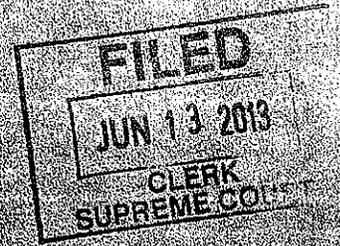


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-000519



Appeal from Kentucky Court of Appeals
No. 2010-CA-001798

JIMMY KIRBY

APPELLANT

v.

LEXINGTON THEOLOGICAL SEMINARY

APPELLEE

AMICUS CURIAE BRIEF OF ALLIANCE DEFENDING FREEDOM
AND ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL
ON BEHALF OF APPELLEE
LEXINGTON THEOLOGICAL SEMINARY

I hereby certify that on April 29, 2013, a true and correct copy of the foregoing was served by placing same in the U.S. Mail, postage prepaid, addressed to: Douglas C. Howard, Howard Law Group, PLLC, P.O. Box 562, 227 W. Main Street, Suite 4, Frankfort, KY, 40601-0562 and Amos N. Jones, The Amos Jones Law Firm, 1150 K. Street NW, Ninth Floor, Washington DC 20005-6809, counsel for Appellant; Richard G. Griffith and Elizabeth S. Muyskens, Stoll Keenon Ogden, PLLC, 300 West Vine Street, Suite 2100, Lexington, KY 40507, counsel for Appellee.

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ARGUMENT

This case is strikingly similar in law and fact to *Kant v. Lexington Theological Seminary*, which is concurrently pending before this Court. Out of consideration for this Court's time and in recognition of the substantial overlap between the cases, the points and authorities discussed by *amicus curiae* Alliance Defending Freedom in *Kant v. Lexington Theological Seminary* are incorporated by reference, but will not be restated here.

I. UNDER *HOSANNA-TABOR'S* ALL-THINGS CONSIDERED ANALYSIS, KIRBY WAS A MINISTERIAL EMPLOYEE.

In 2012, the United States Supreme Court issued a seminal decision affirming the existence of a ministerial exception, rooted in the First Amendment, that bars suits between a religious institution and one of its ministers. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694 (2012) (“We agree that there is such a ministerial exception”).

The case arose in the context of an employment discrimination lawsuit filed by a former teacher against a church school. *Id.* at 700-701. The teacher, Cheryl Perich, alleged that her employment had been terminated in violation of the Americans with Disabilities Act; the school countered that Perich was a ministerial employee whose employment was terminated for religious reasons. *Id.* at 701. After affirming the constitutionally-mandated ministerial exception, the Supreme Court determined that Perich was a ministerial employee, and concluded that her claims against the school must therefore be dismissed. *Id.* at 706, 710. The Court reasoned that

[r]equiring 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 action interferes with the internal governance of the church,

depriving the church of control over the selection of who will personify its beliefs.

Id. at 706.

The Supreme Court's analysis in *Hosanna-Tabor* dictates the resolution of Kirby's claims.¹ As discussed in the brief filed by *amicus curiae* in *Kant v. Lexington Theological Seminary*, Lexington Theological Seminary is indisputably a religious organization that may raise the ministerial exception as an affirmative defense to the claims of its ministerial employees. The remaining question is whether Kirby is a ministerial employee.

A. *Hosanna-Tabor* Does Not Employ A Rigid Formula In Evaluating Ministerial Employees.

In considering who qualifies as "ministerial" for the purposes of the ministerial exception, the Supreme Court expressly refused to "adopt a rigid formula for deciding when an employee qualifies as a minister." 132 S.Ct. at 707. Rather, the Court considered "all circumstances of her employment." *Id.*

The Supreme Court found that Perich was employed by a church-operated Lutheran school, offering "Christ-centered education" to students in kindergarten through eighth grade. *Id.* at 699. The school "called" Perich to full-time ministry after she completed certain religious educational courses. *Id.* She accepted the call and assumed

¹ While *Hosanna-Tabor* was decided in the context of a Title VII employment discrimination claim, the ministerial exception was not limited to that context. See *Hosanna-Tabor*, 132 S.Ct. at 710 ("The case before us is an employment discrimination suit...[w]e express no view on whether the exception bars other types of suits...") Rather, *Hosanna-Tabor* "radiates...a spirit of freedom for religious organizations, an independence from secular control or manipulations—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) (referencing *Watson v. Jones*, 13 Wall. 679 (1872)). As such, courts regularly apply the ministerial exception to breach of contract claims. See, e.g., *Mills v. Standing General Com'n on Christian Unity*, 958 N.Y.S.2d 880 (N.Y.Sup., 2013); *Music v. United Methodist Church*, 864 S.W.2d 286 (Ky. 1996); *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878 (Wis., 2012). Thus, as is more fully discussed in the brief of *amicus curiae* in *Kant*, the ministerial exception applies to breach of contract claims.

the formal title “Minister of Religion, Commissioned.” *Id.* at 699-700. Perich taught math, language arts, social studies, science gym, art, and music. *Id.* at 700. She also taught religion classes four days a week, led the students in prayer and devotions, and attended weekly chapel services. *Id.* Perich led the chapel service about twice a year, “choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible.” *Id.* at 700, 708. She was expected to perform her job “according to the Word of God and the confessional standards of the Evangelical Lutheran Church.” *Id.* at 707. Her employment evaluations were based on religious criteria, including her “skills of ministry” and “ministerial responsibilities.” *Id.* She was charged with “lead[ing] others toward Christian maturity” and “teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity as set forth in all the symbolical books of the Evangelical Lutheran Church.” *Id.* at 708.

