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U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

October 5, 1983

Honorable Richard Hauser
Deputy Counsel to the President
Old Executive Office Building
Washington, D.C. 20500

Re: Madeline Ritter v. Mount St. Mary's College

Dear Dick:

As discussed, enclosed are the draft memorandum to the Solicitor General, the EEOC recommendation and the district court's decision.

Give me a call when you have decided how you want to proceed.

Sincerely,

J. Paul McGrath
Assistant Attorney General

Enclosures

DOJ must notify Court on Friday.

JPM:CBK:MJSinger:lcb
145-184-180

Washington, D.C. 20530

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Madeline Ritter v. Mount St. Mary's College, Nos. 81-1534 & 81-1603 (4th Cir.)

TIME LIMIT

The plaintiff-appellant's opening brief is due by October 11, 1983. We must advise the Court by that date whether we intend to intervene on this appeal. If we intervene on behalf of the plaintiff-appellant, our brief would also be due on that date.[1]

RECOMMENDATIONS

The Equal Employment Opportunity Commission (EEOC) recommends intervention on behalf of the plaintiff-appellant.[2]

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[1] The Civil Division was not aware of this case until September 20, 1983, when it received the Court's letter of September 12 certifying that this case "may draw into question the constitutionality of an Act of Congress affecting the public interest." See 28 U.S.C. 2403(a); F.R.A.P. 44. The Court asked that we advise it of our intentions regarding intervention by September 22. Instead, we advised the Court by telephone and confirming letter that a determination of whether or not to intervene could not be made for two or three weeks. Mr. Scott A. Richie, Counsel for the Clerk's Office, informally indicated that this delay would be permitted under the circumstances.

[2] We also solicited comments from the Civil Rights Division, the Department of Health and Human Resources (HHS), and the Department of Labor (DOL). Mr. Brian K. Landsberg of Civil Rights (633-2195) indicated that his Division would have no comment, since the statutes involved are not within that Division's area of concern. Mr. Jeffrey Claire of the HHS General Counsel's Office (245-7545) similarly indicated that his agency would have no comment. Ms. Karen Ward, Associate

(CONTINUED)

I concur.

QUESTIONS PRESENTED

1. Whether the antidiscrimination requirements of the Equal Pay Act, 29 U.S.C. 206(d), apply to a religiously affiliated institution of higher education like Mount St. Mary's College, at least where the plaintiff is a female lay teacher in the liberal arts division of the school and complains only of her alleged discriminatory treatment on the basis of sex as compared to similarly situated lay male teachers, and the school asserts no religious belief as the basis for discrimination in pay.

2. Whether the antidiscrimination requirements of the Age Discrimination in Employment Act, 29 U.S.C. 621 et seq., apply to a religiously affiliated institution of higher education like Mount St. Mary's College, at least where the 57-year-old plaintiff is a lay teacher in the liberal arts division of the school and the school asserts no religious belief as the basis for age discrimination.

STATEMENT

1. Mount St. Mary's College is the oldest private, independent Catholic institution of higher learning in the United States. See Ritter v. Mount St. Mary's College, 495 F.Supp. 724, 725 (D. Md. 1980) (copy attached). Although its ties to the Catholic Church are close and strong (ibid.), the College is not "church-operated" but only" religiously affiliated" (id. at 726 n.3).

Indeed, the religious character of this very College, among others, was the subject of scrutiny in Roemer v. Board of Public Works of Maryland, 387 F.Supp. 1282 (D. Md. 1974), aff'd, 426 U.S. 736 (1976), a case upholding the constitutionality of state grants of financial aid to private colleges -- including several religiously affiliated colleges. In Roemer, the

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[2] (FOOTNOTE CONTINUED)

Solicitor for Appellate Litigation at DOL (523-8237), indicated that her agency will probably have some comments, but DOL has not had sufficient time to consider this matter.

plurality opinion of Justice Blackmun specifically upheld the trial court's conclusion, based on the voluminous factual record, that Mount St. Mary's College was not "pervasively sectarian." 426 U.S. at 755-759. Of particular relevance here, the Court approvingly noted the following trial court findings:

> (a) "The Church is represented on [the religiously affiliated colleges'] governing boards, but, as with Mount Saint Mary's, 'no instance of entry of Church considerations into college decisions was shown.'" 426 U.S. at 755, quoting 387 F.Supp. at 1295.
>
> (b) "[A]part from the theology departments, * * * faculty hiring decisions are not made on a religious basis. At * * * Mount Saint Mary's, no inquiry at all is made into an applicant's religion." 426 U.S. at 757.

2. Madeline Ritter was a member of the lay faculty at the College. She is Catholic and was 57 years old in 1980. In 1978, she was considered for tenure along with four other faculty members -- one of whom was a priest. The College President denied tenure to Ms. Ritter at that time, along with two other lay faculty members. The tenure decision regarding the third lay faculty member was postponed, and only the priest was granted tenure. The College's Board of Trustees affirmed the President's tenure denial decision. Ms. Ritter then accepted a one-year contract, and her employment terminated in June 1980. See 495 F.Supp. at 725-726.

In the meantime, she filed an administrative complaint and brought this suit in March 1980, alleging employment discrimination in violation of Title VII of the Civil Rights Act, the Equal Pay Act and the Age Discrimination in Employment Act (ADEA). The College moved to dismiss plaintiff Ritter's claims on the ground that the antidiscrimination statutes do not apply and, constitutionally, cannot apply to religiously affiliated institutions of higher education like Mount St. Mary's.

3. On August 8, 1980, the district court ruled that plaintiff's Equal Pay Act and ADEA claims could not be pursued because of the College's religious character but that the Title VII issue should go to trial. The trial was held in April and May of 1981, and judgment was rendered in favor of the College on May 27. But the court denied the College's motion for

attorney's fees and costs by memorandum and order of June 22. The parties timely filed cross-appeals in June 1981.

