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Legal Issues in Hiring for Mission

ROBERT JOHN ARAUJO, S.J.

“The harvest is plentiful, but the laborers are few.”

Matthew 9:37; Luke 10:2

Who gets chosen to be a laborer in the vineyard of Jesuit higher education? What kinds of factors may legitimately be taken into account in the decision? From the viewpoint of United States law, much depends on how one defines the vineyard.

In the context of U.S. law as it relates to the making of hiring decisions, employment practices are the concern of Title VII of the Civil Rights Act of 1964. In choosing to hire or not to hire, employers, as we all know, generally cannot discriminate against would-be laborers on the grounds of race, color, religion, sex, or national origin. The authoritative scrutiny provided by the anti-discrimination provisions of Title VII ensures that choices shall be made on the basis of merit and substance, not on the basis of racial, ethnic, gender, or religious grounds which generally have no bearing on the talents of the laborer to perform the tasks for which that laborer is hired.

Jesuit colleges and universities, however, historically have defined themselves as a particular kind of vineyard. Despite recent claims that Jesuit institutions are, for better or worse, already far along in a process of sec-

ularization that will inevitably make them indistinguishable from universities with no claim to religious affiliation,¹ Jesuit schools continue to present themselves as different. They continue to be places where

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¹ For an account that applauds the separation of the professional work of the Catholic university from its religious foundation, see Mark Tushnet, “Catholic Legal Education at a National Law School: Reflections on the Georgetown Experience,” in *Georgetown at Two Hundred: Faculty Reflections on the University’s Future*, ed. McFadden (Washington, D.C.: Georgetown University Press, 1990); in another vein altogether is Chris Reidy’s lament over the loss of a Jesuit institution’s “soul” in the pursuit of “mainstream excellence.” See “Hitting the Heights,” *Boston Globe*, Mar. 28, 1993.

laborers—teachers and administrators in particular—are invited to come together as members of a community with a rich, living tradition of seeking understanding in the context of religious belief.

As the other articles in this issue of *Conversations* attest, however, recent and complex trends have begun to raise serious questions about how long Jesuit institutions will continue to be able honestly to claim that they are distinctive. Many commentators throughout the country have begun to focus on the possibility of instituting some sort of preferential hiring program designed to reinforce the religious affiliation of Jesuit universities. The question arises: May religiously affiliated colleges and universities legally institute such a program? In what follows, I shall argue that they certainly may.

The Three Religious Exemptions of Title VII

Jesuit colleges and universities and other religiously affiliated institutions have already addressed the issue of how the institution's mission can or may play a role in employment practices. In some instances, these practices have allegedly violated the civil rights of individuals because they were either discharged or not employed on the grounds of religious considerations. These cases include the discharge of a teacher at a religiously affiliated primary school who became pregnant out of wedlock and the hiring of ordained ministers because of the requirement of ordination as a qualification to teach seminarians, as well as the preferential hiring of members of a religious order to teach philosophy in a university founded by and affiliated with the same religious order.

It is also clear that religious organizations generally have grounds for some, but not all exemptions from the requirement for non-discrimination employment practices of the Civil Rights Act of 1964. These exemptions cover, (1) religious corporations, associations, educational institutions, or societies who employ individuals of a particular religion to perform work connected with their religious activities; (2) employment practices which admit or employ an individual on the basis of religion, sex, or national origin where any of these characteristics are *bona fide* occupational qualifications reasonably necessary to the "normal operations" of the employer's business or enterprise; or (3) employment practices of a school, college, university, or other edu-

cational institution to hire individuals of a particular religion where the educational institution is "in whole, or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such [institution] is directed toward the propagation of a particular religion."

A question remains: what happens when the employee or candidate for employment is not a member of the religious group which sponsors the university? In other words, what happens when the Jesuit college or university seeks out candidates for employment who are not necessarily members of the church or religious order which is the source of religious affiliation but who are desirous of supporting the mission of the religiously affiliated university? The language of none of the three exemptions of Title VII addresses these situations. Does this mean that the institution violates Title VII when it prefers a candidate for employment who indicates a personal desire to support the mission of the religiously affiliated institution over a candidate unable or unwilling to articulate his or her position vis-à-vis the religious identity and mission of the school?

One federal appellate court and the United States Supreme Court have offered helpful insight pertaining to not hiring or to discharging individuals whose views conflict with those of the religiously affiliated institution. The Seventh Circuit responded to the allegations of sex discrimination made by Dr. Marjorie Maguire, who applied for the position of associate professor of theology at Marquette University. She alleged that she was denied on at least six occasions the appointment she sought because of her gender and because of her controversial views on the morality of abortion. The lower court noted that the crucial issue was not the alleged sex discrimination but, rather, the plaintiff's views on abortion, which conflicted with the Roman Catholic Church's teachings and position. Although Dr. Maguire professed to be a member of the Catholic Church, she asserted that the preferential hiring policy adopted by the defendant university to hire Jesuits sexually discriminated against her. Ultimately the Seventh Circuit found that the principal issue was not the allegation of sex discrimination but, rather, the plaintiff's personal views, which were hostile to the goals and mission of Marquette. The circuit court concluded that the plaintiff did not have Title VII grounds for challenging the employment practices of Marquette because she was not discriminated against on the basis of either sex or religion.

