

SCHMITT SCHNECK EVEN & WILLIAMS, P.C.

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How a Church or Ministry Can Hire Only Employees Who Share the Tenets of Its Faith

Religious Employment Practices in Light of Bostock v. Clayton County, Georgia

**Schmitt Schneck Even & Williams,
P.C. Robert Erven Brown, Esq.
Church &
Ministry Law Group**

Given the recent ruling of *Bostock v. Clayton County, Georgia*,¹ if a church or religious organization only intends on hiring employees who agree with its doctrines, it is critical to consider the following information.

This white paper contains:

- Recommended course of action and suggested updates for:
 - Church bylaws
 - Church Constitution/Statement of Faith
 - Personal Conduct Policy regarding gender and marriage
 - Facility Use Policy

¹ No. 17–1618 (U.S. June 15, 2020).

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- A summary of the *Bostock* decision and federal case law regarding:
 - Ecclesiastical Abstention Doctrine
 - Ministerial Exemption under Title VII

I. Introduction

A. What did the Supreme Court Rule?

On June 15, 2020, the U.S. Supreme Court held that any employer with 15 or more employees violates Title VII if they fire an employee based, in part, on their sexual orientation or gender identity.² The Court interpreted Title VII's prohibition against discriminating "on the basis of sex" to encompass gay and transgendered individuals.³ The Court reasoned that because firing a gay or transgender employee requires the employer to take that person's sex into account, it is considered discrimination "on the basis of sex."

B. Who is Impacted by *Bostock*?

Churches and ministries which desire to employ like-minded people whose conduct complies with a Statement of Faith. This statement can include one or more of these scriptural definitions :

- marriage as permitted only between one man and one woman whose gender and identity were created at birth; or
- active homosexuality as a sin which is prohibited by Scripture; or
- church leadership as being open only to adult male members of the congregation; or
- procuring or supporting abortion is a barrier to church membership; or
- church membership as a revocable privilege defined by Holy Scripture as interpreted by the Pastor and/or elders.

C. Action Steps

1. Read the entire white paper making notes about areas of concern.
2. Assemble copies of your Ministry's Statement of Faith or similar denominational statement. Check it against the one posted on your website, handouts, Employee Handbook, Facilities Use Policy, etc. to confirm that they are consistent. Review your Statement of Faith with your leaders, elders, pastor, and denomination leaders, if any.
3. Gather the Ministry's Articles of Incorporation, Bylaws, Employee Handbook, Employment Contracts and Volunteer Agreements, etc. (Collectively, these are the "Core Documents".)
4. Compare these Core Documents for compliance with the principles outlined in this White Paper. Seek guidance from your leaders and legal counsel if there are areas of concern.
5. Consider adoption of personal conduct policy as part of your Employee Handbook. Standards of Conduct should be supported with specific scriptural references.
6. Review/prepare "Job Descriptions" for all paid and volunteer positions with specific emphasis on leadership positions, teaching positions, and those positions in which the person

² *Id.*

³ Title VII of the Civil Rights Act of 1964 (Title VII) is a federal statute prohibiting employment discrimination (including harassment as a form of discrimination) on the basis of race, color, national origin, religion and sex. Title VII also prohibits retaliation for engaging in conduct protected by Title VII. (42 U.S.C. § 2000e-2.)

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- will be seen as a public representative of the church or ministry. Have employees sign job descriptions acknowledging their understanding and agreement.
7. Review hiring practices and procedures to confirm that all employees and volunteers agree with, will support, and will live in accordance with the Statement of Faith.
 - a. Review existing employee files to confirm that all have signed.
 - b. Be consistent in applying the policy.
 - c. Consider requiring annual renewal signatures on the Statement of Faith for all employees and volunteers.
 8. Conduct a similar review of your Facilities Use Policy if you want to prohibit use of your campus by the public.
 9. Review Church Articles of Incorporation and Bylaws. If you have reviewed these documents since 2016, in light of the gay marriage issue,⁴ it is possible that no additional work will be needed.
 10. Select a “dispute resolution forum,” for resolution of Ecclesiastical and Church disputes that will be sympathetic to your doctrinal values and interests. The use of Alternative Dispute Resolution agreements with all Church or Ministry employees is a further layer of protection.

