RELIGION AND THE COURTS

A Catholic Health Care Organization Wins a Suit Filed by an Unhappy Former Employee

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Editor's note: The following article concerns a lawsuit against a Catholic health care organization in California, filed by a former employee of that organization on the grounds that he had been unlawfully terminated from his job. The suit was eventually decided in the employer's favor by the state's Supreme Court. Although the case may not seem immediately relevant to other Catholic organizations in other states, we believe that its central issue—the right of a religious employer to claim special latitude in choosing its employees—should be of interest to them, especially since the California Supreme Court's final decision was based on the First Amendment to the U.S. Constitution.

The Catholic Church in the United States is currently under intense scrutiny as it strives to balance, on one hand, its inherent prerogative as a faith-based institution to define and control its religious mission with, on the other hand, the demands of secular authorities for conformity to laws of general applicability. The church's core values, such as belief, compassion, and confidentiality, and its rituals as well, are increasingly subject to the scrutiny and the often conflicting demands and values of secular authorities—such as, for example, transparency or retribution. This is an age-old problem, and one that will never be resolved so long as religious entities continue to play a significant role in society independent of civil authority.

To make matters more complicated, legislatures, particularly in California, are constantly busy making new laws that affect the employer community generally and require interpretation by civil judges. Only occasionally, however, are judges called upon to decide cases of truly unique significance to Catholic employers that clearly display the tension inherent in accommodating both religious and secular values. The 10-year case of *Silo v. CHW Medical Foundation*, recently definitively decided (for a second time) by the California Supreme Court, was one such case.

THE CASE'S BACKGROUND

CHW Medical Foundation (CHWMF) is a not-for-profit public benefit corporation affiliated with Mercy Healthcare Sacramento, a constituent organization of Catholic Healthcare West. The foundation was formed by three sponsoring congregations: the Sisters of Mercy of Burlingame, CA; the Sisters of Mercy of Auburn, CA; and the Sisters of St. Dominic of the Most Holy Rosary of Adrian, MI. CHWMF's purpose is to provide operational and management support services to the Medical Clinic of Sacramento, a professional corporation of physicians that staffs the hospitals operated by Mercy Healthcare Sacramento. CHWMF's articles of incorporation specifically require it to conduct its activities in a manner consistent with and supportive of the philosophy of its sponsoring congregations and in conformance with the *Ethical and Religious Directives for Catholic Health Care Services.* Although the foundation provides medical services to people of all faiths and does not require its employees to be Catholic, it does require its employees to comport themselves in a manner consistent with the philosophy of its sponsoring congregations and the *Ethical and Religious Directives.*

In July 1991, Terence Silo, a recent immigrant to the United States from the Philippines, began working for CHWMF in Sacramento as a medical records clerk. Before coming to this country, Silo had studied to become a minister at an evangelical Christian seminary. After working for

CHWMF for about 16 months, Silo, in November 1992, underwent a religious conversion and was "born again." As a result, during a period in which he would later describe himself as having been "on fire," he began "sharing" his religious experience while at work with some co-workers and at least one of CHWMF's patients. In particular, Silo began greeting his co-workers and patients by saying, "Jesus loves you" (or words to that effect) and began having discussions with his co-workers, some of whom were Catholic, in which he challenged their religious faith or practices (or lack thereof).

Some of Silo's co-workers were disturbed by these discussions, and they complained to his supervisors. Around the same time, Silo's supervisors noticed that his timeliness in delivering patient charts had begun suffering. In early 1993, his supervisors met with and counseled him both about his declining productivity and about complaints that they had received from certain of his co-workers about his religious "sharing." Silo was instructed to limit his discussions about religion, if any, to his break time, and to stop having any such discussions with patients or co-workers who were put off by his behavior or comments.

However, his performance did not improve and his supervisors received additional complaints from his co-workers about unwelcome "sharing" at work. Believing that their explicit directions had been ignored, Silo's supervisors decided to terminate his employment in April 1993.

Silo Files a Lawsuit

Silo found a new job soon thereafter. A year later, however, in April 1994, he filed a lawsuit in Sacramento Superior Court, alleging causes of action against CHWMF and his two former supervisors for religious discrimination in violation of the California Fair Employment and Housing Act (FEHA), as well as wrongful termination in violation of "public policy" (see **Box**). In particular, Silo alleged that his "sincerely held religious beliefs and practices" had caused him to engage in "discussions with other persons concerning religious topics" in the workplace and that CHWMF had discriminated against him because of his religious beliefs or practices when it terminated him.

