ASSESSMENT OF CLERGY CANDIDATES IN THE 21ST CENTURY
LEGAL AND ETHICAL ISSUES
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Overview:

In the following I will address several, though by no means all, of the legal and ethical issues in conducting assessment evaluation of clergy candidates – both from the vantage point of the Annual Conference and that of the ministerial assessment specialist (MAS). These comments are crafted specifically relying upon United Methodist polity and canonical rules, but generally apply to other adjudicatories.

The issues to which I refer will include:

- Whether liability attaches to the Annual Conference associated with conducting psychological evaluations of clergy candidates?
- Whether HIPAA, Title VII of the Civil Rights Act of 1964, or the Americans with Disabilities Act (ADA) apply to such evaluations?
- Whether, to what extent, MAS's have liability for the conduct of evaluations?
- The conflicting roles of the MAS.
- Issues of competence, consent, records, access to the report by the candidate.
- Needs for special competencies as applied to ethnically diverse populations.

Caveat:

Each Annual Conference has a chancellor whose task it is to provide legal consultation to the Bishop and Annual Conference. In addition, GCF&A has a Legal Services Division providing legal services to the Church *sui generis.* The following comments are not intended to be, nor should they be construed as, legal advice and each Annual Conference should thoughtfully consult with its own chancellor regarding any potential legal issue. These comments are but educational in nature and provide some general background information, and do not supplant the duty as stated above.

Liability of the Annual Conference in conducting clergy assessments

It is now a well settled area of law that the courts will not resolve essentially ecclesiastical disputes, and specifically will not attach liability for the manner in which

religious entities employ criteria for selection of clergy. In every federal venue which has considered the matter, no liability attaches to church adjudicatories for the manner in which clergy are selected. These holdings are based upon an interpretation of the 1st Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…"

There is a plethora of cases wherein the courts have held that this clause creates an exception which protects a church's interest in the process of selection, as well as criteria for selection, of its clergy, and in deciding the duties to be performed by those ministers. See, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012)[1]; *McDowell v. Calvin Presbyterian Church*, 397 F.3d 790 (9th Cir. 2005); *Serbian E. Orthodox Diocese for the U.S. and Can. v. Milivojevich*, 426 U.S. 696 (1976); *Lewis v. Seventh-Day Adventists Lake Region Conference*, 978 F.2d 940 (6th Cir. 1992).

The Supreme Court has long refused to involve itself in religious matters: In *Watson v. Jones*, 80 U.S. 679 (1871) the Supreme Court was faced with a property dispute originating in Louisville, KY between two factions of a Presbyterian congregation which has split during the civil war over the issue of slavery. A controversy arose out of church doctrine and the Supreme Court refused to intervene.

A very familiar quote from a D.C. Circuit case is illustrative of courts' general position: In *Minker v. Baltimore Annual Conference of United Methodist Church,* 894 F.2d 1354 (D.C. Cir. 1990), the court stated "We cannot imagine an area of inquiry less suited to a temporal court for decision, evaluation of the "gifts and graces" of a minister must be left to ecclesiastical institutions."

The claims against churches in recent times have been based upon Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act (ADA). With limited and very case specific exceptions, virtually all such claims have failed. For example, in *Werft v. Desert Southwest Conference of The United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004) a pastor alleged that despite his history of an attention deficit disorder, dyslexia, and certain heart problems, he was able to perform his ministerial duties with minor

accommodations. The Church, however, refused to make any accommodations and instead according to his petition, "forced him to resign from his pastoral position." He claimed discrimination on the basis of failure of the church to accommodate his disabilities. The federal district court dismissed the matter and the 9th Circuit affirmed, on the basis that "a religious institution must retain unfettered freedom in its choice of clergy." Subsequent cases in other circuits would temper that conclusion only by noting that the reasoning in these cases applies specifically to clergy and to the church's "spiritual function", see discussion in *Skrypzcak v. Roman Catholic Diocese*, 611 F.3d 1238 (10th Cir. 2010).

