ISSUES IN LAW AND MINISTRY: TORT AND EMPLOYMENT LAW

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ABSTRACT

This article provides a broad overview of two of the most common and fraught areas of interaction between American law and professional Christian ministry work: employment law and tort law. The article proceeds from quantitative and qualitative data developed and analyzed as part of the 30-month Study on Law and Ministry in the United States conducted at Emory University's Center for the Study of Law and Religion. The article offers doctrinal overviews of all the major, common

issues of employment and tort law that arise in ministry contexts. It also discusses results from a national survey of clergy and from a series of focus-group discussions with American Christian ministers about how these areas of law impact their work and how they navigate legal issues in ministry.

I. INTRODUCTION

In numerous seen and unseen ways, federal, state, and local laws impact and govern the ministry activities of Christian clergy and lay leaders, as well as Christian schools, charities, and other religious organizations. Despite this, few pastors enter the ministry with the basic legal knowledge and skills needed for pastoral and administrative work.[1] In particular, Protestant and Evangelical seminaries in the United States do not offer even basic training in the legal aspects of pastoral vocations.[2] Graduates of these institutions are thus ill-equipped to deal with common legal issues touching on Christian ministry.

In recent years, public attention has focused on instances of legal misconduct in America's churches and religious organizations. Cases of clergy sexual abuse, financial crimes and tax fraud, employment disputes, organizational misgovernance, and property disputes routinely make national news headlines. One of the most notorious such incidents was the Ravi Zacharias scandal that broke in 2021.[3] Christianity Today published an in-depth investigative report that detailed the facts and events surrounding Zacharias's fall from grace, which included decades of sexual abuse and the organization's attempted cover-up and pattern of victim-shaming.[4] Unfortunately, Ravi Zacharias was not the only prominent church leader to make national headlines. In 2020, Carl Lentz, the lead pastor of Hillsong Church, was terminated from his position due to accusations of breaching the organization's trust, leadership issues, and

1. *See infra* Part II.B.2; *See infra* Part II.C II.B.2; *See infra* Part III.C. *See generally, Study on Law and Ministry in the United States*, EMORY UNIV. CENT. FOR THE STUDY OF L. & RELIGION 1, 37–47 (2023), https://cslr.law.emory.edu/research-programs/law-and-christianity/Lilly%20Report.pdf [https://perma.cc/THD9-C6NG].

2. *See generally, id*.

3. *See* Daniel Silliman & Kate Shellnutt, *Ravi Zacharias Hid Hundreds of Pictures of Women, Abuse During Massages, and a Rape Allegation*, CHRISTIANITY TODAY https://www.christianitytoday.com/news/2021/february/ravi-zacharias-rzim-investigation-sexual-abuse-sexting-rape.html (last visited Feb. 11, 2021). [https://perma.cc/3T96-FGX7] This article was translated into seven different languages and read by about two million people around the world.

4. *Id.*

allegations of sexual misconduct.[5] Religious employment matters have also made national headlines and have been central to many important court decisions. A recent New York Times article covered the story of a Catholic schoolteacher fired from her position when the school discovered she became pregnant out of wedlock.[6] While religious employment disputes rarely progress to the trial level,[7] how a church terminates a pastor from their position is an important factor that was the central issue in the case.[8]

Legal disputes impact churches both financially and reputationally. Depending on location and quality, attorney services can easily cost between $200-$800 per hour, and even relatively simple matters can become very costly to resolve. For example, it is estimated that from 2007–2018, religious organizations have paid over $3 billion in financial compensation to victims of child sexual abuse, and at least 19 filed for bankruptcy.[9] Since 2018, other clergy abuse lawsuits have resulted in monetary compensation, including the Catholic Archdiocese of Pittsburgh paying over $19.2 million to 224 clergy sexual abuse victims in 2020.[10] While clergy abuse lawsuits garner the most public attention and involve deeply troubling circumstances, such lawsuits represent only a fraction of the total number of lawsuits filed against churches.[11]

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5. Ruth Graham, *Hillsong, Once A Leader of Christian Cool, Loses Footing in America*, N.Y. TIMES, (Mar. 29, 2022), https://www.nytimes.com/2022/03/29/us/hillsong-church-scandals.html. [https://perma.cc/AG36-7QL2].

6. Tracey Tully, *An Unmarried Catholic Schoolteacher Got Pregnant. She Was Fired.*, N.Y. TIMES (June 28, 2021), https://www.nytimes.com/2021/06/28/nyregion/pregnant-catholic-school-teacher.html. [https://perma.cc/F3NQ-3FY8] *See also* John Beauge, *Unwed Pa. Teacher Fired for Being Pregnant Loses Second Bid to Get Her Job Back*, PENN LIVE (Jan 28, 2020, 7:28PM), https://www.pennlive.com/news/2020/01/unwed-pa-teacher-fired-for-being-pregnant-loses-second-bid-to-get-her-job-back.html [https://perma.cc/TJ8M-72PE] (reporting on the case of an unwed teacher fired from a Catholic school in Pennsylvania after she became pregnant and did not state immediate plans to marry the father).

7. *See* Ronald J. Colombo, *The Past, Present, and Future of Christian ADR*, 22 CARDOZO J. CONFLICT RESOL. 45 (2020) (discussing the preference for ADR over trial litigation in Christian circles).

8. *See* Beauge, *supra* note 6.

9. Tom Gjelten, *The Clergy Abuse Crisis Has Cost the Catholic Church $3 Billion*, NPR (Aug. 18, 2018, 5:00AM), https://www.npr.org/2018/08/18/639698062/the-clergy-abuse-crisis-has-cost-the-catholic-church-3-billion. [https://perma.cc/F73N-ZD7L].

10. Ronald V. Miller Jr., *Clergy Sex Abuse Against Churches*, LAWSUIT INFO. CTR. (Mar. 24, 2022), https://www.lawsuit-information-center.com/clergy-sex-abuse-lawsuits-against-churches.html [https://perma.cc/F236-2VSD].

11. *See* The Editors, *The Top 5 Reasons Churches and Religious Organizations End Up in Court*, CHURCH L. & TAX (Feb. 10, 2021), https://www.churchlawandtax.com/web/2020/december/top-5-reasons-churches-end-up-in-court.html [https://perma.cc/2Q8D-BNE9].

Low-income churches are even more vulnerable to the fiscal impact of litigation. Smaller, marginalized communities are more at risk of suffering from even a simple legal misstep or problem.[12] Even larger, more financially stable organizations often need help as religious and lay leaders seek a basic understanding of when professional help is needed. In these situations, minor issues grow into much bigger problems when ministers fail to enlist legal assistance from the start of the issue.

Legal missteps and lawsuits can cause reputational harm that may be even greater than their financial costs. At a time when reported religiosity in America is at an all-time low, a church scandal may do irreparable harm to the public's confidence in religion.[13] A loss of public confidence in religious institutions may also lead to greater regulation by the government.[14] Thus, pastoral legal education may help prevent liability and public distrust while sparing church and religious community members from personal and emotional harm. A simple prevention measure such as running a criminal background check on pastors and employees may help inhibit employees in positions of spiritual power and authority from taking advantage of congregants.[15] The cost of prevention might very well be a fraction of what it would cost a church to hire legal defense.

Existing legal education and training for clergy and other ministry professionals are inadequate, exacerbating the financial, legal, and

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12. *See,* Paul Prettitore, *Do the Poor Suffer Disproportionally from Legal Problems?* BROOKINGS INST. (Mar. 23, 2022), https://www.brookings.edu/blog/future-development/2022/03/23/do-the-poor-suffer-disproportionately-from-legal-problems/ [https://perma.cc/YJ37-R35H].

13. *See* Jeffrey M. Jones, *How Religious Are Americans?*, GALLUP NEWS (Dec. 23, 2021), https://news.gallup.com/poll/358364/religious-americans.aspx#:~:text=Most%20Americans%20Identify%20With%20a%20Religion&text=By%20far%20the%20largest%20proportion,simply%20as%20a%20%22Christian.%22 [https://perma.cc/8YBJ-UAQJ].

14. See for example, recent efforts by New York State educational authorities to impose tighter educational equivalency requirements and government oversight on New York's faith-based private schools in response to numerous news reports and personal narrative accounts of how some religious schools fail to provide students with basic competency in English language, math, and other essential subjects. *See* Zalman Rothschild, *Free Exercise's Outer Boundary: The Case of Hasidic Education*, 119 COLUM. L. REV. F. 200 (2019); Menachem Wecker, *New York State Cracks Down on Jewish Schools*, 19 EDUC.NEXT 28 (2019).

15. This was true for the scandal surrounding leadership at the Meeting House, where the church hired two pastors with criminal histories of child abuse. The pastors proceeded to abuse congregants over a number of years. While there are likely many other factors to the clergy abuse scandal at this church, running a criminal background is still a measure that helps protect congregants from clergy who abuse their power. *See generally*, Meagan Gillmore, *How Meeting House Megachurch Preacher Bruxy Cavey Groomed Young Women for Sex*, TORONTO LIFE (Mar. 27, 2023), https://torontolife.com/deep-dives/how-meeting-house-megachurch-preacher-bruxy-cavey-groomed-young-women-for-sex/.

reputational risks faced by Christian ministry organizations. We expect accountants, doctors, teachers, and others to have enough legal knowledge to comply with the laws governing their work and to know enough to appreciate when professional legal assistance is required. Nevertheless, many seminaries do not provide basic legal education.[16] Notably, some church organizations offer legal services to member congregations or some forms of continuing legal education for ministers.[17] Still, even these offerings are only useful to church leaders that know enough about the law to take advantage of them, and they exclude the countless smaller and independent churches and religious organizations most at risk for harmful impacts from legal issues. While pastors should not be expected to serve as legal experts, adequate legal education would significantly reduce the potential for legal liability to the extent that a pastor may understand how to better handle such issues or know when to call for legal assistance.

These concerns prompted the author to develop the Study on Law and Ministry in the United States (the "Study"), a multi-year research project facilitated by Emory Law School's Center for the Study of Law and Religion and funded with a grant from the Lilly Endowment. The study involved identifying and analyzing state and federal laws that impact Christian ministry work, researching the frequency of reported cases involving pastors and religious organizations, and conducting quantitative and qualitative analysis of ministry professions' encounters with American law. This article focuses on some of the study's critical findings with respect to interactions between law and Christian ministry in the areas of employment and tort law.

Part I of this article provides a methodological overview of the Study on Law and Ministry in the United States. Parts II and III, respectively, offer comprehensive discussions of employment law and tort law, and the ways that these areas of law specially impact Christian ministry organizations and professionals. These parts also discuss how ministry professionals view their interactions, knowledge, and risk exposure in these two legal spheres based on the Study's comprehensive national survey of church-law interactions and focus group discussions with ministry professionals.

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16. *Study on Law and Ministry*, 152–54 (on file with author) (explaining that a seminary education did not prepare ministers to navigate the legal issues that they face in the ministry).

17. *Study on Law and Ministry*, 171–72 (on file with author) (reporting some participants turned to people and resources supplied by their denomination and to let leadership make decisions about how to respond to legal challenges. Other participants in less-centralized denominations appeared to more on fellow pastors in their denomination or educational programming provided by the denomination).

The original Study examined law-ministry interactions in nine different fields of law, including clergy professionalism, organizational governance, taxation, organizational finance, torts, employment law, zoning, education law, and access to government funding. This article focuses only on tort and employment law, however. This narrower scope is appropriate because the Study found that these are two areas where legal issues most frequently arise in the ministry contexts. Given the prominence of tort and employment law issues and the financial and reputational harm they can inflict on ministries, this article aims to offer focused guidance for churches, ministers, and the attorneys who represent them on what to be aware of when working at the intersection of law and ministry. Future articles on this topic may discuss other legal subjects covered in the study.

I. THE STUDY ON LAW AND MINISTRY IN THE UNITED STATES: AN OVERVIEW

The primary objective of the Study on Law and Ministry in the United States was to better understand the pressure points and patterns of interactions between American law and professional Christian ministry work. This was seen as a preliminary step towards designing and implementing improved legal education and training opportunities for clergy and church administrators, as well as more focused guidance for lawyers serving the needs of ministry clients. To achieve these goals, the Study identified and examined state and federal statutes and caselaw on issues impacting ministry work; gathered information on existing resources for addressing legal issues in ministry and for education and training on the interaction of law and ministry; conducted a nationwide survey of Christian church leaders and clergy about their experience, knowledge, and practices around legal issues in their ministries; and convened a number of focus group discussions with ministers from a cross-section of American churches to more fully understand where the problems lie.

A. Legal Research and Analysis

The legal research aspects of the Study involved two main tasks. First, as described in section I.A.1, we performed a comprehensive study of federal, state, and local laws and regulations that govern religious organizations and professional pastoral work. Next, as discussed in section I.A.2, we used the initial results of our legal research and existing legal databases, to design and execute a quantitative analysis of reported cases decided between 2010–2020 involving Christian churches.

1. State and Federal Statute and Regulation Research

The Study began by reviewing several secondary sources addressing the interaction between American law and Christian ministry work.[18] Based on that initial exploration, we created a master list of topics designed to cover all areas of the law that relate to ministry work, which we then grouped into nine broader categories: (1) tort liability, (2) employment law, (3) tax law, (4) education law, (5) land use and zoning, (6) organizational finance, (7) organizational governance, (8) government funding, and (9) pastoral professionalism. These nine general fields structured all subsequent research in the Study.

Using the nine broad areas of law-ministry interactions, and dozens of sub-topics, we proceeded to conduct in-depth research on state and federal laws relating to each issue on our list. Our research focused on several key questions: Which areas of federal, state, and local law—directly and indirectly—impact ministry and professional work of pastors? Next, what are the most and least common legal issues that bring pastors and churches into contact with the legal system? Third, which legal issues are the most and least costly or damaging to the individuals or institutions? To answer these questions, researchers identified and collected state and federal legal materials, including statutes, regulations, and major judicial decisions relevant to each topic for every United States jurisdiction. Based on this, we provided an overview of legal concerns and doctrines implicated by ministry activities while accounting for major variations across state and federal jurisdictions. This work, in concert with other aspects of the Study, also allowed researchers to draw conclusions about the nature and significance of legal risks faced by churches, religious organizations, and clergy in different areas of ministry.

2. Quantitative Case Law Research

Alongside the Study's analysis of state and federal statutes and caselaw, we also conducted a quantitative analysis of reported cases involving churches in all United States jurisdictions from the years 2010–2020. This work aimed to determine whether there are particular legal issues, religious denominations, and jurisdictions that correlate to higher numbers of litigated cases, which would help identify areas of greater legal exposure for ministry professionals.

The quantitative caselaw research stage of the Study entailed two steps: First, researchers developed a data set of reported cases from 2010–

18. *See, e.g.*, WILLIAM W. BASSETT, ET AL., RELIGIOUS ORGANIZATIONS AND THE LAW (2017); RICHARD HAMMER, PASTOR, CHURCH, AND LAW (2008).

2020 that involved churches or other Christian religious organizations. Researchers built this data set of reported cases by selecting federal and state cases from Westlaw's database. They focused on cases where keywords associated with one or more of the eleven Protestant denominations, which account for more than 60% of American Christians, were present.[19] The denominational groups included in the data collection were: United Methodists, Southern Baptists, Church of Christ, African Methodist Episcopal, Seventh-day Adventists, Lutherans, Nazarene, Presbyterian, Disciples of Christ, Church of God, Assemblies of God, and Evangelical Friends Church.

Second, we analyzed the resulting data by filtering the cases by legal issue, religious denomination, and jurisdiction. Reported cases within the selected dataset parameters were analyzed and categorized into one of the nine general legal areas—tort liability, employment law, tax law, education law, land use and zoning, organizational finance, organizational governance, government funding, and pastoral professionalism—that were selected to be used as a framework for the Study. Specifically in connection to this article, the tort liability category included cases where tort liability, including insurance disputes, was the primary issue in an action brought by or against a church or other religious organization. Cases in the employment law category included disputes related to hiring, firing, and compensation of employees, as well as dealings with third-party contractors, such as construction workers, and the legality of employment regulation for religious organizations. Case results were further divided by state jurisdiction and federal circuit, as well as by the selected Protestant denominations. Once researchers categorized the cases in this manner, they recorded the total number of cases by denomination, jurisdiction, and topic to gain a better understanding of the patterns of legal risk in ministry settings.

B. Quantitative Survey of Ministerial Interactions with Law

Our research into statutes, regulations, and court decisions told us much about the law on the books and gave us a partial picture of how litigation impacts churches (at least litigation directly involving selected denominations that produced reported court decisions). Still, this data does not fully describe how American legal systems and ministry organizations and professions interact. Specifically, the Study's legal research did not clarify how pastors and churches manage and experience legal issues and

19. *See America's Changing Religious Landscape*, PEW RSCH. CTR. (May 12, 2015), .pewresearch.org/religion/2015/05/12/americas-changing-religious-landscape/ [https://perma.cc/S4KZ-DH8Y].

how the potential for legal benefits or consequences impacts their practices and decision making. The Study, therefore, developed a nation-wide survey of Christian ministers, lay leaders, and other church administrators to better understand how they address legal concerns in their work, how much they already know about the law, and which forms of training they have received and might prefer or need to have in the future.

The survey was designed to gather data on respondents' denominational affiliations, education, employment status, as well as demographic information about respondents' churches and ministries. Other questions about respondents' knowledge and experience about law were organized around the nine general areas of law-ministry interactions previously identified through our legal research. For each topic, the survey invited respondents to describe their levels of knowledge, how often such issues come up in their ministries, and what resources they typically use to address those concerns. The completed survey was distributed online to ministry professionals using social media, including Facebook and Twitter, professional networking sites, such as LinkedIn, and a direct email campaign that drew on existing databases of Christian ministries in the United States. The survey garnered over 1,000 complete responses from a wide cross section of ministry professionals affiliated with numerous different Christian denominations located across the United States.

After reaching the Study target of 1,000 complete survey responses, our researchers compiled the results and translated this data into a series of analytic memoranda—one for each of the nine areas of the law and ministry that structured the Study. Our analysis involved breaking down responses along geographic, demographic, denominational, and other relevant lines; identifying correlations between denominational affiliation, legal knowledge, and the kinds of legal resources used by ministry professionals.

C. Qualitative Research and Focus Groups

In addition to the quantitative survey of ministry professionals, the Study also undertook qualitative ethnographic research to gain a more wholistic picture of how law impacts the professional lives of pastors, lay leaders, and other ministry workers. Study researchers conducted a series of online focus groups that used Zoom videoconferencing to hold informative, one-hour dialogues with groups of clergies from across the United States led by a moderator drawn from the Study research team. Focus group participants were recruited from among survey respondents that had positively indicated their willingness to participate in further

Study research. Our research strategy included a commitment to continue convening new focus groups until findings reached "saturation," a subjective measure based on traditional qualitative protocols suggesting that research should continue until additional sessions no longer yield added information.[20] The Study achieved saturation after conducting fifteen individual focus groups that included forty-five clergy participants from a range of denominations and backgrounds.