During depositions that followed the filing of Silo's suit, he testified that, among other things, he did not believe Catholics could go to heaven and he likened their need for salvation to that of alcoholics and drug addicts. He steadfastly maintained, however, that he had observed his supervisors' instructions to engage in "sharing" only while "off the clock."

Upon the conclusion of the discovery phase of the litigation—the pretrial disclosure of pertinent facts or documents—CHWMF's attorneys brought a motion to dismiss Silo's case. In support of that motion, they made two main points:

- First, relying on the explicit exemption for "religious associations or corporations not organized for private profit" FEHA, the only statute Silo was suing under, CHWMF argued that Silo's claims had to be dismissed. (Silo's attorneys had failed to file a claim under Title VII of the federal Civil Rights Act of 1964, which contains a narrower exemption for religious employers and actually did cover CHWMF.)
- Second, CHWMF argued that Silo could not maintain a claim of wrongful termination in violation of "public policy" (which carried with it the potential for an award of punitive damages and damages for emotional distress) against it because there was no sufficiently "clear" or "fundamental" "public policy," as required for such claims under California law, that forbade a religious employer from taking into account an employee's religious practices when deciding whether to create or sever an employment relationship (see **Box**).

In September 1995, a judge rejected both these arguments and decided to let the case go to trial, which took place the following month. Silo did not dispute that his supervisors had received

What Is the "Free Exercise Clause"?

Several terms used in this article have special legal meaning and may, as employed here, be unfamiliar to readers who are not attorneys.

- A "tort" is a wrongful act (other than a breach of contract) for which the injured party may receive damages.
- The "free exercise clause" of the First Amendment to the Constitution states that: "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof . . .*" [italics added]
- "Public policy," a concept that the California Supreme Court has observed is "notoriously resistant to precise definition," refers to the moral and/or economic rationales embodied in all laws, whether constitutional, statutory, or regulatory. A contract to perform an illegal act will not be enforced by a court since it offends "public policy." In California, in order for the termination of an employee who might otherwise be dismissed "at will" to constitute a tort, that termination must violate a "clear" and "fundamental" "public policy." This means, the California Supreme Court has held, that the "public policy" in question must be "carefully tethered" to a federal or state constitutional, statutory, or regulatory provision. Thus, for example, a hospital employee cannot be terminated at will for having alerted governmental authorities about the employer's violation of a law or regulation, since such a termination would violate the "public policy" embodied in the law or regulation.
- "Creed" in California law is synonymous with religion.

several complaints from employees and at least one patient regarding his "sharing." He testified, however, that all his "sharing" had occurred while he was on break and thus not actually working, and that he had not violated his supervisor's instructions. After hearing the evidence, the jury on November 2, 1995, returned a verdict in Silo's favor, finding that CHWMF had unreasonably failed to accommodate his religious practices in violation of the FEHA and that he had been wrongfully terminated as a result. Curiously, however, although the jury awarded Silo all the "contractual" damages he requested—$6,305—it awarded him only $1 in damages for emotional distress. (The trial judge had already ruled at the close of Silo's case that punitive damages were not appropriate.)

The First Appeal

CHWMF filed an appeal of this verdict in January 1996. As in their original pretrial motion, the foundation's lawyers argued that there were no disputed facts underlying the two main issues on appeal and that, since there weren't, the Court of Appeal could have decided them based solely on its interpretation of the law.

- Was CHWMF exempt from California's FEHA? If it was exempt, the verdict in Silo's favor under that statute could not stand.
- Assuming that Silo's statutory FEHA claim was insupportable, did California still have any sufficiently clear "public policy" that would preclude a religious entity such as CHWMF from terminating him for proselytizing, so that his wrongful termination tort claim would still be viable?

