RENDERED: JULY 27, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001798-MR

JIMMY KIRBY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 09-CI-04480

LEXINGTON THEOLOGICAL SEMINARY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON, JUDGE; LAMBERT,[1] SENIOR JUDGE.

CAPERTON, JUDGE: Jimmy Kirby appeals from the Fayette Circuit Court's summary judgment order dismissing all claims asserted by Kirby against his former employer Lexington Theological Seminary (hereinafter "Seminary"),

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

including breach of contract and request for declaratory judgment that his separation of employment resulted in a breach of contract, breach of implied duty of good faith and fair dealing, and race discrimination. After thoroughly considering the parties' arguments, the record, and the applicable law, we find no error in the Fayette Circuit Court's grant of summary judgment. Accordingly, we affirm.

The Seminary is a religious institution and ministry of the Christian Church (Disciples of Christ). The Mission of the Seminary is to "prepare faithful leaders for the church of Jesus Christ and, thus, to strengthen the church's participation in God's mission for the world."[2] All of the courses and degree programs offered by the Seminary are religious and consistent with the Christian Church's (Disciples of Christ) commitment to Christian unity and to maintain an ecumenical spirit reflected in denominational diversity and interfaith inclusiveness. Faculty are expected to prepare students for Christian ministry in accordance with the Seminary's religious mission. Faculty are also expected to teach Biblical-based curriculum and model the ministerial role for the Seminary's students.

Kirby initiated this action after his employment with the Seminary ended in 2009. Kirby had taught at the Seminary for approximately fifteen years after answering his "call to carry out your ministry by serving as Instructor of Church and Society."[3] As a part of his duties as a faculty member of the Seminary,

[2] Record on Appeal (RA) 199.
[3] *See* Letter to Kirby from Seminary issuing "this call," i.e., employment to teach at the Seminary, dated August 10, 1993. RA 216.

Kirby taught exclusively religious courses, opening each class with a prayer. He was evaluated based on religious criteria. In addition, Kirby had presided at least once, as evidenced by the record, at a Monday morning worship service for new student orientation. Although Kirby taught at the Seminary, he was never ordained as a minister of the Christian Church (Disciples of Christ), nor has he ever been a member of said church; instead, Kirby is a member of the Christian Methodist Episcopal Church.

In 2009, the Seminary restructured due to financial exigency. The restructuring included a tailoring of the curriculum to focus on better integrating students into congregations through a pastoral life program. The Seminary contends that the elimination of courses unrelated to this new focus ultimately resulted in Kirby's termination of employment.

Kirby filed suit against the Seminary asserting breach of contract and request for declaratory judgment that his termination of employment resulted in a breach of contract, breach of implied duty of good faith and fair dealing, and race discrimination.[4] The Seminary moved for summary judgment and argued to the Fayette Circuit Court that the First Amendment prohibited the judiciary from deciding ecclesiastical matters. The court granted summary judgment and dismissed all of Kirby's claims against the Seminary. It is from this order that Kirby now appeals.

[4] Kirby is African-American.

On appeal Kirby presents two issues, namely: (1) whether the ecclesiastical abstention doctrine permits the Seminary to breach its contracts, violate duties of good faith and fair dealing, and practice invidious racial discrimination; and (2) whether the ministerial exception, if adopted, should be applied to the facts presented by this case.

In response, the Seminary argues that the trial court properly granted summary judgment because: (1) the ecclesiastical abstention doctrine prohibits the court from considering Kirby's claims against the Seminary; and (2) that the ministerial exception is a complete defense to all claims asserted by Kirby against the Seminary. Moreover, the Seminary asserts that the ministerial exception doctrine is applicable *sub judice* as evidenced by the United States Supreme Court's recent opinion in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694,181 L. Ed. 2d 650 (2012). With these arguments in mind we now turn to our applicable jurisprudence.

