U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of Commissioner Chai R. Feldblum

The Title VII Religious Exemption: An Annotated Source List[1]

I. Title VII

Title VII provides two exemptions for religious employers – one in section 702 for religious corporations, associations, and societies generally and another in section 703 for religious educational institutions.

Section 702 initially only covered employees who engaged in "religious activities" for religious organizations. But Congress dropped the term "religious" from the phrase "religious activities" in an amendment to the Equal Employment Opportunity Act of 1972. The debate on the amendment suggests that the motivating concern of the sponsors was the right of religious institutions, primarily religious schools, to prefer co-religionists in hiring for all activities, not simply religious ones. *See* Legislative History of the Equal Employment Opportunity Act of 1972, pp. 843-851, 1665-1666.

a. Section 702[2]

"This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion *to perform work connected with the carrying on by such corporation, association, or society of its religious activities* or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution." Section 702 of the Civil Rights Act of 1964, 78 Stat. 241, 255.

"This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion *to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities*." Section 3 of the Equal

[1] Prepared by Pierce Blue, Special Assistant and Attorney-Advisor to Commissioner Chai R. Feldblum 10/21/14.

[2] In *Corp. of the Presiding Bishop of the Church of Jesus Christ of Later-Day Saints v. Amos*, 483 U.S. 327 (1987) the Supreme Court held that the exemption in §702 did not violate the Establishment Clause of the First Amendment. The majority opinion implies that this would be the case for any religious organization that falls under the terms of §702. Concurring opinions from Justices Brennan, Marshall, Blackmun, and O'Connor, however, express doubt as to whether the exemption applied to a religious organization engaged in for-profit activity would survive an Establishment Clause challenge.

Employment Opportunity Act of 1972, 86 Stat. 103-04, *amending* Section 702 of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. §2000e-1(a)).

b. Section 703

"Notwithstanding any other provision of this subchapter . . . (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning *to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion* or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion." Section 703(e) of the Civil Rights Act of 1964 (codified as 42 U.S.C. §2000e-2).

II. <u>What Constitutes a Religious Organization?</u>

Title VII does not define "religious corporation, association, or society." In seeking to interpret the term, the courts have developed four tests outlined below. I have also included a summary of a recent case from the 9th Circuit, *Spencer v. World Vision, Inc.*, which modifies the "primarily religious" test and puts a slightly broader spin on its meaning. Commission guidance states that the "primarily religious" test put forward in *EEOC v. Townley* is the correct standard.

a. Secularization Test – *Fike v. United Methodist Children's Home of Virginia, Inc.*, 547 F. Supp. 286 (E.D. Va. 1982) *aff'd*, 709 F. 2d. 284 (4th Cir. 1983).

"There is little precedent on the meaning of "religious corporation" under 2000e-1. In *McClure v. Salvation Army*, 323 F.Supp. 1100 (N.D.Ga.1971), *aff'd*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896, 93 S.Ct. 132, 34 L.Ed.2d 153 (1972). The Court held that the Salvation Army is a religious corporation within the meaning of s 2000e-1. The decision was based on an analysis of the various branches of the organization, each established for the purpose of disseminating the Christian gospel and developing the Christian life. The Court noted, "The original mission of the Salvation Army has remained unchanged. It is to seek the unsaved, (and) to secure the commitment of those who are determined to live a Christian life...." *Id.* at 1102.

While the original mission of the United Methodist Children's Home may have been to provide a Christian home for orphans and other children, that mission has not remained unchanged. The facts show that as far as the direction given the day-to-day life for the children at the Home is concerned, it is practically devoid of religious content or training, as such. While the purpose of caring for and providing guidance for troubled youths is no doubt an admirable and a charitable one, it is not necessarily a religious one. For an organization to be considered "religious" requires something more than a board of trustees who are members of a church. The Court, therefore, holds that for the purposes

of the exemption in 2000e-1 the United Methodist Children's Home is, quite literally, Methodist only in name. It is a secular organization." *Fike* at 290.

b. Sufficiently Religious Test – *Killinger v. Samford University*, 113 F. 3d 196 (11th Cir. 1997)

