

**WHEN SHEPHERDS RAVAGE THE SHEEP:
THE LIABILITY OF RELIGIOUS ORGANIZATIONS
FOR SEXUAL MISCONDUCT BY CLERGY**

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ABSTRACT

There is a growing trend in the United States of parishioners suing their churches for sexual misconduct by clergy. The courts will not recognize a lawsuit based on clerical malpractice for fear of violating the First Amendment. However, because of the scope of the problem, courts are instead finding for plaintiffs on the basis of a variety of torts, such as breach of fiduciary duty, negligent hiring, negligent retention and supervision, and intentional infliction of emotional distress. This article explores the breadth of the problem, the actions that have been brought, the application of the First Amendment, and solutions for churches.

Cases involving clerical misconduct have been consistently dismissed by the courts for a variety of reasons related to the First Amendment [1]. The courts have not recognized the tort of clergy malpractice [2]. They have decreed that defining the standards for proper clerical behavior would certainly violate the separation of church and state required by the First Amendment: "Defining forces the court to investigate and review the skill, training, and standards required of clergy members in different religions, denominations, and sects. Undertaking such a task causes courts to become heavily entangled in religious doctrine and practice" [3, at 229-230]. The courts have also ruled that such decisions would violate churches' rights to free exercise of religion [4]. Because of the courts' failure to recognize a

cause of action for clerical malpractice, plaintiffs have used a variety of tort claims to redress clergy sexual misconduct. This article explores the breadth of the problem, the variety of lawsuits that have not been brought due to clerical sexual misconduct, discusses the application of the First Amendment, and displays human resource management policies that will help prevent liability for churches.

SCOPE OF THE PROBLEM

The problem of clerical sexual misconduct is very significant. Statistics vary depending on the source, but there is no avoiding the fact that sexual misconduct by clergy exists. “Surveys of 300 clergy from four U.S. Christian denominations (Assemblies of God, Episcopal Church U.S.A., Presbyterian Church U.S.A., and United Methodist), reported that 38 percent admitted to some sort of sexual contact with a member of their congregation, and 12 percent admitted to having sexual intercourse with a congregant. An astonishing 76 percent said they knew of another clergy member who had engaged in sexual intercourse with a congregant” [5, at 14, n. 87]. According to numbers provided by the Presbyterian Church, the percentage of clerics involved in sexual misconduct is lower, but still, that Church “found evidence suggesting that between 10 percent and 23 percent of clergy nationwide have had sexual contact with parishioners, clients, or employees while performing their religious duties” [6, at 505]. Further examples of the magnitude of this problem come from a report authorized by the Catholic Church in 2004 suggesting that “4,392 of the 109,694 priests and others under vows to the church” have been accused of abuse in America; and a website that tabulates reports of allegations against clergy (www.reformation.org), shows clerical misconduct mainly in independent bible churches [Associated Press, 7, para. 4]. On the other hand, as revealed below, the most disturbing statistics involve the well publicized sexual abuse of children.

The current problem is relatively clear: Churches have, in the past, been remiss in their treatment of offenders. Frequently, the misbehaving cleric has simply been transferred to a new congregation where he could then prey on new, unsuspecting parishioners or children. One “study revealed that this pattern held true in approximately twenty-five dioceses of the Roman Catholic church throughout the country” [8, at 334]. The infamous example of this trend is seen in the case of Rev. Gilbert Gauthe, a Roman Catholic priest, who admitted sexual involvement with boys at every place he served, over a twelve-year period, despite the fact that the bishop of the diocese had received notice of Gauthe’s sexual misconduct three years after it began. Media attention primarily has been focused on the sexual abuse of children by Catholic priests. “. . . as many as 3,000 Roman Catholic priests in the United States suffer from pedophilia, accounting for five percent of the nation’s 57,000 priests . . . over 140 cases of priests accused of child molestation have been reported in 18 states” [8, at 313]. Other “studies indicate

that the average pedophile is heterosexual and experiences 265 sexual contacts in his lifetime” [8, at 334]. In one such civil action, the victim claimed abuse twenty-seven years after the alleged occurrence; she stated that she was victimized while she was in high school [2]. Therefore, the Catholic Church and other religious organizations may face further cases which are catastrophic from both the financial and faith perspectives.

Obviously one key issue is cost. As reported, dioceses have spent millions of dollars to settle with those who have been affected by sexual misconduct. This included 43 credible allegations against 14 priests [9]. In Washington State, the Associated Press reported that over \$14 million has been paid out in recent years to victims of abuse [10]. Statewide there have been 64 accusations against priests from 177 victims, going as far back as 50 years. Up until now, most of the costs have been covered by insurance; however, some dioceses have had to draw from their general operating funds or borrow from banks or social groups, such as the Knights of Columbus. The other noteworthy point is that although the Catholics have received the lion’s share of the attention; many other religions are facing victims in the courts. At a meeting in March 2004, William Bowen, once a Jehovah Witnesses’ congregational leader and founder of a group which victims can contact, noted that more than 6,000 alleged sexual abuse victims have contacted a group founded in 2001 to express outrage at being silenced by the institutional policies of the faith [11]. The Evangelical Church of America is facing negligence charges for ordaining a priest who molested 14 boys, and the Presbyterian Church is tightening up policies after a missionary was charged with molesting 19 girls. And beyond the Christian denominations, other religious groups are beleaguered as even the Hare Krishnas are dealing with abuse allegations. The Hare Krishnas are “working on a settlement with 540 students who claim they were abused in boarding schools while their parents were practicing the faith by chanting and begging. A \$400 million dollar suit by 91 of them drove the Hindu group into bankruptcy” [12, para. 5].

