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Religious Employers and Gender Employment Discrimination

John P. Boyle*

I. Introduction

Linda Hoskinson was a teacher at Dayton Christian Schools (hereinafter DCS), in Dayton, Ohio. In January, 1979, she casually informed the principal that she was pregnant. As a result of Hoskinson's announcement, the principal promptly advised her that her teaching contract would not be renewed for the following year. As a Christian mother, the principal said, her place was at home with her preschool-aged children and she would be a poor Christian example at the school if she continued to teach.¹

Following this conversation, Hoskinson attempted to discuss her contract with the school board. When this proved unsuccessful, she consulted her attorney, who sent a letter to the school threatening legal action based on the school's alleged sexual discrimination against Hoskinson. As a result of that letter, Hoskinson was immediately terminated.² The school considered her consultation with an attorney a violation of its concept of "the Biblical Chain of Command"³ and therefore a violation of her contract

* John P. Boyle received his M.A. from St. John's University and will receive his J.D. from the University of Minnesota Law School in 1987.

1. *Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n*, 578 F. Supp. 1004 (S.D. Ohio 1984), *rev'd*, 766 F.2d 932 (6th Cir. 1985), *rev'd and remanded*, 106 S. Ct. 2718 (1986), 802 F.2d 457 (6th Cir. 1986) (no opinion issued on remand). The letter from principal James Rakestraw specifically stated:

My concern . . . was . . . that as you will be a new parent (June) your teaching next year would be in contrast to the School's philosophy. As a school, we see the importance of the mother in the home during the early years of child growth. This is a factor we consider as we interview prospective teachers. If there are pre-school age children in the home we recommend the mother stay there and do not accept her application.

766 F.2d at 934 n.2.

2. *Id.* at 934.

3. The school argued that this "Biblical Chain of Command" concept was embodied in paragraph 13 of Hoskinson's contract which stated: "The teacher agrees to follow the Biblical pattern of Matthew 18:15-17 and Galatians [sic] 6:1 and always give a good report. All differences are to be resolved by utilizing Biblical principles—always representing a united front." *Id.* at 934 n.3.

warranting termination.⁴

Hoskinson filed a complaint with the Ohio Civil Rights Commission (hereinafter Commission) alleging sex discrimination. When the Commission began discovery, the school and other plaintiffs joined in the suit⁵ brought a complaint challenging the Commission's jurisdiction to regulate its hiring practices.⁶ The plaintiffs requested a declaratory judgment arguing that the application of the Ohio Civil Rights Act against the school was unconstitutional, violating its first, ninth, and fourteenth amendment rights.⁷ The school also sought injunctive relief to enjoin the Commission from interfering with the school's free exercise of its religious beliefs.⁸

The United States District Court for the Southern District of Ohio, Western Division, upheld the Ohio Civil Rights Commission's jurisdiction over the school concerning Hoskinson's termination.⁹ DCS appealed to the United States Court of Appeals for the Sixth Circuit. The circuit court reversed the district court, holding that the Commission's jurisdiction over the school was an impermissible entanglement by the state in the religious affairs of the school.¹⁰ The Commission then appealed the decision to the Supreme Court, where it was dismissed on abstention grounds and left for the Ohio state courts to adjudicate.¹¹

The *Dayton Christian Schools* decision presents troubling issues which this article will address. One such issue is how much

4. The minutes of the board meeting terminating Hoskinson stated: "The Board . . . has concluded that there is a serious philosophical difference between the Hoskinsons and Dayton Christian Schools. This has been evidenced by violation of paragraph 13, contained in the contract between Linda Hoskinson and Dayton Christian School dated April 17." *Id.* at 934 n.3.

5. The other plaintiffs joined in the suit were Patterson Park Church, Christian Tabernacle, DCS Superintendent Claude Schindler, parents Stephen and Camillia House, and DCS teacher Paul Pyle. *Id.* at 935.

6. The plaintiffs brought their action under 42 U.S.C. § 1983 against the Commission, five commissioners, the Ohio Attorney General, Commission directors, and two assistant state attorney generals. *Id.*

7. The plaintiffs specifically alleged that the enforcement of the state civil rights act violated their free exercise rights, and that the attempts by the Commission to exercise jurisdiction violated the establishment clause. *Id.*

8. The district court granted a temporary restraining order pending trial on the merits. In their complaint, the plaintiffs sought a permanent injunction enjoining the Commission from interfering with the school. *Id.*

9. 578 F. Supp. at 1041.

10. 766 F.2d at 956, 961. As the Supreme Court discussed in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), one of the tests for whether the state has violated the establishment clause is whether a statute fosters an excessive government entanglement with religion.

11. 106 S. Ct. 2718, 2722-24 (1986). For a discussion of the abstention doctrine, see *infra* notes 190-194 and accompanying text.

deference should courts give to discriminatory religious beliefs? Additionally, are the religious beliefs used by certain religious groups to protect employment discrimination merely practices that circumvent public policy and perpetuate a stereotypical denigration of women in society? And finally, what opportunities do discriminating religious employers have to declare a practice to be a religious belief deserving constitutional protection?

Using the *Dayton Christian Schools* decision as a backdrop, this article will explore these issues. First, this article compares and contrasts the various circuit and district court cases involving gender discrimination disputes with religious organizations. Second, the article explores the courts' rationale used in the *Dayton Christian Schools* decisions in light of these earlier cases. Third, relying on the ideology of the Christian Fundamentalist Right¹² as a contemporary example of the development of unequal gender roles within religious belief structures, this article examines public policy concerns presented by the *Dayton Christian Schools* line of cases and similar court decisions.

Specifically, the public policy concerns addressed by this article concern the dangers to society in general and to women in particular if, because of fear of government entanglement in religious matters under the first amendment, courts automatically defer to religious groups or organizations like DCS. Without minimally testing the legitimacy of the claim of a "belief" upon which a discriminatory practice is based, courts risk giving a free hand to religious groups to carry on discrimination against women—a group often not regarded by some religious groups as equal with men.¹³ From a policy standpoint, it is one thing for gender-selective belief practices to be carried on within the privacy of the home or within the ecclesiastical ranks of the church.¹⁴ A completely different is-

12. In its teacher's manual, the school asserted that it saw itself as an extension of the local evangelical fundamentalist church's Christian education program. 766 F.2d at 1010.

For the purposes of discussion, this article will examine the constitutional questions raised by *Dayton Christian Schools* in light of the contemporary Christian fundamentalist movement. Generally, Christian fundamentalism is a church movement marked by the following characteristics: 1) a strong emphasis and belief that the Bible is the literal and inerrant word of God; 2) a hostility to modern theology and particularly to modern critical study of the Bible; 3) a conviction that those who do not adhere to their religious viewpoint are not truly Christian. See, e.g., James Barr, *Fundamentalism* (1978) (a recent critical work on fundamentalism). For an overview of the Christian Right in the United States today, see *Jerry Falwell's Crusade: Fundamentalist Legions Seek to Remake Church and Society*, *Time*, Sept. 2, 1985, at 48.

13. See John L. Kater, *Christians on the Right: The Moral Majority in Perspective* 83 (1982); Gabriel Fackre, *The Religious Right and Christian Faith* 37 (1982).

14. The right of churches to discriminate by sex as to who may be ordained is

sue exists where those practices are applied in the work place where, by law, a female employee has a right to even-handed employment treatment.

II. Employment Gender Discrimination by Religious Groups: Development of Case Law

The case law that has developed concerning first amendment religion issues has encompassed several different areas of concern. Courts have addressed such key issues as prayer in schools,¹⁵ government assistance to sectarian schools,¹⁶ exemptions from taxation,¹⁷ and the free exercise of religion in public places.¹⁸ This section examines the development of first amendment case law pertaining to employment practices and the accompanying discrimination practiced by certain religious organizations.

A. Federal Statutory Background

Employment discrimination is prohibited for both public and private employers under title VII of the 1964 Civil Rights Act.¹⁹ An exemption, however, is available to religious employers under section 2000e-1 of the Act. It provides that the Act "shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities."²⁰ This exemption allowing religious groups to discriminate between employees has been interpreted by the courts to mean that a religious employer may deliberately select employees of a particular denomination or religious persuasion in hiring.²¹ The courts have held, however, that religious organizations cannot discriminate on the basis of race, color, sex, or national origin.²² In other words, a religious employer may

beyond the scope of judicial review under the "Minister Exception." *See infra* notes 47-67 and accompanying text.

15. *See, e.g.*, *Jaffree v. Board of School Comm'rs*, 459 U.S. 1314 (1983).

16. *See, e.g.*, *Meek v. Pittenger*, 421 U.S. 349 (1975).

