

40247-5-II

NO. 83037-1

(from Pierce County Cause No. 08-2-09228-9)

SUPREME COURT
OF THE STATE OF WASHINGTON

ANGELA ERDMAN,

Plaintiff/Appellant,

v.

CHAPEL HILL PRESBYTERIAN CHURCH; MARK J. TOONE,
individually; and the marital community of MARK J. TOONE and JANE
DOE TOONE,

Defendants/Respondents.

On Appeal from Pierce County Superior Court

BRIEF OF APPELLANT

Robin Williams Phillips, WSBA No. 17947
Sean V. Small, WSBA No. 37018
Attorneys for Plaintiff/Appellant
Lasher Holzapfel Sperry & Ebberson, PLLC
2600 Two Union Square
601 Union Street
Seattle WA 98101-4000

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I. IDENTITY OF PETITIONER

Appellant Angela Erdman, plaintiff in the underlying action in Pierce County Superior Court Cause No. 08-2-09228-9, respectfully submits this brief for the Court's consideration.

II. INTRODUCTION

This matter concerns the application of the First Amendment protections to religious organizations. Ms. Erdman's causes of action for violation of the Washington Law Against Discrimination ("WLAD"), Title VII, and common law were wrongfully dismissed by the trial court. Ms. Erdman was even limited in her ability to conduct discovery to assist in the establishment of her claims.

Without any analysis or consideration, the trial court ruled that if a lay employee submits a grievance to a hierarchically-organized church that has ecclesiastical judicial tribunals, whether liability was predicated upon secular conduct or involved the interpretation of church doctrine, and whether the tribunal investigated her claim, the aggrieved party is barred from asserting a lawsuit in a secular court.

The trial court's blanket bar on claims is inconsistent with Art. I, § 11 of the Washington State Constitution, as well as previous holding by this Court in related cases. The trial court's decision allows a religious organization the unabashed right to discriminate against its lay employees. Ms. Erdman was encouraged by the attorney for Respondents, Chapel Hill

Presbyterian Church (“Church”) and Rev. Mark J. Toone (“Toone”), to prepare and submit a grievance to the Presbytery of Olympia (“Presbytery”). Based on Ms. Erdman’s decision to do so, the trial court ruled that any causes of action which “could” be based on facts asserted by Ms. Erdman in her grievance to the Presbytery, regardless of whether the grievance was investigated and an actual decision concerning the same was made, were barred.

Ms. Erdman is before this Court respectfully requesting that it review the trial court’s decisions, and reverse the trial court’s improper analysis of the First Amendment and/or remand this case with clear direction on analyzing the First Amendment when a lay employee of a religious organization brings causes of action in a secular court.

III. ISSUES PRESENTED FOR REVIEW

- Whether the trial court erred when, on January 23, 2009, it denied Appellant’s Motion to Compel, when the First Amendment does not provide religious organization unfettered protections from engaging in discovery?
ANSWER: YES
- Whether the trial court erred when, on February 20, 2009, it only partially granted Appellant’s Motion to Enforce the Subpoena to the Presbytery, when the First Amendment does not provide religious organization unfettered protections from engaging in discovery?
ANSWER: YES
- Whether the trial court erred when, on March 27, 2009, it granted Respondents’ Motion for Summary Judgment, when the trial court conducted no analysis of whether liability was predicated on secular conduct and did not involve the interpretation of church doctrine or religious beliefs?

ANSWER: YES

- Whether the trial court erred when, on March 27, 2009, it granted Respondents' Motion for Summary Judgment dismissing Appellant's WLAD claims, when the religious exemption in the WLAD is unconstitutional?

ANSWER: YES

- Whether the trial court erred when, on March 27, 2009, it granted Respondents' Motion for Summary Judgment and relied on withheld documents held by the trial court *in camera*, when the trial court had previously ruled that the documents did not have to be produced?

ANSWER: YES

IV. STATEMENT OF THE CASE

A. Relevant Facts of the Case

1. Initial Investigation of Toone's Handling of Tours

The facts of this matter began in the mid-1990's when Toone, senior pastor for the Church, without disclosure to Session¹ or the congregation, began acting as a Tour Director for Y'alla Tours. CP 659. As a tour director, Toone solicited his congregation to participate in vacation tours and, in exchange, received a per head commission from Y'alla Tours, free flights, free hotel, and kick-backs from various businesses during the tour. CP 496-502.

In 2003, Toone's activities became know to former Executive Pastor Stuart Bond, who, concerned with the practice, commissioned an investigation. CP 503-04, 509. A Session committee was formed to

¹ Governing body of the Chapel Hill Presbyterian Church.

review Toone's questionable practices, and it was determined that Toone's practices were not appropriate, and in an e-mail, decided that all remuneration from Y'alla Tours be paid directly to the Church. CP 509, 520. From 2004 until 2008, Toone disregarded this decision, and kept personally all money received from Y'alla Tours. CP 505.

2. **Ms. Erdman Learns of Harmful Tax Consequences as a Result of Toone's Handling of the Tours**

Ms. Erdman's role in this unfortunate series of events began in June of 2007 when Toone requested that she reimburse him for the cost of an airline ticket to Ireland. CP 311, 372-73, 506. Ms. Erdman's position at the Church was akin to that of a Chief Financial Officer ("CFO"). CP 307-309.² Id. She discovered that the airline ticket had been given to Toone by Y'alla Tours and that Toone had not incurred any out-of-pocket expense for the ticket. CP 311, 372-73, 506. Ms. Erdman, concerned with the propriety of the request, did not reimburse Toone for the ticket. Id.

Up until this point, Toone had never disclosed to Session or the congregation that he was receiving a per head kick-back from Y'alla Tours. CP 494-95. In 2006, the per head kick-back was significant

² Her job duties were to reduce the level of debt, improve tithing levels, increase finance competence, manage the Accounting Manager, manage financial planning, and develop a database. CP 307-309

enough that the income reported by Toone from Y'alla Tours was \$27,600. CP 501, 519.³

3. **The Church's CPA Confirms the Harmful Handling of the Tours by Toone**

Ms. Erdman, in September 2007, brought the matter to the attention of the Church's CPA, Rick Battershell, for guidance. CP 310-11. Mr. Battershell reviewed the matter and drafted a policy prohibiting Toone from receiving direct compensation from Y'alla Tours. CP 312-13.

On September 11, 2007, Ms. Erdman spoke to Toone about Mr. Battershell's concerns and possible accounting issues. CP 312. Ms. Erdman was very clear that Toone's actions could violate IRS § 501(c)(3) tax laws jeopardizing the Church's tax exempt status and expose himself, the members of Session, and all Church officers (including Ms. Erdman) to possible intermediate sanctions as a result of automatic excess benefits. Id.

4. **Toone Suspends Ms. Erdman's Duties and Conducts his Own Investigation**

On September 12, 2007, Toone told Ms. Erdman to forward him all the information she had concerning her investigation, and then "do nothing". CP 312. Toone then suspended Ms. Erdman's duties by removing her (thus preventing fulfillment of her duties as Church treasurer

³ It was not until 2007 that Toone finally disclosed to Ms. Erdman and Session that in 2004 a committee of Session investigated his relationship with Y'alla Tours and mandated that he turn all money over to the Church. CP 417. In fact, Session was misled by Toone to believe that he had been turning all Y'alla Tours money into the Church. CP 418-19.

and CFO in ensuring financial integrity and compliance) from any further involvement related to the handling of the tours. Id.

