EMPLOYMENT AND LABOR LAW

PATRICIA NEMETH[†]
DEBORAH BROUWER[‡]

I. INTRODUCTION

The last several years (election cycles, actually) have been turbulent ones in the Michigan court system. In 2008, after an extended period in which the majority of the Michigan Supreme Court justices were identified as having conservative or Republican leanings, one such justice, Clifford Taylor, was replaced on the bench by Diane Hathaway, who is viewed as less conservative. For some time, then, liberal and conservative justices were evenly divided, with Justice Elizabeth Weaver, who was reliably conservative in the past, as a swing vote. In fall 2010, then Justice Weaver resigned, which allowed then-Governor Jennifer Granholm to appoint Alton Davis to the high court. Despite running as an incumbent in the 2010 election, Justice Davis did not retain that seat, and was replaced by Mary Beth Kelly, returning the court's majority to the conservatives.

Each of these shifts has been followed with a rush of motions for reconsideration and applications for leave to appeal on issues that were assumed to have been conclusively decided. "Once and for all" does not seem to have much meaning in Michigan jurisprudence, however, and each reconstitution of the high court has resulted in some of its own decisions being overturned.

The impact of these decisions on lower courts is not easy to assess. Certainly the courts of appeal are aware of trends in the supreme court, and may well tailor their decisions accordingly. It has been difficult to get a fix on the supreme court, however, as seen in the few employment law cases decided during the *Survey* period. The supreme court reversed the court of appeals in *Brightwell v. Fifth Third Bank of Michigan,*[1] a

† Managing Partner, Nemeth Burwell, P.C.; B.A., 1981, University of Michigan; J.D., 1984, Wayne State University; L.L.M. (Labor), 1990, Wayne State University.

decision that would seem to favor plaintiff-employees, but also reversed *Duskin v. Department of Human Services,*[2] a decision that would seem to favor defendant-employers. A brief look at the denial of leave applications involving retaliation claims also hints at significant disagreements on the court. Applications for leave to appeal were denied in *Jenkins v. Trinity Health Corporation*[3] and *Kaupp v. Mourer-Foster, Inc.*[4] In each case, the denials were met with disagreement from several of the justices, who complained that the plaintiffs had failed to establish the requisite causal connection between their protected activity and their subsequent termination.[5] With a different group of justices now on the bench, this may be an area that we will be talking about in the next *Survey.*

II. VENUE UNDER THE ELLIOTT LARSEN CIVIL RIGHTS ACT

In *Brightwell,*[6] the Michigan Supreme Court held that, for claims under the Elliott-Larsen Civil Rights Act (ELCRA),[7] venue is proper in the county where the plaintiff worked, because that is the site of the alleged violation of the Act.[8] This ruling not only reversed the court of appeals in the immediate case, but also overruled the published decision of *Barnes v. International Business Machines Corp.*[9] In both *Barnes* and *Brightwell,* the court of appeals had concluded that a violation of the ELCRA occurs at the time the decision to discharge is made; therefore, venue is proper where that decision is made.[10] The most striking aspect of the jurisprudence on this issue—venue under the ELCRA—is that so

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‡ Partner, Nemeth Burwell, P.C.; B.A., 1973, University of Michigan; J.D., 1980, Wayne State University.

Michael Kon, law clerk at Nemeth Burwell, P.C., also contributed greatly to the preparation of this article.

1. 487 Mich. 151 (2010).
2. 485 Mich. 1064 (2010).
3. 486 Mich. 852 (2010).
4. 485 Mich. 1033 (2010).
5. *Duskin,* 485 Mich. at 1065-66; *Jenkins,* 486 Mich. at 852; *Kaupp,* 485 Mich. at 1034.
6. 487 Mich. 151 (2010).
7. MICH. COMP. LAWS ANN. §§ 37.2101-.2804 (West 2001).
8. *Brightwell,* 487 Mich. at 154.
9. 212 Mich. App. 223 (1995).
10. Brightwell v. Fifth Third Bank of Mich., Nos. 280820, 281005, 2009 WL 961505, at *1 (Mich. Ct. App. Apr. 9, 2009); *Barnes,* 212 Mich. App. at 225-26. For a detailed discussion of the court of appeal's decision in *Brightwell,* see Patricia Nemeth & Deborah Brouwer, *Employment & Labor Law, 2010 Ann. Survey of Mich. Law,* 56 WAYNE L. REV. 189 (2010).

many differing opinions have emerged as to what every judge or justice characterizes as completely unambiguous statutory language.

