IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALETHA FASSL,	:	
Plaintiff,	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
OUR LADY OF PERPETUAL HELP	:	
ROMAN CATHOLIC CHURCH,	:	
Defendant.	:	NO. 05-cv-0404

MEMORANDUM AND ORDER

OCTOBER 4, 2005

PRATTER, District Judge

I. PROCEDURAL HISTORY AND SUMMARY OF DECISION

The Rule 12(b)(1) jurisdictional challenge by the defense here is predicated upon the widely-recognized "ministerial exception" that exempts employment relationships between religious institutions and their "ministers" from various federal employment laws. The specific question before the Court is whether that exception does or should apply to claims under the Family and Medical Leave Act of 1993, 28 U.S.C. § 2601. There are no controlling cases on this issue, and no reported cases either endorse or reject the exception's applicability in this specific context.

On or about March 23, 2004, Aletha Fassl, the former Director of Music for Defendant Our Lady of Perpetual Help Roman Catholic Church (the "Church") filed a Writ of Summons

against the Church in the Court of Common Pleas of Northampton County, docketed at No.C-0048-CV-2004-1951. On or about December 23, 2004, Ms. Fassl filed her Complaint in Northampton County alleging the Church's violation of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. ("ADA") (Count I), the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq. ("FMLA") (Count II) and the Pennsylvania Human Relations Act, 43 P.S. § 955(d) ("PHRA") (Count III). On January 28, 2005, the Church filed the Notice of Removal based upon federal question jurisdiction. (Docket No. 1)

The Church filed its Motion to Dismiss Plaintiff Fassl's Complaint pursuant to Rule 12(b)(1) and 12(b)(6), with exhibits. (Docket No. 2).[1] Plaintiff Fassl thereafter filed a Memorandum of Law in Opposition. (Docket No. 5). The Court held oral argument on April 14, 2005. During oral argument, the Court also issued an order, on the record, permitting the parties to conduct very limited discovery with regard to the Rule 12(b)(1) jurisdiction challenge. Specifically, the parties were authorized to depose Monsignor Sacks, the Church decision-maker here, and Plaintiff Fassl, to assist in the determination of whether the "ministerial exception" applies to all of the Plaintiff's causes of action. In addition to this limited discovery, the parties were to permitted submit post-argument legal memoranda with regard to the Rule 12(b)(1) challenge to the Court's jurisdiction. The parties each submitted a post-hearing memorandum. (Docket Nos. 11 and 12).

Plaintiff never took Monsignor Sacks's deposition. See Stipulation (Docket No. 10). In fact, it appears that no discovery was taken by either side. Instead, the Court received a joint

[1] Because all of the causes of actions will be disposed of pursuant to Rule 12(b)(1), the Court will not engage in a Rule 12(b)(6) analysis.

Stipulation from counsel acknowledging that Plaintiff's ADA claim was being withdrawn. The joint Stipulation of Counsel reads in its entirety:

> The undersigned counsel agree as follows:
>
> 1. The Plaintiff shall voluntarily withdraw her ADA count, which is Count I of her complaint.
>
> 2. The undersigned counsel agree that the **Plaintiff's job functions** as Director of Music for the Defendant **were ministerial** in nature.
>
> 3. The undersigned **counsel disagree as to the applicability to the "Ministerial Exception" to the Plaintiff's FMLA count**. The Defendant contends that the court does not have jurisdiction to hear the Plaintiff's FMLA count due to the applicability of the Ministerial Exception. The Plaintiff, in response, contends that the Ministerial Exception does not apply to FMLA cases.

Stipulation ¶¶ 1-3 (emphasis added). Thus, the parties have stipulated that Plaintiff Fassl served the Church in a ministerial capacity and, for that reason, Ms. Fassl withdrew her ADA claim, presumably because of the unambiguous case law that holds that the ADA does not apply to churches, if invoked by "ministers." However, Plaintiff Fassl refused to withdraw her FMLA claim, presumably because there has been no similar Court of Appeals for the Third Circuit holding with regard to the FMLA.

