THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

COLBY A. BAKER, Complainant, v. MONSIGNOR ROBERT K. JOHNSON, et al., Respondents.	MCAD Docket No.: 13BEM00852 EEOC/HUD No.: 16C-2013-01284

MEMORANDUM OF AMICI CURIAE
GLBTQ LEGAL ADVOCATES & DEFENDERS AND
AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS
IN SUPPORT OF COMPLAINANT/APPELLANT, COLBY A. BAKER

Introduction

The amici, GLBTQ Legal Advocates & Defenders (GLAD) and American Civil Liberties Union of Massachusetts (ACLUM), are Massachusetts-based organizations that are committed to both the protection of all people from illegal discrimination under laws such as G.L. c. 151B and respect for the protections properly afforded to individuals and religious organizations under the religion clauses of the federal and state constitutions. The amici are filing this brief in support of the Complainant/Appellant, Colby A. Baker ("Baker").

The amici submit that, in this case, in finding a lack of probable cause as to the claims asserted against the Respondents/Appellees, the Roman Catholic Diocese of Worcester ("the Diocese"), Monsignor Robert K. Johnson ("Johnson"), and Monsignor

Pedone ("Pedone") on the basis of the so-named "ministerial exception," the Investigating Commissioner misconceived the nature of the claim being asserted and went too far in applying the exception. The Commissioner went beyond even what the Diocese, Johnson and Pedon asked for and went beyond what the law requires, or, indeed, allows, in the application of the ministerial exception.

Background

The Claims

As noted by the Investigator, the complainant here, Colby A. Baker, has asserted claims for sexual harassment and for retaliation in the context of the ensuing investigation of the alleged sexual harassment conducted by the Diocese. Baker claims that Johnson sexually harassed him over the course of a 2012 summer college internship program in which Baker worked at St. Paul's Cathedral in Worcester where Johnson, the Cathedral's Rector, was his supervisor. Baker seeks to hold Johnson directly liable for the sexual harassment and the Diocese vicariously liable as his supervisor, Johnson's, employer.[1]

When Baker filed a complaint with the Diocese concerning the sexual harassment by Johnson, the Diocese conducted an investigation. Baker found the investigation

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[1] The complainant has also asserted claims, based on Johnson's sexual harassment, against the College of the Holy Cross ("Holy Cross") where Baker was a student at the time of the internship and which ran and funded the internship program. The Commissioner did not apply the ministerial exception to the claims against Holy Cross but found no probable cause as to Holy Cross on other grounds. The amici are writing only as to the ministerial exception and so will not address the resolution of the claim against Holy Cross. However, it is worth noting that Holy Cross did not raise the ministerial exception in its defense.

inadequate and considered Pedone's interference with his rights, in the form of pressure on his parents and on a priest in the Holy Cross chaplain's office by the Diocese to convince him not to pursue a legal claim against Johnson, to be legally retaliatory.

The Response of the Diocese, Bishop McManus, and Pedone

The Diocese, Bishop McManus, and Pedone filed a Position Statement in response to Baker's claims and asserted a number of grounds for dismissal of those claims that were wholly unrelated to the ministerial exception. (Position Statement of the Diocese, May 3, 2013). In closing, the Diocese noted:

> Finally, it is clear beyond discussion or argument that the Commission and EEOC have no authority or ability to address Mr. Baker's requests, on page eleven of his complaint, that "the MCAD order that Monsignor Johnson be required to step down as Rector of St. Paul's Cathedral, that he not be permitted to work with any seminarians or teenage men ..." The Commission has no authority in areas of a religious institutions [sic] employment decisions regarding its ministers. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 132 S. Ct. 694, 705 & n. 2, [(2012); *Temple Emanuel of Newton v. Mass.*] *Commission Against Discrimination,* 463 Mass. 472, 477-78 (1912) (sic); *Williams v. Episcopal Diocese of Massachusetts,* 436 Mass. 574, 577, 583 (2002).