17. *See, e.g.*, *Bob Jones University v. U.S.*, 461 U.S. 574 (1983).

18. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981).

19. 42 U.S.C. § 2000e (1976).

20. 42 U.S.C. § 2000e-1 (1976).

21. *See, e.g.*, *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); *Equal Employment Opportunity Comm'n v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982).

22. *See* Bruce Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Colum. L. Rev. 1514, 1534 (1979).

permissibly require that an employee belong to a particular religion, but it cannot discriminate based on race, sex, or national origin, nor may it use its faith requirement as a pretext for unlawful discrimination.²³ As a result, a religious employer may require its employees to belong to a particular faith, but it then may not discriminate based on an employee's race, sex, or national origin, since title VII does not protect this additional discrimination.²⁴

B. Discrimination Based on Religious Affiliation

An example of permissible religious discrimination occurred in *Feldstein v. Christian Science Monitor*.²⁵ The plaintiff alleged that he was not given adequate employment consideration by the *Christian Science Monitor* because he was not a Christian Scientist.²⁶ The court examined at length the exemption granted religious organizations under title VII,²⁷ and it found the *Christian Science Monitor* to be "a religious activity of a religious organization."²⁸ Therefore, the court held that it was "permissible for the Monitor to apply a test of religious affiliation to candidates for employment."²⁹ In a similar case, *Larsen v. Kirkham*,³⁰ a woman's employment contract at a Mormon school was not renewed because she did not meet the standards of participation in the Mor-

23. *Id.* See also *Equal Employment Opportunity Comm'n v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); see *infra* note 46 and accompanying text.

24. See generally Annotation, *Validity, Construction, and Application of Provisions of § 702 of Civil Rights Act of 1964 (42 U.S.C.S. § 2000e-1) Exempting Activities of Religious Organizations from Operation of Title VII Equal Employment Opportunity Provisions*, 67 A.L.R. Fed. 874 (1984).

25. 555 F. Supp. 974 (D. Mass. 1983).

26. *Id.* at 975-76. When he inquired about applying, Feldstein was informed that he stood little chance of being employed since he was not a Christian Scientist. The employment application contained several questions relating to the applicant's religious practices and affiliation. It closed with the statement: "The First Church of Christ, Scientist, may by law apply the test of religious qualifications to its employment policies. Those who meet this requirement and are otherwise qualified will be hired, promoted and transferred without regard to their race, national origin, sex, color or age." *Id.* at 976.

27. The exemption had been modified in 1972. Prior to that time, the exemption applied only to "religious activities" of religious organizations. However, in 1972, the word "religious" was deleted from 42 U.S.C. § 2000e-1. The court found this change in the language to present a potential question of whether the amended statute was constitutional. *Id.*

28. 555 F. Supp. at 978. The judge here noted that if he had found otherwise, he may have been forced to consider the constitutionality of 42 U.S.C. § 2000e-1 in light of the establishment clause.

29. *Id.* at 978. As a result, the court found the *Christian Science Monitor* innocent of unlawful employment practices.

30. 499 F. Supp. 960 (D. Utah 1980). The plaintiff alleged she was discriminated against on the basis of sex and religion.

mon church. The District Court in Utah held against the teacher on the ground that the school could legitimately set religious participation standards.³¹

In *Amos v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*,³² persons were fired from their jobs with church-operated corporations because they "were unable or refused to satisfy the Mormon Church worthiness requirements for a temple recommend."³³ The plaintiffs sued under a variety of legal theories, including illegal religious discrimination by the defendants.³⁴ On defendant's motion for dismissal or summary judgment, the district court found it was undisputed that the plaintiffs were fired for failure to meet the church's religious qualifications. It therefore considered whether such discriminatory practices were permissible.³⁵ The court examined the nature of the jobs and their relationship with the church's hierarchy, religious rituals, and tenets to determine whether the jobs involved substantial religious activity.³⁶ Here the jobs provided by one employer, a church-affiliated gymnasium, did not involve a religious activity.³⁷ More discovery was necessary concerning another employer—a manufacturer and distributor of temple clothing—to determine whether substantial religious activity was involved.³⁸

In *Amos*, the court conducted a very detailed analysis of the legislative history of title VII to determine whether the religion exemption of 42 U.S.C. § 2000e-1 applied to secular, non-religious jobs.³⁹ It concluded that the application of title VII to "religious organizations engaging in religious discrimination in secular, non-religious activity" does not involve excessive entanglement,⁴⁰ nor

31. The court noted that "neither the equal protection clause nor the establishment clause checks the power of the legislature to permit a religious school, be it Mormon, Roman Catholic, Jewish, Protestant or otherwise, the freedom to consider religious practice and belief when hiring its teachers." *Id.* at 967.

32. 594 F. Supp. 791 (D. Utah 1984), *rev'd*, 618 F. Supp. 1013 (D. Utah 1985).

33. 594 F. Supp. at 796.

34. Together with common law causes of action, the plaintiffs alleged that the defendants discriminated against them on religious grounds as applied to non-religious jobs by violating section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(2)(a), and Utah Code Ann. § 34-35-6 (Supp. 1983). 594 F. Supp. at 797.

35. 594 F. Supp. at 797.

36. *Id.* at 798-804.

37. *Id.* at 802. After analyzing its administrative structure, the court found that nothing in the running or purpose of the recreation center (known as the Deseret Gymnasium) indicated that it was intended "to spread or teach the religious beliefs and doctrine and practices of sacred ritual of the Mormon Church or that it was intended to be an integral part of church administration." *Id.* at 800.

38. *Id.* at 802-04.

39. *Id.* at 803-14.

40. *Id.* at 817.

does it impinge on free exercise rights.⁴¹ The court found that the religious discrimination exemption in title VII as applied to secular, non-religious activities of a religious organization would "advance religion in violation of the establishment clause."⁴² Consequently, the court sought to maintain a very limited level of permissible discrimination based on religious affiliation. The case was unique because of the court's examination of the nature of the church's questioned activity to determine whether it was religious activity or not. In a sense, the court applied title VII in its pre-1972 amendment version, where only "religious" activities of a religious employer were excluded from the Act's coverage.⁴³

One case has considered the issue of how clear a religious employer must be when claiming its employment practices are covered by the religious affiliation exception. In *Ritter v. Mount St. Mary's College*,⁴⁴ a female lay teacher was denied tenure by a non-profit Catholic college and brought an action under title VII alleging sex and age discrimination. The district court denied the College's motion for summary judgment, holding that a material issue of genuine fact existed as to whether religion played any role in the decision affecting the teacher.⁴⁵ Although the school had a stated policy of favoring the hiring of priests, nothing in the record indicated the tenure decision was based on a religious motivation.⁴⁶

C. Minister Exception

Courts have also fashioned another special area of exemption for discriminatory practices by religious groups: they will not interfere with internal church administration or ecclesiastical matters. In *McClure v. Salvation Army*,⁴⁷ the Fifth Circuit applied this exemption even though it specifically held that "[t]he language and the legislative history of section 701 compelled the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees

41. *Id.* at 819.

42. *Id.* at 828. The court therefore denied the defendants' motion either to dismiss or grant summary judgment with regard to the claims under state and federal laws involving illegal religious discrimination. *Id.* at 825-26. For an example of a court upholding the application of the FCC's anti-bias rules against a radio station licensee affiliated with a religious organization for positions not connected with religious programs, see *King's Garden, Inc. v. Federal Communications Comm'n*, 498 F.2d 51 (D.C. Cir. 1974).

43. See *supra* note 27.

44. 495 F. Supp. 724 (D. Md. 1980).

45. *Id.* at 730.

46. *Id.* at 729. The court found the grounds for denial of tenure to be unclear.

47. 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972), *reh'g denied*, 409 U.S. 1050 (1972).

on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment."⁴⁸

In *McClure*, a female Salvation Army officer⁴⁹ alleged that the Salvation Army had not treated her equally with males as to pay and fringe benefits. She further alleged that she was discharged in retaliation for complaints she made to her supervising officers and to the Equal Employment Opportunity Commission (hereinafter EEOC). The court held against the plaintiff on the ground that she was a minister and the involvement of the court in a church-minister employment relationship would impermissibly impinge on the Salvation Army's free exercise rights.⁵⁰

In a similar case, *Simpson v. Wells Lamont Corporation*,⁵¹ the Fifth Circuit refused to grant subject matter jurisdiction where a minister who had been removed from his position brought suit against church officials and parishioners. The court held that the minister's situation involved an ecclesiastical question outside the powers of the civil court.⁵²

In *Rayburn v. General Conference of Seventh Day Adventists*,⁵³ a white female brought an action for sexual and racial discrimination after being denied a pastoral position with the church.⁵⁴ The district court granted summary judgment for the defendant church⁵⁵ and on appeal the Fourth Circuit affirmed. The circuit court noted that "churches are not—and shall not be—above the law" but where, as here, the church's decisions involve

48. 460 F.2d at 558.

