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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000004-MR

LAURENCE H. KANT — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 09-CI-04070

LEXINGTON THEOLOGICAL SEMINARY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; KELLER AND MOORE, JUDGES.

MOORE, JUDGE: Laurence H. Kant appeals the Fayette Circuit Court's order dismissing his complaint against Lexington Theological Seminary. After a careful review of the record, we affirm because the "ecclesiastical matters rule" and the "ministerial exception" are applicable to this case.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case was brought by Laurence H. Kant against Lexington Theological Seminary (LTS) alleging breach of contract and breach of the implied duty of good faith and fair dealing after LTS terminated Kant's employment. Kant was a tenured faculty member at LTS. LTS maintains Kant's employment was terminated after it restructured its curriculum and that as a religious institution, its action was protected by the First Amendment of the United States Constitution.

LTS is affiliated with the Christian denomination known as the Disciples of Christ. The mission statement of the seminary provides: "The purpose of [LTS] 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." This statement is written in very large font and is italicized at the beginning of the Faculty Handbook. Immediately following the mission statement is a section entitled "BASIC RESPONSIBILITIES," which states:

> The basic responsibility of faculty shall be to uphold the purpose of Lexington Theological Seminary *to prepare the faithful leaders of the Church of Jesus Christ, and, thus, to strengthen the Church's participation in God's mission for the world*. Whether or not they are ordained, faculty are expected to serve as models for ministry.

According to the affidavit in the trial court record of James P. Johnson, President of LTS, "[e]verything the Seminary does revolves around this aim," *i.e.,* "preparing faithful leaders for the Church of Jesus Christ and to strengthen the Christian Church's participation in God's mission for the world."

Johnson further averred that "[a]ll of the Seminary's degree programs are faith-based and intended to prepare students for Christian Ministry." To further explain this, Johnson stated that "[t]he Seminary does not offer any degree programs or courses with a strictly secular purpose. Because all of its course offerings are religious, the Seminary is a purely ecclesiastical institution that does not hire any faculty members to teach secular courses." As Kant's counsel acknowledged before this Court at oral argument, all students enrolled at LTS are there to prepare for Christian ministry.

Kant is not a minister and is of the Jewish faith. A fair reading of his qualifications reveals that he is a scholar in Jewish studies, among other subjects.

In 2000, Kant accepted an offer to teach an "Introduction to Greek" class at LTS. The following year, he accepted LTS's offer for the one-year position of "Professor of New Testament." In 2002, Kant accepted LTS's offer of the position of "Assistant Professor of Religious Studies ('tenure-track')."

Kant applied for tenure in January of 2006. As part of his application, he wrote a self-evaluation which explained that he had taught fourteen courses at LTS. In defining his future core interests and also suggesting a possible title for his position, Kant wrote:

> On the latter, I would recommend the following: "Associate[1] Professor of the History of Religion." As I have taught a wide variety of courses, I regard the following areas as integral in my responsibilities: 1) Biblical Studies (including biblical languages, as needed); 2) Jewish Studies and Jewish-Christian

[1] The word "Associate" is handwritten above "Professor."

> Relations; 3) World Religions (including religions in the US); 4) Religion and Cultural Studies (including thematic courses, such as religion and violence, religion and literature, and religion and film). My roots and interests start with scripture, but cover a wide expanse of intellectual territory beyond it. Many of my courses would cover more than one of these areas (such as "Bible, Holocaust, and Jewish and Christian Memory."). Likewise, most of my courses touch in some way Jewish studies and cultural studies. "Jesus the Jew" is one new course I would very much enjoy teaching. In addition, I can easily transform my course, "Thinking Theologically in the Church," to "The Meaningful Life" for use in another context. Indeed, issues of meaning are what motivate many in our pool of potential students. I have a solid foundation of courses from which to draw and hope to be able to repeat many of them in future years.
>
> I very much look forward to my coming years at LTS and to contributing in every way possible to the goals of our institution. Thank you so much for having the courage to include a Jewish scholar in your vision of a Christian seminary and for welcoming me in such an open and warm way. I value this not only from a scholarly, intellectual, theological, and pedagogical point of view, but from a personal and spiritual one as well. I welcome any thoughts on how I might contribute further to the mission of LTS and on how I might most effectively use my skills.

Kant was thereafter granted tenure in March of 2006 as an Associate Professor of the History of Religion at LTS. According to the Faculty Handbook:

> Tenure at Lexington Theological Seminary means appointment to serve until retirement, resignation, or dismissal for adequate cause. Tenure appointment is one way that the Seminary safeguards the freedoms outlined in this *Handbook*. Along with tenure, however, go the responsibilities specified in the *Handbook* as well as an added expectation of leadership in the faculty.

Regarding dismissal of tenured faculty, the Handbook provides that "[t]he only grounds for dismissal of a tenured faculty member are moral delinquency, unambiguous failure to perform the responsibilities outlined in this Handbook, or conduct detrimental to the Seminary."

In 2009, LTS declared a financial emergency, which was due in part to the downturn in the national economy. The trial court record contains an article from the *Courier-Journal.Com*, dated January 14, 2009, reporting on the situation at LTS. The article noted that LTS's endowment fund had shrunk from $25 million to $16 million from 2007 to 2009. The article further stated that the declaration of a financial emergency was "an official declaration that the seminary's survival [was] at stake." As a result of this financial emergency, LTS announced its plans to eliminate tenure and reduce the number of faculty and staff it employed, as well as to reorganize in efforts to keep the seminary open.