Toone indicated that he would personally handle the investigation into possible tax violations with his personal accountant. CP 312. Toone's personal accountant was not retained by the Church to protect the Church's interests; rather, Toone's accountant was retained by Toone to maximize Toone's financial gain. Id. Toone then instructed Ms. Erdman that the issue was "out of her hands". Id.

On October 16, 2007, Toone sent an email to Ms. Erdman indicating he was finished with his investigation, and made the summary statement that current process for handling the trips was appropriate. CP 312-313. Toone did not provide any guidance or insight as to who or how the determination was made. Id. On that same day, consistent with her job duties and obligations, Ms. Erdman requested that Toone explain how the decision had been made. Id.⁴

5. Toone Berates Ms. Erdman with Uncontrolled Rage

On October 17, 2007, Ms. Erdman, via e-mail, inquired again as to how the tours were being handled to ensure resolution of the issue prior to printing of Church's bulletin in which the tours were advertised. CP 313-14.

⁴ Ms. Erdman even contacted Mr. Battershell, who informed her that there were still a number of unresolved issues that needed to be addressed. CP 313.

At approximately 4:30 p.m. that day, Toone entered Ms. Erdman's office, slammed her door, leaned over her desk, and proceed to scream at Ms. Erdman for 25 minutes. CP 313-14. In the next room, Carey Snow, the Director of Human Resources, described the incident as "uncontrolled rage." Id., CP 481. Ms. Erdman, in tears, ran from her office. Id.

6. **The Church's HR Director was Unable to Provide a Safe Working Environment**

That evening, Carey Snow concerned about verbal abuse she had witnessed, phoned Ms. Erdman. CP 466. During the phone conversation, Ms. Erdman lodged a complaint of harassment and retaliation against Toone. CP 467.

On October 19, 2007, in accordance with the Church's policy, Ms. Erdman submitted to Ms. Snow a written complaint against Toone.⁵ CP 455, 521-24. Unfortunately, the Director of Human Resources could do nothing. Desperately afraid of retaliation, Ms. Snow **did not investigate** the matter. CP 457-59, 460-62, 468. In fact, since 1996 Ms. Snow, as HR Director, **had received 15 other complaints from women in the workplace.** CP 457-59. Each of these complaints was against Toone and based upon his inappropriate, often abusive working relationships with subordinate women. Id. Ms. Snow did not investigate any of these complaints for fear of retaliation. CP 468.

⁵ Snow admits that the Church's policy was ineffective as to complaints made against the senior pastor (Toone). CP 455.

7. *Ms. Erdman Takes a Leave of Absence*

On October 17, 2007, Ms. Erdman notified Ms. Snow that she was taking sick days, and would not be returning to work immediately. CP 313-14. On October 20, 2007 and on October 22, 2007, Ms. Erdman explained to Ms. Lukens⁶ that she was fearful of Toone and felt that the workplace was unsafe. CP 315-16. She explained the details of the October 17, 2007 assault by Toone, and reported that Toone treated women badly. Id.

Despite this clear complaint, Ms. Lukens made no investigation as to Toone's behavior. CP 410-14. In fact, Ms. Lukens admitted that she had little understanding of harassment or any idea how to investigate such a complaint. Id. Ms. Lukens, however, made it clear that Ms. Erdman could return to work as soon as she "felt comfortable" doing so. CP 429.

On October 29, 2007, Ms. Erdman formally took medical leave and remained out on leave until November 30, 2007, when she contacted the Church and notified it that her doctor had cleared her to return to work. CP 316. Ms. Erdman was promptly told that she could not return to work until a meeting took place. CP 435, 437. The purpose of the meeting was either to offer a severance package or facilitate reinstatement. CP 516.

⁶ Member of Session asked to facilitate the dispute between Ms. Erdman and Toone.

8. *Ms. Erdman is Instructed to File a Complaint with the Presbytery*

On November 27, 2007, Session met, and voted to offer Ms. Erdman “continued employment or renegotiation of a settlement of up to four months in pay.” CP 514-15, 431. A meeting was scheduled for December 3, 2007, via a November 28, 2007 letter from Respondents’ counsel in which he indicated that if Ms. Erdman had issues with harassment or accounting issues, she should put them in writing. CP 317-18, 392-93.

On December 2, 2007, consistent with the instruction from Respondents’ counsel, Ms. Erdman documented her concerns against Toone in a grievance and submitted them to:

- a) Business Administrator and HR Director: per Church’s employee handbook;
- b) Session: per Respondents’ letter of instruction; and
- c) Presbytery of Olympia: per Book of Order

CP 318.

On December 3, 2007, because of the utter failure of the Church to investigate her charges, Ms. Erdman sent an e-mail to the Presbytery seeking help. CP 318. In that e-mail, Ms. Erdman stated that she had experienced harassment and retaliation on nine separate occasions. Id. Ms. Erdman provided Respondents a copy of her e-mail. Id.

On December 4, 2007, a meeting between the parties was held. Rather than follow Session’s mandate, Toone decided that **because Ms.**

Erdman filed a complaint with the Presbytery that she:

- Would not be offered four months of severance;
- Would not be offered reinstatement; and
- Would be put on immediate administrative leave.

CP 516-17.⁷

Sometime in mid-December, Toone made the decision to fire Ms. Erdman, and the recommendation was presented to Session. CP 438. This was surprising given that Ms. Lukens testified that as a member of the “task force,” she had “no idea why she [Ms. Erdman] was terminated.” Id. Toone made the final decision to terminate Ms. Erdman effective December 31, 2007. CP 318-19, 396-401.

9. The Presbytery Failed to Conduct an Investigation

The Presbytery’s notes and testimony clearly indicate that it did not feel it had jurisdiction over Ms. Erdman’s allegations pertaining to violation of Session policy or State or Federal laws. CP 319, 405. Notes by the Presbytery concerning Ms. Erdman’s allegations indicated the following:

- “She [Ms. Erdman] lists several violations from the Chapel Hill Session policies of which we have no jurisdiction.”
- “She also has a list of violations form [sic] state and federal law of which we have no jurisdiction --

⁷ Despite Toone’s insistence that the “committee” made these decisions, it is clear from Ms. Luken’s testimony that she thought the offer of four months severance and reinstatement had been made. CP 146-47. Additionally, Ms. Luken’s admitted that all employment decisions regarding Appellant, including being put on administrative leave, would be up to “the boss,” Toone. Id.

unless we relied on Romans 13 which calls for us to obey the laws of the civil majistrates [sic].”

Id. The Presbytery recognized that the issues before it were outside its scope, and that it was not capable of making a determination. Id. Rev. John Schmick, Chairperson of the Investigative Committee, specifically testified that the Committee had no jurisdiction over any claim involving violations of Chapel Hill Session policies or Chapel Hill employee handbook. CP 649-50.

Further, Presbytery members indicated that it would not be able to understand the issues that were raised anyway. CP 319. Rev. Schmick stated in an email to the Church’s CPA, “I too believe that the letter from Washington State Dept. of Revenue Property Tax Division will be important for us. It would be helpful (**though I doubt I can understand it**) to have it prior to our phone conversation.” Id., 405. The Presbytery was not equipped to investigate, comprehend, or resolve the complex issues raised by Ms. Erdman. Id.

In addition, there was no investigation whatsoever regarding any of Ms. Erdman’s civil claims. Rev. Schmick testified that the investigative committee never investigated:

- Whether provisions of the handbook had been violated. CP 642.
- Whether Appellant had been retaliated against, even though Appellant had clearly explained to the investigative committee that she had been placed on

leave and terminated because of her complaint to the Presbytery. CP 644-45.