CAUSES OF ACTION

The dollar size of the awards against religious organizations has become large despite the fact that the courts initially refused to realize they could aid claimants without violating the First Amendment. Still, “. . . most courts have not recognized clergy malpractice because it calls for setting a standard for the duties of a clergyman” [13, at 965]. Conversely, as a multitude of cases involving clerical sexual misconduct have been brought before them, and as they have considered the public policy implications, the courts have often undertaken a more exacting inquiry into the facts and issues and have been allowing cases to proceed to trial on a variety of issues. These issues include negligence by the employer church for hiring the cleric [14], negligent supervision and retention [15], breach of fiduciary duty [16], hostile work environment sexual harassment [17], retaliatory discharge

[18], whistle blower violations [19], and intentional infliction of emotional distress [20].

BREACH OF FIDUCIARY DUTY

Breach of fiduciary duty occurs when someone in a position of trust and confidence and a superior position of power takes advantage of that position. Lawsuits based on this cause of action typically occur because a cleric has taken advantage of someone who sought counseling. Since women and children usually seek counseling at a time of vulnerability and the cleric stands in a position of spiritual authority, sexual misconduct that occurs toward a parishioner that arises out of counseling sessions can give rise to lawsuits for breach of fiduciary duty [1].

A recent case decided for the victim on this issue involved a woman who became distraught as a result of her affair with the cleric who counseled her [16]. She eventually tried, albeit unsuccessfully, to commit suicide. Although the Supreme Court of New Jersey refused to recognize a claim for clerical malpractice, the court recognized a breach of fiduciary duty. The court stated that the First Amendment “does not prohibit courts from any involvement in religious disputes. The amendment merely prohibits courts from determining underlying questions of religious doctrine and practice” [16, at 703]. The court basically concluded that if it dealt with this claim on the basis of clerical malpractice, it would become entangled in determining a standard of care for the average clergyman. Nevertheless, the court found that if the claim were treated on the basis of breach of fiduciary duty, the case could be tried without such excessive entanglement. The court said, “The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position” [16, at 703-704]. The court relied on precedents from other jurisdictions that recognized that a fiduciary duty had been breached when sexual misconduct occurred with a parishioner. The court distinguished such actions from claims based on clerical malpractice. “Unlike an action for clergy malpractice, an action for breach of fiduciary duty does not require establishing a standard of care and its breach Establishing a fiduciary duty essentially requires proof that a parishioner trusted and sought counseling from the pastor. A violation of that trust constitutes a breach of the duty” [16, at 703-704].

Not every court recognizing a duty has characterized the tort this way. In *Sanders v. Casa View Baptist Church* [21], the court reviewed the trial court decision that awarded compensatory damages and punitive damages against a minister, Shelby Baucum, who had engaged in a sexual relationship with each of two church employees to whom he served as a supervisor and as a marriage counselor. Each woman had separately begun counseling with Baucum at his invitation and due to his lies about counseling other women at the church and his qualifications. In fact, the church had hired Baucum solely to be its Minister of Education and Administration and his duties did not include counseling. The

church had a staff to provide spiritual counseling. Furthermore, Baucum was aware that the church referred church members to a licensed professional counselor when non-pastoral counseling was needed and even had a written policy to that effect.

The First Amendment difficulties posed by a claim for clergy malpractice are not, however, present in this case because the duties underlying the plaintiffs' claims for malpractice by a marriage counselor and breach of fiduciary duties are not derived from religious doctrine. That is, because the jury found that Baucum held himself out as possessing the education and experience of a professional marriage counselor, his counseling activities with the plaintiffs were judged, not by a standard of care defined by religious teachings, but by a professional standard of care developed through expert testimony describing what a reasonably prudent counselor would have done under the same or similar circumstances. . . . Similarly, because the jury found that he entered into a fiduciary relationship with the plaintiffs, Baucum's conduct was to be consistent with "something stricter than the morals of the marketplace [21, at 337].

Consequently, the court of appeals upheld the trial court ruling that Baucum had committed malpractice as a counselor. Additionally, it affirmed the lower court's ruling that he breached his fiduciary duty because he acquired and abused his influence over these women.

Another leading case dealing with sexual misconduct in a counseling setting, *Bear Valley Church of Christ v. DeBose* [22], set a similar standard. The case involved the inappropriate touching of a minor child, DeBose, during counseling sessions. In this case, testimony was introduced about a second family, the Wygals, who previously had complained about the counseling sessions of their minor son and indicated they were concerned that he had been sexually molested. Even after the Wygals met with the minister and the church elders to express their fears, the church allowed the minister to continue counseling members of the congregation, including the DeBose's young son. Consequently, the court allowed the plaintiffs to introduce the Wygals' material not for the truth of the matter, but rather for determining whether or not the church knew and when they knew of problems with the minister's counseling methods.