II. Religious Exception in Light of *Bostock v. Clayton County, Georgia*

A. Summary of Supreme Court’s Decision in *Bostock*

In *Bostock v. Clayton County, Georgia*, the U.S. Supreme Court ruled 6-3 that employers who fire individuals who identify as gay or transgender violate Title VII’s prohibition against an employer discharging an individual on the basis of sex.⁵ The Court interpreted the term “sex” to encompass sexual orientation. The Court described the rule in this way:

An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It makes no difference if other factors besides the plaintiff’s sex contributed to the decision or that the employer treated women as a group the same when compared to men as a group. A statutory violation occurs if an employer intentionally relies in part on an individual employee’s sex when deciding to discharge the employee. Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII.⁶

While the Supreme Court stated its deep concern for upholding the Constitutional protection of the First Amendment, it did not directly address how this ruling will impact religious liberty.⁷ Citing Title VII’s statutory exemption for religious organizations, the ministerial exception, and the Religious Freedom Restoration Act of 1993, the Court wrote, “how these doctrines protecting religious liberty interact with Title VII are questions for future cases ...”⁸

This recent decision now makes it unlawful for churches to discharge employees who are not ministers on the basis of their sexual orientation. However, churches may lawfully discriminate on the basis of religion. Therefore, any limitation on non-ministerial roles within the church

⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

⁵ No. 17–1618 at 2.

⁶ *Id.*

⁷ *Id.* at 32 (citing 42 U. S. C. § 2000e–1(a)).

⁸ *Id.* (citing *Hosanna-Tabor*, 565 U. S. at 188).

must be couched in the religious doctrine of the organization in other ways. Churches will have a difficult time avoiding the requirements of Title VII, as interpreted by *Bostock*, if the Court finds that an employee's discharge was "based in part on sex."⁹ *Bostock* stands for the proposition that if an employee was fired because of their sexual orientation or sexual identity, then the employer discriminated against them on the basis of sex. Churches' hiring and firing practices must therefore be founded either upon the statutory religious exemption or the ministerial exception under Title VII. **In short, churches and ministries must be able to prove that an employment decision was grounded in the church's belief about sexuality rather than on the basis of a person's sexuality.**

This new requirement under *Bostock* not only applies to churches, but also to religious organizations. In *Spencer v. World Vision*, a panel of the United States Court of Appeals for the Ninth Circuit ruled that World Vision, Inc., an organization founded on Christian principles but unaffiliated with any specific Christian church, could terminate employees who no longer adhered to Christian doctrines embraced by *World Vision*.¹⁰ *World Vision* describes itself as a "Christian humanitarian organization dedicated to working with children, families and their communities ... by tackling the causes of poverty and injustice." *World Vision* requires its employees to adhere to a statement of doctrinal belief. Upon learning that two employees disavowed the doctrine of the trinity, World Vision terminated them. In an appeal granting World Vision summary judgment, the court considered only one question: Is World Vision a "religious corporation, association, ... or society" entitled to an exception from Title VII of the Civil Rights Act's prohibition of religious discrimination in employment?

The court announced three separate tests in three opinions. In his concurrence, Judge O'Scannlain wrote that "a nonprofit entity" qualifies as a religious organization if it "(1) is organized for a self-identified religious purpose ... (2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and (3) holds itself out to the public as religious." In his concurring opinion, Judge Kleinfeld argued that being a non-profit entity was insufficient and added a fourth element to the test: "and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." Judge Berzon, dissenting, would only apply the exemption to an organized church or an entity affiliated with an organized church.

If your ministry desires to hire only employees whose beliefs and lifestyles comply with your Statement of Faith, then you must be consistent and rigorous in obtaining a signature from each employee on a document acknowledging and accepting the ministries Statement of Faith as a condition of employment.

There is an important distinction in this context between the rights of the church and those of other ministries which do not qualify as a bona fide "church," but which do qualify as "Religious Organizations". Churches enjoy wide latitude in discriminating against nonbelievers since to do otherwise would violate the very essence of freedom of assembly and freedom of worship. Ministries which qualify as "Religious Organizations" due to the language in their Core Documents and in their actual practices do not enjoy that same broad right of discrimination against nonbelievers. Ministries do, however, have the right to hire and fire based on a requirement that the employee sign a statement of faith. This was an important holding of the *Spencer v. World Vision*.

B. Recommended Course of Action for Churches & Ministries.

⁹ *Id.* at 2.

¹⁰ 633 F.3d 723 (9th Cir. 2011).

