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A Miscarriage of Justice: Pregnancy Discrimination in Sectarian Schools

Lauren E. Fisher

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Lauren E. Fisher*

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Introduction

On November 22, 2005, CNN reported that an unmarried preschool teacher at St. Rose of Lima Catholic School in Queens, New York, had become pregnant and was fired from her first teaching position.¹ Michelle McCusker appeared on national news that night at a press conference, crying about losing her first job just a week after she told her employer that she was pregnant. In its coverage, CNN showed McCusker's letter of termination, which stated, "[a] teacher cannot violate the tenets of Catholic morality. . . . [T]ermination of contract must occur."² Some journalists called her behavior "shameless" and said that she should have "acknowledged the justice of the school's position, and resigned."³ Others supported the school's position, suggesting that it "fired her because a visibly pregnant and unmarried authority figure dealing with young children is conveying a message . . . that the church does not want to send."⁴ The New York Civil Liberties Union (NYCLU)⁵ took on McCusker's case and asserted that under current law, no private school will ever have a legitimate legal reason to fire a pregnant woman who is unmarried because of her supposedly immoral actions outside the classroom.⁶

1. *Fired Teacher Sues* (CNN Television Broadcast Nov. 22, 2005) (transcript on file with author).

2. *Id.*

3. Carol Platt Liebau, *Sexual Morality Is Lost in New York*, HUMAN EVENTS (July 28, 2009), <http://www.humaneventsonline.com/article.php?id=10580> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

4. John Leo, *The Case of Michelle McCusker*, TOWNHALL (July 28, 2009), http://townhall.com/columnists/JohnLeo/2005/12/05/the_case_of_michelle_mccusker (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

5. The NYCLU is the New York State affiliate of the American Civil Liberties Union (ACLU).

6. *NYCLU Defends Pregnant School Teacher Fired by School*, N.Y. CIVIL LIBERTIES (Nov. 21, 2005), <http://www.nyclu.org/news/nyclu-defends-pregnant-school-teacher-fired->

This Note will investigate and ultimately support the position of the NYCLU, citing to cases from multiple circuits while exploring the genesis and development of pregnancy discrimination claims over the past fifty years. Part I will describe Title VII of the Civil Rights Act of 1964 and Title VII's amendment to include the Pregnancy Discrimination Act of 1978. That Part will explain how plaintiff women work within the framework of Title VII to establish a claim, and how defendant schools can defeat an accusation of pregnancy discrimination. Part II will discuss the religious entities exceptions to Title VII, highlighting the inconsistent application and problematic broadening of the ministerial exception and other exemptions. In Part III, this Note will explain the troublesome application of the "bona fide occupational qualification" standard to teachers in religious schools, with schools claiming that a teacher either failed to abide by a moral code or failed to serve as an appropriate role model. Finally, in Part IV, this Note will conclude by stating that none of these loopholes that schools use to escape liability under Title VII should be applied to cases involving pregnancy discrimination, because teachers—who are largely *not* ministers—cannot be treated equally, without regard to sex, in enforcing a policy that disproportionately targets those with swelling abdomens.

*I. Title VII of the Civil Rights Act of 1964 and the Pregnancy
Discrimination Act*

A. The Route to Equality: An Historical Background

Before the enactment of the Civil Rights Act of 1964, some employers regularly discriminated against women. Patriarchal norms permitted employers to pigeonhole women into stereotypically female professions or to prohibit them from performing stereotypically male jobs.⁷ The U.S. Congress enacted Title VII of the Civil Rights Act of 1964⁸ to remedy and prohibit employment discrimination on the basis of race, color, religion, sex, or national origin. Title VII provides:

It shall be an unlawful employment practice for an employer:

school [hereinafter *NYCLU Defends*] (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

7. See generally Ruth Bader Ginsburg, *Muller v. Oregon: One Hundred Years Later*, 45 WILLAMETTE L. REV. 359 (2009).

8. 42 U.S.C. § 2000e to -17 (2010).

1. To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
2. To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.⁹

Congress' enacting Title VII was a great success for women, but the law did not combat the employment discrimination teachers often faced if they became pregnant.¹⁰ If a pregnant teacher was not terminated without hesitation or did not resign, then she could be pushed into a mandatory pregnancy leave that was much longer than necessary and did not hold her job.¹¹ School boards unhesitatingly dismissed teachers who were pregnant, particularly if they were unmarried, and based their decisions on both student-centered and teacher-centered reasoning.¹² They claimed that pregnant, unmarried teachers would have a poor moral influence on students, while at the same time they paternalistically sought to protect women from "giggling schoolchildren."¹³ Women were discriminated against because of their pregnancies and had no available legal remedy for their problem.¹⁴

9. 42 U.S.C. § 2002e-2(a)(1)–(2).

10. *See generally* Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 350–59 (E.D.N.Y. 1998) (providing an historical background of the changing roles of women in society, shifting sexual mores, and the role of religion in both).

11. Susan A. Kidwell, Note, *Pregnancy Discrimination in Educational Institutions: A Proposal to Amend the Family Medical Leave Act of 1993*, 79 TEX. L. REV. 1287, 1288 (2001).

12. *Id.* at 1290–91 ("With respect to the mandatory leave policies, the Court recognized the liberty interest of teachers who decide to bear children but also acknowledged legitimate state interests in maintaining continuity in the classroom and protecting the health of teachers and their unborn children.").

13. *Id.* at 1291 (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 641 n.9 (1974)).

14. *See id.* at 1303 (describing the lack of legal remedy for the pregnant teachers when the employers were able to offer a legitimate, nondiscriminatory reason for their discriminatory action because any reasonable proffered explanation was enough to warrant rejecting the plaintiff's claim).

Twelve years after Title VII was enacted, *General Electric Co. v. Gilbert*,¹⁵ brought pregnancy discrimination to the attention of the nation. In this case, the Supreme Court found that pregnancy discrimination did not constitute sex discrimination and hence was not prohibited by Title VII.¹⁶ The Court rejected an Equal Employment Opportunity Commission (E.E.O.C.) guideline that would have brought pregnancy discrimination under Title VII's protective umbrella.¹⁷ Instead, it found that General Electric's insurance policy did not inherently discriminate against women in failing to cover pregnancy-related claims because those claims were only a few of the many denied without regard to sex.¹⁸ Justice Brennan strongly dissented, stating that "the E.E.O.C.'s construction of sex discrimination under § 703(a)(1) is fully consonant with the ultimate objective of Title VII, 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered (sexually) [sic] stratified job environments to the disadvantage of (women) [sic].'"¹⁹

Congress, agreeing with Justice Brennan's view, "unambiguously expressed its disapproval"²⁰ with *Gilbert* and amended Title VII through the Pregnancy Discrimination Act (PDA)²¹ two years later, in 1978. The PDA describes discrimination based on pregnancy as included within the

15. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

16. *See id.* at 138 ("[I]t is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits . . .").

17. *See id.* at 140–41 (citing to the E.E.O.C. guideline). That E.E.O.C. guideline is as follows:

Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. . . . [Benefits] shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

29 CFR § 1604.10(b) (1975).

18. *See Gilbert*, 429 U.S. at 138–39 ("[G]ender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive.").

19. *Id.* at 160 (Brennan, J., dissenting) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)); *see also* Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy Discrimination Act*, 38 AM. BUS. L.J. 819, 819–20 (2001) (analyzing the intended meaning of Title VII with respect to sex discrimination).

20. *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 678 (1983).

21. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

statutory description of discrimination based on sex.²² In subsequent decisions, courts consistently ruled that the PDA made it illegal for pregnant women to be fired on the basis of their pregnancies alone.²³ Because of the PDA, pregnant women finally had a legal response to the discrimination their predecessors had experienced for decades.

B. Establishing a Claim: McDonnell Douglas and Burden Shifting

Even before a teacher alleging pregnancy discrimination has an opportunity to establish her prima facie case, the defendant school has a chance to file a motion that could remove the case from the purview of Title VII, and thus potentially from the reach of the court system. The defendant could file for summary judgment, arguing that the "ministerial exception" to Title VII prevents the court from interfering with the school's hiring and firing of ministers, and claiming that the plaintiff serves a ministerial function.²⁴ Alternatively, the defendant school could argue in a summary judgment motion that the court's Title VII analysis is prohibited because other religious exemptions to Title VII²⁵ disqualify the courts from examining the reasons behind a religious organization's employment decisions. If the court decides that the plaintiff was not a "minister," or that an organization's employment decision was based on a religious tenet but was not so religiously grounded that examination for pretext would involve

22. The text of the Pregnancy Discrimination Act is as follows:

The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k).