- Whether Appellant had been emotionally harmed by any conduct of the Respondents. CP 643.
- Whether Appellant had been paid appropriately. CP 645.

The investigative committee of the Presbytery never investigated any allegation against the Church. CP 650-52. Ms. Erdman's Form 26 stated that "[her complaint] does not include specific allegations of wrong-doing on the part of the Session of Chapel Hill Presbyterian Church which I believe have also contributed to the issue at hand." CP 320. The members of the Presbytery could not and did not make a determination of an issue that was not before them.⁸

One would expect even a modest investigation, at the very least, to include interviews of other female workers supervised by Toone; however, only three female employees were interviewed: Ms. Snow, Ms. Erdman, and Betsy Hunt. CP 646, 648-49. Each of these women told the committee that they had concerns regarding Toone's conduct. *Id.* Both Ms. Snow and Ms. Erdman told the committee that they were afraid of the workplace. CP 648.

⁸ The Presbytery never investigated whether the Church through various session members had retaliated against Erdman or whether the Church failed to provide a safe work environment.

Rev. Schmick testified that he had no experience in investigating employment related matters and had no training in investigating workplace issues.

In addition, Ms. Erdman specifically discussed with the Presbytery Investigative committee the likelihood of filing a lawsuit against the Church. CP 319-20. Ms. Erdman informed the panel that she had not yet decided; yet, the panel expressed the concern that if there was an active lawsuit some witnesses would be more hesitant to talk with them about the issues raised. Id. However, the Presbytery Investigative panel never expressed that Ms. Erdman was potentially waiving her right to file a lawsuit by bring her grievances to the Presbytery, and appeared to contemplate the possibility of conducting their investigation at the same time a civil lawsuit was pending. Id.

Finally, the grievances provided to the Presbytery by Appellant were separate and distinct from the causes of action asserted in the underlying action, and specifically did not include any allegations against the Church. CP 320. The Book of Order specifically states:

“The church’s disciplinary process exists not as a substitute for the secular judicial system, but to do what the secular judicial system cannot do.”

CP 378-83.

Consistent with the role of the Presbytery, Ms. Erdman’s Form 26 requested a finding that Toone had violated scripture. CP 320, 210. This

is clearly evidenced by the many biblical and Book of Order references. Id. Further, the Book of Order states that “disciplinary cases are for acts by officers of the church that are **contrary to the scriptures** or the Constitution of the Presbyterian Church.” CP 381-82. Any determination made by the Presbytery would be limited not only by the fact that it had no subpoena power, no ability to compel a party to tell the truth, no incentive to conduct a thorough investigation⁹, no ability to make Ms. Erdman whole, etc., but by the very question put before it -- whether Toone violated scripture. CP 320.

Finally, and most importantly, despite the “investigation,” the investigative committee never made a finding. No decision was ever made as to whether Toone did or did not violate scriptures. CP 655.

B. Procedural History

This matter was initiated in July 2008, when the Church and Toone were served with the Summons, Complaint, and discovery requests. CP 1-13. On August 25, 2008, the Church and Toone submitted an Answer to the Complaint. CP 14-18.

On December 16, 2008, with limited discovery conducted, Respondents filed a motion for summary judgment. CP 19-31. At that time, there had been no depositions conducted, the discovery cut-off was

⁹ The Presbytery is a co-signer on the Church’s \$9 million real property note, has no individual ability to generate revenue, and relies on the Church for approximately 20% of its annual funding. CP 320.

April 23, 2009, and the trial was set for June 11, 2009. Id.

On August 19, 2008, Mrs. Erdman issued a valid and enforceable subpoena to the Presbytery. CP 78-83. The subpoena was filed because Mrs. Erdman previously lodged accusations against Toone with Presbytery. CP 67. Mrs. Erdman's subpoena sought to review and analyze the scope and extent of Presbytery's investigation; however, in response to the subpoena counsel for Presbytery withheld documents on the grounds that they were protected by the First Amendment of the U.S. Constitution. Id., CP 84-85.

On January 13, 2009, Ms. Erdman filed a Motion to Compel, and requested that the trial court Order the Presbytery to produce the entire contents of its file. CP 66-73. On January 23, 2009, the trial court, after hearing oral argument, reviewed the documents at issue *in camera*, and found that the documents sought by Ms. Erdman (1) were protected by a First Amendment privilege; (2) contained evidence of the thought processes of the Presbytery; and (3) considered each accusation lodged by Ms. Erdman in it Form 26 Complaint. CP 171-72. In addition, the trial court ruled that Ms. Erdman had not made the requisite showing of necessity and the documents did not need to be disclosed because the materials were irrelevant and protected. Id.

On January 16, 2008, Ms. Erdman sought leave to amend the Complaint to allege causes of action arising out of the protection of Title

VII of the Civil Rights Act. CP 87-90. January 23, 2009, the Court granted Ms. Erdman's motion to file an Amended Complaint. CP 156-57. In response, on January 29, 2009, Respondents filed a Revised Motion for Summary Judgment seeking to dismiss all of Ms. Erdman's causes of action. CP 191-219.

Ms. Erdman continued to try and conduct discovery, including the deposition of Rev. Schmick. CP 262-72. Rev. Schmick was a vital witness for both Ms. Erdman and Respondents (as evidenced by Respondents' identifying him in their witness disclosure). CP 288. In response to the subpoena to Rev. Schmick, counsel for Presbytery indicated that she would not produce the witness in light of the Presbytery's First Amendment privileges. CP 293-94.

On February 11, 2009, Ms. Erdman and the Presbytery both filed motions pertaining to the subpoena to take the deposition of Rev. Schmick. CP 262-72. While the trial court granted Ms. Erdman's Motion to Compel the deposition, the trial court's Order limited Ms. Erdman's inquiry. CP 635-37. Consistent with the trial court's previous ruling, counsel for the Presbytery objected to most questions and instructed the witness not to respond on the basis that the information sought was protected by the First Amendment. CP 733.

After conducting limited discovery, briefing was submitted on Respondents' Motion for Summary Judgment, and on March 13, 2009, the

trial court heard oral argument. CP 733. Following oral argument, the trial court issued an oral ruling addressing the issues before it; however, it requested that the parties generate a written Order following the parties' review of the transcript from the Oral decision. Id.; RP 23-28.

On March 27, 2009, the parties each presented Orders on Respondents' motion, and the trial court signed Respondents' Order with no modification and effectively dismissed all of Ms. Erdman's causes of action.¹⁰ CP 717-20.

V. ARGUMENT

A. **Standard of Review**

De novo review is the applicable standard for all of the issues raised here because the ultimate questions before the Court are constitutional in nature and involve the applicability of a statute and/or rule.

The trial court's interpretation of the First Amendment of the U.S. Constitution and Washington Constitution and related case law can be divided into decisions regarding limitations to investigate the claims asserted and the motion for summary judgment.

It has been held that a court will review questions of constitutional construction de novo. State v. Norman, 145 Wn.2d 578, 579, 40 P.3d

¹⁰ Ms. Erdman's remaining claims were eventually dismissed pursuant to CR 41(a)(1)(B) without prejudice and without award of costs or attorney's fees. CP 789-90.

1161 (2002). More generally, the applicability of a statute or other rule of law will also be review de novo. Lobdell v. Sugar 'N Spice, Inc., 33 Wn. App. 881, 658 P.2d 1267 (1983). Finally, an appellate court reviews a trial court's interpretation of case law de novo. State v. Willis, 151 Wn.2d 255, 87 P.3d 1164 (2004).