For the reasons stated more fully below, the Court finds that Plaintiff's FMLA claim should be dismissed with prejudice. It is clear to this Court that the Court of Appeals for the Third Circuit would find the ministerial exception applicable here, as have its sister circuit courts in similar circumstances. See, e.g., Little v. Wuerl, 929 F.2d 944, 947 (3d Cir. 1991). Not only does Plaintiff have no right to relief under the laws invoked, but, as the defendant Church has posited, and as this Court finds, based on the weight of the case law cited, discussed infra, not to

mention the clear language from the United States Constitution,[2] Plaintiff filed a frivolous complaint. Moreover, despite being presented with objectively incontrovertible evidence to the contrary, Plaintiff also insisted on pursuing her FMLA cause of action even as she voluntarily withdrew her ADA claim.

All of Ms. Fassl's employment claims in the Complaint are dismissed with prejudice.

II. FACTUAL BACKGROUND

Ms. Fassl performed ministerial responsibilities as Director of Music for the Church. See Complaint, ¶¶ 2, 4. See also, Stipulation of Counsel ¶ 2. Through the Bishops' Committee on the Liturgy of the U.S. Catholic Conference, the Roman Catholic Church has declared the "preeminent importance" of music, explaining that music is "[a]mong one of the many signs and symbols used by the Church to celebrate its faith." See Bishops' Committee on the Liturgy, Music in Catholic Worship at ¶¶ 23 (2d ed. 1983) (Def. Ex. "B"). Thus, according to the leadership of the Catholic Church, a director of music is "not merely an employee or volunteer.

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[2] The Free Exercise Clause of the First Amendment to the United States Constitution bars this Court's exercise of jurisdiction over this case in its entirety. The Free Exercise Clause states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof [.]

U.S. CONST. amend. I.

The application of the Free Exercise Clause to employment laws, to exclude religious organizations from being required to adhere to such laws, or, as here, facing legal liability predicated upon allegations that such an organization has violated any of the federal employment laws with regard to a person serving in a ministerial capacity, is philosophical at its core and based on the fundamental principle, established by the Founding Fathers, of separation of church and state. There has been, and indeed can be no logical argument that the"ministerial exception" applies to some federal employment laws but not to others. The governing applicable principles are not distinguishable or disposable with regard to the underlying facts at issue, depending upon which of the federal statutory laws are at issue.

He or she is a minister, someone who shares faith, serves the community, and expresses the love of God and neighbor through music." Id; Liturgical Music Today (1982) (Def. Ex. "C" at ¶ 64). In the Roman Catholic Church, directors of music are "recognized for the special gifts they exhibit in leading the musical praise and thanksgiving of Christian assemblies" and their "ministry is especially cherished by the Church." Id. at ¶ 63.

The defendant Church contends that it follows these teachings and guidance. The Church's Director of Music is a non-ordained liturgical minister who is an integral part of the pastoral and spiritual mission of the Catholic Church. See Affidavit of Rev. Msgr. Sacks (Def. Ex. "D"). The Church contends that the necessary qualifications for its Director of Music go far beyond musical experience and skill. Rather, the qualifications for Director of Music include an ability to teach, to lead, and to evoke active participation of the people in all liturgical celebrations and an ability to work with the volunteers who freely give their time and talent to the group that the Church deems to be its music ministry. Thus, the position of Director of Music is significantly distinguished from that of purely custodial, clerical or office personnel. At this Church, the Director of Music reportedly requires a thorough "understanding of and love for" the Liturgy of the Church and the relationship of music to the liturgical life of the Church. Id. Furthermore, as the Church announces on its website, "[t]he celebration of the Liturgy is the primary activity of Our Lady of Perpetual Help. Coming together as a parish to praise and worship God is the main reason we exist . . . [m]usic in the Liturgy is an essential element for true worship." See (Def. Ex. "E" at pp. 1-2) ("Liturgical Ministries" and "Liturgical Music Ministry"). Rev. Msgr. Sacks also states that music serves a unique function in worship by virtue of its capacity to uplift the spirit and manifest the relationship between the individual or

congregation and God. See (Def. Ex. "D"). The Monsignor explains that the efforts of a music minister thus can influence the spiritual and pastoral mission of his parish as much as one who leads the congregation in prayer, preaches from the pulpit, or teaches theology in school. Id.

Among other duties at the Church, the Director of Music is responsible for choosing music that reflects and enhances the theme of the Scriptures to be the subject on the specific day and assists the congregants "in their individual journeys of faith." Thus, according to the Church, the responsibilities of the Director of Music, as summarized in the Church Job Description, are integral to the spiritual and pastoral mission of the Church, including the spiritual growth and development of the parish members. Id. See also, Job Description (Def. Ex. "F").