The expert witness' testimony regarding the qualifications of the cleric to do pastoral counseling was also ruled admissible because it went to the issue of negligent hiring and supervision by the church. The testimony revealed that the clergy member in question had been a preacher for several years and been previously employed as a director of education at many churches. The expert witness, an ordained minister, testified: "In my opinion, neither of these things qualified him for the position that he was being asked to serve in. So that, combined with lack of oversight and supervision, seemed to me inadequate" [22, at 1328]. The court also allowed the expert testimony regarding the appropriateness of nudity and partial nudity in the pastoral relationship. The trial

court established the grounds for a cause of action based on negligent hiring in its statement, “An employer is found liable for negligent hiring if, at the time of hiring, the employer had reason to believe that hiring this person would create an undue risk of harm to others” [22, at 1328].

The court of appeals ruled that the lower court had committed a reversible error in allowing the expert testimony. The Supreme Court of Colorado, however, reversed the court of appeals and reinstated the jury verdicts of the trial court. The defendant had argued that the testimony established a standard of care for clergy converting the cause of action to one for clergy malpractice. However, the court disagreed, holding that the jury was instructed that the testimony was not to establish a standard of care for pastoral counselors, but to establish whether the church had notice of the misconduct and failed to prevent reasonably foreseeable harm. The trial court’s damage awards against the cleric and the church based on breach of fiduciary duty, outrageous conduct, negligent hiring and supervision, and vicarious liability were reinstated. The family of the injured child received compensatory damages, exemplary damages, and interest.

FIDUCIARY DUTY: AN ANALYSIS

As revealed, fiduciary duty is usually claimed when the cleric takes sexual advantage of a person who has come in for counseling. Under this standard, if a member of the clergy takes advantage of an emotionally vulnerable person while in a position to unduly influence him or her, this behavior can be actionable. Such a professional standard of care is based on the previous recognition by courts that counselors, psychologists, and others have a fiduciary duty in regard to the person being counseled. As a result, a growing number of jurisdictions are recognizing liability in tort law against clerics who abuse the counseling relationship. Under the law, “A fiduciary duty arises . . . when one person is under a duty to act for or to give advice for the benefit of another Among the duties a fiduciary assumes are that of loyalty and exercising reasonable skill and care” [1, at 760, n. 147 & 148].

The strongest argument against holding clerics to the same neutral professional standard of care is that doing so could have a “chilling” effect on free exercise of religion. In other words, the church might become reluctant to provide pastoral counseling. Yet, in balancing the potential “chilling” effect versus the severe psychological harm that can result from an abuse of a counseling relationship, states have been able to argue successfully for the existence of a compelling state interest in the protection of the parishioners and employees who are abused [13, at 975]. The courts have concluded “the compelling need to protect both adult and minor parishioners from clergy sexual misconduct, and to prevent the Church’s sustained efforts to hide or ignore that misconduct, meets the requirements of the court’s strict scrutiny” [13, at 975]. Strict scrutiny is the highest most exacting in depth inquiry a court can give in its review of a case.

THE ISSUES OF TRANSFERENCE & REPORTING LAWS

Some may still ask why clerics should be held to a professional standard of care. The answer is the transference phenomenon. Since there is an emotional response of a patient to a therapist, true consent to a sexual relationship is not possible. When the emotional and spiritual advisor is a member of the clergy, the balance of power is further skewed, “making the parishioner more vulnerable and dependent, and further inhibiting any ability to freely consent to sexual relations” [6, at 501]. Also, “the courts have been almost unanimous in holding that sexual relations between a therapist and a patient constitute malpractice and permitting recovery of damages for emotional distress or any other resultant harm” [6, at 503].

The growing trend for parishioners to seek counseling from their clergy raises concerns because the evidence suggests that the victims of clerical malpractice suffer profound psychological and emotional damage. Consultants and experts who work with these victims have found women suffer “. . . lasting devastation’ . . . [and] suffer the same type of ‘shame, guilt, and anxiety experienced by incest victims’” [6, at 507]. Victims often suffer a loss of faith and sometimes experience such profound depression that they commit suicide. Thus, the importance of holding clerics to a professional standard in counseling situations cannot be understated.

Another issue involves the disclosure of child abuse. While every state has some type of mandatory reporting law requiring childcare workers to report incidents of suspected or known child abuse to local officials, most states omit clergy as mandatory reporters. For example, Florida includes social workers, school teachers, health care professionals, and physicians, but excludes all clergy. “In fact, although the Florida legislature recently amended Section 39.204 of the *Florida Statutes*, which abrogates certain privileged communications in cases involving child abuse, the amended statute maintains the penitent priest privilege” [13, at 984]. The existing Florida statute, § 90.241, recognizes that the privilege protects all confidential communication with a clergyman as spiritual advisor rather than only a “confession.” This includes seeking spiritual advice from any clergyman whether or not he is working full time. Any person who is a minister of a religious organization or denomination normally referred to as a church, including Christian Science practitioners, are covered by the statute. Kansas and many other states have similar statutes as well.