The appellate proceedings were then delayed for over two years while the plaintiff sought to have the trial proceedings transcribed. The Fourth Circuit finally issued a briefing schedule by order of September 6, 1983.

DISCUSSION

This case presents difficult questions in a sensitive, delicate and unsettled area of the law.

1. At issue at this stage of the appeal is whether the Equal Pay and Age Discrimination Acts should be construed to apply to religiously affiliated colleges and, if so, whether such application of the statutes is constitutional under the Establishment and Free Exercise Clauses of the First Amendment.[3] The district court has, in effect, announced a blanket exemption from these antidiscrimination statutes for religiously affiliated colleges. The court did not limit this exemption to the employer-teacher relationship, nor did it distinguish between professional and nonprofessional employees of such colleges.[4] Rather, under the district court's analysis, these

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[3] This case is also likely, at a later stage, to raise the question of the constitutionality of applying Title VII to religiously affiliated colleges like Mount St. Mary's. The College raised this issue in its initial motion to dismiss and will probably renew its argument on this point as an alternative defense of the district court judgment in its favor on the Title VII claim. EEOC has previously successfully argued that religiously affiliated colleges, and other organizations, are not entitled to a blanket exemption from Title VII coverage on First Amendment grounds. See EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981).

[4] The district court does hint that there might be room for drawing distinctions between professional and nonprofessional employees in this area (495 F.Supp. at 728 n.6), but the

(CONTINUED)

antidiscrimination statutes simply must not be read as extending to religiously affiliated college employers at all. And, as the EEOC warns in its recommendation (EEOC Ltr. at 1, 4), the district court's broad rationale could readily be invoked by other kinds of religiously affiliated organizations --such as hospitals and social service agencies -- to insulate themselves from the requirements of these antidiscrimination laws.

The broad blanket exemptions announced by the district court are not likely to survive appellate review. But the College could probably make a forceful argument in favor of a narrower exemption -- limited to the special school-teacher relationship. And the plaintiff could probably make an equally forceful, or possibly more forceful, argument against such an exemption --at least where, as here, the College does not assert any religion-based reason to justify the alleged discrimination on the basis of sex and age.[5] Colorable arguments could be made on either side of this case because the statutory provisions themselves do not address these matters; there is no controlling precedent on these particular issues; and the legislative history is not very instructive.[6]

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[4] (FOOTNOTE CONTINUED)

decision makes no effort to draw any lines more narrow than a per se rule of nonapplicability to religiously affiliated colleges.

[5] The district court recognized that plaintiff's allegation was not that she was denied tenure to enable the College to grant tenure to a priest. 495 F.Supp. at 729. Rather, the allegation is that religion played no role in the decision against plaintiff's grant of tenure (ibid.), and the College has argued that the denial of tenure was based on her "professional qualifications" (id. at n.9).

[6] The district court indicated that it conducted an independent examination of the legislative history and found no indication that Congress considered the question of the Equal Pay Act or ADEA's applicability to religious institutions. See 495 F.Supp. at 727-728 n.5, 728 n.7. The plaintiff did find some evidence of congressional intent, however, based on the narrow exception for employees of a "religious or nonprofit educational

(CONTINUED)

2. The government's basic choices, then, are (1) to decline this opportunity to intervene, (2) to intervene in support of the College's and district court's construction of the statutes, or (3) to endorse EEOC's recommendation and intervene in support of the plaintiff's position. We think that the third alternative represents the best course of action for the government in this case.

a. The first option -- declining intervention -- offers the obvious advantage of allowing more time for consideration of the issues. But EEOC has already determined the position that it wants the government to take, and it is the agency charged with primary responsibility for administering these antidiscrimination laws. Moreover, EEOC has indicated that it stands ready and is eager to file a brief by the current October 11, 1983 deadline in this case. Accordingly, we should not decline to intervene unless there are very serious doubts about the government's position. Moreover, we are not precluded from reconsidering the government's position in light of the ultimate decision of the Fourth Circuit in this case.

b. The second option -- siding with the College -- would place the government in a very awkward position. In order to argue for a construction of the antidiscrimination statutes that does not reach religiously affiliated colleges, we would be required to concede at the outset that the broader statutory construction would pose "a significant risk that the First Amendment will be infringed." NLRB v. Catholic Bishop of

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[6] (FOOTNOTE CONTINUED)

conference center" in the Fair Labor Standards Act (FLSA), of which the Equal Pay Act is a part. See 29 U.S.C. 213(a)(3), discussed at 495 F.Supp. at 727. And the EEOC, in addition, points to the congressional intent reflected by 29 U.S.C. 203(r)(2), which expressly indicates that the FLSA applies to not-for-profit educational institutions. See EEOC Ltr. at 3. It is conceivable that an exhaustive review of the legislative history of the FLSA, Equal Pay Act and ADEA could produce some additional information, although EEOC has informally advised us that there is nothing more to be gained from such an undertaking. What little legislative history there is bearing on this matter is discussed in the EEOC Shenandoah brief, at 2-7 (attached).

Chicago, 440 U.S. 490, 502 (1979). Once we have made such a concession, we would be hard-pressed to defend the constitutionality of the statutes if the Fourth Circuit were to accept plaintiff's (and EEOC's) view that Congress did intend to include religiously affiliated colleges within the scope of the Equal Pay Act and the ADEA. We would be compromising our ability to defend the constitutionality of those statutory provisions, even though we would otherwise be able to advance substantial arguments in support of their constitutionality. We should not allow ourselves to be trapped in that awkward position, especially since EEOC's argument to the contrary has substantial legal merit.

c. The third option -- intervening in support of the plaintiff's position -- has several advantages. It adopts the position urged by the agency charged with primary responsibility for administering the statutes in question. It enables the government to assume the familiar position of advocating the broadest possible reach of a remedial statute consistent with the Constitution. And it probably does most accurately reflect the intent of Congress to eliminate sex and age discrimination from the workplace.

