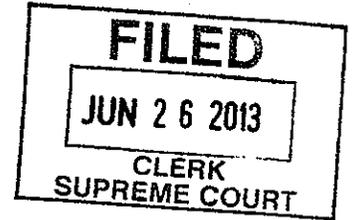


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-00502-DG



On Appeal from Kentucky Court of Appeals,
Case No. 2011-CA-000004-MR

DR. LAURENCE H. KANT

APPELLANT

v.

LEXINGTON THEOLOGICAL SEMINARY

APPELLEE

REPLY BRIEF ON BEHALF OF APPELLANT, DR. LAURENCE H. KANT

This is to certify that a true and correct copy of the foregoing has been served by mailing same this the 26th day of April, 2013, to the following: Hon. Richard G. Griffith and Hon. Elizabeth S. Muyskens, Stoll Keenon Ogden, PLLC, 300 W. Vine Street, Suite 2100, Lexington, Kentucky 40507, Counsel for Appellees; Judge Kimberly Bunnell, Fayette Circuit Court, 120 N. Limestone, Lexington, Kentucky 40507; Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and by hand-delivering ten copies to Hon. Susan Stokley Clary, Clerk, Court Administrator and General Counsel, Kentucky Supreme Court, 209 Capitol Building, 700 Capital Avenue, Frankfort, Kentucky 40601.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. D. Miller", written over a horizontal line.

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INTRODUCTION

Appellant, Dr. Laurence H. Kant, (hereinafter "Kant" or "Appellant"), files this Reply Brief not to re-argue what he has already argued. Indeed, most of the points raised in the well-written brief filed by Appellee, Lexington Theological Seminary (hereinafter "LTS" or "Appellee") have been addressed by Kant in his principal Brief filed with this Honorable Court. However, LTS now raises a few issues in its Brief that have never been argued before and/or which require some brief comment from Kant.

ARGUMENTS

1. Kant held a Tenure Contract with LTS

By far the most perplexing argument raised by LTS, for the first time in the history of this litigation, is that Kant did not in fact have a tenure contract with LTS. This argument is littered throughout LTS's Brief. It is enough to say that Kant alleged in his Verified Complaint and Demand for Jury Trial that he was granted tenure by LTS on March 6, 2006 as an Associate Professor of the History of Religion, effective August 1, 2006. (Complaint ¶ 7, RA 0002; Attached as **Tab 1** in Appendix). In its Answer, LTS makes the following admission: "The Defendant admits the allegation contained in numerical paragraph 7 of the Complaint that Plaintiff received tenure as Associate Professor of the History of Religion in 2006." (Answer ¶7, RA 0011, Attached as **Tab 2** in Appendix). LTS has already admitted that Kant was a tenured professor of the History of Religion. The record also contains a letter signed by LTS's President which congratulates Kant on receiving this tenure contract. (March 7, 2006 Letter from Robert Cueni to Kant granting Tenure, RA 0161, Attached as **Tab 3** in Appendix). Kant did not "artfully craft" his Complaint to somehow allege a claim that was not present in the first

instance. Indeed, Count I of the Verified Complaint is styled "Breach of Contract (Tenure)." (Appendix Tab 1). Whether LTS is liable upon this valid contract has been an issue in this case since its inception.

This is truly a non-issue which has already been admitted by LTS. However, this newly raised argument that Kant did not in fact have tenure rights raises another, much more disturbing question. Is LTS saying that it defrauded Kant when it granted him tenure, and that it had no desire or plan to actually honor its contractual commitments at the outset? This very Court held in *Music v. United Methodist Church*, 864 S.W.2d 286, 287 (Ky. 1993) that "Civil courts may intervene in ecclesiastical areas, however, if there is fraud,¹ collusion or arbitrariness." (Emphasis added).

What is equally clear about Kant's contract of tenure is that its parameters are defined by the *Faculty Handbook* (RA 0777-0803), not the *Employee Handbook* (RA 0777-0803) as urged by LTS. See, LTS's Brief, pg. 14, fn 14. Indeed, the *Employee Handbook* explicitly states, "The information contained in this handbook applies to all employees unless otherwise indicated. **With respect to faculty, the *Faculty Handbook* supersedes the *Employee Handbook*.**" *Id.*, p. 1 (emphasis added). The *Faculty Handbook* in turns provides that "The only grounds for dismissal of a tenured faculty member are moral delinquency, unambiguous failure to perform the responsibilities outlined in this Handbook, or conduct detrimental to the Seminary." (RA 173). LTS does not argue that Kant engaged in moral delinquency, an unambiguous failure to perform his responsibilities, or conduct detrimental to LTS. Rather, it argues that a financial exigency

¹ Indeed, if what the LTS is telling the Court is that, when it promised the contractual commitment of tenure to Kant, it had absolutely no intention of honoring same, then LTS engaged in fraud and the Court should remand this action back to this Trial Court to allow Kant to amend his Complaint to formally allege same.

somehow allowed it to eliminate tenure, and therefore violate Kant's tenure contract. This is a narrowly tailored issue that would not require this Court to engage in any ecclesiastical discussion.