Although there are strong laws and Constitutional doctrines shielding churches, there is no guarantee against lawsuits or public criticism. Under the *Bostock* ruling, churches must be vigilant in avoiding Title VII claims. When an employment discrimination dispute arises, churches will benefit by having a carefully considered written job description for every position which requires adherence to the Statement of Faith —whether the position is related to a religious activity or not. Job descriptions should include explanations of how each position furthers the church’s mission, as well as Scriptural references. These Scriptural citations are especially important when it appears a church position discriminates on the basis of any of the protected categories under Title VII. For example, if a church’s beliefs require that certain positions be held by heterosexual men, this should be stated in the bylaws with Scriptural support. Requiring attendance at Bible Study sessions and Church events also is helpful. The job descriptions can be maintained as a separate policy statement of the church, integrated into the church’s Employee Handbook, or integrated into the church’s bylaws. Employees should be required to sign their job description, acknowledging their acceptance and understanding of the requirements of the position and the document placed in their file.

Bylaws are one of the first places secular judges look to determine whether the church’s position is based on a sincere interpretation of Scriptural guidance. Given the ecclesiastical abstention doctrine and the religious exemption of Title VII, courts should abstain from interfering in church doctrinal disputes or in religious practices based on good faith beliefs rooted in First Amendment. Clear statements of religious beliefs, as noted above, will aid the church and its counsel in convincing a judge to rule in the church’s favor if these complex, quickly-evolving social and political issues are tried in a court of law. In addition to updating bylaws, churches should strongly consider adopting personal conduct and facility use policies that are grounded in Scripture. This will further protect churches in cases of discrimination or public accommodation issues.

III. Ecclesiastical Abstention Doctrine and Ministerial Exemption Doctrine

A. Ecclesiastical Abstention Doctrine

The Constitution prohibits civil courts from ruling on purely ecclesiastical matters.¹¹ This is known as the ecclesiastical abstention doctrine or church autonomy doctrine. First announced in *Watson v. Jones*, 80 U.S. 679 (1871), this doctrine is rooted in the Free Exercise and Establishment Clauses of the First Amendment. The Free Exercise Clause protects individual’s religious expression from government intervention. The Establishment Clause prohibits government from regulating religious beliefs and from discriminating between differing religions.

In *Watson*, the Court stated:

[W]here a subject-matter of dispute, strictly and purely ecclesiastical in its character, - a matter over which the civil courts exercise no jurisdiction, - a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them . . . [i]t may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it¹²

¹¹ See *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); see also *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952).

¹² 80 U.S. at 733.

Although courts must generally abstain from resolving internal church disputes, in certain limited circumstances religious bodies may be subject to the court’s jurisdiction. For example, a court may adjudicate church-related property disputes if a resolution can be achieved by applying “neutral principles of law” without inquiring into religious doctrine or controversies.¹³ However, if the underlying matters require the resolution of religious controversies, courts lack subject matter jurisdiction to review the case.¹⁴ The critical issue for a church to consider is whether its actions fall within the bounds of the ecclesiastical abstention doctrine. If not, churches and religious organizations lose the doctrine’s protection, allowing courts to exercise their lawful jurisdiction over issues that may arise.

B. Ministerial Exception Under Title VII

The ministerial exception is a subset of the ecclesiastical abstention doctrine and concerns the requirements of Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, national origin or age. However, as described above, the Constitution and Bill of Rights are protective of church autonomy. Under the ministerial exemption, religious organizations have a nearly absolute right to hire and fire their leaders. Such decisions are usually not subject to Title VII.

The ministerial exception is rooted in Free Exercise Clause and Establishment Clause considerations. The seminal case for the doctrine is *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). In *McClure* the Fifth Circuit found a clear congressional intent that the requirements of Title VII apply generally to religious organizations and churches. But, the Court also found that when it came to employment decisions by a church with regard to its ministers, the First Amendment protected churches from the mandates of Title VII. To resolve this issue, the Court created a “ministerial exception” to the statute. This exception was later confirmed by the U.S. Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012). In *Hosanna-Tabor*, the Supreme Court reasoned that:

The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such an action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According to the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

While Title VII does not explicitly exclude the position of minister from its prohibitions on discrimination, the Supreme Court has established that these roles are generally insulated from Title VII’s requirements. But, Title VII still prohibits religious employers from discriminating on the basis of race, color, national origin, sex, age, or disability against all other individuals employed by the church. Churches and religious organizations may, however, discriminate on the basis of religious belief. This applies to all employment and volunteer positions in churches and religious organizations and is not limited to roles involving religious activities.

¹³ *Jones v. Wolf*, 443 U.S. 595, 602-04 (1979).

¹⁴ *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969).

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Our mailing address is:
1221 East Osborn Road
Suite 105
Phoenix, AZ 85014

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