(*Id.* at pp. 3-4).

In short, the Diocese, Bishop McManus, and Pedone raised the ministerial exception (and arguably the Establishment Clause of the First Amendment) to challenge the MCAD's authority to address one particular aspect of Baker's request for relief. It did not challenge the MCAD's authority to find that the Diocese, Johnson, and/or Pedone had violated G.L.c. 151B, or to address Baker's request for monetary relief for sexual harassment and retaliation.

The Response of Monsignor Johnson

Johnson also filed a Statement of Position in response to Baker's claims (Statement of Position of Johnson, May 2, 2013) and asserted a dozen defenses, including a limited reference to the First Amendment:

> Apart from the request for money damages, MCAD has no jurisdiction to award the additional relief Complainant demands in his complaint on the basis of first amendment principles. (Emphasis added.)

(*Id.* at p. 19, Defense 10).

In sum, as with the Diocese, Bishop McManus, and Pedone, Johnson does not challenge the MCAD's authority to address Baker's claim for monetary relief for sexual harassment.

The Investigating Commissioner's Determination of Lack of Probable Cause As to the Diocese and Johnson

The Investigating Commissioner rendered a "Lack of Probable Cause" as to the Diocese and Johnson based on the written findings of Investigator Leger. As to the Diocese, those findings were, in essence, that: (1) the claimant was performing "religious and ministerial functions"; (2) the Diocese is a "religious institution"; (3) the undisputed facts of the claimant's internship "implicate First Amendment interests of Respondent"; and (4) the ministerial exception protects who will preach, teach and carry out the mission of a religious group and that the State should not intrude on such a group's decision as to who should teach its religion, citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) and *Temple Emanuel of Newton v. Mass.*

Comm'n Against Discrimination, 463 Mass. 472 (2012). (Investigative Disposition, pp. 3-4).

Based on the foregoing and while noting that the Respondent Diocese "would not likely defend [the alleged acts of 'unwanted sexual advances by a supervisor' as] related to any of its employment decisions," the Investigator stated:

> However, the sexual harassment investigation carried out by Respondent, as well as decisions related to the remedial action implemented to address the alleged harassment, were clearly employment decisions to which the ministerial exception applies. Accordingly, a Lack of Probable Cause finding is recommended.

(*Id.* at p. 4).

It is worth noting at this point that the Investigator missed the focus of Baker's claim – the sexual harassment itself and the resulting harm suffered by Baker.

As to the retaliation claim against the Diocese, the Investigator states that the alleged retaliatory acts "were in fact the result of employment decisions made by Respondent. Accordingly, the ministerial exception applies, and a Lack of Probable Cause finding is recommended." (*Id.* at p. 5).

However, the retaliatory acts alleged by Baker – phone calls made to his father and a priest at Holy Cross to work to dissuade Baker from filing a complaint (Statement of Particulars, p. 10, ¶¶ 41 and 43) – cannot properly be characterized as "the results of employment decisions." They were totally independent of any decisions relating to Johnson.

As to Johnson, after noting that liability requires that Johnson "engaged in discriminatory harassment," the Investigator stated:

> [Johnson] is himself a minister, and as such, the employment decisions Respondent made regarding him are protected by the First Amendment.

> As stated above, the undisputed facts of Complainant's ministerial internship implicate First Amendment interests in the employment decisions of a religious institution, and therefore, fall within the ministerial exception. Accordingly, a Lack of Probable Cause finding is recommended.

(*Id.* at p. 5).