Similarly in *Combs v. Central Texas Annual Conference of the United Methodist Church*, 713 F.3d 343 (5th Cir. 1999) an associate at First United Methodist Church, Hurst, who was in the process of entering into ministry in the United Methodist Church from the Baptist tradition, requested maternity and family leave benefits under the Family and Medical Leave Act, which were not provided. She ultimately sued the Central Texas Annual Conference and First United Methodist Church, Hurst, alleging discrimination on the basis of her sex and her pregnancy in violation of Title VII. She alleged that the deprivation of her benefits and her termination were the conclusion of a practice of discrimination that included disparate salary and treatment while she was employed. The trial court rejected her arguments and the 5th Circuit held as follows:

> "In short, we cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread, the internal management of a church....Thus, we are persuaded that the First Amendment continues to give the church the right to select its ministers free from Title VII's restrictions."

More recent cases include: *Penn v. New York Methodist Hospital*, 884 F3d 416 (2nd Cir. 2017) wherein a former chaplain argued that he suffered discrimination due to race and religion. Summary judgment was granted for the hospital.

To be sure, failure of the Church to properly assert the ministerial exception is critical and cannot be done on appeal. In an unpublished case, *Mosaic United Methodist Church, Inc. v. Hammond*, No. 2014-CA-001422-MR, 2018 Ky. App. Unpub.

LEXIS 34 (Ct. App. Jan. 19, 2018), involving employment discrimination and the director of a day school who was discharged, the Church simply failed to properly exert the exemption, and the court noted that attempting to so do on appeal was ineffective, if not raised at the trial level.

The first case to cite the ministerial exception was *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert denied,* 409 U.S. 896 (1972). Ms. McClure was commissioned as a minister and alleged discriminatory employment practices, i.e. less salary and less benefits than male officers. The court did not find for the plaintiff.

Similarly, in *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 09/23/1985) a woman who had an M.Div. and a Ph.D. in psychology sought a position as an associate pastor, was rejected, unsuccessfully sued, and the court's language was as follows:

> "This case raises significant questions about the application of the civil rights laws to churches. The issue is whether a woman denied a pastoral position in the Seventh-day Adventist Church may charge that church with sexual and racial discrimination under Title VII of the Civil Rights Act of 1964. The district court granted summary judgment to defendants on the grounds that the suit was barred by the religion clauses of the First Amendment. Because state scrutiny of the church's choice would infringe substantially on the church's free exercise of religion and would constitute impermissible government entanglement with church authority, we affirm the judgment of the district court……. The application of Title VII to employment decisions of this nature would result in an intolerably close relationship between church and state[.] . . . It is axiomatic that the guidance of the state cannot substitute for that of the Holy Spirit and that a courtroom is not the place to review a church's determination of "God's appointed."

The 5th Circuit specifically applied the ministerial exception to ADA cases and concluded that the ADA cannot constitutionally be applied to a church's employment decisions regarding clergy. *Starkman v. Evans*, 198 F3d 173 (5th Cir. 1999).[2] This was a case involving a Louisiana Conference choir director and musician who "allegedly suffered various disabilities, including asthma, osteoarthritis in both knees, migraine headaches, and endometriosis" and the church was accused of failing to accommodate her various conditions after knee surgery. She sued. The court extended the ministerial exception to her, as a lay person, because "her position as a choir director required her

to perform ministerial functions that warrant the First Amendment's protections against undue interference with the personnel decisions of churches and religious leaders…." The court's reasoning was based upon *EEOC v. Catholic University of America* 83 F.3d 455, 461 (D.C. Cir. 1996) (citing *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)). The "ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission." Catholic University, 83 F.3d at 463. Similarly, a suit against the Missouri Annual Conference was dismissed, after the plaintiff – a St. Paul School of Theology student –filed an ADA claim because of rejection by the Annual Conference from proceeding in candidacy due to her morbid obesity and diabetes.[3]

On the other hand, the ministerial exception would not apply to persons performing strictly secular functions, such as a janitor or secretary. The issue is whether the employment decision is based upon what the courts could decipher as "essentially religious criteria." See *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003) "In determining whether an employee is considered a minister for the purposes of applying [the **ministerial] exception**, we do not look to ordination but instead to the function of the position."