2. **Kant was not Required to and did not in Fact Espouse the Tenets of LTS's Faith, nor was he Evaluated upon Same**

Another new argument raised by LTS is that Kant was not only required to espouse its faith while performing his teaching duties, but also that he was evaluated, at least in part, on how well he did so. LTS has not, and cannot, point to a single document in this action which supports this argument, and the text of the *Faculty Handbook* belies such an argument. Indeed, this argument comes solely from the affidavit of LTS's former President, which LTS attached as Tab 4 to its Appendix. (See, ¶¶13-14). LTS never made this direct argument before, and there is not a shred of documentary evidence in the record to support it. It is further untrue. Kant has stated in his Affidavits (ROA 0661-0664, RA 0665-0668) that he did not teach the tenets of the Disciples of Christ because **he does not believe those tenets**. For example, in Kant's Second Affidavit, he stated under oath as follows:

I cannot espouse Christian or Disciples of Christ (DOC) doctrine, because I do not believe it. I cannot lead a Christian worship service or officiate at Christian events, because I am neither licensed nor qualified to do so. I never took communion nor a blessing at communion (always staying in my seat or moving to the back of the room so as to avoid people having to climb over me). (¶3, ROA 0665; see also ROA 661, ¶5)(Kant's First Affidavit is attached at **Tab 4** in the Appendix, and his Second Affidavit is attached as **Tab 5** in the Appendix).

There is absolutely no evidence in this action that Kant was "evaluated" based in part on how well he espoused the tenets of LTS's faith. LTS attempts to compare Kant to Ms. Perich, the plaintiff in *Hosanna-Tabor Evangelical Lutheran Church and School v.*

EEOC, 132 S.Ct. 694 (2012) by arguing that Kant participated in chapel services, Communion services and ordinations, reading scriptures and giving prayers, devotions and at least one sermon..." (LTS's Brief, p. 28). This argument is belied by the Court of Appeals' majority opinion, which rightfully found that Kant did not "espouse of support the tenets of the Disciples of Christ faith." (COA Opinion, pp. 22-23, Appendix Tab 2 to Kant's principal Brief). Of course, Kant believes that the majority Opinion is wrong when it found that this fact does not matter.

Such an argument is also contrary to Kant's sworn testimony, wherein, in addition to the above, he noted that he attended and "occasionally participated in [his] capacity as a **layperson** in convocations and worship services" but that he did not serve as a minister or teacher during these services because he is not qualified to do so and is non-Christian. (ROA 661-662, Tab 3). Surely, merely attending a few services as a layperson does not make one a "minister" of that faith. This is a far cry from Ms. Perich, who was a "commissioned minister" for Hosanna-Tabor, having gone through training and schooling to become same, along with a formal religious process of commissioning; was held out by Hosanna-Tabor as a minister, which was a role that was distinct from most of the rest of its members; was issued a "diploma of vocation" and was required to perform her commissioned office "according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the sacred scriptures"; was periodically reviewed by the congregation on her "skills of ministry" and "ministerial responsibilities;" became a commissioned minister of that church, which was preceded by a "significant degree of religious training followed by a formal process of commissioning;" held herself out as a minister, claiming an allowance on her tax returns

that was only available to people "involved in the exercise of the ministry"; and was required to teach the tenets of that particular church's beliefs when teaching the students, leading the students in prayer three times a week, taking her students to chapel service, and leading the chapel service twice a year, "[c]hoosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible." She further led her class in devotional exercises each morning. As the Supreme Court held, she "performed an important role in transmitting the Lutheran faith to the next generation." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694, 707-709 (2012).

This is not the case in the matter, *sub judice*. Despite LTS's new, and completely unsupported argument to the contrary, Kant played absolutely no role in conveying LTS's faith to the next generation, or to anyone at all. He did not personify their beliefs because he did not believe in same.