Ms. Fassl has admitted, by written stipulation, that her responsibilities as Director of Music were ministerial in nature. Moreover, according to Ms. Fassl's December 20, 2001 written resignation, she played, sang and/or directed three to five masses per weekend, planned music for liturgies, scheduled and trained the cantors, directed multiple Church choirs, chaired the "Renew 2000" liturgy team, and prepared and played for penance services, all school liturgies, all other Holy Days, and contemporary and teen music groups among her enumerated duties. See (Def. Ex. "D").

Furthermore, in subsequent written communications to Msgr. Sacks and fellow Church members, Ms. Fassl made similar admissions of her role as a "minister" within the Church. In her January 9, 2002 e-mail to Msgr. Sacks, Ms. Fassl stated "I've always known that I am God's instrument." Likewise, in her March 18, 2002 e-mail to Msgr. Sacks, Ms. Fassl stated her belief that she "belong[ed], heart and soul, to [the Church] music ministry." In her March 31, 2002 e-mail to Msgr. Sacks, Ms. Fassl expressly referred to her former employment as the "ministry that

[she] devoted most of [her] life to". (See Def. Ex."D") (emphasis added).

Lastly, in an April 2, 2002 e-mail that Ms. Fassl sent to approximately 40 members of what she referred to as the "OLPH Music Ministry," she characterized her former position as "Director of Music Ministries at Our Lady of Perpetual Help Church." In that message, Ms. Fassl referred to leaving "a ministry [she] loved so much." See id. (emphasis supplied). In this same April 2 e-mail, Ms. Fassl stated, "[o]ur music was not just a jumble of notes on a paper that we were to somehow make sense. It was the language of God that hit the air waves [sic] to be translated differently in each person receiving the message, sent through the Holy Spirit." See id.

Ms. Fassl's professional memberships further support the Church's argument that she viewed her position as a music ministry. For example, Ms. Fassl is a member of the National Association of Pastoral Musicians ("NPM"). NPM is "a membership organization primarily composed of musicians, musician-liturgists, clergy and other leaders of prayer devoted to serving the life and mission of the Church through fostering the art of musical liturgy in Catholic worshiping communities in the United States of America." (Def. Ex. "H").

In her Complaint, Ms. Fassl alleged that she has a neurological disorder "considered to be a variant of Porphria [sic]" and was experiencing "ambulatory difficulties" and "decreased stamina and energy" in December 2001. Complaint, ¶¶ 6, 31-32. On or about December 20, 2001, Ms. Fassl allegedly "approached Msgr. Sacks requesting a break," and he asked her how long of a break she would need. Id., ¶¶ 33, 35. Ms. Fassl does not allege that she informed Msgr. Sacks that she needed "a break" due to her purported medical condition. Nevertheless, after Ms. Fassl allegedly informed Msgr. Sacks that "she had no idea how long she would need," he reportedly denied her request for "a break." Id., ¶ 37. Ms. Fassl claims that she "informed

Msgr. Sacks that she had no choice then, but to resign." Id., ¶ 38. Msgr. Sacks allegedly told Ms. Fassl he needed her resignation in writing. Id., ¶ 39. Thus, according to Ms. Fassl, "[a]t that point, [she] considered herself to have been constructively discharged." Id., ¶ 40.

Ms. Fassl's written resignation does not allege any compulsion upon her to resign. To the contrary, as Ms. Fassl explained, "[l]eaving Our Lady was a difficult decision for me." (Def. Ex. "G") (emphasis added). Ms. Fassl's written resignation also does not allege that she needed "a break" for medical reasons. Instead, Ms. Fassl's written resignation explained her decision as follows:

> Perhaps the most convincing reason for me to leave is because I would like to know what it's like to have a day off sometime, to be able to attend my grandson's birthday party (he had 2 – I missed them both), to be able to go to the parish breakfast on a Sunday morning, or maybe to be able to go to a movie and enjoy myself without worrying about the next day's demands . . . .I am taking one full year off to find out what it's like to be "normal."