Liability of the Annual Conference for negligent hiring or negligent retention will apply

Note that in contrast to issues of selection, where the ministerial exception applies, liability to the general church **will** generally extend to claims of clergy misconduct such as sexual misbehavior and the claims will be those of negligent hiring, negligent retention, or even intentional infliction of emotional distress. The ministerial exception offers no protection to misconduct by the clergyperson –and, without listing all the jurisdictions which have enacted such --- numerous states have criminalized sexual contact between a clergy person and congregant, as well as permitting civil proceedings. Texas, for example, would attribute liability to the denomination if the denomination knew or should have known of the clergyperson's misconduct and did nothing about it! Moreover, we are all well aware of the plethora of suits because of the

misconduct of priests, not to say Protestant clergy – with devastating effects to victims but also to the Church where such cases result in substantial costs. Yet these claims are highly technical and while claims of "clergy malpractice" may not be sustained in one circumstance, subtle differences (to the lay reader) may result in liability. For example, in *Bladen v. First Presbyterian Church*, 857 P.2d 789, 1993 OK 105 (Okla. 1993), Oklahoma would not recognize clergy malpractice as a cause of action when the pastor was providing counseling services to a couple and became romantically involved with one of the parties. Yet, in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) the courts allowed a successful claim against a priest in the same circumstance, reasoning that as he was providing essentially secular counseling services, he would be held to the same standard as a secular psychotherapist. Suffice it to say that claims by persons having been the victim of clergy misconduct have been sustained, and in the modern world would – under best case conditions – receive substantial public scrutiny.

Liability to the ministerial assessment specialist (MAS)

Liability for the MAS is quite a different matter, for in contrast to the Annual Conference, MAS's would not necessarily enjoy any protections for issues such as:

- Regulatory violations, Board complaints,
- Malpractice claims
- Criminal prosecution for sexual misconduct

Duties of the MAS

Liability is based upon a determination of negligence and negligence involves three factors: (1) a duty which is incumbent upon the MAS, (2) a breach of that duty by the MAS and (3) damages which are proximally related to the breach.

The duties imposed on MAS's include – but are not limited to -- matters relating to competence, consent and confidentiality, honesty and fair dealing, maintenance of personal boundaries and record keeping.

- Competence.

The MAS has a duty to practice within the bounds of his/her competence and is accountable both to a licensing Board as well as in a court of law in response to a malpractice claim. For example, if a MAS is unfamiliar with a psychological instrument

employed in the evaluation process then he or she should establish competence through independent study, supervision, continuing education courses, or consultation. Failure to do so would place the MAS in an indefensible position in the event of a Board complaint or lawsuit.

- Consent & Confidentiality.

The MAS has a duty to inform the subject of the examination of the limits of confidentiality. Failure to do so could result in liability for failure to obtain adequate informed consent and/or maintain confidentiality, subject to the terms of the consent agreement. This means having obtained – in writing -- a waiver of confidentiality from the client/candidate for purposes of disclosure to entities of the Church.

A comment about the application of HIPAA is appropriate at this point. The fears of mental health practitioners, as well as Church adjudicatories, about any issue related to HPIAA are very nearly unbridled – and fueled in part by for-profit entities touting either training or the use of specific forms. In fact, HIPAA is pre-empted by state law that provides greater rights to persons, and even in the absence of such, there are quite specific comments about the appropriateness of waivers of rights of access to information, see Endnote.[4] Evaluations of persons for clergy positions may be conditioned on a waiver of access to the information, if that is the policy of the Annual Conference. There is no inherent "right of access" granted by HIPAA to the information obtained in the course of an evaluation of this type. See the HIPAA discussion in Endnotes.

It is beyond dispute that psychologists have suffered complaints or court proceedings for inappropriate release of records (not to say failure to release when appropriate). It is beyond the scope of this presentation to elucidate the multiplicity of issues involved in releasing information and readers are encouraged to read the article by Jennings, F.L. & Hays, J.R. (2011) *How are treating psychologists to respond to requests for court testimony?* Open Access Journal of Forensic Psychology, 3, 19-29. (This journal is available on-line at no cost.).

- Honesty/fair dealing

The MAS has a duty to conduct his/her practice and relationship both with the candidate and with the Church in an honest and forthright fashion, billing only for those

services that are provided. Honesty requires full disclosure. For example, many jurisdictions would prohibit blind interpretations of test data and virtually all would require disclosing to the recipient of the examiner's opinion, i.e. the Church, that opinions derived from such data have impaired validity, and little evidentiary value in court proceedings. (Not also that this practice, though common, would not likely be looked upon in a kindly manner by complaint committees of licensing Boards.)

- Maintenance of personal boundaries

It goes without saying that the examiner has a duty to scrupulously maintain personal boundaries in examination of candidates. Failure to do so could result in loss of the contract with the Annual Conference, sanctions by a licensing Board, and possible criminal action.