As to Johnson's actions, the challenge here is not to any "employment decisions" that were made with respect to Baker, but to Johnson's inappropriate personal acts. Moreover, whatever "employment decisions" the Diocese made as to Johnson are irrelevant to the claim made by Baker – that he was sexually harassed by Johnson and is entitled to damages for the harm caused to him by that illegal conduct.[2]

Discussion

I. THE MINISTERIAL EXCEPTION IS NOT AN ABSOLUTE BAR TO ALL CLAIMS BY A "MINISTER" AGAINST A RELIGIOUS ORGANIZATION.

A. The Ministerial Exception Is Now Well-Established Under The First Amendment.

There is no doubt that a "ministerial exception" applies under the First Amendment. *See Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 463 Mass. 472, 476-478 (2012), noting and discussing *Hosanna-Tabor Evangelical*

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[2] Amici agree that the actual employment decisions made by the Diocese vis a vis Johnson are wholly protected by the First Amendment and that Baker cannot challenge those decisions by seeking other forms of discipline against Johnson. However, the core of Baker's claim has nothing to do with employment decisions of any kind. It is a claim of sexual harassment and retaliation that exists wholly apart from any decisions the Diocese made about Johnson's employment. And, as discussed more fully herein, there is nothing in the ministerial exception that bars this Commission from providing monetary relief in the event of a finding that such sexual harassment and/or retaliation occurred.

Church & Sch. v. EEOC, 132 S. Ct. 694 (2012). Moreover, although not expressly using the ministerial exception terminology, the Supreme Judicial Court has long recognized that courts cannot intrude on certain kinds of church disputes. *See Williams v. Episcopal Diocese of Mass.,* 436 Mass. 574, 579 (2002)(citing cases).

Regardless of the label, the governing principle is that "the First Amendment 'precludes jurisdiction of civil courts over church disputes touching on matters of doctrine, canon law, polity, discipline and ministerial relationships ...'." *Temple Emanuel*, 463 Mass. at 476-477 (quoting *Williams, supra*). Put another way, it would violate the First Amendment if a court were to "order a religious group to hire or retain [a 'minister'] that the religious group did not want to employ, or to order damages for refusing to do so." *Temple Emanuel*, 463 Mass. at 486; *see also Callahan v. First Congregational Church of Haverhill*, 441 Mass. 699, 713 (2004)(a "church must be free to decide for itself what its obligations to its ministers are, without being subject to court interference," quoting *Williams, supra*); *Hosanna-Tabor*, 132 S. Ct. at 706 (cannot require a religious group "to accept or retain an unwanted minister" because a church must have "control over the selection of those who personify its beliefs"); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989)("probe into a religious body's selection and retention of clergymen" implicates the First Amendment); *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3rd Cir. 2006)(the ministerial exception "applies to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions").

B. The Ministerial Exception Is Not Absolute.

As well established as the First Amendment principles embodied in the ministerial exception may be, it is equally established that those principles do not extend blanket protection to every conceivable claim that could be asserted against a religious body by a "minister," or otherwise. The ministerial exception extends only so far as the First Amendment requires and no further. *See, e.g., EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir. 2000)(ministerial exception's "contours are not unlimited"; it "does not insulate wholesale the religious employer from the operation of federal anti-discrimination statutes").

Moreover, a blank check to religious institutions could run afoul of the Establishment Clause. *See Smith v. O'Connell*, 986 F. Supp. 73, 80 (D.R.I. 1997)("Indeed, permitting some individuals to engage in conduct proscribed by neutral laws that must be observed by everyone else simply because that conduct emanates from a religious belief might be viewed as the kind of official recognition of a religion that is prohibited by the establishment clause."); *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 335-336 (5th Cir. 1998), *cert. denied sub nom. Baucum v. Sanders*, 525 U.S. 868 (1998) (to "categorically insulate religious relationships from judicial scrutiny" would "impermissibly place a religious leader in a preferred position in our society"); *Prince of Peace Lutheran Church v. Linklater,* 28 A.3d 1171, 1184 (Md. 2011) *cert. denied* 132 S. Ct. 1907 and 1911 (2012)(quoting *Sanders, supra*); *cf. Smith v. Raleigh Dist. of N.C. Conf. of the United Methodist Church*, 63 F. Supp. 2d 694, 719 (E.D.N.C. 1999)(court should be mindful of "potentially abusive use of the First Amendment as a shield to protect otherwise prohibited employment decisions ...").