The exemption in the California FEHA for "religious" corporations "not organized for private profit" has a history extending back to the advent of the civil rights movement. In fact, at the time the statute preceding the state's FEHA (the California Fair Employment Practices Act) was passed in 1959, the legislature had seen fit to exempt a wide variety of nonprofit "associations" and "corporations" from its ambit, including those that were "fraternal, charitable, educational or religious," as well as "social" clubs. The rationale was that because not-for-profit organizations are formed for a variety of noncommercial reasons, their founders and members have a reasonable claim that their constitutional right to associate freely with individuals of their own choosing will be abridged if they are required to hire, for example, without regard to race, sex, or religion.

Over the years, the force of this rationale has been gradually weakened as an increasingly strong societal consensus in favor of equal opportunity in all employment relationships has reduced the need for lawmakers favoring equality to make exemptions as a political compromise to pass (or preserve) such legislation. During the same period, numerous courts have rendered decisions weakening the force of the "free association" objection to civil rights legislation. Indeed, by 1977 the California legislature was ready to delete references to social, fraternal, charitable, and educational entities entirely from the statute's exemption. The blanket exemption for religious associations or corporations, in contrast, remained intact because it potentially implicated an entirely different constitutional right, the "free exercise" right of religious adherents.

The "free exercise" clause of the First Amendment to the U.S. Constitution (see **Box**, p. 25) had long been interpreted as preventing civil authorities from meddling in the internal governance of churches. In the employment arena, moreover, this principle had long prevented civil courts from entertaining common law claims, such as for breach of employment contract, as well as statutory claims, such as for sex or race discrimination, brought by members of the clergy against religious employers. With respect to people performing other than strictly religious duties, in contrast, not all such claims have been constitutionally precluded. Thus, for example, a janitor working for a church might be able to bring a claim of race discrimination or harassment against the employer. In general, however, a claim of religious discrimination against a religious entity has been deemed precluded as a constitutional matter, since adjudicating such a claim would inevitably require civil courts to become overly entangled in what was essentially a religious dispute. (See, for example, *Corporation of Presiding Bishop v. Amos* [1987] 483 U.S. 327.)

In 1980 California undertook a major revision of its not-for-profit corporation laws, in the process creating, for the first time, three separate kinds of not-for-profit corporations, each with slightly different statutory prerogatives and limitations on their corporate purposes. These were termed "public benefit," "mutual benefit," and "religious" not-for-profit corporations. Religiously affiliated hospitals already in existence and incorporated at that time, as well as those formed thereafter, were required to choose one of these three forms of incorporation.

CHWMF elected to incorporate as a "public benefit" corporation, as had many religiously affiliated organizations with religious, charitable,

educational, and health care missions, or with mixtures thereof. Silo's attorneys argued that, given CHWMF's decision to incorporate as a "public benefit" not-for-profit corporation as opposed to a "religious" nonprofit corporation, it could not thereafter invoke the exemption in the FEHA for "religious associations or corporations." In response, CHWMF argued that since a religiously affiliated entity did not even have to be incorporated to be covered by the FEHA exemption (which also applied to "associations"), the legislature had intended no relationship between the language of the FEHA exemption and that of the not-for-profit corporations law—and that a religiously sponsored "public benefit" corporation could remain a "religious association or corporation" exempt from the FEHA.

The Catholic organization lost the first round in the appellate court.

The Court of Appeals disagreed with CHWMF. In November 1997 it affirmed the trial court's judgment against CHWMF on Silo's FEHA cause of action, finding that the FEHA exemption was limited to religiously affiliated corporations organized under the "religious" nonprofit corporation law. (Although the appellate court also affirmed the judgment for wrongful termination based on the "public policy" embodied in the FEHA, it expressly declined to decide at the time whether the trial verdict could be supported by the prohibition on discrimination based on "creed" [see **Box**, p. 25] set forth in Article I, Section 8 of the California Constitution.)

On January 5, 1998, CHWMF successfully petitioned the California Supreme Court a first time to determine whether the appellate court's interpretation of the religious employer exemption in the FEHA was limited to corporations organized under the "religious" not-for-profit corporation law. As it happened, the Supreme Court had already decided to take up the identical issue in another case involving CHWMF's parent organization, Mercy Healthcare Sacramento, *McKeon v. Mercy Healthcare Sacramento.* In February 1998, the state Supreme Court granted CHWMF's petition pending its decision in the *McKeon* case.

