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Church Employment and the First Amendment: The Protected Employer and the Vulnerable Employee

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CHURCH EMPLOYMENT AND THE FIRST AMENDMENT: THE PROTECTED EMPLOYER AND THE VULNERABLE EMPLOYEE

Madsen v. Erwin[1]

When an employer dismisses an employee, most Americans would believe that the dismissal should be based on the employee's job performance, not on his or her personal lifestyle. However, when the employer is a religious institution[2] protected by the First Amendment of the Constitution,[3] recent case law has established that an employee who is dismissed solely on the basis of his or her lifestyle has little recourse against the employer. Through the case of *Madsen v. Erwin*,[4] this Note analyses the free exercise[5] and establishment clause[6] protections accorded a religious institution that dismisses an employee because that employee's personal lifestyle violates church tenets.

Christine Madsen, a member of the Church of Christ, Scientist, was employed as a sportswriter for the *Christian Science Monitor*. In December of 1981, the editor of the *Monitor*, Earl W. Foell, discussed with the quality control editor, Pamela O. Marsh, a rumor that Madsen had asked a manager's wife to accompany her to a lesbian organization meeting, or had approached the manager's wife about having a lesbian affair.[7] When Marsh confronted Madsen with the rumor, Madsen denied the alleged actions, but admitted that she was a lesbian.[8] Marsh later confronted Madsen with a rumor that Madsen had changed her name because of a homosexual marriage. Madsen also denied this rumor.[9]

Marsh and Foell met with Anthony Periton, the manager of the Christian Science Publishing Society, to discuss the rumors.[10] Periton subsequently met

1. 395 Mass. 715, 481 N.E.2d 1160 (1985).
2. The terms religious institution, church, and religious organization will be used interchangeable throughout this Note.
3. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . .").
4. 395 Mass. 715, 481 N.E.2d 1160 (1985).
5. "Congress shall make no law . . . prohibiting the free exercise thereof." U.S. CONST. amend. I.
6. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.
7. *Madsen*, 395 Mass. at ____, 481 N.E.2d at 1168.
8. *Id.*
9. *Id*
10. *Id.*

with Madsen and demanded to know if the rumors were true.[11] Madsen denied the rumors, but admitted that she was gay.[12]

Periton again met with Madsen and asked Madsen if she would heal herself of her homosexuality. Madsen refused.[13]

Subsequently, Madsen met with Karen Gould, the employee relations manager for the Christian Science Church. Gould informed Madsen that the church was concerned about Madsen's homosexuality.[14] When Gould asked if Madsen was seeking healing, Madsen replied that she was not.[15] Gould informed Madsen that she had the choice of resigning or being fired if she persisted in her refusal to be healed.[16]

Madsen neither resigned nor sought healing. She was dismissed with severance and vacation pay.[17] A note was included in Madsen's personnel file stating that she would not be rehired unless "a radical change in views on homosexuality takes place."[18]

Madsen commenced an action[19] for declaratory and injunctive relief and for damages, alleging "wrongful discharge, defamation, invasion of privacy, intentional infliction of mental distress, sexual and affectional preference discrimination, and breach of fiduciary responsibilities under deeds of trust."[20] In her complaint, Madsen invoked the Massachusetts civil rights statutes,[21]

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at ___, 481 N.E.2d at 1169.
17. *Id.*
18. *Id.*
19. Madsen's complaint listed as defendants the trustees of the Christian Science Publishing Society, the board of directors of the First Church of Christ, Scientist, in Boston, Massachusetts, and the individual Christian Science Publishing Society employees involved in Madsen's dismissal. *Id.* at ____, 481 N.E.2d at 1160.
20. *Id.* at ____, 481 N.E.2d at 1161.
21. MASS. GEN. LAWS ANN. ch. 12, § 11H (West Supp. 1985) provides:

> Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.

Id.; MASS. GEN. LAWS ANN. ch. 12, § 11I (West Supp. 1985) provides:

the Massachusetts right to privacy statute,[22] Massachusetts common law, the Massachusetts Constitution and the United States Constitution.[23]

The defendants' motion to dismiss and/or for summary judgment was denied by a judge of the superior court.[24] Defendants appealed the denial and the Supreme Judicial Court of Massachusetts reversed, directing entry of summary judgments for defendants with respect to Madsen's claims under the United States and Massachusetts Constitutions, her claims under the Massachusetts civil rights statutes, and her claims for breach of contract and wrongful discharge.[25] In ordering summary judgments, the court viewed the *Monitor*'s decision to fire Madsen as a religious decision made by a church employer to which the court was bound to defer.[26] However, the court affirmed the lower court's denial of summary judgments on Madsen's right to privacy claim and her tort claims of defamation, intentional infliction of emotional distress, interference with advantageous relations and interference with her employment contract, directing that Madsen be permitted to replead these torts in a manner sufficient to state a cause of action.[27]

The threshold inquiry the court addressed in determining whether the *Monitor*'s dismissal of Madsen was protected by the First Amendment was whether the *Monitor* was a religious endeavor of the Church of Christ, Scientist.[28] The court relied on an affidavit submitted by the Church's personnel manager which stated that the Church's personnel office was in charge of the personnel at the *Monitor*, a memorandum on sexual morality that

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> Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of litigation and reasonable attorneys' fees in an amount to be fixed by the court.

Id.

22. MASS. GEN. LAWS ANN. ch. 214, § 1B (West Supp. 1985) provides:
> A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.

Id.

23. *Madsen*, 395 Mass. at ____, 481 N.E.2d at 1161.
24. *Id.*
25. *Id.* at ____, 481 N.E.2d at 1167.
26. *Id.* at ____, 481 N.E.2d at 1165.
27. *Id.* at ____, 481 N.E.2d at 1167.
28. *Id.* at ____, 481 N.E.2d at 1163.

was distributed to all Church employees including those working at the *Monitor*, and an employment badge issued to Madsen that was to be worn during her employment by the Church.[29] Also submitted were authenticated copies of Madsen's employment application to the First Church of Christ, Scientist; the employee handbook which provided that the Church would employ only members of the Church in its activities, including the Christian Science Publishing Society; and Madsen's employment badge labelled "First Church of Christ, Scientist, Boston."[30] The court ruled that the plaintiff's affidavit, which stated that the *Monitor* was not an organ of the Church, was insufficient to rebut the clear inference that the *Monitor* was a religious activity of the Church of Christ, Scientist.[31]