Brightwell involved the consolidated cases of two former employees of Fifth Third Bank, each alleging that the bank had violated ELCRA by terminating his or her employment based on racial considerations.[11] Both plaintiffs had been employed at bank branches in Wayne County.[12] Fifth Third's regional office was located in Oakland County, and that is where, according to the bank, the termination decisions were made.[13] When the plaintiffs filed suit in Wayne County, the bank moved for a change of venue under MCR 2.223,[14] arguing that venue was proper in Oakland County but not in Wayne County.[15] The motions were denied in each case, and the bank successfully sought leave to appeal.[16] The court of appeals then consolidated the cases.[17]

In a 2-1 decision, the court of appeals reversed the lower courts' denial of the venue motions.[18] The majority decision noted initially that the ELCRA's venue provisions allow for suit to be filed in the county in which the defendant-employer "resides or has his principal place of business," or where "the alleged violation occurred."[19] Unless suit is filed in the county of the employer's principal place of business, the core issue is what constitutes a violation of the Act.[20] Addressing this question in *Barnes v. International Business Machines*, the court of appeals had concluded that a violation of the Act is "the action which gives rise to liability under the act, i.e., the corporate decision affecting the plaintiff's employment."[21] Based on *Barnes*, the court of appeals in *Brightwell* held that the locale of the termination decision is the proper venue, and "not the place where the" effects of the alleged violation are felt or where the damages accrue.[22]

Court of appeals Judge Elizabeth Gleicher dissented, noting that, while the ELCRA does state that venue lies where the "violation

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11. *Brightwell*, 487 Mich. at 154.
12. *Id.*
13. *Id* at 155.
14. MICH. CT. R. 2.223.
15. *Brightwell*, 487 Mich. at 155.
16. *Id.*
17. *Id.*
18. *Id.* at 154.
19. *Brightwell*, 2009 WL 961505, at *1 (citing MICH. COMP. LAWS ANN. § 37.2801(2) (1976)).
20. *Id.*
21. *Brightwell*, 487 Mich. at 155 (quoting *Brightwell*, 2009 WL 961505, at *3).
22. *Id.*

occurred,"[23] "a claim for discriminatory discharge cannot arise until a claimant has been discharged,"[24] a principle established by past Michigan Supreme Court decisions.[25] Thus, in Judge Gleicher's view, the place of the actual discharge dictates venue, not the locale of the discharge decision.[26] Because the discharge decisions in *Brightwell* were effectuated in Wayne County, according to Judge Gleicher, venue was proper in Wayne County.[27]

Presumably encouraged by the split decision at the court of appeals level (as well as a change in the makeup of the supreme court following the 2008 election), the plaintiffs sought leave to appeal, which was granted.[28] In its order granting leave, the supreme court directed the parties to address whether *Barnes* had been correctly decided, and whether an alleged violation of the ELCRA occurs only when and where the corporate decision regarding the plaintiff is made.[29]

The supreme court answered these questions in the negative, reversing the court of appeals and overruling *Barnes*.[30] The court held that venue was proper in Wayne County because "the alleged discrimination occurred in Wayne County, where plaintiffs worked and where the allegedly discriminatory actions were implemented."[31]

This decision was far from unanimous, however, resulting in three opinions. Interpreting the language of the ELCRA, the four-justice majority (consisting, somewhat unusually, of Justices Kelly, Cavanagh, Markman and Hathaway) first decided that a violation of the Act requires *both* an adverse employment action and an improper (i.e. discriminatory) motive for that action.[32] The court held that "it logically follows that a violation of the CRA 'occur[s]' when the discriminatory decision is made *and* adverse employment actions are *implemented*."[33] The court rejected the holding in *Barnes* because it restricted "what constitutes a violation of the CRA to 'adverse employment decisions'" alone.[34]

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23. *Brightwell*, 2009 WL 961505, at *4 (Gleicher, J., dissenting) (quoting MICH. COMP. LAWS ANN. § 37.2801(2)).
24. *Id.* (quoting Collins v. Comerica Bank, 468 Mich. 628, 633 (2003)).
25. *Id.* at *5.
26. *Id.*
27. *Id.*
28. Brightwell v. Fifth Third Bank of Mich., 772 N.W.2d 427 (Mich. 2009).
29. *Id.* at 428.
30. *Brightwell*, 487 Mich. at 154.
31. *Id.*
32. *Id.* at 158.
33. *Id.* (emphasis added).
34. *Id.*