Nine months later, that court found in *McKeon* that the FEHA exemption for religious employers had not been limited by virtue of the amendments to the not-for-profit corporation laws to those entities incorporated as "religious" not-for-profit corporations. In September 2000, the state Supreme Court transferred the *Silo* case back to the Court of Appeal with directions to vacate its decision and to reconsider the case in light of its decision in *McKeon.*

The Second Appeal

With the *Silo* case back before the appellate court, Silo's attorneys argued that even if CHWMF's exemption from the California FEHA logically necessitated that there was no sufficiently clear "public policy" expressed in that statute supporting the wrongful termination verdict, the prohibition on discrimination based on religious "creed" contained in the California Constitution nevertheless *did* embody an alternative, sufficiently clear "public policy" against terminating their client. In response, CHWMF's lawyers argued that even if California's constitutional prohibition on discrimination based on religious "creed" might support a wrongful termination claim against a nonreligious employer engaging in religious "discrimination," the state had—given CHWMF's countervailing constitutional right as a religious entity to define its own religious message (as well as its legitimate concern to prevent other employees from being harassed based on their religious beliefs or lack thereof)—no sufficiently "clear" or "fundamental" "public policy" that prevented the foundation from taking into account an employee's religious practices in making employment decisions.

In January 2001, the Court of Appeal announced its second decision. Although the court concluded that, following *McKeon*, CHWMF was no doubt covered by the FEHA exemption, it determined that the prohibition on discrimination based on religious "creed" in the California constitution was sufficiently "clear" and "fundamental" to independently support the jury's wrongful termination verdict against CHWMF.

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In March 2001 CHWMF filed a second petition for review with the California Supreme Court, which the court granted later that spring.

The Final Supreme Court Decision

In this second appeal to the state Supreme Court, CHWMF's attorneys argued that, given its status as an entity founded to carry out the healing ministry of the Catholic Church, it could have, consistent with interpretations of the "free exercise" clause, chosen to hire only Catholics; but it had not done so. Instead, CHWMF had decided to employ people without regard to their religion—but only so long as they agreed to comply with the mission and philosophy of CHWMF's religious sponsors and with the *Ethical and Religious Directives.* As a result, CHWMF's lawyers maintained, the foundation retained a constitutional right to determine what religious message, if any, would be disseminated within its premises. Given this countervailing right of CHWMF, there was no sufficiently "clear" or "fundamental" "public policy" requiring a religious employer to accommodate an employee's religious practice of proselytizing on its premises—or one that would prevent a religious employer from terminating an employee who insisted on acting as if there were such a right.

In May 2002, in a 9-0 decision, the state Supreme Court announced that it agreed with CHWMF. The court's rationale was relatively straightforward. In cases involving a non-religious employer, the court said, the "public policy" embodied in the state's constitutional prohibition on religious "creed" discrimination would be a sufficiently "clear" and "fundamental" mandate to underpin a claim of wrongful termination based on a failure to accommodate a religious practice. However, given CHWMF's constitutional right under the "free exercise" clause to control and define the religious message disseminated on its premises, and the fact that Silo was attempting to engage in religious proselytizing, declaring that a "clear" and "fundamental" "public policy" prevented Silo's termination would excessively (and impermissibly) entangle a civil court in an essentially religious dispute in violation of the "establishment clause" of the First Amendment. The judgment in Silo's favor on his wrongful termination claim thus had to be reversed.

In December 2002, the appellate court, following the state Supreme Court's decision, vacated its second decision and remanded the case to the trial court with instructions to enter a judgment in favor of CHWMF. In February 2003, just a few months short of the 10-year anniversary of Silo's firing, the Sacramento Superior Court entered that judgment, finally putting an end to the *Silo* litigation.

Lessons Learned

Perhaps the clearest lesson of the *Silo* case is found in its tortuous history. Over a 10-year period, a trial judge and three judges of the Court of Appeal, on the one hand, and nine judges of the California Supreme Court, on the other, reached diametrically opposite conclusions on more than one occasion as to the proper location of the line dividing civil and religious authority over a single course of behavior. The ultimate result of the litigation—CHWMF's vindication—is consistent with, and reaffirms, constitutional jurisprudence that carves out a sphere of autonomy for religious employers when it comes to essentially religious issues and controversies.

For religious employers, however, the greater difficulty—and one that will persist after *Silo*—will be in determining when an employment controversy is sufficiently "religious" in nature that invocation of these potent constitutional rights will be important. □

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