49. In the Salvation Army, officers are the equivalent of a minister or similar religious leader in other religious organizations.

50. 460 F.2d at 555. The court limited its holding on the free exercise issue to the ecclesiastical "church-minister" relationship. The court noted that "[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." *Id.* at 558-59.

51. 494 F.2d 490 (5th Cir. 1974).

52. *Id.* at 492. The court noted the importance of maintaining religious organizations' freedom from state involvement in their internal ecclesiastical matters. *Id.* at 493.

53. 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 333 (1986).

54. The plaintiff, a member of the Seventh-Day Adventist Church, held a Master of Divinity degree and Ph.D. in psychology. She applied for an associate in Pastoral Care internship with the Conference and for a pastoral staff vacancy at a church in Tacoma Park, Maryland. When both positions were awarded to another woman, the plaintiff sued under title VII. *Id.* at 1165.

55. The district court for the District of Maryland granted summary judgment for the defendant on the grounds that the General Conference should be dismissed as a defendant and on the grounds that the religion clauses of the first amendment barred a title VII suit. *Id.* at 1166.

its "spiritual functions,"⁵⁶ application of title VII would violate the church's free exercise and establishment protections.⁵⁷

The minister exception is not an impenetrable defense, given that one court has distinguished a certain factual situation from the *McClure*⁵⁸ and *Simpson*⁵⁹ rationale. The district court in *Whitney v. Greater New York Corporation of Seventh-Day Adventists*⁶⁰ held for a church typist-receptionist who alleged that she had been discharged because of a "casual social relationship" with a man of another race.⁶¹ The court distinguished the case from *McClure*, finding that the typist-receptionist's position was far removed from the type of relationship the church has with one of its ministers, thus presenting no first amendment free exercise problem.⁶²

The same distinction was applied in *Equal Employment Opportunity Commission v. Mississippi College*.⁶³ A female psychology professor charged that the college, which was run under the auspices of the Mississippi Baptist Convention, refused to hire her on account of her sex. She also charged that the school discriminated on the basis of race in its recruiting and hiring practices.⁶⁴ When the EEOC attempted to investigate the charges of discrimination, the school refused to comply with their investigation, arguing that it was exempt from any governmental inquiry.⁶⁵ The court rejected the school's argument stating:

The facts distinguish this case from *McClure*. The College is not a church. The College's faculty and staff do not function as ministers. The faculty members are not intermediaries be-

56. *Id.* at 1171.

57. *Id.* at 1167-71. In its reasoning, the court noted that there is only a narrow exemption to religious institutions regarding the coverage of title VII. *Id.* at 1166. The court, however, found that application of title VII in this case would restrict a church's free choice of its leaders, and that the state cannot substitute its guidance for that of the Holy Spirit in selecting church leaders. *Id.* at 1168, 1170.

58. See *supra* notes 47-50 and accompanying text.

59. See *supra* notes 51-52 and accompanying text.

60. 401 F. Supp. 1363 (S.D.N.Y. 1975).

61. The plaintiff alleged that she was discharged and evicted because she, a white, "was maintaining a casual social relationship with . . . a black man." *Id.* at 1365.

62. *Id.* at 1368. The court found that the facts did not fall within the "church-minister relationship" outlined in *McClure*, *supra* notes 47-50 and accompanying text.

63. 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

64. 626 F.2d at 479-80. The court dealt separately with issues relating to the race discrimination allegations. *Id.* at 481-84.

65. *Id.* at 484. The College argued that its hiring practices fell under the 42 U.S.C. § 2000e-1 exception, relating to the right to hire persons of a particular religion. The College also argued that the *McClure* "church-minister relationship" holding applied to its situation, and that EEOC jurisdiction over it would violate its establishment clause rights and its free exercise rights. *Id.* at 484-86, 488.

tween a church and its congregation. They neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine. 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. The employment relationships between Mississippi College and its faculty and staff is one intended by Congress to be regulated by title VII.⁶⁶

In answering the school's defense that its establishment clause rights were being violated, the court found that there was not excessive governmental entanglement with religion as a result of the EEOC's jurisdiction over the school concerning the charges.⁶⁷ In response to the school's asserted free exercise clause arguments, the court found that the employment practices subject to title VII did not involve religious beliefs or practices and the government had "a compelling interest in eradicating discrimination in all forms."⁶⁸ The court also noted that:

Although the number of religious educational institutions is minute in comparison to the number of employers subject to Title VII, their effect upon society at large is great because of the role they play in educating society's young. If the environment in which such institutions seek to achieve their religious and educational goals reflects unlawful discrimination, those discriminatory attitudes will be perpetuated with an influential segment of society, the detrimental effect of which cannot be estimated. Because the burden placed upon the free exercise of religion by the application of Title VII to religious educational institutions is slight, because society's interest in eradicating discrimination is compelling, and because the creation of an exemption greater than that provided by Section 702

66. *Id.* at 485.

67. *Id.* at 487. In deciding the establishment clause issue, the court used the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971): "(1) whether the statute has a secular legislative purpose, (2) whether the principal or primary effect of the statute is neither to advance nor to inhibit religion, and (3) whether the statute fosters 'an excessive government entanglement with a religion.'" *Mississippi College* focused on the third criterion and found that such a minimal burden on the school in applying title VII was not excessive government entanglement. 626 F.2d at 486, 488.

68. 626 F.2d at 488. Citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the court stated that in examining whether a free exercise problem exists, the Supreme Court has considered:

(1) the magnitude of the statute's impact upon the exercise of the religious belief, (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief, and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.

626 F.2d at 488. The court concluded that the government's compelling interest in ending discrimination outweighed the minimal burden to the College of applying title VII. *Id.* at 489.

would seriously undermine Congress' attempts to eliminate discrimination, we conclude the application of Title VII to educational institutions such as Mississippi College does not violate the free exercise clause of the First Amendment.⁶⁹

Consequently, the court held the "church-minister" exception did not apply to the College because of its largely secular nature, and therefore the EEOC had jurisdiction to investigate discrimination charges against the school.

D. Compensation and Benefit Discrimination

The right of a religious organization to discriminate was further narrowed in *Equal Employment Opportunity Commission v. Pacific Press Publishing Association*.⁷⁰ In this case, the EEOC brought an employment discrimination suit against the Pacific Press Publishing Association, a religious publishing house owned and operated by the Seventh Day Adventist Church. The EEOC brought the action in federal district court under title VII on the ground that two women employees were victims of discrimination by receiving lower monetary allowances than those received by male employees. The EEOC also asserted that the two women were terminated in retaliation for bringing their case to the attention of the EEOC.⁷¹ The district court held against the publishing house,⁷² which then appealed to the Ninth Circuit Court of Appeals. The circuit court concluded that Congress specifically intended title VII to apply to this type of an employment situation.⁷³ The terminated women also did not fall within the "church-minister" exemption,⁷⁴ and the Adventist Church proclaimed a policy and belief against discriminating on the basis of sex.⁷⁵ Consequently, the court held that since "the impact on religious belief is minimal and the federal interest in equal employment opportuni-

69. 626 F.2d at 489.

70. 676 F.2d 1272 (9th Cir. 1982).

71. *Id.* at 1275. The court also was required to consider the issue of whether application of title VII to the case presented a free exercise or establishment clause problem.

72. 482 F. Supp. 1291 (N.D. Cal. 1979).

73. 676 F.2d at 1276. The court stated:

The legislative history of this exemption [42 U.S.C. 2000e-1] shows that although Congress permitted religious organizations to discriminate in favor of members of their faith, religious employers are not immune from liability for discrimination based on race, sex, national origin, or for retaliatory actions against employees who exercise their rights under the statute.

Id.

74. 676 F.2d at 1278. The court noted that the *McClure* rationale does not apply because the duties involved did not relate to that of a minister or seminary teacher.