With this concept established, the court next examined the specific actions that make up the unlawful discharge that constitutes an ELCRA violation.[35] The court found the positions offered by each party to be wanting and rejected both.[36] The plaintiffs' claim that the only relevant action was where the discharge decision was communicated to them was deemed too simplistic and too readily subject to manipulation by the employer.[37] Similarly, the court was not persuaded by Fifth Third's contention that venue was proper in Oakland County because that is where actions (e.g., removal from payroll) were taken to effectuate the discharges.[38] Given that that the termination process often requires numerous actions and decisions, adopting the bank's position would force courts to trace the location of each element of the decision and somehow determine venue on that basis.[39]

Moreover, under the decision-making approach that the plaintiffs suggested, it would be possible for a defendant to exclusively control the forum in which the claim may be filed by shifting administrative tasks to a favorable location or department.[40]

In rejecting these positions, the supreme court stated "that it is the severance of the employment relationship that constitutes the actual discharge, not the mere communication of an adverse employment decision."[41] According to the court, the ELCRA does not protect individuals from being *informed* of an adverse employment action, but rather shields them from being *terminated* for discriminatory reasons.[42] Thus, an employee's rights are actually violated, not simply when that person is told "[Y]ou're fired,"[43] or when administrative tasks effectuating the decision occur, but when that employee is unlawfully denied the ability to work in a certain place.[44]

Addressing the concurrence/dissent's position that the ELCRA violation occurs when the discharge is communicated to the employee, the *Brightwell* majority opined that the "place of employment" is a more logical benchmark for defining where the violation occurs, because it is that locale where most relevant actions involving the employer-employee relationship take place, and it is that precise relationship that is affected

35. *Id.* at 159.
36. *Brightwell,* 487 Mich. at 159.
37. *Id.* at 159-60.
38. *Id.* at 159.
39. *Id.* at 159-60.
40. *Id.* at 160.
41. *Id.* at 164.
42. *Brightwell,* 487 Mich. at 164 (emphasis added).
43. *Id.* at 162.
44. *Id.* at 160.

by an alleged violation.[45] Therefore, the adverse action suffered by the employee does not occur at the time of notice of termination, but more realistically occurs "when the employee is no longer entitled to enter his or her place of work and perform the responsibilities of employment."[46]

Responding to the four-justice majority opinion, Justice Young (joined by Justice Corrigan) agreed that the court below had wrongly decided that venue was proper where the termination decision was made, but disagreed with the majority's choice of the workplace as the proper situs for venue.[47] While agreeing that venue is proper when the discriminatory decision is made and implemented, Justice Young rejected the majority's view as to when such a decision is implemented.[48] For Justice Young, the communication of the disciplinary decision itself is the violation because the employee's claim is actionable at that precise moment.[49] Under this analysis, while a violation of the Act may require both actus reus (the adverse employment action) and mens rea (the wrongful intent), there is no violation until that discriminatory intent is communicated to the employee.[50] It is this convergence that is the violation, rather than some future event, such as when the employee is prevented from performing his duties. Thus, according to Justice Young, venue is proper where the discriminatory decision is communicated to the plaintiff, which may or may not be the plaintiff's workplace.[51] This position did not win the day, however.

In overturning *Barnes* and the lower court's decision in *Brightwell*, the Michigan Supreme Court surely hoped to provide clarity and simplicity to venue decisions under the ELCRA. While the provision at issue may appear unambiguous, it nonetheless resulted in differing interpretations at each appellate level—varying from the place where the decision was made, the place where the plaintiff worked, the place where the decision was communicated to the plaintiff, and the place where the discharge occurred. Further, while the high court majority justified its decision as the approach best designed to avoid arbitrariness, its holding leaves many open questions. While it may seem straightforward to conclude in a routine discharge case that venue is proper where the plaintiff was employed, does the same conclusion follow in a failure-to-

45. *Id.*

46. *Id.*

47. *Id.* at 169 (Young, J., concurring/dissenting). Justice Weaver also dissented, stating that she believed that leave to appeal should not have been granted. *Id.* at 178 (Weaver, J., dissenting).

48. *Brightwell*, 487 Mich. at 169.

49. *Id.*

50. *Id.* at 171.