In order to better organize and analyze the results of these focus groups, and wherever possible, each discussion included clergy of only one Christian denomination. The conversations were guided by a previously developed moderator's guide organized around the nine general areas of law and ministry interactions that frame much of the Study. For each topic, the moderator's guide included general questions and discussion prompts. Each topic also included several hypothetical scenarios of common ministry issues that raise legal concerns. These were designed to draw participants into considering how they might react to such situations, and into speaking about similar real-world situations they may have dealt with in their work.

Researchers recorded and transcribed the focus group sessions, and then conducted follow-up coding and analysis of each session. This analysis began with a brief discussion between the moderator and other Study researchers after each session to highlight general impressions, including added information that had emerged during the session, recurrent themes from earlier sessions, and any noteworthy moments or quotes. Researchers then viewed each video recording and read each session transcript, making notes of initial impressions, and assigning participants pseudonyms to preserve confidentiality. The coders then performed a line-by-line analysis of the text for each transcript, using a constant-comparison method to discern differences and similarities between participants, developing codes related to research questions and emerging ideas.[21] Finally, researchers produced a memorandum for each focus group session, using coded data on themes and trends, as well as representative quotes from participants, to describe the resulting findings.

II. EMPLOYMENT LAW

This Part discusses various aspects of employment law and how they interact with churches and other religious organizations. This includes

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20. *See* M.M. Hennink MM, et al., *What Influences Saturation? Estimating Sample Sizes in Focus Group Research*, 10 QUAL HEALTH RES. 1483 (2019).

21. *See* Barney G. Glaser, *The Constant Comparative Method of Qualitative Analysis*, 12 SOC. PROBS. 436 (1965).

laws, regulations and special benefits associated with employment in religious contexts. Part II.A covers employee hiring, firing, the ministerial exception, compensation, and the various factors influencing church-pastor relationships. Part II.B discusses the quantitative findings for employment law and how it relates to pastor knowledge, pastor training, the resources used to confront these issues, and other factors. Part II.C discusses the qualitative findings for employment law, including the responses we received for the Study surrounding employment law issues.

A. Legal Regulation of Ministry Employers and Employees

Most churches are employers. They hire and fire employees, negotiate employment contracts, supervise employees, discipline employee conduct, and handle routine payroll issues. Indeed, according to the Study's findings, churches encounter employment law issues more frequently than any other single kind of legal problem.[22] Although churches face many of the same employment issues as secular employers, some employment matters, such as dealing with clergy employees subject to the ministerial exception, may be unique to religious employers. Additionally, churches do not always have the same legal obligations as do secular employers because religious organizations are often exempt from certain areas of federal and state employment law. Such exemptions offer important benefits to ministry employers (and may also impose unique burdens and legal risks on ministry employees), and it is therefore important for church leaders to understand how employment laws and regulations do and do not apply to their ministries and employees. This section reviews those doctrinal areas of law that may have unique impact in ministry settings. Section II.A.1 discusses legal concerns that may arise when churches hire new employees. Section II.A.2 next considers issues that relate to terminating ministry employees, and Section II.A.3 addresses general concerns related to compensation. Sections II.A.4 and II.A.5 turn specifically to the relationship between a church or religious organization and its clergy, focusing on the nature and extent of the pastor-church relationship, as well as unique legal rights and privileges pastors and other clergy may have in their capacities as employees of ministry organizations.

22. According to the *Study*, nearly one-third (1,837 out of 5,822 cases) of all the cases we produced and investigated involved employment law disputes to which churches were a party.

1. Employee Hiring

This section explains that, subject to some important exceptions, churches and religious organizations are generally subject to the same rules and regulations regarding employee hiring practices. Ministries may also bear legal liability if they fail to take adequate care to comply with these legal obligations and standards of conduct.

a. New Hire Reporting

Church communities are often close-knit, and some ministries may be tempted to engage members of their religious communities to perform work on an informal basis. However, churches must generally adhere to the same federal hiring practices to which all U.S. employers are subject. For example, churches—like all employers—are subject to new hire reporting and employment eligibility verification requirements.[23] This means that every newly hired employee must be reported to the relevant state Department of Labor.[24] The employment eligibility and immigration status of each new hire must be reported as well.[25] In these new hire reports, churches are required to disclose the name, address, and social security number of the employee, as well as the name, address, and federal employer identification number of the employer.[26] If the church or organization fails to comply, it could be subject to significant claims for damages and will often need to implement better screening measures for future hired employees to prevent other litigation.[27]

b. Negligent Hiring

The negligent selection of church workers creates a risk that the church may be directly liable to plaintiffs injured by the organization's failure to implement sufficient procedures or policies to ensure the careful hiring of an employee.[28] Most often, negligent hiring claims against

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23. *See generally* CHURCH LAW & TAX, § 8.02 ("Employers must provide a designated state agency with information about every new hire as a result of federal legislation that seeks to facilitate the enforcement of child support orders and reduce fraud in welfare programs.").

24. *See* 42 U.S.C. § 653(a).

25. *See id*.

26. *See id*.

27. *See e.g.,* J. v. Victory Tabernacle Baptist Church, 372 S.E.2d 391 (Va. 1988); Moses v. Diocese of Colo., 863 P.2d 310 (Colo. 1993); Winkler v. Rocky Mountain Conf. of the United Methodist Church, 923 P.2d 152 (Colo. App. 1995).

28. *See generally* CHURCH LAW & TAX, § 8.05, 10.03–10.04 (One of the most significant legal risks facing churches is negligent selection. Negligent selection claims can

churches stem from religious organizations' inadequate screening of potential employees, their failure to investigate or act on potential red flags uncovered during the screening process, or their decisions to employ unqualified workers.[29]

In *Evan F. v. Hughson United Methodist Church,* a child parishioner sued the church for the negligent hiring of a clergy member that molested her brother.[30] Evidence existed suggesting the clergy member had sexually molested adolescents while serving in a prior ministry post, and that the clergy member had been asked to step down from his role as a minister as a result of those allegations.[31] Eventually, a different church hired the clergy member, appointing him to serve as the church's youth director.[32] The clergy member went on to molest one of the child parishioners in the youth group for many years.[33] The sister of the victim sued the church, claiming, among other things, negligent hiring because of inadequate screening practices that enabled the clergy member to slip through the cracks.[34] Although the church was ultimately victorious in the case,[35] litigating this issue was much more costly than proactively implementing adequate screening practices for the employee hiring process—not to mention that proper pre-hire screening could have prevented the alleged abuse from having taken place.

In *J. v. Victory Baptist Church,* the mother of an adolescent abuse victim brought an action against a church for negligently hiring a pastor. The mother claimed that the church knew, or should have known, that the pastor had been convicted of aggravated assault on a young girl and should have acted on that knowledge by not hiring him.[36] Adequate screening practices for employee hiring is purposeless if the church does not act on the unfortunate information they discover. The Supreme Court of Virginia made three important determinations in that case: (1) the tort of negligent

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arise any time that a church's failure to exercise reasonable care in the selection of an employee or volunteer leads to a foreseeable injury.).

29. *See, e.g.,* Evan F. v. Hughson United Methodist Church, 10 Cal. Rptr.2d 748 (Cal. Ct. App. 1992); J. v. Victory Tabernacle Baptist Church, 372 S.E.2d 391 (Va. 1988); Moses v. Diocese of Colo., 863 P.2d 310 (Colo. 1993); Winkler v. Rocky Mountain Conf. of the United Methodist Church, 923 P.2d 152 (Colo. App. 1995); Piney Grove Baptist Church v. Goss, 565 S.E.2d 569 (Ga. App. 2002).

30. *Evan F.,* 10 Cal. Rptr.2d at 754.

31. *Id.* at 750.

32. *Id.* at 751.

33. *Id.*

34. *Id.* (explaining that the church prevailed because the judge was unwilling to find the church liable for the harm caused to the sister of the victim because of the abuse inflicted by their employee on the victim).

35. *Id.* at 759.

36. *Victory Tabernacle Baptist Church*, 372 S.E.2d at 392.

hiring operates as an exception to charitable immunity of religious institutions; (2) the negligent hiring cause of action did not require allegation and proof that negligently hired individual negligently injured plaintiff; and (3) the negligent hiring tort did not require proof that misconduct was within wrongdoer's scope of employment.[37] Consequently, the court found in part for the mother, who sufficiently stated a claim of negligent hiring.[38]

In *Piney Grove Baptist Church v. Goss,* a church hired a parishioner with residential construction experience to undertake a renovation project for the exterior of the church.[39] The member constructed a platform from which volunteers could assemble scaffolding on the side of the church building.[40] The platform was entirely of the parishoner's design and choosing, and he assured volunteers that it was safe.[41] Under his supervision, the platform collapsed, and volunteers on the project were injured.[42] Although the member had experience in other areas of construction, he was underqualified to oversee the exterior renovation.[43]

Courts usually require that religious organizations know, or should have known, about an employee's traits or proclivities that create a risk of harm.[44] Thus, where the church is reasonably unaware of past harmful conduct by potential employees which exposes the church and its members to future harms, the church will likely not be found responsible.[45] Consequently, churches can usually avoid direct liability for negligent hiring by developing clear employment criteria, and by implementing relatively basic employee screening protocols that incorporate standard background checks, as well as adequate inquiry into the candidates' employment history.[46]

For example, where a background check is conducted and no red flags are raised, usually there is no basis for direct liability even where hiring

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37. *See id.* at 391.
38. *Id.* at 394.
39. *Piney Grove Baptist Church*, 565 S.E.2d at 570.
40. *Id.*
41. *Id.* at 572–573.
42. *Id.* at 572.
43. *See id.*
44. *See, e.g.,* M.L. v. Magnuson, 531 N.W.2d 849, 851 (Minn. App. 1995); Bouchard v. N.Y. Archdiocese, 719 F.Supp.2d 255, 257 (S.D.N.Y. 2010); R.A. v. First Church of Christ, 748 A.2d 692, 698 (Pa. Super. 2000).
45. *Bouchard*, 719 F.Supp.2d at 256.
46. Tichenor v. Roman Cath. Church of the Archdiocese of New Orleans, 32 F.3d 953, 960 (5th Cir. 1994); Roman Catholic Bishop v. Super. Ct. of San Diego Cnty., 50 Cal. Rptr.2d 399, 405 (Cal. App. 1996); Olinger v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints, 521 F.Supp.2d 577 (E.D. Ky. 2007).

the employee resulted in harm or injury.[47] This was true in *Tichenor v. Roman Catholic Church*, where officials of the church were immediately notified after a pastor discovered pornographic materials in another clergy member's room.[48] The church immediately fired the clergy member.[49] Attentive hiring procedures can reduce the risk of direct liability.[50] In *Olinger v. Corporation of the President,* the church was not held responsible for the conduct of its employee in a negligent hiring, supervision, and retention suit as a result of their thorough hiring procedures.[51] Importantly, the church asked the employee questions about his sexual history and his worthiness to serve in the role, and none of his answers indicated that he had any tendency to interact inappropriately with children.[52]

Religious organizations can also be held directly liable for negligent supervision of employees where they fail to exercise reasonable supervision over church programs and activities.[53] Plaintiffs often establish negligent supervision claims when the church knows or had reason to know, that an employee's conduct was creating a reasonable risk of harm and failed to exercise reasonable care in the supervision of that employee to mitigate such harm.[54]

To be sure, churches are not the legal guarantors of their parishioners' safety.[55] However, churches do have an affirmative duty of care to those participating in their programs and activities; and failure to exercise

47. *See, e.g., Tichenor*, 32 F.3d at 960; *Roman Cath. Bishop*, 50 Cal. Rptr.2d at 405.

48. *See Tichenor*, 32 F.3d at 956.

49. *Id.*

50. *See Olinger*, 521 F.Supp.2d at 584 (citing Mitchell v. Hadl, 816 S.W.2d 183, 186 (Ky. 1991)).

51. *Id.* at 578.

52. *Id.* at 580.

53. *See* Malicki v. Doe, 814 So. 2d 347, 360 (Fla. 2002) (discussing priest serving alcohol and molested children during neighborhood event); Spielman v. Carrino 910 N.Y.S.2d 105, 108 (N.Y. App. Div. 2010); *see generally* CHURCH LAW & TAX, §10.08 ("Churches can use reasonable care in selecting workers, but still be liable for injuries sustained during church activities on the basis of negligent supervision.").

54. Hutchison *ex rel.* Hutchison v. Luddy, 896 A.2d 1260, 1275 (Pa. 2006) (finding that the church had reason to know that their employee could cause a disruption); Fortin v. Roman Cath. Bishop of Portland, 871 A.2d 1208, 1232 (Me. 2005) (finding that the church had actual knowledge); Doe v. Redeemer Lutheran Church, 531 N.W.2d 897 (Minn. Ct. App. 1995) (finding that the church had actual knowledge); Kenneth R. v. Roman Cath. Diocese of Brooklyn, 654 N.Y.S.2d 791, 793 (N.Y. App. Div. 1997) (finding that the church had actual knowledge); Doe v. Liberatore, 478 F.Supp.2d 742, 774 (M.D. Pa. 2007) (finding that the church had reason to know).

55. *See* Wallace v. Boys Club of Albany, 439 S.E.2d 746, 748 (Ga. Ct. App. 1993).

reasonable supervision of church employees in ways that exposes others to injury can constitute a breach of that duty.[56]

c. Discriminatory Hiring Practices

Traditional state and federal employment laws and the hiring requirements of religious organizations diverges significantly on the issue of employment discrimination. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination with the goal of removing "artificial, arbitrary, and unnecessary barriers to employment ... [that] operate invidiously to discriminate on the basis of racial or other impermissible classifications."[57] One such impermissible basis for discrimination is religion. Thus, typical employers cannot base hiring decisions on a job candidate's religious affiliation.[58]

Importantly, religious organizations and religious educational institutions are properly exempted from this requirement because in these employment settings, religion may be a Bonda Fide Occupational Qualification (BFOQ).[59] Under the BFOQ rule, an employer may utilize what would otherwise be considered discriminatory hiring practices if doing so is "reasonably necessary to the normal operation of the particular business or enterprise."[60] Understandably, in the context of religious organizations, hiring employees of the same religion or denomination as the employer institution is often essential to the normal operation of the organization.[61] Relatedly, the Supreme Court has ruled that this legal permission for religious discrimination in church hiring practices does not violate the First Amendment's Establishment Clause.[62]

One case, in particular, involved terminating an employee who worked in the church-affiliated gymnasium.[63] The church terminated the employee because he failed to comply with the church's moral and religious standards, including regular church attendance and abstinence from alcohol and tobacco.[64] The employee sued the church, arguing that

56. *See Fortin*, 871 A.2d at 1217 (stating the special relationship between the church and its members establishes a duty of care); *see also* Morehouse College, Inc. v. McGaha, 135 S.E.2d 432, 432–434 (Ga. 1964) (holding that a charity failed to use ordinary care in the selection of its employees).

57. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

58. *See* 42 U.S.C. § 2000e-2(e)(1).

59. *Id.*; Pime v. Loyola Univ. of Chi., 803 F.2d 351, 353 (7th Cir. 1986).

60. 42 U.S.C. § 2000e-2(e)(1).

61. *See id.*

62. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987).

63. *Id.* at 330.

64. *Id.* at 330 n.4.

his termination constituted religious discrimination and thus violated the Civil Rights Act of 1964.[65] The Court ruled, however, that the church, like other religious institutions and employers, was exempt from this prohibition on religious discrimination.[66]

Importantly, while churches are exempt from religious discrimination rules in their hiring and firing decisions, they are not afforded similar flexibility regarding other anti-discrimination laws that affect employment practices.[67] Thus, religious organizations are legally obligated to comply with the hiring requirements and employment accommodations for disabled persons outlined by the Americans with Disabilities Act.[68] In addition, most church hiring practices are subject to the Age Discrimination in Employment Act, which prohibits hiring discrimination against employees over 40 years of age.[69] Finally, the Pregnancy Discrimination Act, which prohibits employment discrimination against a woman because she is pregnant, also applies to the hiring practices of religious organizations.[70]

There are some instances in which the church can utilize its ability to discriminate based on religion to terminate employees without raising questions about discrimination on other grounds. For example, in *Boyd v. Harding Academy of Memphis,* a church terminated an unmarried employee who became pregnant while working as a preschool teacher in the church-affiliated school.[71] Although terminating an employee based on their pregnancy is illegal, the church claimed that it fired the teacher for violating its religious policy against extramarital sex.[72] The court found that the termination primarily stemmed from the violation of the religious policy, and not necessarily in the pregnancy itself.[73]

d. The Ministerial Exception

While churches are required to comply with most anti-discrimination hiring statutes, courts recognize a ministerial exception to most anti-

65. *Id.* at 327.
66. *See id.* at 336.
67. *See id.* at 335–336.
68. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101.
69. *See* 29 U.S.C. §§ 621–634.
70. *See* 42 U.S.C.A. §§ 2000e(k). However, some religious organizations have successfully terminated pregnant employees without PDA liability due to well established policies against extra-marital sex, where pregnancy of the employee indicated the policy had been violated. *See, e.g.*, Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 414–415 (6th Cir. 1996).
71. *Boyd,* 88 F.3d at 411.
72. *Id.* at 412.
73. *Id.* at 414.

discrimination statutes that bars clergy employees from bringing employment discrimination suits against religious organizations.[74] The ministerial exception, rooted in the Free Exercise and Establishment Clauses, grants churches significant latitude .[75] Due to the ministerial exception, religious organizations can make most clergy hiring and firing decisions in the organization's best interest without the fear of anti-discrimination liability.[76]

Notably, the ministerial exception does not apply to all church employees; it applies only to those ministers and other clergy.[77] Since the common law is fairly ambiguous on what it means to be a "minister" for the purposes of the exception, it is important that churches consider the risk that their hiring and firing decisions about certain employees that serve both ministerial and non-ministerial functions may not be immune from discrimination claims.[78] Helpfully (from the perspective of religious organizations), the Supreme Court has recently endorsed an expanded conception of which kinds of ministry employees are subject to the ministerial exemption. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Court held that a religious school teacher was a minister subject to the ministerial exception.[79] The Court looked to several factors which weighed in favor of protection under the ministerial exception, including the employee's significant religious training, their accepting a formal call to religious service, job duties that included

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74. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).

75. "Minister" for the purposes of the ministerial exception usually applies to all hired members of the church with an important religious functioning. Ministers are usually more than employees of the church; they are leaders, counsels, and friends. The ministerial exception allows churches and other religious organizations the select the best leaders for their congregation based on factors and "fit" that might not otherwise be relevant to traditional employment determinations.

76. *See* Geoffrey A. Mort, *Freedom to Discriminate: The Ministerial Exception Is Not for Everyone – or Is It?*, NYSBA (Oct. 31, 2022), https://nysba.org/freedom-to-discriminate-the-ministerial-exception-is-not-for-everyone-or-is-it/ [https://perma.cc/A8PK-44E4] ("Widespread application of the exception has reached the point where there is growing concern about it potentially eviscerating the civil rights of employees of organizations with even tenuous ties to religion.").