3. The basic legal arguments that would be made by EEOC in support of plaintiff's position are outlined in the accompanying EEOC recommendation and in the attached pleadings filed by plaintiff in the district court. See especially briefs filed by DOL and EEOC in Marshall v. Shenandoah Baptist Ministries Ass'n, Civil Action File No. 78-0115 (W.D. Va.). A few additional comments about EEOC's proposed argument are in order.

a. The government need not, and should not, argue that the Equal Pay Act and ADEA prohibit sex and age discrimination in all circumstances involving employees of religiously affiliated colleges. This case does not involve employees of a church-operated seminary, or discrimination in the pay of nuns as compared to priests, or lay teachers as compared to priests. Any number of troublesome hypotheticals can be imagined in this delicate and sensitive area of the law. But all that is at issue here is the alleged discriminatory treatment of a female lay teacher, as compared to other similarly situated lay teachers, in the liberal arts division of an independent, though church-affiliated, college. And the College does not contend that the alleged discrimination results from any religion-based belief or practice.

The applicability of the antidiscrimination statutes in this context does not foster excessive government entanglement with

religion in violation of the Establishment Clause. And it does not burden the College's religious beliefs in violation of the Free Exercise Clause. Moreover, even if any incidental burden on the free exercise of religion might be identified (though none has been suggested), the government has a compelling interest in eradicating sex and age discrimination from the workplace. Thus, the government has a substantial argument that plaintiff may properly pursue her statutory antidiscrimination remedies against the College in the factual context of this particular case.

b. It should be noted that a federal district court in Tennessee has specifically rejected the reasoning and holding of Ritter on the Equal Pay Act issue. See Russell v. Belmont College, 554 F.Supp. 667 (M.D. Tenn. 1982). The decision in Russell appears well-researched and well-reasoned. It will definitely aid our argument in the Fourth Circuit. See also Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879 (7th Cir.), cert. denied, 347 U.S. 1013 (1954) (FLSA applies to religiously affiliated publishing house); Marshall v. Pacific Union Conference of Seventh Day Adventists, 14 EPD ¶7806 (C.D. Calif. 1977) (FLSA and Equal Pay Act applies to religious institution).

c. The College might seek support for its position from the decision in St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981), in which the Supreme Court held that the Federal Unemployment Tax Act (FUTA) does not apply to church-operated schools. That case is distinguishable from this one in two important respects. First, the schools involved in that case had "no separate legal existence from a church * * *." 451 U.S. at 784. Second, the Act contained a specific exemption for employees of a church. The Court merely held that the employees of the church-owned and operated schools fell squarely within that specific statutory exemption.

d. EEOC indicates that its ADEA argument will rely heavily on the analogy between the Age Act and Title VII, as recognized by the Supreme Court in Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979). In this connection, it should be emphasized that the definition of "employer" in the ADEA, 29 U.S.C. 630(f), and the definition of that same word in Title VII, 42 U.S.C. 2000e(b), employ essentially the same statutory language.

At the same time, the relationship between the ADEA and the FLSA should not be ignored. Indeed, as the Supreme Court noted in Lehman v. Nakshian, 453 U.S. 156, 166-167 (1981), Section 7

of the ADEA, U.S.C. 626, expressly incorporates FLSA enforcement powers, remedies and procedures.[7] A persuasive argument on the FLSA/Equal Pay Act issue in this case may therefore carry over to the ADEA issue.

CONCLUSION

For the foregoing reasons, I recommend that the government intervene in support of the plaintiff-appellant in this case.

J. PAUL McGRATH
Assistant Attorney General
Civil Division

By:

Carolyn B. Kuhl
Deputy Assistant Attorney General

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[7] See also Oscar Mayer & Co. v. Evans, supra, 441 U.S. at 766 (Blackmun, J., concurring) ("I could be persuaded * * * that ADEA proceedings have their analogy in Fair Labor Standards Act litigation and not in Title VII proceedings").

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

September 22, 1983

Richard Willard
Deputy Assistant
Attorney General
Civil Division
Department of Justice

Re: Intervention in Ritter v.
Mount St. Mary's College
No. 81-1534(L) and 81-1603

Dear Mr. Willard:

On September 12, 1983, the United States Court of Appeals for the Fourth Circuit, pursuant to 28 U.S.C. § 2403(a) and Rule 44, Fed. R. App. P., wrote the Attorney General to advise him that this case "may draw into question the constitutionality of an Act of Congress."1/ The letter also instructed the government to inform the court, by September 22, 1983, if it wished to intervene and participate in the appeals. We understand that the civil division has verbally obtained from the court a two week extension for its response.

The issues involved here concern coverage of the Age Discrimination in Employment Act, 29 U.S.C. 621 et seq. (1967) and the Equal Pay Act, 29 U.S.C. 206(d) amendments to the Fair Labor Standards Act, 29 U.S.C. 201 et seq. (1963). Specifically, the issues are whether educational institutions operated by religious groups are exempt from the provisions of these Acts. If the district court's reasoning is upheld, the issue is much broader and may call into question coverage of any church-affiliated activities such as hospitals, social service agencies and other business ventures. We believe that such institutions are not excluded from coverage.

Since 1979, the EEOC has been responsible for enforcing both the ADEA and the EPA. (E.O. 12144, 44 Fed. Reg. 37193 (1979)). However, whenever constitutional issues may arise in litigation under these acts, the EEOC must notify your department. In the past, as in EEOC v. Wyoming, ___F. Supp ___ 27 FEP Cases 1291 (D.C. Wyo. 1981) rev'd and remanded 51 U.S.L.W.