On July 20, 2009, LTS filed a motion in Fayette Circuit Court, *In the matter of Lexington Theological Seminary*, Civil Action No.: 09-CI-896, styled "Motion to Release Restrictions." In the accompanying memorandum in support of the motion, LTS stated that it had

> experienced a material decline in its endowment over the past year due to the unprecedented financial crisis in the United States. One unfortunate aspect of this decline is that the value of LTS's endowment fund is now below the "historic dollar value" (as that term is defined in KRS [Kentucky Revised Statutes] 273.510) of the endowment fund. As a consequence, LTS's Board of Trustees has taken dramatic steps to reduce the institution's expenses (including, but not limited to, drastically reducing its

> workforce, eliminating the tenure of its faculty, materially cutting costs and restructuring its curriculum to better meet the needs of the denomination – (The Christian Church (Disciples of Christ)—that it principally serves)[)]. LTS also is hereby requesting this Court to release restrictions on the endowment fund. LTS's survival depends on the Court's provision of the requested relief; if the Court were to overrule the present motion, LTS almost certainly would be forced to liquidate its assets and cease operations.

As a result of the reorganization and restructuring of its curriculum, LTS desired "to better meet the needs of the Christian Church (Disciples of Christ)." It tailored its curriculum "to focus on better integrating students into congregations through a pastoral life program." A brochure in the trial court record outlines this new program and includes the statement "A New Approach to Theological Education."

LTS sent a written offer,[2] dated February 24, 2009, to Kant stating that because of the financial exigencies that LTS was experiencing, its Board had decided to "eliminate tenure and restructure its faculty and staff." LTS proffered in the proposed agreement to continue to employ Kant through the spring semester of 2010, despite its financial exigencies, if Kant agreed to release any and all claims he may have against LTS. If Kant refused to sign the proffered agreement, then his employment would terminate at the end of the spring 2009 semester. Kant refused to sign the agreement. Therefore, his employment was terminated at the end of the spring 2009 semester.

[2] Kant refers to this as the "proposed severance agreement."

Kant then filed his complaint in the circuit court against LTS, alleging that LTS had breached his contractual right to tenured employment and breached the implied duty of good faith and fair dealing. Kant requested a declaratory judgment declaring that his termination was a material breach of his contractual right of tenured employment. He also sought compensatory damages and punitive damages from LTS.

LTS filed its answer in the circuit court and also moved to dismiss the action or, in the alternative, for summary judgment. LTS argued, *inter alia*, that the case involved an ecclesiastical matter and that the ministerial exception applied. Thereafter, the circuit court entered an order denying the motion to dismiss/motion for summary judgment. In its order denying the motion, the court stated that "either party may submit additional arguments regarding [LTS's] claim of the 'ministerial exception' and the Court may re-visit this issue in the future. The parties may commence discovery on all issues involved in this action."

LTS thereafter renewed its prior motion to dismiss or, in the alternative, for summary judgment, in which it asserted that the case involved an ecclesiastical matter and that the ministerial exception applied. Kant also filed a motion for partial summary judgment.

In his motion, Kant argued that the Faculty Handbook, which specifies the circumstances under which a tenured professor's employment may be terminated, does not provide that a tenured professor may be terminated due to a financial emergency. Kant also filed two affidavits, which included his averments

that he was not a minister at LTS, and, as a Jew, could not have been considered a minister at a Christian seminary. Kant further added that he is not even a minister in the Jewish faith and was never trained in a ministerial capacity.

While it appears undisputed that Kant never wavered from his Jewish beliefs and faith while teaching at LTS, he did, however, participate in two ordinations, giving the sermon at one and serving as a scripture reader at another. He also participated in chapel services, Senior Communion and other religious services sponsored by LTS.

The circuit court held a hearing on the parties' motions. At the end of the hearing, the court stated its findings. One of its findings was that LTS was a religious institution. Another finding was that Kant was a ministerial employee because he taught the Old Testament, as well as current issues in classes such as "Jesus in Film," which are topics that the Christian Church has in common with Judaism. Therefore, the court reasoned that Kant, as a Jewish person, could have been ministerial in the topics he taught. The circuit court also found that the issues involved in the case pertained to an ecclesiastical matter. Consequently, the court concluded that it did not have subject matter jurisdiction, and it sustained LTS's motion to dismiss based upon the court's findings that the ministerial exception applied and that the issues in the case also involved an ecclesiastical matter. The court further found Kant's motion for partial summary judgment was moot.

Kant now appeals, contending that the ecclesiastical matters rule and the ministerial exception do not apply to this case.

II. ANALYSIS

We conduct *de novo* review of a circuit court's determination that it lacks subject matter jurisdiction. *See Harrison v. Park Hills Bd. Of Adjustment*, 330 S.W.3d 89, 93 (Ky. App. 2011). Furthermore, although the circuit court considered matters outside the pleadings and, therefore, should have analyzed this case pursuant to LTS's motion for summary judgment, rather than pursuant to its motion to dismiss, we can affirm the circuit court's decision for any reason supported by the record. *See Lynn v. Commonwealth*, 257 S.W.3d 596, 599 (Ky. App. 2008). We will, therefore, treat the circuit court's grant of the motion to dismiss as a grant of summary judgment. *See McBrearty v. Kentucky Community and Technical College System*, 262 S.W.3d 205, 211 (Ky. App. 2008). We review a decision granting summary judgment as follows: "The 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). "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." *McBrearty*, 262 S.W.3d at 211.

Kant argues that the circuit court erred because this case merely involves issues regarding breach of contract and breach of the implied duty of good

faith and fair dealing and, therefore, the ecclesiastical matters rule and the ministerial exception are inapplicable. We will discuss these doctrines in turn.

