd. of Educ. of City of Chicago*, 2017 WL 3838039, at *9 (N.D. Ill. Sept. 1, 2017) (collecting cases).

[14]If, during discovery, the Archdiocese believes Demkovich is intruding into protected religious territory, then the Archdiocese may raise the issue with this Court.

Finally, the Court rejects the Archdiocese's argument that the Amended Complaint fails to adequately state a claim for relief. Fed. R. Civ. P. 12(b)(6). Demkovich alleges that his supervisor, Dada, harassed him based on his disability in violation of the ADA and Illinois Human Rights Act. Am. Compl. ¶¶ 35-39, 41, 43, 82, 95. The Archdiocese contends that "the alleged conduct was not severe or pervasive, was not physically threatening, and ... is not alleged to have altered the terms and conditions of Plaintiff's employment," so the claim must fail. Def.'s Suppl. Mot. Dismiss at 15. But it is important to remember this case is at the *pleading* stage, so Demkovich need not plead more facts than necessary to give the Archdiocese "fair notice of [his] claims and the grounds upon which those claims rest, and the details in [his] ... Amended Complaint present a story that holds together." *Huri*, 804 F.3d at 834 (cleaned up).[15] Demkovich alleged multiple instances of harassing statements made to him by Dada about his medical condition and his disability, and the Amended Complaint alleges the effect on Demokovich as well: the alleged discrimination made him feel "discriminated against," made him feel "humiliated and belittled," "severely damaged [his] ... personal and professional reputation" and caused his "physical and mental health [to] suffer[]." *See* Am. Compl. ¶¶ 43-44, 46-47; *id.* ¶ 35 (Dada repeatedly encouraged Demkovich to walk Dada's dog to get some exercise to lose weight); *id.*

[15]It is true that many courts, at the *summary judgment* stage, have dismissed hostile work environment claims based on a similar degree of evidence as alleged in the Amended Complaint here. In every case cited by the Archdiocese in support of its argument that Demkovich does not state a claim for a hostile work environment based on his disability, the court dismissed the case at the *summary judgment* stage. Def.'s Supp. Mot. Dismiss at 13, 15; Def.'s Reply Br. at 11-12, 12 n.3. At that stage, the Archdiocese may file a summary judgment motion, if discovery so justifies it.

¶ 36 (Dada would "tell Demkovich that he needed to lose weight because [Dada] didn't want to have to preach at Demkovich's funeral"); *id.* ¶ 37 (Dada told Demkovich several times that Demkovich's weight and diabetes made it cost prohibitive for the parish to include him on its health and dental insurance plans); *id.* ¶ 38 (on one instance in 2012, Dada told Demkovich he needed "to 'get his weight under control' to help eliminate Demkovich's need for insulin"); *id.* ¶ 39 (other parish employees were overweight or suffered from chronic health issues, but Demkovich alone suffered frequent and routine harassment because of it). At this pleading stage, Demkovich's allegations about the harassment are sufficient to state a hostile-environment claim. *See Huri*, 804 F.3d at 834 (holding "it is premature at the pleadings stage to conclude just how abusive [the plaintiff's] work environment was," and reversing the district court's dismissal of the plaintiff's hostile work environment claims because the alleged conduct, including "screaming, prayer circles, social shunning, [and] implicit criticism"—"could plausibly be abusive."); *see also Valdivia v. Twp. High Sch. Dist. 214*, 2017 WL 2114965, at *3 (N.D. Ill. May 15, 2017) (collecting in-district cases in which the courts denied motions to dismiss hostile work environment claims based on allegations of repeated and ongoing verbal harassment). So the hostile-environment claims are adequately pled.

## IV. Conclusion

For the reasons discussed, the Defendants' motion to dismiss is granted as to the claims based on sex, sexual orientation, and marital status, but denied as to the claims based on disability.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: September 30, 2018

**UNITED STATES DISTRICT COURT**
**FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 6.2.2**
**Eastern Division**

Sandor Demkovich

Plaintiff,

v.

Case No.: 1:16–cv–11576
Honorable Edmond E. Chang

Archdiocese of Chicago, The, et al.

Defendant.