23. See, e.g., *Maldonado v. U.S. Bank*, 186 F.3d 759, 762 (7th Cir. 1999) (denying a defendant-employer's motion for summary judgment on a pregnancy discrimination claim). In denying the motion, the court stated that "[Congress] designed the PDA specifically to address the stereotype that 'women are less desirable employees because they are liable to become pregnant,' . . . and to insure that the decision whether to work while pregnant 'was reserved for each individual woman to make for herself.'" *Id.* (citations omitted).

24. See generally Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776 (2008) (examining the scope and applicability of the ministerial exception to Title VII cases).

25. See, e.g., *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1365-67 (9th Cir. 1986) (describing the scope of Title VII's religious exemptions).

excessive entanglement between government and the religious entity, then the plaintiff's claim may proceed past summary judgment.²⁶

In order to shift the burden of proof to the defendant, however, the plaintiff must first prove a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*,²⁷ established a test for all Title VII discrimination cases that is used to determine whether the plaintiff has proven her prima facie case.²⁸ As specifically applied to pregnancy discrimination, the four prongs of the *McDonnell Douglas* test are:

1. The plaintiff must prove that she was pregnant; and
2. She must prove that she was meeting the requirements of her job; and
3. She must prove that she was terminated, or otherwise suffered an adverse employment action; and
4. She must prove that the circumstances of her termination give rise to an inference of discrimination.²⁹

Often in pregnancy discrimination cases involving single teachers at sectarian schools, the defendant school will argue that the plaintiff was terminated for failure to fulfill the second prong of the analysis. Schools argue that a teacher's conforming to a particular moral code of conduct or serving as a role model was a condition of the teacher's employment, or "bona-fide occupational qualification" (BFOQ).³⁰ Ultimately, if the plaintiff succeeds in proving all four points, then the burden of proof shifts to the employer, who must proffer a legitimate, nondiscriminatory reason for termination.³¹

In a pregnancy discrimination case involving a sectarian school, the school will typically argue that it is exempt from the

26. See discussion *infra* Part II.B.2.

27. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (establishing a four-prong evidentiary framework for employment discrimination cases filed under the Civil Rights Act of 1964).

28. See *id.* (enumerating the prongs of the test)

29. *Id.*

30. See, e.g., *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 271 (N.D. Iowa 1980) (describing the school's argument that plaintiff, a teacher, failed to meet the BFOQ of adherence to a particular code of religious conduct and was terminated because of this failure).

31. See *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253–56 (1981) (articulating the nature of the burden of proof that shifts to the defendant).

nondiscrimination requirements of Title VII through one of a variety of religious exceptions.³² If the defendant is able to prove that the plaintiff teacher is a ministerial employee—i.e., an employee whose job involves "ministering" to her students—then the court will not examine the religious justification behind the plaintiff's termination and will not allow the plaintiff to attempt to prove that such a justification was pretextual; thus, the litigation ceases.³³ If the defendant instead claims another religious exemption from Title VII, the plaintiff "may not challenge the plausibility of putative religious purposes. A fact finder will necessarily have to presume that an asserted religious motive is plausible in the sense that it is reasonably or validly held."³⁴ Though the plaintiff may not challenge the legitimacy of the stated religious reason for the adverse employment action, in some circuits she may claim that the stated reason is pretextual, focusing on "factual questions such as whether the asserted reason for the challenged action comports with the defendant's policies and rules, whether the rule applied to the plaintiff has been applied uniformly, and whether the putative non-discriminatory purpose was stated only after the allegation of discrimination."³⁵

If the plaintiff is able to prove that the defendant's stated religious reason for termination is in fact pretextual, and that the defense's given reason is only an excuse for termination when the actual reason is discriminatory, then the plaintiff will likely win her case. In pregnancy discrimination cases, plaintiffs often accomplish this by proving that, while the defendant's stated reason for termination was facially non-discriminatory, the proffered reason was not enforced equally across the sexes.³⁶ Though this might seem a fairly simple way for a case to progress, the legal history of trials dealing with pregnant

32. See, e.g., *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 219 (E.D.N.Y. 2006) ("The Court . . . noted that Congress had carved out exceptions to the Controlled Substances Act for peyote use, possession, and transportation by all members of recognized Indian tribes.").

33. See *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167 (4th Cir. 1985) ("Ecclesiastical decisions are generally inviolate; civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.") (internal quotation marks and citations omitted).

34. *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 171 (2d Cir. 1993).

35. *Id.*

36. See *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 344 (E.D.N.Y. 1998) ("Religious codes of morality must be applied equally to male and female teachers.").

unwed women in religious schools has become far more complex than one might expect.

II. Religious Entities' Exceptions to Title VII of the Civil Rights Act of 1964

Often a religious school facing a pregnancy discrimination suit will claim that its decision to terminate a pregnant employee was not pregnancy discrimination, but discrimination on the basis of religion.³⁷ If the actions of the school indeed constituted permissible religious discrimination, and this defense is not pretextual, then the school may in fact be excused from abiding by Title VII through an exception.³⁸

A. The Ministerial Exception

The ministerial exception, which derives from the Free Exercise and Establishment Clauses of the First Amendment,³⁹ prevents a court from scrutinizing a religious organization's employment decisions regarding its ministers under Title VII.⁴⁰ In plain terms, when a religious organization persuades a court that the person it terminated functioned as a minister, then the former employee cannot argue that the former employer discriminated against him or her on the basis of race, color, religion, sex, or national origin.⁴¹ The reasoning behind this exception is understandable: because ministers act as the "lifeblood" of the religious institution and represent the religious institution to its people, the institution should not be limited in employment decisions concerning ministers.⁴² In addition, when a religious organization takes an adverse employment action against one of its

37. See generally Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965 (2007).

38. See *id.* at 1975 (explaining that "[t]his autonomy covers *all aspects* of the ministerial employment relationship, not just hiring and firing" (emphasis added)).

39. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .").

40. See *McClure v. Salvation Army*, 460 F.2d 553, 558–61 (5th Cir. 1972) (establishing the ministerial exception by holding that the application of Title VII to a religious organization's employment decision regarding its ministers would violate the First Amendment).

41. See Corbin, *supra* note 37, at 1975–76 (observing that religious organizations maintain complete discretion regarding the employment of their ministers despite a number of anti-discrimination statutes).

42. *McClure*, 460 F.2d at 558–59.

ministers, it is not required to articulate a legitimate "religious" justification.⁴³ The Fifth Circuit has consistently reasoned that "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."⁴⁴ Thus, courts give great deference to churches with respect to their employment decisions concerning ministers. Additionally, ministerial employees do not have to be employed by churches; rather, universities, religious schools, and hospitals might hire and fire such "ministers."⁴⁵ Regardless of the employer, if a court decides that an employee is serving in a ministerial capacity, that decision is outcome determinative: the employer will almost always prevail.⁴⁶

These policy justifications came to the forefront of analysis in *McClure v. Salvation Army*,⁴⁷ the 1972 case in which the Fifth Circuit created the ministerial exception to Title VII, stating that "government lacks the constitutional power to regulate discriminatory employment practices by a religious entity against one of its ministers."⁴⁸ In that case, the court held that a female minister was barred from bringing a Title VII claim against her church, because a central guarantee of the religion clauses is to give churches the "power to decide for themselves . . . matters of church governance as well as those of faith and doctrine."⁴⁹ Title VII was inapplicable to the church/minister relationship, because its application to ministerial employment decisions "would result in an encroachment by the

43. See *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (stating that "the free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it").

44. *Combs v. Cent. Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999) (holding that the free exercise clause of the First Amendment prohibited the court from applying Title VII to a church's decision to terminate a member of its clergy).

45. See *Corbin*, *supra* note 37, at 1976 (noting that courts have interpreted the term "minister" broadly).

46. See *id.* at 2038 ("As applied by the lower courts, the ministerial exemption currently grants religious organizations full immunity from [employment discrimination] claims brought by ministerial employees.").

47. See *McClure v. Salvation Army*, 460 F.2d 553, 560–61 (5th Cir. 1972) (holding that "Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister").

48. See G. Sidney Buchanan, *The Power of Government to Regulate Class Discrimination by Religious Entities: A Study in Conflicting Values*, 43 EMORY L.J. 1189, 1216–17 (1994) (citing *McClure*, 460 F.2d at 560–61).

49. *McClure*, 460 F.2d at 560 (citations omitted).