51. *Id.*

promote case, where the plaintiff may have sought a promotion at a locale different from the one where she was employed? And where is the plaintiff's work location if the plaintiff telecommutes or does not have a fixed worksite? And what about a failure-to-hire claim, where the plaintiff never worked for the employer at any location? Not surprisingly, given the multiplicity of decisions engendered by the words, "the county where the alleged violation occurred,"[52] the final (for now) decision leaves unanswered questions.

III. CLASS ACTIONS UNDER THE ELLIOTT-LARSEN CIVIL RIGHTS ACT

During the previous *Survey* period, in *Duskin v. Department of Human Services*,[53] the Michigan Court of Appeals provided what in essence was a road map to trial courts confronting class actions in the employment discrimination context. During this *Survey* period, the Michigan Supreme Court, acting on the plaintiffs' application for leave to appeal, vacated and remanded *Duskin* for reconsideration in light of its subsequent decision in *Henry v. Dow Chemical*.[54] What makes the supreme court's action noteworthy, however, is described in Justice Corrigan's dissent from the order of remand, which begins, "I dissent from the Court's unnecessary order of remand, which will result in a costly waste of scarce state resources—as well as a waste of plaintiffs' resources—in this clearly meritless class action."[55]

Duskin was a proposed class action filed in Ingham County Circuit Court on behalf of all minority (African-American, Hispanic, Arab and Asian) male employees of the Michigan Department of Human Services (DHS), covering more than 600 individuals in departments and offices throughout Michigan.[56] The plaintiffs alleged race, ethnicity, and gender discrimination against the DHS regarding management and supervisory promotion decisions.[57]

The plaintiffs moved to certify the class on January 8, 2007.[58] Opposing the motion, the DHS argued that the plaintiffs failed to satisfy the requirements of MCR 3.501(A)(1)[59] and that their claims were not

52. *Id.* at 156.
53. 284 Mich. App. 400 (2009), *vacated and remanded*, 485 Mich. 1064 (2010).
54. 484 Mich. 483 (2009).
55. *Duskin*, 485 Mich. at 1065.
56. *Duskin*, 284 Mich. App. at 407.
57. *Id.* at 403.
58. *Id.*
59. MICH. CT. R. 3.501(A) states:
(1) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if: (a) the class is so

appropriate for class treatment.[60] The trial court disagreed, relying on the DHS's internal study regarding possible state-wide disparities in promotion decisions.[61] The DHS sought interlocutory review, which the court of appeals granted.[62]

The appellate court, relying upon MCR 3.501, agreed with the DHS that class certification was not appropriate.[63] The court noted initially that the plaintiffs had the burden of establishing the appropriateness of class certification and of demonstrating that all requirements of the court rule had been met.[64] The court then analyzed whether the plaintiffs had carried their burden. In the absence of significant Michigan case law on the subject, the court of appeals looked to the standard applied by federal courts to class certification issues—that "a class 'may only be certified if the trial court is satisfied *after a rigorous analysis*, that the prerequisites of [the court rule] have been satisfied.'"[65] The *Duskin* court did not limit its analysis strictly to the pleadings, relying on the same internal DHS memorandum as the plaintiffs.[66] The court also closely followed the requirements of MCR 3.501. Based on this, the appellate court reversed the trial court's class certification.[67]

Less than two months after the court of appeals' decision in *Duskin,* the Michigan Supreme Court addressed class actions in *Henry v. Dow Chemical.*[68] In *Henry,* the court rejected the federal "rigorous analysis" standard as insufficiently precise, stating that MCR 3.501 provides adequate guidance for Michigan courts assessing motions for class certification.[69] The supreme court also noted that if a plaintiff's pleadings do not make a sufficient case for class certification, the trial court is to

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numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members; (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (d) the representative parties will fairly and adequately assert and protect the interests of the class; and (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

60. *Duskin*, 284 Mich. App. at 407.

61. *Id.* at 407-08.

62. *Id.* at 408.

63. *Id. at* 426.

64. *Id.* at 408-09.

65. *Id.* at 408-09 (alteration in original) (quoting Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161 (1982)).

66. 284 Mich. App. at 406-07, 417.

67. *Id.* at 426.

68. 484 Mich. 483, 502-03 (2009).