1/ There are two appeals being considered together. One involves a denial of attorneys' fees with which we are not at present concerned.

145-184-180

4219 (March 2, 1983), the Commission has taken lead responsibility in the conduct of the litigation. See also EEOC v. Allstate Insurance Co., No. J82-0186(B) (S.D.Mo.), and other cases raising the INS v. Chadha, 51 U.S.L.W. 4907 (June 23, 1983), issues. We propose that the same practice be followed here, whereby the Commission will prepare the initial brief and will submit it to the civil division for comment so that the final brief will represent the views of both Department of Justice and the EEOC.

At the outset, it should be noted that the specific issues raised on appeal do not involve constitutional questions but merely ones of statutory interpretation, whether Congress intended these statutes to apply to religious institutions. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499 (1979). Only if we are successful in overturning the district court rulings will there be any possibility of a constitutional issue arising. Id. The issue would involve the Religion Clauses of the First Amendment, an issue we have successfully litigated in the Title VII context. See e.g. EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir 1982), and EEOC v. Southwest Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981). The General Counsel will recommend to the full Commission that the EEOC intervene in this case to defend the jurisdiction of these statutes.

The instant action was brought by a fifty-seven year old former faculty member of Mount St. Mary's College, a private institution affiliated with the Catholic Church. She alleged that she had been denied tenure in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and the ADEA, and that she had not been compensated at a rate equal to similarly situated males, in violation of the EPA. On August 8, 1980, the United States District Court for the District of Maryland entered summary judgment for lack of jurisdiction regarding the ADEA and EPA claims, but ordered that the Title VII claims go to trial.2/ Ritter v. Mount St. Mary's Hospital, ___F.Supp___, 23 FEP Cases 734 (D.C. Md 1980) (a copy of the decision is attached).

2/ The district court, after trial, on May 21, 1981, ruled against the plaintiff on the merits of her Title VII claim. We are not, at this time, concerned with this aspect of the appeal. However, if the college raises the issue of whether there is jurisdiction under Title VII over church-affiliated colleges, the Commission will address that issue in its brief.

The court based its ruling regarding both the ADEA and EPA claims on its understanding of the Supreme Court's ruling in NLRB v. Catholic Bishop of Chicago, supra 440 U.S. 490. In Catholic Bishop the Court held that, before a court may exercise jurisdiction in cases such as this, there must be a determination that there was a "clear expression of an affirmative intention of Congress" to include religious institutions within the scope of the statute. Id. at 504. The court held that neither statute nor their respective legislative histories evidence any such intent. We disagree.

We plan to argue that the intent of Congress to include religious institutions under the coverage of the EPA is clear from section 3(r)(2) of the FLSA, 29 U.S.C. § 203(r)(2), which indicates that schools such as Mount St. Mary's are covered by the Act. It provides that the Act covers, inter alia, the activities of any person or persons:

> in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

(Emphasis supplied). We believe the inclusion of private, not-for-profit educational institutions strongly indicates Congress' intent to cover religious educational institutions since they make up the bulk of that category. This inference is supported by a 1977 amendment to section 13(a)(3), 29 U.S.C. § 213(a)(3), of FLSA which, for the first time, added the emphasized language below. That section, in part, excludes:

> any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year. . . .

We submit that Congress would not have amended the FLSA to specifically exempt seasonal religious educational conference centers if all religious educational institutions were already exempt under the Act. Therefore, the inference that educational institutions like Mount St. Mary's are covered by the Act is compelling.

The coverage of the ADEA emanates from Title VII rather than from the FLSA since its coverage and proscriptions were taken from Title VII. See Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979). The only significant difference between the two statutes, with regard to coverage, is that the ADEA does not provide an exception similar to section 702 of Title VII which clearly establishes that the statute applies to most employment practices of religious institutions. That section is an exemption to the coverage of Title VII which provides that religious institutions may discriminate on the basis of religion in most of their employment decisions. As the district court in this case and other courts have noted, by negative implication, this provision makes clear that religious institutions are covered by Title VII regarding other forms of discrimination. See e.g. EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980). The reason the ADEA has no similar exemption is because it contains a broader, all-encompassing, exemption in Section 4(f), 29 U.S.C. § 624(f), that permits differential treatment as long as it "is based on reasonable factors other than age." Inclusion of an exemption such as found in §702 of Title VII would therefore have been redundant. Since Title VII applies to religious institutions, and since the ADEA was drafted to parallel Title VII, we believe there is no justification for more limited coverage under the ADEA.

The effect of widespread application of the reasoning of the district court is as drastic as it is obvious. While this case deals with a tenure decision, the approach of the trial court would exclude from the EPA a broad range of practices, including differential payment, on the basis of sex, of housekeeping and janitorial personnel, and would allow discrimination in wages for administrative personnel, as well as the professorial staff. The same broad immunity would occur in the age discrimination area. Finally, as noted above, the decision would apply to church affiliated hospitals, social service agencies and other business ventures, excluding such institutions from the scope of the ADEA and EPA. We do not believe Congress intended such a result.

Sincerely,

Philip B. Sklover

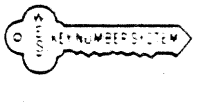
PHILIP B. SKLOVER
Associate General Counsel
Appellate Services Division
Office of General Counsel

Bros. by disguising the warranty of workmanlike performance and implied obligation of reasonable performance as an independent basis of tort liability between employer and platform owner.

[2] Whatever responsibility Houma had with respect to its employees' safety, it is clear that it was a duty owed to its employees and not Mesa. Assuming an independent tort duty did exist between an employer and a platform owner, the employer's obligation to indemnify the platform owner the damages it is required to pay the injured employee arises "on account of" the employee's injury.[9] In the absence of a contractual indemnity provision, "there simply exists no underlying tort liability upon which to base a claim for indemnity against the employer."[10] *Berry Bros.*, 377 F.2d at 515.

