Memorandum

TO: Joseph Tribiani
FROM: 11887
DATE: November 19, 2013
RE: Green v. Orange County Christian School: Pregnancy Discrimination

STATEMENT OF FACTS

Earlier this year, Rachel Green was terminated from her job as a teacher at Orange County Christian School (hereafter, the School), after becoming pregnant, while unmarried.

In August 2006, Green signed an employment contract with the School, that contained two key clauses. The morality clause requires employees to be "Christian role models" and among other things, abstain from "sexually immoral behavior including premarital sex and living with a significant other before marriage." The statement of faith requires teachers to actively believe in the School's belief statement, which holds in part that "the Bible is the word of God and has the right to command our beliefs and actions." The School was originally founded by Orange County Church, and it's mission is to serve families as a ministry and outreach of the church. At present it is unknown whether the School is organized as a nonprofit public benefit corporation or a nonprofit religious corporation.

In July 2013, Green notified human resources that she was pregnant and would need to take maternity leave, starting in January 2014. It was common knowledge at the School that Green was single, and had been dating Ross Geller for several years. In August 2013, the School notified Green that her employment was terminated, effective immediately. When Green asked why she was losing her job, Phoebe Buffay, the school's human resources manager, said, "Well isn't it obvious?" Green then let Buffay know that she planned to marry Geller before the baby was born, and before school started that Fall, but the School's position remained unchanged, and

Green's employment was terminated.

QUESTIONS PRESENTED

1. Under the California Fair Employment and Housing Act (FEHA), does the School qualify for an exemption, when it was founded by a church and is considered a religious institution?
2. Under FEHA and the California Constitution, does the ministerial exception apply, when a teacher's duties include religious activities?
3. Under FEHA and the California Constitution, does Green have a valid claim, when seeking to establish a prima facie case of discrimination?

BRIEF ANSWERS

1. Yes. As an institution founded and currently run by a church, the School is both religious and a corporation not organized for private profit, and is thus exempt from FEHA claims.
2. Yes. The ministerial exception is not dependent on the the title of the employee, but rather the duties. Green was actively engaged in activities—teaching the bible, bringing students to chapel service, and occasionally organizing and leading the chapel service—that would qualify her job as falling under the ministerial exception.
3. Maybe. If Green can show that her employment was terminated specifically because she was pregnant, her claim would be considered valid. However, if the School can show it acted due to a violation of its morality clause, that would not qualify as discrimination, and the School would prevail in this claim.

DISCUSSION

An institution affiliated with a church can generally overcome a claim of discrimination in one of three ways: by showing that it qualifies for (1) a FEHA exemption, or (2) a ministerial exception, or by showing that (3) the termination was not in fact discriminatory.

1. FEHA Exemption

The California Fair Employment and Housing Act (FEHA) prohibits employers from discriminating or refusing to employ any person on the basis of their marital status, sex, or gender. Cal. Gov't Code Ann. § 12940 (West). In defining "employer," the statute specifically excludes "a religious association or corporation not organized for private profit." Cal. Gov't Code Ann. § 12926 (West). For the School to be exempt from FEHA claims, it must show that it falls under the definition of a religious association.

In Kelly v. Methodist Hospital of Southern California, the Supreme Court of California held that as the hospital had demonstrated that it was created and affiliated with the United Methodist Church, and was exempt from federal taxation as a corporation "organized and operated exclusively for religious, charitable . . . or educational purposes" as set forth in 26 United States Code section 501(c)(3), it qualified as a religious association. Further, the court held that if the legislature intended to exclude the "affiliated institutions" created by religious groups, it could easily have done so. Kelly v. Methodist Hosp. of S. Cal., 997 P.2d 1169, 1179 (Cal. 2000).

In the present case, the School was created and is run by Orange County Church and its statement of faith claims that the mission of the School is to serve as an outreach of the church. Additionally all employees of the School must sign a morality clause promising to be good "Christian role models." Further, part of the curriculum is a study of the Bible, and as in Kelly,

the School is exempt from federal taxation. Thus the School qualifies as a religious institution.