- Record keeping

Other areas of liability would conceivably include record keeping and access to records. That is, as suggested above, it would be incumbent upon the MAS to clarify in advance of the delivery of service the issue of ownership of records. Who owns the records? What is the right of access by the client to the records? It is generally recommended that the MAS owns only data he/she generated and his/her opinion, but the Church owns all reports. Whether the candidate has access to the report is a matter of conference policy as well as the posture of the examiner in reviewing the purpose of psychological evaluation. The GBHEM waiver reflects two very different positions on this issue.

Conflicting roles of examiner

Across the country there is a fair amount of conflict viz. the purpose of evaluations of candidates for ministry and correspondingly, the role of the examiner in regard to the candidate himself or herself.

Stages of examination: Most commonly the process of examination is seen as different depending upon the stage at which the candidate is being seen. At the candidacy level, the issue regarding he aspirant is one of "fitness", i.e. is there evidence of behavior that would constitute an impediment to the conduct of ministry that would pose an embarrassment to the Church, jeopardy to congregants, or to the candidate? On the other hand, at the level of commissioning, the issue is more one of "readiness",

i.e. is the person ready to enter the apostolic ministry of the Church, is he grounded in the Methodist tradition, does he/she demonstrate sufficient maturity so as to pose no major difficulties in whatever setting the person may function, has he/she begun to garner an appreciation of personal strengths/weaknesses, and areas for growth? Or, at the level of final ordination and admission into the Annual Conference, the issue is one of "effectiveness", i.e. has the person developed the skill set(s) necessary to function effectively as a minister in the United Methodist Church, or will he/she pose problems for appointment in the future? Furthermore, given the advent of the *Discipline* ¶*349* appertaining to the Eight-Year Assessment process, there is some degree of agreement that this process is one that is largely for the benefit of the clergyperson, though details of how the information may be used by the Annual Conference are not now specified in the *Discipline.*

Conflict between examining and nurturing functions: Thus, the role of the MAS – and the inherent conflict related thereto -- may differ somewhat depending upon the point at which the candidate is examined. In general, the Church has a nurturing posture toward candidates, and desires to aide in the growth and development of future leaders. Examiners, however, may find themselves in a somewhat conflicted position, particularly at the point of entry into candidacy. For as forensic psychologists point out, evaluations at that point require a very different contractual position than that of being a nurturing therapist. The development of forensic psychology as often applied to personnel assessments (i.e. third party evaluations) contributes a conceptualization of the process as quite different from evaluations arising out of a psychotherapeutic context, counseling or even mentoring. The primary loyalty of the examiner is to the Church in general and the Annual Conference in particular, and only secondarily to the candidate. For example, the examination has not been prompted by a desire of the candidate for assistance in resolving personal issues, but is part and parcel of the Church's evaluation and confirmation of the person's call to ministry. And while examinations should always be conducted kindly, the examiner's duty may require disclosure of matters which the candidate would far prefer to be maintained confidential, and could result in termination from the candidacy process, or significant delay therein.

As a result, the examiner must have clarified with the examinee – prior to conducting the examination -- that all matters disclosed will be shared with the Church, and at the examiner's discretion, i.e. the candidate once having entered voluntarily and knowingly into the process, and the examiner having relied upon such authorization, the candidate does not have the right to either grant access to, or withhold access from, information gained in the course of the examination. Truly informed consent is a requisite – and failure to obtain such would pose liability to the examiner. Simply put: The examinee must understand that having once consented to the examination, consent cannot be withdrawn save to the extent to which it has not been relied upon by the examiner. That is, once the examiner has shared his or her opinion with the Annual Conference, the candidate could withdraw from the process but would have no recourse against the examiner (excepting on issues of competence). Fundamentally the role conflict arises because the examiner is not an advocate for the candidate but an agent of the Church.