NEGLIGENT SUPERVISION AND RETENTION

The elements of negligence as defined in tort law include duty, the breach of that duty, and an injury that results from that breach. In *Smith v. Privette* [15], the Court of Appeals of North Carolina in 1998 reviewed the trial court’s dismissal of a

claim made against a United Methodist Church on the basis of negligent supervision and retention. The minister hugged, kissed, and touched the plaintiffs who were workers at the church. He also made offensive sexual comments to the women who argued the church knew or should have known of his propensity for sexual harassment. The employees also argued the church had failed to warn or protect them from Privette's sexual misconduct. The plaintiffs believed that the church was negligent in supervising the senior pastor and by not establishing a safe work environment. The trial court dismissed the case believing it did not have the power to hear the case because of First Amendment issues [15].

On appeal, the court ruled that the trial court erred. The appellate judges felt that the plaintiff's negligent supervision and retention claim did not require the court to interpret or evaluate church doctrine. A cause of action for negligent supervision and retention was recognized as an independent tort in the state of North Carolina based on an employer's liability to third parties. Subsequently, the case was reversed and remanded [15].

This case employed the same standard used in traditional workplace sexual harassment cases. An employer in business is considered negligent when he knows, or in the exercise of reasonable care should have known, that sexual harassment is occurring. The court claimed, "The dispositive issue is whether the First Amendment precludes the filing of a negligent retention and supervision claim against a religious organization, when that claim is based on the conduct of a cleric of that organization" [*Smith*, 15, at 397]. In this case, the court also considered the implications of the Free Exercise Clause. The court relied on its view of the U.S. Supreme Court's interpretation of the Clause replying that courts could not decide disputes where they would keep the religious organization from interpreting its own laws and doctrine. The "First Amendment, however, does not grant religious organizations absolute immunity from liability Indeed, the '[a]pplication of a secular standard to secular conduct that is tortious is not prohibited by the Constitution'" [*Smith*, 15, at 397]. The court refused to accept that adjudicating the claim of the plaintiff would embroil it in an inquiry to determine why the church chose that particular minister. The court stated that it could resolve the lawsuit by instead looking at the issue of "whether the Church Defendants knew or had reason to know of Privett's propensity to engage in sexual misconduct . . . conduct that the Church Defendants do not claim is part of the tenets or practices of the Methodist Church" [*Smith*, 15, at 398].

Using the neutral secular standard should be applicable in situations involving churches and clerical sexual misconduct. Although there are inconsistent approaches by the courts, at times a court does not even discuss the First Amendment; instead, the court uses standards appropriate in any employment case where sexual harassment is involved, reviewing claims such as retaliatory discharge and intentional infliction of emotional distress.

RETALIATORY DISCHARGE, INTENTIONAL INFLICTION, AND OTHER STATE TORT CLAIMS

Davis v. Black concerned a ten-year veteran parish secretary who made sexual harassment claims against the church and the diocese and was subsequently discharged. Upon her dismissal, the rector reported in a church newsletter that she was actively working to maliciously discredit him. She then brought suit against the church, diocese and the rector for retaliatory discharge, intentional and negligent infliction of emotional distress, invasion of privacy, and defamation [19].

The lower court considered the case and ruled that the defendant cleric was an employee of the church but that the defendant was not acting for the church if he was involved in sexual harassment. Therefore, he was not acting within the scope of his employment or serving to promote the business of his employer, but acting out of purely personal motives. On appeal, the court said employers could always avoid liability if that was the appropriate standard. The court concluded that the church had hired the defendant and had given him supervisory and hiring power. Furthermore, the alleged sexual harassment occurred primarily during working hours at the church. After the plaintiff complained, her work week was reduced by two days and then she was fired. The court reasoned,

Sexual harassment is seldom for the benefit of the employer, but, instead, is usually for the benefit of the supervisor who commits the harassment. It is doubtful that any corporation actually authorizes or condones sexual harassment by its supervisors. Nor is such harassment usually designed to further the business of the employer. Here, the supervisor, defendant Fisher, was the agent through whom the employer, defendant St. James, operated in dealing with its employee, plaintiff. In other words, defendant St. James had delegated to defendant Fisher its responsibilities to provide a proper work environment free from sexual harassment [19, at 16].

In addition, the appellate court determined the lower court had also erred in classifying the accused cleric as the employer for purposes of counting the number of employees. The court had found that Fisher did not have four or more employees as required by the state civil rights statute. The court found that the term employer meant the defendant church, St. James. The court stated, “Clearly, the supervisor for whom an employer may be vicariously liable under the doctrine of respondeat superior is also an employer within this definition” [19, at 19]. The court reversed and remanded the case with instructions based on the errors of the lower court. The argument for holding clerics and the churches employing them liable seem grounded in the fact that discrimination violates public policy and is not religious in nature. Certainly sexual misconduct violates the religious policies and precepts of almost every recognized religion and therefore lawsuits grounded upon such behavior should be sustained.

Other cases involving negligent hiring, negligent retention, negligent supervision, and sexual exploitation by a therapist include *Odenthal v. Minnesota*

Conference of Seventh-Day Adventists [15], *J.M. v. Minnesota Council of the Assemblies of God* [14], and *Olson v. First Church of the Nazarene* [20].