"Samford presented extensive evidence to establish that it is a 'religious educational institution.' Samford was founded as a 'theological' institution in 1841 by the Alabama Baptist State Convention (the "Convention"). While Samford recently amended its charter to remove the Convention's power to elect the school's trustees, its trustees are now, must be, and always have been (with one historical exception) Baptist. Samford receives roughly seven percent of its annual budget (over four million dollars) from the Convention. This sum is its largest single source of funding. This money is also the largest amount (from a single source) received by a Baptist college in the United States. Samford reports financially to both the Convention and the Alabama Baptist State Board of Missions and submits financial reports to the Convention's audit, budget and insurance committees. The audited financial statements are published in the Convention's annual proceedings, and both it and Samford's external audit are made available to all churches within the Convention. In addition, the school is a member of the Association of Baptist Colleges and Schools, which limits membership to Baptist educational institutions.

Before teaching religion courses at the school, all faculty must subscribe to the 1963 Baptist Statement of Faith and Message, which contains various 'affirmations' and 'commitments' to advancing Christianity. Both the faculty handbook and individual faculty contracts affirm this commitment, with termination as a potential penalty for failing to abide by it. Samford's charter designates its chief purpose as 'the promotion of the Christian Religion throughout the world by maintaining and operating ... institutions dedicated to the development of Christian character in high scholastic standing.' Samford's student handbook describes Samford's purpose this way: 'to foster Christianity through the development of Christian character, scholastic attainment, and a sense of personal responsibility, ...' Furthermore, all students are required to attend chapel. Both the Internal Revenue Service ("IRS") and the Department of Education recognize Samford as a religious educational institution and grant it exemptions on that basis. Plaintiff has requested and received a minister's housing allowance from the IRS based on Samford's exemption. In sum, Samford is doubtlessly a 'religious educational institution.'

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This case comes down to this situation: Plaintiff is not allowed to teach at the divinity school of a religious educational institution because his religious beliefs—as Plaintiff frankly admits—differ from those of the school's dean, the person selected by the religious educational institution to apply its policy and to lead the faculty at the divinity school. The Section 702 exemption's purpose and words easily encompass Plaintiff's case; the exemption allows religious institutions to employ only persons whose beliefs are

consistent with the employer's when the work is connected with carrying out the institution's activities. To us, a teaching job in a divinity school of a religious educational institution is at the core of the Section 702 exemption: the inherent purpose of such schools is the study of God and God's attributes. We conclude that the exemption protects Samford in this case." *Killinger* at 199-200.

c. The Primarily Religious Test – *EEOC v. Townley*, 859 F. 2d. 610 (9th Cir. 1988).

"A brief review of the relevant legislative history is necessary. In 1963, the House Judiciary Committee drafted H.R. 7152, the bill which was the basis of much of the Civil Rights Act of 1964. Title VII of the bill included a section that stated the title would not apply to a 'religious corporation, association, or society.' The committee report accompanying the bill did not elaborate on the section. However, the section was the subject of some debate in the House after Representative Purcell proposed amending H.R. 7152 to allow an educational institution to discriminate on the basis of religion if the institution was wholly or partly supported or managed 'by a particular religion or by a particular religious corporation, association, or society,' or if the institution's curriculum was 'directed toward the propagation of a particular religion.' EEOC Legislative History of Titles VII and XI of the Civil Rights Act of 1964, at 3197 (1968).
The debate on this proposal is relevant because an issue in the debate was whether such institutions were already protected by the 'religious corporation' exemption. The consensus was that they were not protected if they were merely 'affiliated' with a religious organization. For example, Representative Celler, the chairman of the Judiciary Committee and one of the drafters of the bill, was asked whether a church-supported orphanage would already be covered by the bill. He said, 'If it is a wholly church supported organization, that is, a religious corporation that comes under [then] section 703.' Id. at 3204 (emphasis added). This coverage was considered too narrow, and the House passed the proposed amendment.

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The debate over Representative Purcell's amendment . . . indicate[s] . . . that Congress's conception of the scope of section 702 was not a broad one. All assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm.