77. *Hosanna-Tabor*, 565 U.S. at 188 (holding that the "'ministerial exception,' grounded in the First Amendment . . . precludes application of [employment-discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers.").

78. *See id*. at 181 (holding a religious schoolteacher is a minister); *but see* Clapper v. Chesapeake Conference of Seventh-Day Adventists, 166 F.3d 1208 (4th Cir. 1998) (holding a religious schoolteacher is not a minister).

79. *See Hosanna-Tabor*, 565 U.S. at 181 (holding a religious schoolteacher is a minister).

conveying the religious message of the church, providing religious instruction, their involvement in transmitting the faith to church members, and their title as a commissioned or ordained minister.[80]

More recently, the Supreme Court strongly reinforced the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru*[81] and its companion case, *St. James School v. Biel*.[82] These cases involved two private Catholic schools under the Archbishop of Los Angeles. Each school professed a commitment to providing "religious instruction, worship, and personal modeling of the faith," and each expressed its intent to hold its teachers to those standards.[83] The teachers involved in both cases had some religious training and taught religious subjects.[84] They also prayed with students each day and counseled them in the Catholic faith.[85] The schools claimed that the ministerial exception gave them the authority to dismiss the plaintiff teachers in both cases for underperformance.[86] The teachers, in response, claimed that they were not "ministers" within the meaning of the term as applied to the ministerial exception.[87] The Court held for the schools.[88] In its decision, the Court grounded the ministerial exception in the Free Exercise and Establishment Clauses, holding that the clauses support the "autonomy" of religious institutions "with respect to internal management decisions that are essential to the institution's central mission"[89] The Court also emphasized that many factors may be important in determining whether an employee qualifies as a "minister," and emphasized that no single factor, such as formal religious title or specialized religious training, is dispositive.[90] Instead, the Court held that the focus should be on "what the employee does" and how close their activities are to the central purpose of the religious institution.[91]

In addition to federal rules restricting workplace discrimination, many states have their own individual anti-discrimination laws that prohibit discriminatory hiring practices.[92] The extent and application of these laws

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80. *See id.* at 190–191.
81. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).
82. *See* St. James School v. Biel, 140 S. Ct. 2017 (2020).
83. *See Our Lady of Guadalupe Sch.,* 140 S. Ct. at 2052.
84. *Id.* at 2057.
85. *Id.*
86. *Id.* at 2058.
87. *Id.*
88. *See id.* at 2066–2067.
89. *Id.* at 2054.
90. *Id.* at 2058.
91. *Id.* at 2063.
92. *See, e.g.,* Gabriel v. Immanuel Evangelical Lutheran Church, Inc., 640 N.E.2d 681 (Ill. App. Ct. 1994); Montrose Christian Sch. Corp. v. Walsh, 770 A.2d 111, 114 (Md. App. Ct. 2001); Porth v. Roman Cath. Diocese of Kalamazoo, 532 N.W.2d 195, 197 (Mich. Ct.

varies by state.[93] Many state courts have applied the ministerial exception to state anti-discrimination laws, protecting religious organizations from anti-discrimination liability at the federal and state levels.[94] Since the First Amendment's Free Exercise and Establishment Clauses have been incorporated to apply to state governments,[95] the ministerial exception applies to limit the application of state anti-discrimination laws to churches.

2. Employee Firing

This section discusses issues related to termination that are likely to arise in ministry contexts, and the importance of churches complying with legal restrictions, reporting requirements, and other regulations implicated by the decision to terminate an employee.

a. Discriminatory Termination

Anti-discrimination discussed above in connection to hiring decisions apply throughout the entire course of employment.[96] Thus, as discussed below, religious organizations must continue to navigate anti-discrimination liability when making retention and termination decisions.

Religious organizations can employ workers indefinitely or for a set term.[97] Indefinitely employed workers are understood as "at will" workers, meaning both the employer and the employee can terminate employment

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App. 1995); Assemany v. Archdiocese of Detroit, 434 N.W.2d 233, 234 (Mich. Ct. App. 1988); Geraci v. ECKANKAR, 526 N.W.2d 391, 394 (Minn. Ct. App. 1995); Sabatino v. Saint Aloysius Par., 672 A.2d 217, 221 (N.J. Super. Ct. App. Div. 1996); Scheiber v. St. John's Univ., 600 N.Y.S.2d 734, 735 (N.Y. App. Div. 1993); Speer v. Presbyterian Child.'s Home & Serv. Agency, 847 S.W.2d 227, 228 (Tex. 1993); Jocz v. Lab. & Indus. Rev. Comm'n, 538 N.W.2d 588, 589 (Wis. Ct. App. 1995).

93. *See generally Employment Discrimination Laws: 50 State Survey*, JUSTIA L., https://www.justia.com/employment/employment-laws-50-state-surveys/employment-discrimination-laws-50-state-survey/#:~:text=For%20example%2C%20a%20state%20anti,age%2C%20disability%2C%20and%20sex [https://perma.cc/5M75-87CR].

94. *See* Madsen v. Ervin, 481 N.E.2d 1160 (Mass. App. 1985); Temple Emanuel of Newton v. Mass. Comm. Against Discrimination, 463 Mass. 472 (2012); Egan v. Hamline United Methodist Church, 2004 WL 771461 (Minn. App. 2004); Dignity Twin Cities v. Newman Ctr. & Chapel, 472 N.W.2d 355 (Minn. App. 1991); Logan v. Salvation Army, 809 N.Y.S.2d 846 (Sup. Ct. 2005).

95. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause); *see also* Everson v. Bd. of Ed. 330 U.S. 1 (1947) (incorporating the Establishment Clause).

96. *See supra* Part II.A.1.iii.

97. W. HOLLOWAY AND M. LEECH, EMPLOYMENT TERMINATION (2d ed. 1993).

at any time, without cause.[98] Although an employer need not provide a reason for the termination of an at will employee, they may not terminate an employee for prohibited reasons.[99] Thus, an employer may not legally terminate an employee who is a member of a protected class for discriminatory reasons that relate to their membership in that protected group.[100] While the ministerial exemption offers some protection to church employers that decide to terminate clergy for virtually any reason, religious organizations should exercise caution when navigating the termination of an at will employee who is a member of a protected class, especially if the nature of the employment is secular.[101]

Employees hired for a definite term cannot be dismissed without cause.[102] Their employment naturally terminates at the end of their contractual term, and to terminate the relationship prematurely an employer must show good cause.[103] Churches may hire term employees for short-term contracting, volunteer work, or other various roles that do not require indefinite employment. This may be especially common for employees hired for holiday seasons or to manage summer programs and similar seasonal functions. Should a religious organization terminate a term employee prematurely, it is important that the church have—and be able to document—good cause for doing so.[104] Notably, due to the ministerial exemption doctrine that insulates most church decisions about their religious leadership, courts are generally unwilling to interfere with religious organizations' decisions to terminate ministers and other clergy, regardless of the nature of their employment contracts.[105]

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98. *Id.*

99. *Id.*

100. *Id.*; 42 U.S.C. § 2000e-2(e)(1).

101. Unacceptable reasons for termination at will employees vary by state. Some of the most common include traditional anti-discriminations statute protected classes, including religious, race, sexual orientation, gender, disability, and age. Some courts have even found that termination of at will employees that do not overtly raise anti-discrimination concerns can still be improper where they violate public policy. *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

102. W. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION (2nd ed. 1993).

103. *Id.*

104. Normally, good cause includes basic employment contract violations, as well as misconduct, negligence, and exceptionally poor performance. Churches are unique in that doctrinal and moral deviation from church standards can be sufficient good cause.

105. *See, e.g*, *Hosanna-Tabor*, 565 U.S. at 171; *Our Lady of Guadalupe Sch.*, 591 U.S. at 591.

b. Negligent Retention

Just as employers may be subject to liability for wrongfully terminating an employee, they may also face exposure to legal risks for failing to terminate an employee that ought to be fired.[106] Thus, even when a church exercises reasonable care in hiring and supervising an employee, it can still be directly responsible for employee misconduct if said employee is not rightfully terminated after the church acquires information suggesting that the employee poses a risk of harm to others. In negligent retention cases, religious organizations usually already have information or knowledge of information, suggesting that an employee's behavior creates a reasonable risk of harm to others.[107] A religious organization can be held directly liable to injured parties for negligent retention when the organization fails to act on this information by terminating the employee.[108]

For example, in *Mills v. Deehr,* a plaintiff successfully stated a claim for negligent retention based on a church's refusal to terminate a bishop who sexually assaulted parishioners.[109] The plaintiff established that the church had reason to know of the sexual abuse perpetuated by the bishop.[110] Specifically, the bishop had displayed a pattern of extremely inappropriate and alarming behavior and conducted himself in a manner such that many other clergy members would have taken notice.[111] Because this pattern of behavior should have alerted other church officials to potential abuse, the court held that the church had reason to know the abuse was taking place. The church was therefore liable for failing to dismiss the bishop and thus enabling him to harm the plaintiff.[112]

Sexual misconduct and clergy malpractice are two of the most common employee behaviors that create a reasonably foreseeable risk of harm for which a religious organization might be directly liable.[113] Hiring,

106. *See* HOLLOWAY & LEECH, *supra* note 102.

107. Mills v. Deehr, No. 82799, 2004 WL 1047720 (Ohio App. 2004) (discussing where organizational knowledge that a priest frequently had victims in his room late into the night was sufficient to establish a claim for negligent retention); Hutchinson v. Luddy, 1999 WL 1062862 (Pa. 1999) (discussing where knowledge of actual conduct that caused harm was sufficient to establish a claim for negligent retention).

108. *Id.*

109. No. 82799, 2004 WL 1047720.

110. *Id.* at *7.

111. *Id.* at *5.

112. *Id.*

113. *See generally* CHURCH LAW & TAX, § 10.09 ("Many of the cases in which churches have been sued for negligent supervision involve incidents of child molestation. While the parents may allege that the church was negligent in selecting or retaining the offender, they

supervision, and termination policies or procedures that fail to identify and address the risk of sexual misconduct expose religious organizations to direct tort liability.[114] Choosing to hire employees that are underqualified for certain positions within the church may also raise concerns that the church will be subject to direct liability for any resulting harms.[115]

3. Compensation

Typically, employees of religious organizations are compensated in some form. Churches must ensure that they are providing fair and adequate compensation to such employees as required by applicable state and federal laws and must also ensure that they are providing sufficiently safe work environments for employees and volunteers alike.

Workplace accidents and injuries can be common, especially amongst religious organizations. It is inevitable that things will sometimes go wrong; accidents *will* happen. It is important for churches to be adequately prepared to address injuries their workers sustain while on the job. All states have workers compensation laws, which provides automatic payouts to injured employees in exchange of their rights to sue the employer directly.[116] Employers must buy in to workers compensation systems through workers compensation insurance coverage.[117] Many states require churches and other religious organizations to participate in state workers compensation plans, while other state statutes are ambiguous about whether religious organizations must maintain mandatory coverage.[118] It is best practice for a religious organization to maintain workers' compensation coverage for each employee unless they are specifically exempted by state statute. Otherwise, courts have been unwilling to apply

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also may assert that the church was negligent in supervising the offender and its premises and activities.").

114. HELENA VAN COLLER & IDOWU A. AKINLOYE, DEATH IN WORSHIP PLACES: EVALUATING THE ROLES OF RELIGIOUS ORGANISATIONS AND STATE GOVERNMENTS IN REDUCING THE RISKS OF RELIGIOUS DISASTER (2021) (describing workplace injuries and deaths and the data surrounding these issues.).

115. Depending on the church sponsored activity or program, certain abilities or training may be required. For example, clerical training, CPR certification, or a valid driver's license.

116. *See generally* CHURCH LAW & TAX, § 8.07.

117. TRACY BATEMAN FARRELL ET AL., , 82 AM. JUR. 2D WORKERS' COMPENSATION § 8.

118. *See, e.g.*, CAL. LAB. CODE § 3207; IOWA CODE ANN. § 87.1; *see also* Roman Cath. Archbishop v. Indus. Accident Comm'n, 230 P. 1 (Cal. Ct. App. 1924); Gardner v. Tr. of Main St. Methodist Episcopal Church, 250 N.W. 740 Iowa Ct. App. 1933); Meyers v. Sw. Region Conf. Assoc., 88 So.2d 381 (La. Ct. App. 1956); Schneider v. Salvation Army, 14 N.W.2d 467 (Minn. 1944).

religious or ministerial exceptions.[119] Indeed, it may be best to maintain workers' compensation coverage, despite any state statutory exemptions for churches, in order to minimize direct liability to employees for potential injury on the job.[120]

The Fair Labor Standards Act requires that religious or secular employers comply with basic wage and hour standards.[121] Such standards include equal pay between genders and time-and-a-half compensation for all hours that exceed a 40-hour work week.[122] The Fair Labor Standards Act does not apply to all types of businesses and may only apply to certain parts of the church and certain classes of church employers.[123] For example, FLSA principles do not apply to churches, but they may apply to religious schools, daycare centers, and hospitals.[124] Churches uncertain about FLSA applicability may want to adhere to these legal requirements for all employment positions within the church for consistency and compliance purposes, and because failure to comply with FLSA regulations can subject an organization to substantial risk of liability for unpaid wages and penalties.[125]

Labor and employment law is a vast and complicated area of law that affects churches in many aspects. Religious organizations should be aware primarily of the types of employees they are employing, the hiring and termination requirements of those employees, and the applicability of various federal laws to their employment behavior. A basic understanding of this area of law will enable churches to avoid the most egregious employment law violations and provide and safer and more equitable workplace.

4. The Pastor-Church Relationship

Many ministers are both employees and leaders of their churches. Thus, clergy members often confront numerous employment law issues that are unique to their status as church officials. This section addresses several such issues, including clergy employment contracts, compensation matters, concerns related to dismissing clergy members from church

119. Victory Baptist Temple v. Industrial Comm'n, 442 N.E.2d 819 (Ohio Ct. App. 1982), *cert. denied* 459 U.S. 1086 (1982); S. Ridge Baptist Church v. Indus. Comm'n, 676 F. Supp. 799 (S.D. Ohio 1987); United States v. Lee, 455 U.S. 252 (1982).

120. *See generally* Church Law & Tax, § 8.07–8.09.

121. 29 U.S.C.A § 203.

122. 29 U.S.C. § 207(a)(1).

123. *See* 29 U.S.C § 213.

124. *See generally* CHURCH LAW & TAX, § 8.08.01.

125. *See* CHURCH LAW & TAX, § 8.07.02.

leadership and employment, and the resolution of legal disputes between churches and their ministers.

a. The Contract

The employment status of a minister is traditionally established by a written contract signed by both parties.[126] However, when employment agreements are made verbally and informally, without a written document, the parties' subsequent conduct may create an implied contract that is legally binding. Thus, if both parties clearly act in ways that indicate that an employment agreement exists, their conduct—such as exchanging salary payments for pastoral work—creates an implied contract.[127] Such informal arrangements may be more common in ministry settings than in other employment contexts, since religious organizations and clergy members may rely on the good-faith and honesty of their coreligionists and all parties' collective sense of religion mission. Still, churches, pastors, and other church employees should be wary of relying on implied contracts, as it is difficult to enforce a contract without written conditions.[128] In fact, when an implied contract exists, a civil court may not hear wrongful termination or discrimination claims; it may only determine whether the church's employment action was proper according to its bylaws.[129]

Even when formalized in writing, employment contracts do not always address all pertinent aspects of employment. Courts often find vague or incomplete contracts unenforceable. For example, one church abandoned its employment agreement with a pastor right before his duties officially began.[130] When he sued for breach of contract, the court found that the contract was too vague and indefinite to be enforceable because it did not properly describe the nature and extent of the pastor's duties.[131] To protect themselves from wrongful termination, clergy members should seek employment opportunities established in writing in enforceable contracts containing terms for compensation, duties, and engagements, and length of employment.

126. *See* BASSETT ET AL., *supra* note 18.
127. *Id.*
128. *Id.*
129. *See* Vincent v. Raglin, 318 N.W.2d 629, 631 (Mich. 1982).
130. *See* McTerry v. Free For All Missionary Baptist Church, 200 S.E.2d 915, 915–916 (Ga. 1973) (holding that contracts without clear terms may be unenforceable).
131. See *id.* at 916.

b. Compensation

Due to unique tax issues that apply to churches,[132] compensation for clergy members differs from traditional employment compensation. Because tax-exempt organizations cannot be structured to benefit private individuals, the extent and nature of compensation for church employees must be limited.[133] Payment to a minister of an unreasonably high salary can result in the revocation of a church's tax-exempt status.[134] For example, one court affirmed the revocation of the tax-exempt status of a church that spent approximately 70 percent of its income on the living expenses of only 15 members,[135] while another court denied tax-exempt status to a church that paid for its ministers traveling expenses, loans, and gave fluctuating allowances.[136] Clergy members should be aware of the concept of reasonable compensation to ensure they are fairly and adequately paid for their service, though not more than the reasonable value of their services performed.

c. Termination

Due to the ministerial exception doctrine discussed above,[137] courts are hesitant to review employment disputes between churches and their ministers regarding termination.[138] As a result, ministers often have little to no recourse for termination, even where such termination is wrongful.[139] Some courts, however, brave employment disputes between churches and their clergy members where doing so does not require a court to interpret religious doctrine. For example, one court found that a pastor's claims against a church for breach of contract, wrongful eviction, and defamation did not implicate religious doctrine and could be evaluated by the courts.[140] However, rulings of this kind are uncommon. Usually, ministers contesting their dismissal or raising other claims for breach of contract

132. *See* BASSETT ET AL., *supra* note 18, at § 32.
133. I.R.C. § 501(c)(3).
134. *See* Harding Hosp., Inc. v. U.S., 505 F.2d 1068 (6th Cir. 1974); Mabee Petroleum Corp. v. U.S., 203 F.2d 872, 875, 877 (5th Cir. 1953).
135. Basic Unit Ministry of Alma Karl Schurig v. Comm'r, 670 F.2d 1210, 1212 (D.C. Cir. 1982).
136. *See* Unitary Mission Church of Long Island v. Comm'r, 74 T.C. 507, 513–15 (1980).
137. *See supra* Part I.A.1.iv.
138. *See Hosanna-Tabor*, 565 U.S. at 188.
139. *See id.*
140. *See* Gregorio v. Hoover, 238 F.Supp.3d 37, 47–48 (D.D.C. 2017).

must seek redress within their ecclesiastical hierarchy for termination disputes.[141]

d. Formal Resolution of Church Disputes

The First Amendment and decades of Supreme Court precedents generally prohibit state and federal courts from interpreting contractual provisions that invoke ecclesiastical doctrine, discipline, church membership, custom, clergy qualification, or faith.[142] Given how difficult it is for civil courts to enforce religious contracts in light of First Amendment protections,[143] it may be wise for both churches and ministers to include alternative dispute resolution (ADR) provisions in clergy employment agreements.[144] Arbitration, a form of ADR, allows parties to bypass the costly, drawn-out process of civil litigation and instead elect to resolve their case in front of an impartial third-party arbitrator, who will issue a binding decision called an award.[145] Under the Federal Arbitration Act (FAA), arbitration awards are final and enforceable by civil courts.[146]

In a religious context, using arbitration to settle internal disputes protects the freedom of religious organizations to interpret and apply their own doctrine while also providing relief for wronged parties.[147] Within the Protestant Christian tradition, followers of Christ are to resolve disputes according to scripture by taking various internal measures to reconcile with each other before taking a dispute before church leadership and—if the dispute remains unresolved—to public courts.[148] Arbitration and other

141. Watson v. Jones, 80 U.S. 679, 680 (1871) (establishing judicial deference to religious authorities for ecclesiastical issues, such as contract disputes).