The First Amendment of the United States Constitution provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." As an initial matter, it is not disputed that LTS's purpose for its existence is faith-based, and designed and intended to prepare its students for Christian ministry. And as Kant's counsel conceded at oral argument before this Court, students attended LTS for the purpose of involvement in Christian ministry. Therefore, LTS is a religious organization entitled to protection under the First Amendment. *See E.E.O.C. v. Southwestern Baptist Theological Seminary,* 651 F.2d 277, 281 (5th Cir. 1981); *see also Patterson v. Southwestern Baptist Theological Seminary*, 858 S.W.2d 602 (Tex. Ct. App. 1993) (citing *The Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709, 96 S.Ct. 2372, 2382, 49 L.Ed.2d 151 (1976); *Crowder v. Southern Baptist Convention*, 828 F.2d 718, 724 (11th Cir. 1987)).

In evaluating seminaries under the First Amendment, some courts have treated them differently from other religious education institutions. In *Klouda v. Southwestern Baptist Theological Seminary*, 543 F. Supp.2d 594 (N.D. Tex. 2008), the Court reviewed *Southwestern Baptist Theological Seminary*, 651 F.2d 277, as compared with *E.E.O.C. v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980). Therein, the Court explained there could be similarities and differences between a seminary as compared to a college owned, controlled and operated by a

religious institution. Both have protections under the First Amendment, but a seminary is distinguishable. Regarding *Mississippi College*, the

> evidence established that the character and purpose of the College were pervasively sectarian, whereas, in contrast, the character and purposes of Seminary are wholly sectarian. . . . With respect to the status of the members of Seminary's faculty, the court [in *Southwestern Baptist Theological Seminary*], said:
>
> > The Seminary's role is vital to the Southern Baptist Church. No one would argue that excessive intrusion into the process of calling ministers to serve a local church is constitutionally permissible. *The Convention's hiring of faculty and other personnel to train ministers for local churches is equally central to the religious mission and entitled to no less protection under the first amendment*. [*Southwestern*, 651 F.2d at 281].

Klouda, 543 F. Supp.2d at 607 (emphasis added in *Klouda*).

Regarding the rationale relied upon to decide that a seminary is entitled to the status of "church," the Court in *Southwestern* explained:

> Clearly, the Seminary is an integral part of a church, essential to the paramount function of training ministers who will continue the faith. It is not intended to foster social or secular programs that may entertain the faithful or evangelize the unbelieving. Its purpose is to indoctrinate those who already believe, who have received a divine call, and who have expressed an intent to enter full-time ministry. The local congregation that regularly meets in a house of worship is not the only entity covered by our use of the word "church." That much is clear from *McClure* [*v. Salvation Army,* 460 F.2d 553 (5th Cir. 1972)]. In the Baptist denomination, the Convention is formed to serve all participating local congregations. The fact that those who choose to participate in the Convention do so voluntarily renders it no less deserving of the protection of *McClure*. Since the

> Seminary is principally supported and wholly controlled by the Convention for the avowed purpose of training ministers to serve the Baptist denomination, it too is entitled to the status of "church."

Klouda, 543 F.Supp.2d at 608 (quoting *Southwestern*, 651 F.2d at 283).

Regarding the dangers of state interference,

> the church itself [is] the institution with which the danger of entanglement is most sensitive. If the dangers of entanglement were severe with respect to parochial schools, *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985); *Lemon* [*v. Kurtzman*, 403 U.S. 602, 613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971)], they are all the more serious with respect to the church itself. While schools may serve both secular and sectarian functions, the purpose of the church is fundamentally spiritual, and the danger of "interaction between church and state," *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 1364, 79 L.Ed.2d 604 (1984), is what the establishment clause protects against.

Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1170 (4th Cir. 1985).

According to the affidavit of its President, James P. Johnson, LTS "is in a covenant relationship with, and is a ministry of, the Christian Church (Disciples of Christ)." LTS's stated purpose is to prepare faithful leaders for the Church of Jesus Christ. Given the undisputed sectarian purpose of LTS, the dangers of state entanglement in reviewing the merits of Kant's claims are greatly magnified.

The United States Supreme Court has held that civil courts have no role in deciding religious or ecclesiastical questions. *See Music v. United Methodist Church*, 864 S.W.2d 286, 287 (Ky. 1993) (citing *Presbyterian Church*

v. Hull Church, 393 U.S. 440, 89 S.Ct. 601, 21 L. Ed.2d 658 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed.120 (1952)). Religious institutions have "'power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* __ U.S. __, 132 S.Ct. 694, 704, 181 L.Ed.2d 650 (2012) (quoting *Kedroff*, 344 U.S. 94 at 166, 73 S.Ct. 143 at 154).

It would be the extremely rare case for state intervention into religious matters to be appropriate. However, the Court in *Music* noted that "[c]ivil courts may intervene in ecclesiastical areas, however, if there is fraud, collusion or arbitrariness." *Music*, 864 S.W.2d at 287 (citing *Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601. Additionally, under the "neutral principles" test, civil courts may have jurisdiction over property disputes. *Id.* (citing *Jones v. Wolf*, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979); *Parker v. Harper*, 295 Ky. 686, 175 S.W.2d 361 (1943)).

In *Music*, the Kentucky Supreme Court addressed the "ecclesiastical matters" rule. Therein, a former employee of the United Methodist Church "claimed that a contractual relationship had been established between the parties by virtue of the . . . 'Employee Manual'" of the Church and that the Church had "violated the terms of his 'employment contract' by failing to follow the procedures set forth in [the Manual] when they placed him on a forced leave of absence/sabbatical." *Music*, 864 S.W.2d at 287. Music argued also that the civil

courts may be involved because "arbitrariness [was demonstrated . . . by the [Church's] refusal to follow the established procedures of [its] own *Book of Discipline* . . . ." The Kentucky Supreme Court disagreed and decided that Music's case involved his "status and employment as a minister of the church. It therefore concern[ed] internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom and law." *Music*, 864 S.W.2d at 288. Because the Court found that Music's claim could not "be separated from an interpretation of church law," *i.e.*, "whether he was removed in accordance with church law," the Court concluded "that an excessive entanglement with religion would exist, so as to preclude jurisdiction." *Music*, 864 S.W.2d at 288-289.