At the outset, we note that the applicable standard of review on appeal of a summary judgment is, "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 705 (Ky.App. 2004). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001). With this standard in mind we turn to the issues raised by Kirby.

The parties argue extensively about the application of the ecclesiastical abstention doctrine and the ministerial exception. We believe the difference between the two to be adequately explained by *Klouda v. Southwestern Baptist Theological Seminary*, 543 F. Supp. 2d 594, 611 (N.D. Tex. 2008):[5]

[5] *See also Dayner v. Archdiocese of Hartford,* 301 Conn. 759, 772 (2011), wherein the court discussed how the ministerial exception "was first articulated in *McClure v. Salvation Army,* [460 F.2d 553, 560 (5th Cir. 1972),] as an evolution of the ecclesiastical abstention doctrine established by the United States Supreme Court in *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727,

> [T]he Fifth Circuit has, for the most part, warmly embraced the broad "ecclesiastical abstention doctrine" and the narrower "ministerial exception" in challenges to a religious institution's employment decisions. As to the broader doctrine, the courts are prohibited by the First Amendment from involving themselves in ecclesiastical matters, such as disputes concerning theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733, 20 L.Ed. 666 (1871).
>
> If the claim challenges a religious institution's employment decision, an important inquiry is whether the employee is a member of the clergy or otherwise serves a ministerial function. If the answer is "yes," the "ministerial exception" applies, thus preventing court review of the employment decision without further question as to whether the claims are ecclesiastical in nature. *See Combs* [*v. Central Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999)]. The court has concluded that a review by this court of the employment decision of defendants concerning plaintiff's employment is prohibited by the ecclesiastical abstention doctrine as well as the ministerial exception.

Klouda at 611. We believe that application of either the ecclesiastical abstention doctrine or the ministerial exception *sub judice* required the trial court to grant summary judgment for the reasons discussed *infra.*

First, Kirby argues that the ecclesiastical abstention doctrine does not apply to the case *sub judice* and, therefore, the trial court erred in granting summary judgment. The Seminary disagrees and asserts that the trial court properly granted summary judgment based on the ecclesiastical abstention doctrine.

---

20 L.Ed. 666 (1872)."

At issue, Kentucky courts have long recognized the prohibition from courts becoming entangled in ecclesiastical controversies involving internal affairs that require the court to delve into matters of ecclesiastical policy based on the First Amendment. In 1935, the high court of Kentucky set forth this prohibition in *Marsh v. Johnson*, 259 Ky. 305, 82 S.W.2d 345, 346 (1935), but left open the possibility of a contract claim in a limited circumstance:

> [C]onsistently declared that the secular courts have no jurisdiction over ecclesiastic controversies and will not interfere with religious judicature or with any decision of a church tribunal relating to its internal affairs, as in matters of discipline or excision, or of purely ecclesiastical cognizance…. However, we are among those which hold that the state courts may and should protect clerical and membership prerogatives involving some contract or property right from arbitrary action of those who may constitute the church tribunals and will see that those rights are not denied otherwise than according to the rules and laws of the particular church.

Marsh v. Johnson, 82 S.W.2d 345 at 346.

Later, the Kentucky Supreme Court interpreted *Marsh* to recognize the:

> [P]rinciple of separation of church and state, held that secular courts have no jurisdiction over ecclesiastic controversies and will not interfere in matters of discipline or expulsion of ministers, as persons who assume the relation of minister or member of a church voluntarily covenant to conform to its canons and rules and to submit to its authority and discipline.

Music v. United Methodist Church, 864 S.W.2d 286, 289 (Ky. 1993).

The *Music* Court went on to note that:

> [I]f appellant was forced to inquire into matters of ecclesiastical policy, the court may grant summary judgment, as such would create an excessive entanglement with religion. "[T]he first amendment forecloses any inquiry into the church's assessment of Minker's suitability for a pastorship, even for the purpose of showing it to be pretextual...."

Music at 288, citing *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C.Cir. 1990).