Here, Ms. Erdman seeks review of the trial court's January 23, 2009 Order to conduct an *in camera* review of documents withheld in response to a valid subpoena, and ultimate decision that the withheld documents were protected by the First Amendment, and did not have to be produced. As well as the trial court's later reliance on the withheld documents to support its determination on summary judgment.

Similarly, Ms. Erdman seeks review of the trial court's February 20, 2009 decision limiting the scope of Ms. Erdman's motion to enforce the deposition subpoena of Rev. Schmick. Ms. Erdman was not permitted to inquire into the scope of the decision making process of the investigation of the Presbytery.

In both of the above described decisions, the trial court interpreted the protections afforded under the First Amendment separating Church and State, as well as the case law relating to the same. De novo review is appropriate.

In regards to Court's decision granting Respondents' motion for summary judgment, all of the above rules supporting de novo review

apply, in addition to the well established principle that a reviewing court conducts de novo review on motions for summary judgment. Ski Acres, Inc. v. Kittitas County, 118 Wn.2d 852, 827 P.2d 1000 (1992).

As such, this Court should consider all of the facts and reasonable inferences in the light most favorable to Ms. Erdman. Mason v. Kenyon Zero Storage, 71 Wn. App. 5, 8-9, 856 P.2d 410 (1993). A finding of a genuine issue of any material fact would warrant reversal of the trial court's determination on summary judgment. Condor Enters., Inc. v. Boise Cascade Corp., 71 Wn. App. 48, 54, 856 P.2d 713 (1993).

B. The First Amendment is Not a Pretextual Shield to Protect a Religious Organization's Otherwise Prohibited Employment Decision

The central issue before the Court is whether the trial court had jurisdiction to hear the dispute. The First Amendment to the United States Constitution prohibits any "law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. Const. amend. I. The United States Supreme Court has interpreted this clause to mean that the civil courts cannot decide disputes involving religious organizations where the religious organizations would be deprived of interpreting and determining their own laws and doctrine. See Watson v. Jones, 80 U.S. 679, 20 L. Ed. 666, 13 Wall. 679 (1871) (Establishing doctrine of judicial abstention in matters which involved interpretation of religious law and doctrine).

Similarly, Art. I, § 11 of the Washington State Constitution

protects “[a]bsolute freedom of conscience in all matters of religious sentiment,” however, that protection “shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.” C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 728, 985 P.2d 262 (1999).

In Washington, civil courts may adjudicate church-related disputes if the dispute does not involve ecclesiastical or doctrinal issues. Elvig v. Ackles, 123 Wn. App. 491, 98 P.3d 524 (2004); Gates v. Seattle Archdiocese, 103 Wn. App. 160, 166-67, 10 P.3d 435 (2000) (Secular courts will hear contract and employment cases arising from a church controversy when no ecclesiastical or doctrinal issues are involved). Because the frontier between church doctrine and civil contract law is a sensitive area, a court must determine whether the specific facts of the case present a threat of religious liberty. Id.; *see* Org. for Preserving Constitution of Zion Lutheran Church of Auburn v. Mason, 49 Wn. App. 441, 445, 743 P.2d 848 (1987); Southside Tabernacle v. Pentecostal Church of God, Pac. N.W. Dist., Inc., 32 Wn. App. 814, 817, 650 P.2d 231 (1982); Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360, 363 n. 3 (8th Cir. 1991).

The First Amendment is **not** a pretextual shield to protect a religious organization’s otherwise prohibited employment decision. “The First Amendment does not provide churches with absolute immunity to

engage in tortious conduct. So long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs, it does not offend constitutional principles.” C.J.C., 138 Wn.2d at 728, 985 P.2d 262; *citing Sanders v. Casa View Baptist Church*, 134 F.3d 331, 336 (5th Cir.), *cert. denied*, 525 U.S. 868, 119 S.Ct. 161, 142 L.Ed.2d 132 (1998) (“the constitutional guarantee of religious freedom cannot be construed to protect secular beliefs and behavior, even when they comprise part of an otherwise religious relationship between a minister and a member of his or her congregation. To hold otherwise would impermissibly place a religious leader in a preferred position in our society”).

Courts consistently have subjected the personnel decisions of various religious organizations to statutory scrutiny where the duties of the employees were not of a religious nature. *See Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *E.E.O.C. v. Fremont Christian School*, 781 F.2d 1362 (9th Cir.1986); *Volunteers of Am.-Minn.-Bar None Boys Ranch v. N.L.R.B.*, 752 F.2d 345 (8th Cir. 1985); *E.E.O.C. v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981).

The **dispositive question** is whether resolution of Ms. Erdman’s legal claim requires the court to interpret or weigh church doctrine. If not, the First Amendment **is not implicated** and neutral principles of law are

properly applied to adjudicate the claim. See Serbian Eastern Orthodox Diocese for the U.S. and Canada v. Milivojevich, 426 U.S. 696, 710, 49 L. Ed. 2d 151, 163 (1976).

In the instant matter, there are two central issues with respect to the trial court's interpretation of the First Amendment and its protection of religious organizations. First, the proper analysis for determining whether resolution of the legal claim requires the court to interpret or weigh church doctrine. Second, whether civil courts must defer to mechanisms within a religious organization, which are designed to resolve and render binding decisions in disputes.

Below, Ms. Erdman demonstrates that (1) the legal claim asserted by Ms. Erdman did not require the Court to interpret or weigh church doctrine and (2) a religious tribunal did not make a determination that binds the Court.

C. Ms. Erdman's Causes of Action Were Based on Secular Conduct

1. The Legal Claims Here Involve An Entirely Secular Inquiry

In this matter, liability is predicated on secular conduct and does not involve the interpretation of Church doctrine or religious beliefs. Ms. Erdman has asserted causes of action based on the hostile, retaliatory, and prejudicial work environment, willful withholding of wages, breach of contract and wrongful discharge. CP 158-69. It is not necessary to

interpret, let alone review, the Church's doctrine to adjudicate this matter. This case does not require this Court to entangle itself in the Church's religious beliefs.

In Bollard v. The California Province of the Society of Jesus, 196 F.3d 940 (9th Cir. 1999), the court held that Title VII applies without an exception compelled by the First Amendment where a defendant church is neither exercising its constitutionally protected prerogative to choose its ministers nor embracing the behavior at issue as a constitutionally protected religious practice. When a claim is made against a religious employer, a plaintiff may show she was sexually harassed and that the harassment created a hostile work environment, without offending the First Amendment. *Id.* at 950; *see also* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 959 (9th Cir. 2004). The Bollard court ultimately reasoned that because the evaluation of a sexual harassment claim involves an entirely secular inquiry that does not intrude into areas concerning the doctrines of a religious organization, it is allowed. *Id.*

The court in Bollard determined that allowing the plaintiff to proceed with a Title VII action did not foster impermissible government entanglement with religion, so as to violate the establishment clause of First Amendment. *See* Bollard, 196 F.3d 947. Specifically, the court found that there was no substantive entanglement at issue, and any procedural entanglement that would result from the action was not great

given that any affirmative defense that the religious organization exercised reasonable care to prevent harassment would not require evaluation of religious doctrine, and no continuing court surveillance would be required given that plaintiff's sought damages as his sole remedy. Id.

The Bollard court reasoned that a similar analysis would apply to the plaintiff's State law claims. 196 F.3d 947.

Ms. Erdman asserted that Respondents created a work environment that was premised on harassment and discrimination. CP 158-69. The environment was hostile and abusive towards women during the time she worked for the Church. Id. Ms. Erdman's Title VII and WLAD claims are secular in nature and do not require evaluation of religious doctrine -- Ms. Erdman should have the opportunity to litigate her claims.