The case at bar involves Kant's employment as a tenured faculty member at LTS. Kant asks us to interpret the "Faculty Handbook" in deciding his claims because of his tenured status, arguing this is a contractual issue. He notes that the LTS Faculty Handbook provides: "The only grounds for dismissal of a tenured faculty member are moral delinquency, unambiguous failure to perform the responsibilities outlined in this Handbook, or conduct detrimental to the Seminary." Thus, he maintains that, as a tenured teacher, he contractually could not be removed except for the stated reasons in the Handbook; financial emergency is not one of the stated reasons in the Handbook for termination of a tenured faculty member.

Kant's claims for breach of contract and breach of the implied duty of good faith and fair dealing cannot be decided without interpreting the Faculty

Handbook to determine whether it allows for a restructuring of LTS under a financial emergency and for eliminating tenured faculty under those circumstances. Indeed, an inquiry into the rationale for LTS's decision making as to who will teach its students—all of whom attend there with a desire to become pastors or ministers—would be an inquiry into an ecclesiastical matter by this Court. At the core of his argument, Kant would have this Court entangle itself with how the Disciples of Christ Church can structure and reorganize LTS and have us evaluate and condone who the Church selects to train the future leaders of the Christian faith attending there. The First Amendment clearly does not grant this Court jurisdiction to engage in these queries. Pursuant to *Music,* any of the inquiries by this Court would involve an excessive entanglement with religion. 864 S.W.2d at 289. Thus, LTS's decisions regarding restructuring its programming, including decisions to eliminate tenured positions, are governed by the ecclesiastical matters rule. The circuit court did not err in finding that its jurisdiction was precluded.

The circuit court found, alternatively, that the ministerial exception applied to Kant's claims.[3] Accordingly, we now turn to the arguments presented

[3] The circuit court held that because the ministerial exception applied, LTS's motion to dismiss should be granted based upon a lack of subject matter jurisdiction. Although the Kentucky Supreme Court in *Music* held that the ecclesiastical matters rule precludes a court's subject matter jurisdiction when it is applicable to a case, we were unable to find any cases from Kentucky state courts addressing the ministerial exception. Therefore, we look to federal cases as persuasive authority to assist with our analysis. The United States Supreme Court recently held that the ministerial exception does not preclude a court's subject matter jurisdiction. Rather, the Court held that the ministerial exception acts "as an affirmative defense to an otherwise cognizable claim." *Hosanna-Tabor Evangelical Lutheran Church and School*, __ U.S. __, 132 S.Ct. at 709 n. 4. The Court reasoned that federal trial courts have the power to consider the type of employment claim raised in *Hosanna-Tabor* "and to decide whether the claim can proceed or is instead barred by the ministerial exception." *Id.* We find this reasoning persuasive and conclude that the ministerial exception should be treated as an affirmative defense in Kentucky

by the parties regarding the "ministerial exception doctrine" and Kant's claims of wrongful termination.

The ministerial exception has been recognized by the federal appellate courts for years. It was only recently recognized by the United States Supreme Court. In *Hosanna-Tabor*, the United States Supreme Court agreed

> that there is . . . 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, __ U.S. __, 132 S.Ct. at 706. Therefore, the Supreme Court "concluded that there is a ministerial exception grounded in the Religion Clauses of the First Amendment." *Id.* at 707. Consequently, religious institutions have a constitutional right "to be free from judicial interference in the selection of [their

courts. Kentucky trial courts have the power to decide whether, as in the present case, breach of contract and breach of the implied duty of good faith and fair dealing claims may proceed, or whether they are barred by the ministerial exception affirmative defense, if it is properly raised. In the present case, LTS properly asserted the ministerial exception as an affirmative defense in its answer to the complaint.

ministerial] employees." *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007).[4]

The United States Court of Appeals for the Sixth Circuit has stated:

> Although the ministerial exception is often raised in response to employment discrimination claims under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e to 42 U.S.C. § 2000e-17 (2006), which specifically bars discrimination on the basis of religion, it has also been applied to claims under the ADA [Americans with Disabilities Act] and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2006), *as well as common law claims brought against a religious employer*.

Id. (Emphasis added).[5]

The Sixth Circuit in *Hollins* explained the ministerial exception as follows:

> In order for the ministerial exception to bar an employment discrimination claim, the employer must be a religious institution and the employee must have been a

[4] *Abrogated by Hosanna-Tabor* on the grounds that the ministerial exception operates as an affirmative defense, not a jurisdictional bar.

[5] In *Hosanna-Tabor*, the United States Supreme Court held that the ministerial exception applied in that case, which involved an employment discrimination claim brought by a minister regarding a church's decision to fire her, but the Supreme Court expressed "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*, __ U.S. __, 132 S.Ct. at 710. Regardless, because other federal courts have found that the ministerial exception bars common law claims when it is applicable, we will determine first whether the ministerial exception applies in this case. If it is applicable, the ministerial exception will act as an affirmative defense to Kant's claims of breach of contract and breach of the implied duty of good faith and fair dealing.