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[E]ach case must turn on its own facts. All significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious. Only when that is the case will the corporation be able to avail itself of the exemption.

Townley and the EEOC do not dispute the 'primarily religious' standard. They differ over whether Townley is primarily religious or secular. On the secular side, the company is for profit. It produces mining equipment, an admittedly secular product. It is not affiliated with or supported by a church. Its articles of incorporation do not mention any

religious purpose. Against these elements are the facts that Townley encloses Gospel tracts in its outgoing mail, prints Bible verses on its commercial documents (such as invoices and purchase orders), financially supports churches, missionaries, a prison ministry, and Christian radio broadcasts, and, of course, conducts a weekly devotional service. Underlying these facts, of course, is 'the discipleship Jake and Helen Townley have for the Lord Jesus Christ.'

When viewed together, we have no difficulty in holding that these characteristics indicate that Townley is primarily secular. We do not question the sincerity of the religious beliefs of the owners of Townley. Nor do we question that they regard the conduct of their company as subject to a compact with God. We merely hold that the beliefs of the owners and operators of a corporation are simply not enough in themselves to make the corporation 'religious' within the meaning of section 702. We therefore agree with the district court that Townley is not exempt under section 702 from Title VII's prohibition against religious discrimination." *Townley* at 617-619.

d. The Hybrid Test – *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F. 3d. 217 (3d Cir. 2007).

"The statute does not define what constitutes 'a religious corporation, association, educational institution, or society'; as the Ninth Circuit Court of Appeals has put it, '[a]ll significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious.' *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir.1988). Over the years, courts have looked at the following factors: (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists. *See Killinger v. Samford University*, 113 F.3d 196 (11th Cir.1997); *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458 (9th Cir.1993); *Townley*, 859 F.2d at 618–19 (9th Cir.1988); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir.1980).

It is apparent from the start that the decision whether an organization is 'religious' for purposes of the exemption cannot be based on its conformity to some preconceived notion of what a religious organization should do, but must be measured with reference to the particular religion identified by the organization. Thus not all factors will be relevant in all cases, and the weight given each factor may vary from case to case.

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[T]he LJCC saw itself as a center for the local Jewish community, identified itself as Jewish through the mezuzah on its doorway, relied on coreligionists for financial support, and offered instructional programs with a Jewish content. The Jewish religious calendar provided the rhythm for the LJCC's yearly (and even weekly) activities; the three area rabbis were involved in management decisions, including the search for an executive director; and the Board of Trustees began meetings with Biblical readings and remained acutely conscious of the Jewish character of the organization. These characteristics of the LJCC, taken together, clearly point to the conclusion that the LJCC was primarily a religious organization.

LeBoon argues that despite all this the LJCC is not sufficiently religious to qualify for Section 702 protection. She points out that it engaged in secular activities, such as lectures and instructions with no religious content, and once even rented space to a Hindu group for meetings, that its employees were overwhelmingly Gentile, that it accepted United Way funds with the promise that it would not discriminate in the funded programs, and that it failed to ban non-kosher foods. None of these factors is decisive." *LeBoon* at 226-229.

e. The Broad Primarily Religious Test – *Spencer v. World Vision, Inc.*, 633 F. 3d. 723 (9th Cir. 2011).

"[A]n entity is eligible for the section 2000e–1 exemption, at least, if it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.

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The Employees argue [that the 9th Circuit has adopted] a narrow interpretation [that] limits the exemption to 'churches, synagogues, and the like' or '[c]hurches, and entities similar to churches.' *Townley*, 859 F.2d at 618 & n. 14

Despite the Employees' protestations to the contrary, our interpretation of section 2000e-1 is not as 'narrow' as they would have it. First, in *Townley*, we did not confine our inquiry to considering whether the manufacturing firm at issue was essentially a church. Rather, we weighed all relevant religious and secular characteristics to determine whether the company at issue was 'primarily religious or secular' in nature. *See id*. at 618–19. Moreover, *Townley*'s allegedly limiting language—'[c]hurches, and entities similar to churches'—appears in its discussion of section 2000e–1' s legislative history, a discussion on which our holding did not depend. *See id*.; *see also Kamehameha*, 990 F.2d at 460 n. 5 ('In any event, the test the court adopted in *Townley* does not depend on an analysis of the legislative history.'). At the least, the comment seems more appropriately characterized as a 'suggestion' rather than a strict rule. *LeBoon*, 503 F.3d at 230.