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## NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, March 25, 2019:

MINUTE entry before the Honorable Edmond E. Chang: The motions [40] [42] to reconsider filed by both sides are denied. Federal Rule of Civil Procedure 54(b) governs the reconsideration of non–final orders, and the rule states that such orders "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." See also Marconi Wireless v. United States, 320 U.S. 1, 47 (1943) (non–final orders are subject to reconsideration any time before final judgment). "A court has the power to revisit prior decisions of its own... in any circumstance, although as a rule courts should be loathe to so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 817 (1988) (citation omitted). There are no extraordinary circumstances here: the parties have essentially repeated the prior arguments made in litigating the second motion to dismiss. The opinion deciding that motion considered the current state of the law in the various Circuits, R. 36 at 7–15, explained how the law has developed (and not yet developed) on hostile work environment claims without a tangible employment action, id. at 16–21, as well as on the claims of sex, sexual orientation, and marital status, id. at 21–25, and finally disability, id. at 25–28. The closest in terms of new arguments presented by the parties is from Plaintiff on the extent of the intrusiveness (or, in Plaintiff's view, the lack thereof) of discovery on the dismissed claims, R. 42 at 10–12, but nothing in this argument alters the Court's view, as anticipated and expressed in the opinion, R. 35 at 22–25. Both motions are denied. This clears the way for consideration of the 1292(b) motion that the Court encouraged, R. 62, 63. Emailed notice(eec)

**ATTENTION:** This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| SANDOR DEMKOVICH, | ) | |
| | ) | |
| Plaintiff, | ) | No. 16-cv-11576 |
| | ) | |
| v. | ) | |
| | ) | Judge Edmond E. Chang |
| ST. ANDREW THE APOSTLE PARISH, | ) | |
| CALUMET CITY; and | ) | |
| THE ARCHDIOCESE OF CHICAGO, | ) | |
| | ) | |
| Defendants. | ) | |

**ORDER**

Sandor Demkovich was the music director and organist at St. Andrew Parish in Chicago. In the first complaint filed in this case, Demkovich alleged that Reverend Jacek Dada, pastor of St. Andrew Parish, fired Demkovich because he entered into a same-sex marriage and because of his disabilities (diabetes and a metabolic syndrome). R. 1, Compl. ¶¶ 41, 51, 63, 77, 89.[1] The Court dismissed the complaint, without prejudice, on the grounds that the discrimination and wrongful-termination claims were barred by the First Amendment's "ministerial exception." R. 15.

In the amended complaint, Demkovich alleged much of the same discriminatory conduct, but modified his claims to challenge only the hostile work environment, rather than the firing itself. R. 16, Am Compl. at 9-15. In contrast to the original complaint, which sought relief arising from the firing,[2] he now seeks damages caused by the emotional distress, mental anguish, and physical ailments he allegedly suffered from the hostile work environment. *Id.* The Amended Complaint thus does not seek relief for any adverse tangible employment action, but rather for the damages caused by the alleged discriminatory insults and remarks.

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[1]Citations to the record are noted as "R." followed by the docket number and the page or paragraph number.

[2]Demokovich originally sought reinstatement, back pay, front pay, fringe benefits, compensatory damages, and punitive damages, all arising from the firing. Compl. at 7-14.

The Archdiocese (for convenience's sake, this Order will collectively refer to the two Defendants that way) moved to dismiss, again invoking the ministerial exception. This time, the Court held that the ministerial exception does not categorically bar hostile work environment claims that do not seek relief for a tangible employment action. R. 36 at 7-21. Instead, those types of claims (like the ones Demkovich presented) must be evaluated on a case-by-case basis for excessive intrusion on the religious institution's First Amendment rights. The Court undertook that analysis based on the allegations in the case, and dismissed the claims based on sex, sexual orientation, and marital status, R. 36 at 21-25, but permitted the disability claims to move forward, R. 36 at 25-28.

After discovery got underway, the Archdiocese filed an interlocutory appeal. R. 55. The Court expressed skepticism over whether there was appellate jurisdiction to consider an interlocutory appeal, and the Seventh Circuit is considering that question now. But in the meantime, the Court invited the parties to consider whether a 28 U.S.C. § 1292(b) certification would be appropriate. R. 62. The Court's preliminary thinking was that both sides might want to certify a § 1292(b) interlocutory-appeal question. *Id.* The Archdiocese has filed a motion for a certification, and Demkovich objects, though he proposes a cross-question if the Archdiocese's motion is granted. R. 64, 67.