75. *Id.* at 1279. Therefore, title VII's equal pay provision could not conflict with the church's religious beliefs.

ties is high, the balance weighs heavily in favor of upholding Press' liability under Title VII for its use of sexually discriminatory wage scales A total exemption for Pacific Press and similar enterprises would represent a serious conflict with the government's equal employment objectives."⁷⁶

The court commented specifically on the retaliatory dismissal, noting that the Press asserted the dismissals were based on religious grounds, "citing . . . violation of church doctrines which prohibit lawsuits by members against the church."⁷⁷ In dismissing the Press' argument, the court held:

[permitting] the various Adventist institutions to retaliate against employees who challenge discrimination through EEOC procedures would defeat Congress' intention to protect employees of religious employers. The effect would be to withdraw title VII's protection from employees at the hundreds of diverse organizations affiliated with the Adventist church, including businesses which process food, sell insurance, invest in stocks and bonds, and run schools, hospitals, laboratories, rest homes and sanitariums.⁷⁸

The court affirmed that the discharged employees had "a constitutional right to inform the government of violations of federal law."⁷⁹

The circuit court upheld the district court decision and dismissed the Press' further contention that the matter involved was an intra-church doctrinal dispute.⁸⁰ It also rejected the Press' argument that the EEOC's jurisdiction over the publisher would involve major entanglement problems. The court specifically said that the "EEOC's relationship to religious employers threatens no more entanglement than other statutes which regulate employee compensation at religious institutions."⁸¹

In *Marshall v. Pacific Union Conference of Seventh-Day Adventists*,⁸² a United States district court in California denied a

76. *Id.*

77. *Id.* at 1280.

78. *Id.* The court stressed the government's high priority and compelling interest in guaranteeing equal employment opportunities.

79. *Id.* Without legal recourse, the individual's right to bring charges under title VII would not be protected.

80. *Id.* at 1281. The court rejected the "church-minister" argument offered by the Press on the grounds that such an exemption would prohibit lawsuits which are part of the enforcement mechanism Congress intended title VII to provide. The court noted that the church was still free to exercise ecclesiastical sanctions against the parties.

81. *Id.* at 1282. The court carefully distinguished this case from *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), where the NLRB attempted to exercise mandatory collective bargaining provisions at a sectarian school because there would result no ongoing scrutiny of Press' operations.

82. 14 Empl. Prac. Dec. (CCH) ¶ 5956 (C.D. Cal. 1977).

summary judgment motion by the Seventh-Day Adventist Church. The court reasoned that application of the equal pay provisions of the Fair Labor Standards Act⁸³ to the non-ministerial, lay employees of the church's schools did not impinge on the church's first amendment guarantees.⁸⁴ Furthermore, the court held that audits by the EEOC of the school's payroll records would not amount to impermissible entanglement.⁸⁵ A subsequent attempt by the church to stay discovery orders relating to the payroll records was also denied.⁸⁶

In a case similar to *Marshall*, the court in *Donovan v. Central Baptist Church, Victoria*⁸⁷ upheld the Secretary of Labor's discovery efforts in investigating alleged violations of the minimum wage laws of the Fair Labor Standards Act by a church-run day-care center.⁸⁸ The church alleged that the day-care center was an "integral part" of its ministry and that it should be exempt from the wage laws under the first amendment.⁸⁹ The court concluded that the church must first answer the interrogatories submitted to it before the court could determine if the first amendment objections were valid.⁹⁰ The court noted that requiring the church to answer these interrogatories would not involve "excessive entanglement with the Church or interfere with anyone's free exercise of religion."⁹¹

In the recent *Equal Employment Opportunity Commission v. Fremont Christian School*⁹² case, the Ninth Circuit upheld a partial summary judgment and injunction against a school operated by the First Assembly of God Church which provided health insurance only to single persons and married men. At the district court, the school argued that its practice of discriminating against female

83. 29 U.S.C. § 201 (1978 & Supp. 1986).

84. The district court rejected the church's free exercise and entanglement arguments. 14 Empl. Prac. Dec. (CCH) at ¶¶ 5957-59.

85. The court found the entanglement involved in reviewing the records to be minimal. *Id.*

86. *Pacific Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305 (1977).

87. 96 F.R.D. 4 (S.D. Tex. 1982).

88. The Secretary had submitted four interrogatories which questioned who worked at the day-care center, how they were paid, and what the requirements of the positions were. The church was seeking a protective order from answering the interrogatories. *Id.* at 6.

89. *Id.* at 5.

90. *Id.* at 6. The court stated: "This information is critical to the ultimate resolution of this case." Otherwise, it could not determine whether the day-care employees were ministers and therefore exempted from the application of the Fair Labor Standards Act. *Id.*

91. *Id.*

92. 781 F.2d 1362 (9th Cir. 1986).

employees was based on religious belief and was therefore protected by the free exercise and establishment clauses.⁹³ The district court rejected the school's first amendment arguments and granted partial summary judgment for violations of title VII and the Equal Pay Act.⁹⁴

The issue in the case involved the school's practice of providing health insurance only to "head of household" employees.⁹⁵ The practice was based on the school's and its sponsoring church's religious belief that "while the sexes are equal in dignity before God, they are differentiated in role."⁹⁶ The school asserted that "in any marriage, the husband is the head of the household and is required to provide for that household . . . regardless of what his salary is in relation to that of the wife."⁹⁷ While it did not offer health insurance on an equal basis, the school provided equal pay scales⁹⁸ and disability and life insurance to all of its employees, regardless of sex.⁹⁹ As an act of Christian charity, in cases where the husband was incapable of providing for his family,¹⁰⁰ the school also provided health benefits to a full-time married employee only for the time of her husband's incapacity.¹⁰¹

The Ninth Circuit considered and rejected the school's arguments that both title VII¹⁰² and the Equal Pay Act should not apply to the school.¹⁰³ With regard to the school's free exercise claim, the court found a lack of substantial impact on the religious beliefs of the school to warrant protecting the school's continued use of the discriminatory practices.¹⁰⁴ Addressing the school's establishment clause argument, the court held that since "the duties of the teachers . . . do not fulfill the function of a minister," no

93. Equal Employment Opportunity Comm'n v. Fremont Christian School, 34 Fair Empl. Prac. Cas. (BNA) 1038, 1040 (N.D. Cal. 1982).

94. *Id.* at 1045.

95. 781 F.2d at 1364.

96. *Id.*

97. *Id.* at 1365.

98. *Id.* at 1364. Before 1976, the school paid married male employees at a rate above similarly situated female employees but ceased this practice when it feared possible adverse legal consequences.

99. *Id.*

100. Such incapacity might be the result of illness or nonworking student status. *Id.* at 1365.

101. However, the school still considered the husband to be the scripturally required head of the household. *Id.*

102. The school argued that it was exempted under the religion exemption, 42 U.S.C. § 2000e-1 (1982), as well as the bona fide occupational qualification exemption of section 703(e) of 42 U.S.C. § 2000e-2(e). 781 F.2d at 1365-66.

103. 781 F.2d at 1367.

104. *Id.* at 1368. The school's sponsoring church did not have a formal belief of discriminating against women, and the school's practice of providing other benefits without regard to sex weakened its free exercise claim. *Id.* at 1368-69.

excessive entanglement was involved.¹⁰⁵ The school's employment practices were therefore subject only to the coverage of title VII.¹⁰⁶

In *Russell v. Belmont College*,¹⁰⁷ a female teacher brought a gender employment discrimination suit under both title VII and the Equal Pay Act¹⁰⁸ against Belmont College, a school operated by the Tennessee Baptist Convention.¹⁰⁹ In its decision, the court first considered whether the first amendment permitted a church-controlled educational institution such as Belmont College to discriminatorily compensate its employees on the basis of sex.¹¹⁰ The court concluded that the college was not exempted from the Equal Pay Act.¹¹¹ Because the college did not assert as a central tenet of the Baptist faith its practice of discriminatory compensation of its employees on the basis of sex, the court held that application of the Equal Pay Act to the college would violate neither the college's free exercise rights¹¹² nor its establishment clause rights.¹¹³

E. Seminary Faculty Exception

An important extension of the church-minister exception was expressed in *Equal Employment Opportunity Commission v. Southwestern Baptist Theological Seminary*.¹¹⁴ This case dealt with the difficult issue of the degree of discrimination permitted at a seminary. The EEOC brought the suit to establish jurisdiction over the Seminary, which was affiliated with the Southern Baptist

105. *Id.* at 1370. The school had argued "that because the School [was] an integral part of the religious mission of the Church to its children, coupled with the highly specialized role of the teacher, a role it claim[ed] to be a ministry, the entanglement implications [were] significant." *Id.* at 1369.

106. *Id.* at 1370.

107. 554 F. Supp. 667 (M.D. Tenn. 1982).

108. 29 U.S.C. § 206(d) (1978 & Supp. 1986).

109. 554 F. Supp. at 669-70.

110. *Id.* at 672.

111. *Id.* at 675-76. The court found the plaintiff and defendant fit within the definitional meaning of "employer and employee" under the Fair Labor Standards Act and its amendment, the Equal Pay Act.