State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."⁵⁰ Thus, the freedom of religious employers to choose their ministers is virtually absolute—such employers are not even required to articulate the reasoning behind their decisions.⁵¹

A religious employer's use of the ministerial exception becomes particularly troublesome when the employee who has suffered adverse employment action is not a "minister" by title; instead, he or she might be a principal, a teacher, or even a press secretary.⁵² In *Rayburn v. General Conference of Seventh-Day Adventists*,⁵³ the Fourth Circuit defined the parameters of who may be considered a ministerial employee, stating that "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy."⁵⁴ The *Rayburn* court also noted that the ministerial exception to Title VII "does not depend upon ordination but upon the function of the position."⁵⁵ Since the *Rayburn* decision, a court's analysis of which employees constitute ministers has become, predictably, a rather complex matter.

1. The "Primary Duties Test" and Inconsistencies in Its Application

Typically, courts decide whether an employee is a "minister" through application of the "primary duties" test, which has its foundation in *Rayburn*.⁵⁶ This test leads to inconsistent results.⁵⁷ For example, in

50. *Id.*

51. *See* Corbin, *supra* note 37, at 1975 (explaining that the First Amendment protects effectively all employment decisions that include religious judgments).

52. *See* Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698, 703–04 (7th Cir. 2003) (deciding that a press secretary was a minister, and holding that the First Amendment precluded the court's jurisdiction).

53. *See* *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1170–72 (4th Cir. 1985) (holding that a plaintiff's sex and race discrimination claims, levied against a church that denied the plaintiff a pastoral position, were barred by the religion clauses of the First Amendment).

54. *Id.* at 1169.

55. *Id.* at 1168.

56. *See* Note, *supra* note 24, at 1776 (remarking that courts will only ask "whether an employee's job responsibilities render him 'important to the spiritual and pastoral mission of the church'" (quoting *Rayburn*, 772 F.2d at 1169)).

57. *See id.* at 1787–89 (identifying the problems associated with the application of the

Clapper v. Chesapeake Conference of Seventh-Day Adventists,⁵⁸ the Court of Appeals for the Fourth Circuit held that an elementary school teacher was a minister, although twelve of his thirteen job duties were expressly secular.⁵⁹ The court found Clapper's primary role to be "teaching and spreading the Seventh-day Adventist faith and supervising and participating in religious ritual and worship,"⁶⁰ even though those activities consumed only 10.6% of his time.⁶¹ According to the decision, "the quantity of time an employee spends on religious matters must be considered alongside 'the degree of the church entity's reliance upon such employee to indoctrinate persons in its theology.'"⁶² The church's dependence on Clapper to indoctrinate his students in the Seventh-day Adventist faith ultimately tipped the scales in favor of the ministerial exception.⁶³

In contrast, in *Redhead v. Conference of Seventh-Day Adventists*,⁶⁴ the Eastern District of New York held that an elementary school teacher at a Seventh-day Adventist school did not meet the primary duties test and thus did not qualify as a minister.⁶⁵ *Redhead* is particularly relevant here, because it involved a religious school's termination of a pregnant teacher, ostensibly because of her pregnancy.⁶⁶ In *Redhead*, the court found that the ministerial exception did not apply to the plaintiff's Title VII pregnancy and sex discrimination claims, because her teaching duties were primarily secular.⁶⁷ Though *Redhead* did teach a Bible class, much like Clapper, this duty consumed only one hour per day, and her only other religious duty as a teacher was to attend a yearly religious ceremony.⁶⁸ Ultimately, the court

primary duties test).

58. *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, No. 97-2648, 1998 WL 904528 (4th Cir. Dec. 29, 1998) (per curiam) (holding that a former teacher's Title VII claim was barred because of the ministerial exception).

59. *Id.* at *3.

60. *Id.* at *7.

61. *Id.* at *4.

62. See Note, *supra* note 24, at 1788 n.75 (quoting *Clapper*, No. 97-2648, 1998 WL 904528, at *7).

63. See *Clapper*, 1998 WL 904528, at *7.

64. See *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 220–24 (E.D.N.Y. 2006) (holding that the ministerial exception did not apply, because the terminated teacher's duties were primarily secular, and that there existed a genuine question of fact as to whether the motive for plaintiff's dismissal was religious or secular).

65. See *id.* at 221 (describing the application of the primary duties test as fact-specific and distinguishing its result from previous cases).

66. *Id.* at 214–16.

67. *Id.* at 221.

68. *Id.* at 214.

determined that Redhead was not a minister, the excessive entanglement challenges present in *Clapper* did not apply, and Redhead was permitted to proceed with her Title VII claim.⁶⁹

In rendering decisions such as *Clapper* and *Redhead*, courts often apply the primary duties test with inconsistent and seemingly arbitrary results.⁷⁰ The results can devastate the case of a woman who was terminated because of her pregnancy then deemed to be a "minister" because potential entanglement concerns prohibit a court from examining whether a religious employer engaged in activities prohibited by Title VII.

2. The Ministerial Exception: Stretched to Its Breaking Point?

Clapper and *Redhead* illustrate a developmental flaw in the ministerial exception: courts have stretched it to its breaking point. In Caroline Mala Corbin's article *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*,⁷¹ the author explores the expansion of the ministerial exception from its early narrow reach to its current broad swath. Corbin questions whether courts have been loyal to the original purpose of the ministerial exception, as stated in *McClure v. Salvation Army*, which sought to protect church autonomy in choosing its ministers because "[a]ny attempt by the civil courts to limit the church's choice of its religious representatives would constitute an impermissible burden on the church's First Amendment rights."⁷²

Some courts have moved far beyond protecting such choices as the Catholic Church's hiring only male priests. The ministerial exception has been used, for example, to eliminate a Jewish nursing home's liability under a Fair Labor Standards Act claim for unpaid overtime due to a Kosher supervisor.⁷³ Other courts have been more hesitant to expand the reach of the ministerial exception, thereby limiting a religious organization's ability to use discriminatory employment practices.⁷⁴ In its

69. *Id.* at 221, 224.

70. *See* Note, *supra* note 24, at 1788 (noting that the unpredictability leaves both religious institutions and their employees unsure of how such lawsuits will be decided).

71. *See generally*, Corbin, *supra* note 37.

72. *Id.* at 1975 (citations omitted).

73. *Id.* at 1976 (citing *Shaliehsabou v. Hebrew Home of Greater Wash.*, 363 F.3d 299, 301 (4th Cir. 2004)) (discussing a case in which a court held that the Mashgiach, or kosher supervisor, of a predominantly Jewish nursing home was a minister for the purposes of federal employment laws, and that the nursing home was a religious institution under the ministerial exception, thereby barring the discrimination claim).

74. *See generally* *E.E.O.C. v. Fremont Christian Sch.*, 609 F. Supp. 344, 350 (N.D.

1982 decision, *E.E.O.C. v. Pacific Press Publishing Association*,⁷⁵ the Ninth Circuit stated that "Congress's purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious conviction."⁷⁶ Reflecting on *McClure*, the *Pacific Press* court referred to *E.E.O.C. v. Mississippi College*,⁷⁷ another Fifth Circuit case, and stated:

Significantly, the Fifth Circuit refused to broaden the *McClure* exemption to include the faculty at Mississippi College, noting that: "The College's faculty and staff do not function as ministers. The faculty members are not intermediaries between a church and its congregation. They neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine. That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern."⁷⁸

Though this definition of "minister" has largely given way to the broad "primary duties" test, applying a narrower standard to determine whether a teacher actually functions as a minister would lead to results becoming more consistent, both with one another and with the ministerial exception's original purpose.

B. Statutory Religious Exemptions to Title VII

1. Amos and Analysis Under the First Amendment

Even if an employee fails the primary duties test, a school may still attempt to classify its employment decision as outside the reach of Title

Cal. 1984) ("The School is entitled to hire only members of its faith for teaching positions and the like, but may not, under the § 702 exemption, discriminate against its employees thereafter.").

75. See *E.E.O.C. v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1277–78 (9th Cir. 1982) (finding that a secretary was not a minister under *McClure*, and thus that her employer could not avail itself of the ministerial exception).

76. *Id.* at 1280.

77. See *E.E.O.C. v. Miss. Coll.*, 626 F.2d 477, 485–86 (5th Cir. 1980) (holding that the ministerial exception should be applied narrowly, and that it did not apply to the relationship between a religious educational institution and its faculty), *cert. denied*, 453 U.S. 912 (1981).