69. *Id.* at 502.

look to information beyond the pleadings to assess whether class certification is proper.[70]

In response, the *Duskin* plaintiffs sought leave to appeal to the Michigan Supreme Court. In lieu of granting leave, the court vacated the court of appeals' judgment and remanded the matter to the trial court for reconsideration in light of *Henry*.[71] It was in reaction to this order that Justice Corrigan (joined by Justice Young) expressed her frustration.[72] In her dissent, she observed that the court of appeals in *Duskin* had already, in essence, applied the standards enunciated in *Henry,* concluding that the plaintiffs had completely failed to identify any allegedly discriminatory policy or practice affecting all class members.[73] In fact, according to Justice Corrigan, "even the individual plaintiffs have not alleged facts showing either direct bias *or* that particular plaintiffs were denied positions under circumstances establishing an inference of discrimination."[74] Given that the plaintiffs' allegations were insufficient as a matter of law (and that the court of appeals had already reached that very conclusion, applying the correct law), it struck Justice Corrigan (and many others, it can be presumed) as absurd for the supreme court to require that the trial court re-analyze the matter. She wrote: "I cannot join this Court's decision to order a futile remand that will simply drain resources and ultimately result in the same outcome as that reached by the Court of Appeals."[75] The end result, however, is that the road map to class certification of ELCRA claims so helpfully set forth by the court of appeals is now reported as "no longer good law."

IV. THE MINISTERIAL EXCEPTION TO EMPLOYMENT CLAIMS

In 2008, in *Weishuhn v. Catholic Diocese of Lansing*,[76] the Michigan Court of Appeals formally recognized that a doctrine known as the "ministerial exception" may preclude claims under the ELCRA. This "ministerial exception," rooted in the First Amendment's Establishment and Free Exercise of Religion Clauses, "generally bars inquiry into a religious institution's underlying motivation for a contested employment

70. *Id.* at 503.

71. *Duskin*, 485 Mich. at 1064.

72. *Id.* at 1065 (Corrigan, J., dissenting).

73. *Id.*

74. *Id.* at 1066 (Corrigan, J., dissenting).

75. *Id.* at 1067 (Corrigan, J., dissenting).

76. 279 Mich. App. 150 (2008). For a more detailed discussion of the court of appeal's 2008 decision in *Weishuhn*, see Patricia Nemeth & Deborah Brouwer, *Employment & Labor Law, 2008 Ann. Survey of Mich. Law*, 54 WAYNE L. REV. 167 (2008).

decision" involving that institution and its ministerial employees.[77] Thus, if an employee is deemed to be a ministerial employee, the courts lack subject matter jurisdiction over any challenge to the employment decision, such as a discrimination claim.[78]

The exception recognized is a narrow one, requiring that courts "determine only whether the resolution of a plaintiff's claim would limit a religious institution's right to choose who will perform particular spiritual functions. It is a tailored exception to the application of employment-discrimination and other similar statutes, not an invalidation of such statutes."[79] Further, the exception does not apply to all claims brought by any employee of a religious institution.[80]

Madeline Weishuhn had been employed as a teacher at a religious school for six years when she was terminated for non-religious, employment-related issues.[81] She sued the school for alleged violations of Michigan's Whistleblower's Protection Act (WPA) and the ELCRA.[82] The trial court dismissed Weishuhn's WPA claim for failure to establish a genuine issue of material fact, but refused to dismiss the ELCRA claim under the ministerial exception, concluding that whether Weishuhn was a ministerial employee was a question of fact for the jury.[83] The court of appeals vacated the ruling, and remanded for consideration of whether Weishuhn qualified as a ministerial employee, based on a non-exclusive list of factors, including:[84]

> (1) Whether Weishuhn had primarily religious duties and responsibilities in the sense that her primary duties consisted of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship; (2) Whether Weishuhn's duties had religious significance; (3) Whether Weishuhn's position was inherently, primarily, or exclusively religious, whether that position entailed proselytizing on behalf of defendants, whether that position had a connection to defendants' doctrinal mission, and whether that position was important to defendants' spiritual and pastoral mission; and (4) Whether Weishuhn's functions were essentially liturgical, that is, related to worship, and whether those functions

77. *Weishuhn*, 279 Mich. App. at 152.
78. *Id.*
79. *Id.* at 173-74.
80. *Id.*
81. *Id.* at 154.
82. *Id.*
83. *Weishuhn*, 279 Mich. App. at 155.
84. *Id.* at 178-79.