Based on previous rulings regarding the *Monitor*'s status as a religious organization, Madsen had little chance of convincing the court that the *Monitor* was not entitled to First Amendment protection.[32] However, the question of an employer's status as a religious organization is not always so clear-cut. As the court in *Feldstein v. Christian Science Monitor*[33] stated, "[n]ot every endeavour that is affiliated, however tenuously, with a recognized religious body may qualify as a religious activity of that body and come within the scope of protection from governmental involvement that is afforded by the First Amendment.[34]

It is possible that an organization affiliated with a recognized religion could become so secularized that it should no longer be viewed as a religious organization deserving of First Amendment protection.[35] The religious status

29. *Id.*
30. *Id.*
31. *Id.*
32. In Feldstein v. Christian Science Monitor, 555 F. Supp. 974 (D. Mass. 1983), the United States District Court for the District of Massachusetts found the conclusion inescapable that the Monitor was a religious activity of a religious organization. *Id.* at 978. The court stated that although the Monitor had a recognized position and established reputation in the secular world, "a religious activity of a religious organization does not lose that special status merely because it holds some interest for persons not members of the faith, or occupies a position of respect in the secular world at large." *Id.* The court also noted that numerous administrative bodies, including the EEOC, the IRS, the Department of National Revenue of Canada, the state income tax administrators for Illinois and Massachusetts and the District of Columbia unemployment compensation board had found the Monitor to be a religious activity. *Id.*
33. *Id.*
34. *Id.* at 978.
35. In NLRB v. St. Louis Christian Home, 663 F.2d 60 (8th Cir. 1981), the court held that a children's home originally established in 1905 as an orphanage exclusively for members of the Christian Church had evolved into an essentially secular facility by 1981. The home received most of its funds from government sources, hired employees without regard to religion, took children solely from state agency referrals, and obtained parental consent before resident children attended

of an organization must be decided on a case-by-case basis by determining whether the institution is operated in a pervasively religious manner.[36] Only those organizations which are religious organizations will be accorded First Amendment protection through the free exercise clause and the establishment clause.

The free exercise clause has been interpreted to protect individuals[37] and religious organizations[38] from governmental intrusion upon their religious

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Christian church services. *Id.* at 64. However, in State v. Heart Ministries, Inc., 227 Kan. 244, 607 P.2d 1102, *appeal dismissed*, 449 U.S. 802 (1980), the court held that a children's home with the purpose of providing "housing, facilities, care and detention for wayward, homeless or delinquent individuals . . . to preach the Word of God, lead individuals to trust Christ as Saviour and Lord, reach out with his love and compassion to those whose lives have been broken and marred by sin, and thus rescue the perishing," remains a religious institution. *Id.* at 1104.

36. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 403 (1984). The Supreme Court has clarified the term "pervasively religious" in cases dealing with parochial schools. For example, in Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), parochial schools which exhibited the following characteristics were found to be pervasively religious: the schools imposed religious restrictions on student admissions, they required pupils to attend religious activities, they required pupils to adhere to the doctrines and dogma of a particular faith, they required pupils to attend instruction in the theology of the faith, the schools were an integral part of the mission of their sponsoring churches, they had as a substantial purpose the inculcation of religious values, they imposed religious restrictions on faculty employment, and they imposed religious restrictions on how and what the faculty could teach. *Id.* at 767-68.

The Supreme Court has never had occasion to rule on the Christian Science Monitor's status as a pervasively religious institution. However, in *Feldstein*, 555 F. Supp. 974, the United States District Court for the District of Massachusetts emphasized the following factors in holding the Monitor to be a religious organization: the stated purpose of the Monitor is to promote and extend the Christian Science religion; every member of the Christian Science Church must subscribe to the Monitor; the Board of Trustees of the Christian Science Church is directed to conduct the business of the Monitor on a strictly Christian basis, for the promotion of the interests of Christian Science; the Christian Science Church routinely subsidizes the Monitor, which would otherwise operate at a significant loss; the Monitor's building is provided by the Christian Science Church; and the Monitor refuses on religious grounds to carry advertisements for a number of products such as tobacco and liquor. *Id.* at 977.

37. *E.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

38. Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1388 (1981). However, the United States Supreme Court has not directly addressed the question of whether an organization as an organization may assert a free exercise claim. All cases which the Court has decided on free exercise grounds have involved the rights of individuals. In School Dist. v. Schempp, 374 U.S. 203 (1963), the Court stated that the free exercise clause "recognizes the value of religious training, teaching and observance, and more particularly, the right of every *person* to

liberties. Judge Nolan, writing for the majority in *Madsen*, apparently felt

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freely choose his own course with reference thereto, free of any compulsion from the state." *Id.* at 222 (emphasis added). The Court stated that the purpose of the free exercise clause is "to secure religious liberty in the *individual* by prohibiting any invasions thereof by civil authority." *Id.* at 223 (emphasis added).

A free exercise claimant must show that the government has forced him to make a "cruel choice" between obedience to the government and obedience to his sincerely held religious beliefs, which resulted in a coercion of conscience. *See infra* notes 60-61 and accompanying text. It would seem that an organization as an organization would not possess a conscience capable of being coerced. However, many lower courts, the *Madsen* court among them, have allowed organizations to prevail on free exercise grounds.

In a recent case, the United States Supreme Court may have cryptically expressed the view that an organization as an organization does not have a free exercise claim. In Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985), a nonprofit religious organization raised a free exercise claim in attempting to avoid the requirements of the Fair Labor Standards Act. *Id.* at 303. Justice White stated that the Foundation had standing to raise the free exercise claims of its members. *Id.* at 303 n.26. However, stating that an organization has third party standing is not equivalent to stating that an organization as an organization has a free exercise claim. Third party standing allows the organization to assert the coercions of conscience of the members of the organization on behalf of those members, not on behalf of the organization as an organization. It would seem that since Justice White felt the need to explain that the organization was being given third party standing to raise a free exercise claim on behalf of its members, he may have been implying that the organization as an organization did not have such a claim.