CONCLUSION

Based on the foregoing legal authorities, the Court hereby GRANTS, the motion of Houma Welders, Inc., for summary judgment.



Madeline RITTER

v.

MOUNT ST. MARY'S COLLEGE.

Civ. A. No. N–80–632.

United States District Court,
D. Maryland.

Aug. 8, 1980.

Plaintiff, a lay female teacher who was refused tenure, brought action against religious, nonprofit college alleging sex and age discrimination. Upon college's motion to dismiss, which was treated as a motion for summary judgment, the District Court, Northrop, Chief Judge, held that: (1) plaintiff did not have a claim under Equal Pay Act or Age Discrimination in Employment Act but did have a claim under Title VII, and (2) material issue of genuine fact existed as to whether religion played any role in decision of defendant which granted tenure to priest, to not grant tenure to lay female teacher, precluding summary judgment in favor of the college on First Amendment grounds on teacher's Title VII claim.

Order in accordance with opinion.

1. Civil Rights ⇐9.10

In enacting Title VII, Congress demonstrated a clear, affirmative intention to include religiously affiliated schools within its scope and only exempt them from liability for religious discrimination; thus, a lay female teacher denied tenure by religious, nonprofit educational institution had a claim under Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Labor Relations ⇐20.5, 1333

Neither Equal Pay Act nor Age Discrimination in Employment Act expressed a clear, affirmative intention to include within their scope religious, nonprofit educational institutions; thus, female teacher denied tenure at such a college had no claim under those Acts. Fair Labor Standards Act of 1938, § 6(d) as amended 29 U.S.C.A. § 206(d); Age Discrimination in Employment Act of 1967, §§ 2–17, 29 U.S.C.A. §§ 621–634.

3. Federal Civil Procedure ⇐2497

Material issue of genuine fact existed as to whether religion played any role in

9. 33 U.S.C. § 905 provides, in pertinent part:
The liability of an employer prescribed in section 904 [for compensation] shall be exclusive and in place of all other liability of such employer to the employee,
and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death

10. This holding was most recently reaffirmed in *Olsen v. Shell Oil Co.*, 593 F.2d 1099, 1103–1104 (5th Cir. 1979).

decision of religious, nonprofit educational institution, which granted tenure to priest, to deny tenure to lay female teacher, precluding summary judgment in favor of the college on First Amendment grounds on teacher's Title VII claim. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; U.S.C.A.Const. Amend. 1.

James M. Kramon, Baltimore, Md., Dona S. Kahn and JoAnne Dellaverson, Philadelphia, Pa., for plaintiff.

Henry R. Lord and Neil J. Dilloff, Baltimore, Md., for defendant.

NORTHROP, Chief Judge.

Plaintiff, Madeline Ritter, a fifty-seven year-old Catholic, brought this action against the defendant, Mount Saint Mary's College (hereinafter the College), alleging sex and age discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; the Equal Pay Act of 1963, 29 U.S.C. § 206(d); and the Age Discrimination in Employment Act (hereinafter the ADEA), 29 U.S.C. §§ 621-634. The matter is presently before the Court on defendant's motion to dismiss the complaint under Rule 12(b)(1), (b)(2), and (b)(6) of the Federal Rules of Civil Procedure. A hearing on the motion was conducted before this Court on August 5, 1980. Because affidavits and other materials outside the complaint have been presented, the Court will treat the defendant's motion as a motion for summary judgment. Fed.R.Civ.P. 12(b).

Plaintiff was a lay faculty member at the College, which is the oldest private, independent Catholic institution of higher learning in the United States. The College's objectives are to provide a liberal arts education and a Catholic experience for its students. All undergraduate students are required to take at least fifteen semester credit hours in philosophy, ethics, and theology prior to graduation. Students are encouraged to attend regular church services. Approximately 90% of the student body and 80% of the faculty are Catholic. In 1978, out of a total faculty of 76, there were 21 full-time priests and one nun on the faculty. Since its inception in 1808, the College has had a policy of recruiting and retaining qualified priests on its faculty. In an affidavit, the Chairman of the Board of Trustees of the College, the Rev. Msgr. Andrew J. McGowan, gave the following reasons for this policy:

> The reasons for the policy of recruiting and retaining qualified priests on the College faculty are many: priests provide a spiritual dimension to the College consistent with its history, tradition and mission; priests provide spiritual services and perform other clerical functions for which they receive no extra compensation; the College pays substantially less salary to priests and, accordingly, financial considerations militate in favor of employing priests over lay faculty; and priests are necessary to teach the required theology courses offered by the College.

Affidavit of Rev. Msgr. Andrew J. McGowan in Support of Motion to Dismiss at 2.

Plaintiff was considered for tenure in late 1978 along with four other faculty members, of which one was a priest—Father Vincent P. Malloy. On December 20, 1978, plaintiff was advised by the President of the College, Dr. Robert J. Wickenheiser, that she had been denied tenure. Two other lay faculty members were also denied tenure, and a tenure decision regarding the remaining lay faculty member had been postponed. Father Malloy was given tenure.[1] Plaintiff appealed her denial of tenure to the College's Board of Trustees,[2] which affirmed the President's decision. In late March 1979, plaintiff accepted a one-year terminal contract at the College, which

1. Father Malloy was subsequently appointed Vice President of the College.

2. The Board of Trustees acted through a quorum of its Executive Committee, of which a majority were clergy (including the Archbishop of Baltimore who serves on the Executive Committee *ex officio*). At that time, the By-Laws of the College required a majority of the Board to be composed of clergymen and specifically included the Archbishop of Baltimore.

expired in June 1980. After having apparently complied with the administrative prerequisites of Title VII, plaintiff filed this action in March 1980.