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The Supreme Court in 1987 addressed similar issues in the Amos case. There the employer was the Church of Jesus Christ of Latter Day Saints, which owned and operated a recreational facility and gymnasium at which Amos was employed. The facility was run as a non-profit recreational facility open to the public. Amos and other employees of the church were dismissed because they had failed to obtain “temple recommends,” certifications that they were members in good standing regarding particular church practices. The former employees alleged that if the church, under Title VII, were able to discriminate on religious grounds by firing employees from non-religious jobs, the establishment clause of the first amendment of the U.S. Constitution would be violated. The fact that this case was largely decided on the constitutional issues does not restrict the insight it provides concerning the multiplicity of questions regarding employment discrimination allegations and religiously affiliated employers. The court recognized that the non-profit activities of religious employers are entitled to protection from Title VII discrimination allegations when the work involved has been defined by the religious organization as being relevant to carrying out its mission. Moreover, the court held that the statutory insulation from anti-discrimination enforcement given to religious organizations for employment practices involving non-religious positions did not violate the establishment clause.

Justice Brennan’s concurring opinion fleshed out the important issues inherent to the court’s decision. He recognized that Title VII’s exemptions address the non-profit activities of religious employers and are related to “the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions.” But Justice Brennan was not content with assuming what religious missions and organizations mean.

He understood “religious activity” to have a broad meaning. His definition emerges from the variety of human endeavors consisting of individual participation in a “larger religious community” which “represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.” This definition avoided the legalistic and technical, and it embraced the realistic and practical. His insight acknowledged the significance that those individuals who are committed to the mission of the religious organization are those persons qualified to determine which activities in fact further the organization’s mission. He

demonstrated that those individuals who are members of the community and are “committed to [its] mission” are best able to determine what constitutes a “religious activity.” It is not public officials equipped with statute books and judicial opinions, legislative histories, and law dictionaries who can address this important issue, but rather it is those individuals who are in some way committed to the institution’s beliefs, practices, and observances who are best qualified to provide answers.

With this corpus of constitutional and statutory law as background, Jesuit colleges and universities can claim both the right to determine what constitutes their religious activity along with the sovereign exercise of employment practices that favor certain types of individuals over others.

A review of all the legislative history of the Title VII exemptions also lends support to these claims (despite the recent claims of the Ninth Circuit Court in *E.E.O.C. v. Kamehameha Schools/Bishop Estate*).³ After lengthy congressional debate, a strong consensus emerged about Title VII which would “permit our religious and church-related colleges and charitable institutions the freedom to employ the teachers and personnel of their choice.”⁴ As the debate on these exemptions concluded, any legislative intent that the religious exemptions applied only to a narrow group of religious educational institutions died. When the analyst carefully reviews the legislative debate on these provisions, it becomes clear that Congress acknowledged the need that religious liberty extend to a very wide group of institutions claiming some kind of religious affiliation determined not by the federal government or the courts but by the institutions and the people who comprise them.

A Plan for Positive Action and Apostolic Preference

With the breadth of these exemptions in mind, a blueprint for hiring practices which are consistent with Title VII begins to take shape. Such a plan could enable Jesuit colleges and universities to formulate an affirmative action, apostolically preferential, and mission-sensitive hiring policy. While candidates for employment may be co-religionists, they need not be. What is relevant to the preferential treatment is the hiring institution’s identification of those candidates who would enthusiastically support and further the mission of the religiously affiliated school. I suggest that such preferential hiring practices would be consistent with the

meaning of Title VII and its provisions for religious exemptions. These employment practices also would enable institutions to engage in hiring conversations that would help determine the candidates’ understanding of and sympathy with the apostolic mission of these schools.

The ability and the opportunity of the religiously affiliated school to pursue affirmative action hiring would contribute to its survival in the larger world of American higher education. This claim for survival is an exercise of the right of self-determination which is ingrained in western democratic political theory. The religiously affiliated school of today retains the right as well as the legal protection to determine its own destiny and its own character.