Were the United States Supreme Court directly to hold that organizations as organizations do not have free exercise claims, much of the alleged tension between the free exercise clause and the establishment clause could be avoided. When a court rules in favor of a religious organization on a free exercise claim, there is the appearance that the state is advancing that religious organization over other religious organizations or over non-religious entities, which could be interpreted as being in violation of the establishment clause. *See infra* notes 120-37 and accompanying text. This has led one commentator to state that the two clauses, set side-by-side in the Constitution, actually intersect with one another, necessitating a zone of permissible accommodation which the free exercise clause carves out of the establishment clause for accommodation of free exercise rights. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 823 (1978). If the free exercise clause were reserved for claims of coercion of conscience by *individuals only*, there would be no argument that a protection of an *individual claimant's* beliefs on free exercise grounds would result in the advancement of an *entire religion*, and therefore a violation of the establishment clause.

It may appear that an entire religious organization is advanced when that organization is given third party standing to assert a free exercise claim for its members and the organization is successful on that claim. However, the underlying justification for granting third party standing is the coercion of individual member's consciences, not the coercion of the organization's conscience. Therefore, the advancement which results from a successful free exercise claim asserted by an organization given third party standing is an advancement of several *individuals'* religious beliefs which are asserted collectively, not an advancement of the religious organization as an organization. The effect would be no different than if each individual had brought a separate free exercise claim.

bound to direct summary judgments in favor of the defendants as to Madsen's constitutional, civil rights, breach of contract, and wrongful discharge claims on the basis of the free exercise clause.[39] Because the defendants established by affidavit that homosexuality is against the tenets of the Church of Christ, Scientist,[40] the majority suggested that awarding declaratory and injunctive relief or damages would place a substantial burden on defendants' free exercise of their religious beliefs.[41] However, in the dissent Judge O'Connor disagreed with the majority's view that judicial deference to the *Monitor*'s decision was necessarily dictated by the free exercise clause,[42] and instead advocated a judicial balancing of competing Church and state interests.[43] Neither the majority nor the dissent clearly set out the complete free exercise analysis of state interference in the *Monitor*'s decision to dismiss Madsen. Such analysis is helpful in evaluating this case and other church employment cases which may arise in the future.

The United States Supreme Court has determined that the first step in judicial analysis of an alleged burden on free exercise should be to determine

39. 395 Mass. at ____, 481 N.E.2d at 1165. Although the court did not expressly state it was deciding the case based upon the free exercise clause, the cases and authority cited by the majority in support of its position dealt with the free exercise clause, not the establishment clause.

40. *Id.* at ____, 481 N.E.2d at 1164.

41. *Id.* at ____, 481 N.E.2d at 1165.

42. *Id.* at ____, 481 N.E.2d at 1170 (O'Connor, J., dissenting). Judge O'connor did concur in the court's direction of summary judgments for the defendants. However, Judge O'Connor would have based the summary judgments not upon the First Amendment, but instead, upon the absence of a state interest in prohibiting sexual preference discrimination. *Id.* ("Those conclusions would be correct if the controversy were entirely unrelated to a church or church personnel."). *See infra* notes 87-110 and accompanying text. Due to the lack of state interest in protecting homosexual employees, the dissent stated that the majority should not have considered the constitutional question. ("I only point out that the First Amendment question is far from simple, that the court confronts it unnecessarily, and that the court answers it perhaps incorrectly.") *Id.* at ____, 481 N.E.2d at 1171 (O'Connor, J., dissenting).

43. *Id.* at ____, 481 N.E.2d at 1171 (O'Connor, J., dissenting). Because the dissent felt the constitutional question should never have been reached, Judge O'Connor refrained from considering the outcome of balancing the state interest and the free exercise burden. Similar balancing language may be found in lower court opinions. *E.g.*, Walker v. First Presbyterian Church, 22 Fair Empl. Prac. Cas. (BNA) 762, 764-68 (Cal. Super. Ct. 1980) ("Thus the City and County's interest in protecting gays against discrimination and providing a remedy for it is to prevent 'strife and unrest' and to fully utilize the City and County's 'capacities for development and advancement.' This must be balanced against defendants' free exercise of religion rights."). However, reference to the free exercise clause as a balancing test may be somewhat misleading because it implies that the free exercise burden and the state interest are initially of equal importance. The reader should be aware, in reading opinions which discuss balancing, that the process is not truly an even balancing. The United States Supreme Court has held that a burden on free exercise is given substantial weight and can be outweighed only by a state interest of the highest order. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

whether the belief which is burdened is religion-based.[44] A broad and flexible definition of religion is necessary, as a narrow definition may exclude some beliefs deserving of First Amendment protection. As a result, courts have been hesitant to precisely define "religion" or "religion-based belief."[45] The Supreme Court has been more precise in defining what a religious belief is not, than what it is.[46]

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task . . . . However, the resolution of that question is not to turn upon judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.[47]

The Court's imprecision in defining "religious belief" was based on its belief that the judiciary is not a competent tribunal to judge ecclesiastical matters.[48] Lower courts have been somewhat more precise in developing a workable definition of religion.[49] The following three factors have been identified as useful indicia to determine the existence of a religion:

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.[50]

The *Madsen* court accepted the *Monitor*'s rejection of homosexuality as a religion-based belief.[51] The court based its conclusion on an affidavit sub-

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44. Thomas v. Review Bd., 450 U.S. 707, 713 (1981) ("Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion.").

45. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination of Religious Organizations*, 79 COLUM. L. REV. 1514, 1516 (1979).

46. *Thomas*, 450 U.S. at 714.

47. *Id.*

48. *Id.* at 716. The absence of any precise definition of "religion" or "religion-based belief" has led one commentator to state that any belief which is arguably religious should be considered as such in a court's free exercise analysis. L. TRIBE, *supra* note 38, at 826-33. However, as the Supreme Court stated in *Thomas*, 450 U.S. at 715, "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *E.g.*, Brown v. Pena, 441 F. Supp. 1382 (S.D. Fla. 1977) (claimant's argument that his religous beliefs mandated the consumption of cat food was rejected by the court), *aff'd*, 589 F.2d 1113 (5th Cir. 1979).

49. *See* Africa v. Pennsylvania, 662 F.2d 1025, 1029-30 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1982); International Soc. for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 438-41 (2d. Cir. 1981); Malnak v. Yogi, 592 F.2d 197, 208-09 (3d Cir. 1979) (Adams, J., concurring); Founding Church of Scientology v. United States, 409 F.2d 1116, 1160 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969).

50. *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981).