> were inextricably intertwined with defendants' religious doctrine in the sense that Weishuhn was intimately involved in the propagation of defendants' doctrine and the observance and conduct of defendants' liturgy by defendants' congregation.[85]

On remand, after applying these proposed factors, the trial court concluded that Weishuhn qualified as a ministerial employee, and subsequently dismissed her ELCRA claim.[86] Weishuhn appealed as of right.

The court of appeals affirmed.[87] In reviewing the trial court's assessment of the factors set forth in the appellate court's initial opinion, the court found no error in the trial court's conclusions. With regard to the first factor, whether the employee's primary duties as a teacher were religious, the court of appeals rejected the plaintiff's claim that, numerically, the majority of her classes were mathematics, because that analysis failed to consider classroom time, preparation time, and time spent on religious duties.[88] Further, the court noted that the teaching of a so-called "secular" class such as mathematics can involve religious duties when, as the plaintiff admitted, the teacher incorporates religious teachings into her mathematics lessons.[89]

The second factor, regarding the religious significance of the employee's work, received little analysis by the court. Indeed, the court summarily stated that the facts of this case, such as Weishuhn's teaching of religion classes and preparing children for confirmation, established that "all aspects of her work had religious significance."[90]

The court of appeals also approved the trial court's conclusion that Weishuhn's extensive religious instruction and preparation of children for sacraments satisfied the third factor—that her duties were inherently religious because she was engaged in proselytizing and thus was an important mechanism in furtherance of the church's doctrinal and pastoral mission.[91] Finally, the court held that although Weishuhn's functions were not precisely "liturgical," her planning of religious rituals and worship services constituted propagation of church doctrine, and therefore met the fourth factor of the ministerial exception test.[92]

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85. *Id.* at 178.

86. Weishuhn v. Catholic Diocese of Lansing (*Weishuhn II*), 287 Mich. App. 211 (2010).

87. *Id.* at 214.

88. *Id.* at 218.

89. *Id.* at 218-19.

90. *Id.* at 219.

91. *Id.*

92. *Weishuhn II*, 287 Mich. App. at 220.

The court also rejected the plaintiff's argument that the ministerial exception is inapplicable to claims brought under the WPA. While noting that Michigan courts had yet to extend the exception to the WPA, the court of appeals also observed that the rationale for recognizing the exception to claims under the ELCRA applied equally to claims raised under the WPA.[93] The court of appeals therefore concluded that the trial court properly granted summary disposition to the defendant school.[94]

The Sixth Circuit Court of Appeals also addressed the ministerial exception during the *Survey* period, in *E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church and School.*[95] In the Sixth Circuit, the exception functions as a procedural mechanism, depriving a court of subject matter jurisdiction over the claim, rather than a substantive defense.[96] In contrast, in the First, Third, Ninth, and Tenth Circuit Courts of Appeal, the ministerial exception is an affirmative defense under Federal Rule of Civil Procedure 12(b)(6).[97]

In the Sixth Circuit, as in Michigan courts, the exception bars an employment discrimination claim when the parties fulfill two conditions.[98] First, the employer must be a religious institution.[99] The term religious institution is not limited to "traditional religious organizations," but embraces a wider definition including entities whose "mission is marked by clear or obvious religious characteristics."[100] Second, the employee asserting the claim must be a ministerial, rather than a secular, employee.[101] For a position to be designated as ministerial, the employee's primary duties and responsibilities must "consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[102] The enumerated factors are to be analyzed in their totality, with no single element being wholly dispositive.

As in *Weishuhn,* the employee at issue in *Hosanna-Tabor* was an instructor. Cheryl Perich was initially hired as a contract (lay) teacher,

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93. *Id.* at 222.

94. *Id.* at 227.

95. 597 F.3d 769 (6th Cir. 2010). The U.S. Supreme Court recently granted certiorari to the Hosanna-Tabor Evangelical Lutheran Church and School. No. 10-553, 2011 WL 1103380 (Mar. 28, 2011). At issue is a split among the circuits as to the applicability of the ministerial exception to employees other than pastors, priests or rabbis.

96. *Hosanna-Tabor*, 597 F.3d at 777.

97. *Id.* at 775.

98. *Id.* at 778.

99. *Id.*

100. *Id.* at 778 (citing Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 226 (6th Cir. 2007)).

101. *Id.* at 778.