Courts across the country have refused to apply the ministerial exception to cases involving teachers at religious schools who actually were actually required to perform some traditional, "ministerial" functions. As noted by the Court in the post-*Hosanna* case of *Dias v. Archdiocese of Cincinnati*, 1:11-CV-00251, 2012 WL 1068165 (S.D. Ohio Mar. 29, 2012)(a copy of which is attached in the Appendix as hereto as **Tab 6**):

Plaintiff cites *Braun v. St. Pius X Parish*, No. 09-CV-779-GKF-TLW, 2011 U.S. Dist. LEXIS 123750 at *9 (N.D.Okla. October 25, 2011) ("Defendants cite no authority ... for the argument that a teacher at a parochial school is a minister or qualifies for the ministerial exception."); *E.E.O.C. v. Mississippi College*, 626 F.2d 477, 485 (5th Cir.1980) ("That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern."); *Geary v. Visitation of Blessed Virgin Mary Parish School*, 7 F.3d 324, 331 (3rd Cir.1993) ("We believe, however, that notwithstanding Geary's apparent general employment obligation to be a visible witness to the Catholic Church's philosophy and principles, a court

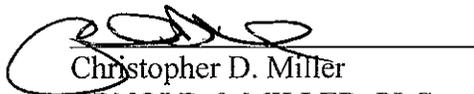
could adjudicate Geary's claims without the entanglement that would follow were employment of clergy or religious leaders involved.”); *Redhead v. Conference of Seventh-Day Adventists*, 440 F.Supp.2d 211, 221–222 (E.D.N.Y.2006) (holding that a teacher at a Seventh Day Adventist elementary school does not classify as a ministerial employee because her teaching duties were primarily secular and her daily religious duties “were limited to only one hour of Bible instruction per day”); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F.Supp.2d 849, 854 (S.D.Ind.1998) (holding that a fifth grade teacher who taught at least one class in religion per term and organized Mass once a month at a religious elementary school was not a ministerial employee); and *DeMarco v. Holy Cross High School*, 4 F.3d 166, 172 (2d Cir.1993) (holding that applying the ADEA to a math teacher who led students in prayer and accompanied them to religious services at a religious high school would not result in excessive entanglement under the Establishment Clause).

LTS apparently now realizes how crucial this fact is to the analysis, but its newly raised attempts to convince the Court that Kant did indeed "espouse the tenets" of its faith is belied by all evidence of record besides a self-serving and unsupported statement in its former President's Affidavit. At best, this creates a genuine issue of material fact. Mere attendance, and perhaps even rare participation, in a church service does not somehow transform a man of Jewish faith into a minister of the Disciples of Christ faith. This Court is reminded that the ministerial exception only prevents outside interference when "[s]uch action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694, 706 (2012). It is beyond dispute that Kant did not personify LTS's beliefs, because, among other things, he did not believe them himself. Neither LTS nor Kant ever, at any time, held Kant out as a minister or someone who performed the traditional functions of a minister or religious advisor. He simply taught classes about the history of religion, and was not tasked with and did not in fact spread LTS's faith in any way.

CONCLUSION

To be clear, Kant is not arguing that there should not exist such a "ministerial exception," or that this Court should reverse its holding in *Music*. He simply is arguing that those concepts do not serve as a bar to his claims in this case. LTS has not, and cannot, cite this Court to a case from anywhere in this country where a Jewish, or any other non-Christian religion, tenured professor of Religion was found to be a "minister" of a Christian seminary or any other religious institution. Despite LTS's insistence to the contrary, this case is about neutral principles of contract law, and nothing about ecclesiastical matters or wading into doctrinal waters. Kant held contractual rights with LTS which were clearly breached by LTS when it decided to terminate his employment without adequate cause as defined in its own *Faculty Handbook*, a document authored by this Defendant. Kant merely requests this Court to enforce those contractual rights, and remand this action back to the Trial Court for further proceedings. LTS is liable on its valid contracts, particularly where, as here, the contractual matters are not rooted in religious belief, but rather an alleged financial exigency. LTS's attempts to *post-facto* argue that its elimination of tenure was a "spiritual decision," while convenient for its purposes now, is unconvincing and contrary to its previous statements to the Fayette Circuit Court. LTS, like all institutions in this country, is liable on its valid contracts. To hold otherwise would place LTS in a preferred position over secular institutions which may well create establishment clause problems of its own. *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 336 (5th Cir.1998); Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 Mich. J. Gender & L. 45, 75 (2001) (noting that "non-application of tort principles where they might otherwise apply may be more like Establishment, creating an exception for religion").

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. Miller", is written over a horizontal line.

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APPENDIX

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