> ministerial employee. But, in order to invoke the exception, an employer need not be a traditional religious organization such as a church, diocese, or synagogue, or an entity operated by a traditional religious organization. Examining cases decided in all of the circuit courts, the Fourth Circuit found that the exception has been applied to claims against religiously affiliated schools, corporations, and hospitals by courts ruling that they come within the meaning of a "religious institution."

Id.

Further, the Court in *Hollins* noted: "As a general rule, the ministerial exception will be invoked if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Hollins*, 474 F.3d at 226 (internal quotation marks and string citations omitted). Courts that have considered the issue "have considered a particular employee to be a 'minister' for purposes of the ministerial exception based on the function of the plaintiff's employment position rather than the fact of ordination." *Id.* (String citations omitted). The Supreme Court agreed that "the ministerial exception is not limited to the head of a religious congregation." *Hosanna-Tabor*, __ U.S. __, 132 S.Ct. at 707. The Court was in fact reluctant to "adopt a rigid formula for deciding when an employee qualifies as a minister." *Id*.

In his concurrence in *Hosanna-Tabor*, joined by Justice Kagan, Justice Alito added much clarity to the often confused and unfortunate use of the term "minister" in evaluating the doctrine. He explained that many religious groups do not even use this term. *Id.* at 711. Thus, he maintained the focus should

be on the "function performed by persons who work for religious bodies." *Id.* Justice Alito noted that the Fourth Circuit was the "first to use the term 'ministerial exception' but in doing so it took pains to clarify that the label was a mere shorthand." *Id.* at 714 (citing *Rayburn*, 772 F.2d at 1168). He thereafter wrote that there was a consensus among the circuits that the ministerial exception has not been limited to the members of the clergy and cautioned that the "Court's opinion . . . should not be read to upset this consensus." *Id*. As justification for his position, Justice Alito further wrote that

> [d]ifferent religions will have different views on exactly what qualifies as an important religious position, but it is nonetheless possible to identify a general category of "employees" whose functions are essential to the independence of practically all religious groups. These include those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation. . . .
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> . . . [A]s we have recognized in a similar context, "[f]orcing a group to accept certain members may impair [its ability] to express those views, and only those views, that it intends to express." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000). That principle applies with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious ideals. *See Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 882, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (noting that the constitutional interest in freedom of association may be "reinforced by Free Exercise Clause concerns"). As the Court notes, the First Amendment "gives special solicitude to the rights of religious organizations . . . but our expressive-association cases are nevertheless useful

> in pointing out what those essential rights are. Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith.
>
> When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters. . . .
>
> . . . .
>
> The "ministerial" exception gives concrete protection to the free "expression and dissemination of any religious doctrine." The Constitution leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith.

Id. at 712-13 (internal citation to opinion omitted).

Turning to the present case, given the total sectarian purpose of LTS as earlier analyzed, the first part of the ministerial exception test has been satisfied.

As for the second part of the test, *i.e.*, whether Kant was a "ministerial" employee, Kant's primary duties at LTS consisted of teaching students who desired to become involved in Christian ministry. As we noted, *supra*, the Faculty Handbook states that: "The basic responsibility of faculty shall be to uphold the purpose of [LTS] *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*." There can be no question that the Faculty Handbook espouses a religious mission that underlies the responsibilities of the LTS faculty.

Nevertheless, Kant argues that his primary duties as a faculty member at LTS were not in any way religious. This argument is untenable. Because Kant's primary duties involved teaching religious-themed courses at a seminary, his position was one that prepared students for Christian ministry. Hence, as contemplated by the precepts underlying the ministerial exception doctrine, Kant's role fits the description of circumstances wherein the doctrine is unquestionably applicable. *See Hollins*, 474 F.3d at 226; *see also Southwestern Baptist Theological Seminary*, 651 F.2d 277 (finding that the ministerial exception applied to claims regarding the employment relationship between a seminary and its faculty); *Klouda*, 543 F.Supp.2d 594.

The case of *Klouda*, 543 F.Supp.2d 594, is highly instructive and persuasive on this issue. Klouda was a female assistant professor at Southwestern Baptist Theological Seminary, which had an absolute sectarian purpose. According to Klouda's allegations, she began teaching at the seminary as a fellow in the School of Theology and later was hired as an assistant professor of Old Testament languages. She was on a tenure track. Klouda argued that her duties did not teach or spread faith, and she was not a minister. *Id.* at 596. Klouda maintained that she was led to believe that her employment would be renewed on a yearly basis based on her performance. She exhibited "professional excellence" while employed at the seminary. *Id.* Approximately three years after she began working there, a new president of the seminary was appointed. According to Klouda, he assured her that his appointment would not jeopardize her position. *Id.*

However, three years later her contract was terminated because she was a woman and, under the doctrines of the church, a woman could not teach at the seminary.

Klouda thereafter filed suit asserting various claims, including one for breach of contract. In her complaint, she alleged she had been assured that her contract would be renewed each year so long as her performance evaluations warranted it and that she was on track to become a tenured professor. *Id.* Through discovery, it was revealed that her initial hiring was a compromise to allow her to teach at the seminary although she was a woman. "The compromise included an expression that the purpose of [her] position was 'to help students gain facility in the handling of the Hebrew and Aramaic text of the Old Testament.'" *Id.* at 601. Her employment involved preparing her students for the ministry through the study of biblical languages. *Id*. at 602. All courses taught by Klouda had sectarian goals. *Id.*

Under the doctrines of the Southern Baptist Convention, Klouda, as a woman, could not serve as a pastor. She had never been ordained under any faith as a pastor. Nonetheless, given the position held by Klouda in the seminary of preparing students for the ministry, the Court held that she was a "'minister' as contemplated by the ministerial exception doctrine." *Id.* at 611.