Allowing Ms. Erdman to pursue her claims would not offend the protections of the First Amendment. However, this Court's jurisdictional inquiry does not stop with a determination that this dispute is amenable to civil court resolution. Bellow, Ms. Erdman examines the intrinsic characteristics of the Presbytery and its investigation to demonstrate that the trial court was under no obligation to defer to mechanisms within the Presbytery.

D. This Court is Not Bound by the Presbytery

1. The Trial Court Failed to Apply the Correct Standard of Review

The trial court relied on the Elvig decision to find that it did not have jurisdiction to adjudicate Ms. Erdman's claims. RP 25-26. However, the trial court failed to conduct the relevant inquiry in making its decision, namely, whether the action before it depended upon a question of doctrine, ecclesiastical law, rule or custom, or church government, and whether that question had been previously decided by the highest tribunal within the organization. The trial court's sole reliance on Elvig was in error, and warrants reversal.

The Elvig court held that in Washington, civil courts **may adjudicate** church-related disputes if the dispute does not involve ecclesiastical or doctrinal issues. 123 Wn. App. at 496, 98 P.3d 524; *see Gates*, 103 Wn. App. 160, 10 P.3d 435, Mason, 49 Wn. App. 441, 743 P.2d 848, and Southside, 32 Wn. App. at 817, 650 P.2d 231.

However, the Elvig court went on to state that "if the church accused of wrongdoing is a member of a hierarchically-organized church that has ecclesiastical judicial tribunals, civil courts must defer to the highest church tribunal's resolution of the matter, despite the fact that the dispute could be resolved by a civil court." 123 Wn. App. at 496, 98 P.3d 524.

The trial court here relied on this provision in granting Respondents' motion for summary judgment, and specifically stated, "the Elvig case says that I cannot examine decisions made by a church tribunal." RP 25.

However, a review of the Elvig decision and the authority it relied upon demonstrates that the existence of a religious tribunal **alone** does not provide a pretextual shield to protect a religious organization's otherwise prohibited employment decision.

The principles limiting the role of civil courts in the resolution of religious controversies that incidentally affect civil rights were initially fashioned in Watson, 80 U.S. 679, 20 L. Ed. 666, 13 Wall. 679, a diversity case decided before the First Amendment had been rendered applicable to the States through the Fourteenth Amendment. The Elvig court specifically relied upon the decision in reaching its conclusion. With respect to hierarchical churches, Watson held: "(T)he rule of action which should govern the civil courts...is, that, whenever the questions of **discipline**, or of **faith**, or **ecclesiastical rule, custom, or law** have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." Id. at 727.

The Watson court specifically carved out the areas in which a decision by a tribunal should not be disturbed by a secular court: (1)

discipline, (2) faith, or (3) ecclesiastical rule, custom, or law. However, the Elvig court did not fully articulate the Watson decision, and in turn, the trial court misapplied the applicable standard.

The Elvig court also relied upon the Mason decision. In Mason, church members opposed to the election of a new pastor brought an action against the new pastor, church, and church counsel to enjoin the installation of the pastor. 49 Wn. App. 441, 743 P.2d 848. The case arose over the proper interpretation of a provision in Zion Lutheran's constitution regarding elections. Id.

In making its decision, the Mason court relied upon Watson and the Washington Supreme Court case Presbytery of Seattle, Inc. v. Rohrbaugh, 79 Wn.2d 367, 485 P.2d 615 (1971), *cert. denied*, 405 U.S. 996, 92 S.Ct. 1246, 31 L.Ed.2d 465 (1972). The Mason court applied the polity approach, which focuses upon the organizational structure of the church, to review the question of jurisdiction. Id. at 446-47. The court reasoned that when the Washington Supreme Court had the opportunity to rule upon a church property dispute, the Court expressly rejected the neutral principles method and, instead, reaffirmed the polity approach of Watson. Id.; *see* Rohrbaugh, 79 Wn.2d 367, 485 P.2d 615. The Mason court then expanded the Rohrbaugh decision, and ruled that the polity approach should be used to determine when the civil courts have jurisdiction over religious disputes not involving property. Id.

The court in Rohrbaugh reaffirmed this State's adoption of the rule of Watson, and specifically stated that that, "in the absence of fraud, where a right of property in an **action before a civil court depends upon a question of doctrine, ecclesiastical law, rule or custom, or church government**, and the question has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive." 79 Wn.2d at 373, 485 P.2d 615. The Rohrbaugh court recognized that this rule was established in Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969), and saw no reason to abandon it.

Finally, while not specifically relied upon by Elvig, the United States Supreme Court's decision in Milivojevich, 426 U.S. 696, 710, 49 L. Ed. 2d 151, 163, provides further guidance as to when a civil court must defer to the decision of an ecclesiastical tribunal of a hierarchical church.

"civil courts do not inquire whether the relevant (hierarchical) church governing body has power under religious law (to decide such disputes)...Such a determination...frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a (hierarchical) church so as to decide...religious law (governing church polity)...would violate the First Amendment in much the same manner as civil determination of religious doctrine."

In Milivojevich, the religious dispute at issue affected the control of church property in addition to the structure and administration of the church. Id. Similar to the line of cases detailed above, the Court affirmed the decision in Watson, and specifically held that “where resolution of religious disputes cannot be made without **extensive inquiry by civil courts into religious law and polity**, First and Fourteenth Amendments mandate that civil courts not disturb decisions of highest ecclesiastical tribunal within church of hierarchical polity but, rather, accept such decisions as binding on them, **in their application to religious issues of doctrine or polity** before them.” Id. at 709 (emphasis added). The Court cited to Md. & Va. Churches v. Sharpsburg Church, 396 U.S. 367, 369, 90 S.Ct. 499, 500, 24 L.Ed.2d 582 (1970), and held that:

Once again, the Supreme Court in Milivojevich looked specifically to whether the tribunal’s decision concerned religious law governing church polity. The trial court here failed to conduct **any** analysis concerning the decision of the Presbytery tribunal, and improperly provided Respondents with a pretextual shield to protect Respondents’ otherwise prohibited employment decision. The trial court misapplied the protections of the First Amendment and the holding in Elvig resulting in dismissal of Ms. Erdman’s claims. The trial court held as follows:

THE COURT: So her [Ms. Erdman] claims based on the facts she alleged to the tribunal are barred.

MS. PHILLIPS: How about breach of employee handbook policies?

THE COURT: I know what your concern is. If she's addressed it to the tribunal, it's barred. I could be wrong.

MS. PHILLIPS: Can I make a distinction between addressing it to the tribunal and the tribunal actually investigating and resolving that issue" So for instance, if she were to...

THE COURT: I made a finding that whatever she addressed to the tribunal was...

MS. PHILLIPS: Regardless of whether the tribunal actually looked at it or not, so it doesn't matter what the...

THE COURT: No. Don't interrupt me and put words in my mouth and complete a sentence that I would not complete.

MS. PHILLIPS: I'm trying to clarify. Sorry, your Honor.

RP 25, 26-27.

The trial court's misapplication of law warrants reversal of the decision on summary judgment and/or remand of this case.

2. *The Presbytery Confirmed that Appellant's Claims were Secular in Nature*

In its misapplication of Elvig, the trial court failed to consider testimony that demonstrated that the Presbytery tribunal was not making a determination that bound the civil court. Instead, the tribunal was designed to resolve the alleged violations of religious doctrine as a result of Toone's handling of the tours.