As it analyzed the facts before it, the Court noted that the school held out Perich as a minister. *Id.* at 707. “Although such a title, by itself, does not automatically ensure coverage, the fact that an employee has been ordained or commissioned as a minister is surely relevant.” *Id.* at 708. Additionally, “Perich held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms.” *Id.* at 708. Finally, the Court considered that Perich’s job duties “reflected a role in conveying the Church’s message and carrying out its mission” as she was charged with leading others towards Christian maturity and with faithfully teaching the Word of God. *Id.*

In light of these circumstances of her employment, the Supreme Court concluded that Perich was a ministerial employee. *Id.* at 707.

B. Kirby Is A Ministerial Employee Given All Circumstances Of His Employment At The Seminary.

Kirby – like Perich – was a ministerial employee. Approximately fifteen years ago, Lexington Theological Seminary extended a “call” to Kirby, inviting him to “carry out [his] ministry by serving as Instructor of Church and Society.” Court of Appeals Opinion (“Opinion”), pg. 2. Prior to this time, Kirby had received a Masters in Christian Education from the Christian Theological Seminary. Kirby accepted that call to religious services at the Seminary, and assumed the responsibility of preparing students for full-time ministry and furthering the spiritual education of the next generation of Christian leaders. *See* Opinion, pg. 12. Kirby taught Biblically-based curriculum, was expected to model the ministerial role for those under his instruction, and was evaluated based upon religious criteria. *See id.* He opened each class with prayer. *See id.* And not only did Kirby participate in chapel services, but Kirby also led religious worship services. *See id.*

Under the totality of the circumstances, Kirby is plainly a ministerial employee of the Seminary. He was “called” into ministry by the Seminary. He possessed religious training, and was qualified to assist students in preparing for vocational ministry. He led in religious activities and services, and taught religious courses. Kirby’s lack of ordination as a “clergyman” is not dispositive. Ordination is only a factor to be considered in the totality of the circumstances – it, alone, is not dispositive. *See Hosanna-Tabor*, 132 S.Ct. at 708; *see also EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981) (holding seminary faculty members to be ministerial employees even though some were not ordained ministers). Thus, Kirby was a ministerial employee.

C. The Courts Below Recognized That Kirby Was A Ministerial Employee, But They Did Not “Convert” Him Into One.

Kirby’s contention that the courts below unconstitutionally “converted” him into a minister of another faith “through the hermeneutical hopscotching of three-judge panels” may make for melodramatic briefing, but the argument has no basis in reality. First, as discussed in the brief of *amicus curiae* in *Kant v. Lexington Theological Seminary* also pending before this Court, the term “ministerial employee” has never been limited to clergymen. See *EEOC v. Catholic Univ.*, 83 F.3d 455, 461 (D.C. Cir. 1996) (The ministerial exception has not been limited to members of the clergy.”). In this context, “ministerial” simply denotes a person “who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.” *Hosanna-Tabor*, 132 S.Ct. at 712 (Alito, J. concurring). Second, courts make legal and factual findings based upon the facts as presented; they do not create new facts, much less “judicially ordain” persons for religious ministry. Under the facts of this case, Kirby became a ministerial employee when he accepted the Seminary’s “call” to train men and women for vocational Christian ministry. Both the Circuit Court and Appellate Court below evaluated all circumstances of Kirby’s employment at LTS, and concluded that Kirby was a ministerial employee – a teacher of religious faith.

Thus, Kirby’s contention that recognizing him as a “ministerial” employee of the Seminary somehow violates the Establishment Clause by foisting on him the title of “minister” of another faith is without merit. There is no religious significance attached to the legal shorthand of a “ministerial” employee and the designation merely denotes someone who has a “role in conveying the Church’s message and carrying out its mission.” *Hosanna-Tabor*, 132 S. Ct. at 708. The appellate court in this case simply

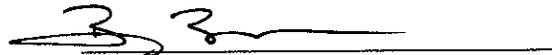
found that Kirby had a role in conveying the Seminary's message and carrying out its mission.

CONCLUSION

In light of the fact that Kirby was a ministerial employee of the Seminary, his claims against the Seminary are barred by the ministerial exception. "When a minister who has been fired sues [his] church...the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way." *Hosanna-Tabor*, 132 S.Ct. at 710. Therefore, this Court should affirm the Court of Appeals' decision.

Respectfully submitted this 29th day of April, 2013.

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