Courts across the country have consistently recognized that the ministerial exception is not absolute. *See, e.g., Petruska*, 462 F.3d at 305 n.8 (ministerial exception "does not apply to *all* employment decisions by religious institutions, nor does it apply to *all* claims by ministers"; emphasis in text); *Weishuhn v. Catholic Diocese*, 787 N.W.2d 513, 522 (Mich. App. 2010)(same); *Rweyemamu v. Cote*, 520 F.3d 198, 207 (2nd Cir. 2008)(ministerial exception "is not always a complete bar to suit"); *McKelvey v. Pierce*, 800 A.2d 840, 844 (N.J. 2002)("The First Amendment does not immunize every legal claim against a religious institution and its members"); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 657 (10th Cir. 2002)(the "church autonomy doctrine is not without limits ..."); *Van Osdol v. Vogt*, 908 P.2d 1122, 1134 and n.18 (Colo. 1996)("We do not by this opinion hold that churches are insulated from the law," footnoting "various claims that could be brought"); *cf. Hosanna-Tabor*, 132 S. Ct. at 710 ("We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers").

This is also consistent with Massachusetts law which has noted clearly both the protection of religious institutions from court intervention on matters of church-minister relationships and "that the rights of religion are not beyond the reach of the civil law." *Hiles v. Episcopal Diocese of Mass.*, 437 Mass. 505, 514 (2002)(quoting *Madsen v. Irwin*, 395 Mass. 715, 726-727 (1985)); *Petrell v. Shaw*, 453 Mass. 377, 382 (2009)("The First Amendment does not grant religious organizations absolute immunity from tort liability"); *Alberts v. Devine*, 395 Mass. 59, 72-73 (1985)(religion clauses do not preclude

imposition of liability where "[c]onduct remains subject to regulation for the protection of society").

This is just obviously true. As the Second Circuit noted in *Rweyemamu, supra,*

> ... however high in the church hierarchy he may be, a plaintiff alleging particular wrongs by the church that are wholly non-religious in character is surely not forbidden his day in court. The minister struck on the head by a falling gargoyle as he is about to enter the church may have an actionable claim.

Rweyemamu, 520 F.3d at 208.

In Massachusetts, the SJC has ruled, for example, that the following claims by a minister against a church or church official are not barred: (1) an assault and battery claim, *Hiles v. Episcopal Diocese of Mass.*, 437 Mass. 505 (2002); (2) a defamation claim in a context outside a disciplinary proceeding, *Callahan v. First Congregational Church of Haverhill*, 441 Mass. 669 (2004); and (3) an invasion of privacy action, *Alberts v. Devine,* 395 Mass. 59 (1985). *See Petrell v. Shaw,* 453 Mass. 377, 384-388 (2009)(court takes no position on claims of negligent hiring, retention or supervision against a diocese and three bishops by a parishioner claiming improper sexual behavior by a rector); *cf. Soc'y of Jesus of New Eng. v. Commonwealth,* 441 Mass. 662, 667 (2004)(noting court has jurisdiction over a criminal prosecution against a priest for alleged sexual assaults against a minor).

More particularly, with respect to the present case, Baker's claims for sexual harassment and retaliation are not barred by the ministerial exception.

II. BAKER'S CLAIMS ARE NOT BARRED BY THE MINISTERIAL EXCEPTION.

A. Baker's Sexual Harassment Claim Is Not Barred.

There is a series of cases in which the courts have carefully analyzed the application of the ministerial exception to sexual harassment claims and hold that they are not barred. The seminal case is *Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999) *rehearing and rehearing en banc denied* 211 F.3d 1331 (9th Cir. 2000).

In *Bollard*, a Jesuit Catholic seminarian alleged that he had been sexually harassed by various superiors over the course of six years of training and that his complaints prompted no corrective action. *Id.* at 944. As a result, he felt forced to leave the seminary; and he filed a complaint for sexual harassment under Title VII as well as several state law claims, including constructive wrongful discharge. *Id.* The district court dismissed his federal Title VII claim, and the Ninth Circuit reversed.