142. *Id;* Serbian Eastern Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 712–13 (1976) (protecting the decision of a church tribunal to dismiss a bishop from state court review under the First and Fourteenth Amendments); Jones v. Wolf, 443 U.S. 595, 609 (1979) (holding questions of church membership and discipline are matters of religious doctrine, which civil courts are prohibited from reviewing).

143. *See Watson*, 80 U.S. at 680.

144. BASSETT ET AL., *supra* note 18 at §§ 14, 15.

145. *See* Michael J. Broyde, Ira Bedzow, & Shlomo C. Pill, *The Pillars of Successful Religious Arbitration: Models for American Islamic Arbitration Based on the Beth Din of America and Muslim Arbitration Tribunal Experience*, 30 HARV. J. RACIAL & ETHNIC JUST. 33, 38–39 (2014).

146. Federal Arbitration Act, 9 U.S.C. § 10(a) (2002); *See* Broyde et al., *supra* note 145, at 39.

147. *See* Broyde et al., *supra* note 145, at 53–58.

148. *Matthew* 18:15–17 (English Standard Version); Ronald Colombo, *A Legal Analysis of Religious Arbitration*, CANOPY F. (Apr. 16, 2022), https://canopyforum.org/2022/04/16/a-legal-analysis-of-religious-arbitration/ [https://perma.cc/8BZE-DDJE] (explaining the history of arbitration within the Christian church).

forms of ADR may mirror the Biblical conflict resolution model and allow churches to resolve disputes privately, efficiently, and amicably.

However, the concept of religious arbitration may invoke concerns that parties involved in ADR might feel coerced by their religious community to participate in the church's chosen dispute resolution forum, or that a member of the public might unknowingly sign an arbitration provision without recognizing the religious nature of the arbitration process.[149] Under the FAA, a court may refuse to enforce an award if it was obtained through fraud, or duress, or if it was the product of fraud, bias, corruption, or misconduct on the part of the third-party arbitrator.[150] If a church opts to include an arbitration provision in its contracts, a formal, detailed, and transparent framework for arbitration is essential in minimizing the possibility of a court vacating the arbitration award.[151]

5. Authorities, Rights, and Privileges

Clergy members enjoy many legal immunities and privileges as employees of religious organizations.[152] The basis for these protections extends from the First Amendment and a long history of cautionary religious jurisprudence.[153] While each state has different laws regarding clergy immunities and privileges, courts are generally hesitant to intervene in matters of the church.[154] As discussed in this section, such hesitancy is an explicit doctrine in certain areas, including privileged communication and exemption from certain social obligations.

a. Clergy-Penitent Privilege

One of the most striking legal privileges enjoyed by clergy members is the clergy-penitent privilege, an evidentiary doctrine that protects ministers from being forced to testify in court about pastoral discussions with their constituents.[155] Testimonial privilege is rooted in the concept of clergy members as a confidants; members of the church often confide in

149. Colombo, *supra* note 7, at 2.

150. *See* Federal Arbitration Act, 9 U.S.C. § 10(a) (2002), which further contains provisions that allow courts to vacate arbitration awards not pursuant to the original valid agreement between parties, or when no agreement existed at all.

151. *See* Broyde et al., *supra* note 145 at 46, for a complete list and explanation of six 'pillars' underlying the arbitration process successfully used by both the Jewish and Muslim traditions in arbitrating internal religious disputes.

152. *See*, People v. Bragg, 824 N.W.2d 170, 183–84 (Mich. App. 2012).

153. *See,* Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in Am., 860 F.Supp. 1194, 1199 (W.D. Ky. 1994), *aff'd*, 64 F.3d 664 (6th Cir. 1995).

154. *See, e.g.,* Seefried v. Hummel*,* 148 P.3d 184, 191 (Colo. App. 2005).

155. UNIF. R. EVID. 505.

their religious leaders to unburden themselves.[156] Information shared with church members may be embarrassing, troubling, or even incriminating. The law recognizes the value of parishioner-minister relationships, and therefore protects the contents of such discussions as privileged.[157] Thus, a minister cannot be forced to disclose the nature or content of communications confidentially made to them by parishioners while they were acting professionally as a spiritual advisor.[158]

Even nonverbal communication may be privileged if made in the proper context.[159] To illustrate, one court protected the testimony of a minister who received a gun from an elderly man.[160] The court emphasized that the elderly man's act relayed his intent to confide in the pastor regarding his use of the gun.[161] Even considering the length some courts take to protect communications, there are situations where interactions between ministers and others are not considered privileged.[162] When a minister forms a personal impression of a person or observes a person's mental state, such recollections are not considered protected by clergy-penitent privilege.[163]

A pertinent aspect of clergy-penitent privilege is determining which clergy positions qualify for protection. While each state has different qualifications, privilege is generally limited to ordained clergymen, priests, and ministers of the gospel.[164] Communications are often not protected when made to ministers who are "self-ordained"[165] or to church corporations as a whole.[166] Church staff members lacking formal ordination may be protected by clergy-penitent privilege depending on

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156. *See* Sonya Cook, Biblical Pastoral Counseling: An Integrative Approach to Healing, at 48– 51 (Apr. 2022) (Ph.D. dissertation, Liberty University).

157. *See* BASSETT ET AL., *supra* note 18 at § 20.

158. *See* UNIF. R. EVID. 505; Simpson v. Tennant, 871 S.W.2d 301, 312 (Tex. Ct. App. 1994). *See also* Church of Jesus Christ of Latter-Day Saints v. Superior Ct. of Ariz., 764 P.2d 759, 764 (Ariz. Ct. App. 1988) (discussing waiver of privilege).

159. BASSETT ET AL., *supra* note 18 at § 20.

160. Lewis v. N.Y. Hous. Auth., 542 N.Y.S. 2d 165, 165 (1989). In this case, the minister was both an assistant pastor and a local police officer, which sparked the litigation surrounding his duty to report alleged criminal activity.

161. *Id*. at 239–240.

162. *See, e.g.*, Buuck v. Kruckeberg, 95 N.E.2d 304, 307 (Ind. Ct. App. 1951).

163. *Id.*

164. State v. Glenn, 62 P.3d 921, 925 (Wash. Ct. App. 2003) (holding that a person must be ordained to be considered a "clergy" for the purposes of privilege).

165. La. v. Hereford, 518 So. 2d 515, 516–517 (La. Ct. App. 1987) (holding a convicted felon who claimed to be "self-ordained" did not fall under the definition of "clergy" according to the state's statute).

166. *See* U.S. v. Luther, 481 F.2d 429, 432 (9th Cir. 1973) (holding an email sent to a church organization was not protected by privilege and defining a cleric as a "natural person").

applicable state law. Some states have a stricter approach to clergy privilege;[167] one court in Washington did not afford clergy-penitent privilege to a nonordained church counselor because the statements made to her by a babysitter charged with rape were not made during "confession."[168] However, several states have extended the privilege to communications made to church staff members holding positions with pastoral functions or to communications made by individuals who reasonably believed that the staff member was a pastor.[169] Other courts decided to grant the clergy-penitent privilege to nonordained religious counselors due to concerns about the effect of limiting privilege exclusively to licensed ministers.[170] For example, one California court emphasized that, without privilege protection, certain volunteer ministry programs, such as prison ministry, would effectively shut down considering their dependency on volunteer ministers operating in confidentiality.[171]

Clergy-penitent privilege is often applied when information is disclosed through therapeutic counseling and marriage counseling, regardless of whether the counselee is a member of the church.[172] In some states, however, privilege is waived when the counselee discloses the same communication to another person.[173] For example, an Arizona court held that a criminal defendant waived clergy-penitent privilege when he divulged incriminating information to both his pastor and his wife; the court ruled that even information shared within two confidential relationships waives the clergy-penitent privilege.[174]

Lastly, it is important to note that the confidential nature of the clergy-penitent relationship does not prevent ministers from contacting the police

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167. *See, e.g.*, ARIZ. REV. STAT. § 13-4062(3); WASH. REV. CODE § 5.60.060(3).

168. Wash. v. Buss, 887 P.2d 920, 923–24 (Wash. Ct. App. 1995); *see also* Wash. v. Martin, 975 P.2d 1020, 1026 (Wash. 1999) (holding that the church, not the courts, should determine what "confession" and "discipline" mean).

169. *See* UNIF. R. EVID. 505.

170. *See* U.S. v. Dillard, 989 F. Supp. 2d 1155, 1157 (D. Kan. 2013) (holding a lay prison minister, despite lack of formal ordination, qualified for privilege due to the regular, explicitly ministerial nature of her prison visits); *In re* Verplank, 329 F. Supp. 433, 436 (C.D. Cal. 1971) (extending privilege to lay counselors assisting a licensed minister in counseling the church congregation due to the vast number of members seeking counsel).

171. *Dillard*, 989 F. Supp. 2d at 1166.

172. *See, e.g.,* Kohloff v. Bronx Sav. Bank, 233 N.Y.S.2d 849, 850 (Civ. Ct. 1962); Ziske v. Luskin, 524 N.Y.S.2d 145, 146–147 (Sup. Ct. 1987).

173. *See Church of Jesus Christ of Latter-Day Saints*, 764 P.2d at 767 (holding the counselee waived his privilege when he disclosed the same information to both the police and his minister).

174. Ariz. v. Baca, No. 1 CA-CR 08-0817, 2009 WL 5156236 at *4–5 (Ariz. Ct. App. 2009).

regarding information disclosed during a counseling session.[175] While the minister may be barred from providing testimony in court, the police can use the information to start an investigation.[176] Thus, a New York court found a pastor did not violate his privilege by contacting the police after a woman confessed to murder during a counseling session; while his testimony was barred, the police were able to gather enough evidence to arrest and convict the woman of murder.[177]

b. Exemptions

Clergy members also enjoy exemptions from various legal obligations such as jury duty[178] and military duty.[179] In many states, clergy are exempt from jury duty so that their work is not interrupted.[180] Even where clergy are not exempt by statute, a judge may dismiss them if they can show undue hardship or inconvenience resulting from their service.[181] Although clergy members are not exempt from the selective service registration process for compulsory military service, they are exempted from actual service.[182] However, only duly ordained ministers who regularly preach and teach the principles of a religious organization as a vocation are exempt.[183] Part-time ministers who preach irregularly will not qualify for an exemption.[184] For example, one court denied military exemption to a minister who worked full-time in a secular position while also serving part-time in a ministry position.[185] Another court denied exemption to a minister who performed ministerial duties for only one-third of his total working hours.[186] One court went so far as to hold that a minister should devote at least 160 hours every month to ministry to qualify for the exemption.[187] Conversely, a full-time minister who works in a part time secular position may qualify for exemption from military service, as some

175. N.Y. v. Ward, 604 N.Y.S.2d 320, 320 (N.Y. App. Div. 1993).
176. *Id.*
177. *Id.*
178. Rawlins v. Ga., 201 U.S. 638, 640 (1906).
179. 50 U.S.C. app. § 453(a); 50 U.S.C. app. § 456(g)(1).
180. *Rawlins*, 201 U.S. at 640.
181. *See* BASSETT ET AL., *supra* note 18, at § 20.
182. 50 U.S.C. app. § 453(a); 50 U.S.C. app. § 456(g)(1).
183. 50 U.S.C. app. § 466(g)(2).
184. *See* U.S. v. Burgueno, 423 F.2d 599, 600 (9th Cir. 1970); U.S. v. Isenring, 419 F.2d 975, 979 (7th Cir. 1960); U.S. v. Kenstler, 250 F.Supp. 833, 836 (W.D. Pa. 1966), *aff'd* 377 F.2d 559 (3d Cir. 1967).
185. *Burgueno*, 423 F.2d at 600.
186. *Isenring*, 419 F.2d at 979.
187. *Kenstler*, 250 F.Supp. at 836.

ministers rely on a secondary income for financial support.[188] For example, the Supreme Court found that a minister still qualified for military exemption even though he held a secondary job working as a radio technician for five hours each week.[189]

B. Quantitative Findings on Employment Law and Ministry

Employment law is a significant source of potential legal liability for churches. Nearly one-third (1,837 out of 5,822 cases) of all the reported cases identified by the Study involved employment law disputes to which churches were a party.[190] Moreover, each of the four Protestant denominations involved in the largest number of cases—Methodist, Baptist, Church of Christ, and AME—have distributions of case types that mirror the aggregate profile for employment law issue encounters. Church of Christ, Disciples of Christ, Lutheran, and United Methodist congregations are particularly likely to encounter employment law issues, with 30–40% of the cases these congregations litigated involving employment law issues. For Adventist and Assemblies of God congregations, employment law is an especially common source of litigation, with nearly 50% of the cases these congregations encountered involving employment law issues. Accordingly, it is important to consider which factors—including knowledge, training, congregation size, access to resources, and church demographics—influence a religious organization's likelihood of and leave a congregation specifically vulnerable to encountering employment law litigation.

The charts provided below provide a visual representation of the results of the Study's analysis of reported employment law cases involving church parties. Section II.B.1 shows the relationship between congregation size and legal encounters with employment law. Section II.B.2 illustrates the relationship between the ministry's self-reported knowledge of employment law issues and how often the ministry encounters employment law issues. This section also charts the relationship between religious denomination and the training that ministers in the denominations studied reported receiving in employment law. Section II.B.3 focuses on the resources that the various denominations reported using to confront employment law issues if litigation arises. Finally, Section II.B.4 illustrates the relationship between a congregation's socioeconomic status and the resources that it uses to address employment law litigation.

188. Dickinson v. U.S., 346 U.S. 389, 395–396 (1953).
189. *Id.*
190. *See supra* Part I.A.2.

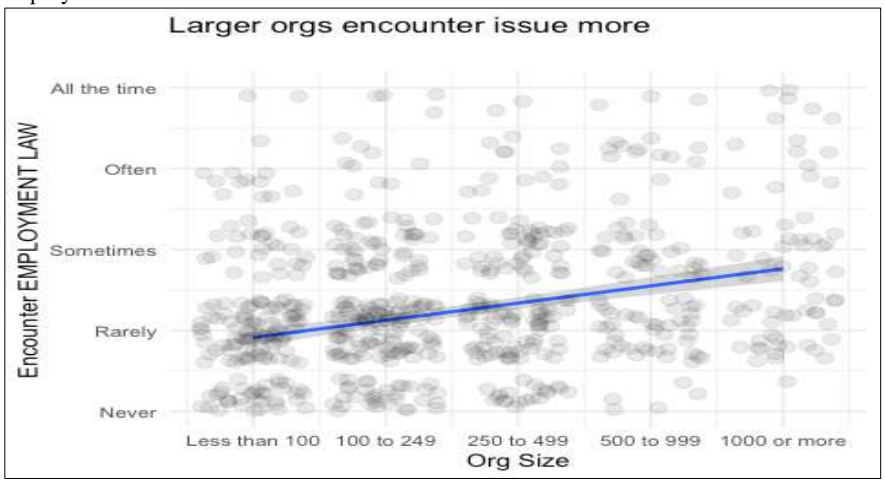
1. Congregation Size

Religious organizations with more members reported encountering employment law issues more frequently than churches with fewer members (positive correlation of 0.26). In particular, the largest organizations (1,000+ members) reported mostly encountering employment law issues "sometimes," while the smallest organizations (less than 100 members) mostly reported "rarely" or "sometimes" encountering employment law issues. This result could suggest that even if employment law issues are among the most common litigation that churches and religious organizations must confront, the risk of liability in general is modest. Consequently, while it would be advantageous for larger organizations to promote greater training in employment law, the risk of liability should not be overestimated and should serve as a significant source of concern.

The observation that the risk of liability is modest and should not be overestimated is bolstered by the churches and organizations themselves, considering that there is only a slight positive relationship between congregation size and perceived risk of encountering employment law issues (positive correlation 0.2), with most congregations reporting only having a "slight risk" of encountering litigation.[191]

Likewise, religious organizations with more employees report encountering employment law issues much more often than smaller organizations (positive correlation of 0.4). Most respondents in our sample represented organizations with less than 15 employees, but the relationship

191. Study data analysis produced the following graphical depiction of the relationship between congregation size and the frequency at which organizations encounter employment law issues:

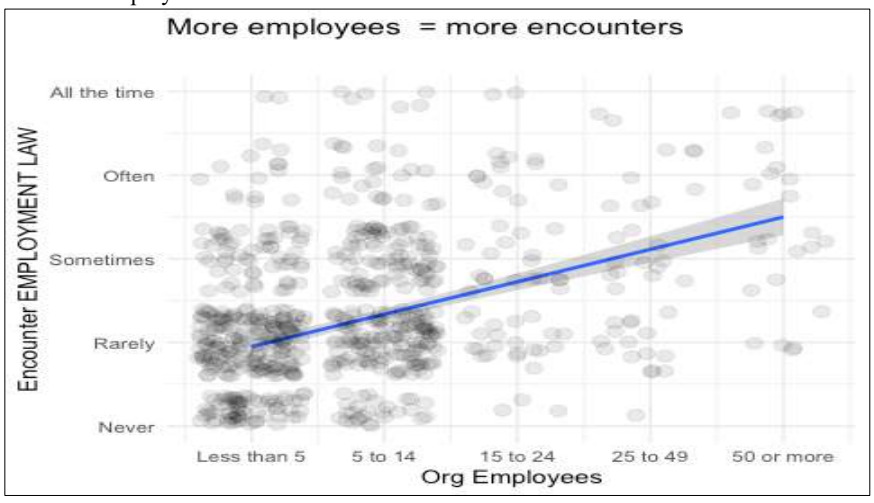


between employee number and legal encounters is still strong. The largest organizations (50+ employees) usually encounter employment law "sometimes" to "often" with a few claiming to encounter this issue "all the time." By contrast, small organizations with less than five employees report rarely encountering employment law. This result could suggest that even though the risk of litigation associated with employment law is rather modest overall, the risk is significantly elevated when the organization has a larger workforce. Moreover, given that churches and religious organizations routinely contend with hiring, firing and compensation issues, it is sensible that organizations with more employees face a heightened risk of encountering these issues. Accordingly, it would be wise for organizations with many employees to place an emphasis on legal knowledge and training in the area of employment law.[192]

2. Knowledge and Training

Similar to congregation size, the church leaders' knowledge of employment law and the frequency with which they encounter such issues have a positive correlation. Church leaders that reported having more knowledge of employment law also report encountering employment law issues slightly more often, but the correlation is relatively weak (positive correlation of 0.13). Most people report having "fair" knowledge of employment law and rarely encounter the issue; and those with excellent knowledge report only rarely encountering employment law.