51. 395 Mass. at ____, 481 N.E.2d at 1164.

mitted by the defendants, and correctly declined to delve into an analysis of the beliefs of the church.[52]

The second step in judicial analysis of a free exercise claim is to determine whether the religion-based belief is sincerely held by the claimant.[53] In a case such as *Madsen*, where a religious organization, as opposed to an individual, is asserting a free exercise claim,[54] a court may be able to make this determination as it decides whether the belief is religion-based.[55] It is possible, albeit unlikely, that a church might be insincere in claiming that an employee's lifestyle violated a religion-based belief in order to fire a particular employee for other reasons.[56] The sincerity requirement is an attempt to deter such fraudulent claims.[57] However, considering the deference that courts give to church statements of ecclesiastical matters,[58] a court is not likely to rigorously question the sincerity of a church's doctrinal claims. The *Madsen* court properly accepted the *Monitor*'s contention that homosexuality is against the tenets of the Church.[59]

The third step in judicial analysis of a free exercise claim is to determine whether the government is putting the claimant in the position of having to make a "cruel choice" between obedience to the government and obedience to the sincerely-held religious belief, resulting in a coercion of conscience.[60] Had the *Madsen* court granted Madsen relief, it would have placed the *Monitor* in the "cruel choice" position of choosing between obedience to the Church's belief that homosexuality is a sin, and obedience to the state. When the claimant is in fact forced to make such a choice, a burden on the claimant's free exercise of religion may result.[61] However, in order for there to exist a free exercise violation, the burden on the claimant's free exercise of religion must be substantial.[62] It is within this step of the free exercise analysis that a complete explanation of the majority's logic would have been most helpful. The majority failed to discuss the substantiality of the burden that would have been placed upon the *Monitor*'s free exercise of religion if Madsen had been awarded declaratory and injunctive relief or money dam-

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52. *Id.*
53. Thomas v. Review Bd., 450 U.S. 707, 716 (1981).
54. *See supra* note 38.
55. *See supra* notes 44-52 and accompanying text.
56. No cases were found which demonstrated this type of fact situation.
57. Bagni, *supra* note 45, at 1519. ("The fear is that the unscrupulous would otherwise try to use 'religious belief' as a subterfuge for engaging in impermissible conduct not genuinely motivated by religious conscience.").
58. *E.g.*, United States v. Ballard, 322 U.S. 78, 86 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.").
59. 395 Mass. at ____, 481 N.E.2d at 1165.
60. Sherbert v. Verner, 374 U.S. 398 (1963).
61. Thomas v. Review Bd., 450 U.S. 707, 718 (1981).
62. *Id.*

ages for her dismissal. Instead, the court simply deferred to the *Monitor*'s decision, concluding that to do otherwise would be a free exercise violation.[63]

The majority first cited *Walker v. First Presbyterian Church*[64] to support the proposition that awarding declaratory and injunctive relief or damages against the *Monitor* would have resulted in a substantial burden on free exercise.[65] In *Walker*, a church organist was discharged by the First Orthodox Presbyterian Church of San Francisco after he admitted his homosexuality and refused to repent.[66] The court held:

> If Mr. Walker were allowed to collect damages from defendants because he was discharged for being gay, defendants would be penalized for their religious belief that homosexuality is a sin for which one must repent to be accepted as a part of the group that leads the congregation in worship. It forces defendants to pay general and special damages, plus punitive damages to maintain their religious beliefs. This is a substantial burden on defendant's right to free exercise of religion.[67]

The majority also cited *Lewis ex rel. Murphy v. Buchanan*[68] to further uphold the finding of a substantial burden on free exercise. In *Murphy*, the pastor of a Roman Catholic church withdrew an offer of parochial school employment to the plaintiff, a music teacher, after receiving information that the plaintiff was homosexual.[69] The court held that forcing the defendant to pay damages would deprive him of his right to free exercise of religion.[70]

The *Madsen* majority failed to note that in both *Walker* and *Murphy*, the plaintiff's activities were much more closely involved with the actual religious activities of the respective defendants than were Madsen's. The *Walker* court emphasized that as the church organist, Walker was part of the "worship team," with duties which included playing at Sunday worship services, communions, and baptisms.[71]

The plaintiff in *Murphy* was to be employed as a music teacher in a Roman Catholic school.[72] Parochial schools are religious institutions organized for the purpose of transmitting a religion's doctrines and values to succeeding generations. Parochial school teachers are charged by the church with carrying out that purpose.[73] As a parochial school teacher, Murphy

63. 395 Mass. at ____, 481 N.E.2d at 1165.
64. 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. Ct. 1980).
65. *Madsen*, 395 Mass. at ____, 481 N.E.2d at 1165.
66. *Walker*, 22 Fair Empl. Prac. Cas. (BNA) at 763.
67. *Id.* at 764.
68. 21 Fair Empl. Prac. Cas. (BNA) 696 (Minn. Dist. Ct. 1979).
69. *Id.* at 697.
70. *Id.* at 698.
71. *Walker*, 22 Fair Empl. Prac. Cas. (BNA) at 763.
72. *Murphy*, 21 Fair Empl. Prac. Cas. (BNA) at 697.
73. Laycock, *supra* note 38, at 1411.

would have been involved in an actual religious activity of the Roman Catholic Church.

For a court to attempt to regulate the hiring and firing of those persons involved in essentially ecclesiastical activities of the church would certainly place a substantial burden on the free exercise of religion.[74] However, the *Madsen* dissent stated that it has never been established that the state cannot interfere in matters involving lay church employees with secular duties.[75] The dissent seems to be arguing that as the distance of the employee from the religious functions of the religious organization increases, the substantiality of the burden placed on the organization's free exercise of religion decreases. This position has found some support among commentators.

Professor Bagni has suggested that the activities and relationships of religious organizations should be viewed as three concentric circles revolving around an epicenter.[76] In the epicenter are the purely spiritual aspects of the church, such as church/clergy relationships, church membership policies, religious educational programs, and church-affiliated schools which teach secular subjects with a decidedly religious orientation.[77]

The first emanation from the epicenter represents church- sponsored community activities, and relationships between the church and its support employees with some religious or quasi- religious functions. The second emanation includes the church's secular business activites, and relationships between the church and its employees who perform entirely secular functions. The third emanation represents the secular world.[78] The further removed a church activity is from the epicenter, Professor Bagni argues, the greater the possibility that the state could regulate the activity without substantially burdening the church's free exercise of religion.[79]

However, it would seem that to analyze the substantiality of the free exercise burden in accordance with an employee's proximity to the epicenter of church activities would be to reintroduce the requirement that a belief be central to the religion before a free exercise burden could exist.[80] The cen-

74. It is firmly established that the state may not interfere in a church's employment decisions concerning a minister. *See, e.g.*, McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896, *reh'g denied*, 409 U.S. 1050 (1972) (where the court held that the Salvation Army could discriminate against a female minister on the basis of sex, notwithstanding the Title VII prohibition against sex-based discrimination, because the Church's actions were protected by the First Amendment).