78. See *Pac. Press Publ'g Ass'n*, 676 F.2d at 1278 (quoting *E.E.O.C. v. Miss. Coll.*, 626 F.2d at 485).

VII.⁷⁹ Often this is done by articulating a religious reason for termination and attempting to fit into one of the narrow written exemptions to Title VII.⁸⁰ These exemptions excuse religious employers from Title VII by permitting them to employ only members of their own faith in their non-profit activities.⁸¹ In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*,⁸² the Supreme Court upheld these exemptions, stating that such a rule was constitutionally permissible and "rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions."⁸³ Yet, as the Ninth Circuit stated in *E.E.O.C. v. Pacific Press Publishing Association*, "although Congress permitted religious organizations to discriminate in favor of members of their faith, religious employers are not immune from liability for discrimination based on race, sex, national origin, or for retaliatory actions against employees who exercise their rights under the statute."⁸⁴ In that case, for example, the court decided that although the wage disparity between men and women at a religious publishing company was a sincere

79. See, e.g., *E.E.O.C. v. Tree of Life Christian Schs.* 751 F. Supp. 700, 709 (S.D. Ohio 1990) ("Tree of Life argues that to apply the Act and invalidate its head of household allowance would violate its rights under the Religion Clauses of the First Amendment.").

80. See, e.g., *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1365–1367 (9th Cir. 1986) (stating that Title VII exempts religious employers "only with respect to discrimination based on religion, and then only with respect to persons hired to carry out the employer's 'religious activities'"). The court held that a religious school's stated reason for the disparity in men's and women's wages—the religious belief that men, as heads of households, should be paid more—was insufficient to exempt the school from liability for sex discrimination. *Id.* at 1367.

81. 42 U.S.C. § 2000e-1(a) states that "[t]his subchapter 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" (emphasis added). 42 U.S.C. § 2000e-2(e)(2) states that "[i]t shall not be an unlawful employment practice for a school . . . to *hire and employ* employees of a particular religion if such school . . . 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 . . . is *directed toward the propagation of a particular religion*" (emphasis added).

82. See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338–39 (1987) (holding that applying Title VII's religious exemption to a religious organization's secular nonprofit activities was permissible under the Establishment Clause of the First Amendment).

83. *Id.* at 339.

84. *E.E.O.C. v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982).

reflection of religious beliefs, such a disparity still constituted impermissible gender discrimination under Title VII.⁸⁵

Courts find it difficult to make decisions similar to the holding in *E.E.O.C. v. Pacific Press*. In cases involving religious discrimination as well as potential gender discrimination, they must interpret Title VII in a way that gives credence to Title VII's desire to remedy our nation's "long and unfortunate history of sex discrimination."⁸⁶ At the same time, they must neither endorse⁸⁷ nor restrict⁸⁸ the practice of religion, as the Establishment and the Free Exercise clauses, respectively, require. The Supreme Court's *Lemon* test⁸⁹ sets forth three factors for courts to examine in determining whether a statute violates the Establishment Clause of the First Amendment: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"⁹⁰ Similarly, the Court has examined three factors in determining whether a statute violates the Free Exercise Clause: "(1) the magnitude of the statute's impact upon the exercise of the religious belief; (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious

85. *See id.* at 1277 ("We reject the argument that the exemption provided by section 702 applies to all actions taken by an employer with respect to an employee whose work is connected with the organization's 'religious activities.'").

86. *See Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (holding that classifications based on sex are inherently suspect and deciding that the federal statute providing automatic dependency status for wives of male uniformed service employees but requiring husbands of female uniformed service employees to jump through administrative hoops to prove dependency violated the Due Process Clause of the Fifth Amendment).

87. The Establishment Clause of the First Amendment requires that "Congress shall make no law respecting an establishment of religion. "U.S. CONST. amend. I. *See also* Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994) (holding that a statute creating a special school district to encompass a religious village violated the Establishment Clause of the First Amendment).

88. The Free Exercise Clause of the First Amendment requires that "Congress shall make no law . . . prohibiting the free exercise [of religion]. "U.S. CONST. amend. I. *See also* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (holding that although Congress does have the power to enact legislation enforcing the right to free exercise, that power may be used only in preventative or remedial ways and cannot be used to substantively change the right itself).

89. *See Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971) (holding that the Rhode Island statute providing state aid to private schools was unconstitutional under the Establishment and Free Exercise clauses of the First Amendment, and setting out what became known as the *Lemon* test).

90. *Id.* at 612–13.

belief; and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state."⁹¹ Title VII is regularly scrutinized under these tests, and with varying results, when a former employee files a pregnancy discrimination claim against a religious employer.

2. Dolter, Vigars, and Application of the Statutory Exemptions

In *Dolter v. Wahlert High School*,⁹² the Northern District of Iowa was faced with deciding whether examining an underlying claim of gender discrimination, regardless of the presence of a stated religious reason for termination, would violate the religion clauses of the First Amendment.⁹³ Dolter had been an English teacher at Wahlert, a private Roman Catholic high school.⁹⁴ She was unmarried at the time of her employment and became pregnant; subsequently, her contract was not renewed.⁹⁵ The high school cited her status as a pregnant unmarried woman as the reason her contract was not renewed, and Dolter sued on the grounds of gender discrimination.⁹⁶

Wahlert High School claimed that because the school was a religious one, the application of Title VII would result in excessive entanglement of church and state as prohibited under the religion clauses of the First Amendment.⁹⁷ The court resolved the defendant's motion for summary judgment in favor of the plaintiff, rejecting Wahlert's claim.⁹⁸ It used the

91. *E.E.O.C. v. Miss. Coll.*, 626 F.2d 477, 489 (5th Cir. 1980) (citations omitted).

92. *See Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 270–271 (N.D. Iowa 1980) (holding that the application of Title VII to a former sectarian school teacher's claim of sex discrimination would not violate the religion clauses of the First Amendment).

93. *See id.* (holding that the application of Title VII to a former sectarian school teacher's claim of sex discrimination would not violate the religion clauses of the First Amendment).

94. *Id.* at 267.

95. *See id.* ("In June, 1978, defendant refused to honor that contract and terminated her employment allegedly on the grounds she was unmarried and pregnant.").

96. *See id.* (describing genesis of the suit).

97. *Id.* at 269–70 ("Defendant's . . . assertion of Title VII jurisdiction over this case would entail excessive entanglement of government with the religious mission of the school is grounded on its essential argument that Ms. Dolter, as a Catholic lay teacher of English, is significantly involved in the religious pedagogical ministry of the Catholic Church.").

98. *Id.* at 270–71 ("The court concludes, therefore, that its assertion of Title VII jurisdiction over plaintiff's claim of Sex discrimination would not entail excessive entanglement in the religious mission of defendant's school and would not be violative of the religion clauses of the first amendment.").

two-prong test set forth by the Supreme Court in *National Labor Relations Board v. Catholic Bishop of Chicago*,⁹⁹ to eliminate both Establishment Clause and Free Exercise Clause concerns.¹⁰⁰ First, the court asked whether Congress had "clearly expressed" its intention to have Title VII apply to religious schools; and second, it asked whether Title VII's "anti-discrimination strictures," when applied to religious schools, would result in excessive entanglement between church and state, thereby violating the religion clauses of the First Amendment.¹⁰¹ The court found that Congress had intended all employers, including private religious ones, to be bound by the standards set by Title VII unless an articulated exemption applied,¹⁰² and reasoned that its examination of Dolter's case would not require it to "pass judgment on the legitimacy of its religious teachings, its moral precepts and the administration of its religious pedagogical ministry."¹⁰³ Importantly, the *Dolter* court stated:

The only issues the court need decide are whether those moral precepts, to the extent they constitute essential conditions for continued employment, are applied equally to defendant's male and female teachers; and whether Ms. Dolter was in fact discharged Only [sic] because she was pregnant rather than because she obviously had pre-marital sexual intercourse in violation of the defendant's moral code.¹⁰⁴

It noted that to construe Title VII "to exempt all forms of discrimination in sectarian schools would itself raise First Amendment problems since it would imply the government's special preference of sectarian schools over nonsectarian schools."¹⁰⁵ Though this Establishment

99. See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (holding that the National Labor Relations Act did not authorize the NLRB to exercise jurisdiction over teachers at sectarian schools—such an act would violate the religion clauses of the First Amendment).

100. See *id.* ("The First Amendment, of course, is a limitation on the power of Congress. Thus, if we were to conclude that the Act granted the challenged jurisdiction over these teachers we would be required to decide whether that was constitutionally permissible under the Religion Clauses of the First Amendment.").

101. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); see also *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 268 (N.D. Iowa 1980) (applying the standard set forth in *NLRB*, 440 U.S. at 499).

102. See *Dolter*, 483 F. Supp. at 266, 269 (noting that although Congress clearly intended to allow religious employers to hire only members of their own religion, "[t]here is no indication in the legislative history that when Congress enacted the 1972 amendment it also intended to exempt sectarian schools from liability for [s]ex discrimination.").

103. *Id.* at 270.