After reviewing the parties' filings, the Court grants the Archdiocese's motion (though with a modified formulation of the certified question). The certified question is:

> Under Title VII and the Americans with Disabilities Act, does the ministerial exception ban all claims of a hostile work environment brought by a plaintiff who qualifies as minister, even if the claim does not challenge a tangible employment action?

This question meets all of the requirements under 28 U.S.C. § 1292(b).[3] Section 1292(b) permits a district judge to certify, and the Court of Appeals to accept (in its discretion), an interlocutory appeal if the "order involves a controlling question of law as to which there is substantial ground for difference of opinion," and if "an immediate appeal from the order may materially advance the ultimate termination of the

[3]It is worth noting that the Archdiocese did not argue that the ADA does not provide a cause of action for hostile work environment claims. R. 36 at 25-26. So the certified question assumes that those types of claims are permitted by the ADA.

litigation." § 1292(b). Ordinarily, interlocutory appeals are disfavored (more than disfavored—generally barred), but § 1292(b) is an exception, *Sterk v. Redbox Automated Retail LLC*, 672 F.3d 535, 536 (7th Cir. 2012), and the exception fits here.

First, whether the ministerial exception bars all hostile work environment claims qualifies as a "controlling question of law," and is not a fact-bound question. *See Ahrenholz v. Board of Trustees of Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000). There is also "substantial ground for difference of opinion," § 1292(b), on the right answer to the question. As the Court explained in the prior Opinion, the federal courts of appeals and district courts have answered the question in different ways. R. 36 at 7-21 (discussing the case precedent on the issue). Demkovich's primary argument against the certification is that the ministerial exception is not a jurisdictional bar. That is right, but the exception's status as an affirmative defense, rather than a jurisdictional bar, does not undermine the propriety of certification under § 1292(b), which is not limited to jurisdictional questions.

The final requirement of § 1292(b) is also met: an immediate appeal may materially advance the termination of the suit. If this Court's holding on the scope of the ministerial exception is wrong—that is, if the exception does apply even to a hostile-environment claim that does not challenge a tangible employment action—then the case would end. And even if the Court is right that the exception is inapplicable in this case, then the Seventh Circuit's affirmance of that holding will provide the parties a much clearer settlement-valuation picture. It is true that, in an ideal world, the Archdiocese would have moved for § 1292(b) certification much sooner after the decision on the dismissal motion. But still it is better to obtain the appellate answer to the question now, rather than consume more time and resources on discovery, summary judgment, and maybe even trial.

Demkovich argues in the alternative that, if this Court certifies the defense's proposed question, then the Court also should certify a question that asks whether the sex, sexual orientation, and marital status claims should have been dismissed. It is understandable why Demkovich proposed this question: the Court actually *encouraged* him to propose a question on the dismissal of those claims. R. 63.

On further deliberation, however, the Court concludes that certifying a question on the dismissals is not appropriate. Rather than presenting pure question of law with an insubstantial factual component, the dismissals of those claims required the Court to apply the particular circumstances of this case to the excessive-entanglement standard. R. 36 at 21-25. The Court made predictive judgments on how religious doctrine might appear in the litigation, particularly in discovery. R. 36 at

24. This is not the sort of clean question of law that § 1292(b) covers. So the only question that the Court certifies is the one posed earlier on the applicability of the ministerial exception to hostile work environment claims that do not challenge a tangible employment action.

In light of the certification, the defense motion [56] to stay discovery is granted, though not for the reasons presented in the original motion. As explained in the earlier Opinion, the Court disagrees that discovery on the disability-based hostile work environment claim would impermissibly intrude on the Archdiocese's exercise of relegation. But because a § 1292(b) appeal now has been certified, discovery should pause for the appeal. **Both sides are warned to maintain the litigation hold that each side's lawyers should have already warned them to maintain.** Also, the Court will consider a targeted motion to take limited discovery if there is good cause to believe that evidence will be lost or impaired during a stay (such as based on age or medical condition). Both sides also remain free to obtain (if they have not already), non-rule-based witness statements from non-parties to preserve witness memories.

Lastly, to avoid further delay, the Archdiocese shall promptly file the notice of appeal based on the certification no later than the close of business on May 8, 2019. The status hearing of May 6, 2019 is reset to June 11, 2019 at 9:30 a.m.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: May 5, 2019