We acknowledge that Klouda was of the same faith as the seminary she sued, unlike Kant's case. However, it is irrelevant that Kant was of the Jewish faith and that he did not "espouse or support the tenets of the Disciples of Christ

faith."[6] Indeed, the record reflects that "most of [his] courses touch in some way Jewish studies and cultural studies." At the time Kant was employed, LTS apparently determined that preparing its students for the Christian ministry was benefitted by having Kant on the faculty. Kant has acknowledged that his position at LTS was to fulfill its mission. In his self-evaluation for tenure he stated

> I very much look forward to my coming years at LTS and to contributing in every way possible towards the goals of our institution. Thank you so much for having the courage to include a Jewish scholar in your vision of a Christian seminary and for welcoming me in such an open and warm way. I value this not only from a scholarly, intellectual, theological, and pedagogical point of view, but from a personal and spiritual one as well. I welcome any thoughts on how I might contribute further to the mission of LTS and on how I might most effectively use my skills.

Given his position as a faculty member teaching at a seminary, Kant's personal views are not determinative of the function he served. Rather, we review the function of his position: teaching future Christian ministers primarily on Judeo -Christian subjects and culture. Kant's personal faith and beliefs do not clash with the actuality that the classes he taught at LTS were for the purpose of preparing future church leaders of the Christian faith. According to the affidavit of the President of LTS, no courses there were taught for a secular reason. Rather, all courses were designed and intended to further the mission of LTS. Consequently, Kant's position was important to LTS's mission during the time he was employed

[6] Kant's claims against LTS are grounded in contract law.

there, prior to the restructuring of its program. Thus, Kant's role fit within the parameters espoused in the ministerial exception doctrine.

As the Supreme Court noted in *Hosanna-Tabor*, "[b]y requiring the Church to accept a minister it did not want, such an order would have plainly violated the Church's freedom under the Religion Clauses to select its own ministers." *Hosanna-Tabor*, __ U.S. __, 132 S.Ct. at 709. Accordingly, it does not matter that Kant has fashioned his case around a contract cause of action; this does not trump constitutional protections and freedoms of the church. Therefore, Kant's claims are barred by the affirmative defense of the ministerial exception. Hence, we agree with the circuit court that Kant's position fit within the meaning of the doctrine espoused by the ministerial exception doctrine in teaching at LTS. The order of the Fayette Circuit Court is affirmed.

ACREE, CHIEF JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, CHIEF JUDGE, CONCURRING: Having benefit of two equally well-written, but disparate, analyses of this case, I concur with Judge Moore's opinion because I consider it more in line with the First Amendment's restraints on religious freedom. I write separately, however, to explain my reasoning.

The opinion which becomes the majority with my concurrence makes it sufficiently clear that the reorganization of LTS and the restructuring of its curriculum "to better meet the needs of the Christian Church" is an ecclesiastical

matter over which no civil court has subject matter jurisdiction. Still, "the civil courts could 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 Kant, 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).

Kant's claim of wrongful termination is a cognizable claim over which the civil courts do exercise subject matter jurisdiction. Absent a defense to the claim, a civil court might well and properly award Kant the relief he seeks. However, this same subject matter jurisdiction also authorizes civil courts to assess all defenses to that claim, including LTS's ministerial exception defense – "an affirmative defense to an otherwise cognizable claim." *Hosanna-Tabor*, 132 S.Ct. at 709 n.4.

Although Judge Keller's thoughtful dissent is not without merit, I am not persuaded by the analysis. First, unlike the dissent, I believe it is of no consequence that LTS is "intentionally ecumenical," or even that it invites all persons to "study Christianity in a disciplined way." Unquestionably, the seminary is a religious organization, and that is sufficient, for the Supreme Court has purposefully articulated the First Amendment's governmental restraints in a way that "'radiates . . . a spirit of freedom for *religious organizations*[.]'" *Hosanna-Tabor*, 132 S.Ct. at 704 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian*

Orthodox Church in North America, 344 U.S. 94, 116, 73 S.Ct. 143, 154, 97 L.Ed. 120 (1952) (citing *Watson v. Jones*, 13 Wall. 679, 20 L.Ed. 666 (1872))) (emphasis added). The fact that "the goal of LTS is not just to create leaders and/or ministers for the Christian Church (Disciples of Christ)," as the dissent notes, does not mean LTS is not a religious organization and does not mean LTS will never decide ecclesiastical matters over which civil courts will have no jurisdiction.

On the other hand, I agree *in part* with the second point in dissent – that we do have jurisdiction over non-ecclesiastical issues raised in the complaint – but not because, as the dissent urges, LTS "discharged Kant for economic reasons." True, LTS reorganized and restructured because it lost substantial assets when endowment funding significantly declined. However, the manner in which LTS's remaining assets could best be allocated, including allocations to payroll, *without compromising the seminary's mission and message*, is a matter entirely ecclesiastical in nature. That decision is no less an ecclesiastical matter than if LTS's leaders had decided to close the seminary entirely.

As I also previously expressed, the narrowest kind of review of the specific church decision to terminate Kant would not inject the civil courts into substantive ecclesiastical matters. However, that narrow review does not require application of precedent relating to the ecclesiastical matters doctrine; it requires application of precedent relating to the ministerial exception. On that point, I again agree with Judge Moore and the circuit judge that the ministerial exception applies.

Obviously, the most difficult issue to resolve is whether Kant was, for purposes of this exception and as the term has been qualified,[7] a "minister." Although we may now look to *Hosanna-Tabor*, that fact-pattern is so comfortably supportive of a finding that the employee, Perich, was a "minister,"[8] and the holding so narrow,[9] that it provides only the most general guidance, largely by contrasting and comparing the facts of this case with those of that case.