112. 554 F. Supp. at 676. The court found no evidence that Belmont College believed it was obliged by the tenets of the Baptist Church to compensate discriminatorily based on sex. Therefore, the state's compelling interest to end discrimination overcame any minimal burden to the College of applying the Equal Pay Act. *Id.* at 676-77.

113. *Id.* at 677. Since Belmont College would be subjected "only to limited investigation and de novo judicial determination," the court reasoned that application of the Equal Pay Act to the College would not foster excessive government entanglement. *Id.* at 678 (citing *Equal Employment Opportunity Comm'n v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981)).

114. 485 F. Supp. 255 (N.D. Tex. 1980), *aff'd in part*, 651 F.2d 277 (5th Cir. 1981), *reh'g denied*, 659 F.2d 1075 (5th Cir. 1981).

Convention, to compel the Seminary to submit staff information reports required by the EEOC. The Seminary refused to submit the reports, alleging that the EEOC's jurisdiction would violate its first amendment religion rights.¹¹⁵

In deciding the case, the district court found the Seminary to have a "pervasively religious environment"¹¹⁶ which, for its continuation, necessitated that all employees "be willing members of the ecclesia."¹¹⁷ The court found that even support personnel "perform a bona fide religious and educational function."¹¹⁸ The Seminary regarded "its employment decisions as divinely guided assessments of each employee's suitability for the position he will occupy in relation to the students and as a representative of the institution [and therefore sought] to assert its right to make these intensely subjective decisions without government supervision."¹¹⁹ Since the court found "[t]he operation of a seminary [to be] an ultimate religious activity entitled to the highest degree of first amendment protection,"¹²⁰ and the Seminary's employment decisions to be "steeped in a perception of divine will and inseparable from its mission,"¹²¹ the court could not require the Seminary to comply with EEOC reporting requirements.¹²²

On appeal, the Fifth Circuit Court of Appeals considerably narrowed this holding.¹²³ Although the circuit court found the "Seminary's role [to be] vital to the Southern Baptist Church"¹²⁴ and "essential to the paramount function of training ministers who will continue the faith,"¹²⁵ it narrowed the categories of employees falling under the minister exception to title VII coverage. Because the Seminary faculty served as "intermediaries" and "instruct[ed]

115. 485 F. Supp. at 257.

116. *Id.* at 258. The Seminary's bylaws, in fact, prohibited strictly secular matters in the curriculum.

117. *Id.* All employees were expected to contribute to "a unified religious endeavor . . ."

118. *Id.* at 259. Membership in the Baptist Church, however, was not a requirement for support personnel.

119. *Id.* All employees were "encouraged and expected to view their work as fulfillment of a religious calling."

120. *Id.* at 260. The court stated that "[t]he risk of unseemly governmental entanglement increases exponentially as the function of an institution becomes more fundamentally and pervasively religious."

121. *Id.* at 261.

122. *Id.* The court feared that the "good faith and legitimacy" of the Seminary's religious grounds would be questioned if title VII were imposed, and that employment functions would have to be dissected into "religious and secular components."

123. Equal Employment Opportunity Comm'n v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), *reh'g denied*, 659 F.2d 1075 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982).

124. 651 F.2d at 281.

125. *Id.* at 283.

the seminarians in the 'whole of religious doctrine' and taught only "religiously oriented courses," the minister exception applied to them.¹²⁶ The court also found, however, that this exception did not apply to support and part-time staff,¹²⁷ and it did not have sufficient information to know whether some or all of the administrators fell under the minister exception.¹²⁸ In so doing, the court noted that "[w]hen churches expand their operations beyond the traditional functions essential to the propagation of their doctrine, those employed to perform tasks which are not traditionally ecclesiastical or religious are not 'ministers of a church' entitled to McClure-type protection."¹²⁹

In weighing the burden of requiring the Seminary to file the required EEOC forms against the seminary's establishment clause and free exercise clause rights, the circuit court concluded no constitutional violation existed:¹³⁰ "an exemption for the Seminary's support staff and other non-ministers is not constitutionally compelled."¹³¹

F. Theology Faculty Exception

The seminary faculty exception and the "church-minister" exception were extended to include theology department faculty members in the case of *Maguire v. Marquette University*.¹³² A woman who had unsuccessfully sought a theology position at Marquette University, a Catholic institution, filed suit alleging sex discrimination.¹³³ The district court granted summary judgment for the University, holding that "a federal court is [not] the appropriate forum in which to decide who should teach in the theology de-

126. *Id.* at 283-84. In an unclear passage, the court also noted that "[g]iven the unique role of the faculty of any school, they are afforded unique protection." *Id.* at 284 (citation omitted).

127. *Id.* Those denied coverage of the minister exception included four ordained ministers who worked as non-ministerial support personnel.

128. *Id.* at 284-85. The circuit court referred the matter of determining which administrators qualified as ministers to the district court, in the event the parties were unable to agree as to which positions qualified. *Id.* at 285.

129. *Id.*

130. *Id.* at 285-87. The court found no excessive degree of government entanglement. Since the Seminary did not hold a religious tenet requiring sex discrimination, there was no burden on the exercise of religious belief. *Id.* at 286.

131. *Id.* at 287. As the court noted in giving its decision, "[n]either the Supreme Court nor this court has held that the employment relationship between a church and all of its employees is a matter of purely ecclesiastical concern." *Id.*

132. 627 F. Supp. 1499 (E.D. Wis. 1986).

133. The plaintiff charged violations of title VII and also of state and university policy regarding academic freedom. The court rejected the academic freedom charge as having no basis in law. *Id.* at 1507.

partment at a Catholic university.”¹³⁴

The plaintiff, who herself was a Catholic, specifically alleged that her application was rejected because of her sex and because the University perceived her views on abortion as unacceptable.¹³⁵ The University argued that under 42 U.S.C. § 2000e-2(e)(2)¹³⁶ it was specially exempted from discrimination charges when made on the basis of religion since it was controlled by the Jesuits—a Catholic religious society.¹³⁷ The plaintiff argued that the exemption did not apply because the school could only discriminate against non-Catholics and she was a Catholic.¹³⁸ The court, however, rejected the plaintiff’s argument, stating that whether she was a Catholic was a “question . . . the First Amendment leaves to theology departments and church officials, not federal judges.”¹³⁹

In reaching its decision, the court likened the case to *McClure*¹⁴⁰ and *Rayburn*,¹⁴¹ both “church-minister” exception cases. It stated that “[t]here is probably no teaching position at Marquette University which is more closely tied to the University’s religious character than that of theology professor.”¹⁴² The court reasoned that if it became involved in the hiring process of a theology professor, it would violate the free exercise clause and impermissibly entangle government with religion.¹⁴³ The court did not want to “impose upon the theology department at Marquette [its] judgment as to what comprise[d] adherence to the Catholic faith.”¹⁴⁴ The court was especially hesitant to intervene when Marquette did not believe the plaintiff’s theological beliefs made her “an appropriate person” to teach theology there.¹⁴⁵

134. *Id.* at 1500-01.

135. *Id.* at 1502.

136. 42 U.S.C. § 2000e-2(e)(2) reads in pertinent part:

[I]t shall not be unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society

137. 627 F. Supp. at 1502-03.

138. *Id.* at 1503.

139. *Id.*

140. See *supra* notes 47-50 and accompanying text.

141. See *supra* notes 53-57 and accompanying text.

142. 627 F. Supp. at 1504.

143. *Id.* at 1505.

144. *Id.*

145. *Id.* at 1507.

G. Discrimination Based on Morality

At least one court has refused to apply differing moral standards to women and men in a religious employment setting. In *Dolter v. Wahlert High School*,¹⁴⁶ a single lay teacher at a private high school sued under title VII alleging she was terminated due to her pregnancy and marital status. The teacher had notified the school of her pregnancy prior to renewing her contract, but the school later refused to honor that contract and terminated the teacher.¹⁴⁷ The school defended its position on the grounds that as a private Roman Catholic high school, it was exempt from the application of title VII under its first amendment rights. It also asserted that it was entitled to set standards of morality under the "bona fide occupational qualifications" exception to title VII, allowing it to terminate the teacher for her improper moral standards.¹⁴⁸

After the court determined that title VII applied to the action,¹⁴⁹ it addressed the high school's specific assertions. The school had argued that title VII jurisdiction over it "would necessarily require the court to pass judgment on the legitimacy of its religious teachings, its moral precepts and the administration of its religious pedagogical ministry."¹⁵⁰ The court reasoned that the issue before it was not the moral code of the school nor the religious teachings of the Catholic Church. The court instead considered whether the moral precepts were applied equally to the school's male and female teachers, and whether the plaintiff was discharged because she was pregnant, rather than because she had engaged in premarital sex.¹⁵¹ The court concluded that the extension of title VII over the school in a sex discrimination case would not involve excessive entanglement in the religious mission of the school nor would it violate the school's first amendment rights.¹⁵²

146. 483 F. Supp. 266 (N.D. Iowa 1980).