The College contends that 1) this Court lacks personal jurisdiction over the College: 2) this Court lacks subject matter jurisdiction over the case; and 3) the complaint fails to state a claim upon which relief may be granted. The College bases these contentions on the grounds that Title VII, the Equal Pay Act, and the ADEA do not express a clear, affirmative intention to include within their scope religious, non-profit, educational institutions such as the College. Assuming, *arguendo*, these statutes do express such an intention, the College submits that the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution prohibit this Court from considering the plaintiff's claims:

> The College's rights under the Establishment Clause would be violated because of excessive governmental entanglement into the College's internal decisionmaking and administrative affairs with respect to its faculty, including clergymen, and the policy of the College in seeking to retain qualified priests on its faculty. The College's rights of free exercise of its religious practices will be unconstitutionally burdened, *inter alia*, by the Court's review of (1) the granting of tenure to a priest, Reverend Malloy, as opposed to Mrs. Ritter, (2) clergy holding tenured positions in the faculty, (3) clergy holding administrative positions, (4) the tenure policies of the College as they may be influenced by consideration of clergymen eligible for tenure, and (5) faculty salaries of lay and clerical faculty.

Motion to Dismiss at 2–3.

The starting point for this Court's analysis must be *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979), where the Supreme Court held that church-operated schools[3] teaching both religious and secular subjects were not subject to the jurisdiction of the National Labor Relations Act. The Court stated that where the exercise of a federal regulatory statute over a religious institution raises serious first amendment questions, a court must first determine whether the statute provides jurisdiction over the institution. The test used to make this determination is whether there was a "clear expression of an affirmative intention of Congress" to include religious institutions within the scope of the statute. 440 U.S. at 504, 99 S.Ct. at 1320. In *Catholic Bishop*, the Supreme Court found "no consideration" by Congress of church-operated schools in either the Act or its legislative history. *Id.* The Court therefore excluded such schools from the jurisdiction of the Act.

[1] Title VII prohibits an employer from discriminating against an employee on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). Stressing the absence of any mention of religious institutions from the definition of "person" or "employer" in Title VII, 42 U.S.C. § 2000e(a) & (b), the College maintains there was no clear, affirmative intention of Congress to include religious institutions within the ambit of Title VII.

The courts which have construed the applicability of Title VII to religious institutions in light of *Catholic Bishop*, however, have concluded that Title VII does apply to religiously affiliated institutions. *Dolter v. Wahlert High School*, 483 F.Supp. 266 (N.D. Iowa 1980); *EEOC v. Pacific Press Publishing Ass'n*, 482 F.Supp. 1291 (N.D.Cal.1979). Section 702 of Title VII, 42 U.S.C. § 2000e-1 provides an exemption for religious organizations to discriminate on the basis of religion:

> This subchapter shall not apply . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such cor-

3. Although the College is not "church-operated," its status as a religiously affiliated school suffices to invoke *Catholic Bishop* in analyzing this case. *See NLRB v. Ford Central High School*, 623 F.2d 818 (2d Cir. 1980).

poration, association, educational institution, or society of its activities.

Section 703 of Title VII, 42 U.S.C. § 2000e-2(e)(2) provides a similar exemption:

> [I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning 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 school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Unless this Court were to regard these statutes as mere surplusage, it is thus clear that Congress exempted religiously affiliated schools only from religious discrimination.[4] *Accord McClure v. Salvation Army*, 460 F.2d 553, 557–58 (5th Cir.), *cert. denied*, 409 U.S. 896, 93 S.Ct. 132, 34 L.Ed.2d 153 (1972) (pre-*Catholic Bishop* analysis). The only case to the contrary, *EEOC v. Mississippi College*, 451 F.Supp. 564 (S.D.Miss.), *appeal docketed*, No. 78-3123 (5th Cir. Sept. 27, 1978), is less than persuasive in its reasoning. This Court therefore concludes that Congress has shown a clear, affirmative intention to include religiously affiliated schools within the scope of Title VII.

[2] Turning to the Equal Pay Act, 29 U.S.C. § 206(d)(1), this Court agrees with the defendant that under the *Catholic Bishop* test Congress did not demonstrate a clear, affirmative intention to include church-affiliated schools within the Act's jurisdiction. Plaintiff has not pointed to anything in the legislative history of the Act to indicate this intention. She does point to an exemption in the Fair Labor Standards Act, which governs the Equal Pay Act, contained at 29 U.S.C. § 213(a)(3). This exemption applies to "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center" operated on a seasonal basis. Plaintiff makes the superficially appealing argument that if Congress had intended to exempt all religious organizations from the ambit of the Equal Pay Act, there would have been no need to carve out an exception for this narrow type of religious organization.

This Court believes, however, that this statutory reference fails to meet the "clear, affirmative intention" requirement of *Catholic Bishop*. Although this Court employed a similar "surplusage" rationale in its analysis of Title VII, the sweeping language of 42 U.S.C. § 2000e-1 and the inclusive language of 42 U.S.C. § 2000e-2(e)(2) permitted such an interpretation. To translate the narrow, non-inclusive exemption contained in § 213(a)(3) into the broad proposition that Congress expressed a clear, affirmative intention to have the Equal Pay Act applied to religious institutions would do violence to the *Catholic Bishop* holding. While § 213(a)(3) certainly provides a *clue* to Congress' intent, it is far from conclusive.[5]

4. Had Congress intended to exempt religious organizations from other forms of discrimination, the United States Court of Appeals for the District of Columbia has noted in strong dicta that section 702 might be constitutionally infirm. *King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C.Cir.), *cert. denied*, 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1974). *Cf. Catholic Bishop, supra* at 518 n.11, 99 S.Ct. at 1321 n.11 (Brennan, J., dissenting) (majority's construction of congressional intent raises establishment clause question).