In McKeon v. Mercy Healthcare Sacramento it was argued that if an institution affiliated with a church was organized under the Nonprofit Public Benefit Corporation Law (Corp.Code, § 5110 et seq.) instead of the Nonprofit Religious Corporation Law, it did not qualify as a religious association, and thus could not claim the religious-entity exemption. McKeon v. Mercy Healthcare Sacramento, 965 P.2d 1189, 1190 (Cal. 1998). The Supreme Court of California held that since the latter was enacted after FEHA, the Legislature could not have meant to require a form of incorporation that did not yet exist. Further, there was no mention in FEHA requiring religious associations to change their form of corporate organization, in order to keep their FEHA exemption intact. Id. at 1192. And since there was "nothing in the language or history of the religious-entity exemption" that required incorporation as a nonprofit religious corporation, it was not necessary in order to invoke the religious-entity exemption. Id. at 1190.

In Henry v. Red Hill Evangelical Lutheran Church of Tustin, while a school was located on the same property as a church, it was argued there was no evidence the school operated by the church as part of its ministry was a nonprofit public benefit corporation. But the Court of Appeal, Fourth District, Division 3, California, held that in fact, the school had "no independent legal status apart from the church." Henry v. Red Hill Evangelical Lutheran Church of Tustin, 134 Cal. Rptr. 3d 15, 21 (Cal. App. 4th Dist. 2011).

It is not known at present whether the School is a nonprofit public benefit corporation or a nonprofit religious corporation, but as shown in McKeon, incorporation as a nonprofit religious corporation is not necessary, in order to invoke the exemption. Further, as shown in Henry, the distinction between a nonprofit public benefit corporation and a nonprofit religious corporation, is immaterial, in reference to the exemption. Therefore, the School as a religious association

should qualify for the religious-entity exemption under FEHA.

2. Ministerial Exception

The courts have long recognized a "ministerial exception," rooted in the First Amendment, which allows religious institutions to select their own ministers, without the intervention of any legislation concerning employment issues. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 132 S. Ct. 694, 705 (2012). In order to claim the ministerial exception under FEHA and the California Constitution, the School must show that it is a qualified religious institution and that Green's job duties qualified her as a "spiritual leader." Henry, at 25.

The Court of Appeal in California, in Hope International University v. The Superior Court of Orange County, found that the line between "teaching" and "preaching" can be very fine. Hope Intern. U. v. Super. Ct., 14 Cal. Rptr. 3d 643, 655 (Cal. App. 4th Dist. 2004). If the subject matter is not necessarily religious in nature, then even if the school is connected to a church, that may not be enough to invoke the ministerial exception for teachers. Id. at 656. There, two professors in the Marriage and Family Therapy program, claimed that while they incorporated "Christian concepts" into their courses, they were never charged with teaching the "Bible classes." Id. at 648. The court ultimately remanded that case, ruling that the defendant had failed to present evidence that the plaintiffs' "duties and responsibilities" as professors teaching a mostly secular subject at a religious university, were covered by the ministerial exception. Id. at 658.

The Supreme Court of the United States however clarified that fine line between teaching and preaching, in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment

Opportunity Commission, when it held that the ministerial exception was not limited to the head of a religious congregation. Hosanna-Tabor, at 708. Job duties which included teaching courses in religion, leading prayers, taking students to a chapel service, leading services, choosing the liturgy, and selecting the hymns, "reflected a role in conveying the Church's message and carrying out its mission" and thus a teacher played a significant part in imparting the faith. Id. at 708. Further, the court noted that the term "ministerial exception" was considered "mere shorthand," since the First Amendment protects freedom of all religions, and not all religions use the term "minister." Id. at 714. The court also noted that while a teacher who taught only secular subjects would not qualify for the "ministerial" exception, the "protection of religious teachers is not somehow diminished when they take on secular functions in addition to their religious ones." Id. at 715.

Like in Hosanna-Tabor, Green taught the bible every day, brought students to chapel service, and organized and led the weekly chapel service multiple times each year. Thus she actively engaged in activities that would qualify her job as ministerial in nature. And while Green taught secular subjects, as in Hope, that does not diminish her function as a religious teacher, as defined under Hosanna-Tabor, qualifying her for a ministerial exception.

3. Discrimination

The California Constitution bars discrimination on the basis of sex, Cal. Const. art. I, § 8, and the Court of Appeal in California has found that "pregnancy discrimination is a form of sex discrimination." Badih v. Myers, 43 Cal. Rptr. 2d 229, 233 (Cal. App. 1st Dist. 1995). Further, FEHA includes in its definition of sex, "pregnancy or medical conditions related to pregnancy" Cal. Gov't Code Ann. § 12926 (West). To be successful in a claim of discrimination, Green must

show that she was a member of a protected class, was qualified for the position she held, and she must present "evidence that suggests the employer's motive for the adverse employment action was discriminatory." Johnson v. United Cerebral Palsy/Spastic Children's Found. of Los Angeles and Ventura Counties, 93 Cal. Rptr. 3d 198, 208 (Cal. App. 2d Dist. 2009).