In recognizing and applying the ministerial exception, the court looked carefully at both the Free Exercise Clause and the Establishment Clause. As to free exercise, the court found that the clause's rationales for the exception were missing. The Jesuits did not "offer a religious justification for the harassment Bollard alleges; indeed, they condemn it as inconsistent with their values and beliefs." *Id.* at 947.[3] Therefore, there was no danger of any impact on religious beliefs or doctrines. Likewise, the plaintiff did

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[3] The Investigator here made a similar point, noting, of the alleged "unwanted sexual advances by a supervisor," that the Diocese "would not likely defend [such acts as] related to any of its employment decisions." (Investigative Disposition, p. 4).

not complain of any adverse personnel action as to his position within the religious institution. *Id.* Finally, the court noted that it was intruding no further on church autonomy than when allowing parishioners' civil suits against churches for the sexual misconduct of ministers. *Id.* at 947-948.

As to the Establishment Clause, the court rightly noted that the pertinent issue is entanglement, whether procedural or substantive. Procedurally, as the court demonstrates, the resolution of a sexual harassment claim is a "restricted inquiry" that does not evaluate religious doctrine or practices while the plaintiff's requested relief was solely damages entailing no continuing court surveillance. *Id.* at 949-950.[4] In sum, any entanglement is "no greater than that attendant on any other civil suit a private litigant might pursue against a church." *Id.* at 950.

Finally, the *Bollard* court noted that the plaintiff sought only damages and "neither reinstatement nor any other equitable relief that might require continuing court surveillance." *Id.* at 950. With only "the limited and retrospective nature of the damages remedy" sought, there would be no "future or ongoing monitoring of church activities." *Id.*

In sum, under the *Bollard* analysis, application of the ministerial exception in any particular cases depends on the precise nature of the claim and its associated remedy. *Id.*

The well-reasoned result in *Bollard* has been followed by courts throughout the country considering claims of sexual harassment. *See, e.g., Prince of Peace Lutheran Church v. Linklater,* 28 A.3d 1171, 1182-1186 (Md. 2011) *cert. denied* 132 S. Ct. 1907

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[4] Any substantive Establishment Clause concerns mirror the court's Free Exercise analysis. *Id.* at 948-949.

and 1911 (2012); *Rojas v. Roman Catholic Diocese of Rochester,* 557 F. Supp. 2d 387, 399 (W.D.N.Y. 2008); *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1003-1007 (D. Kan. 2004); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 963-964, 969 (9th Cir. 2004)("the First Amendment should not require that churches become sanctuaries for sexual harassment by those who act outside of church doctrine"); *McKelvey v. Pierce*, 800 A.2d 840, 857-858 (N.J. 2002); *Smith v. Raleigh Dist. of the N.C. Conf. of the United Methodist Church*, 63 F. Supp. 2d 694 (E.D.N.C. 1999); *Black v. Snyder*, 471 N.W.2d 715, 720-721 (Minn. App. 1991); *Nigrelli v. Catholic Bishop*, 1991 U.S. Dist. LEXIS 3083, 55 Fair Empl. Prac. Cas. (BNA) 495 (N.D. Ill. 1991).

Although the Massachusetts courts have not directly addressed a sexual harassment claim involving a minister and a religious organization, the SJC has noted the issue and cited *Bollard*. *See Temple Emanuel*, 463 Mass. at 487 n.10 (noting that a harassment claim was neither raised nor briefed and therefore the court need not decide if the ministerial exception would apply to such a claim, citing *Williams, supra*); *Williams*, 436 Mass. at 582-583 (finding nothing in the record to support a sexual harassment claim, the court notes the question and discusses *Bollard*).