Second, the reading of section 2000e–1 propounded by the Employees is belied by the text of the statute. Congress extended the exemption to any 'religious corporation, association, ... or society.' 42 U.S.C. § 2000e–1(a). If Congress had intended to restrict the exemption to '[c]hurches, and entities similar to churches' it could have said so. Because Congress did not, some religious corporations, associations, and societies that are not churches must fall within the exemption.

Third, the canon of constitutional avoidance counsels against the Employees' stringent interpretation of section 2000e–1. *See NLRB v. Catholic Bishop*, 440 U.S. 490, 500, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979) ('[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.'). In *Townley* itself, we noted that the Free Exercise Clause 'clearly' protects "organizations less pervasively religious than churches." 859 F.2d at 620 n. 15; *see also id*. at 618 n. 13 (explaining that even absent the exemption for religious organizations, "the First Amendment would limit Title VII's ability to regulate the employment relationships within churches and similar organizations"). Moreover, the Employees' reading also potentially runs afoul of the Establishment Clause's core command of neutrality among religious groups. *See, e.g., Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) ("[The] clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). As the United States argues as amicus, interpreting the statute such that it requires an organization to be a 'church' to qualify for the exemption would discriminate against religious institutions which "are organized for a religious purpose and have sincerely held religious tenets, but are not houses of worship." *See* Thomas M. Messner, Can Parachurch Organizations Hire and Fire on the Basis of Religion Without Violating Title VII?, 17 U. Fla. J.L. & Pub. Pol'y 63, 69–71 (2006) (listing numerous such "parachurch" organizations); *see also Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir.2008). It would also raise the specter of constitutionally impermissible discrimination between institutions on the basis of the 'pervasiveness or intensity' of their religious beliefs. *Colo. Christian*, 534 F.3d at 1259; *see also Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C.Cir.2002) ('[A]n exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns—discriminating between kinds of religious schools.'). Thus, the cramped reading of the exemption put forth by the Employees raises serious questions under both the Free Exercise Clause and the Establishment Clause. As we must, we reject this constitutionally questionable interpretation.

That said, there is no denying that we have held that section 2000e–1 should be construed "narrowly." *Kamehameha*, 990 F.2d at 460. But the same panel which held that a narrow construction was necessary found nothing contradictory between such a reading and Townley's requirement of a case-by-case weighing of '[a]ll significant religious and secular characteristics ... to determine whether the corporation's purpose and character are primarily religious.' *Id.* (*quoting* Townley, 859 F.2d at 618). Analysis of additional or alternative factors cannot contravene circuit precedent which explicitly mandates consideration of " '[a]ll significant religious and secular characteristics.' " *Id*. (emphasis added).

> In sum, when confronted with a section 2000e–1 case, *Townley* and *Kamehameha* require us to analyze, on a case-by-case basis, whether the 'general picture' of an organization is 'primarily religious,' taking into account '[a]ll significant religious and secular characteristics.'" *Spencer* at 724-730 (quoting per curiam opinion and concurring opinion of J. Scannlain).

III. The Ministerial Exemption

In addition to the statutory exemptions in sections 702 and 703, the courts have recognized a "ministerial exemption" to Title VII and other employment discrimination statutes. This exemption stems from the Establishment and Free Exercise Clauses of the First Amendment and it prevents a person in a "ministerial" post from suing a religious employer for discrimination on any basis.

In *Hosana-Tabor Evangelical Lutheran Church v. EEOC,* 132 S. Ct. 694 (2012) the Supreme Court refused to adopt a set formula for deciding whether an employee is a minister for purposes of the exemption. Instead, they simply said that it was enough that the religious organization in the case before it had (1) held the employee out as minister (and the employee had done the same); (2) required significant religious training for those, like the employee, that it called ministers; and (3) entrusted the employee with important religious duties. *See Hosana-Tabor* at 707-708.