First, Green must show that she was a member of a protected class. In Badih v. Myers, the Court of Appeal in California held that as the FEHA has "concluded that pregnancy discrimination in employment is a form of sex discrimination" there is precedence in California, for including pregnancy under sex discrimination. Badih, at 232. Here, Green was also pregnant, and thus according to Badih, is a member of a protected class.

Second, Green would need to show that she was qualified for her job. In Johnson v. United Cerebral Palsy/Spastic Children's Foundation of Los Angeles and Ventura Counties, the Court of Appeal, California, noted that in presenting a prima facie case of discrimination, the plaintiff must be "qualified for the position he or she sought or was performing competently in the position he held." Johnson, at 208. Green had been an employee at the School for over six years when she was terminated, and neither side is contending that she was not qualified for the position.

Third, in order to have a valid claim for discrimination, Green would need to present "evidence that suggests the employer's motive for the adverse employment action was discriminatory." Id. at 208.

In Johnson the Court of Appeals, California, held that even if "several matters" which by themselves would not be considered discriminatory, "*when taken together*," do demonstrate that pregnancy was the true reason for employment termination, that is enough to establish a claim of discrimination. Id. at 212. In that case the plaintiff was fired soon after becoming pregnant, was

not given a specific reason for the termination, was never told that her work was unsatisfactory, and her employer had expressed misgivings about employing pregnant employees. Id. at 212. Green could similarly claim that she was also fired soon after she announced her pregnancy, had never received notice that her work was unsatisfactory, and was told "Well isn't it obvious?" when she asked why she was being terminated.

However, the court also noted in Johnson that an ambiguous or cryptic answer as to why an employer terminated an employee does not on it's own, "support an inference of intentional discrimination." Id. at 211. Green received an ambiguous answer as to why she was fired, and if taken alone, that may not be enough to anchor a viable claim of discrimination. But when taken together with the timing of the termination so soon after she announced her pregnancy, and the fact that she never received notice that the School found her work in any way unsatisfactory, may in combination be enough to establish a valid claim of discrimination.

If Green is able to establish a prima facie case of discrimination, the court also stated in Johnson, that the burden of proof then "shifts to the employer to rebut the presumption with evidence that its action was taken for a legitimate, nondiscriminatory reason." Id. at 208.

In Henry, a school was also accused of terminating a single teacher's employment after she became pregnant. There the school argued against discrimination because the teacher was not fired for becoming pregnant or for having a baby outside of wedlock, but rather for "failure to adhere with the Professional Expectations of the teaching staff in that her living arrangements were contrary to the religious beliefs of the church and school." Henry, at 20. When the teacher chose to live with her boyfriend, unmarried, it was a violation of the church requirement that its teachers "live a life in conformity with the fundamentalist beliefs of the church" Id. at 23. The Court of Appeal in California ruled accordingly, that it was not discrimination. Id. at 23.

When Green accepted her job, she voluntarily embraced the School's belief statement, and signed the employment contract knowing that violation of the School's morality clause, could lead to termination of her employment. Since that clause specifically precludes "sexually immoral behavior including premarital sex and living with a significant other before marriage" the School can argue that her behavior violated the clause. However, Green may argue that as she was planning to marry Gellar before school started in the fall, and they were not living together, she was not in fact in violation of the morality clause.

If the School can show that Green's termination was the result of a violation of the morality clause in her employment contract, that would not qualify as discrimination, and the School would prevail in this claim. However, if Green can show she was in fact terminated because of her pregnancy, both the California Constitution and FEHA would consider it sex discrimination, which is barred. Therefore, Green could be successful in this claim.

CONCLUSION

Green does not have a sustainable claim of discrimination in employment, because the School is exempt as a religious association under FEHA.

Further, the School is also eligible as a qualifying religious institution to invoke the ministerial exception, since Green's duties and function qualify her as a religious teacher.

However, if both the FEHA exemption and the ministerial exception were to fail, and Green was able to establish a prima facie case of discrimination, the School would have to prove that Green's termination was in fact for a valid, nondiscriminatory reason, or Green's claim would be viable.

By turning in this assignment, I have followed the Collaboration Guidelines explained in

the Legal Research & Writing I syllabus.