Nonetheless, at all levels there is disagreement as to whether examiners can serve in both roles as evaluator and nurturer – and some, such as this writer, see these roles as largely incompatible, believing it would be far clearer to differentiate the examiner-therapist functions. The informed consent/waiver documents provided by GBHEM can be most useful in clarifying the role of the MAS in relation to candidates. But, MAS's would be well advised to have a written contract with the Annual Conference as well. (A sample contract is available from GBHEM/DOM.) Some jurisdictions would say to psychologists, "You can be an examiner or a treater – but not both in the same case!"[5] Similarly, in some jurisdictions, subjects of forensic examinations are not to be considered "patients" with automatic right of access to records.[6]

It should be noted that representatives of Boards of Ministry in several Annual Conferences have oft expressed frustration in MAS reports that are either obtuse or, worse, non-specific in identifying potential areas of difficulty either for the Church or the candidate should he/she go forward. Whatever else a report may be, it must reflect candor.

Specific issues in assessment

Several assessment issues have already been addressed, e.g.

- Access to the examiner's report by the candidate – which is a function of the policy of the Annual Conference
- Records retention – which is both a function of the law of the jurisdiction and the policy of the Annual Conference. That is, by contractual agreement the Annual Conference could establish ownership of the records and control of the distribution of same. The candidate would but be informed of this matter.
- Behavioral Health Guidelines for Boards of Ministry

While constructed for Boards of Ministry, and available on the GBHEM website, the Behavioral Health Guidelines constitute baselines information of which MAS's should be knowledgeable. The Guidelines identify ten areas which are often areas of concern for Boards, and, as well, for MAS's. They include critical areas, a standard of expected behavior, exploratory questions for candidates, and recommendations. The categories are:

- Physical health
- Management of personal finances
- Mental illness
- Alcohol abuse and dependence
- Chemical abuse/dependency
- Legal (general)
- Family violence
- Divorce or infidelity
- Sexual misconduct
- Legal – sex related crimes
- Pornography

Note that the foregoing would require that the MAS examiner have access to and/or knowledge of, the candidate's history of involvement with any aspect of the legal system, either civil or criminal.

Two additional areas having legal/ethical import are:

- Conflicts of interest
- Special competencies viz. assessment of ethnically diverse populations

Conflicts of interest

It goes without saying that examiners have a duty to refer in the circumstance wherein there is an apparent, or even perceived, conflict of interest. For example, when asked to examine a candidate with whom the examiner has had a prior relationship – family, friend, student, supervisee, etc. – the examiner would be duty bound to demur and refer. Similarly, a conflict of interest would exist on those occasions wherein some potential benefit would inure to the examiner if he/she opined favorably, or the alternative, some potentially negative consequence would inure if the opinion were negative, e.g. the candidate is the son or daughter of a Board member of the institution in which the examiner is employed. This also means that the examiner must politely resist attempts to influence the outcome of the examination by powerful persons within the Church who call to express their support and opinion of the candidate's potential usefulness.

Special competencies viz. assessment of ethnically diverse populations

Assessment of ethnically diverse populations requires both special competencies and instrumentalities which have been normed on that population – or at the very least, a disclaimer as regards the usefulness of any instrumentality which, if given, was normed in a very different cultural setting. The availability of such instruments has already been discussed, so the logistical issues will not be explored. Suffice it to say that supervision, consultation, and/or formal education as to the cultural differences between the dominant culture and the subculture of the candidate are sine qua non for conducting valid appraisals of these populations.

Summary:

In summary, there is little liability that attaches to the Church as regards the methodologies of clergy selection, including the reliance upon psychological evaluation. At the same time, liability would attach for failure to conduct reasonable inquiry into the stability and personality features of candidates should future untoward events occur that a trier of fact could regard as "reasonably foreseeable."

In sharp contrast to the protections afforded the Church, no similar protections exist for examiners and examiners are vulnerable not because they examined a

candidate, but if they were to do so with less than reasonable inquiry, or violated the person's confidentiality without waiver of such, much less violated personal boundaries.

Should questions arise, feel free to contact GBHEM – or Google the author.

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[1] "The Establishment and Free Exercise Clauses of the First Amendment [****4] bar suits brought on behalf of ministers against their churches, claiming termination in violation of employment discrimination laws. Hosanna-Tabor, Pp. 181-190, 181 L. Ed. 2d, at 659-664.
(a) The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church. By forbidding the "establishment of religion" and guaranteeing the "free exercise thereof," the Religion Clauses [**697] ensured that the new Federal Government--unlike the English Crown--would have no role in filling ecclesiastical offices. Pp. 181-185, 181 L. Ed. 2d, at 659-661.
(b) This Court first considered the issue of government interference with a church's ability to select its own ministers in the context of disputes over church property. This Court's decisions in that area confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers. See Watson v. Jones, 80 U.S. 679, 13 Wall. 679, 20 L. Ed. 666; Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 73 S. Ct. 143, 97 L. Ed. 120; Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151. [****5] Pp. 185-187, 181 L. Ed. 2d, at 661-663.
[*173] (c) Since the passage of Title VII of the Civil Rights Act of 1964 and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a "ministerial exception," grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers. The Court agrees that there is such a ministerial exception. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."

