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## 9th Circ. Draws Battle Lines Over Religious Exemption

By **Vin Gurrieri**

Law360 (June 25, 2019, 8:21 PM EDT) -- The full Ninth Circuit on Tuesday declined to revisit a ruling allowing a fired Catholic school teacher who had cancer to sue the school for disability bias, which prompted a forceful rebuke from nine circuit judges who said the ruling creates a circuit split and cuts "deep into core constitutional bone" of religious protection.

A majority of Ninth Circuit judges rejected a request by St. James Catholic School for an en banc review of a divided three-judge panel's December decision that revived plaintiff Kristen Biel's suit, which claims the school violated the Americans with Disabilities Act when it didn't renew her contract as a fifth-grade teacher after she informed the school she had breast cancer and would need to miss time to undergo treatment. A representative for the Roman Catholic Archdiocese of Los Angeles, of which St. James is a part, told Law360 Tuesday that the former teacher recently died.

The panel had upheld a trial court's conclusion that Biel's suit was barred by the First Amendment's so-called "ministerial exception," which shields religious institutions from employment claims. The panel determined that the exception didn't apply to Biel's claims in light of the Supreme Court's 2012 ruling in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* in which the justices unanimously ruled that religious workers at churches are barred from bringing employment discrimination suits.

But in their dissent to the order rejecting St. James School's en banc bid, the nine dissenting judges said the panel took a constricted view of the ministerial exception that is inconsistent with *Hosanna-Tabor* as well as decisions by numerous other circuit and state courts.

"By declining to rehear this case en banc, our court embraces the narrowest construction of the First Amendment's 'ministerial exception' and splits from the consensus of our sister circuits that the employee's ministerial function should be the key focus," said Circuit Judge Ryan D. Nelson, writing on behalf of the dissenters. "In turning a blind eye to St. James's religious liberties protected by both religion clauses, we exhibit the very hostility toward religion our Founders prohibited and the Supreme Court has repeatedly instructed us to avoid."

The dissenters also said the appellate ruling in Biel's case is one of several decisions the Ninth Circuit has issued in recent years that have left the circuit court "weaker, not stronger" in applying the ministerial exception.

"Not once, not twice, but three times now in the last two years, we have departed from the plain direction of the Supreme Court and reversed our district courts' faithful application of Supreme Court precedent," he added. "And in each successive case, we have excised the ministerial exception, slicing through constitutional muscle and now cutting deep into core constitutional bone."

The dissenting judges took issue with the approach taken by the panel majority to compare Biel's job with the job held by the worker in the *Hosanna-Tabor* case, a comparison that resulted a finding that the employees' circumstances differed enough that the ministerial exception that applied in the *Hosanna* case didn't apply in Biel's.

Instead of comparing Biel's responsibilities with the worker in the *Hosanna-Tabor* case, the dissenting Ninth Circuit judges said the panel should've instead just focused on Biel's job duties. They noted she devoted large chunks of her week to teaching religion and that her employment contract included

numerous references to performing her job in accordance with Catholic teachings.

"The panel majority rejected a function-focused approach embraced by all other circuits, including our own, before and after *Hosanna-Tabor*, in favor of its resemblance test," the dissent said. "Biel's significant religious function, as a Catholic school teacher who teaches religion, demonstrates why the exception applies."

Moreover, the dissenters said that even though the Supreme Court in *Hosanna-Tabor* didn't lay out a cut-and-dried legal test to analyze whether the ministerial exception applies to any particular worker, Justices Elena Kagan, Clarence Thomas and Samuel Alito were part of concurrences in which they vouched for legal tests that would have resulted in the exception applying to Biel's claims.

"The panel majority mistakes *Hosanna-Tabor* to hold that the ministerial exception cannot apply based on important religious functions alone, despite the Court's express reservation of the question," the dissenters said. "Absent further review of Biel, the implications are stark: Catholic schools in this circuit now have less control over employing its elementary school teachers of religion than in any other area of the country."

Biel filed her ADA suit in 2015 and U.S. District Judge Terry J. Hatter awarded St. James School summary judgment in early 2017. The school had argued in court briefs that she was let go due to performance issues.

Andrew S. Pletcher of JML Law APLC, one of her attorneys, said he was pleased the Ninth Circuit denied the school's en banc petition.

"The Ninth Circuit correctly assessed the totality of Biel's role at St. James School in its Dec. 17, 2018, decision and today's decision reaffirms that," Pletcher said. "We look forward to moving onto the next stage of the case and hope that today's decision will help many more employees in the years to come."

The Archdiocese of Los Angeles told Law360 through a spokesperson that its lawyers are "currently reviewing" the Ninth Circuit's order. The archdiocese also said that it recently learned that Biel had died.

"The Archdiocese of Los Angeles learned on Sunday that Ms. Biel passed away earlier this month," its statement said. "We express our condolences to Ms. Biel's family and are offering our prayers for them and for her eternal rest."

Ninth Circuit Judges Paul J. Watford and Michelle T. Friedland and Third Circuit Judge D. Michael Fisher sat on the initial panel that heard the case.

Counsel for both parties were not immediately available for comment.

Biel was represented by Cathryn Fund, Joseph Mark Lovretovich and Andrew Pletcher of JML Law.

St. James was represented by Jack S. Sholkoff of Ogletree Deakins Nash Smoak & Stewart PC, Margaret G. Graf of the Roman Catholic Archdiocese of Los Angeles, and Eric C. Rassbach, Lori H. Windham, Daniel H. Blomberg and Diana M. Verm of the The Becket Fund for Religious Liberty.

The case is *Kristen Biel v. St. James School et al.*, case number 17-55180, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Amy Rowe.

*Update: This story has been updated with comment from the parties.*