Part of my proposal is rooted in Justice Frankfurter’s concurring opinion in *Sweezy v. New Hampshire* (1957). Justice Frankfurter identified “four essential freedoms” associated with higher learning: (1) the determination of who may teach; (2) what is to be taught; (3) how these subject matters shall be taught; and, (4) who is to be taught. Each of Justice Frankfurter’s essential freedoms has relevance to my argument and to the question of whether Jesuit colleges and universities in the United States will be able to retain the right of self-determination in the future. While religiously affiliated universities will offer tuition in many subjects taught also in secular schools, they also incorporate into the curriculum subjects respectful of the religious tradition that permeates the character of the school. Moreover, religiously affiliated schools have the freedom to direct how all subjects, including secular ones, are to be taught.

The kind of affirmative action plan which I propose does not seek only the co-religionists who participate in the same religious beliefs of the hiring institution. The action I propose is more inclusive and extensive. It seeks to identify, recruit, and hire those individuals who share in the vision for the future which accompanies the exercise of self-determination undertaken by

³ In *E.E.O.C. v. Kamehameha Schools/Bishop Estate* the Ninth Circuit Court has clouded the right to self-determination for religious organizations in non-profit activities; however, as I argue at length in my article in *The University of Richmond Law Review*, that case construes the exemptions to Title VII much too artificially and mechanistically, and fails to take into account key issues in the legislative history.

⁴ 110 Congressional Record, 2593 (1964). Emphasis added.

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the institution and its community of scholars which concludes that the school, besides having a secular mission to teach secular subjects, also has a mission to teach them in the context of faith. The plan would follow several phases. The first phase would take place within the university when it determines that an existing position within the ranks of the faculty or administration is to be filled or a new position is to be created. Here, the community should address the threshold question: is it important for the individual who is selected and hired to share in or support the mission of the institution insofar as it is defined by the religious affiliation? Assuming a positive response to this issue, the second phase of the plan would consider how the mission of the institution should be featured in the advertisement announcing that the vacancy exists. The content of the advertisement would also be incorporated into the personal contacts members of the faculty and administration might make. The third phase would be executed in the interview process itself. Questions designed to ascertain the candidate's views on and understanding of the history and mission should be raised, along with questions about how each candidate envisions his or her own contributions to this mission. While these questions should avoid what might appear to be some test of orthodoxy, they should also shun polite, diplomatic questions which avoid getting to the heart of the issue and the genuine beliefs of the candidate toward the institution's religious identity and mission. These questions could also be raised prior to the in-person interview. If the university has a mission statement, the candidate could be requested to submit a written response detailing how he or she would help further the mission if an offer of employment were made. The candidate's written submission could then be used to facilitate the telephone or on-campus interview which might follow. The final stage of this plan would be ongoing. It would be the continuation of a substantive discussion by both the recently hired as well as the veteran employees of the university to ensure that their individual and communal understandings of the religious nature and mission of the school remain a part of their focus.

An important issue which the pragmatic administrator of a religiously affiliated university might well raise at this point would be whether my proposal would jeopardize receipt of federal or state funding. A critic of my proposal might argue that implementation of this proposal would produce a violation of the establishment clause of the first amendment. My proposal

should not raise establishment clause concerns because, as the United States Supreme Court has held, federal funding of most educational functions at religiously affiliated universities is constitutionally permissible under *Tilton v. Richardson*. The *Tilton* Court, in citing a case upholding the legality of a federal construction grant to a religiously affiliated hospital, noted that not every form of financial aid to religiously sponsored activities violates the first amendment. The thrust of my proposal does not mandate that only co-religionists are hired to do specifically religious work; rather, it develops a responsible program for employing individuals from different religious backgrounds (including co-religionists) or even no religious background to teach or to administer at the university. The primary effect of this proposal is to hire individuals, regardless of their own religious persuasion, who demonstrate the willingness and competence to support the mission of the school. This is clearly permitted under the constitution, for, as the court noted in *Tilton*, the “crucial question is not whether some benefit accrues to a religious institution” but whether the benefit’s “principal or primary effect advances religion.” The constitution permits a religiously-affiliated university that receives or applies for assistance in promoting broad educational goals to take steps to insure that the people it employs will support its distinctive educational mission.

because critical employment appointments could not be made with mission-oriented goals in mind.

And this the American legal matrix does not mandate.

Hope for the Future

While employers cannot, at one level, discriminate against would-be employees on the grounds of race, color, religion, sex, or national origin, Jesuit colleges and universities are nonetheless given statutory flexibility to select employees who share in such schools’ mission: to seek wisdom and understanding within a context of religious belief. Preferential hiring practices such as are recommended here could help promote and sustain the diversity that is important to American culture and education vis-à-vis race, ethnic heritage, color, sex, and even religion. Mission-sensitive hiring practices can acknowledge that while some private and public institutions will and ought to remain secular, others need not and should not. Diversity is enhanced, and pluralism is protected. If affirmative steps are not taken to address the erosion in religiously affiliated higher education, it is quite possible, perhaps even inevitable, that the religiously affiliated university will become extinct, not because of voluntary decision, but