Testimony by the Presbytery supported Ms. Erdman's position that she had a right to pursue both a grievance with the Presbytery and civil litigation. However, the trial court did not consider this evidence because it improperly applied the Elvig decision

The Presbytery investigation chair, Rev. Schmick, testified that Appellant's claim of discrimination under Title VII was a civil issue, not an issue dealing with scripture. CP 653-54.

In addition, serious questions as to (1) whether the Presbytery members believed that the Presbytery had jurisdiction over the conflict, (2) whether the Presbytery members were impartial, (3) whether the Presbytery members understood the complicated issues before them, and (4) whether the investigation was "thorough" support the conclusion that the Presbytery tribunal did not make a determination concerning doctrine, ecclesiastical law, rule or custom, or church government that bound the trial court.

Notes by the Presbytery concerning Appellant's allegations against Toone indicated the following:

- "She [Appellant] lists several violations from the Chapel Hill Session policies of which we have no jurisdiction."
- The Ethics Committee was more qualified to review the matter, but they were simply too busy to take the matter.

- “She also has a list of violations form [sic] state and federal law of which we have no jurisdiction -- unless we relied on Romans 13 which calls for us to obey the laws of the civil majestates [sic].”

CP 319, 405. The Presbytery recognized that the issues before it were outside its scope, and that it was not capable of making a determination.

Id. In fact, the investigation team admitted to Ms. Snow that the matter should have gone to the Ethics Committee for review. CP 476-77.

Moreover, the Presbytery’s attempt at an investigation fell far short of the mark. First and foremost, the investigation was not impartial. Rev. Schmick admitted that that the purpose of the investigation was to protect the Presbyterian Church and keep its pastors out of trouble. CP 477-78.

The investigation was not thorough. When questioning the most important witness, Ms. Snow, Director of Human Resources for the Church, the committee asked only one question. CP 479-80. According to Ms. Snow, the committee had an entire page of questions, yet only one was asked. Id. She tried during the interview to explain Toone’s harassing and retaliating pattern of conduct; however, the Presbytery was uninterested. Id. Despite offering evidence that Toone was violating employment policies, the Presbytery took no action. Id. The interview end to be continued at a later date; however, despite the committee admitting that many questions remained, Ms. Snow was never contacted again. CP 476, 479-80.

Further, the Presbytery members indicated that it would not be able to understand the issues that were raised anyway. CP 319, 405. Rev. Schmick stated in an email to the Church's CPA, "I too believe that the letter from Washington State Dept. of Revenue Property Tax Division will be important for us. It would be helpful (though **I doubt I can understand it**) to have it prior to our phone conversation." *Id.* (emphasis added). The Presbytery was not equipped to investigate, comprehend, or resolve the complex issues raised by Appellant. *Id.*

As the case law above details, some inquiry by the trial court or preliminary showing by the religious organization is required to determine whether the action before the civil court depends upon a question of doctrine, ecclesiastical law, rule or custom, or church government, and if that question was previously decided by a tribunal. Only then can the trial court make a determination concerning jurisdiction. Here, the trial court conducted no inquiry.

3. Appellant's Form 26 Grievance does Not Bind the Court

The trial court improperly relied on the document Ms. Erdman submitted to the Presbytery to determine that it lacked jurisdiction. The trial court's misapplication of *Elvig* resulted in no review of the questions before the tribunal, and/or the scope of the determination of the tribunal. Instead, the trial court blindly dismissed all of Ms. Erdman's causes of action because she submitted a list of grievances to the Presbytery.

The trial court specifically relied upon Elvig, and ruled that “[T]he facts that she alleges in her document and I forget what it’s called, but there is a specific document that she has provided to the church alleging facts against Mr. Toone, claims based on those facts are barred.” RP 25.

The Form 26 grievance provided to the Presbytery by Ms. Erdman is separate and distinct from the causes of action asserted. Consistent with the role of the Presbytery, Ms. Erdman’s Form 26 requested a finding that Toone had violated scripture. CP 320, 210.

Further, the Book of Order states that “disciplinary cases are for acts by officers of the church that are contrary to the scriptures or the Constitution of the Presbyterian Church.” CP 381-82.

Any determination made by the Presbytery would be limited not only by the fact that it had no subpoena power, no ability to compel a party to tell the truth, no incentive to conduct a thorough investigation, no ability to make Ms. Erdman whole, etc., but by the very question put before it -- whether Toone violated scripture.

In addition, Ms. Erdman only identified grievances against Toone in the Form 26 -- **not the Church**. CP 320. Ms. Erdman’s Form 26 stated that “it does not include specific allegations of wrong-doing on the part of the session of Chapel Hill Presbyterian Church which I believe have also contributed to the issue at hand.” CP 320. The Presbytery did not make a determination on issues that were not before it. Yet, the trial court

neglected to recognize the scope of the Form 26, and simply dismissed all of Ms. Erdman's claims against both Toone and the Church.

The trial court is only bound by a determination previously decided by a religious tribunal concerning doctrine, ecclesiastical law, rule or custom, or church government -- no such issues were present in this case. The trial court was free to resolve the secular causes of action before it, as such, summary judgment was not appropriate.

4. *The Church's HR Department Confirmed that Ms. Erdman's Claims were Secular in Nature*

Ms. Snow, Director of Human Resources, testified that Ms. Erdman's claims were clearly outside the ministry and teaching of the Church. CP 482. Ms. Snow stated that Ms. Erdman's complaints were secular in nature, and identified that the applicable Church policy supported the same. CP 482, 483-84, 526. Ms. Snow confirmed that an employee has two avenues of relief: they can look to the Book of Order and they can look to the Court system. Id. Each is not mutually exclusive. Id.

The trial court did not consider this evidence because of the misapplication of the Elvig decision.

5. *The Church's Employee Handbook Confirmed that Ms. Erdman's Claims were Secular*

The Church's own Handbook mirrors the protections that every Washington employee has a right to expect. The Church's Employee

Handbook specifically states that “[T]he Church does not discriminate on the basis of race, color national origin, sex, marital status, age or disability in employment as required by federal law.” CP 333.

In addition, the Handbook states that “[T]he Church expressly prohibits any form of unlawful harassment of employees base on race, color, national origin, sex, marital status, age or disability.” CP 327, 333. Finally, the Handbook states that “[I]t is against the Church’s policy to discriminate or retaliate against any person who has complained concerning harassment or has participated in any manner in any investigation.” CP 328.

No investigation or determination was made by the Presbytery concerning discrimination or retaliation. The Handbook confirms Ms. Erdman’s protections as an employee, and reiterates the simple fact that the trial court was not bound by a decision that was never made.

6. Conclusion

A civil court may adjudicate a claim if: (1) liability is based on secular conduct and does not require interpretation of church doctrine; and (2) an ecclesiastical tribunal has not already resolved the matter.

Here, Ms. Erdman asserted claims based on discrimination and retaliation. The trial court failed to determine whether a religious tribunal made a determination as to doctrine, ecclesiastical law, rule or custom, or church government. The trial court conducted no analysis, and simply

provided Respondents with a pretextual shield to protect a religious organization's otherwise prohibited employment decision. The trial court's determination on summary judgment should be reversed.

E. The WLAD is Unconstitutional

1. RCW 49.60.040(3) Violates this State's Privileges and Immunities Clause

RCW 49.60.040(3) violates the State's privileges and immunities clause, Constitution article I, § 12, because it confers an unequal privilege to a minority class -- religious organizations. Specifically, it allows religious organizations to discriminate in violation of a fundamental right and contrary to RCW chapter 49.60.