For example, the employee at the center of *Hosanna-Tabor* taught in a parochial school for students in kindergarten through eighth grade.[10] I believe it is significant that Kant taught at a seminary.[11] A California Court of Appeals,

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[7] Recognizing that not all religions utilize the term "minister," courts have "clarif[ied] that the label was a mere shorthand." *Hosanna-Tabor*, 132 S.Ct. at 714 (citing *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (1985)).

[8] The Court refused to "adopt a rigid formula for deciding when an employee qualifies as a minister." *Hosanna-Tabor*, 132 S.Ct. at 707. But it was clear Perich was one. She was a "called teacher" who fulfilled academic study requirements, passed an oral examination by faculty at a Lutheran college, was accorded the title "Minster of Religion, Commissioned," and was held out as a minister by the Church. *Id.*; *see also* Thomas C. Berg, *et al*, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 186 fn. 57 ("*Hosanna-Tabor* presents an easy case[.]").

[9] The Court stated: "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. There will be time enough to address the applicability of the exception to other circumstances if and when they arise." *Hosanna-Tabor*, 132 S.Ct. at 710.

[10] Brief for the Petitioner at 3, *Hosanna-Tabor*, 132 S.Ct. 694 (No. 10-553), 2011 WL 2414707.

[11] The Court in *E.E.O.C. v. Southwestern Bap. Theological Seminary, supra,* defined a seminary in a manner that fits the facts of the case before us.

> Seminary is an integral part of a church, essential to the paramount function of training ministers who will continue the faith. It is not intended to foster social or secular programs that may entertain the faithful or evangelize the unbelieving. Its purpose is to indoctrinate those who already believe, who have received a divine call, and who have expressed an intent to enter full-time ministry. . . . They do instruct the seminarians in the "whole of religious

thoroughly summarizing and categorizing cases applying the ministerial exception, noted that "where the school itself is a seminary—that is, exclusively preoccupied with religion and the training of a religion's own clergy as distinct from more general learning—the ministerial exception has been *categorically applied to faculty . . . .*" *Hope Intern. University v. Superior Court*, 119 Cal.App.4th 719, 737, 14 Cal.Rptr.3d 643, 655-56 (Cal.App. 4 Dist. 2004) (citing *E.E.O.C. v. Southwestern Bap. Theological Seminary*, 651 F.2d 277 (5th Cir. 1981)) (emphasis added). That analysis is tidy and tempting. But the Court in *Hosanna-Tabor* said that "the exception covers Perich, *given all the circumstances of her employment*." *Hosanna-Tabor*, 132 S.Ct. at 707 (emphasis added). Teaching at a seminary as opposed to a grade school, then, is just one circumstance – although I consider it a very significant one.

Kant certainly knew the seminary's mission when he agreed to take the position. In fact, he identifies himself in his brief as "a 'utility player' with respect to the Seminary's mission." Some courses Kant taught (Biblical Studies, Jewish-Christian Relations, World Religions, etc.) might be offered at other institutions of higher learning, whether church-affiliated or not. But Kant chose to teach those courses at a Christian seminary along with his course, "Thinking Theologically in the Church." I cannot escape the conclusion that he was advancing the religious

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doctrine," and only religiously oriented courses are taught.

651 F.2d at 283-84.

mission of LTS even to the point of teaching future ministers of the church how to think theologically.[12]

I am not concerned that Kant is a Jew and does not personally follow the tenets of the Christian Church (Disciples of Christ), although both are considerations. In *E.E.O.C. v. Southwestern Bap. Theological Seminary*, *supra*, all seminary faculty members were deemed ministers despite the fact that other factors were "considered *more important than their devotion to the Baptist church*[.]" 651 F.2d at 283 (emphasis added). Where Kant taught, what he taught, and to whom he taught it are considerations which, in my opinion, outweigh what he personally believed.

Nor is my conclusion undermined by the dissent's concern that Kant's discharge was for economic rather than religious reasons. "The purpose of the [ministerial] exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason." *Hosanna-Tabor*, 132 S.Ct. at 709. I understand this passage to mean that if we first decide that Kant is a minister and

[12] Complementary jurisprudence in another First Amendment area comes to mind, and it is perhaps worthwhile to ponder whether government aid to a seminary like LTS would more likely violate the Establishment Clause than if such aid were provided to another institution of higher learning, including a church-affiliated institution. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are [sic] subsumed in the religious mission[.]" *Hunt v. McNair*, 413 U.S. 734, 743, 93 S.Ct. 2868, 2874, 37 L.Ed.2d 923 (1973). A substantial portion of LTS's functions is subsumed in its religious mission; therefore, a grant to LTS for Kant to teach his courses would be suspect as violative of the Establishment Clause because it could have the "primary effect of advancing religion." *Bowen v. Kendrick*, 487 U.S. 589, 609-10, 108 S.Ct. 2562, 2574, 101 L.Ed.2d 520 (1988) ("[W]e have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion. One way in which direct government aid might have that effect is if the aid flows to institutions that are 'pervasively sectarian.'"). If such aid to LTS to teach Kant's courses could be seen as advancing religion, then, logically, how could Kant's teaching those courses without such aid not be seen as advancing religion to that same extent?

therefore that the exception applies, we need not, and cannot, inquire into the reason for the firing. Justice Alito explains why: "In order to probe the *real reason* for [the employee's] firing, a civil court—and perhaps a jury—would be required to make a judgment about church doctrine." *Hosanna-Tabor*, 132 S.Ct. at 715 (Alito, J., with whom Kagan, J., joins, concurring). As one court puts it, once it is determined that the exception applies, "'[t]he rule is about as absolute as a rule of law can be: The First Amendment guarantees to a religious institution the right to decide matters affecting its ministers' employment, free from the scrutiny and second-guessing of the civil courts.'" *Hope Intern. University*, 119 Cal.App.4th at 734 (quoting *Schmoll v. Chapman University*, 70 Cal.App.4th 1434, 1436, 83 Cal.Rptr.2d 426 (Cal.App. 4 Dist. 1999)).