147. *Id.* at 267.

148. *Id.*, citing title VII, 42 U.S.C. § 2000e-2(e).

149. *Id.* at 269. Using the holding in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the court made a two-pronged analysis of whether title VII applied in the instant case. The court first determined that Congress intended title VII to apply to sectarian schools such as *Wahlert High*, and second, that application of title VII to sex discrimination, as opposed to religious discrimination, is proper. 483 F. Supp. at 268-69.

150. 483 F. Supp. at 270.

151. *Id.* The court pointed out that single male teachers in the school who were known to have engaged in premarital sex were also not discharged, implying that the plaintiff was discharged for being pregnant and not for violating the school's moral code.

152. *Id.* at 270-71. Imposition of title VII would not involve day-to-day scrutiny of the school administration, thereby violating its first amendment rights.

In responding to the school's "bona fide occupational qualification" argument, the court concluded that the issue raised a question of fact needing to be resolved at trial. It noted, however, that even if certain moral requirements were properly placed on teachers as occupational qualifications, the requirements could still not be applied discriminatorily on the basis of sex.¹⁵³

H. Overview

As a matter of law, gender discrimination by any employer—including religious organizations—is prohibited. Title VII and similar state civil rights provisions designed to eliminate discrimination are regarded as measures representing compelling state interests.¹⁵⁴ While title VII does permit an exception for religious employers to selectively employ those of a particular religious faith,¹⁵⁵ courts have held that the exception cannot be used as a pretext for gender discrimination.¹⁵⁶

Religious employers are bound by the same prohibitions against sex discrimination as other employers, except for three narrow areas the courts have singled out. Because of overriding constitutional concerns, courts will not interfere, even in the face of a discrimination charge, in an ecclesiastical "church-minister" relationship,¹⁵⁷ where an inquiry into a seminary's internal administration is required,¹⁵⁸ or where the selection of a theology faculty member is involved.¹⁵⁹ Apart from these narrow exceptions, courts have enforced both the legislative intent of title VII and the public policy disfavoring employment discrimination against religious employers.¹⁶⁰

III. Analysis of the *Dayton Christian Schools* Decision

In *Dayton Christian Schools*,¹⁶¹ the trial court faced a fact situation requiring a determination of first amendment issues not un-

153. *Id.* at 271. The plaintiff included in her affidavit her assertion of knowledge of other single teachers in the schools "known to have violated defendant's asserted code of conduct" against premarital sex and who were not discharged.

154. See Title VII, 42 U.S.C. § 2000e (1976); Ohio Rev. Code Ann. § 4112 (Page 1980 & Supp. 1985).

155. See Title VII, 42 U.S.C. § 2000c-1 (1976).

156. See *supra* note 23.

157. See *supra* notes 47-69 and accompanying text.

158. See *supra* notes 114-131 and accompanying text.

159. See *supra* notes 132-145 and accompanying text.

160. See generally *supra* notes 70-113, 146-153 and accompanying text.

161. *Dayton Christian Schools v. Ohio Civil Rights Comm'n*, 578 F. Supp. 1004 (S.D. Ohio 1984), *rev'd*, 766 F.2d 932 (6th Cir. 1985), *rev'd and remanded*, 106 S. Ct. 2718 (1986).

like the issues faced by courts in the other cases cited in this article. The major issue before the court was whether the Ohio Civil Rights Commission could permissibly exercise jurisdiction over Dayton Christian Schools "to investigate and to conduct a hearing on the charge that the school discriminated on the basis of sex and/or engaged in prohibited retaliatory employer practices when it terminated a female teacher's employment contract."¹⁶²

In approaching the jurisdictional issue, the district court found that the religious purpose and mission of DCS was the propagation of the Christian faith and that its religious orientation was an integral part of the school's philosophy and operation.¹⁶³ The court further concluded that the plaintiff, Ms. Hoskinson, had not been aware of any school policy regarding pregnancy, nor was the school's philosophy concerning pregnancy ever specifically described to its employees.¹⁶⁴ The court also determined "that the immediate ostensible precipitating cause of Hoskinson's discharge was the fact that she went to an attorney to obtain advice and assistance in resisting the decision not to renew her contract because she was pregnant."¹⁶⁵

The court relied on the findings of the Ohio Civil Rights Commission's initial investigation. The Commission had found that the "[e]vidence and testimony indicate that but for the fact that Complainant is female and elected to have a child, she would have been offered a teaching contract for the 1979-1980 school year."¹⁶⁶ The Commission had also established that "[e]vidence and testimony indicate that Complainant would not have been thus treated had she been a male, and that therefore, she had been discriminated against because of her sex."¹⁶⁷

162. 578 F. Supp. at 1008.

163. *Id.* at 1010. The court based its finding on the evidence, noting that the plaintiff had not offered evidence to the contrary.

164. *Id.* at 1012. The court said, "Based on the exhibits presented by Plaintiff, it appears that the School's philosophy concerning pregnancy was not anywhere specifically delineated for its employees." *Id.* The court further noted:

Mr. Schindler [the principal] acknowledged in his testimony that We had not adequately explained this [philosophy] to our faculty and to our staff. . . . [T]hus Mrs. Hoskinson was not fully aware of the convictions of the administration and of the School Board relative to this particular Biblical principle.' Since there was nothing in writing, Mrs. Hoskinson had no way of knowing the policy

Id.

165. *Id.* at 1013. Hoskinson had retained an attorney to represent her in attempting to keep her job at the school. DCS considered this to be in violation of the "Biblical Chain of Command" and was grounds for her immediate dismissal. See *supra* notes 3-4.

166. 578 F. Supp. at 1015.

167. *Id.*

In order to avoid a needless constitutional conflict, the district court examined the construction of the applicable Ohio Civil Rights provisions to determine if they could be interpreted in such a manner so as to prevent a conflict with constitutionally protected rights.¹⁶⁸ The court examined the conflicting interests of the school and the statutes designed to prevent discrimination based on sex.¹⁶⁹ It determined that since the jurisdiction of the Commission did not present "the clear possibility of ongoing and intensive oversight," the Ohio legislature therefore intended "the jurisdiction of [the Commission] to extend to religious schools such as DCS."¹⁷⁰

Having resolved the question of the applicability of the Ohio Civil Rights provisions, the court addressed the plaintiffs' specific constitutional claims. It dismissed outright the plaintiffs' charges of overbreadth¹⁷¹ and vagueness.¹⁷² The plaintiffs also had asserted a violation of their free exercise rights, arguing that the school's decision had been based on legitimate religious tenets.¹⁷³ The Commission attempted to counter this argument by charging that Hoskinson's termination was based on the personal philosophy of Mr. Shindler, the principal, and not on any true religious convictions.¹⁷⁴ The Commission had contended that the eventual dismissal of Hoskinson for violating the "Biblical Chain of Com-

168. *Id.* at 1018. The court wished to avoid needless determination of constitutional issues if construction of the statute involved could be done so as to "obviate the apparent conflicts with constitutional rights to which the Plaintiffs object." *Id.* The specific statutes involved were Ohio Rev. Code Ann. § 4112 (Page 1980 & Supp. 1985) which the court found to be the equivalent of title VII, 42 U.S.C. § 2000e. 578 F. Supp. at 1019. The court noted that the Ohio statutes appeared to adopt "an even broader prohibition against discriminatory practices." 578 F. Supp. at 1019. An employer could adopt a "bona fide occupational qualification," such as membership in a particular religion, but such a qualification had to be certified by the Commission, according to Ohio Rev. Code Ann. § 4112.02(E) (Page 1980). 578 F. Supp. at 1020.

169. 578 F. Supp. at 1018-24. The court made a lengthy analysis of the legislative intent of the Ohio statutes and concluded that the legislature intended the Commission to have jurisdiction over sectarian schools like DCS. *Id.* at 1024.

170. *Id.* The court decided that the jurisdiction of the Commission over schools like DCS would not cause the kind of state encroachment into sectarian administration of the school that the Supreme Court had disfavored in *Catholic Bishop*.

171. *Id.* at 1025-26. The court noted that the Ohio statute's failure to have an exemption for religious employers, as found in title VII, 42 U.S.C. § 2000e-1, was not enough of an infringement to make it unconstitutional.