75. 395 Mass. at ____, 481 N.E.2d at 1170.

76. Bagni, *supra* note 45, at 1539.

77. *Id.*

78. *Id.*

79. *Id.* at 1540.

80. This analysis assumes that the religious belief in question is that the church should not employ a person of this type, e.g., a homosexual.

trality requirement was rejected by the Supreme Court in *Thomas v. Review Bd.*[81] As long as the belief is religion-based and sincerely held, there is no longer a requirement that the belief be central to the religion before a believer has a free exercise claim.[82] If the believer is put in the position of having to choose between obedience to his sincerely held belief, regardless of its centrality, and obedience to the state, a coercion of conscience and a substantial burden on free exercise result.[83] Therefore, the *Madsen* majority, despite its lack of explanation, was correct in finding a substantial burden on the *Monitor's* free exercise of religion, regardless of the distance between Madsen's duties and the actual religious activities of the Christian Science Church.

The state may justify a substantial burden on free exercise only by proving that the burden is necessary in order to achieve a compelling state interest. If there is no compelling state interest, a church's right to free exercise will automatically prevail over the employee's claims.[84]

Because the *Madsen* majority deferred to the *Monitor*'s decision on free exercise grounds, the court did not address the question of whether Massachusetts has a compelling state interest in protecting homosexuals from employment discrimination. However, the *Madsen* dissent stated that nothing in the United States or Massachusetts Constitutions, federal or state statutes, or public policy prohibits an employer, religious or non- religious, from firing an employee at will on the facts of this case.[85] Judge O'Connor seems to have been implying that as to the claims which were disposed of by summary judgment, the state of Massachusetts had no express interest in protecting homosexuals from employment discrimination.[86]

The existence of a state interest in protecting homosexual employees from employment discrimination is far from clear.[87] Possible ways a state

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81. 450 U.S. 707, 715 (1981); *see* United States v. Lee, 455 U.S. 252, 257 (1982).
82. *Thomas*, 450 U.S. at 715-16.
83. *See supra* notes 60-62 and accompanying text.
84. *Thomas*, 450 U.S. at 718.
85. 395 Mass. at ____, 481 N.E.2d at 1169-70.
86. Judge O'Connor's statement that General Law chapter 151B, section 4, does not preclude employment discrimination based upon sexual preference would seem to indicate that the state interest referred to was the interest in protecting homosexual employees from discrimination. *Id.* at ____, 481 N.E.2d at 1170 (O'Connor, J., dissenting). However, Judge O'Connor later refers to balancing the state's interest in the enforcement of its citizens' contract rights. *Id.* at ____, 481 N.E.2d at 1171 (O'Connor, J., dissenting). Therefore, it is unclear as to precisely which state interest Judge O'Connor referred.
87. A recent case, Under 21 v. City of New York, 65 N.Y.2d 344, 482 N.E.2d 1, 492 N.Y.S.2d 522 (1985), illustrates the uncertainty which exists over whether there is in fact a state interest in protecting homosexuals from employment discrimination. The mayor of New York issued Executive Order No. 50 "to ensure compliance with equal employment opportunity requirements of the City, State and Federal law in City contracting." *Id.* at ____, 482 N.E.2d at 3, 492 N.Y.S.2d at 524. The order applied to virtually all New York City contracts and required all those entering into

interest may be shown include local ordinances or state statutes prohibiting sexual preference discrimination in employment, or interpretation of Title VII of the 1964 Civil Rights Act[88] to include homosexuals.

A number of cities have enacted some type of local gay rights ordinance.[89] Most of these ordinances protect only municipal employees and fail to extend coverage to homosexuals employed in the private sector.[90] However, if a locality has enacted a gay rights ordinance which deals with private employment, it may serve as some evidence of a state interest in protecting homosexuals from employment discrimination.[91]

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such contracts to ensure equal employment opportunities in all employment decisions. *Id.* Included in the definition of equal employment opportunity was a prohibition on discrimination based upon sexual or affectional preference. *Id.* Regulations enacting Executive Order No. 50 required that city contracts include language which stated that the contractor agreed not to discriminate in any employment decision on the basis of sexual orientation or affectional preference. *Id.* Agudath Israel, the Salvation Army, and a not-for-profit corporation of the Roman Catholic Archdiocese of New York, all of which contract to provide social services for the city, filed actions against the city, claiming that the portion of Executive Order No. 50 pertaining to sexual orientation or affectional preference was beyond the scope of the mayor's authority, and, therefore, was void. *Id.* The Court of Appeals of New York found for the plaintiffs, stating that the portion of Executive Order No. 50 dealing with sexual preference was an unlawful usurpation of the legislative power of the city council. *Id.* at ____, 482 N.E.2d at 10, 492 N.Y.S.2d at 531. The court emphasized that neither Congress, the state legislature, nor the city council had enacted legislation prohibiting sexual preference discrimination in private employement. *Id.* at ____, 482 N.E.2d at 6, 492 N.Y.S.2d at 527. The court held that without an express state interest in proscribing such discrimination, the mayor could not broaden the class of persons protected from discrimination in private employment on the basis of sexual preference. *Id.*, 482 N.E.2d at 6-7, 492 N.Y.S.2d at 527-28. The court also stated that because the conduct of the private contractors such as the plaintiffs did not rise to the level of state action, the mayor did not have the power to prohibit sexual preference discrimination on an equal protection basis. *Id.* at ____, 482 N.E.2d at 8, 492 N.Y.S.2d at 529. The court declined to decide what level of equal protection scrutiny should be applied to governmental employment discrimination based upon sexual preference. *Id.* at ____, 482 N.E.2d at 10, 492 N.Y.S.2d at 531.

88. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

89. A list of cities which have enacted local gay rights ordinances is available from the National Gay Rights Task Force, 80 Fifth Avenue, New York, New York 10011. This list is updated quarterly.