5. Neither party has supplied the Court with any meaningful research on the legislative history of the Equal Pay Act of 1963 or the Fair Labor Standards Amendments of 1977 which created the exemption found at 29 U.S.C. § 213(a)(3). This Court's own examination of the congressional committee reports and debates of the Equal Pay Act of 1963, *see* H.R. Rep.No. 309, 88th Cong., 1st Sess., *reprinted in* [1963] U.S.Code Cong. & Admin.News, pp. 687, 687 *et seq.*; S.Rep.No. 176, 88th Cong., 1st Sess. (1963); 109 Cong.Rec. 8892 & 8913-8917 (1963); 109 Cong.Rec. 9192–9218 & 9263 (1963); 109 Cong.Rec. 9761-9762 (1963), and the Fair Labor Standards Amendments of 1977, *see* H.R.Rep.No. 95-521, 95th Cong., 1st Sess., *reprinted in* [1977] U.S.Code Cong. & Admin.

Plaintiff insists that application of the Equal Pay Act to the College would not interfere with the College's religious mission but, rather, would only involve a mechanical comparison of faculty salaries. This argument is flawed. There is no suggestion in *Catholic Bishop* that the courts should engage in *ad hoc* determinations of whether a federal regulatory statute should apply to one bona fide religiously affiliated school while not applying to another.[6] Applying statutes on such a hodgepodge basis would lead to chaotic and inconsistent results. Inasmuch as clerics are paid lower salaries than lay faculty at the College, the threat of governmental intrusion into first amendment areas does not, at first blush, seem serious (although defendant has not yet addressed this point). The Court cannot, however, look at this one particular religiously affiliated school in isolation. Unquestionably, there are other such institutions that base their salary scales upon religious criteria. *See also* B. Schlei & P. Grossman, *Employment Discrimination Law*, at 218 (1976) ("[M]any religious institutions prefer members of their religion for all jobs, but will offer temporary employment, frequently at a lower rate of pay, to nonmembers when there are insufficient members interested in employment.").

The two cases plaintiff cites in support of her position are of no assistance. *Marshall v. Pacific Union Conference of Seventh-Day Adventists*, 14 Empl.Prac.Dec. ¶ 7806 (C.D. Cal.1977) was decided prior to *Catholic Bishop*. In dictum, *EEOC v. Pacific Press Publishing Ass'n*, 482 F.Supp. 1291, 1308 (N.D.Cal.1979) indicates its approval of *Pacific Union*, but it, too, contains no *Catholic Bishop* analysis. This Court must therefore conclude, under *Catholic Bishop*, that Congress did not demonstrate a clear, affirmative intention to include religiously affiliated schools within the sweep of the Equal Pay Act of 1963.

Applying *Catholic Bishop* to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, this Court must also conclude that Congress did not express a clear, affirmative intention to include religious educational institutions under the ADEA. Plaintiff has not pointed to anything in the Act or its legislative history to indicate such an intention.[7] Instead, she urges this Court to construe the ADEA in conjunction with Title VII for "public policy reasons," citing *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979). *Oscar Mayer*, however, involved provisions of the ADEA and Title VII that are virtually *in haec verba*. There is no provision in the

News, pp. 3201, *et seq.*; S.Rep.No. 95-440, 95th Cong., 1st Sess. (1977); H.R.Conf.Rep. No. 95-711, 95th Cong., 1st Sess. (1977); S.Conf.Rep.No. 95-497, 95th Cong., 1st Sess., *reprinted in* [1977] U.S.Code Cong. & Admin.News, pp. 3201, 3254; 123 Cong.Rec. 29430-29484 (1977); 123 Cong.Rec. 32,893-32,909 (1977); 123 Cong.Rec. S17,252-S17,254 (daily ed. Oct. 19, 1977); 123 Cong.Rec. H11,327-H11,338 (daily ed. Oct. 20, 1977), uncovered no indication of any congressional consideration of religious institutions in general.

6. There is language in *Catholic Bishop* that might allow courts to draw distinctions between professional and non-professional employees of a religious institution. *See Catholic Bishop, supra*, at 501, 99 S.Ct. at 1319 ("critical and unique role of the teacher in fulfilling the mission of a church-operated school"); *EEOC v. Pacific Press Publishing Ass'n*, 482 F.Supp. 1291, 1302, 1310 & 1314 (N.D.Cal.1979). *Accord, Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F.Supp. 1363, 1368 (S.D.N.Y.1975); *NOW v. President and Board of Trustees of Santa Clara College*, 16 FEP Cases 1152, 1156 (N.D.Cal.1975); Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Colum.L.Rev. 1514, 1544-46 (1979). *EEOC v. Southwestern Baptist Theological Seminary*, 485 F.Supp. 255 (N.D.Tex.1980) represents a special situation due to the pervasively religious and virtually cloistral environment of the seminary.

7. Neither party has supplied the Court with any meaningful research on the legislative history of the ADEA. This Court's own examination of the congressional committee reports and debates on the ADEA revealed no indication of any congressional consideration of religious institutions. *See* H.R.Rep.No. 805, 90th Cong., 1st Sess., *reprinted in* [1967] U.S.Code Cong. & Admin.News, pp. 2213, *et seq.*; S.Rep.No. 723, 90th Cong., 1st Sess. (1967); 113 Cong.Rec. 34,738-34,755 (1967); 113 Cong.Rec. 35,053-35,057 (1967); 113 Cong.Rec. 35,228-35,229 (1967); 113 Cong.Rec. 31,248-31,257 (1967).

ADEA similarly worded as 42 U.S.C. §§ 2000e-1 or 2000e-2(e)(2).[8]

[3] Having determined that Title VII applies to religious institutions, the Court must now turn to the question of whether its exercise in this case would violate the guarantees of the Religion Clauses of the First Amendment.