104. *Id.*

105. *Id.* at 269 (citing *King's Garden v. FCC*, 498 F.2d 51, 54–57 (D.C. Cir. 1974)).

Clause argument generally has not been used to support Title VII's application to religious schools' stating a religious reason for an adverse employment action, the decision signals a readiness by courts to limit the religious exemptions to Title VII when otherwise straightforward cases of actionable discrimination are present.¹⁰⁶

Whether a court could examine the religious justification for blatant sex discrimination was again at issue in *Vigars v. Valley Christian Center of Dublin, California*.¹⁰⁷ Valley Christian Center terminated Vigars when she became pregnant while in the process of annulling one marriage and entering into another.¹⁰⁸ In a motion to dismiss, the school claimed that Vigars had been terminated because her pregnancy outside of marriage was inconsistent with the beliefs of the church.¹⁰⁹ Because the focus of the adverse employment action was her pregnancy and not her sexual behavior, the court determined that the school had engaged in per se pregnancy discrimination that could not be made permissible through use of a religious exemption.¹¹⁰ The court denied the motion to dismiss, and Valley subsequently filed a motion for summary judgment, changing its defense.¹¹¹ Valley modified its claim based on the decision in *Dolter v. Wahlert*, proffering that it was Vigars' adulterous relationship with the man who was

106. See G. Sidney Buchanan, *The Power of Government to Regulate Class Discrimination by Religious Entities: A Study in Conflicting Values*, 43 EMORY L.J. 1189, 1221 (1994) (suggesting that the *Dolter* decision indicates that "governmental accommodation of nonreligious discrimination by a religious entity would constitute a prohibited establishment of religion").

107. See *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 808 (N.D. Cal. 1992) (denying summary judgment on the grounds that the plaintiff could prove that she had been fired because of her pregnancy). The court stated that "[t]he PDA makes it clear that this is per se sex discrimination. In enacting the PDA, Congress expressed its intention to apply Title VII to just such a case as this." *Id.*

108. See *id.* at 804 ("[S]he was fired, [defendants] now allege, because the school learned that she was involved in an adulterous relationship (i.e., sexual relations with her 'new' husband before she was divorced from her 'old' husband).").

109. See *id.* (referring to her termination letter, which "states without equivocation that the reason for her termination was the fact that she was 'pregnant without benefit of marriage,' which condition was inconsistent with the religious values of the church and school").

110. See *id.* at 807–08 ("[O]nly women can ever be fired for being pregnant without benefit of marriage. Thus, women would be subject to termination for something that men would not be, and that is sex discrimination, regardless of the justification put forth for the disparity." (emphasis in original)).

111. *Id.* at 804 (describing the defendant's change in tactics).

the father of her child, not her pregnancy outside of marriage, which served as the grounds for her termination.¹¹²

In resolving the motion for summary judgment, the court stated, "defendants' 'new' position—that plaintiff was fired for adultery, and not on account of her pregnancy—would not give rise to a Title VII claim."¹¹³ However, the court would not turn a blind eye to the defendant's previously stated reason for termination, and looked to precedent to determine whether a proffered religious reason for termination could be examined for pretext.¹¹⁴ It stated that "[t]he Supreme Court's decision [in *Amos*] . . . simply does not state that *all* employment decisions of a religious entity are off limits from Title VII, so that churches are free to discriminate on the basis of sex or race while other non-religious employers are not."¹¹⁵ The court recognized the potential for sex discrimination in cases such as this one, because it is only women who bear the physical manifestation of sexual activity, and stated that if Title VII were not applied:

[W]omen would be subject to termination for something that men would not be, and that is sex discrimination, regardless of the justification put forth for the disparity. The fact that defendants' dislike of pregnancy outside of marriage stems from a religious belief may be relevant to the Court's *First Amendment* analysis, but it does not automatically exempt the termination decision from Title VII scrutiny.¹¹⁶

Ultimately, in denying the defendant's motion for summary judgment, the court decided that Congress had intended Title VII to apply to

112. *See id.* ("However, in their summary judgment motion, defendants—for the first time—assert that plaintiff's termination had nothing to do with her pregnancy. On the contrary, she was fired, they now allege, because the school learned that she was involved in an adulterous relationship. (i.e., sexual relations with her 'new' husband before she was divorced from her 'old' husband).")

113. *Id.* at 805.

114. *See id.* ("[D]efendants' 'old' position—that plaintiff was fired because she was pregnant . . . raises the possibility of sex discrimination. If Title VII does not apply to that decision, there would . . . be no *material* fact in dispute . . . [P]laintiff would not be entitled to relief under Title VII in either event."). The court goes on to state, "If Title VII does apply, however, the dispute as to the true basis for plaintiff's termination becomes material." *Id.* Therefore, the court looked to precedent to determine whether Title VII applies to the school's decision to terminate the plaintiff based on her pregnancy and whether application of Title VII overcomes First Amendment scrutiny. *Id.* at 805–10.

115. *Id.* at 807 (emphasis in original).

116. *Id.* at 808 (emphasis in original).

employment decisions based on sex, even when made by religious employers.¹¹⁷

3. *A Split Among the Circuits*

This narrow reading of the religious exemptions to Title VII is not common to all the circuits.¹¹⁸ The *Vigars* court was persuaded primarily by Ninth Circuit cases, but based its narrow reading of the religious exemptions to Title VII on cases from the Ninth, Fourth, and Fifth Circuits.¹¹⁹ In contrast to those circuits, the Third Circuit in *Little v. Wuerl*,¹²⁰ decided that Title VII could not regulate a Catholic school's decision not to renew a teacher's contract because of her remarriage.¹²¹ The court decided that examining the school's employment decisions through the lens of Title VII would violate the Free Exercise and Establishment clauses of the First Amendment,¹²² and concluded that Congress had not intended Title VII's scope to be so broad.¹²³ The Third Circuit recently

117. *See id.* at 809 (stating that Title VII does not violate the Establishment Clause because its primary purpose is secular, and its primary effect is not to promote or inhibit religion, but to render illegal the vast majority of sex, race, and national origin-based discrimination). The court also found that Title VII did not violate the Free Exercise Clause because it is a "secular, neutral statute which, in this case, incidentally has a profound impact on defendants' free exercise of their religion." *Id.*

118. *See Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (holding a school's decision not to renew a teacher's employment contract was exempt from Title VII); *see also Curay-Cramer v. Ursuline Acad. of Wilmington*, 450 F.3d 130, 142 (3d Cir. 2006) (holding that a former teacher's Title VII claim was barred because such a claim would require the court to examine church doctrine, which would violate the religion clauses of the First Amendment).

119. *See Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 807–08 (N.D. Cal. 1992) (citing to Ninth Circuit cases as well as the Fourth Circuit's opinion in *Rayburn* and the Fifth Circuit's opinion in *Mississippi College*).

120. *See Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (holding that a school's decision not to renew a teacher's employment contract was exempt from Title VII).

121. *See id.* ("We recognize that Congress intended Title VII to free individual workers from religious prejudice. But we are also persuaded that Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices . . ."). The court broadly interpreted the religious exemptions to Title VII, stating that Wuerl's discriminatory action against Little would fit within the exemptions, even though Little was hired as a Protestant. *Id.*

122. *See id.* at 947 ("Application of this prohibition to the Parish's decision would be constitutionally suspect because it would arguably violate both the *free exercise clause* and the *establishment clause of the first amendment*." (emphasis in original)).

123. *See id.* at 951 ("We conclude that the application of Title VII's prohibition against religious discrimination to the Parish's decision not to rehire Little would raise substantial

considered and followed this holding in *Curay-Cramer v. Ursuline Academy of Wilmington*,¹²⁴ a case involving gender discrimination in a sectarian school, and cited to *Little v. Wuerl* for the proposition that a religious entity's religious justification for discrimination could not be examined for pretext.¹²⁵ The *Curay-Cramer* court stated:

[I]nquiry into the employer's religious mission is not only likely, but inevitable, because the specific claim is that the employee's beliefs or practices make her unfit to advance that mission. It is difficult to imagine an area of the employment relationship less fit for scrutiny by the secular courts. Even if the employer ultimately prevails, the process of review itself might be excessive entanglement.¹²⁶

Thus, the circuits split regarding whether the religious exemptions to Title VII should be construed broadly or narrowly.¹²⁷ The Supreme Court has failed to address the issue of whether a religious entity's stated religious justification for discrimination can be examined for pretext.¹²⁸

III. Arguments in the Alternative: *Bona Fide Occupational Qualifications*

Typically, if a religious employer fails to establish that the pregnant teacher whom it terminated was a minister, and fails to establish that application of Title VII to its religiously-based employment decision would

constitutional questions. We further determine that neither Title VII's plain language, nor its legislative history, demonstrates Congress' affirmative intent that Title VII apply here.").