“[T]he privileges and immunities clause of the Washington State Constitution, Article I, § 12, requires an independent constitutional analysis from the equal protection clause of the United States Constitution.” See Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 812, 83 P.3d 419 (2004); Madison v. State, 161 Wn.2d 85, 94-95 n. 6, 163 P.3d 757 (2007).

Article I, § 12 provides as follows: “No law shall be passed granting to any citizen, class of citizens, or corporation...privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” The plain language of this provision requires a two-part analysis: “(1) Does a law grant a citizen, class, or corporation

‘privileges or immunities,’ and if so, (2) Are those ‘privileges or immunities’ equally available to all?” Andersen v. King County, 158 Wn.2d 1, 59, 138 P.3d 963 (2006). For a violation of article I, § 12 to occur, the law, or its application, must confer a privilege/immunity to a class of citizens. Grant County, 150 Wn.2d at 812, 83 P.3d 419.

Here, RCW 49.60.040(3) violates Article I, § 12 because it provides religious organizations, who employ thousands, the unabashed right to discriminate against their employees for **any** reason. Based on the language of RCW 49.60.040(3), religious organizations are exempt from adhering to the laws against discrimination. The plain language of the statute provides religious organizations an unequal privilege and immunity.

Ms. Erdman’s fundamental right to pursue a common occupation free from unreasonable government interference is implicated by the application of RCW 49.60.040(3). Ample precedent supports Ms. Erdman’s claim that she has not only a constitutional right but **a fundamental right** to pursue a common occupation free from unreasonable government interference. Supreme Court of N.H. v. Piper, 470 U.S. 274, 280 n. 9, 285, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985); Duranceau v. City of Tacoma, 27 Wn. App. 777, 620 P.2d 533 (1980); Grant County, 150 Wn.2d at 813, 83 P.3d 419. The privileges and immunities clause is concerned both with “avoiding favoritism” and

“preventing discrimination,” the latter being the primary purpose of the federal equal protection clause. Andersen, 158 Wn.2d at 14, 138 P.3d 963.

To survive strict scrutiny, the statute must be narrowly tailored to serve a compelling governmental interest. Here, as opposed to the equivalent federal statute, 42 U.S.C. § 2000e-1, which **only** exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion, RCW 49.60.040(3) provides religious organizations the ability to discriminate on **any** grounds. The statute is not narrowly construed to protect a religious organization's First Amendment protections. Rather, it is overly broad in its effect, and cannot survive strict scrutiny review.

The privilege and immunity granted to religious organizations via RCW 49.60.040(3) is in violation of Ms. Erdman's, as well as all Washington State employees who are protected by the WLAD, fundamental right to pursue a common occupation free from unreasonable government interference. RCW 49.60.040(3) must be invalidated.

2. **RCW 49.60.040(3) Violates the Equal Protection Clause of the United States Constitution**

Equal protection under the law is required by both the Fourteenth Amendment to the United States Constitution and article I, § 12 of the Washington Constitution. American Legion Post #149 v. Washington

State Dept. of Health, 164 Wn.2d 570, 192 P.3d 306 (2008); O'Hartigan v. Dep't of Pers., 118 Wn.2d 111, 117, 821 P.2d 44 (1991). Equal protection requires that “all persons similarly situated should be treated alike.” Id. The equal protection clause is aimed at “securing equality of treatment by prohibiting hostile discrimination.” Andersen, 158 Wn.2d at 15, 138 P.3d 963. To show a violation, a party must establish that the challenged law treats unequally two similarly situated classes of people. Samson v. City of Bainbridge Island, 149 Wn. App. 33, 202 P.3d 334 (2009).

Under the equal protection clause, the appropriate level of scrutiny depends on the nature of the classification or rights involved. American Legion, 164 Wn.2d 608-09, 192 P.3d 306. Suspect classifications are subject to strict scrutiny. Id.; *citing* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Strict scrutiny also applies to laws burdening fundamental rights or liberties. Id.

In the instant matter, RCW 49.60.040(3) creates two distinct classes of employees in this State: (1) employees who are in a class protected by the WLAD, that **do not** work for a religious organization, yet **do** receive the protections of the WLAD and (2) employees who are in a class protected by the WLAD, **do** work for a religious organization, yet **do not** receive the protections of the WLAD.

Strict scrutiny should apply because the parties affected by the

unequal right are those that are protected by the WLAD. Namely, the individual classes described in RCW 49.69.010, which includes individuals who are discriminated against on the basis sex. The WLAD was an exercise of the State's police power for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. Id. The legislature found and declared that practices of discrimination against any of its inhabitants because protected classes are a matter of state. Id.

Ms. Erdman's Complaint against the Church alleges discrimination on the basis of sex. As a member of a suspect class, strict scrutiny should apply to the review of RCW 49.60.040(3).

In addition, as stated above, Ms. Erdman has a fundamental right to pursue a common occupation free from unreasonable government interference. RCW 49.60.040(3) burdens Ms. Erdman's fundamental right, thereby further supporting strict scrutiny review of RCW 49.60.040(3).

As stated above, RCW 49.60.040(3) is not narrowly tailored to serve to protect a religious organization's First Amendment protection because it provides religious organizations the ability to discriminate on any grounds. This is especially true in light of the equivalent federal statute 42 U.S.C. § 2000e-1. RCW 49.60.040(3) is overly broad in its effect, and cannot survive strict scrutiny review.

F. The Trial Court's Denial of Appellant's Motion to Compel was in Error

Religious organizations are not immune from discovery. The trial court denied Appellant's motion to compel the production of documents withheld in response to a subpoena. The trial court's *in camera* review of the withheld documents, resulted in a finding that the documents were protected by a First Amendment privilege and Ms. Erdman had not made the requisite showing of necessity.

Ms. Erdman's subpoena sought to review and analyze the scope and extent of Presbytery's investigation to directly address Respondents' position that the trial court lacked jurisdiction to resolve the matter because a religious tribunal previously resolve the dispute -- this was ultimately the basis the trial court relied upon to dismiss Ms. Erdman's claims.

The trial court's decision denying the motion to compel limited Ms. Erdman's ability to obtain relevant discovery concerning the Presbytery's investigation of Ms. Erdman's grievances against Toone, and fully respond to the Respondent's motion for summary judgment.

1. The Trial Court Improperly Extended the Protections Provided to Religious Organizations

The Watson court specifically carved out the areas in which a decision by a tribunal should not be disturbed by a secular court: (1) discipline, (2) faith, or (3) ecclesiastical rule, custom, or law. 80 U.S. 679, 20 L. Ed. 666, 13 Wall. 679. Watson and the First Amendment protections

do not pertain to discovery because it does not require a secular court to disturb **any** decision.

CR 45 allows the use of a subpoena duces tecum to obtain documents or other tangible things from a nonparty during discovery. Ms. Erdman's subpoena did not involve a dispute over religious doctrine, but the ability to seek discovery. Conducting discovery **did not** (1) infringe upon Presbytery's First Amendment rights and (2) entangle the trial court in ecclesiastical matter. More specifically, issues pertaining to (1) Mrs. Erdman's right to subpoena the Presbytery when it possess responsive documents and (2) the decision of an ecclesiastical tribunal pertaining to religious matters are separate and distinct.

Decisions where courts have limited a secular court's jurisdiction when an ecclesiastical tribunal has made a **determination** do not pertain to discovery, and there is no direct authority for the proposition that religious organizations are immune from discovery.

Ms. Erdman was prejudiced because she unable to obtain facts and evidence to properly analyze the Presbytery's review of her grievances.