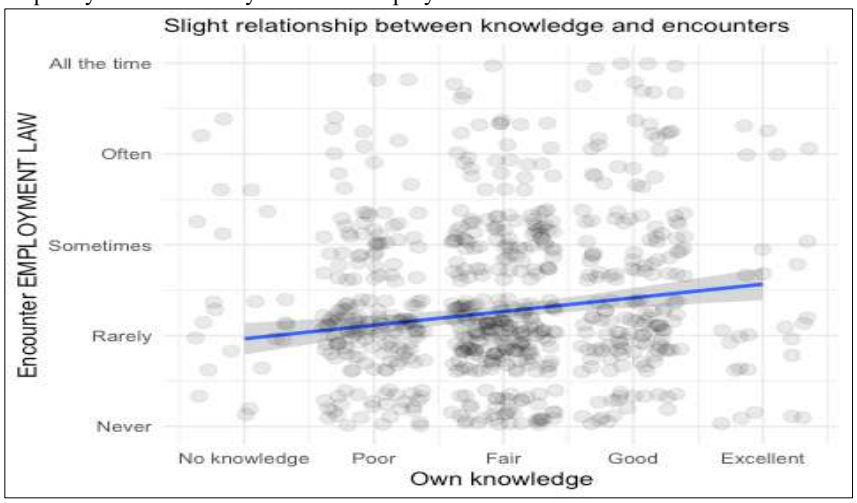
192. Study data analysis produced the following graphical depiction of the relationship between the number of employees at a church and the frequency at which organizations encounter employment law issues:



This result could support the notion that many congregations, especially those reporting that they rarely encounter the issue, may want to emphasize knowledge and training in other areas of law before they attempt to mitigate the risks posed by employment law litigation. This idea is especially true when considering that there is no relationship between one's own knowledge and perceived risk of encountering employment law issues, with most respondents reporting a "slight risk" regardless of their own knowledge.[193]

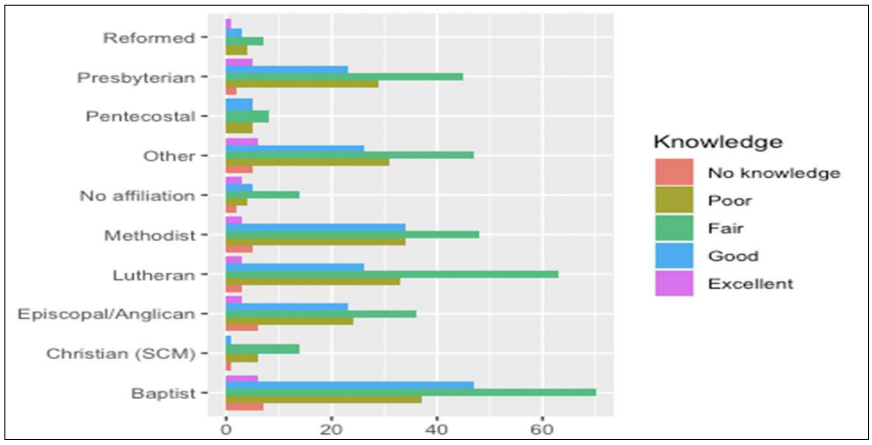
Additionally, there is no obvious relationship between churches' affiliations and ministers' knowledge of employment law. In particular, most respondents rate their knowledge as either "poor," "fair," or "good" regardless of denomination. Notably, large numbers of Presbyterian, Methodist, Lutheran, Baptist and "Other" churches (80–100 individual churches) report having "fair" or "good" knowledge regarding employment law. These results could suggest that congregations may want to address deficiencies in legal knowledge in other legal areas, where the results broadly registered "no knowledge" or "poor" knowledge, before considering ways to improve employment law legal knowledge.[194]

193. Study data analysis produced the following graphical depiction of the relationship between the level of employment law knowledge church leaders report having and the frequency with which they encounter employment law issues in their work:



194. The following chart depicts Study findings on relationships between denomination and clergy knowledge of tort law:

The levels of clergy legal training and the frequency with which they encounter employment law have no statistically or substantively meaningful relationship. Similarly, the training received on employment law and organization denomination have no relationship. By percentage, it appears that Pentecostals report more training than others, but the Study sample only has 18 Pentecostal respondents. As a result, this indication is not fully reliable. Otherwise, the Study indicates that the overwhelming majority of congregations have low-levels of training in employment law, with 60–80% of every measured denomination (other than Pentecostals) reporting that they either have "no training" or "poor" training in employment law. This result could suggest that every denomination could



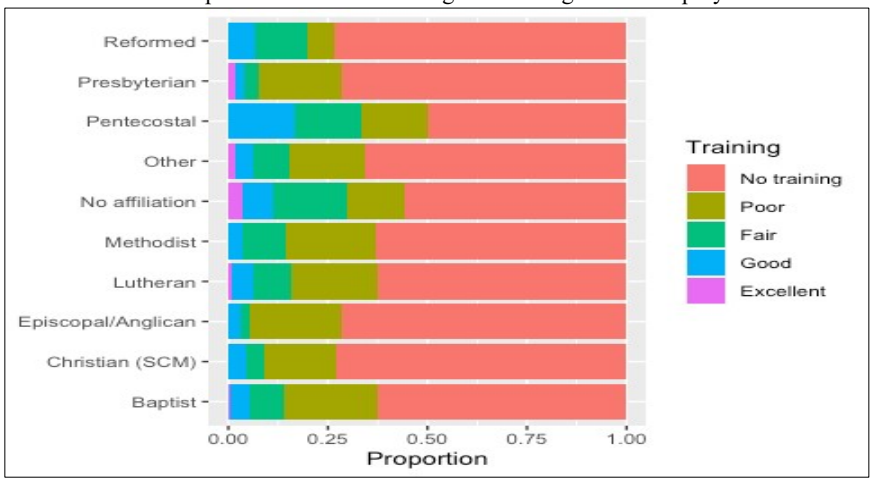
better prepare for future employment law litigation by improving legal training in employment law.[195]

3. Resources Used by Congregations

The legal resources used by churches and religious organizations and the frequency they encounter employment law issues have no clear statistical or substantive relationship. Likewise, the resources respondents use to address employment law issues and their knowledge regarding employment law have no clear relationship. Those who do not use any legal resources ("none") report less knowledge of employment law, but the correlation is not strong or meaningful. Moreover, like knowledge, the resources respondents use to address employment law issues and the training they received in employment law have no relationship. In particular, 63% of respondents report "no training" in employment law, and this fact and the kinds of legal resources used have no relationship.

In general, the most common resources used are outside counsel, denominational resources, and reference materials. Additionally, the denomination and the types of resources used to confront employment law issues have no obvious relationship.

195. The following chart illustrates the relationship between denominational affiliation and ministers' reported levels of legal training on employment issues:

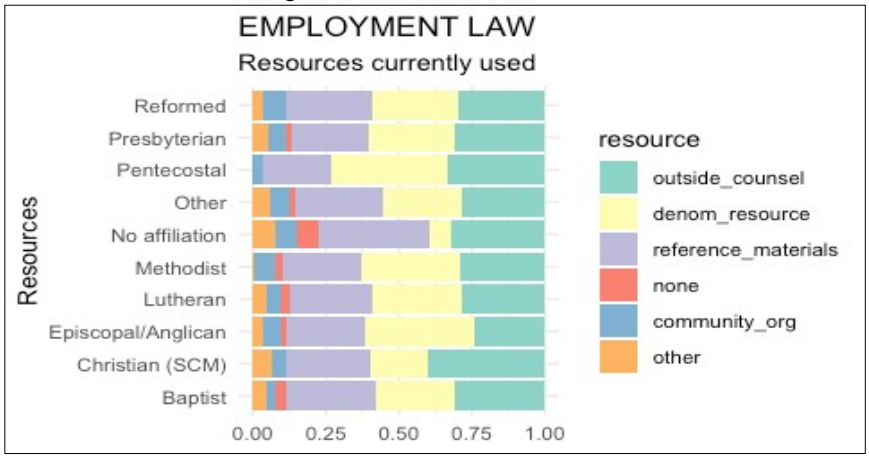


However, it is worth noting that organizations with no affiliation report very rarely using "denominational resources."[196]

4. Socioeconomic, Race/Ethnicity and Location Considerations

The socioeconomic status of a religious organization is a factor that plays a significant role in how these organizations respond to and address tort litigation. In particular, when faced with legal issues, all organizations look primarily to (1) outside counsel, (2) denominational resources, and (3) reference materials. However, the use of outside counsel is stratified by socioeconomic status, with higher-income organizations using outside counsel more frequently than organizations with lower incomes. In the case of employment law, this relationship is perfectly monotonic (always increasing with socioeconomic status). By contrast, denominational resources and reference materials are much more evenly distributed and are used roughly equally among organizations with varying socioeconomic backgrounds. Broadly, this finding suggests that outside counsel may be the preferred resource when faced with employment law issues, but professional legal services are expensive and disproportionately available to wealthier organizations.

196. The following graphic charts the kinds of resources used by clergy of various denominations to deal with legal issue:



The availability of high-quality resources or reference materials has the potential to help organizations of all socioeconomic backgrounds better confront employment law issues.[197]

The Study's sample of respondents included 83% majority-white organizations. Based on this response rate, there is no observable relationship between the organization's majority race and resources used to address employment law issues. Similarly, our research indicates that an organization's majority race and frequency of encountering employment law issues have no relationship. This finding may suggest that with regards to employment law, race/ethnicity does not play a major role generating or addressing litigation.

Similarly, our research suggests that state location and frequency of encountering employment law issues have no relationship. Our sample has many southern/midwestern respondents, but they appear to encounter this issue at an equal rate. In addition, state location and resources currently used by congregations when faced with employment law issues have no observable relationship.

Thus, state location, like race/ethnicity, does not appear to play a major role in whether religious organizations face employment law litigation, or how these organizations seek to address employment law issues when they arise.[198]

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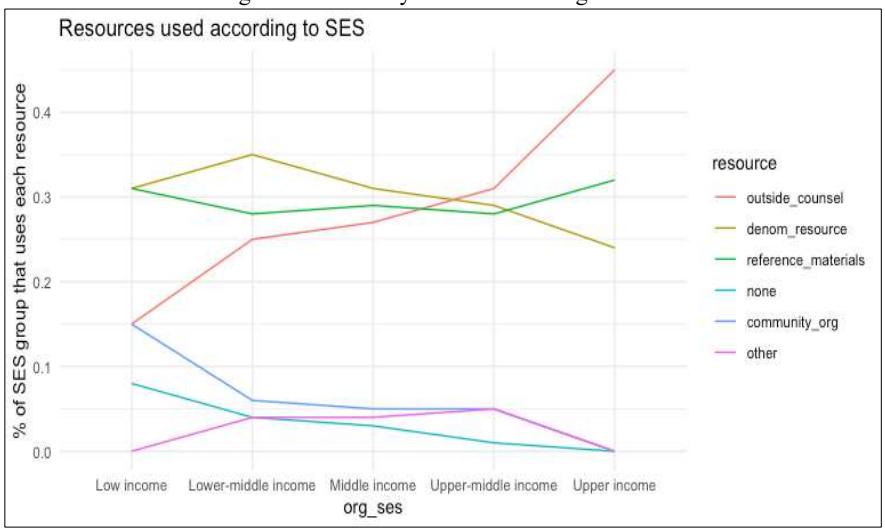
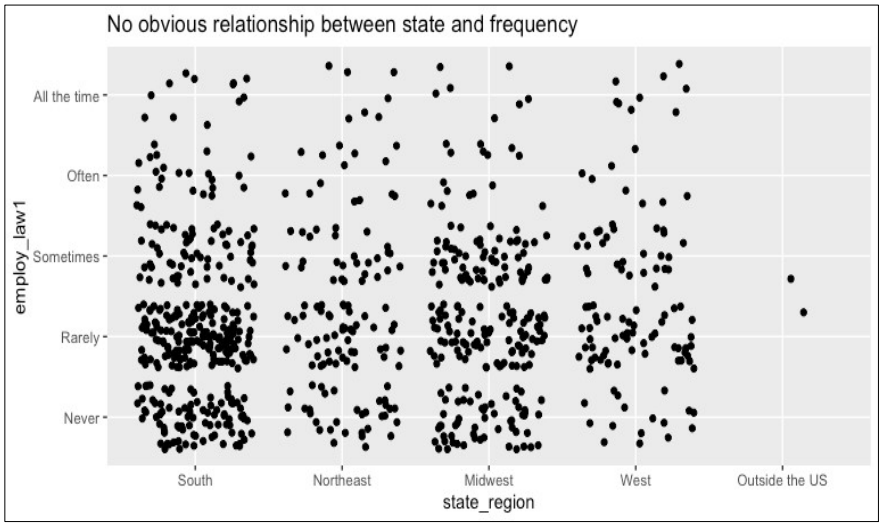
197. The following chart tracks the relationship between churches' socio-economic status and the kinds of legal resources they use to address legal concerns:



198. The following graph tracks correlations between geographical region and the frequency at which churches encounter employment law issues:

5. Summary of Quantitative Findings

Our research indicates that organizations with a larger number of members are more likely to encounter employment law issues than smaller organizations, which mostly report "rarely" or "sometimes" encountering employment law issues. Accordingly, these larger organizations may want to place a greater emphasis on knowledge and training for employment law issues, but they should not be too worried overall. This is because most large organizations report encountering employment liability issues "sometimes," which is a relatively modest figure. Additionally, there is a weak positive correlation between knowledge of employment law and the frequency of encountering the issue, with most people reporting that they have a "fair" knowledge of employment law and rarely encounter the issue. This result shows that congregations may want to emphasize improving knowledge and training in other areas of the law before focusing on employment law. For resources, our results suggest that the use of outside counsel, a resource favored for employment law issues, is stratified by socioeconomic status, with upper-income organizations using outside counsel more frequently lower-income organizations. Accordingly, increasing access to outside counsel and other high-quality legal resources could help organizations of all socioeconomic backgrounds better confront employment law issues.



C. Qualitative Findings on Employment Law and Ministry Work

Focus group participants had an opportunity to respond to several hypothetical scenarios involving employment law.[199] Some clergy had little experience with hiring and firing because their churches were so small; they were often the only employee. However, all offered opinions on the hypotheticals. The "pastoral care first" theme arose here, too—even toward an employee being terminated for poor performance such as the individual described in the "Bad Sermon" hypothetical; likewise, an expectation exists that the employee would not sue because ministers need to "be the bigger person" and avoid bitterness.

Participants also exhibited compassion toward the employee described in the "Pregnancy Firing" hypothetical, although participants split in response to that case. Clergy from more conservative churches terminated her employment (but with "grace, love, and forgiveness"), while more liberal denominations thought her pregnancy would be a cause for

199. The following two employment law scenarios and accompanying guided discussion questions were presented to clergy participants in the Project's focus groups:
Scenario #1: Michael is a new minister at your church who was hired on a contract basis till the end of the year. The expectation is that if he is a good fit, at the end of his contract he would be brought on as a permanent employee of the church. Unfortunately, you have received several complaints from church members about the content of Michael's Sunday sermons. Each time a complaint is made, church leadership meets with Michael to express concern, and suggest areas for improvement. Occasionally, Michael agrees with suggestions made by the church leadership, but more often than not, he disagrees. After a few months, and many more complaints, church leadership decides things to terminate Michael in September, a few months before the end of his contract. Michael threatens to sue the church for violating the terms of his employment contract, and for dismissing him without good cause.
How would you handle this dispute? What are some steps you could take to prevent a situation like this?
Thinking back to when you were a new minister and what you know now, how were you able to learn about employment law?
Given that employment law changes over time, how do you keep up?
Scenario #2: A church employee, Lauren, teaches a Sunday school class. She was a kindergarten teacher for 2 years before being hired by the church and kids and parents love her. One day, Lauren – who is 23 and unmarried -- announces she is pregnant. Several church members are concerned that because Lauren is unwed, her pregnancy may set a "bad example" for the children in her class. Also, as an employee, she is required by the employee handbook to embody the values of the church. Leadership agrees that premarital sex conflicts with the values of the church, and considers terminating Lauren as a result. The Pregnancy Discrimination Act prohibits employers from terminating employees because they are pregnant, but permits churches to terminate employees who violate policies against premarital sex.
If the church feels Lauren's pregnancy is a problem, how would you resolve the issue?
What has your experience been with these kinds of conflicts? How do you balance "embodying the values of the church" with potential liability?

celebration in their churches where there are declining numbers of families with young children.

One participant expressed frustration with what he called a need for "padding the file" to document a grievance against an employee to prevent being sued. He blamed his large, mainstream denomination for being "huge cowards… [that put] individual churches in a bind and we're having to pay bad employees" because the denomination was unwilling to support necessary employment terminations.

For the "Nursery Supervision" hypothetical, many participants cited formal policies for onboarding and vetting volunteers, including mention by some that their churches follow established Safe Sanctuary guidelines for the protection of children. Still, while two participants said that their church does not allow teenagers to do childcare, other participants were not troubled by a 14-year-old volunteer in the nursery, if she was properly supervised at all times. Aside from these policies, and the mention by one person of "the employment policy" their church follows, there were few mentions of formal onboarding or disciplinary procedures.

However, two policies emerged that may influence the likelihood of legal issues related to employment law: One was a policy described by a participant whose church is thinly staffed and low on resources; he first called it an "NDA," but later corrected himself and called it an "Everybody's going to be good to each other…clause." The policy encompassed confidentiality about all church matters, the provision of what the participant termed a "generous…eight weeks severance," and the promise to "speak well" of each other into the future. It was unclear what, if anything, including dismissal for cause or for civil or criminal wrongdoing, would invalidate this clause.

Another unexpected employment policy that emerged across multiple groups was a prohibition on hiring church members, and conversely, on church employees deciding to join the church. As described by participants, these policies are taken very seriously; an employee interested in joining the church would be taken aside and counseled that this decision would mean the end of their employment.

III. TORT LAW

This Part discusses various aspects of tort law and how it interacts with churches and other religious organizations. This includes laws, regulations, and special benefits associated with torts in religious contexts. Part II.A covers different varieties of torts and how these issues affect churches. Part II.B discusses the quantitative findings for tort law and how it relates to pastor knowledge, pastor training, the resources used to

confront these issues, among other factors. Part II.C discusses the qualitative findings for tort law, including the responses we received for the Study surrounding tort law issues.