124. See *Curay-Cramer v. Ursuline Acad. of Wilmington*, 450 F.3d 130, 142 (3d Cir. 2006) (holding that a former teacher's Title VII claim was barred because such a claim would require the court to examine church doctrine, which would violate the religion clauses of the First Amendment).

125. See *id.* at 138–39 ("[W]e concluded that applying Title VII to a claim of religious discrimination by an employee terminated from a Catholic school for marrying in violation of canon law would raise serious constitutional questions." (citing *Little v. Wuerl*, 929 F.2d 944, 950 (3d Cir. 1991)).

126. *Id.* at 139 (quoting *Wuerl*, 929 F.2d at 949).

127. See *E.E.O.C. v. Kamehameha Schs./Bishop Estate*, 848 F. Supp. 899, 899–900 (D. Haw. 1993) (vacating an order granting summary judgment to the defendant and granting partial summary judgment to plaintiff on the issue of liability because according to the Ninth Circuit panel, defendant's 'Protestant' hiring requirement is not protected by any Title VII exemption). The court points out that the Ninth Circuit has chosen to construe the Title VII exemption narrowly, while all other circuits that have considered the issue have construed it broadly. *Id.*

128. See *id.* at 900 (noting that the United States Supreme Court has declined to consider the conflict between circuits regarding whether the Title VII exemption should be construed narrowly or broadly).

raise any serious First Amendment issues, then it moves on to the nonreligious justifications.¹²⁹ Specifically, schools state that the terminated teacher failed to satisfy a BFOQ for her position.¹³⁰ This BFOQ defense was established in the Civil Rights Act of 1964,¹³¹ the standard for establishing that a particular characteristic is a BFOQ was articulated by the Supreme Court in *Dothard v. Rawlinson*.¹³² In that case, the Court decided that employers could purposefully discriminate in their hiring practices if the essential duties of the job warranted it, but also cautioned that any employer who asserted this BFOQ defense would bear a heavy burden.¹³³

In the case of pregnancy discrimination against a sectarian school teacher, the school will usually assert that the teacher failed to satisfy a BFOQ either because she failed to abide by a particular moral code¹³⁴ or

129. See *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 808 ("An employer may justify discrimination otherwise prohibited by Title VII by showing either a business necessity or a bona fide occupational qualification (BFOQ).").

130. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e)(1) (2006) (establishing the bona fide occupational qualification as a defense). The text of the defense, found in § 2000e-2(e)(1), provides:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his *religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.*

Id. (emphasis added).

131. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.) (extending voting rights and outlawing racial segregation in schools, at the workplace, and by facilities that serve the general public).

132. See *Dothard v. Rawlinson*, 433 U.S. 321, 335–37 (1977) (holding that a correctional facility's height and weight requirements for job applicants discriminated against women, stating that the requirements were not job related, but deciding that the height and weight requirements did serve as a bona fide occupational qualification because of particular circumstances).

133. See *id.* at 333–34 (referencing cases in which the BFOQ defense was narrowly interpreted and establishing that the BFOQ exception was meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex); see also *Vigars*, 805 F. Supp. at 808 (stating that an employer seeking to establish a BFOQ defense bears a heavy burden).

134. See cases cited *infra* note 139 (citing cases in which the employer accused an employee of failing to abide by the moral code required by the school because she engaged in premarital sex and became pregnant, and therefore failed to satisfy a BFOQ).

because she failed in her capacity as a role model.¹³⁵ Though the two are often conflated, they are actually distinct, and their usage as defense mechanisms has quite different implications. Claiming that a woman failed to satisfy a BFOQ because she didn't abide by a written moral code is relatively straightforward: because she failed to follow the rules laid out in her employment contract, employee handbook, or manual, she disqualified herself with her behavior.¹³⁶ This is, in its simplest form, a breach of contract claim, and if it is enforced equally across the sexes, then it does not appear unfair.¹³⁷ Claiming that a woman failed to satisfy a BFOQ because she did not serve as a role model is a much more complex argument. There are no set rules for a role model to follow, and what constitutes a role model in the context of an employee at a religious school varies greatly among schools.¹³⁸

A. *Employment Contracts and Written Expectations of Morality*

Religious schools often ask their employees to abide by a particular moral code, with some requiring that employees sign documents such as a "Teacher-Minister Contract" or a "Religious Statement."¹³⁹ Courts are

135. *See, e.g.*, *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 703–05 (1987) (holding that the "role model rule" put in place by the staff to discourage unmarried pregnancies was a BFOQ); *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 808–09 (N.D. Cal. 1992) (denying the employer's motion for summary judgment because the primary function of the employee was to be a librarian and not a role model, and therefore the school's defense that she did not satisfy a BFOQ failed).

136. *See, e.g.*, *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 411 (6th Cir. 1996) (noting that the faculty handbook plaintiff was given after being hired required teachers provide "a Christian example for the students" (internal quotation marks omitted)).

137. *See id.* at 414 (holding that plaintiff's Title VII claim failed in part because defendant presented uncontroverted evidence that it had terminated both males and females that had engaged in extramarital sexual relationships in violation of the school's moral code).

138. *See Adeno Addis, Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1384 (1996) ("When individuals invoke the concept of role model, they refer to a diverse set of political virtues (positive role models) and vices (negative role models).").

139. *See, e.g.*, *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 655 (6th Cir. 2000) (stating that a pregnant teacher who engaged in premarital sex signed a "Teacher-Minister Contract" and acknowledged that her position required her to "build and live Christian community, integrate learning and faith, and instill a sense of mission in her students" (internal quotation marks omitted)); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 344 (E.D.N.Y. 1998) (stating that an unmarried, pregnant teacher signed a "Religious Statement" on her application for employment, agreeing that her "temperament and lifestyle" were "in accordance with the will of God and The Holy Scripture," and that she was expected to be a

usually willing to enforce these contracts, if the school can prove that it enforced the contract's requirements equally across the sexes.¹⁴⁰ The fact that a religious school requires its employees to sign a contract obligating them to abide by certain religious rules does not exempt the school from the mandates of Title VII.¹⁴¹ As a result, the school must show that it terminates male employees along with female employees in enforcement of its moral policies.¹⁴² This is particularly difficult, considering that the majority of sins do not present themselves with hairy palms, growing noses, crossed eyes, or anything else that would make one's sins obvious—except for the one instance in which there is glaring evidence of moral transgression: pregnancy outside of marriage.¹⁴³

Whether abiding by a "moral code" could be a BFOQ was an additional consideration in *Dolter v. Wahlert High School*.¹⁴⁴ Wahlert, a Catholic school, claimed that if the court were to deny its religious exemption and to decide that the case should be judged under Title VII, a BFOQ defense would still be available because the school had a right to set standards of morality to which employees must conform.¹⁴⁵ It claimed that teachers such as Ms. Dolter were required to abide by the moral and religious standards set by the Roman Catholic Church, one of which was

role model).

140. *See Boyd*, 88 F.3d at 414 (deciding that, in a teacher's sex discrimination case in which she claimed her termination was based on her pregnancy, the school could not be held liable because it applied its policy against extramarital sex equally against men and women).

141. *See Ganzy*, 995 F.Supp. at 348 (stating that although inquiry by the courts into the religious faith required by a religious organization of its employees is constitutionally barred, application of Title VII in cases of gender discrimination does not violate the First Amendment, and therefore religious codes must apply to both male and female employees).

142. *See id.* ("Religious codes of morality must be applied equally to male and female teachers.").

143. *See id.* at 344 ("Women can become pregnant. Men cannot. It is therefore sometimes easier to enforce restrictions on sexual activity against a woman employee."). The opinion goes on to state that "[n]evertheless, if a woman is dismissed from a teaching position in a religious school because she is pregnant, rather than because she had sexual relations, state and federal prohibitions on gender discrimination are violated." *Id.*

144. *See Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 271 (N.D. Iowa 1980) (denying defendant school's motion for summary judgment in part because an issue of material fact existed as to whether the teacher's pregnancy entitled the school to dismiss her under the BFOQ exception to Title VII).