In support of its motion, defendant maintains that examining its decision to deny plaintiff tenure would intrude into the College's religious activities. Specifically, the College argues that questioning its decision to grant tenure to a priest, Father Malloy, as opposed to plaintiff, infringes on the College's religious policy of granting tenure to qualified priests whenever possible. Plaintiff strenuously denies she is contending that Father Malloy was given tenure *instead of* her. She indicates there was no limitation on the number of tenured positions in late 1978. Because Father Malloy was in the Theology Department (where all faculty were, and are, priests), and plaintiff was in the Education Department, presumably they were not competing for the same teaching position. The question, plaintiff suggests, is not why Father Malloy was granted tenure *instead of* her, but why she was not *also* granted tenure.

Were this a case where a priest was granted tenure *instead of* a lay person because of the College's religious policy of promoting priests, such a decision could well be shielded from judicial scrutiny by the first amendment. Questioning this policy could result in excessive governmental entanglement, because it might "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Catholic Bishop, supra* at 502, 99 S.Ct. at 1320. The record is unclear, however, as to whether such was the case here. There is nothing conclusive in the record verifying whether there was any limitation on the number of faculty who could be granted tenure. Although defense counsel indicated such a limitation at oral argument, he pointed to nothing in the record to support this contention.

Plaintiff does invite comparisons between herself and Father Malloy in her complaint of discrimination filed with the Maryland Commission on Human Relations, her charge filed with the Equal Employment Opportunity Commission, and her complaint in this case. *See Complaint* at 3 & 5; Exhibits A & B to *Defendant's Reply to Plaintiff's Memorandum in Opposition to Motion to Dismiss*. Despite these comparisons, nevertheless, the grounds for the denial of tenure are unclear.

Roemer v. Board of Public Works of Maryland, 387 F.Supp. 1282 (D.Md.1974) (three-judge panel), *aff'd* 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976) involved the constitutionality of a Maryland statute providing annual, noncategorical grants to private colleges, among them religiously affiliated institutions. The College was a defendant in that case. A reading of the district court's Findings of Fact suggests that apart from the Theology Department, religion plays no part in faculty tenure decisions at Mount Saint Mary's College. *See* 387 F.Supp. at 1294. This finding was noted by the Supreme Court. *See* 426 U.S. at 757, 96 S.Ct. at 2350. Although the defendant has scurried to limit the applicability of the *Roemer* decision to this case, it does not dispute this finding.

If religion played no role in the decision not to grant plaintiff tenure,[9] then the Court fails to see how the application of Title VII to this case would violate the first amendment. *Cf. EEOC v. Southwestern Baptist Theological Seminary*, 485 F.Supp. 255, 258 (N.D.Tex.1980) (faculty tenured on

8. Although plaintiff has not made the argument, one might surmise that if Congress intended for Title VII to apply to religious institutions, it would also intend for the Equal Pay Act and the ADEA to apply likewise. Such *conjecture*, however, does not meet the exacting standards of the *Catholic Bishop* "clear, affirmative intention" test

9. On August 4, 1980, the defendant filed a Motion for Summary Judgment, which indicates that the College based its denial of tenure to plaintiff upon her professional qualifications.

predominantly religious criteria). In any event, genuine issues of material fact are apparent and summary judgment is thus inappropriate. *See NOW v. President and Board of Trustees of Santa Clara College*, 16 FEP Cases 1152, 1156 (N.D.Cal.1975) (motion to dismiss).

A separate order in conformance with these rulings will be entered.

John B. ANDERSON, Stephen P. Kelley, James D. Harrington, and Gerald M. Eisenstat, Plaintiffs,

v.

Rodney S. QUINN, in his official capacity as Secretary of State of the State of Maine, Defendant.

Civ. No. 80-0176 P.

United States District Court, D. Maine.

Aug. 11, 1980.

Suit was brought to challenge the constitutionality of a Maine statute which required independent candidates for the United States Presidency to file nominating petitions with the Secretary of State of Maine by April 1, 1980. Plaintiffs sought a declaratory judgment that the statute was unconstitutional and permanent injunctions enjoining enforcement of statute against them. The District Court, Gignoux, J., held that the April 1 filing deadline for independent candidates for the Presidency imposed substantial and unequal burdens on plaintiffs' rights of association and franchise and was not justified by any compelling state interest and, therefore, the state was unconstitutional and could not be enforced against plaintiffs.

Judgment for plaintiffs.

1. Constitutional Law ⇐91, 225.2(3)
Elections ⇐22

The restriction on an independent presidential candidate's access to the Maine ballot imposed by Maine statutory requirement that such independent candidate file a nominating petition by April 1 of the election year substantially burdened associational and franchise rights of independent candidates and their supporters and also effected an invidious discrimination since Maine did not require party candidates for the presidency to qualify or declare their candidacies by any particular date; therefore, in absence of any compelling state interest the statute was unconstitutional and unenforceable. 21 M.R.S.A. § 494, subd. 9; U.S.C.A. Const. Amends. 1, 14.

2. Elections ⇐21

For purpose of determining whether state statute effected an invidious discrimination against independent candidates for the presidency, burdens imposed on independent candidates must be compared with those imposed on other candidates for the same office, not with candidates for other offices who are elected through an entirely different process. 21 M.R.S.A. § 494, subd. 9; U.S.C.A.Const. Amends. 1, 14.

D. Brock Hornby, Perkins, Thompson, Hinckley & Keddy, Portland, Me., Mitchell Rogovin, George T. Frampton, Jr., Ronna Lee Beck, Rogovin, Stern & Huge, Washington, D.C., for plaintiffs.

Paul F. Macri, Asst. Atty. Gen., Dept. of the Atty. Gen., Augusta, Me., for defendants.

OPINION AND ORDER OF THE COURT

GIGNOUX, District Judge.

Congressman John B. Anderson is an independent candidate for President of the United States in the November 1980 general election. He declared his independent candidacy on April 24, 1980. In this action,