FIRST AMENDMENT ISSUES

The greatest challenges to cases involving clerics on First Amendment issues are those in which the court must review a church's hiring or firing of a member of the clergy. One such case was *Van Osdol v. Vogt* [18]. Van Osdol served as a minister for United Churches of Religious Science (U.C.R.S.) in Washington state. After moving to Denver, she sought and received permission from U.C.R.S.'s Ecclesiastical Committee to start a new church in Denver. One month later Van Osdol informed the ecclesiastical governing body of her church that her stepfather had repeatedly sexually molested her as a child. The molestation had ended when she left home at seventeen, sixteen years prior to her report. The plaintiff's stepfather was a past president of the U.C.R.S., a past member of the Ecclesiastical Committee, a senior minister at the Mile Hi Church of Religious Science, and had a television ministry broadcast throughout Colorado. After this notification, the governing body revoked her ministerial license and revoked its decision to let her open a new Church of Religious Science. Van Osdol sued her stepfather, Hugh Frederick Vogt, Mile Hi Church of Religious Science, and the United Churches of Religious Science. She claimed retaliatory discharge and, additionally, brought intentional tort claims against the defendants. The relief she requested included punitive damages, compensatory damages, back pay, and future pay instead of reinstatement. At the trial level her retaliation claim and some of her intentional tort claims were dismissed. The court felt the First Amendment precluded their consideration of the case and the court of appeals affirmed the trial court decision. The case was appealed to the Colorado Supreme Court and the decision and reasoning of this court is reviewed herein [18].

The Colorado Supreme Court distinguished this case from other cases involving clerical sexual misconduct by stating, "Whether the courts should intrude into ecclesiastical decisions regarding choice of a minister is an issue that bridges both religion clauses of the First Amendment, because it potentially involves governmental intrusion into both ecclesiastical and individual decision-making . . . we find that a church's choice of minister is uniquely protected" [18, at 1126-1127]. The court looked at traditional free exercise analysis and found "governmental actions that substantially burden a religious practice must be justified by a compelling state interest" [18, at 1127]. The court looked at a number of precedent setting cases and determined that although courts had held pre-textual hearings at times, those cases were limited to scenarios where the possibility existed of determining the claim of the employee without analyzing church doctrine. The court distinguished hiring a minister from "any other type of employment case involving a religious institution" [18, at 1129]. The court stated,

“Our holding recognizes a small, inviolable area in which the decision of a church is not subject to governmental scrutiny” [18, at 1129].

The court found that the problem with the Free Exercise Clause was not the only reason the ministerial exception applied. The court found the decision of whether to hire or fire a minister also would involve the courts in excessive entanglement that would violate the Establishment Clause. Consequently, the court looked to the *Lemon* test created by the U.S. Supreme Court to determine the appropriate standard to apply. “The *Lemon* test requires a government regulation to: (1) have a secular purpose, (2) neither advance nor inhibit religion as its primary effect, and (3) not foster excessive entanglement with religion” [8, at 113].

The Colorado Supreme Court in applying the *Lemon* test found excessive entanglement was the issue of concern as the choice of a minister illustrates the beliefs of the church. The court exempted claims for negligent hiring. In those cases it looked instead to whether the danger to third parties was foreseeable and therefore could be decided without searching religious beliefs. Van Osdol asked the court to create an exception to the First Amendment impediment to their reviewing the case based on collusion or fraud. However, the Supreme Court of Colorado stated in an *en banc* decision that “claims for illegal hiring or discharge of a minister inevitably involve religious doctrine . . .” [18, at 1132-1133, n. 17]. Therefore, the justices refused to adopt such an exception but noted that when employment discrimination issues are present, the conflict between religious freedom and public law is terribly tough to solve. Then again, the court specifically pointed out that churches are not kept from being accountable to the legal system as it was not considering whether a church could be found liable for hiring or discharge decisions for non-clerical employees, nor other claims a minister could bring against a church [18].

Conversely, an earlier case decided by the Court of Appeals of Minnesota held that one of an associate minister’s claims under Title VII could be decided without violating the freedoms found in the First Amendment [17]. The lawsuit was not based on a refusal to hire, but the action of the church in firing her. Also, instead of focusing solely on the *Lemon* test which the U.S. Supreme Court decided in 1971, the court looked to a 1990 decision of the Supreme Court regarding the Free Exercise Clause. The court relied on its interpretation of *Employment Division, Department of Human Resources of Oregon v. Smith* [23] saying “The requirement of a compelling state interest is confined to laws that expressly mandate or prohibit religious beliefs or religiously based conduct and to ‘hybrid’ cases alleging violations of the free exercise clause and another constitutional right, such as freedom of speech or of the press” [17, at 719]. The court found that Black’s claims were based on laws that were otherwise generally applicable, facially neutral, and valid. The court did look to the test articulated in *Lemon* to determine whether the Establishment Clause was violated. The court found there would be excessive entanglement if it considered the plaintiff’s whistleblower claim, her retaliation claim, or her breach of contract claim, because they all

revolved around her discharge as a minister. The court noted, “These claims are fundamentally connected to issues of church doctrine and governance and would require court review of the church’s motives for discharging Black” [17, at 720]. However, the court found the plaintiff could go forward on her sexual harassment claim since she was seeking only monetary damages and not reinstatement. The court did not find that review of a sexual harassment claim would burden the church’s religious practices since the church disapproved of such conduct. The court stated, “Black’s sexual harassment claim does not involve scrutiny of church doctrine, interfere in matters of an inherently ecclesiastical nature, or infringe upon the church’s religious practice . . .” [17, at 721].