A. Legal Regulation of Ministries

Tort liability is among the two most prevalent lawsuits that churches and organizations face and is a significant source of potential legal liability.[200] Religious organizations can interact with tort liability in several ways.[201] Churches may incur legal liability for intentionally harming others, for engaging in unreasonable, negligent conduct that causes injuries to others, for their employees' intentional or negligent conduct, and for failing to uphold fiduciary duties towards congregants.[202] According to the Study's analysis of reported cases, 32% of litigated cases involving churches involved tort claims. Often, such claims arise from a church or church employees' ordinary religious or secular activities.[203] Thus, church leaders need to understand the primary sources of tort liability to develop adequate policies and procedures to minimize the risk of harm and reduce legal exposure.

This section offers a general overview of tort law issues as they relate to ministry work. Section III.A.1 discusses intentional torts, and section II.A.2 deals with negligence claims, including vicarious liability that churches may face for the conduct of their employees. Section II.A.3 provides an overview of potential claims arising from churches and ministers breaching fiduciary duties they may owe to congregants and members in special circumstances.

1. Intentional Torts

Liability for intentional torts is, unfortunately, quite common within churches and other religious organizations. This section outlines several chief kinds of intentional tort claims and how they are likely to arise in ministry contexts.

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200. *The Top 5 Reasons Churches and Religious Organizations End Up in Court*, CHURCH LAW & TAX (Feb. 10, 2021), https://www.churchlawandtax.com/keep-safe/children-youth/the-top-5-reasons-churches-and-religious-organizations-end-up-in-court/ [https://perma.cc/F4LD-UH6Q].

201. *Id.*

202. *Id.*

203. *See, e.g.,* Malicki v. Doe, 814 So. 2d 347, 360–61 (Fla. 2002); Thibodeau v. Am. Baptist Churches of Conn., 994 A.2d 212, 215–217 (Conn. App. 2010).

a. Intentional Infliction of Emotional Distress

One is liable for the intentional infliction of emotional distress when they "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another."[204] If the emotionally distressing conduct at issue is religiously prescribed, however, courts have held that there must be a compelling state interest in penalizing the conduct in order to outweigh the burden liability places on the religious practice.[205] Whether conduct is "extreme and outrageous" is contextual, and typically depends on the relationship between the parties and the context in which the conduct occurred.[206]

One common scenario is where a pastor or priest seduces a congregant into an extramarital affair while providing marriage counseling to the congregant and their spouse.[207] While extramarital seduction is not usually regarded as the kind of extreme conduct that would support a claim for intentional infliction of emotional distress, courts have treated such pastor-parishioner cases differently on account of the minister's duplicitousness in undermining a marriage while purporting to try and mend it through spiritual counseling.[208] However, absent a pastor's pretense of providing marriage counseling, courts have generally not recognized sufficient claims for intentional infliction of emotional distress by a congregant whose spouse was seduced into an affair with their minister.[209]

Notably, however, some courts have held that clergy members who abuse their regular—not marital—pastoral and counseling relationships with church members to extricate sexual favors from them face legal liability on the grounds of intentional infliction of emotional distress.[210]

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204. RESTATEMENT (THIRD) OF TORTS § 46 (2012).

205. Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 774 (Okla. 1989). *See*, In re Pleasant Glade Assembly of God, 991 S.W.2d 85, 90 (Tex. App. 1998).

206. *See e.g.,* Martin v. Guevara, 464 Fed. Appx. 407, 411 (5th Cir. 2012), Clayton v. Wisener, 190 S.W.3d 685, 694 (Tex. App. 2005), BASSETT ET AL., *supra* note 18, at § 22:47.

207. *See e.g.,* Amato v. Greenquist, 679 N.E.2d 446, 448 (Ill. App. 1997*)*; Bivin v. Wright, 656 N.E.2d 1121, 1122 (Ill. App. Ct. 1995); Osborne v. Payne, 31 S.W.3d 911, 914 (Ky. 2000).

208. *See, e.g., Amato*, 679 N.E.2d at 451; *Bivin*, 656 N.E.2d at 1124; *Osborne*, 31 S.W.3d at 915–916.

209. *See* Arlinghaus v. Gallenstein, 115 S.W.3d 351, 353 (Ky. Ct. App. 2003); Grigsby v. Winn, No. 2006-CA-000493-MR, 2007 Ky. App. LEXIS 1145 (Ky. Ct. App. June 15, 2007).

210. *See, e.g.,* Erickson v. Christenson, 781 P.2d 383, 385–386 (Or. Ct. App. 1989); Destefano v. Grabrian, 763 P.2d 275, 286–287 (Colo. 1998).

b. Defamation

Defamatory statements are defined as those that "harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[211] The four elements that must be met to sustain a defamation claim are:

> (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[212]

Absent a showing of malice, defamatory remarks may be constitutionally protected under the First Amendment.[213]

Ministers and church leaders who speak from the pulpit about sin and failings may find themselves subject to defamation claims where they identify specific individuals—especially parishioners—as exemplars of such problematic behavior.[214] Thus, in one incident, a pastor was found liable for defamation that occurred when he made statements to members of his congregation about an alleged affair between another pastor and a church employee, leading to the employee's subsequent dismissal from the church.[215] The court required a showing that the pastor acted with malice against the congregant.[216] Likewise, in another case, the court did not find a minister liable for defamation when he sent a letter to another clergy member making allegations regarding the alleged misconduct of a third minister liable for defamation because the allegations were not made with malice.[217]

Harmful statements made as part of a church's internal religious services and disciplines may be constitutionally protected.[218] However,

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211. RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977).

212. RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

213. McNair v. Worldwide Church of God*,* 197 Cal. App. 3d 363, 376 (Ct. App. 1987); *see also* McKinney v. Avery J., Inc., 393 S.E.2d 295, 296–297 (N.C. Ct. App. 1990).

214. St. Luke Evangelical Lutheran Church v. Smith, 568 A.2d 35, 36–37 (1990).

215. *Id.* at 36.

216. *Id.* at 37 (Md. 1990).

217. *See* Browning v. Gomez*,* 332 S.W.2d 588, 591 (Tex. Civ. App. 1960) (barring a pastor from seeking relief for defamation on the grounds that the statements were not subjectively made with malice).

218. *See. e.g.,* Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in Am., 860 F.Supp. 1194, 1199 (W.D. Ky. 1994), *aff'd*, 64 F.3d 664 (6th Cir. 1995); ; Pfeil v. St. Matthews Evangelical Lutheran Church of the Unaltered Augsburg Confession of

this rule is generally limited to statements that are reasonably based.[219] For example, a woman was allowed to sue her pastor for defamation based on his calling her a "'slut' while standing at the church altar in front of the other clergy and church parishioners."[220] Still, the court held that she could not sue the church itself, which the court held was protected under the First Amendment, since adjudicating a claim against the church would involve "excessive entanglement with church policies, doctrines, and beliefs."[221] Following similar reasoning, a pastor was not permitted to sue denominational officials for allegedly defamatory statements about his character and revealing to the congregation that he had undergone psychiatric treatment.[222] In that case, although no specific church doctrine was directly involved, the allegedly defamatory statements were made within the confines of the church and related to the pastor's current and future relationship with the church.[223] They were thus adjudged to be of "ecclesiastical concern" and consequently protected by the First Amendment.[224] Similarly, a court held that churches cannot be sued for statements made during internal disciplinary hearings regarding conduct violating a church's bylaws.[225]

When defamatory statements are made in non-religious church contexts, by contrast, they may create liability.[226] Thus a court held that a pastor could sue two church members for defamation on the basis of statements the defendants made during a church business meeting falsely accusing the pastor of misusing church funds.[227] In that case, the court found that adjudicating whether the statements were defamatory did not involve any "'excessive' entanglement in internal church matters."[228]

Ministers or church leaders who make defamatory statements about individuals who are not church members may not receive First

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Worthington, 877 N.W.2d 528, 541–542 (Minn. 2016); *see also* Connor v. Archdiocese of Phila., 975 A.2d 1084, 1111–1112 (Pa. 2008).

219. *See* Mursean v. Phila. Romanian Pentecostal Church, 962 P.2d 711, 715 (Or. Ct. App. 1998).

220. House of God Church of the Living God, the Pillar & Ground of the Truth Without Controversy, Inc. v. White, 792 So.2d 491, 492 (Fla. Dist. Ct. App. 2001).

221. *Id.* at 494.

222. *See Yaggie*, 860 F. Supp. at 1197–1200.

223. *Id.* at 1199.

224. *Id.*

225. *See* Mallette v. Church of God Int'l, 789 So. 2d 120, 126 (Miss. Ct. App. 2001); *see also,* Hiles v. Episcopal Diocese, 773 N.E.2d 929, 937 (Mass. App. Ct. 2002) (barring a pastor from seeking relief for defamation from statements made during an internal disciplinary hearing regarding his extramarital affair with a member of his church).

226. *See* LeGrande v. Emmanuel, 889 So.2d 991, 993–994 (Fla. Dist. Ct. App. 2004).

227. *Id.* at 993–994.

228. *Id.* at 994.

Amendment protections.[229] In some cases, where the audience of the defamatory statements made by church officials extends to non-members, the protections provided by the First Amendment may be weakened.[230]

c. Fraud

One may be liable for fraudulent misrepresentation for making a statement that:

> the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies.[231]

Churches can be held liable for fraud for soliciting monetary contributions in exchange for unfulfilled promises, provided that the promises do not require the court to evaluate "key religious questions," barring recovery by the First Amendment.[232]

2. Negligence

When churches encounter tort liability claims, they commonly result from negligence.[233] The essential elements of negligence naturally limit the instances in which a church can be found directly liable for a negligent act.[234] If a church does not have an affirmative duty of care to the victim of a negligent institutional act, or if the harm caused by it is not reasonably foreseeable, the church will likely not be directly liable.[235] Religious organizations are most frequently exposed to the risk of direct liability for negligence regarding the hiring, supervision, and termination of church employees.[236] Additionally, where negligence is a result of individual

229. *See* Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1114 (2008).

230. *See, e.g.,* Seefried v. Hummel, 148 P.3d 184, 191 (Colo. App. 2005).

231. RESTATEMENT (SECOND) OF TORTS § 526 (1977).

232. Gulbbraa v. Corp. of the Pres. of the Church of Jesus Christ of Latter-day Saints, 159 P.3d 392, 395 (Utah Ct. App. 2007); *see also* Hancock v. True Living Church of Jesus Christ of Saints of Last Days, 118 P.3d 297, 300–301 (Utah Ct. App. 2005).

233. *Negligence § 4.01*, PASTOR, CHURCH & LAW, https://www.churchlawandtax.com/pastor-church-law/liabilities-limitations-and-restrictions/negligence/ [https://perma.cc/8HE4-2JCL] (last visited Oct. 18, 2023).

234. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1977).

235. *See* RESTATEMENT (SECOND) OF TORTS § 282 (AM. L. INST. 1965) *See, e.g.,* Roman Cath. Bishop v. Super. Ct., 50 Cal.Rptr.2d 399, 406 (Cal. Ct. App. 1996).

236. *See supra* Part II.A.1.ii and II.A.2.ii.

conduct rather than the actions of the church itself, the church can be found liable for negligence where it adopts or fails to adopt official policies or procedures that result in preventable foreseeable harm or fail to adopt official policies or practices that would have otherwise prevented foreseeable harm.[237] Thus, if an employee of the church causes harm or damage in some way, and it is determined that the policies or procedures of the church enabled this behavior, either through the improper employment or insufficient supervision of the employee, the church itself can be found directly liable.[238]

a. Negligent Hiring

The negligent selection of church workers creates an avenue for direct liability when a religious organization fails to implement sufficient procedures or policies to ensure the careful hiring of an employee.[239] Most often, negligent hiring claims result from the inadequate screening of potential employees, failure to investigate or act on potential red flags uncovered during the screening process, or the employment of unqualified workers.[240] Courts usually require that religious organizations actually knew, or should have known, of employees' traits or proclivities that create a risk of harm.[241] For example, a court held that a church could be liable based on the negligent hiring of a pastor for his sexual relationship with a woman for whom he provided marriage counseling.[242] The church screened the priest for hire and even put him through a psychological evaluation, and the diocese regulated his counseling procedures.[243] Nevertheless, the court found a reasonable basis for a negligent hiring claim.[244] In another case, a state supreme court held that a church could be held liable for the sexual abuse of a child committed by a volunteer in a church nursery because the church did not exercise enough care in selecting the volunteer.[245]

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237. BASSETT ET AL., *supra* note 18, at § 22:20.

238. *See e.g.,* Malicki v. Doe, 814 So. 2d 347, 365 (Fla. 2002); Allen v. Zion Baptist Church of Braselton, 761 S.E.2d 605, 612–613 (Ga. Ct. App. 2014).

239. *See, e.g., Malicki*, 814 So.2d at 362; *Allen*, 761 S.E.2d at 611.

240. *See, e.g., Bouchard*, 719 F.Supp.2d at 261; Krystal G. v. Roman Cath. Diocese of Brooklyn, 933 N.Y.S.2d 515, 522 (N.Y. Sup. Ct. 2011).

241. *See, e.g,* M.L. v. Magnuson, 531 N.W.2d 831, 857 (Minn. Ct. App. 1995); *Bouchard*, 719 F.Supp.2d at 257; R.A. *ex rel.* N.A. v. First Church of Christ, 748 A.2d 692, 697–698 (Pa. Super. 2000).

242. Moses v. Diocese of Colo*.,* 863 P.2d 310, 327 (1993).

243. *Id.* at 328–329.

244. *Id.* at 331.

245. *See* Broderick v. King's Way Assembly of God Church*,* 808 P.2d 1211, 1221 (Alaska 1991); *see also* Winkler v. Rocky Mountain Conf. of the United Methodist Church,

Churches can usually avoid direct liability for negligent hiring by developing clear employment criteria and implementing basic employee screening protocols that incorporate standard background checks and an adequate inquiry into the candidates' employment history.[246] Sexual misconduct and clergy malpractice are two of the most common employee behaviors that create a reasonably foreseeable risk of harm where a religious organization might be directly liable. Hiring, supervision, and termination policies or procedures that fail to identify and address the risk of sexual misconduct expose religious organizations to direct tort liability.[247] Employees underqualified for specific positions within the church also raise direct liability concerns. For example, a court held that a church could be liable based on negligent hiring for injuries sustained by one of its members while participating in a construction project because the church failed to investigate the qualifications of the construction foreman.[248]

b. Negligent Supervision

Religious organizations can also be held directly liable for negligent supervision of employees where they fail to exercise reasonable supervision over church programs and activities.[249] Negligent supervision claims are often established when the church actually knew or had reason to know that employee conduct was creating a reasonable risk of harm and failed to exercise reasonable care in the supervision of that employee to

923 P.2d 152, 159 (Colo. App. 1995) (holding that a minister and a denominational agency could be liable for the minister's unwanted sexual advances toward several women based on negligent hiring).

246. Where a background check is conducted, and no red flags are raised; usually, there is no basis for direct liability even where hiring the employee resulted in harm or injury. *See* Tichenor v. Roman Cath. Church of the Archdiocese of New Orleans, 32 F.3d 953, 960 (5th Cir. 1994); Roman Cath. Bishop of San Diego v. Super. Ct. of San Diego Cnty., 50 Cal.Rptr.2d 399, 405 (Cal. Ct. App. 1996). *Cf.* Conti v. Watchtower Bible & Tract Soc'y of N.Y., Inc, 186 Cal.Rptr.3d 26, 45–46 (Cal. App. Ct. 2015). Attentive hiring procedures can reduce the risk of direct liability. *Olinger*, 521 F.Supp.2d at 584–585.

247. *See Broderick*, 808 P.2d at 1221; *see also Winkler*, 923 P.2d at 159.

248. *See* Piney Grove Baptist Church v. Goss, 565 S.E.2d 569, 572 (Ga. App. 2002).

249. *See, e.g., Conti*, 186 Cal.Rptr.3d at 43–44.

mitigate such harm.[250] To be sure, churches are not guarantors of safety.[251] However, churches do have an affirmative duty of care to those that participate in its programs and activities, and failure to exercise reasonable supervision of its employees can constitute a breach of that duty.[252]

In one case, a church was liable based on negligent supervision for a pastor who molested young boys when the boys' parents entrusted the pastor to provide individual trauma counseling for them.[253] In another, a federal court held there was sufficient evidence to find a church liable based on negligent supervision for a priest's acts of child molestation, when the church had "adequate warning" that the priest was "grooming" the victim for a sexual relationship.[254] In that case, the church had evidence that the priest took the victim on several overnight trips, slept together with the victim in a bedroom in the church rectory, and provided the victim with many gifts.[255]

Negligent supervision does not necessarily have to involve sexual conduct. In one case, a court held a church liable based on negligent supervision for injuries sustained by a high school youth group member who was hit by a car while crossing the street while on a field trip with other youth members and four adult chaperones. [256] In another, a court held a church liable based on negligent supervision for injuries sustained by a small boy who slipped and fell off a piece of exercise equipment on the church's property.[257] Lastly, a court held a seminary liable based on negligent supervision for the drowning death of a twelve-year-old altar boy at a seminary-owned pool because no qualified lifeguard was on duty.[258]

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250. *See, e.g.,* Hutchison *ex rel.* Hutchison v. Luddy, 896 A.2d 1260, 1275 (Pa. 2006) (finding that the church had reason to know); Fortin v. Roman Cath. Bishop of Portland, 871 A.2d 1208, 1215–16 (Me. 2005) (finding that the church had actual knowledge); Doe v. Redeemer Lutheran Church, 531 N.W.2d 897, 901 (Minn. Ct. App. 1995) (finding the church had actual knowledge); Kenneth R. v. Roman Cath. Diocese of Brooklyn, 654 N.Y.S.2d 791, 796 (N.Y. App. Div. 1997) (finding the church had actual knowledge); *Doe*, 478 F.Supp.2d at 774 (finding that the church had reason to know); *cf. Conti*, 186 Cal.Rptr.3d at 43–44.

251. Wallace v. Boys Club of Albany, Ga., Inc., 439 S.E.2d 746, 750 (Ga. Ct. App. 1993).

252. *E.g., Fortin*, 871 A.2d at 1222 (stating the special relationship between the church and its members establish a duty of care).

253. Bear Valley Church of Christ v. DeBose, 928 P.2d 1315, 1317 (1996).

254. Doe v. Liberatore, 478 F.Supp.2d 742, 762 (M.D. Pa. 2007).

255. *Id.*

256. Bell v. USAA Cas. Ins. Co., 707 So.2d 102, 105–106 (La. Ct. App. 1998).

257. Daniels v. New St. Paul Tabernacle Church of God in Christ, No. 238923, 2003 WL 1984453 at *1–*2 (Mich. Ct. App. Apr. 29, 2003).

258. Rivera v. Phila. Theological Seminary of St. Charles Borromeo, Inc., 580 A.2d 1341, 1343–1344 (Pa. Super. Ct. 1990).