145. *See id.* ("[D]efendant contends that it was entitled to impose upon its teachers a code of religious moral conduct and to expect them to follow, in their personal life and behavior, the recognized moral precepts of the Catholic Church. . . . [S]uch code and precepts constitute a bona fide occupational qualification . . .").

abstaining from sex outside of marriage.¹⁴⁶ Under this defense, the school believed that its discrimination was justified because Ms. Dolter violated the school's moral code with her actions and her resulting pregnancy.¹⁴⁷

The Northern District of Iowa resolved the motion for summary judgment in favor of the plaintiff.¹⁴⁸ It stated that restrictions specifically targeted at pregnancy are per se gender discrimination, because biology limits pregnancy to women,¹⁴⁹ but said "[t]he court has no substantive quarrel with the possible merits of defendant's contention that it may be entitled to impose a code of moral conduct as a bfoq."¹⁵⁰ However, the court went on to state:

[D]efendant's asserted bfoq appears [to] relate to more religious and/or moral qualifications than to sexual qualifications. To that extent, even where such code of conduct truly constitutes a legitimate religious bfoq, the law nonetheless requires that it not be applied discriminatorily on the basis of sex; that is, unequally to defendant's male and female lay teacher employees.¹⁵¹

In this case, the judge could find no instances in which men who had engaged in premarital sex had adverse employment actions taken against them, and so found that Ms. Dolter's termination could have been the result of gender discrimination.¹⁵² The court noted that the actions of the school raised suspicion about whether the BFOQ defense was indeed pretextual, an issue brought up in many following cases.¹⁵³

Sixteen years after *Dolter*, a sectarian school successfully established that adherence to a moral code could be a BFOQ—and that such a BFOQ could be enforced equally across the genders—in *Boyd v. Harding*

146. *See id.* at 270 ("[D]efendant asserts its right to impose upon all its teacher employees a code of moral conduct including the proscription of pre-marital sexual intercourse.").

147. *See id.* at 271 ("Defendant concludes that it was plaintiff's alleged failure to meet such bfoq relating to morality that was the true reason for her discharge and not her sex.").

148. *See id.* (denying summary judgment to defendant school).

149. *See id.* at 270 n.4 ("The court certainly can take judicial notice of the fact that under present physiological laws of nature women are the only members of the human population who can become pregnant.").

150. *Id.* at 271.

151. *Id.*

152. *See id.* (referring to plaintiff's affidavit, which asserted that she had knowledge that other single teachers, known to have violated defendant's asserted code of conduct by engaging in premarital sex, were not discharged as she was).

153. *See id.* ("This . . . goes to the issue whether defendant's asserted bfoq defense is pretextual . . .").

Academy.¹⁵⁴ Andrea Boyd was a teacher at the preschool of Harding Academy, which was affiliated with the Church of Christ.¹⁵⁵ The faculty handbook given to all teachers specified that in addition to professional ability, Christian character was the basis for hiring teachers at Harding, and that every teacher was required in all actions to be a Christian example for the students.¹⁵⁶ In 1992, Boyd had a miscarriage while unmarried; she told her director about it, but was not terminated.¹⁵⁷ Only in 1993, when Boyd again became pregnant while still unmarried, was she fired.¹⁵⁸ Boyd's supervisor initially told her that she was terminated because she was "pregnant and unwed," but later stated that she actually meant that Boyd was terminated because she had broken the school's moral code by engaging in extramarital sex.¹⁵⁹

The Sixth Circuit Court of Appeals affirmed the lower court's summary judgment award in favor of the defendant, agreeing that Boyd could not establish a *prima facie* case because she did not adhere to the moral codes of the school, which Harding had established as a BFOQ of her job.¹⁶⁰ An essential fact that sets the *Boyd* case apart from *Dolter* is that in *Boyd*, the school was able to successfully prove a qualification set forth in *Dolter*: that a school's "code of conduct be applied equally to both sexes."¹⁶¹ It accomplished this by showing that Boyd's termination was not the first occurrence of teacher termination at Harding because of extramarital sex, and that men as well as women had come under scrutiny and been fired because of their private sexual conduct.¹⁶² To disprove the

154. See *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) (affirming the judgment of the district court that plaintiff failed to meet her burden of proof in establishing a Title VII gender discrimination claim when defendant articulated a legitimate, nondiscriminatory reason for plaintiff's termination by claiming that she was fired for extramarital sex rather than for being pregnant).

155. *Id.* at 411.

156. *Id.*

157. *Id.* at 412.

158. *Id.*

159. *Id.* at 412 n.2 ("Rubio testified that she was trying to be 'as gentle as [she] could' with Boyd and that by saying that plaintiff was pregnant and unwed, she actually meant that plaintiff had engaged in sex outside of marriage.").

160. See *id.* at 414–15 ("[T]he district court was correct in holding that defendant articulated a . . . non-discriminatory reason by stating that it fired plaintiff . . . for engaging in sex outside of marriage . . . Boyd did not meet her burden to prove . . . that this articulated reason was actually a pretext for illegal discrimination.").

161. *Id.* at 414 (citing *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 271 (N.D. Iowa 1980)).

162. *Id.*

contention that Boyd was fired because of her pregnancy, which would be a violation of the PDA, the principal cited several examples of married women who became pregnant while teaching and showed the school's compliance with the law in these cases.

Whether such a BFOQ can ever realistically be enforced equally across the genders is a matter still up for debate, however.¹⁶³ In *Boyd*, the President of Harding Academy came to know of other behaviors in opposition to the school's moral code, and thus was able to punish those who did not abide by it, because of gossip.¹⁶⁴ Under these circumstances, a male teacher who engaged in extramarital sex resulting in pregnancy, but who did not discuss his behavior with others, would be protected from adverse employment actions. In contrast, a female teacher who engaged in the same behavior and with the same results would be at risk for termination, regardless of whether she told anyone about her actions. Because extramarital sex may sometimes publicly proclaim itself through pregnancy, a female teacher at Harding Academy may be unable either to keep her private life private or to keep her job. A woman's inability to keep private her extramarital sex resulting in pregnancy, coupled with a man's ability to do just that, gives men a clear upper hand in avoiding morality-based termination. Such a distinction is gender discrimination, and should not be tolerated.

B. The "Role Model Defense" and Unwritten Expectations of Morality

After a supposed erosion of morals took place in the 1950's and 1960's,¹⁶⁵ a greater number of parents each year chose to take their children out of secular public schools and to place them in sectarian private schools, where they felt comforted by the fact that their children would be taught by people with a shared system of beliefs and values.¹⁶⁶ But for a private school tuition, parents often expect much more than just a teacher of

163. Rachel Knight, Comment, *From Hester Prynne to Crystal Chambers: Unwed Mothers, Authentic Role Models, and Coerced Speech*, 25 BERKELEY J. EMP. & LAB. L. 481, 511-13 (2004).

164. *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 412 (6th Cir. 1996).

165. See Knight, *supra* note 163, at 486 ("As the rigid social norms of the 1950s and early 1960s eroded and collapsed, allowing for greater expression of identity and individualism, a simultaneous rising tide of 'moral panic' swelled up.").

166. Cf. *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 344-45 (E.D.N.Y. 1998) (describing defendant school promoting to parents that it provides a "Christ-centered education" (internal citations omitted)).

Algebra or Literature—they want a teacher who will serve as a role model for their children.¹⁶⁷ The Supreme Court recognized this in *Ambach v. Norwick*,¹⁶⁸ a decision that emphasized that a "teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values."¹⁶⁹ Since *Ambach*, schools have used this concept of a role model in their defensive strategy, to bolster up the termination of teachers whose failure to live up to a moral standard is heralded by pregnancy. This "role model defense" becomes problematic when it appears in its "hypnotic though frivolous shape, to divert attention from problems of power and authority and social reality in general."¹⁷⁰ It is "hypnotic" when used to romanticize the relationship between teacher and child, such as one author's claim that "[e]xcept for sex, education is the most intimate of human contacts. Other than marriage, it is the most loving and momentous of personal relations."¹⁷¹ When schools put such a strong emphasis on the role model relationship between teacher and student, it is easy to see how a court's attention could be diverted from the very real problem of gender discrimination in religious schools. In addition, often schools claim that their teachers should be "comprehensive" role models, demonstrating how a person of a particular belief system should live every part of his or her life.¹⁷² But this defense does not comport with social reality. Though schools claim that their teachers should serve as comprehensive, full-time role models for their students, it would be difficult for any school to enforce this policy in a gender-neutral way that does not infringe on the privacy rights of its teachers.¹⁷³ Still, courts are sometimes

167. *Id.*

168. *See* *Ambach v. Norwick*, 441 U.S. 68, 76–81 (1979) (holding that the New York Education Law provision that prohibited teachers who are not citizens of the United States from obtaining certification to teach public school met the rational basis test required for discrimination against aliens, and emphasizing the role model status of school teachers).

169. *Id.* at 78–79.

170. Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1384 (1996) (quoting C. WRIGHT MILLS, *On Knowledge and Power*, in *POWER, POLITICS AND PEOPLE: THE COLLECTED ESSAYS OF C. WRIGHT MILLS* 599, 612 (Irving L. Horowitz ed., 1963)) (exposing the problems with the role model defense).

171. John Lachs & Shirley M. Lachs, *Education and the Power of the State: Reconceiving Some Problems and Their Solutions*, in *PUBLIC VALUES, PRIVATE SCHOOLS* 235, 237 (Neal E. Devins ed., 1989).

172. *See* Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1393–94 (defining comprehensive role models by stating that they possess two common characteristics: they spend a great deal of time with and exert power over the young people who will likely look up to them).

173. For example, though a Catholic school may terminate a teacher for publicly

swayed by the patriarchal arguments of the schools and agree that acting as a role model, abiding by the moral codes of the religious institution, can be a BFOQ.

This was the case in *Chambers v. Omaha Girls Club, Inc.*,¹⁷⁴ an Eighth Circuit decision in which the court decided that a policy requiring termination of single staff members who became pregnant or caused pregnancy was permissible.¹⁷⁵ In that case, the court held that this "role model rule" was justified both as a business necessity and as a BFOQ.¹⁷⁶ The unique circumstances of that case differentiate it from cases of pregnant school teachers. In *Chambers*, the staff members' primary aim was to serve as role models and to illustrate all the options that are available to young women, not to teach students a secular subject or even to indoctrinate them with a particular set of religious beliefs.¹⁷⁷ The staff viewed unmarried pregnancy as a serious limiting factor on the success of the young women whom the club sought to promote, thought that the presence of unmarried pregnant staff members would implicitly condone pregnancy without the benefit of marriage, and together decided to sign an agreement that unmarried pregnancy would be a termination event.¹⁷⁸

This "role model" defense failed in *Vigars v. Valley Christian Center*.¹⁷⁹ In that case, the defendant argued that Vigars, a librarian, was

proclaiming her pro-choice sentiments, *Curay-Cramer v. Ursuline Academy of Wilmington*, 450 F. 3d 130 (3d Cir. 2006), and the Boy Scouts may prohibit from being assistant scoutmaster a man who publicly proclaimed his homosexuality, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), these policies are difficult to enforce when members of different sexes are not similarly situated with regard to the ability to keep one's views and actions private. Though a woman may try to hide her unmarried pregnancy, her swelling belly publicly proclaims her fornication. A school would have to work much harder to discover a quiet man's similar transgression.

174. See *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 704–05 (1987) (holding that the "role model rule" put in place by the staff to discourage unmarried pregnancies was a bona fide occupational qualification).

175. See *id.* at 699 n.2 (laying out the policy prohibiting unmarried pregnancies, which was contained in the "Major Club Rules," and states: "The following are not permitted and such acts may result in immediate discharge: . . . 11. Negative role modeling for Girls Club Members to include such things as single parent pregnancies").

176. *Id.* at 703–05.

177. *Id.* at 701.

178. *Id.* at 701–02.

179. *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 808–09 (N.D. Cal. 1992) (rejecting the "role model" defense in which it was unclear "how central her moral life was to her job as librarian, whether or not she was truly expected to act as a role model in the Chambers sense, and what impact her pregnancy truly had on her ability to perform either of those functions").

required to serve as a role model for students at Valley, a parochial school, and thus moral character and "non-pregnant out of wedlock" status was a BFOQ.¹⁸⁰ While the court recognized the precedential value of *Chambers*, it distinguished that case by emphasizing that the Omaha Girls Club employees' "function was to act as role models for young girls."¹⁸¹ Though Vigers was required to sign a statement of faith, pledging that she would commit herself to instilling fundamentalist Christian values in the students with whom she interacted, and would commit herself to a fundamentalist Christian lifestyle, her primary function was not to be a role model—it was to be a librarian.¹⁸² The *Vigers* court stated that "[a]lthough the analogy [to *Chambers*] is tempting, it is ultimately not persuasive because it loses sight of the very narrow focus of the BFOQ and business necessity defenses."¹⁸³ The decision even went so far as to state that in order for a quality to be considered a BFOQ, "the person's job must depend upon the discriminatory characteristic."¹⁸⁴ The school also put forth the weak defense that people would be "upset" that the church had "refused to stand up for its religious doctrine" as challenged by Vigers.¹⁸⁵ The court responded to this by stating that "it is clear that fellow employees' and customers' 'preferences' do not constitute BFOQ's for sex discrimination any more than they constitute BFOQ's for race discrimination."¹⁸⁶ Though the court did not address the issue of whether serving as a role model could ever be a BFOQ for Vigers' job, because it was deciding only a summary judgment motion, it certainly made obvious that the school would have an uphill battle in arguing this defense.

IV. Conclusion

Though sectarian schools continue to terminate their pregnant, unmarried teachers, these women rarely lose their pregnancy discrimination suits, and should in fact have an even greater rate of success than they currently enjoy. Because teachers are not "ministers" in the traditional

180. *Id.* at 808.

181. *Id.* (emphasis in original).

182. *Id.* at 804 (describing the pledges that employees of the school were required to make upon their hiring).

183. *Id.* at 808.

184. *Id.*

185. *Id.* at 808 n.4.

186. *Id.*

sense, as explored in *McClure*, the schools that employ them should not be able to invoke the ministerial exception and thus skirt legitimate issues of pregnancy discrimination. Similarly, schools invoking other religious exemptions to Title VII should be required to open up their justifications to challenges of pretext, as articulated by the *Vigars* Ninth Circuit court in its analysis of the congressional record.¹⁸⁷

In addition, though a requirement of moral behavior or adherence to a "role model" status may be justifiable as a BFOQ, such BFOQs are impossible to enforce without preference for the male gender. As the court dryly noted in *Dolter*, "under present physiological laws of nature women are the only members of the human population who can become pregnant."¹⁸⁸ Men and women will never be "similarly situated" with respect to morality requirements such as the ones these private schools claim to require, because women are biologically more disposed to show the outward manifestations of what a private religious school might view as immoral behavior. Because of this, the nondiscriminatory BFOQ defense that was the lynchpin of Harding's argument in *Boyd* can never truly exist, and so it should never succeed.

In the *Boyd* case it should have been impossible for the school to assert that morality as a BFOQ was enforced equally across gender lines, defendant should have lost its summary judgment motion. Under those circumstances the plaintiff would have most likely succeeded in her claim, because the school's religious justification for her termination could easily be established as pretextual. Because Boyd was not terminated when she miscarried, losing a pregnancy that was the result of extramarital sex, and was terminated when her second extramarital pregnancy became obvious, she could claim that her termination was not the result of the school's enforcing its moral code but was instead the result of her ongoing status as a pregnant unmarried woman.¹⁸⁹ Boyd's supervisor even said in her testimony that at the time of the miscarriage "she thought to herself at the time that if Boyd had been *pregnant*, she would have had to terminate her."¹⁹⁰ It should have been obvious to the *Boyd* court that Harding viewed

187. *See id.* at 807 ("The legislative history of these . . . exemptions indicates that . . . although Congress permitted religious organizations to discriminate in favor of members of their faith, [they] are not immune from liability for discrimination based on . . . sex . . ." (internal quotation marks and citations omitted)).

188. *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 270 n.4 (N.D. Iowa 1980).

189. *See Knight*, *supra* note 163, at 512–13 (2004) (noting that her miscarriage provided as much evidence of extramarital sexual activity as her subsequent pregnancy).

190. *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 412 (6th Cir. 1996)

Boyd's pregnancy, not her private sexual activities, as disqualifying her from her position.

Analysis of the "role model" defense leads to a similar conclusion. While schools expect their teachers to be comprehensive role models for their students, a woman's unique ability to become pregnant puts her in a position where disqualification as a role model is inherently suspect. Though schools may claim that all teachers are subject to equal scrutiny of their private lives, in order to ensure that they live up to their role model status, gender-neutral scrutiny is simply impossible. While schools may emphasize that teachers are role models who are expected to abide by certain religious doctrines, these statements should never persuade a court—a woman's rights under the PDA should be weighted far more heavily.

These were the approaches successfully taken by the NYLCU in the more recent case referenced at the beginning of this Note, which was settled out of court.¹⁹¹ The McCusker case indicates that until the Supreme Court decides the open issues as detailed in this Note, sectarian schools will continue to push the boundaries of the ministerial and other religious exemptions, as well as the boundaries of BFOQs. Ultimately, when the Court addresses these issues, particularly if it does so in the context of pregnancy discrimination claims regarding a teacher's termination from a sectarian school, it should decide in favor of women—Title VII requires no less.

(emphasis added).

191. See *NYCLU Defends*, *supra* note 6.