Basically, the First Amendment defense is raised in two ways because there are two clauses aimed at protecting freedom of religion. The first issue highlights the Establishment Clause which has been interpreted as requiring a separation between church and state. The Clause prohibits from establishing a religion or favoring one religion over another. The second clause is called the Free Exercise Clause and it concerns the freedom of religion and the exercise of one’s religious beliefs. The First Amendment has been applied to the states through the Fourteenth Amendment of the U.S. Constitution [24]. Therefore, the First Amendment applies to both federal and state government and the wording of the First Amendment has a double impact:

On the one hand, [the First Amendment] forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship On the other hand, [the First Amendment] safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society [8, at 329, n. 15].

Numerous litigants have lost their cases in the area of clerical sexual misconduct due to the courts’ fear of violating the First Amendment. Hiring and firing in particular are specific circumstances that the courts usually refuse to address [25].

The strongest argument against the use of the First Amendment to shield churches and clergy from claims arising out of sexual misconduct becomes visible when reviewing the intent or purpose of the two clauses. . . . It has been argued that the courts are promoting exactly what they are trying to avoid in granting a ministerial exception. It has been noted, [I]f one were to use the seemingly clear and literal meaning of the Establishment Clause, that it prohibits government from promoting religion, the ministerial exception, instead of being necessary under the First Amendment would actually seem to violate the First Amendment. After all, by allowing religious organizations immunity from discrimination suits brought by their clergy, courts give them an advantage that no secular employee enjoys Thus, the plain meaning of the Establishment Clause and the effect that the ministerial exception has in promoting religion, seem to suggest that the Establishment

Clause does not mandate the ministerial exception, and in fact, it may even prohibit it [25, at 284].

In 1995 as a part of her dissent in the *Pritzlaff* case, Justice Shirley S. Abrahamson wrote, “A court should be especially reluctant to volunteer to tackle a First Amendment issue relating to establishment of religion and the prohibition of the free exercise of religion. . . . [T]his area of First Amendment law is in flux and the United States Supreme Court cases offer very limited guidance” [*Pritzlaff*, 2, at 794].

One difficulty in this area is that in cases where the cleric directly asserts a First Amendment defense, the courts have usually seen no choice but to address First Amendment issues. In one such case, a lawsuit was brought by two employees of the church who had individually received marriage counseling from the church minister (their supervisor) with whom each had an affair [26]. The court, in examining the dictates of the First Amendment, considered the minister’s argument that to judicially review the case would violate the Free Exercise Clause. However, the court allowed the lawsuit to proceed and the jury awarded each former employee significant damages.

In this case, the Fifth Circuit Court of Appeals relied on the Seventh Circuit’s reasoning in reversing and reinstating a plaintiff’s malpractice claim in a case with similar issues [27]. The court found, “that the First Amendment’s respect for religious relationships does not require a minister’s counseling relationship with a parishioner to be purely secular in order for a court to review the propriety of the conduct occurring within that relationship” [27, at 336]. The court distinguished the suit brought in the case from a clerical malpractice case.

The court listed a long line of cases that have failed to recognize a cause of action based on clerical malpractice because the Free Exercise Clause protects against defining the standard of care for such a cause of action. According to the court, “Defining that standard could embroil courts in establishing the training, skill, and standards applicable for members of the clergy in a diversity of religions with widely varying beliefs. Furthermore, defining such a standard would require courts to identify the beliefs and practices of the relevant religion and then to determine whether the clergyman had acted in accordance with them” [27, at 337]. Here the court found no conflict with the First Amendment because it felt the “duties underlying the plaintiff’s claims for malpractice by a marriage counselor and breach of fiduciary duties are not derived from religious doctrine” [27, at 337]. Principally, the court found the minister made himself known as a qualified marriage counselor, so his actions should be judged by the standard of care of a professional counselor, not by “religious teachings.” In other words, the court found that he had a fiduciary duty to the plaintiffs. Based on the circumstances, the court concluded, “The First Amendment does not categorically insulate religious relationships from judicial scrutiny, for to do so would necessarily extend constitutional protection to the secular components of these relationships”

[27, at 335-336]. The court recognized the cleric's behavior in counseling had a secular and religious component, but the religious component did not preclude the court from determining that his sexual misconduct was actionable. The court found that to protect secular beliefs and behavior would place a "religious leader in a preferred position in our society" [27, at 336]. So, with all of these cases in mind, what can churches do to protect themselves from liability?

SOLUTIONS FOR CLERICS AND THE CHURCH

Today's churches need to look to the modern workplace for possible solutions. Although many harassment claims are still filed with the Equal Employment Opportunity Commission every year, the problems are out in the open in the traditional business workplace. Because of the nature of the problem, clerical sexual misconduct has gone unacknowledged by the church until the past decade. Furthermore, many victims fear the consequences of accusing their clergy of such actions and have emotional issues [28]. Additionally, "The shame of victims, the embarrassment of the congregation and the pride of church hierarchs all conspire to make sure sexual abuse by clerics is second only to incest as a taboo subject" [6, at 505, n. 40]. As noted by Kenneth Roosna, an attorney who represents victims in Alaska, he did not realize the emotional toll on victims until talking to expert witnesses. Roosna stated, "Not being a Catholic, . . . not being taught from an infant that priests stood between you and God and were your portal to salvation and critical to your immortal soul, I didn't understand just how incredibly devastating it is to be touched or molested or inappropriately dealt with by a priest" [29, para. 11].