Negligent supervision is not limited to child victims but can also apply to misconduct towards adults. For example, a court held valid a claim for negligent supervision against a church for a pastor's affair with a woman for whom he was providing marriage counseling when another church officer informed the church of the affair.[259] The church permitted the marital counseling to continue and urged the husband not to seek a grievance against the church.[260] Thus, the church was held liable for negligent supervision.[261] Additionally, a court held that female church employees could sue their church and denominational agencies based on negligent supervision for a pastor's sexual harassment of them.[262] Further, adults can bring negligent supervision lawsuits against church officials for injuries sustained as minors.[263]

Even when a church exercises reasonable care in hiring and supervising an employee, it can still be directly responsible for employee misconduct if said employee is not rightfully terminated after the church acquires information suggesting that there is a risk of harm.[264] In negligent retention cases, religious organizations usually already have information or knowledge indicating that employee behavior creates a reasonable risk of harm.[265] A religious organization can be directly liable for negligent retention when the organization fails to act on this information by terminating the employee.[266]

c. Premises Liability

Any landowner, including religious organizations, may incur premises liability regardless of their religious status.[267] For example, a church was held liable for the injuries of a child's mother who darted after her child as

259. Vione v. Tewell, 820 N.Y.S.2d 682, 684 (N.Y. Sup. Ct. 2006).

260. *Id.*

261. *Id.* at 688.

262. Smith v. Privette*,* 495 S.E.2d 395, 398 (N.C. Ct. App. 1998); *see also,* Wheeler v. Cath. Archdiocese of Seattle*,* 829 P.2d 196, 204–205 (Wash. Ct. App. 1992).

263. *E.g.,* Smith v. O'Connell*,* 986 F.Supp. 73, 79 (D.R.I. 1997); High v. Wake Chapel Church, Inc., No. COA22-358, 2022 WL 17815134, *1–*2 (N.C. Ct. App. 2022); Erickson v. Christenson*,* 781 P.2d 383, 386 (Or. Ct. App. 1989).

264. *E.g.*, Mills v. Deehr, No. 82799, 2004 WL 1047720, *5–*6 (Ohio App. 2004)(holding that organizational knowledge that a priest frequently had victims in his room late into the night was sufficient to establish a claim for negligent retention); Hutchison *ex rel.* Hutchison v. Luddy, 763 A.2d 826, 845 (2000), *vacated*, 870 A.2d 766 (2005) (holding that knowledge of actual conduct that caused harm was sufficient to establish a claim for negligent retention).

265. *E.g., Mills*, No. 82799 at *5–*6; *Hutchison*, 763 A.2d at 845.

266. *E.g., Mills*, No. 82799 at *5–*6; *Hutchison*, 763 A.2d at 845.

267. BASSETT ET AL., *supra* note 18, at § 22:45.

she ran onto church property.[268] The pastor was aware of the accumulation of water on the property after a heavy rain, and the pastor knew children played on the church's property.[269] Thus, this posed a risk to children, and the pastor should have realized that the flooding condition on the property created an unreasonable risk of serious harm to young children.[270] The burden of eliminating the danger was slight compared with the chance of harm to children, and the church failed to exercise reasonable care to eliminate the danger or otherwise protect the children.[271]

In another example, the court classified a volunteer at a Vacation Bible School class at a church as a licensee because he was on the premises for spiritual, religious, or social reasons, not for commercial or material purposes.[272] In these situations, the landowner has a limited duty to warn the licensee of any hidden dangerous conditions on the premises that the possessor either knows or reasonably should know.[273]

In a third example, in one case, a state supreme court held that the president of a state organization of a church was an invitee of the church when she fell down a darkened church stairway while presiding over a women's meeting.[274] Thus, her presence was mutually beneficial to herself and the church.[275] The court held the church liable for breaching its duty of care to the invitee.[276] In another case, another state supreme court held that a member attending Sunday school was an invitee, rather than a licensee, stating that the members who participate in religious services and functions are generally invitees, for "religious bodies do expressly and impliedly invite members to come and attend their services and functions... while they do not charge admission fees... churches do depend on contributions … so that they may continue to be open to the public."[277]

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268. Blackburn v. Broad St. Church, 702 A.2d 1331, 1331–1332 (N.J. Super. Ct. App. Div. 1998).

269. *Id.* at 1335.

270. *Id.*

271. *Id.*

272. *See* Kosmalski *ex rel.* Kosmalski v. St. John's Lutheran Church, 680 N.W.2d 50, 54 (Mich. App. 2004).

273. *Id.* at 55.

274. Sullivan v. First Presbyterian Church*,* 152 N.W.2d 628, 631 (Iowa 1967).

275. *Id.*

276. *Id.*

277. Clark v. Moore Mem'l United Methodist Church, 538 So.2d 760, 764 (Miss. 1989); *accord* Heath v. First Baptist Church, 341 So.2d 265, 267–268 (Fla. Dist. Ct. App. 1977); *see* K.T. v. Klein Rd. Church of God, 199 So. 3d 720, 724 (Miss. Ct. App. 2016) (holding that a child who fell off a swing set at a church was a licensee, since the activity was outside the scope of church related functions).

Those who volunteer their time to assist the church at no cost to themselves are also invitees.[278]

Some states do not recognize the distinction between an invitee and a licensee.[279] This imposes a duty on property owners to provide reasonable care to anyone who enters their property by permission, but still does not obligate landowners to notify trespassers of hidden perils on the premises.[280] In jurisdictions that retain the licensee/invitee distinction, courts may construe visitors to the church as licensees, thus entitling the church to provide a lower standard of care.[281]

3. Respondeat Superior, Vicarious Liability, and Denominational Liability

Religious organizations can be held responsible for tortious acts they commit directly, as well as tortious acts committed by individual agents of the organization.[282] Usually, churches can minimize the risk of direct liability by implementing policies and procedures limiting reasonably foreseeable harm and acting on knowledge of misconduct that creates a risk of reasonably foreseeable harm. However, despite these precautions, churches can still be held vicariously liable for the misconduct of their employees. For example, a church could be held vicariously liable for the reckless driving of its pastor if the negligent act is committed during his employment.[283] Scope of employment includes all conduct and behavior that furthers the mission or supports the church's operation, regardless of whether secular or religiously motivated.[284] This can consist of sexual

278. *See* Atwood v. Bd. of Trs. of First Presbyterian Church of Caldwell, 98 A.2d 348, 350 (N.J. Essex Cnty. Ct. 1953) (holding that a volunteer Sunday school teacher is an invitee because she "entered the[] premises as a matter of duty to the [church], and for furtherance of the important interest"); *see also* Haugen v. Cent. Lutheran Church, 361 P.2d 637, 638–639 (Wash. 1961) (holding that a church member volunteering to help construct a church and was subsequently injured in construction is an invitee, because he entered the premises as an economic benefit to the church).

279. *See generally* 22 A.L.R.4th 294 § 3b.

280. *Id.*

281. *See* Hambright v. First Baptist Church-Eastwood, 638 So.2d 865, 868 (1994); *Kosmalski*, 680 N.W.2d at 56–57.

282. *See* Broderick v. King's Way Assembly of God Church, 808 P.2d 1211, 1221 (Alaska 1991); *see also* Winkler v. Rocky Mountain Conf. of the United Methodist Church, 923 P.2d 152, 159 (Colo. App. 1995).

283. *See* Vind v. Asamblea Apostolica De La Feen Christo Jesus, 307 P.2d 85, 90 (Cal. Dist. Ct. App. 1957).

284. Depending on the circumstances, acts committed for the purpose of carrying out personal business, acts committed outside of normal business hours, or acts committed outside of authorized work areas are not considered within the scope of employment. Due to the nature of the church activity or program, the church may consider such acts within

misconduct, so long as the conduct is a "direct outgrowth" of actions within the scope of his employment.[285] A church can implement sufficient procedures and practices to hire, supervise, and terminate employees and still be vicariously liable for employee actions that cause harm.

The level of discretion and control an individual employee has over their own actions can implicate the extent to which the doctrine of respondeat superior applies.[286] A priest who commits tortious acts but otherwise has great control over their schedule, as a result, may be considered self-employed, thus shielding the church he works for from vicarious liability.[287] Similarly, a court held that churches could only be responsible for a pastor's defamatory comments if they're made in the course of employment *and* furtherance of the mission and functions of the church.[288]

Direct liability is commonplace for tort claims but looks unique where the tortfeasor is an organization, not an individual. Usually, an organization commits a tort where an official policy or organizational procedure, or lack thereof, results in damage, injury, or harm. On the other hand, religious organizations can also be found responsible for tortious acts committed by an individual agent of the church through the doctrine of respondeat superior.[289] For example, a state court held that a pastoral counseling center could be liable under respondeat superior for a priest who sexually seduced a woman he was counseling which incurred severe emotional injuries.[290] Individual church agents can also be found directly liable for their actions that result in damage, injury, or harm.

Generally, the more direct supervision a denominational entity has over a local church, the more likely it will face vicarious liability from the

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the scope of employment. For example, the church may be vicariously liable for tortious acts committed by employees on church-sponsored mission trips even if the act was not committed at the church itself, or within usual hours of work. *See, e.g.,* GuideOne Mut. Ins. Co. v. Grace Christian Ctr. of Killeen, Tex., Inc., 156 F. Supp. 3d 831, 839 (W.D. Tex. 2015).

285. Fearing v. Bucher, 977 P.2d 1163, 1168 (Or. 1999). *See also* Does 1–9 v. Compcare, Inc., 763 P.2d 1237, 1244 (Wash. Ct. App. 1988) (stating that a diocese can be liable for alleged sexual molestation of minors by a priest since they knew about his pedophilia, yet still did not revoke his status as a Catholic priest).

286. *See generally* RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006).

287. Brillhart v. Scheier*,* 758 P.2d 219, 224 (Kan. 1988). A church was not found liable for the negligent driving of one of its priests because he was sufficiently independent of the church throughout his day-to-day responsibilities, making him "self-employed" rather than an employee of the church.

288. Cooper v. Grace Baptiste Church of Columbus, Ohio, Inc., 612 N.E.2d 357, 363 (Ohio Ct. App. 1992).

289. Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 346 (Alaska 1990).

290. *Id.* at 350.

church's and its employees' actions.[291] Plaintiffs assert denominational liability to reach those with the most assets to pay claimed damages.[292] To protect denominations from liability, religious organizations should clearly delineate the relationships and boundaries between the different hierarchies within their denomination.[293] Denominations can also avoid certain penalties by creating explicit disciplinary procedures in their bylaws that provide a means for victims to bring their claims.[294]

4. Fiduciary Duties

Courts have held that "there is no inherent fiduciary duty that arises from being a leader in a religious organization."[295] Relationships between priests and their congregants have been characterized as having "a unique degree of trust and confidence, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other."[296] Thus, courts have held that a breach of that trust and confidence is a breach of fiduciary duty.[297] For example, a church and a diocese could be liable for the priest's sexual misconduct toward church members based on a breach of fiduciary duty.[298]

While secular counselors have an affirmative duty to report their patients who risk harming themselves or others, this does not extend to congregants and ministers engaged in counseling.[299] However, a pastor engaged in counseling has a fiduciary duty to refrain from exerting influence over their counselees by using their superior position to obtain sexual favors.[300] Additionally, whereas schools and other secular communities possess an affirmative duty to protect members from other members, this does not extend to religious communities.[301] In general,

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291. BASSETT ET AL., *supra* note 18, at § 17:18.

292. *See* Mark E. Chopko, *Continuing the Lord's Work and Healing His People: A Reply to Professors Lupu and Tuttle,* 2004 BYU L. REV. 1897, 1906–1907 (2004).

293. MARK E. CHOPKO, DERIVATIVE LIABILITY, IN RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 591, 631 (James Serittella et al., eds., 2006).

294. Konkle v. Henson, 672 N.E.2d 450, 455 (Ind. Ct. App. 1996) (holding that a denominational agency was not liable for a priest's molestation of a minor because the victim did not pursue the claim through the denomination's judicial procedures).

295. BASSETT *supra* note 18 at § 22:47.

296. Doe v. Horwich Roman Cath. Diocesan Corp., 309 F.Supp.2d 247, 252 (D. Conn. 2004) (quoting Dunham v. Dunham, 528 A.2d 1123 (Conn. 1987)).

297. *Id.*

298. *See* Doe v. Liberatore*,* 478 F.Supp.2d 742, 773 (M.D. Pa. 2007).

299. *See, e.g.,* Guice-Mills v. Forbes*,* 863 N.Y.S.2d 874, 878 (N.Y. Sup. Ct. 2008).

300. *See* Moses v. Diocese of Colo.*,* 863 P.2d 310, 321–322 (Colo. 1993).

301. *See, e.g.,* Bryan R. v. Watchtower Bible & Tract Soc. of N.Y., Inc., 738 A.2d 839, 843–845 (Me. 1999); Flanigan v. McCrae*,* 93 Wash. App. 1085 (Wash. Ct. App. 1999).

claims against a religious organization for breach of fiduciary duty are rarely successful.[302]

B. Quantitative Findings on Tort Liability in Ministry

Tort law is a significant source of potential legal liability for churches. The Study's review of reported cases involving churches revealed that nearly one-third (1,822 out of 5,822 cases) of all the cases investigated involved tort claims. Moreover, each of the four denominations with the largest number of cases—Methodist, Baptist, Church of Christ, and AME—have distributions of case types that mirror the aggregate profile for tort liability encounters. Presbyterians and African Methodist Episcopal congregations are particularly likely to encounter tort liability issues since nearly 30–50% of the cases these congregations litigated involved tort liability issues. Accordingly, this section considers which factors–including knowledge, denomination, and congregation size—could lead to an increased risk of encountering tort litigation.

1. Congregation Size

Religious organizations with more members generally report encountering tort liability issues more frequently, but the increase is only slight (positive correlation of 0.14). Even the largest organizations in our analysis (1000+ members) only report rarely encountering tort liability issues. This result could suggest that even if tort liability issues are among the most common faced by churches (one-third of cases by our estimates) and religious organizations and that churches could therefore benefit from legal training in this area of the law, the risk of liability, in general, is not significant enough to be a great source of worry.[303]

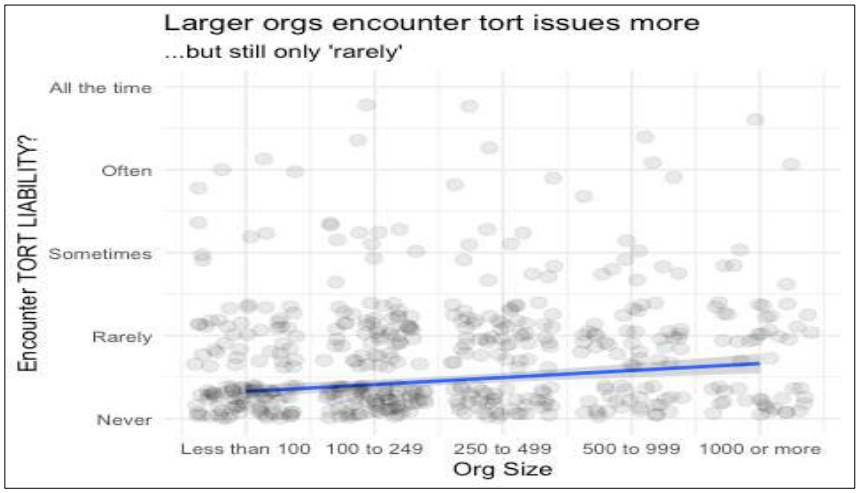
302. *See* BASSETT *supra* note 18, at § 22:47.

303. The following graph depicts the relationship between church size and the incidence of tort issues, according to the Study data:

Similarly, religious organizations with many employees technically report encountering tort liability more frequently, but the increase is only slight (positive correlation of 0.17). Even the largest organizations (50+ employees) only report "rarely" encountering tort liability issues. Like the correlation between larger membership and frequency of encountering tort liability issues, this result could suggest that even though tort liability is a common source of contention when litigation arises, the overall risk of churches and religious organizations encountering any variety of liability, including for torts, is low. This is especially true when considering that organizations of all sizes in terms of membership and employees mostly report "never" or "rarely" encountering tort liability issues. The perceptions of churches and religious organizations seem also to reflect this conclusion, considering that there is no statistically or substantively significant relationship between congregation size and perceived risk of tort liability.

2. Knowledge and Training

Like congregation size, there is no strong relationship between knowledge or training concerning tort liability and the frequency of encountering issues in the field. Beginning with knowledge, our results suggest that most religious organization leaders have "poor" knowledge of tort liability, but those with more knowledge report encountering the issue more often. Specifically, those with no knowledge of tort liability and those with poor knowledge of tort liability have rarely encountered tort liability claims. However, this relationship is relatively small (positive correlation of 0.2), and even those with "excellent" knowledge rarely

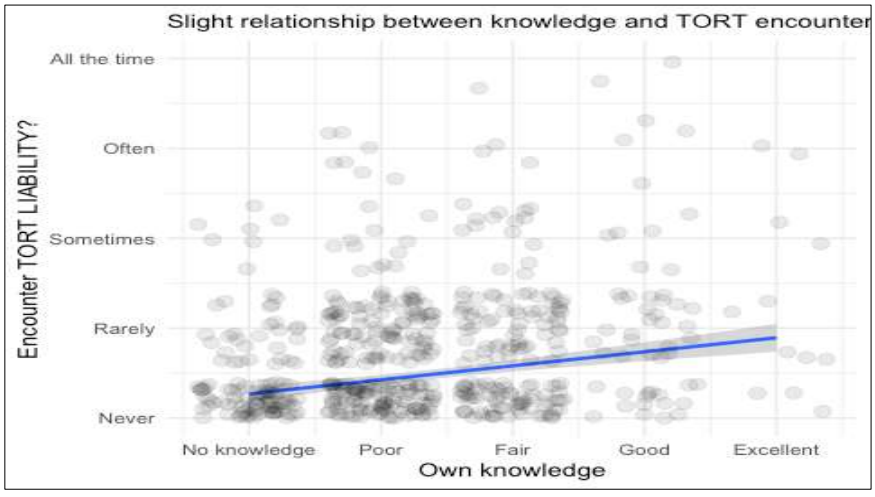


encounter torts. This result could bolster the idea that the overall risk of religious organizations encountering liability for torts is insignificant, even if nearly one-third of cases litigated by religious organizations involve torts.[304]

It should also be noted that it is difficult to assess the causal chain regarding the knowledge and encounter variables and how these two variables interact with one another in general. It could be that those who encounter torts develop more knowledge as a result. Conversely, those with more knowledge may be able to identify tort issues better when they arise. Alternatively, there may be a third factor wherein those who know more about torts also find themselves in situations where these issues arise more often. These possible explanations reveal that more specific research on the interactions between knowledge and encountering tort liability is needed to appreciate and understand this correlation fully.