90. Rivera, *Queer Law: Sexual Orientation in the Mid Eighties*, 10 U. DAYTON L. REV. 459, 480-81 (1985).

91. In Walker v. First Presbyterian Church, 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. Ct. 1980), the state interest was expressed by the San Francisco Police Code, which forbade employment discrimination on the basis of sexual orientation. *See supra* notes 64-67 and accompanying text. In Lewis *ex rel.* Murphy v. Buchanan, 21 Fair Empl. Prac. Cas. (BNA) 696 (Minn. Dist. Ct. 1979), the plaintiff relied on St. Paul city ordinance section 74.03, which provided that no employer could discriminate in hiring or firing on the basis of affectional or sexual preference. Although the ordinance was in effect at the time of the lawsuit, it was later repealed.

Wisconsin is the only state at present which has enacted a civil rights law which expressly protects homosexuals from private employment discrimination.[92] However, the California Labor Code[93] has been interpreted to prohibit private employers from discriminating against openly homosexual employees.[94] Outside of Wisconsin and California's enactments, state legislation appears to be a barren ground for finding a state interest.

Title VII of the 1964 Civil Rights Act[95] also offers little in the way of expressing a state interest in protecting homosexuals from employment discrimination. Title VII originally prohibited discrimination by private employers on the basis of race, color, religion, sex, or national origin.[96] Subsequently, federal statutes were enacted which prohibited discrimination on the basis of age[97] or handicap.[98]

Sexual orientation has not found protection as one of the enumerated characteristics covered by Title VII or by subsequent legislation.[99] Courts have refused to bring sexual orientation under the ambit of Title VII.[100] Reasons cited have included legislative intent to protect only the enumerated classes,[101] and an interpretation of the term "sex" as not including sexual orientation.[102] The interpretation of Title VII appears, at least at the present

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See supra notes 68-73 and accompanying text. In a related case, Gay Rights Coalition of Georgetown Univ. v. Georgetown Univ., 496 A.2d 567 (App. D.C.), *vacated*, 496 A.2d 587 (App. D.C. 1985) (en banc), the Gay People of Georgetown University and the Gay Rights Coalition at the Georgetown University Law Center used the District of Columbia Human Rights Act to contend that Georgetown University was required to grant them university recognition. *Id.* at 568. The Act prohibits discrimination by educational institutions on the basis of sexual preference. The District of Columbia Court of Appeals held that the university must grant recognition to the two groups, as the District of Columbia's interest in enforcing its Human Rights Act substantially outweighed the burden placed upon Georgetown's religious beliefs. *Id.* at 582.

92. WIS. STAT. ANN. §§ 111.32, .321, .322, .36(d) (West Supp. 1983-84).

93. CAL. LABOR CODE §§ 1101, 1102 (West 1980).

94. Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 489, 595 P.2d 592, 611, 156 Cal. Rptr. 14, 33 (1979).

95. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

96. *Id.*

97. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1982).

98. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96 (1982).

99. *E.g., Civil Rights Act Amendments of 1981: Hearings on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. 1-2 (1982).

100. Ulane v. Eastern Airlines, 742 F.2d 1081, 1085 (7th Cir. 1984) ("Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites or transsexuals, and would no doubt have sparked an interesting debate. There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation."), *cert. denied*, 105 S. Ct. 2023 (1985).

101. De Santis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 333 (9th Cir. 1979).

102. *Id.*

time, to preclude its use to show state interest in protecting homosexuals from employment discrimination.[103]

The Supreme Court has emphasized that only a state interest "of the highest order. . .not otherwise served can overbalance the interest protected by the free exercise clause."[104] It would seem that, considering the present view of homosexuality taken by legislatures and courts in most jurisdictions,[105] a religious organization is likely to be successful in arguing that there is no such compelling state interest in prohibiting private employers from discriminating against homosexual employees, even if an anti-discrimination statute has been enacted. In two cases specifically dealing with discrimination by churches against homosexual employees, courts have held that the state interest expressed in local gay rights ordinances is not sufficiently compelling to override the church's free exercise claims. In *Walker*,[106] the court held that a church's free exercise rights in dismissing a homosexual church organist overrode the city's interest in protecting homosexual employees from discrimination, as expressed in the local gay rights ordinance.[107] In *Lewis ex rel. Murphy v. Buchanan*,[108] the court, citing *Cantwell v. Connecticut*,[109] stated that religious conscience may not be invaded unless there is a clear and present danger to a substantial interest of the state. The court held that the city government's interest in protecting the employability of homosexuals is not such a clear and present danger to a substantial interest of the state that it should overrride a church's right to withdraw an offer of employment to a homosexual music teacher.[110]

If at some future time the state does express a compelling state interest in protecting homosexuals which is found to be sufficient to overcome a free exercise burden, the court would still have to find that the state's interest was being served by the least restrictive means possible.[111] Remedies available against a religious institution may be placed on a continuum of restrictiveness.

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103. Even if sexual orientation were to be included within the protected classifications of Title VII, application of Title VII to a religious employer might be held unconstitutional on free exercise grounds. *E.g.*, McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896, *reh'g denied*, 409 U.S. 1050 (1972) (application of Title VII to the church-minister relationship would be unconstitutional); Whitney v. Greater N.Y. Corp. of Seventh Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975) (application of Title VI to the discharge of a church-clerical employee relationship is not unconstitutional where there was no evidence that the discharge was based on the doctrinal policies of the Seventh-Day Adventist Church).

104. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

105. *See supra* notes 87-103 and accompanying text.

106. 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. Ct. 1980).

107. *Id.* at 765.

108. 21 Fair Empl. Prac. Cas. (BNA) 696, 698 (Minn. Dist. Ct. 1979).

109. 310 U.S. 296, 311 (1940).

110. *Murphy*, 21 Fair Empl. Prac. Cas. (BNA) at 698.

111. Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

Although a court would have to examine the specific circumstances of each case, a plausible least-restrictive to most-restrictive continuum would be denial of government benefits,[112] money damages, and forced reinstatement of the employee.

