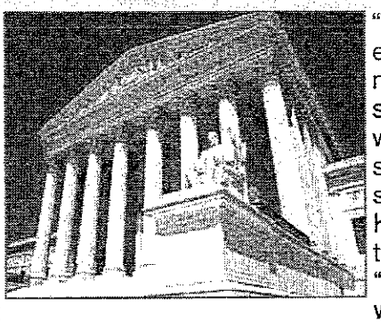
Supreme Court asks: could discrimination claim force female priests?

By Benjamin Mann



Washington D.C., Oct 7, 2011 / 04:53 am (CNA/EWTN News).- A Lutheran teacher's lawsuit led to a provocative question being asked in the Supreme Court on Oct. 5: could government efforts to end job discrimination jeopardize the all-male Catholic priesthood?

The case pitting the commission against Hosanna-Tabor Evangelical Lutheran Church and School does not directly concern the issue of women and the priesthood. But justices were quick to connect the matter at hand – involving the Lutheran group's right to hire and fire ministers at their discretion – with the issue of Catholics' and other groups' right to determine who will exercise ministries.

Wednesday's case first arose when Cheryl Perich, who taught religious and secular subjects, was fired from a position the Lutherans considered a religious ministry.

Perich, who had narcolepsy, claimed she was illegally fired as a form of retaliation for threatening to pursue a legal complaint against the school under the Americans with Disabilities Act. The Equal Employment Opportunity Commission says a traditional "ministerial exception," allowing churches freedom in hiring and firing, does not apply to this case.

Hosanna-Tabor, however, says it fired Perich from her teaching ministry not in retaliation, but on religious grounds. They say the fourth-grade teacher lost her job for refusing to submit to an in-house dispute resolution process, thereby violating the church's interpretation of a biblical passage that discourages Christians from suing one another.

"The (Obama) administration has taken a very extreme position," said Becket Fund Legal Counsel Luke Goodrich, who is leading the religious freedom group's work on the Hosanna-Tabor case. He said the administration was "attacking the very existence of the ministerial exception," such that "even the pastor of a church could sue the church for employment discrimination."

"There's a lot of uncertainty surrounding the outcome of this case," Goodrich told CNA/EWTN News Oct. 3, "because the Supreme Court has not decided a case involving the autonomy of religious groups in many years."

The Justice Department holds that the Lutherans cannot fire Perich for complaining to the government even if church teaching forbids it.

And it was this question – when might the government's interest in preventing discrimination trump a religious group's principles? – that prompted the justices to ask the attorney for the government's Equal Employment Opportunity Commission during Oct. 5 oral arguments why female priests could not be mandated by the government on similar grounds.

"The belief of the Catholic Church that priests should be male only – you do defer to that, even if the Lutherans say, look, our dispute resolution belief is just as important to a Lutheran as the all-male clergy is to a Catholic?" asked Chief Justice John Roberts, questioning Leodra Kruger, the U.S. solicitor general's assistant who represented the Equal Opportunity Employment Commission.

"Yes," Kruger responded. "But that's because the balance of relative public and private interests is different in each case."

"Do you believe, Miss Kruger, that a church has a right that's grounded in the Free Exercise Clause and/or the Establishment Clause to institutional autonomy with respect to its employees?" asked Justice Elena Kagan.

"We don't see that line of church autonomy principles in the religion clause jurisprudence as such," the federal government's attorney replied.

Kruger also said the ministerial exception to discrimination laws was not simply a part of the First Amendment's guarantee of the "free exercise of religion."

Justice Scalia then pressed Kruger on the difference between ordinary "associations" – subject to a range of anti-discrimination laws – and religious ones.

"There is nothing in the Constitution that explicitly prohibits the government from mucking around in a labor organization," said Justice Scalia, "but there, black on white in the text of the Constitution are special protections for religion. And you say that makes no difference?"

Kruger's response included her explanation of what the government considers "the core of the ministerial exception as it was originally conceived ... which is that there are certain relationships within a religious community that are so fundamental, so private and ecclesiastical in nature, that it will take an extraordinarily compelling governmental interest to (allow) just interference."

But Justice Breyer pushed the federal government's attorney to say how far she believed the protection extended.

"Suppose you have a religion and the central tenet is: 'You have a problem with what we do, go to the synod; don't go to court,'" he asked. "So would that not be protected by the First Amendment?"

"It's not protected," Kruger responded.

The government attorney went on to attack Hosanna-Tabor's use of the ministerial exception, which she said would mean " that the hiring and firing decisions with respect to parochial school teachers and with respect to priests is categorically off limits" to federal regulators.

"We think that that is a rule that is insufficiently attentive to the relative public and private interests at stake," she said, citing "interests that this Court has repeatedly recognized are important in determining freedom of association claims."

It was then that Breyer sprung **the question of whether a woman might sue over her exclusion from the Catholic priesthood**, on the same basis that Perich was suing over a religiously-grounded termination.

Kruger said the two situations were different – not categorically, but rather because "the private and public interests are very different in the two scenarios."

"The government's general interest in eradicating discrimination in the workplace is simply not sufficient to justify changing the way that the Catholic Church chooses its priests, based on gender roles that are rooted in religious doctrine," she said.

But, she said, the government does have a "compelling and indeed overriding interest in ensuring that individuals are not prevented from coming to the government with information about illegal conduct," even if the church in question would prohibit its members from doing so on religious grounds.

Justice Samuel Alito pointed out that this distinction between the Lutherans' lawsuit prohibition on the one hand, and the Catholic Church's male priesthood on the other, seemed arbitrary.

Kruger's clearest articulation of the Obama administration's position on religious freedom came in response to Justice Kagan's question as to whether she was "willing to accept the ministerial exception for substantive discrimination claims, just not for retaliation claims."

The government's lawyer responded that "substantive discrimination" claims, such as those alleging sex discrimination, could also be legitimate grounds for a lawsuit against some religious institutions.

She said the government's interest in regulating Hosanna-Tabor's hiring and firing "extends ... beyond the fact that this is a retaliation, to the fact that this is not a church operating internally to promulgate and express religious belief."

"It is a church that has decided to open its doors to the public to provide the socially beneficial service of educating children for a fee, in compliance with state compulsory education laws," she said, drawing a sharp distinction between churches and religious ministries.

"Church-operated schools," Kruger stated, "sit in a different position with respect to the permissible scope of governmental regulations, than churches themselves do."

The court is expected to hand down its ruling by summer of 2012.