More significantly, in *Soc'y of Jesus of New Eng., supra,* the SJC enforced a Commonwealth subpoena seeking documents from a religious institution concerning a priest who was being prosecuted for sexual assault. In reaching its decision and rejecting application of the church autonomy doctrine, the Court first notes that enforcement of the subpoena did not require the Court to decide anything touching on "doctrine, canon law, polity, discipline, [or] ministerial relationships," quoting *Williams, supra*, and citing *Bollard. Soc'y of Jesus*, 441 Mass. at 667-668.

In addition, the Court rejected the notion that examining documents concerning the priest infringed on the church's decision-making with respect to any aspect of its relationship with the priest. *Id.* at 668. The SJC stated:

> "Applying any laws to religious institutions necessarily interferes with the unfettered autonomy churches would otherwise enjoy, [but] this sort of generalized and diffuse concern for church autonomy, without more, does not exempt them from the operation of secular laws."

Id. at 668 (quoting *Bollard*).

Moreover, in a seminal case in this area of the law, *Alberts v. Devine, supra*, the SJC upheld the viability of a minister's claim of invasion of privacy against his bishop and another church superior. Anticipating *Bollard*, the SJC first noted that the case did not involve the propriety of any personnel action against the plaintiff or his qualifications. *Alberts*, 395 Mass. at 72-73. The Court then considered whether questions in issue about the violation of privacy and its causal connection to a minister's failure to gain reappointment were disputes about religious faith, doctrine or discipline and held that they were not. *Id.* at 73. Even assuming for the sake of argument that church officials operated under a church rule granting them the right to seek the private information involved, the Court held that the officials could still be liable because the First Amendment does not give a person absolute freedom to act (as opposed to believe). *Id.*

The Court then, as did the *Bollard* court, weighed any burden on the church versus the State's interest. While acknowledging that the imposition of liability would inhibit the church's desired conduct to some extent, the Court noted that the church had many sources of information such that there would be little impact here. *Id.* at 74. And, on the other hand, public policy strongly favors the protection of privacy at issue. *Id.*

In *Alberts*, the Court expressly held that a civil court could "examin[e] the proceedings that resulted in [the plaintiff's] failure to gain reappointment as minister . . . in order to determine whether that event resulted from wrongful conduct of the defendants." *Id.* at 75. The Court also expressly held that such examination involved no "repetitious inquiry or continuing surveillance" such as to amount to an entanglement violative of the First Amendment. *Id.*

Applying the principles of Massachusetts law to Baker's claim for sexual harassment (and assuming that Baker qualifies as a "minister"), there is no legal justification to bar his claim against either the Diocese, Johnson, or Pedone under the ministerial exception. Baker's sexual harassment claim: (1) does not involve the court in any question of religious faith, doctrine or discipline; (2) does not challenge any personnel decision involving himself; (3) does not challenge any employment decision made by the Diocese; (4) involves only a limited inquiry by the courts and no continuing surveillance; (5) is no more intrusive or burdensome than a clearly permitted civil tort action by a private, non-minister individual; (6) involves alleged wrongful conduct as opposed to some expression of belief; (7) seeks only the damages suffered by the claimant as a result of tortious conduct[5]; (8) the alleged misconduct is not rooted in religious belief in any fashion; and (9) there is a strong public policy against sexual harassment.[6]

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5 See footnote 2, above.

6 As noted above, the Investigator missed the mark in applying the ministerial exception by focusing on the "investigation carried out by" the Diocese and the "remedial action implemented to address the alleged harassment." (Investigative Disposition, p. 4). Baker's claim of sexual harassment and the damage it caused him are totally separate

In sum, investigation[7] and adjudication of Baker's claim for sexual harassment is not barred under First Amendment principles as elucidated by the Massachusetts courts and many other courts throughout the country.

B. Baker's Claim For Retaliation Is Not Barred.

As noted above, Baker has alleged a claim of retaliation against the Diocese and Pedone, asserting that Pedone's behavior in pressuring his parents and a chaplain at Holy Cross to convince Baker not to pursue a legal claim was legally retaliatory.