In addition, the trial court's decision limited Appellant from investigating whether the Presbytery's review was based on fraud or collusion, as set forth in Milivojevich, 426 U.S. 696, 712, 96 S.Ct. 2372, 49 L.Ed.2d 151.

2. *The Trial Court's Application of the Snedigar Test was in Error*

The application of the three part test articulated in Snedigar¹¹ was not appropriate in determining/analyzing Appellant's motion to compel, even more, even if the Snedigar test did apply, Ms. Erdman satisfied the requirements.

Application of the Snedigar test was in error because, at the time the motion to compel was filed, the Presbytery **did not** have a qualified First Amendment associational privilege. The privilege is only available when a question is before a secular court requiring it to second guess a decision made by an ecclesiastical tribunal related to the selection of its ministers and/or the interpretation of church doctrine or religious beliefs -- these issues were not before the trial court on Ms. Erdman's Motion to Compel.

In T.S. v. Boy Scouts of America, 157 Wn.2d 416, 428, 138 P.3d 1053 (2006), the court held that determining whether a trial court must use the Snedigar balancing test depends upon the privilege that is asserted. When a trial court considers a discovery request, the court considers the relevance of the requested discovery only **after** making the threshold determination of whether a privilege shields the matter from disclosure: "Parties may obtain discovery regarding any matter, not privileged, which

¹¹ Snedigar v. Hoddersen, 114 Wn.2d 153, 786 P.2d 781 (1990).

is relevant to the subject matter involved in the pending action.” Id.; *see also John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 778, 819 P.2d 370 (1991).

Here, religious organizations are not immune from discovery. Intertwining decisions where courts have limited a secular court’s jurisdiction when a tribunal has made a determination does not pertain to discovery. The First Amendment privilege only arises when a secular court makes a determination second guessing a tribunal’s decision concerning selecting its ministers and the interpretation of church doctrine or religious beliefs -- these issues were not before the trial court, yet it based its denial of Ms. Erdman’s motion to compel on the same.

At the time of the motion to compel there had not been a determination that an ecclesiastical tribunal made a decision that would limit the trial court’s jurisdiction to hear Ms. Erdman’s claims. The trial court’s denial of Ms. Erdman’s motion to compel on that basis of a First Amendment privilege was premature, and ultimately faulty in light of its misapplication of Elvig.

In addition, even if the Snediger test applied, Ms. Erdman met her burden. Ms. Erdman sought discovery so that she would have the ability to respond to Respondents’ motion for summary judgment. The relevancy and materiality of the information sought went directly to the issues raised by Respondents -- whether a determination by a tribunal had been made

such that the trial court would not have jurisdiction to review the matter. Finally, the Presbytery was the only party with the relevant documents, as such, there were no reasonable alternative sources to obtain the information.

The trial court's denial of Ms. Erdman's motion to compel warrants reversal and remand of this case.

G. The Trial Court's Reliance on Withheld Documents was in Error

The trial court's reliance on documents withheld from production following an *in camera* review in making its determination of summary judgment was in error. The trial court's concluded on Ms. Erdman's motion to compel that the withheld document were irrelevant and protected by the First Amendment.

However, the trial court relied on the withheld documents Ms. Erdman was unable to review and/or analyze. On summary judgment, the trial court stated, "I looked at some documents to see if there was some question of whether or not the thought processes of the tribunal could be disclosed or whether it was protected by the First Amendment and what she addressed to the tribunal. There are some documents that she provided to them, and there is a point-by-point accusation against Mr. Toone or Reverend Toone. That's been decided and discussed."

The trial court's reliance on documents that Appellant never had an

opportunity to review and/or respond to is reversible error, and requires that this case be remanded.

H. The Trial Court Improperly Limited the Deposition of Rev. Jon Schmick

Ms. Erdman issued a subpoena pursuant to CR 45(a) for the deposition of Rev. Schmick, head of the investigative committee assembled by the Presbytery. In error, the trial court limited Ms. Erdman's ability to conduct the deposition of Rev. Schmick, when it ruled that Ms. Erdman was not permitted to inquire into the thought process of the Presbytery investigative committee. The trial court's error was then compounded in light of its previous decision denying Ms. Erdman's motion to compel withheld documents in response to a subpoena to the Presbytery.

Ms. Erdman sought the deposition of Rev. Schmick to understand the breath and depth of the Presbytery's investigation, and be prepared to fully respond to Respondents' motion for summary judgment. Ms. Erdman was prevented from fully inquiring as to information related to (1) the documents disclosed/produced by Presbytery; (2) the interview with Mrs. Snow, as well as other witnesses such as Appellant and Mr. Toone; (3) the purpose of the investigative committee; (4) common business practices of the investigative committee when dealing with grievances; (5) the Presbytery's jurisdiction to investigate hostile, retaliatory, and prejudice work environment

issues/claims; withholding of wage claims; breach of contract claims; (6) the information relied upon by the Presbytery; and (7) the Presbytery's business relationship with Chapel Hill Church.

Non-profit religious organizations are not immune from discovery. Conducting discovery does **not** (1) infringe upon Presbytery's First Amendment rights and (2) entangle this Court in ecclesiastical matter. Similar to the above analysis, Ms. Erdman requested the production of a witness for deposition, nothing more. There is no support for the position that the subpoena powers in this State do not apply to religious organizations or that the court becomes entangled in a First Amendment violation by allowing discovery, and in this case one deposition. Allowing a party to conduct a deposition does not place the trial court in position second guessing a tribunal's previous determination relating to doctrine, ecclesiastical law, rule or custom, or church government

In fact, such a position is not consistent with public policy and the right of a party to obtain information when doing so does not offend the discovery rules. Ms. Erdman was not permitted the opportunity to fully question a witness that had relevant information upon which the Respondents, and ultimately the trial court, relied upon to pertaining to the jurisdiction.

Ms. Erdman was not provided an opportunity to fully develop her opposition to Respondents' motion for summary judgment because the deposition of Rev. Schmick was limited in scope.

The trial Court's misapplication of the First Amendment warrants reversal and remand of this matter.

VI. CONCLUSION

For all of the foregoing reasons, Ms. Erdman requests that this Court reverse and remand this matter to allow Ms. Erdman to conduct discovery and with direction on interpreting a religious organization's the First Amendment privileges. In addition, Ms. Erdman requests that the Court find RCW 49.60.040(3) unconstitutional.

Respectfully submitted this 1 day of October, 2009.



Robin Williams Phillips, WSBA No. 17947
Sean V. Small, WSBA No. 37018
Attorneys for Plaintiff/Appellant
LASHER HOLZAPFEL
SPERRY & EBBERSON, P.L.L.C.
601 Union St., Suite 2600
Seattle, WA 98101
(206) 624-1230

DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on October 1, 2009, I caused to be served a copy of this document upon the following:

Supreme Court of the State of Washington
415 – 12th Ave. SW
PO Box 40929
Olympia, WA 98504
(360) 357-2077
supreme@courts.wa.gov

- Legal Messenger
- By Mail
- By Facsimile
- By E-Mail
- By Federal Express

William A. Coats, WSBA #4608
VANDEBERG JOHNSON & GANDARA, LLP
1201 Pacific Avenue, Suite 1900
PO Box 1315
Tacoma, WA 98401-1315
(253) 383-3791
(253) 383-6377 (fax)
wcoats@vjglaw.com, dmontopoli@vjglaw.com,
and mregimbal@vjglaw.com
Attorneys for Defendants

- Legal Messenger
- By Mail
- By Facsimile
- By E-Mail
- By Federal Express

Michelle D. Moodie

Michelle D. Moodie
Legal Assistant to Robin Williams Phillips