As previously stated, the *Madsen* majority failed to thoroughly analyze the free exercise issues in the case. Even if they had done so, it appears that the end result would have been the same. Madsen's claims under the United States and Massachusetts Constitutions, her claims under the Massachusetts civil rights statutes, and her claims for breach of contract and wrongful discharge would have been dismissed by summary judgment.[113] However, the summary judgments would not have been granted out of a complete deference to the free exercise of religion.[114] Instead, the summary judgments would have been based on the lack of a compelling state interest in protecting homosexuals from discrimination by private employers.[115]

Because Madsen's job as a sportswriter was a significant distance from the "epicenter" of the Church of Christ, Scientist's religious activities, some would argue that the burden on free exercise was not substantial.[116] However, since there is no requirement that the burdened belief be central to the religion, it appears that the cruel choice position in which the Church was put resulted in a substantial burden on its free exercise of religion.[117] In addition, without a compelling state interest in protecting homosexual employees from discrimination by private employers, there was nothing to overcome the free exercise burden, and the church would have prevailed.[118]

As previously noted, the *Madsen* court rested its disposition of the case entirely upon the free exercise clause. However, the Supreme Court has not yet directly addressed the issue of whether an organization such as the Christian Science Church, as an organization may assert a free exercise claim.[119] The establishment clause has traditionally been the constitutional provision to which religious organizations have looked to define their relationships with the state.[120] The establishment clause provides the distance between government and religion which is necessary to protect religious organizations from undue interference by government.[121] It is possible for a violation of the establishment clause to exist without a corresponding violation of the

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112. *E.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (religiously-affiliated school denied tax exempt status because of a racially discriminatory admissions policy).
113. *Madsen*, 395 Mass. at ____, 481 N.E.2d at 1167.
114. *Id.* at ____, 481 N.E.2d at 1165.
115. *See supra* notes 87-110 and accompanying text.
116. *See supra* notes 75-79 and accompanying text.
117. *See supra* notes 80-83 and accompanying text.
118. *See supra* notes 87-110 and accompanying text.
119. *See supra* note 38.
120. *E.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).
121. Esbeck, *supra* note 36, at 348. The clause also serves to protect government

free exercise clause because an establishment clause violation need not go to the extreme of causing a coercion of conscience.[122] In *Lemon v. Kurtzman*,[123] the Supreme Court set out its tripartite test for determining whether government action is constitutional under the establishment clause.

> First, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . [and] finally, the statute must not foster excessive entanglement with religion . . . .[124]

Although the *Madsen* court rested its resolution of the case on the free exercise clause,[125] an establishment clause analysis may be helpful in the resolution of future disputes which may arise when religious organizations dismiss their employees.[126]

Legislation prohibiting discrimination by private employers against homosexual employees would meet the *Lemon* secular purpose test. A local gay rights ordinance,[127] a state anti-discrimination statute,[128] or an interpretation of Title VII to include homosexuality[129] would serve the secular purpose of

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from religious organizations that would seek to use government to further their religious goals. *Id.*

122. Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963). For example, in the context of the *Madsen* case, if Massachusetts had passed a statute giving a one-time subsidy to all religious organizations which, at the time of the passage of the statute, had homosexual employees, an establishment clause violation would exist. However, there would be no free exercise violation, as no coercion of conscience would result from passage of the statute. No claimant would be prohibited from following the dictates of his religion or forced to do something against his religion. See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), and Flast v. Cohen, 392 U.S. 83 (1968), for a discussion of the standing requirement in such a case.

123. 403 U.S. 602 (1971).

124. *Id.* at 612-13 (citation omitted).

125. 395 Mass. at ____, 481 N.E.2d at 1165.

126. The usual establishment clause case involves some type of government legislation. *E.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (concerning an Alabama statute which authorized a period of silence for voluntary prayer or meditation in public schools); Gillette v. United States, 401 U.S. 437 (1971) (concerning statutory exemption from conscription for persons who objected to war). However, the Supreme Court has also interpreted the establishment clause to prohibit civil court resolution of intrafaith disputes where no government legislation was involved. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (involving the reorganization of a diocese of the Church and a bishop's removal from office). Therefore, establishment clause issues could have been raised by the *Madsen* litigants. In addition, other cases which arise when a religious organization dismisses an employee may involve the application of a statute. *E.g.*, Walker v. First Presbyterian Church, 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. Ct. 1980) (applying the San Francisco Police Code).

127. *See supra* notes 89-91 and accompanying text.

128. *See supra* notes 92-94 and accompanying text.

129. *See supra* notes 95-103 and accompanying text.

prohibiting employment discrimination against homosexuals.[130] A religious organization would stand little chance of successfully arguing that the statute did not serve a secular purpose.

A religious organization could make the argument that to apply a statute prohibiting sexual preference discrimination to a church which has dismissed an employee on the basis of his homosexuality would have the primary effect[131] of inhibiting religions which hold homosexuality to be a violation of their tenets.[132] Resolution of such an argument may turn on the extent to which the employee is involved in the actual religious activities of the organization.[133] Were the dismissed employee a minister, the religious organization would have a strong argument that the primary effect of applying an antidiscrimination statute to the organization would be an inhibition of religion. However, with an employee such as Madsen, whose duties do not directly contribute to the worship, propagation, or inculcation of an organization's faith, the church's primary effect argument does not rest on such solid ground. A court could conceivably hold that to regulate the dismissal of an employee like Madsen would have a de minimis effect on religion.

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130. Additional secular purposes may include full utilization of the available work force and prevention of unrest. Walker v. First Presbyterian Church, 22 Fair Empl. Prac. Cas. (BNA), 762, 763 (Cal. Super. Ct. 1980).

131. Primary effect must be determined by examining the effect of applying the statute to the religious organization. If primary effect were determined by examining the effect of applying the statute to society as a whole, almost any statute with a secular purpose would have a secular primary effect. For example, if a statute which authorized a government subsidy to all schools were examined as to its effect on society as a whole, it would be determined to have the secular purpose and primary effect of supporting schools. However, if the statute were examined as to its effect on parochial schools, its primary effect would be determined to be an advancement of religion.

132. In Walker v. First Presbyterian Church, 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. Ct. 1980), the church made such a claim. Conversely, the homosexual employee claimed that exempting a religious organization from a statute which prohibited employment discrimination against homosexuals constituted governmental promotion of religious which consider homosexuality a sin. Note, *The Boundaries of a Church's First Amendment Rights as an Employer*, 31 CASE W. RES. 363, 376-77 (1981). However, the court did not address these claims, but instead based its resolution of the case on the free exercise clause. *Walker*, 22 Fair Empl. Prac. Cas. (BNA) at 765.