172. *Id.* at 1026-27. The court held that the words "to discriminate" were not unnecessarily vague, especially in light of the national commitment "to afford each individual an equal opportunity in life." *Id.*

173. *Id.* at 1027. The school argued that, by consulting an attorney, Hoskinson had violated the religious tenet of following the "Biblical Chain of Command" and of not refraining from making a bad report. The school also argued that if the court considered the termination to be based on Hoskinson's pregnancy, the court should regard this decision as based on a religious tenet.

174. *Id.* at 1027-28.

mand” was a pretext for Hoskinson’s termination because of her pregnancy.¹⁷⁵

In resolving the free exercise question, the court examined the nature of the religious belief upon which DCS made its decision to terminate Hoskinson.¹⁷⁶ The court determined the school’s beliefs that a mother’s place was home with her small children and that the “Biblical Chain of Command” was biblically inspired deserved constitutional protection as free exercise claims.¹⁷⁷ The court concluded, however, that the Commission’s investigation and hearing, as well as any future investigations or hearings regarding Hoskinson’s termination, would only minimally impinge upon or burden the school’s constitutionally protected rights.¹⁷⁸ It held “that though the extension of [the Commission’s] jurisdiction over DCS to investigate and to conduct a hearing on Hoskinson’s discharge may impinge to a limited degree on Plaintiffs’ free exercise rights, the state has a compelling and overriding interest in eliminating sex discrimination in the employment setting.”¹⁷⁹

In addressing DCS’s final argument of an establishment clause violation, the court examined whether the jurisdiction of the Commission over DCS presented an impermissible entanglement by the state into the sectarian interests of the school. The court concluded that:

the occasional intrusion of the [Commission] into the adminis-

175. *Id.* at 1028. The Commission argued a “but for” “chain of events” analysis and urged that decisions to have a child “should not be denied persons simply because they choose to work in parochial school.” *Id.*

176. *Id.* at 1028-32. The court found no basis for a *McClure* “church-minister” exemption. It also refused to say that a religious belief not commonly held or documented was deserving of first amendment protection. *Id.* at 1031.

177. *Id.* at 1028-32. The court found the initial decision not to renew Hoskinson’s contract was based on religious precepts. The court was therefore forced to consider whether a compelling enough state interest existed to permit the Commission to constitutionally exercise jurisdiction over DCS and to burden its free exercise rights.

178. *Id.* at 1035. The court weighed the infringement on DCS’s beliefs, the compelling interest of the state in ending discrimination, and the protected freedom of choice in marriage and family matters. The court noted that the Ohio Civil Rights provisions in Ohio Rev. Code Ann. § 4112.01(B) (Page 1980) specifically includes “because of or on the basis of pregnancy” in its definition of discrimination on the basis of sex. *Id.* at 1035.

179. *Id.* at 1037. The court held that even though the school’s beliefs may arguably be burdened somewhat by allowing the [Commission] to investigate and to conduct a hearing on charges of sex discrimination and retaliatory employer conduct at DCS, the state’s interest in eradicating invidious discrimination and in providing protection to those who seek to vindicate their rights under Chapter 4112 are sufficiently compelling to justify the slight impingement that may result on Plaintiffs’ free exercise rights.

tration of DCS to respond to charges of sex discrimination and retaliatory employer practices will not lead . . . to an excessive level of government entanglement . . . and thus does not run afoul of the proscription contained in the Establishment Clause of the United States Constitution.¹⁸⁰

On appeal, the Sixth Circuit Court of Appeals reversed and remanded.¹⁸¹ The court held that the Commission's jurisdiction over DCS violated the plaintiffs' first amendment free exercise and establishment clause rights.¹⁸² It examined the religious background and focus of the school and relied heavily on the district court's finding of the school's pervasively religious nature.¹⁸³ The court reviewed the applicable Ohio Civil Rights provision and the state's interest in eliminating employment discrimination on the basis of sex.¹⁸⁴ In balancing the interests of the state against the free exercise rights guaranteed to the school, the court found that the Ohio Civil Rights Act placed a heavy burden on DCS's exercise of its religious beliefs. Although the court recognized that the state's interest was substantial, the interest did not justify "such a broad and onerous limitation."¹⁸⁵

In addition, the court concluded that an impermissible degree of entanglement existed which violated the school's establishment clause protections, and that "[t]he statute in this case, as applied by the [Commission], clearly operate[d] to discourage the practice of

180. 578 F. Supp. at 1040-41. The court relied on Equal Employment Opportunity Comm'n v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981), *see supra* notes 63-69 and accompanying text, and Equal Employment Opportunity Comm'n v. Pacific Press, 676 F.2d 1272 (9th Cir. 1982), *see supra* notes 70-81 and accompanying text, to find that no more excessive degree of entanglement would result in allowing Ohio's enforcement against DCS than would be applicable under title VII. *Id.* at 1040.

181. Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985), *rev'd*, 766 F.2d 932 (6th Cir. 1985), *rev'd and remanded*, 106 S. Ct. 2718 (1986).

182. *Id.* at 955, 961.

183. *Id.* at 936-40. The court examined at length the philosophy and religious foundations of the school's educational purpose and goals, including its beliefs in the "Biblical Chain of Command" and a mother's duty to remain at home.

184. *Id.* at 940-44. The court found that "the statute asserts a clear expression of intent to apply the prohibitions at issue in this case to all employers, including religious institutions." *Id.* at 944.

185. *Id.* at 954. The court held "that allowing the [Commission] to assert jurisdiction over the instant complaint against DCS when such complaint is based on conduct pursuant to admittedly sincerely held religious beliefs and where the Ohio Civil Rights Act makes no provision for accommodation of those beliefs, unduly burdens the plaintiffs' right to free exercise of religion." *Id.* at 955. The court based its holding in part on a concern that deciding against DCS would require parents and congregations to be faced "essentially with either supporting a school staffed by faculty who flout basic tenets of their religion or abandoning their support of Christian education altogether." *Id.* at 952.

religious belief."¹⁸⁶ The court concluded that to allow the Commission to have jurisdiction over DCS would necessarily result in an excessive state/church entanglement because of the school's pervasively religious nature and the teacher's particularly sensitive role in explicitly and implicitly fostering the religious beliefs and values of the school. Thus, religious considerations pervaded the hiring scheme of DCS and the Commission should not have interfered with the school's employment practices.¹⁸⁷

The Commission appealed the court of appeals decision denying its right to investigate DCS's employment practices.¹⁸⁸ Based on a *Younger v. Harris* analysis,¹⁸⁹ the Supreme Court held that the federal district court should have abstained from hearing the case. A detailed discussion of the Supreme Court's use of the abstention doctrine is beyond the scope of this article.¹⁹⁰ Nevertheless, it is essential to realize that the Court in its holding was saying that the case should have been left to the Ohio administrative processes and state courts to decide.¹⁹¹

In reversing the circuit court decision on a *Younger* rationale, the Supreme Court noted that it was completely appropriate for a state administrative body, such as the Ohio Civil Rights Commission, to investigate a religious employer where probable cause has been found that discrimination took place.¹⁹² As the Court stated: "[T]he Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this case, if only to ascertain whether the ascribed religious-based reason

186. *Id.* at 961. The circuit court, unlike the district court, relied on *Catholic Bishop* to hold that the Commission's jurisdiction over DCS would impermissibly involve it in the school's sectarian decisions relating to administration of the school. *Id.* at 959-60.

187. *Id.* at 961. The court believed the Ohio Civil Rights Act, as applied to DCS in this case, would operate to discourage the practice of religious beliefs.

188. *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 106 S. Ct. 2718 (1986).

189. 401 U.S. 37 (1971). Based on concerns regarding comity and federalism, the *Younger* abstention doctrine puts forward "strong policies counseling against the exercise of . . . jurisdiction where particular kinds of state proceedings have already been commenced." *Dayton Christian Schools*, 106 S. Ct. at 2722.

190. For a discussion of the abstention doctrine, see Martin H. Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 Cornell L. Rev. 463 (1978); Frank L. Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 Tex. L. Rev. 1324 (1972); William H. Theis, *Younger v. Harris: Federalism in Context*, 33 Hastings L.J. 103 (1981).

191. The concurring opinion by Stevens, J. (Brennan, J., Marshall, J., and Blackmun, J., joining) stated that "the District Court was entirely correct in concluding that [DCS's] constitutional challenge to the remedial provisions of the Ohio statute is not ripe for review." The Commission had not yet posed any sanction possibly causing a constitutional conflict. 106 S. Ct. at 2725-26.