102. *Hosanna-Tabor*, 597 F.3d at 778 (citing *Hollins*, 474 F.3d at 226).

and after completing religious training courses, was hired as a "called teacher."[103] Perich fell ill during a company golf outing, and took disability leave during the 2004-2005 school year.[104] In 2005, Perich attempted to rejoin the faculty after her physician cleared her to return to work.[105] The school board believed that Perich was no longer able to fulfill her duties, however, and after attempting to obtain her resignation, voted to terminate her employment.[106] On behalf of Perich, the Equal Employment Opportunity Commission (EEOC) filed suit, alleging discrimination and retaliation under the Americans with Disabilities Act.[107]

The applicability of the ministerial exception to Perich's disability claims was one of first impression for the court, and differed from *Weishuhn* in two distinct and significant respects. First, Perich's claims for discrimination and retaliation were filed under the ADA, which expressly permits religious entities to prefer employees of a particular religion.[108] Second, Perich was not considered a typical lay teacher, but was designated a "called teacher," also referred to within the religious organization as a "commissioned minister."[109] The lower court viewed these facts as critical in the application of the ministerial exception, and granted summary judgment in favor of the school. In its decision, the district court relied heavily on the fact that the school conferred the title of minister on Perich, and "held her out to the world as a minister by bestowing this title upon her."[110]

On appeal, the Sixth Circuit, mirroring the Michigan courts' focus on the essential and primary functions of the individual, vacated the district court's ruling and remanded the matter for further findings.[111] The appellate court held that although Perich's designation had changed from lay to "called teacher," her functions as an employee had remained identical.[112] While the court acknowledged that Perich spent time leading daily prayer and had completed additional religious training, it also recognized that she taught secular subjects, including math, language

103. *Id.* at 772.
104. *Id.* at 773.
105. *Id.*
106. *Id.*
107. *Id.* at 775. Perich eventually sought to intervene in the suit, and was permitted to file her own complaint, alleging discrimination under Michigan's Persons With Disabilities Civil Rights Act. *Id.*
108. *Hosanna-Tabor*, 597 F.3d at 775; 42 U.S.C. § 12117(d) (2004).
109. *Hosanna-Tabor*, 597 F.3d at 772.
110. *Id.* at 780.
111. *Id.* at 782.
112. *Id.* at 772.

arts, social studies, science, gym, art and music, and rarely introduced religion into secular subjects.[113] The court viewed the ministerial exception narrowly, stating that, "The governing primary duties analysis requires a court to objectively examine an employee's *actual job function*, not her title, in determining whether she is properly classified as a minister."[114] The court, therefore, remanded the matter to the district court for determination of the merits of Perich's ADA claims.[115]

In both of these cases, the courts appeared quite conscious of the sometimes wide discretion afforded religious entities in employment decisions under the ministerial exception. In *Weishuhn,* the court noted that while "it seems unjust that employees of religious institutions can be fired without recourse for reporting illegal activities . . . to conclude otherwise would result in pervasive violations of First Amendment protections."[116] That is, the ministerial exception functions not as an impenetrable shield against federal discrimination laws, but to grant religious entities the freedom to prefer persons who embody the tenets of the religious organization, particularly when hiring individuals who will perform essential elements of faith development.[117] Drawing distinctions between individuals who perform primarily spiritual functions, and those who are simply involved in theological education can be a difficult task for a court. However, these rulings acknowledge courts' reluctance to involve themselves in interpreting matters of religious instruction, while simultaneously seeking to maintain a balance in the effective enforcement of individual employment rights.

V. CONCLUSION

Change in Michigan employment law is slow, seemingly moving only at the edges. When the liberals held the majority on the supreme court, there was talk that the court might reverse its decision in *Garg v. Macomb County Community Mental Health,*[118] a 2005 decision in which the court abrogated the continuing violations doctrine with respect to ELCRA claims. Others thought the court might revisit its 2006 decision in *Zsigo v. Hurley Medical Center,*[119] in which the court limited the circumstances under which a third party can recover from an employer

113. *Id.* at 781.
114. *Hosanna-Tabor*, 597 F.3d. at 781 (emphasis added).
115. *Id.* at 782.
116. *Weishuhn*, 287 Mich. App. at 225.
117. *Hosanna-Tabor*, 597 F.3d at 781.
118. 427 Mich. 263 (2005).
119. 475 Mich. 215 (2006).

for injury caused by an employee. But the court has changed again, and so the talk changes also. To find out what really happens with future court decisions, we will have to wait another year.