133. *See* Esbeck, *Toward a General Theory of Church-State Relations and the First Amendment*, 4 ST. LOUIS U. PUB. L.F. 325 (1985). The author identifies two levels of religious activities. At the first level are those activities comprising the worship, propagation, and inculcation of an organization's faith. At the second level are those activities which are responses to an organization's faith, such as educational and social welfare activities. *Id.* at 341-43. Government should have no control over first level activities absent a compelling state interest. However, limited government regulation of second level activities is proper, notwithstanding the fact that the state interest is paternalistic rather than compelling. *Id.* at 342-43. Madsen's duties as a sportswriter at the Monitor would not appear to rise to the first level of church activities.

A religious organization's most promising establishment clause argument in claiming protection for its decision to dismiss an employee is that, were a civil court to interfere with the organization's decision, excessive entanglement would result. Excessive government entanglement with religion may arise when the government becomes involved in essentially religious disputes such as the discharge or discipline of an employee.[134] The highest degree of entanglement would result from application of a prohibition on sexual preference discrimination to a church's decision to dismiss an employee with actual religious duties, such as a minister.[135] However, excessive entanglement may still be present where the duties of the employee are not central to church religious activities. A suit by any homosexual church employee contending that his dismissal was on the basis of his sexual preference would necessitate an inquiry into the church's motivation for dismissal. Such an inquiry would likely rise to the level of excessive entanglement.

The liberal discovery process preceeding a civil suit could allow a court to become deeply involved in church affairs. If an investigation were assigned to a review board, the board inquiry might also result in excessive entanglement. In *NLRB v. Catholic Archbishop*,[136] the Court stated, "It is not only the conclusions that may be reached by the [investigative] Board which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions."[137] Therefore, it appears that even if the *Madsen* litigants had raised establishment clause issues, the outcome of the case would have been the same. An investigation into the Church's motivation for dismissal and the sincerity of that motivation would have resulted in the excessive entanglement forbidden by the establishment clause.

Although the *Madsen* court properly dismissed on First Amendment grounds Madsen's claims under the United States and Massachusetts Con-

134. Esbeck, *supra* note 36, at 390 n.253. "The Supreme Court's entanglement discussions evidence a sensitivity to the harm that results to religious organizations when . . . government becomes entangled in prolonged monitoring or oversight of religious personnel, resulting in alteration of or prejudice to religious duties." *Id.* at 384-85.

135. In Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929), the petitioner challenged a decision by the Archbishop of Manila who had refused to appoint the petitioner to the chaplaincy because he did not possess the qualifications required by Canon Law. The Court held, "[T]he decisions of church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular cours as conclusive . . . ." *Id.* at 16. In Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 720 (1976), the United States Supreme Court stated that when the Illinois Supreme Court ordered a church to reinstate a bishop who espoused views contrary to those of the church hierarchy, the court had unconstitutionally undertaken the resolution of a religious controversy which the First Amendment commits exclusively to the church.

136. 440 U.S. 490 (1979).

137. *Id.* at 502.

stitutions, her claims under the Massachusetts civil rights statutes and her claims for breach of contract and wrongful discharge, the court affirmed the lower court's denial of summary judgment with regard to Madsen's right to privacy claim and her tort claims of defamation, intentional infliction of emotional distress, interference with advantageous relations, and interference with her employment contract. The court directed that Madsen be allowed to replead these claims in a manner sufficient to state a cause of action.[138] Citing *Cantwell v. Connecticut*,[139] the court emphasized that while the freedom to hold any religious belief is absolute, the freedom to act upon that belief is not.[140] The court stated, "Under the banner of the First Amendment provisions on religion, a clergyman may not with impunity defame a person, intentionally inflict serious emotional harm on a parishioner, or commit other torts."[141]

It appears that the court was issuing a caveat to religious organizations. Although the First Amendment may protect a religious organization's right to dismiss a homosexual employee, there are limits to the manner in which the organization may carry out the dismissal. Actions which rise to the level of tortious conduct against the employee will not be tolerated under the guise of First Amendment protection.[142] For example, had the *Monitor* published an article on the front page detailing Madsen's dismissal and her alleged homosexual activities, the *Monitor* might have been held liable for invasion of Madsen's privacy. Although the *Monitor*'s right to dismiss Madsen would have been protected by the First Amendment, its actions in publishing the story would not have been, as they far surpassed the actions necessary to effectuate the dismissal and rose to the level of invasion of her privacy. Therefore, it would be prudent for a religious organization which feels compelled by church tenets to dismiss an employee to carefully consider the actions taken in investigating and dismissing the employee. Considering the compassion churches should hold toward all persons, it is not unreasonable for a court to demand that a religious organization be considerate in the actions taken to dismiss an employee.

When a religious organization is compelled to dismiss an employee for violation of church tenets, a number of First Amendment issues arise. This note has explored the free exercise and establishment clause issues to be considered when a church employer dismisses an employee.

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138. 395 Mass. at ____, 481 N.E.2d at 1167. The dissent would have dismissed Madsen's tort claims because although Madsen's complaint set out a detailed statement of facts, those facts did not support any claim entitling Madsen to relief. *Id.* at ____, 481 N.E.2d at 1169.

139. 310 U.S. 296, 303-04 (1940).

140. *Id.* ("Conduct remains subject to regulation for the protection of society.").

141. 395 Mass. at ____, 481 N.E.2d at 1167.

142. *Id.*

A church employer stands the greatest chance of free exercise protection when the following conditions exist: the church holds a religion-based belief that rejects the employee's lifestyle,[143] the belief is sincerely held by the church,[144] the church is put into the "cruel choice" position of having to choose between obedience to its religious belief or obedience to the state, resulting in coercion of conscience,[145] and the jurisdiction has no ordinance or statute expressing a state interest in protecting homosexuals from employment discrimination.[146]

A church employer's chances of finding protection within the establishment clause turn on the degree of entanglement which would result from the application of an anti-discrimination statute to the church. The greatest degree of entanglement, and thus the highest level of establishment clause protection, will exist when the employee's position is central to the church's religious activities.[147]

However, religious employers would be wise to heed the *Madsen* court's warning. Even with the guarantees of the First Amendment, a church employer will not be protected from liability if its actions in dismissing the employee amount to tortious conduct.[148]

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143. *See supra* notes 44-52 and accompanying text.
144. *See supra* notes 53-59 and accompanying text.
145. *See supra* notes 60-62 and accompanying text.
146. *See supra* notes 87-110 and accompanying text.
147. *See supra* notes 134-37 and accompanying text.
148. *See supra* notes 139-42 and accompanying text.