192. *Id.* at 2724.

was in fact the reason for the discharge."¹⁹³

The Court suggested that an investigation into possible discrimination does not, in and of itself, constitute a constitutional violation of the religious employer's first amendment rights.¹⁹⁴ An administrative body's mere exercise of jurisdiction over a religious employer does not automatically violate the church's constitutional rights.¹⁹⁵

IV. Policy Concerns: Employment Protection vs. Religious Freedom

In cases involving sexual discrimination in employment by religious organizations, courts have wrestled with the problem of balancing individual employment rights against the first amendment protections afforded to religious organizations. The decisions have been at times inconsistent and have contained varied reasoning. Major policy concerns continue to rest on the issue of how much deference the courts should give to religious organizations.

In *Dayton Christian Schools*, the circuit court chose to give tremendous deference to the school in viewing Hoskinson's dismissal as constitutionally permissible. The court accepted the school's fundamentalist religious beliefs regarding the place of women in society and in the work place as protected religious beliefs. The concepts that the fundamentalist Christian tradition, like those of DCS, hold about the place of women in society and in the home do, however, present difficult equal protection questions.

In general, fundamentalist Christians view the family as "a nuclear group organized hierarchically with the man at the head, exercising spiritual leadership and also caring for the material well-being of his wife and children. Although subordinate to her husband, the wife shares in the training and discipline of their offspring."¹⁹⁶ The family, therefore, is "dependent upon the father for strong leadership, firm discipline, and financial support, and [it looks] to the mother to serve as homemaker' and to dispense tenderness as a gentle counterpart to the father's stern hand."¹⁹⁷ For the Christian Fundamentalist, "[t]he derivation of Eve from Adam's rib . . . implies the subservience of women to men . . .

193. *Id.* The concurring opinion specifically approved of this language. *Id.* at 2725-26.

194. In reaching this decision, the Court noted that "[e]ven religious schools cannot claim to be wholly free from some state regulation." *Id.* at 2724.

195. The Court expressed its satisfaction that DCS would "receive an adequate opportunity to raise its constitutional" challenges to the Commission in the Ohio state forum. *Id.*

196. Kater, *supra* note 13.

197. *Id.*

[Therefore] [f]eminism, the struggle for equal rights, and the movement of women into the work world are considered direct attacks on the divinely established position of the female sex in the order of creation."¹⁹⁸

Christian fundamentalists in general are quite unbending in their view of sex roles, given that they view these roles as God-given.¹⁹⁹ From the typical Christian fundamentalist's perspective, the task of the woman is to be submissive in the home and to avoid employment outside the home.²⁰⁰ For many fundamentalists, "[f]emininity, maternity, and domesticity constitute the appropriate life-style of women."²⁰¹

Balancing fundamentalist religious beliefs against the constitutionally and statutorily protected right of women to fully and equally participate in the work place is no easy task. In light of Congress' strong intent to end sex discrimination,²⁰² how much deference should courts give to the legitimacy of the religious beliefs that put women in an unequal employment environment? This is the critical question in the line of cases dealing with gender discrimination by religious employers.

In *Dayton Christian Schools*, Hoskinson was informed that her employment contract would not be renewed because she was pregnant and because the school preferred a mother to be at home with her young children.²⁰³ While this belief had not been previously articulated by the school nor included in Hoskinson's employment contract,²⁰⁴ it was nonetheless ultimately given the

198. Fackre, *supra* note 13.

199. Samuel Hill & Dennis Owen, *The New Religious Right in America* 18 (1982).

200. Kater, *supra* note 13, at 84.

201. Fackre, *supra* note 13. Religious commentator Daniel Maguire, in *The New Subversives: Anti-Americanism of the Religious Right* (1982), at 133, argues that the fundamentalist view of women encourages unexcusable sexism:

The New Right is a living museum of sexism. The family they want is a sexist shrine where the authority (superiority) of the male is the cornerstone, set there by God *himself*. They would purge our schools and libraries of all that touches on the liberation of woman [sic] from their inferior image. Women are viewed as a hostile force, threatening the various male domains. Jerry Falwell [citing Jerry Falwell, *Listen, America!* 108 (1980)] uses a very significant verb to describe the movement of women into the world. He laments that from astronauts to zoologists, almost every occupation has been "invaded" by women. The "invaders" must be sent back to the hearth that is their destiny.

202. See *Equal Employment Opportunity Comm'n v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980); *cert. denied*, 453 U.S. 912 (1981); *Equal Employment Opportunity Comm'n v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1279 (9th Cir. 1982).

203. See *supra* note 1 and accompanying text.

204. See *supra* note 164 and accompanying text.

status of a religious belief by the courts.²⁰⁵ In restraining the government from affronting the school's conservative religious values, the circuit court denied Hoskinson equal protection under the law.

Obviously, no man would have been faced with a situation like Hoskinson's because men cannot be mothers and therefore be subject to DCS's prohibition against teaching while small children are at home. Furthermore, because Hoskinson attempted to assert her legal rights against an administrative structure insensitive to her equal protection rights,²⁰⁶ she was terminated. The reasoning supporting Hoskinson's termination for seeking outside legal counsel was rejected in the *Pacific Press* case.²⁰⁷ Hoskinson's dismissal, therefore, was a direct result of a clear policy of unequal treatment of the sexes, a policy that would have been given religious-constitutional protection by the circuit court if that decision had not been reversed by the Supreme Court.

Although the court of appeals decision in *Dayton Christian Schools* was overturned by the Supreme Court, future courts confronting similar discrimination claims will have to continue to consider which of two values will prevail: the full status and equality of women in the work place and in society or the right of religious organizations to carry out employment practices not permissible elsewhere. The Supreme Court decision in *Dayton Christian Schools* does not answer this question, but it does suggest that no constitutional infirmity exists when an administrative body exercises its statutory right to investigate alleged employment discrimination against a religious employer where probable cause exists.²⁰⁸

V. Conclusion

In *Dayton Christian Schools*, the circuit court deferred to the school's religious views regarding women's status and overlooked what otherwise would be unacceptable discrimination.²⁰⁹ If not overturned, the decision would have upheld discrimination aimed solely at a woman, denied Hoskinson the opportunity to pursue legal relief, and shielded the school's behavior under the cloak of conservative religious values.

Courts should not give these types of "religious" values such sweeping protection, especially when so much effort has gone into

205. See *supra* note 177 and accompanying text. The trial court found the beliefs legitimate, and the circuit court relied on that finding. *Dayton Christian Schools*, 766 F.2d at 936-41.

206. 766 F.2d at 934.

207. 676 F.2d 1272 (9th Cir. 1982). See *supra* notes 77-79 and accompanying text.

208. See *supra* note 193 and accompanying text.

209. 766 F.2d at 944.

securing equal opportunity in the workplace. Both federal and state legislatures have targeted sex discrimination in employment as a serious social ill to be rooted out and eliminated. Extensive legislation, such as title VII and state civil rights acts, have been enacted to accomplish this end.²¹⁰ The eradication of sex discrimination is a compelling state interest, to be circumvented only by an overriding justification.²¹¹

Courts have limited discrimination by churches to "church-minister,"²¹² theology faculty,²¹³ and seminary faculty relationships²¹⁴ where the connection between the employment and sectarian ecclesiastical affairs was so intimate that the courts dared not interfere. Consequently, in these very limited areas, sexual discrimination can be carried out with impunity.

Public policy strongly dictates that the exemptions to discrimination by religious employers be very limited. Every time sexual discrimination by a religious employer is sanctioned, the broader the possibility for increased discrimination becomes.²¹⁵ Perhaps more importantly, when courts permit the expansion of gender-based employment decisions, greater weight is also given to the underlying attitudes or beliefs encouraging the discriminatory practices.

Any court decision giving churches expanded permission to circumvent employment law and to replace it with discriminatory practices, enshrined in the cloak of religious belief, is indeed a very dangerous proposition. It risks the establishment of a two-tiered employment protection system—one providing full protection and the other, in the name of religion, offering much less protection. The Sixth Circuit Court of Appeals decision in *Dayton Christian Schools* risked expanding the already limited exceptions. Fortunately, the Supreme Court reversed this decision, and in doing so, expressed its approval of investigations into discriminatory employment practices by religious groups where probable cause exists.²¹⁶ Future courts facing similar issues should act to sustain the very narrow grounds upon which churches have free reign to discriminate against women and to allow investigations of alleged discrimination whenever possible.

210. See *supra* note 154.

211. See *supra* note 68.

212. See *supra* notes 47-69 and accompanying text.

213. See *supra* notes 132-145 and accompanying text.

214. See *supra* notes 114-131 and accompanying text.

215. See *supra* text accompanying note 78.

216. See *supra* note 192 and accompanying text.