I do not pretend this is a clear or easy determination. "Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745, 755 (1971). But the line is there, and I conclude that, for purposes of the ministerial exception, Kant crossed it when he chose to teach religion-based courses at a Christian seminary.

KELLER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KELLER, JUDGE, DISSENTING: I respectfully dissent from the majority's well-written opinion for several reasons.

First, I disagree with the majority's holding that LTS's primary, if not sole, "purpose is to prepare faithful leaders for the Church of Jesus Christ." In support of that holding, the majority cites to an affidavit and statements by LTS President Johnson, the Faculty Handbook, and an LTS brochure. While these documents do indicate that LTS is a faith-based institution, they also indicate that it is not solely designed to prepare its students to be leaders in the Christian Church (Disciples of Christ).[13] In "A Letter from the President," President Johnson states that LTS, in addition to being appropriate for those who want to prepare for a career in church leadership, might also be appropriate for students who "simply want an opportunity to study Christianity in a disciplined way." In its brochure, LTS states that it offers courses leading to a "Master of Arts Degree," a "Master of Arts in Pastoral Studies Degree (Roman Catholic)," and a joint "Master of Arts degree from the Seminary and the Master of Social Work degree from the University of Kentucky in less time than it would take to earn the degrees separately." That brochure also touts that LTS "is intentionally ecumenical with almost 50 percent of its enrollment coming from other denominations. The faculty, staff, and trustees are likewise ecumenical, having members from various traditions." These statements indicate that the goal of LTS is not just to create leaders and/or ministers for the Christian Church (Disciples of Christ).

[13] The church is referred to variously as "the church of Jesus Christ," "the Church of Jesus Christ," "the Christian Church (Disciples of Christ)," "The Disciples of Christ Church," and "the Christian Church" by the parties and the majority. I use the designation that is primarily used by LTS in its brief.

Second, I believe the majority's holding that the "ecclesiastical matters rule" deprives the court of jurisdiction is incorrect. As the majority notes, the ecclesiastical matters rule is designed to prevent excessive entanglement by the courts with religion in violation of the First Amendment. Thus, a court has no jurisdiction to rule on a church's personnel decisions if that ruling requires an interpretation of church law. In my view, this matter does not require any interpretation of church law. The Faculty Handbook sets forth a number of reasons why a tenured professor can be discharged, some of which arguably could require interpretation of church law. If LTS had discharged Kant for one of those reasons, the ecclesiastical matters rule might apply. However, LTS admits that it discharged Kant for economic reasons. No interpretation of church law is necessary to determine whether those economic reasons existed and whether they justified Kant's discharge. Because the circuit court would not be required to interpret church law in making that determination, the possibility of "excessive entanglement" by the courts with religion does not exist in this case. Furthermore, the court, in making that determination, would not run afoul of the First Amendment. Therefore, I would hold that the circuit was not deprived of jurisdiction based on the ecclesiastical matters rule.

Third, I disagree with the majority that the ministerial exception applies. The majority's opinion appears to rest on Kant's status as a "religion teacher" as well as his participation in various religious ceremonies at the school. However, I believe the majority fails to differentiate between teaching religion and

teaching about religion. Teaching religion implies that the teacher is inculcating his students in the belief of a particular faith with the goal of converting the students to that faith or confirming/strengthening their pre-existing belief in that faith. This definition could also apply to a minister, and I agree that a person meeting that definition would fall under the ministerial exception. On the other hand, teaching about religion implies that the teacher is informing students about the tenets of a religion so that they can understand it. The teacher is not attempting to convince students to believe in that religion. This kind of instruction takes place on a regular basis in both religious-based and secular colleges and universities across this country. Based on the evidence, I believe that there is a question of fact as to whether Kant, as an avowed Jew, was teaching about the Christian religion or whether he was teaching the Christian religion as an article of faith.

Moreover, I cannot discount Kant's personal religious beliefs as it appears the majority does. A basic tenet of Christianity is that Jesus Christ is the Son of God. Judiasm does not accept that tenet. Therefore, it appears that, because of this seminal difference, Kant, as a practicing Jew, would not be qualified to be a minister of any Christian faith.

Finally, the majority states "that the classes [Kant] taught at LTS were for the purpose of preparing future church leaders of the Christian faith." However, as I previously noted, LTS's brochure touted its ecumenical focus, thus indicating that it was not preparing leaders of the Christian faith but leaders of many Christian faiths. Additionally, President Johnson stated that the purpose of

LTS was not just to produce leaders but to provide a place for those interested in studying Christianity. Based on this evidence, and in the absence of any evidence regarding the actual content of Kant's courses, I cannot conclude that Kant was a "minister" for purposes of the ministerial exception.

For the foregoing reasons, I would reverse the circuit court's summary judgment and remand for additional proceedings. As noted in a footnote in LTS's brief, at least one Federal Circuit Court of Appeals has held that a tenure policy can be interpreted to contain an implied right of termination when sufficient economic exigencies exist. On remand, I would instruct the circuit court to permit the parties to conduct additional discovery regarding the economic conditions that resulted in Kant's termination. Upon completion of that discovery, the court could then address whether LTS's tenure policy contains an implied right of termination for economic reasons and if the economic conditions support the application of any such implied right.

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