[2] Opinion letter from Thomas Starnes, Chancellor of the Baltimore-Washington Annual Conference to Mary Logan, former General Counsel, GCFA, personal communication, 6/12/2000.

[3] Maureen McNeil appeals the district court's dismissal of her disability-discrimination [*913] suit removed from Missouri state court. After careful de novo review, *see Strand v. Diversified Collection Serv., Inc.,* 380 F.3d 316, 317 (8th Cir. 2004), this court affirms. The district court correctly concluded that it lacked subject matter jurisdiction because McNeil's Americans with Disabilities Act (ADA) claim fell within the "ministerial exception" this court recognized in *Scharon v. St. Luke's Episcopal Presbyterian Hosps.,* 929 F.2d 360, 362 (8th Cir. 1991) ("[p]ersonnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts"; doing so would implicate the First Amendment's Free Exercise Clause). *See Hollins v. Methodist Healthcare, Inc.,* 474 F.3d 223, 225 (6th Cir. 2007) [**2] (applying exception to ADA claim; exception bars employment-discrimination claim when employer is religious institution and employee was ministerial employee); *see also Elvig v. Calvin Presbyterian Church,* 375 F.3d 951, 961 (9th Cir. 2004) (church's selection of its ministers is unfettered, and its true reasons – whatever they may be – are therefore unassailable).

[4] http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/index.html
A covered entity may condition the provision of health care solely to generate protected health information for disclosure to a third party on the individual giving authorization to disclose the information to the third party. For example, a covered entity physician may condition the provision of a physical examination to

be paid for by a life insurance issuer on an individual's authorization to disclose the results of that examination to the life insurance issuer. A health plan may condition enrollment or benefits eligibility on the individual giving authorization, requested before the individual's enrollment, to obtain protected health information (other than psychotherapy notes) to determine the individual's eligibility or enrollment or for underwriting or risk rating. A covered health care provider may condition treatment related to research (e.g., clinical trials) on the individual giving authorization to use or disclose the individual's protected health information for the research. 45 C.F.R. 508(b)(4).

http://www.hhs.gov/hipaafaq/providers/smaller/301.html

The public health provision permits covered health care providers to disclose an individual's protected health information to the individual's employer without authorization in very limited circumstances.

First, the covered health care provider must provide the health care service to the individual at the request of the individual's employer or as a member of the employer's workforce.

Second, the health care service provided must relate to the medical surveillance of the workplace or an evaluation to determine whether the individual has a work-related illness or injury.

Third, the employer must have a duty under the Occupational Safety and Health Administration (OSHA), the Mine Safety and Health Administration (MSHA), or the requirements of a similar State law, to keep records on or act on such information. For example, OSHA requires employers to monitor employees' exposures to certain substances and to take specific actions when an employee's exposure level exceeds a specified limit. A covered entity which tests an individual for such an exposure level at the request of the individual's employer may disclose that test result to the employer without authorization.

Generally, pre-placement physicals, drug tests, and fitness-for-duty examinations are not performed for such purposes. However, to the extent such an examination is conducted at the request of the employer for the purpose of such workplace medical surveillance or work-related illness or injury, and the employer needs the information to comply with the requirements of OSHA, MSHA, or similar State law, the protected health information the employer needs to meet such legal obligation may be discussed to the employer without authorization. Covered health care providers who make such disclosures must provide the individual with written notice that the information is to be disclosed to his or her employer (or by posting the notice at the work site if the service is provided there).

When a health care service does not meet the above requirements, covered entities may not disclose an individual's protected health information to the individual's employer without an authorization, unless the disclosure is otherwise permitted without authorization by other provisions of the Rule. However, nothing in the Rule prohibits an employer from conditioning employment on an individual providing an authorization for the disclosure of such information.

[5] See 22 TAC § 465.18

[6] See 22 TAC § 465.1