Based on these two aspects, lack of acknowledgment and fear, sexual abuse in the church manifests itself much like sexual harassment did in the workplace ten years ago. Currently, the most visible victims portrayed in the media are adults who were molested as young boys. In spite of the media slant on this topic, many of the victims in the cases discussed herein are women, because this article specifically focuses on the variety of legal avenues that have been utilized against religious organizations for sexual misconduct.

Initially women who suffered from sexual harassment in the workplace feared to sue because of the consequences at work and because the rewards of litigation were limited to compensatory damages. Then, Title VII of the Civil Rights Act of 1964 was given more power through the 1991 amendments. It created the possibility of receiving punitive as well as compensatory damages. Accordingly, current "federal law provides up to \$300,000 in damages to victims plus punitive damages against the employer" [30, at 198]. Congress created an enormous potential for huge economic consequences for churches as well as traditional employers. Yet, even before the 1991 amendments, a 1985 report to the United States Catholic Bishops estimated that settlement payments could reach \$1 billion during the 1990s [31]. Unfortunately for many victims, while the courts have made

enormous strides in protecting and compensating victims of sexual harassment in a traditional workplace [32], they have often been reluctant to address sexual harassment issues where the church is the employer. Churches, in the past, claimed immunity under the charitable immunity doctrine and under the First Amendment. Although the charitable immunity doctrine has been essentially abolished [5, at 31, n. 207], as the cases discussed in this article have shown, the First Amendment defense has had an enormous impact in shielding churches from liability for sexual misconduct by clergy.

Today, churches and other religious organizations must deal with what business has faced since the 1980s [33]. Some denominations have made great strides in dealing with the issue of sexual abuse, whether the victim is a child or an adult [34]. Other churches need to look to these model organizations and remember two things. First, simply having a policy will not protect the church from an unscrupulous pastor or priest. Second, churches must be conscious of their parishioners' perceptions. For example, many Catholics decried the participation of the former Archbishop of Boston, Cardinal Bernard Law, in the funeral mass of Pope John Paul II [35]. Because of Cardinal Law's past involvement with the clerical sexual misconduct in the Boston area, his participation led many Catholics to believe the Church does not take clergy misconduct seriously. Cardinal Law, in June 2001, "admitted that in 1984 he appointed Reverend John J. Geoghan parochial vicar of a suburban parish two months after learning that Geoghan allegedly molested seven boys" [13, at 959]. Then

[B]efore Christmas 2002, Cardinal Bernard Law submitted his resignation as archbishop of Boston to Pope John Paul II at the Vatican, and it was accepted immediately. . . . The resignation was precipitated in part by a letter signed by fifty-eight archdiocesan priests urging him to resign; a vote by a previously supportive lay organization, Voice of the Faithful, asking him to resign; a subpoena issued by the state's attorney general; millions of dollars in judgments; hundreds of pending law suits; and thousands of pages of Church files still to be revealed [36, at 374].

Define the Problem

One key factor churches must consider is how they define the issue. McCloskey noted that Catholic churches muddy the waters with terms like sin and abuse, rather than using the term crime [33]. The Presbyterian Church defines key terms for the leadership and members through three documents: *Book of Order*, *Striking Terror No More: The Church Responds to Domestic Violence*, edited by Beth Basham and Sara Lisherness, and *Sexual Misconduct Policy and Its Procedures* [37]. The United Church of Christ (UCC) defines the behavior of clerics in its *Clergy Misconduct* policy and provides an example for local churches to use since its organization is much more decentralized than other denominations [38]. These definitions are part of what the business world has been implementing for decades

[39]. In view of that, one can see churches define misconduct differently. However, steering away from religious terms such as sin and using unambiguous terminology more associated with the courts of law, such as crime, sexual harassment, and abuse will make policies crystal clear.

Pledge to Protect

The Catholic Church in 2002 created a fifteen-point plan of action in the *Charter for the Protection of Children and Young People* (Charter). It states that churches should work to create a “safe environment.” The Catholic Church further supported its pledge to protect through the creation of the National Review Board, made up of influential laypeople. It is meant to oversee the work of the new Office for Child and Youth Protection [33]. Yet, there are no set policies for dealing with similar issues within Catholic schools and “zero tolerance” is still not a defining point of policy [40]. Therefore, many faithful Catholics are disappointed in the church and feel it is “dragging its feet” on developing clear and sweeping language and specific guidelines that businesses found necessary long ago [41]. Meanwhile, other denominations such as the Presbyterian Church (USA) allow one to download their *Sexual Misconduct Policy*; it was adopted in 1991 by the 203rd General Assembly [42]. The fact that the Catholic Church waited over ten years after the Presbyterian Church to adopt a policy has hurt the image of the Catholic Church.