Additionally, there is no discernable relationship between organizational denomination and respondents' own knowledge regarding tort issues. As a proportion, reformed organizations are more likely to report "poor" knowledge, but there are only 15 respondents in this category, meaning this result is unreliable. Compared to reformed organizations, other denominations report having more knowledge of tort liability. Specifically, in proportion to its responding congregations, no affiliation, presbyterian, and Baptist denominations reported the largest proportion of having "excellent" knowledge in tort liability. This is followed by Baptist, Methodist, and Presbyterian congregations having the

304. The following chart shows the slight correlation between ministers' knowledge of tort law issues and the frequency at which those ministers encounter such issues in their work:

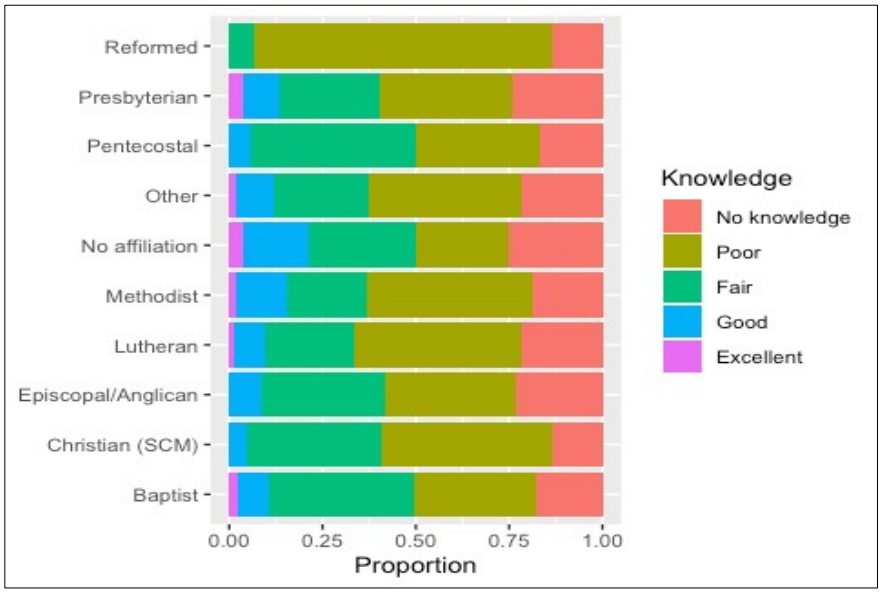


largest proportion of respondents claiming to have "good" knowledge of tort liability. Lastly, Pentecostal, no affiliation, Baptist, episcopal/Anglican, and Christian (SCM) were reported to have significant proportions of their ministers possess fair knowledge in tort liability. These results could suggest that improving legal training is one of several ways that individuals involved in religious organizations can be better acquainted with tort law and prepared for the possibility of future litigation.[305]

Likewise, there is only a slight relationship (positive correlation of 0.2) between a religious leader's own knowledge and perceived risk of tort liability, meaning those who report having greater knowledge regarding the issue also report a greater risk of liability. However, even those with "excellent" knowledge still report very low overall risk levels. This could support the idea that most religious organizations do not fear having to encounter tort liability issues. This stance may be well-founded when considering that most organizations report "never" or "rarely" encountering tort liability issues.

With respect to ministerial training in legal issues, our research indicates no statistically or substantively significant relationship between training received on tort liability and the frequency of encountering tort liability issues, with most respondents having received no training on these issues. In particular, by percentage, almost every congregation designation

305. The following graph illustrates the Study's findings on tort law knowledge among ministers across various denominations:

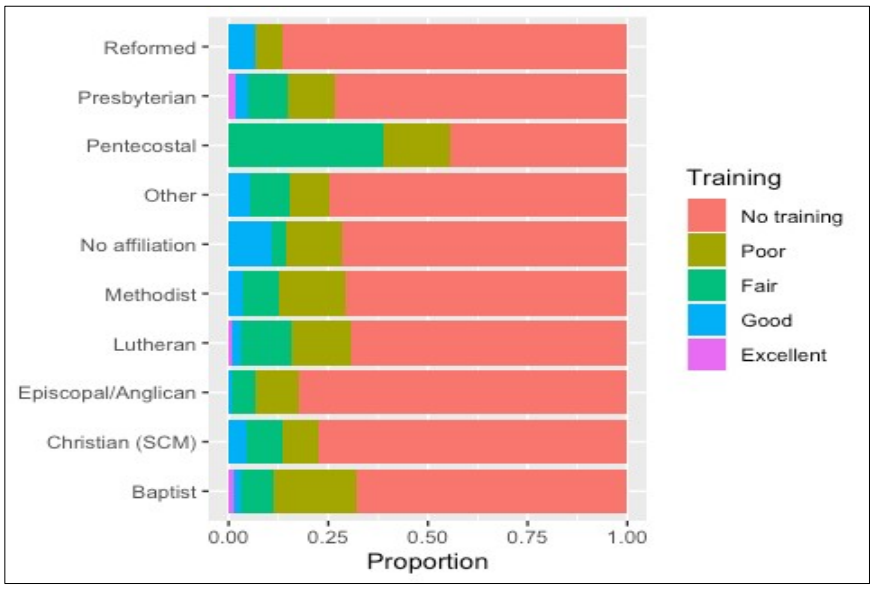


in our sample reported receiving "no training" or "poor" training 80–90% of the time. In fact, "no affiliation" reported receiving "good" training the most often, and even that figure was only 11%. Moreover, there does not seem to be a relationship between training received and denominational affiliation. By percentage, the Pentecostals report more training than others, but there are only 18 respondents in our sample, meaning this is not a reliable relationship. These results suggest ample room to improve legal training on tort liability issues for every denomination.[306]

3. Legal Resources Used by Congregations

The presence or absence of resources that congregations can use when tort liability issues arise is an important consideration for religious organizations when deciding how to best address new and future litigation. Our research generally does not show a clear relationship between resources used and the frequency of encountering tort liability issues. However, our research suggests a relationship between the resources congregations use to address tort liability issues and their knowledge of tort law. Those reporting no resources also report less knowledge of tort liability issues. By contrast, those who use more resources report more knowledge of tort liability issues. Congregations' most common resources include outside counsel, denominational resources, and reference

306. The following graph shows reported levels of training among clergy members of various denominations:

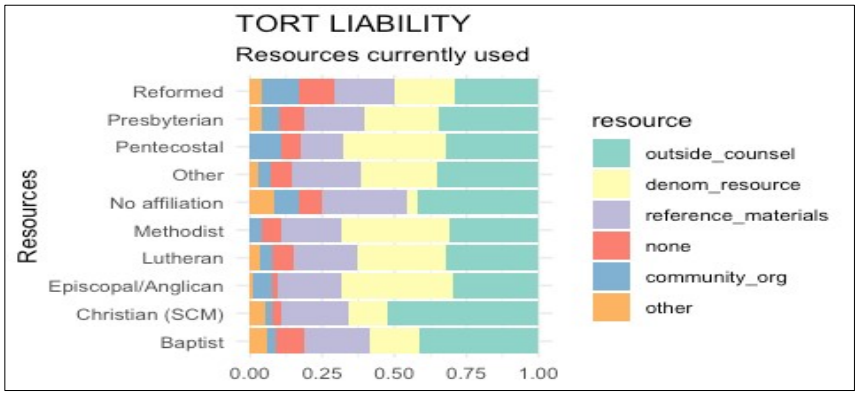


materials in that order. Like with knowledge and encountering tort liability issues, causality is not clear here. Further research could clarify the exact nature of the relationship between the resources used by congregations and how it relates to their knowledge of the issue.

Specifically, research shows congregations that reported having poor knowledge in tort liability have reported more frequently consulting outside counsel (over 150 reports) and reference materials (approximately 130 reports). Those who do not know tort liability report consulting outside counsel, denominational resources, reference materials, and no resources in roughly equal proportions (approximately 50–60 responses in each category). Congregational ministers that report having fair knowledge of tort liability similarly seek assistance from outside counsel (over 125 reports), denominational resources (over 125 reports), and reference materials (approximately 100 reports).

Like with knowledge, there is no clear relationship between respondents' resources to address tort liability issues and the training they received in tort law. In general, 70% of respondents report "no training" in tort liability, and there is no relationship between this factor and the resources used. Similarly, there is no discernable relationship between denomination and the types of resources used to deal with tort liability. Notably, organizations with no affiliation rarely use "denominational resources." Southern Christian Methodist organizations are more likely to resort to outside counsel than other denominations. Episcopal/Anglicans are more likely to utilize denomination resources than other denominations. Organizations with no affiliation are reportedly more likely to consult reference materials than specific denominations. Reformed and Pentecostal denominations report the most frequent usage of community organization materials.[307]

307. The following graphic shows the Study's findings on what resource ministers of various denominations use to address tort law matters in their work:



4. Socioeconomic, Race/Ethnicity, and Location Considerations

Similar to the resources used by congregations, the socioeconomic status, racial/ethnic makeup, and geographical location of a religious organization may play a significant role in how these organizations respond to and address tort litigation. Unlike knowledge and training in tort liability issues, there is a relationship between the socioeconomic status of the congregation's membership and the resources currently used to address tort liability issues. In particular, outside counsel is stratified by socioeconomic status, with upper-middle-income organizations using outside counsel more frequently than organizations with a lower socioeconomic status. Specifically, while 63.5% of upper-middle-income organizations report utilizing outside counsel, only 56.9% of middle-income organizations report using outside counsel, and 42.2% of lower-income congregations report utilizing outside counsel. Conversely, denominational resources and reference materials are much more evenly distributed and used equally among organizations with varying socioeconomic backgrounds. 43.1% of lower-income congregations, 47.2% of middle-income organizations, and 43.8% report using denomination resources. Similarly, 31.2% of lower-income organizations, 36.4% of middle-income organizations, and 38.4% of upper-middle-income organizations report using reference materials.[308] This suggests that outside counsel is the preferred resource when faced with tort liability, but since it is more expensive, it is disproportionately available to wealthier organizations. The availability of high-quality resources or reference materials has the potential to help organizations of all socioeconomic backgrounds better confront tort liability issues.

Moreover, our sample is 83% majority-white organizations. There is no observable statistical or substantive relationship between an organization's majority race/ethnicity and resources currently used to address tort liability issues. Similarly, our research indicates no relationship between an organization's majority race/ethnicity and the frequency of encountering tort liability issues. This may suggest that

308. The following chart shows which legal resources churches of varying socio-economic status utilize when dealing with tort concerns:

Org SES	Outside Counsel	Denom. Resources	Ref. Materials
Lower-income	42.2%	43.1%	31.2%
Middle income	56.9%	47.2%	36.4%
Upper-middle income	63.5%	43.8%	38.4%

race/ethnicity does not play a major role in generating or addressing litigation as it pertains to tort liability.[309]

Similarly, our research suggests that no relationship exists between the state and the frequency of encountering tort liability issues. Our sample has many southern and midwestern respondents, but they appear to encounter this issue equally. Likewise, no observable relationship exists between state location and resources currently used to address tort liability issues. This could suggest that state location, like race/ethnicity, does not play a major role in whether religious organizations face tort liability litigation or how these organizations seek to address tort liability issues when they arise.[310]

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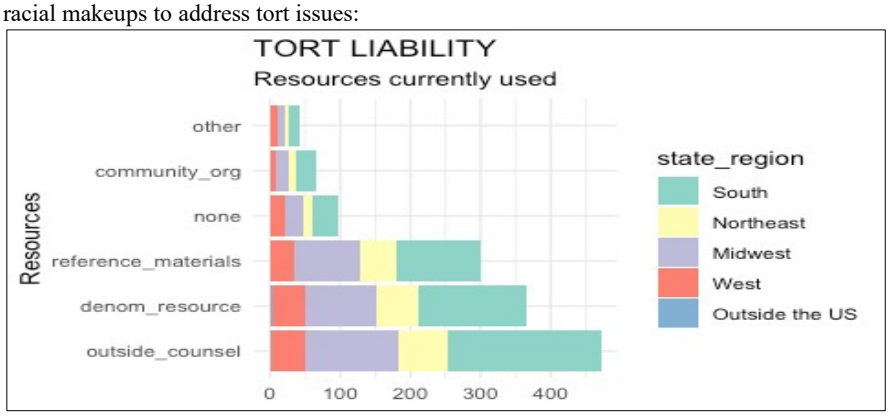
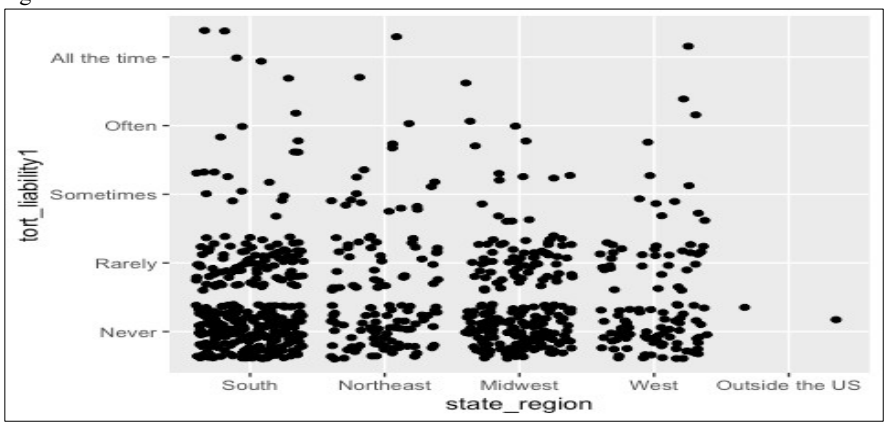
309. The following graph shows the kinds of legal resources used by churches of varying racial makeups to address tort issues:



310. The following chart shows the distribution of tort law issues based on churches' regional locations in the United States:



5. Summary of Quantitative Findings

Our research indicates that large organizations with many members and employees are more likely to encounter tort liability issues, but the increase is only slight. Consequently, larger organizations may want to place a greater emphasis on knowledge and training for tort liability issues. Still, they should not be too worried since even most large organizations report encountering tort liability issues "rarely." Similarly, there does not seem to be any strong relationship between knowledge or training and the likelihood of encountering tort liability issues, with congregations with various knowledge and training levels mostly reporting that they rarely encounter the issue. This result indicates that congregations should not be alarmed about the potential for greater legal knowledge or training to increase the risk of litigation and feel comfortable implementing new legal training regiments for tort liability if they want to. For access to resources, our results indicate that those who use more resources report more knowledge of tort liability issues. In particular, the use of outside counsel is stratified by socioeconomic status, with upper-middle income organizations using outside counsel more frequently than organizations with a lower socioeconomic status. Accordingly, increasing access to high-quality legal resources or reference materials has the potential to help organizations of all socioeconomic backgrounds better confront tort liability issues when they arise.

C. Qualitative Findings on Tort Law and Ministry

Focus groups in which clergy were asked to respond to hypothetical scenarios in which a congregation experienced an incident that could lead to a tort claim revealed tension for many between pastoral impulses and taking action to protect against liability.[311] Although some participants

311. The following two tort law scenarios and accompanying guided discussion questions were presented to clergy participants in the Project's focus groups:
Scenario #1: During church services your church offers free childcare in the church basement for children under 10. It's staffed by volunteers who are selected by the facility coordinator, Mary, who is a church employee. Hannah, a 14-year-old member of the church, would like to volunteer. She has experience babysitting for a family with two elementary-school kids and experience helping with her own two-year-old sister. Hannah is in youth group at the church, and Mary knows her well.
Is Mary okay to approve Hannah as a volunteer? What process should Mary follow? (And is this a requirement or more of a suggested process?) What basic skills and experience should be required for a volunteer position like this?
Let's say Mary invites Hannah to be a volunteer… following the normal process for volunteers at the church. So far, so good. Then, one Sunday Mary steps out for a few moments, and a three-year-old boy Hannah is caring for climbs onto a table and falls off,

indicated they would be quick to consult legal counsel if threatened with litigation, many participants expressed concern for the individual who suffered from the tort and a desire to first minister to that person's emotional and/or material needs before seeking legal advice or representation. In some cases, participants suggested they would maintain some distance from the situation by referring the individual to counseling or assistance from a more objective minister from an unrelated church. However, they would still prioritize helping the individual cope emotionally and spiritually with their situation.

Overall, ministers from more centralized denominations that provide more legal resources tended to embrace this approach and to have greater complacency about any looming liability. In contrast, more decentralized denominations (e.g., Southern Baptists) appeared more concerned about legal risk in the hypothetical scenarios. While this finding of greater complacency among more well-resourced denominations might appear to put them at greater risk, contradicting the data indicating that less-resourced churches are more likely to experience tort claims, it may signal the opposite. It's possible that a pastoral-first approach has a protective effect that defuses hostility and conflict and reduces the number of tort claims that proceed. Perhaps the knowledge that their denomination has high-quality legal resources available gives these ministers the freedom and confidence to take a more pastoral approach. In contrast, other clergy

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breaking his leg. The boy's parents threaten to sue, for both negligent hiring and negligent supervision.

What would you do? Would you change anything about the hiring procedures or basic requirements?

When it comes to issues around liability, how have you learned what you know?

Scenario #2: Your church employs 10 pastoral counselors who are really competent and caring. They often deal with severe cases of addiction and mental illness, and you are really proud of the work they do. A 17-year-old member of the church named Kevin was enrolled in counseling by his parents after he attempted suicide, and he met with a counselor named Mark once a week. Mark has more than 20 years' experience assisting church members with depression and mental illness. Even though Kevin continued to express regret that his suicide attempt failed, Mark felt Kevin was making progress and was optimistic about his condition. However, after a few months of counseling, sadly, Kevin made another suicide attempt and died. Kevin's parents blame Mark and the church for not letting them know about the severity of Kevin's condition and for not referring Kevin to professional psychiatric care. They are threatening to sue on the basis of clergy malpractice.

How would you handle this situation? What would you do to prevent similar situations from arising in the future?

How important is it to have a formal training program or more formal requirements for pastoral counselors?

When it comes to an issue like clergy malpractice, what are the things you think every minister needs to know to avoid lawsuits? How have you become knowledgeable on these issues?

without resources feel pressured to immediately adopt a more defensive stance that does not resolve the conflict – i.e., to "lawyer up" and/or cut off communication with the aggrieved individual – making legal action more likely. This cause-and-effect relationship is an area for future study.

Clergy in multiple focus groups also cited insurance companies as providing important resources and counsel on avoiding liability by preventing hazards and creating policies for child protection. On the other hand, several ministers recounted stories about people being hurt or injured on church property where there was no threat of legal action by the individual, but where the individual's insurance company had sued the church to cover claims.

IV. CONCLUSION

Given the abundance of employment and tort litigation involving churches and other religious organizations, churches need to be attentive to legal concerns and better train ministers to confront legal issues that may arise in the course of their vocation. This article has provided a broad overview of common employment and tort issues that often arise in ministry contexts and that churches should be aware about. As our data from the Study suggests, employment and tort issues are the most commonly litigated, with Church of Christ, Disciples of Christ, Lutheran and United Methodist congregations facing these issues more often than other denominations. However, most congregations report having only "poor" or "fair" knowledge and training regarding employment and tort issues. Accordingly, it is very important that ministers, especially in smaller congregations that cannot afford elaborate legal counsel, to have a basic understanding of these issues and consult materials, like this article, to learn more about these areas of the law and how they relate to religious organizations.