We disagree with Kirby's argument that the ecclesiastical abstention doctrine does not foreclose the courts from considering the merits of his claims. This Court cannot delve into Kirby's claims without also considering the Seminary's internal affairs regarding the restructuring of their curriculum to reflect the goals of their religious mission. *See Music, supra.* While Kirby did not become a member or become ordained as a minister of the Christian Church (Disciples of Christ) with whom the Seminary is in a covenant, we do not believe that this forecloses the application of the fundamental prohibition against excessive entanglement with religion based on our discussion of the next issue, the ministerial exception as enunciated in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012).

We believe that the issue of whether the ministerial exception should apply *sub judice* is answered by a recent United States Supreme Court decision *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* In this case, the United States Supreme Court recognized the ministerial exception to employment discrimination claims under Title VII of the Civil Rights Act of 1964,

42 U.S.C. § 2000e et seq., and other employment discrimination laws. In so doing the Court announced:

> [T]he Courts of Appeals have uniformly recognized the existence of a "ministerial exception," grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.
>
> We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 132 S. Ct. 694 at 705-06 (internal footnotes omitted). We believe that Kirby's role as a "called" teacher at the Seminary carrying out his ministry by serving as Instructor of Church and Society, as evidenced by the facts in the record, is sufficient to apply the ministerial exception *sub judice* as discussed *infra*.

Hosanna-Tabor presented a respondent, Perich, who had taught kindergarten during her first four years at Hosanna–Tabor and fourth grade during the 2003–2004 school year. She taught math, language arts, social studies, science, gym, art,

and music. She also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service. Perich led the chapel service herself about twice a year.

Additionally, both Perich and Hosanna–Tabor titled Perich as a "minister" due to her status as a "called" versus a "lay" teacher. While both types of teachers generally performed the same duties, "lay" or "contract" teachers were not required to undergo the religious training required for "called" teachers and were not required to be Lutheran. Perich claimed that the termination of her employment was not for religious reason asserted by Hosanna–Tabor and, thus, she should be free to pursue her employment discrimination claim. The Sixth Circuit agreed with Perich. In reversing, the Supreme Court noted three mistakes made by the Sixth Circuit:

> First, the Sixth Circuit failed to see any relevance in the fact that Perich was a commissioned minister. 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, as is the fact that significant religious training and a recognized religious mission underlie the description of the employee's position….
>
> Second, the Sixth Circuit gave too much weight to the fact that lay teachers at the school performed the same religious duties as Perich. We express no view on whether someone with Perich's duties would be covered by the ministerial exception in the absence of the other considerations we have discussed. But though relevant, it cannot be dispositive that others not formally recognized as ministers by the church perform the same functions—particularly when, as here,

> they did so only because commissioned ministers were unavailable.
>
> Third, the Sixth Circuit placed too much emphasis on Perich's performance of secular duties. It is true that her religious duties consumed only 45 minutes of each workday, and that the rest of her day was devoted to teaching secular subjects.
>
> . . . The issue before us, however, is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.

Hosanna-Tabor at 708-709.

We note that in recognizing the ministerial exception, the Court limited its holding to the case before it:

> The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.

Hosanna-Tabor at 710.

In analyzing *Hosanna-Tabor* and reaching our conclusion that Kirby qualifies as a minister *sub judice*, we find persuasive the United States Supreme Court's reasoning:

> Perich's job duties reflected a role in conveying the Church's message and carrying out its mission. Hosanna–Tabor expressly charged her with "lead[ing]

> others toward Christian maturity" and "teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church." *Id*., at 48. In fulfilling these responsibilities, Perich taught her students religion four days a week, and led them in prayer three times a day. Once a week, she took her students to a school-wide chapel service, and—about twice a year—she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible. During her last year of teaching, Perich also led her fourth graders in a brief devotional exercise each morning. As a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation.

Hosanna-Tabor at 708.