Grievance Procedure in Place

Today, according to a U.S. Supreme Court ruling in 2004, the need for a harassment policy by employers has increased. The Court noted that a business is not responsible for “sexual harassment by supervisory-level employees when the harassed employee resigns” without taking advantage of the procedure [43]. In 2002 when the Catholic Church passed the Charter, it also passed the “*Essential Norms*” which address how to deal with “assessing allegations, for a canonical trial for the crime of abusing a minor, for formal dismissal from the clerical state, and related issues” [33, 44]. Further, the Catholic Church, as a part of the grievance process, encourages clerics to follow local civil laws when there are accusations of child abuse [40, 45]. In the Presbyterian Church (USA) there is an eight-step complaint process for those working at the National Office [46]. The UCC provides a “Guide for Developing Policies and Procedures” which notes the need for discovery, investigation, intervention, and adjudication [47]. Conversely, one denomination that continues to make the grievance procedure difficult is the Jehovah’s Witnesses who require that children’s or others’ accusations be substantiated by another witness [48]. One should make sure the policy is easy to understand and user-friendly as is suggested in the business world [49].

Proper Investigation

The proper investigation should include a team as used by the Presbyterian Church (five members) or the United Church of Christ (at least two members) [46, 50]. A church should consider making the team gender and ethnically diverse [51]. Some churches bring together a team to help the individual making the complaint cope with the “reality” of the situation [48, 52]. Other issues which are better defined by the United Methodist Church are confidentiality and the interviewing of complainants, witnesses, and the accused [53]. Also, the status of the accused is critical—whether he should remain in his position or be given a leave of absence as done by the UCC in North College Hill, Ohio [54]. Many others note the need to remove priests while under investigation [40]. Last, the investigation should be timely [55].

Implementation of a Result

The Catholic Church has begun to make necessary changes with regard to dismissals or stripping the rights of priests who are not dismissed [33]. The United Methodist Church best defines what kinds of actions should be taken alone or in combination. They include: An apology; oral reprimand; transfer or reassignment; demotion; and discharge [53, 56]. A final concern would be retaliation by the church administration against those who have brought charges—it should not be allowed [57]. As found with businesses, churches must make sure the remedy is “adequate” [“How to,” 55].

Prevention, Education, and Training

The United Methodist Church notes the importance of disseminating the policy by giving it to all new staff on the first day of work; posting it on bulletin boards; and putting it in the church newsletter once a year along with other publication methods [58]. It also suggests different videos, pamphlets, and Websites for use by local churches [59]. With regard to the churches’ orientation, as with business, employees should be required to sign paperwork and have it placed in their personnel file [39].

Even so, one must remember that making a policy available or passing it out is not enough. An organization, business or church, must make an active effort to disseminate and actively enforce the policy; this includes informing individuals from outside the organization [56]. As the court noted in *Kolstad v. American Dental Association*, corporations which have exerted “good-faith efforts” “will not be vicariously liable for punitive damages based on the discriminatory acts of supervisors” [60]. The UCC also addresses training and education in its “Guide.” The UCC curricula should be made available to churches. It provides *Created in God’s Image: A Human Sexuality Program for Ministry and Mission*. It suggests receiving training and informational materials from the Center for the Prevention

of Sexual and Domestic Violence in Seattle, Washington. Additional items suggested for training programs are specific areas like sexual violence, sexual harassment, incest, and clergy misconduct [61].

CONCLUSION

One must remember that having a policy is not enough because even those churches with extensive policies are still fighting accusations from parishioners, co-workers (nuns included) and even their own priests [62]. Some advocates have realized and noted that the answers must come from the membership, while other experts disagree, because the sexual abuse problems are at the top of the organization [Steinfels, 41]. Last, from a religious perspective, there is also prayer. One archbishop noted the need to “pray for the work of the spirit” [Steinfels, 41, “What Can We Do,” para. 8]. Another possible, yet remote, action might be to file RICO charges against the church. Pauline Salvucci is one of the leaders of a program called RICO Campaign for Survivor Justice [63]. RICO stands for Racketeer Corrupt Organizations Act and was originally passed to target the mafia. It not only sets maximum criminal penalties for committing two or more specified offenses within a ten-year period of time, but in civil suits, allows treble damages. As was noted by Golder, the truth is sometimes a bitter pill to swallow, but is the right pill. Golder stated,

Those of us who love the church may want to protect it, especially when the news may seem harmful to the church. But protecting the institutional church is the wrong priority when the church or its ministers are accused of, or involved in, wrongdoing. It is far better to expose the church, no less than the rest of the world, to the light of God’s truth [38, para. 7].

The courts have just recently begun employing the proper approach to the concept of clergy malpractice. Although courts get around the problem of defining an appropriate standard of care for clerics so as to not violate the First Amendment by ruling for victims on different grounds, traditional tort and civil rights statutes should be sufficient to address the problem of clergy sexual misconduct. The crux of the problem occurs when courts immediately assume the First Amendment is violated because the action is brought against a cleric and his church regardless of the elements of the tort upon which the cause of action is brought. If courts will carefully apply neutral principles of law to the sexual misconduct, conflict with the First Amendment is usually not implicated. Rarely does a cleric argue his behavior has a religious basis or purpose. Certainly, tortious sexually explicit behavior which is not tolerated in a civil society is not condoned or encouraged by most if any religions in our society. Due to the especially traumatic and long-lasting impact sexual misconduct has been proven to have on a victim when the cleric serves as the victim’s counselor, stronger laws are needed to hold clergy to the same standards applied to other professionals when counseling is involved.

Such state laws need to include clergy in the listing of professionals instead of excluding them.

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