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## The ministerial exception to workplace claims

Court upholds ministerial exception that protects religious organizations' autonomy from employment discrimination lawsuits

By [Dan Eaton](#) PUBLISHED: January 27, 2025 at 5:00 AM PST

The U.S. Supreme Court has ruled that the religion clauses of the First Amendment of the U.S. Constitution bar judges from second-guessing the decisions of religious institutions about ministers entrusted with carrying out their religious mission.

But what is a “religious institution” under this ministerial exception? And who counts as a “minister” barred from challenging personnel decisions?

In *Markel v. UOJCA*, the U.S. Court of Appeals for the Ninth Circuit recently addressed these and related questions.

### Background

The Union of Orthodox Jewish Congregations of America (OU) is a 501(c)(3) charitable organization. In supporting a network of synagogues, OU runs the largest kosher certification program in the United States. Revenue from the certification program support OU’s youth and educational work.

OU employed Yaakov Markel, an Orthodox Jewish man, as a mashgiach, an inspector tasked with guarding against violations of Jewish dietary laws, commonly called “keeping kosher.” To get his job, Markel had to submit a letter from an Orthodox rabbi certifying he was Sabbath observant and was knowledgeable about and compliant with kosher law.

Markel’s relationship with his supervisor, Rabbi Nachum Rabinowitz, soured. Markel resigned and sued OU and Rabinowitz, asserting claims under California law for unpaid wages and misrepresentation.

The trial court held Markel’s claims were barred by the ministerial exception. The Ninth Circuit agreed.

### What is a religious institution?

The U.S. Supreme Court has not adopted a rigid formula for determining what makes an institution religious.

From prior case law, the Markel court identified four, non-exhaustive marks of a religious institution. The institution: (1) is organized for a religious purpose; (2) is engaged primarily in carrying out that religious purpose; (3) publicly holds itself out as carrying out that religious purpose; and (4) does

not engage primarily or substantially in the exchange of goods and services for more than nominal payment.

The court concluded OU was a religious institution. The first three signifiers indicated OU was religious. It did not matter that OU generated revenue from its kosher certification program. “The acceptance of revenue does not deprive an organization with a religious mission of First Amendment protections.” The court noted OU’s revenues supported its tax-exempt religious and educational purposes.

### **What is a minister?**

The Supreme Court also has not adopted a rigid formula for deciding when an employee is a minister, nor could it as most faiths do not use that term and many lack formal ordination.

The Supreme Court has identified four relevant factors, no one of which is either necessary or sufficient. First, does the organization hold the employee out as a minister, distinct from most of its members? Second, did the employee’s role reflect significant religious training followed by commissioning? Third, did the employee accept a formal call to religious service? Fourth, did the employee’s job duties involve carrying out the religious organization’s message and its religious mission?

In determining Markel was an OU minister, the Ninth Circuit focused on the last of these factors. “Because only observant Orthodox Jews can serve as a mashgiach for the OU, and because they are necessary to carrying out OU’s religious mission of ‘ensuring the wide availability of kosher food,’ a mashgiach is a minister for purposes of the ministerial exception.”

### **What claims are barred?**

Markel could not avoid the bar of the ministerial exception by claiming his wage dispute with OU was secular. The Ninth Circuit ruled that courts will not define for a religious institution what beliefs or practices are religious and those that are not or require institutions to provide a religious justification for their decisions. “The ministerial exception encompasses all adverse personnel or tangible employment actions between religious institutions and their employees and disallows lawsuits for damages based on lost or reduced pay.”

And the same constitution-based concerns that barred Markel’s claims against OU barred his claims against his former supervisor, a religious leader.

### **Limits of ministerial exception?**

Days before the Ninth Circuit ruled in Markel, a Los Angeles federal judge declined to apply the ministerial exception summarily to dismiss pregnancy discrimination claims brought by a fundraising employee for an organization focused on providing education about the Holocaust.

In Lavy v. Am. Soc’y for Yad Vashem, the court ruled plaintiff could not be considered a minister because her duties, among other things, did not require her to be of any specific faith or involve her in any religious ceremonies. And the employer had not shown conclusively its historical educational mission made it a religious institution, as distinct from a fundraising organization.

Notwithstanding Lavy, Markel teaches that the constitutionally based ministerial exception will bar workplace claims brought against religiously grounded institutions by employees tasked with carrying out part of the faith.

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