Kirby, similar to Perich, was entrusted to further the spiritual education of the next generation of church leaders at the Seminary. Kirby lead religious worship services, opened each class with a prayer, taught biblically based classes, was evaluated based on religious criteria, was expected to model the ministerial role and was a "called" teacher for the purpose of carrying out his ministry by serving as Instructor of Church and Society.

Given the Seminary's commitment to Christian unity and an ecumenical spirit reflected in denominational diversity and interfaith inclusiveness, we fail to find persuasive Kirby's argument that his lack of ordination or his lack of membership in the Christian Church (Disciples of Christ) is determinative of his status at the Seminary. *See also EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981) (holding that the ministerial exception was applicable to faculty members at a Baptist seminary because of their religious

function in conveying church doctrine, even though some of them were not ordained ministers).

We note that the case *sub judice* does not present this Court with a situation where a religious institution has undertaken a secular endeavor. Simply put, we cannot escape the fact that the Seminary is inherently a religious institution, training the future leaders of their faith.[6] Because Kirby's ministry was to serve as an Instructor of Church and Society, we believe that the ministerial exception is applicable *sub judice* and the Seminary, pursuant to the First Amendment, is free to decide who will further the instruction of their faith. Accordingly, the trial court did not err in granting summary judgment.

Finding no error, we affirm the Fayette Circuit Court's grant of summary judgment dismissing all of Appellant's claims.

LAMBERT, SENIOR JUDGE, CONCURS.

ACREE, CHIEF JUDGE, CONCURS WITH RESULT AND FILES SEPARATE OPINION.

ACREE, CHIEF JUDGE, CONCURRING: I concur with the majority's well-reasoned opinion. I write separately to clarify that we do have jurisdiction to consider Kirby's challenge to the application of the "ministerial exception" to his claim, despite lacking jurisdiction to address the ecclesiastical

[6] *Sub judice,* the Seminary has been adamant that they are a religious institution and not a secular education facility. Such a position arguably questions the continued validity of the court's reasoning in *Lexington Theological Seminary, Inc. v. Vance*, 596 S.W.2d 11, 14 (Ky.App. 1979), wherein the court likened the Seminary to a private graduate school, i.e., a college or a university.

matter of the Seminary's curricular and administrative restructuring, as I noted in my concurrence in *Kant v. Lexington Theological Seminary*, which was rendered simultaneously with this opinion.

The majority correctly states, as a general matter, that resolution of the question of whether the ministerial exception applies may be achieved "without further question as to whether the claims are ecclesiastical in nature." *Klouda v. Southwestern Baptist Theological Seminary*, 543 F. Supp. 2d 594, 611 (N.D. Tex. 2008). I wish only to add that "the civil courts [can] adjudicate the rights under the [employment contract] without interpreting or weighing church doctrine but simply by engaging in the narrowest kind of review of a specific church decision [to terminate Kirby, as opposed to another employee]. Such review does not inject the civil courts into substantive ecclesiastical matters." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 451, 89 S.Ct. 601, 607, 21 L. Ed. 2d 658 (1969). As in *Kant*, therefore, our assessment of the "ministerial" nature of Kirby's employment is jurisdictionally proper even though we must decline to intrude upon the Seminary's pursuit of its ecclesiastical function to decide how to restructure with fewer resources and without compromising its religious mission.

As in *Kant*, the most difficult determination is whether Kirby is a minister. For all the reasons stated by the majority opinion, and for additional reasons expressed in my concurring opinion in *Kant*, I must conclude that Kirby is a minister for purposes of the First Amendment. Therefore, I concur.

BRIEFS FOR APPELLANT:

Douglas C. Howard
Frankfort, Kentucky

Amos N. Jones
Washington, DC

ORAL ARGUMENT:

Amos N. Jones
Washington, DC

BRIEF FOR APPELLEE:

Richard G. Griffith
Elizabeth S. Muyskens
Lexington, Kentucky

ORAL ARGUMENT:

Richard G. Griffith
Lexington, Kentucky