It is important to note at the outset that these alleged retaliatory acts have nothing to do with: (1) any impact on the work situation of Baker with the Diocese; (2) on the employment status of Johnson with the Diocese; or (3) on the consequences of Baker's claims (or the Diocese's investigation of those claims) on Johnson. They solely concern the institution of the present civil action by Baker with the MCAD and whether the Diocese posed any illegal impediments to this action.[8]

It is also important to note that litigation of these retaliation allegations involves a very limited, secular inquiry. They involve no question of religious doctrine. They

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from the investigation and the remedial action taken and are what must be addressed in considering the ministerial exception.

7 It is worth noting that the SJC has expressly affirmed that the power of the MCAD to investigate claims is not constrained by the First Amendment when claims are asserted by ministers against a religious entity. *Temple Emanuel*, 463 Mass. at 481-483.

8 As noted above, the Investigator misunderstood the nature of the retaliation claim by describing the alleged retaliatory acts as "the result of employment decisions" by the Diocese. (Investigative Disposition, p. 5). The alleged acts were wholly independent of any employment decision concerning Johnson or Baker.

simply ask whether the Diocese behaved in such a way as to violate the law by attempting to dissuade Baker from pursuing his legal rights.

For essentially the same reasons that this particular sexual harassment claim is not barred by the ministerial excerption, this particular retaliation claim is also not barred.

The proper legal analysis is the same as that applied to sexual harassment claims and is exemplified in the few court decisions that have squarely addressed the question presented here. *See Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 954 (9th Cir. 2004)(after formal complaint to the church of sexual harassment, the minister alleged retaliation in the form of relief of some duties as well as verbal abuse and intimidating behavior among other things); *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1000 (D. Kan. 2004)(after complaint of sexual harassment, the minister alleged retaliation in various ways, including threats and a hostile work environment); *cf. Rojas v. Roman Catholic Diocese of Rochester*, 557 F. Supp. 2d 387, 391 (W.D.N.Y. 2008)(alleged retaliation following claim of sexual harassment).

In *Elvig*, the court barred any claims of retaliation that involved protected ministerial decisions, such as the removal of certain duties. *Elvig*, 375 F.3d at 965. At the same time, the court held that verbal abuse and intimidation were not protected employment decisions and set forth a potentially viable claim if the retaliatory conduct was not doctrinal. *Id.*

Similarly, in *Dolquist*, the court noted that some alleged acts of retaliation involved the plaintiff's suitability as a minister and, therefore, could not proceed. *Dolquist*, 342 F. Supp. 2d at 1008. However,

> To the extent plaintiff can demonstrate that defendant engaged in retaliatory harassment that did not involve an employment decision

> relating to its choice of a minister, and so long as defendant does not assert a religious justification for the alleged harassment, the First Amendment does not preclude her claims.

Id. at 1009.[9]

Baker's retaliation claim similarly involves no doctrinal or religious issues and, therefore, is not barred by the ministerial exception.

Conclusion

For all of the foregoing reasons, the amici, GLBTQ Legal Advocates & Defenders and the American Civil Liberties Union of Massachusetts, respectfully submit that the decision of the Investigating Commissioner should be reversed as to the claims against the Diocese of Worcester and the claim against Monsignor Johnson insofar as the dismissal of the claims against the Diocese and Monsignor Johnson were based on the application of the ministerial exception.

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9 The *Rojas* court goes even further and holds, under Second Circuit precedent, that a retaliatory termination claim can proceed if the dispute between the parties was not religious in nature. *Rojas*, 557 F. Supp. 2d at 398-400. The Commission need not go so far in this case as there is no personnel action at issue in any way.

Respectfully submitted,

GLBTQ Legal Advocates & Defenders
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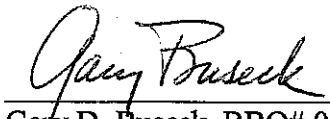
By their attorneys,



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