



Washington Supreme Court Limits the Non-Profit Religious Organization Exemption from the Law Against Discrimination

by Nate Bailey

In February, the Washington Supreme Court issued a landmark decision limiting the scope of the non-profit religious organization exemption from the Washington Law Against Discrimination (WLAD). The Court, in *Ockletree v. Franciscan Health Sys.*, held that the exclusion of non-profit religious organizations from the definition of "employer" was unconstitutional as applied to discrimination that was unrelated to the organization's religious purpose.

Background. Ockletree was a security guard at Franciscan. After he was terminated, he brought discrimination claims against Franciscan based on race and disability. Franciscan removed the case to federal court, where it promptly sought to have Ockletree's WLAD claims dismissed under the non-profit religious organization exemption. Ockletree contended that the exemption violated the Washington Constitution. The U.S. district court sought guidance from the Washington State Supreme Court, certifying two questions to the Court: (1) does the WLAD's immunity from employment discrimination claims for non-profit religious organizations violate the Washington Constitution on its face; and, if not, (2) does that immunity violate the Constitution as applied where the employee claims that the organization discriminated against her for reasons unrelated to any religious purpose?

Lead Opinion Upholds the WLAD's Religious Exemptions. The Court's lead opinion, which four justices endorsed, found that the WLAD's religious exemption does not violate the state Constitution on its face. The court explained that the right to sue one's employer for discrimination is not a fundamental right of citizenship that would constitute a Constitutional "privilege." The Court also rejected the notion that the exemption constituted an unfair benefit to religious organizations at the expense of other businesses. The exemption therefore does not confer an unconstitutional benefit on religious non-profits. The Court noted that even if the exemption did implicate a constitutional "privilege," reasonable grounds exist to distinguish religious from non-religious non-profit organizations.

The lead opinion did not directly answer the second question: whether the religious-organization exemption violated the Constitution as applied. It did, however, hint that the exemption was constitutional as applied because ruling otherwise would impose a significant burden on a religious organization "to predict which of its activities a secular court will consider religious."

Dissent Would Strike Down Exemption As Applied. A dissenting opinion, which was also endorsed by four justices, disagreed with the lead opinion's decision to avoid the exemption as applied to discrimination unrelated to an organization's religious purpose. The dissenting opinion found that the right to be free from workplace discrimination was a "privilege" under the state Constitution. To justify the WLAD's distinction between religious and non-religious non-profit organizations, the dissent would thus require "a religious employer to articulate a sincerely held religious belief that concerns one of Washington's 'growing list of protected categories.'" Here, the dissent would have found the exemption invalid as applied to Ockletree because discriminating against a security guard on the basis of race or disability was unrelated to Franciscan Health System's religious purpose.

Justice Wiggins Breaks Tie by Focusing on Job Description. With the Court deadlocked in a 4-4 tie, Justice Wiggins's opinion delivered the Court's ultimate decision. Justice Wiggins agreed with the lead opinion's conclusion that the WLAD's religious-organization exemption was not facially unconstitutional because he found that there was a reasonable basis for distinguishing between religious and non-religious organizations. Namely, he determined that avoiding excessive entanglement with religious practices and facilitating the free exercise of religion were legitimate bases for the WLAD's distinction.

But he agreed with the dissent that the exemption was unconstitutional as applied to Ockletree. Notably, Justice Wiggins departed from the dissent in his reasoning. He would have courts look to an employee's job description and responsibilities to determine whether that employee has a right of action against a religious non-profit under the WLAD. He would therefore hold that "the constitutionality of the exemption depends entirely on whether the employee's job responsibilities relate to the organization's religious practices."

Employers Should be Aware of the Trend Toward Greater Protection. Since 1949, when Washington enacted the WLAD to protect employees from discrimination on the basis of race, creed, color, or national origin, the legislature has gradually extended the protections offered by the WLAD to prohibit discrimination based on other factors, age and sex for instance. The trend continued in 2006 and 2007, when Washington added sexual orientation and honorable discharge status, respectively, to the list of protected attributes. Against this background, the Court's decision to grant greater protection to employees of non-profit religious organizations is not surprising. In fact, we expect this trend toward greater protection of employees to continue, underscoring the importance for all employers of keeping their anti-discrimination policies up to date.

In the meantime, *Ockletree v. Franciscan Health Sys.* serves as a good reminder to religious non-profits to ensure that their anti-discrimination policies comply with state laws to the extent allowed by the organization's religious practices. They should also be sure that their job descriptions and job responsibilities accurately reflect the organization's religious practices and beliefs where appropriate.

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