Ms. Fassl's lengthy written resignation neither requests a leave of absence nor indicates an intention or desire to return to her position at some point in the future. To the contrary, Ms. Fassl specifically advised Msgr. Sacks **not** to hold her position open for her: "[d]o not hold my job open, expecting me to come back. If, after one year you haven't found an alternative to me, and you would like my return, we can talk." Id.[3]

Subsequent to her resignation, Ms. Fassl allegedly requested reinstatement. She claims her request was denied. See Complaint, ¶ 42. Subsequent to the denial, Ms. Fassl alleges that on

[3] A leave of absence must enable the employee to perform his or her essential job functions in the near future. Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 151 (3d Cir.2004). Thus, a leave of absence "for an indefinite duration is not a reasonable accommodation." See e.g., Dogmanits v. Capital Blue Cross, 2005 WL 1610660 at *7 (E.D.Pa. July 7, 2005); Peter v. Lincoln Technical Inst., 255 F.Supp.2d 417, 437 (E.D.Pa.2002) (citing to Fourth, Fifth, Sixth, and Tenth circuit courts of appeals case law in concluding that "an indefinite leave is inherently unreasonable").

or about September 9, 2003, she executed and sent her "Charge of Discrimination" to the EEOC. Id., ¶¶ 16-17. Ms. Fassl further alleges that on or about November 19, 2003, she requested the EEOC to dual-file her charge with the state agency, the Pennsylvania Human Relations Commission ("PHRC"). Ms. Fassl alleges that the EEOC received the charge for dual-filing on or about November 22, 2003. Id., ¶¶ 18, 19. Ms. Fassl allegedly received her right-to-sue notice from the EEOC on November 17, 2004. Id., ¶ 20.

III. STANDARD OF REVIEW – FED.R.CIV.P. 12(b)(1) AND FRIVOLITY

Pursuant to a Rule 12(b)(1) motion questioning the Court's subject matter jurisdiction, the Court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction to consider the action.[4] See Int'l Assoc. of Machinists & Aerospace Workers v. Northwest Airlines, 673 F.2d 700, 711 (3d Cir. 1982) ("the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.") (citing Land v. Dollar, 330 U.S. 731, 735 n.4 (1947); McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 184-90 (1936)). Finally, when subject matter jurisdiction is challenged, Plaintiff has the burden to provide that jurisdiction exists and no presumptive truthfulness attaches to the Ms. Fassl's allegations. See Mortensen v. First Federal Savings & Loan Association, 549 F.2d 884, 891 (3d Cir. 1977).

If the ministerial exception applies to the federal cause of action, the Court lacks subject matter jurisdiction. See EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 800 (4th

[4] Plaintiff's Memorandum of Law in Opposition to the Motion to Dismiss failed to address the Rule 12(b)(1) jurisdictional question. It is, of course, Plaintiff's burden to establish that this Court maintains jurisdiction to hear this case. Plaintiff's strategy of not addressing these issues is puzzling and certainly unhelpful.

Cir. 2000) (affirming dismissal pursuant to Rule 12(b)(1) based on ministerial exception where the plaintiff served as director of music for a Catholic parish church); Patsakis v. Greek Orthodox Archdiocese of America, 339 F. Supp. 2d 689, 692-93 (W.D. Pa. 2004) ("[t]he propriety of asserting the 'ministerial exception' defense through a 12(b)(1) motion is well-established.").

As the discussion below demonstrates, based on the allegations in the Complaint and exhibits attached thereto, it is clear that this Court lacks subject matter jurisdiction over Ms. Fassl's allegations. [5]

IV. DISCUSSION

A. Plaintiff Failed to Address the Rule 12(b)(1) Argument

In the Memorandum in Opposition to the Motion, counsel for Ms. Fassl does not acknowledge that the Church is seeking dismissal pursuant to Rule12(b)(1). Thus, Plaintiff does not address the primary challenge to the Complaint. The Court has no reason to think that such a circumstance is an excusable accident.

Pursuant to Rule 12(b)(1), the movant may make a factual challenge to subject matter jurisdiction. Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). Faced with a Rule 12(b)(1) motion, plaintiff bears the burden of persuasion in demonstrating that jurisdiction exists. Id. The trial court is permitted to weigh the evidence with regard to the question of jurisdiction and satisfy itself with regard to the existence of its power to hear the

[5] Alternatively, the Court could consider Defendant's Motion to Dismiss as a Motion for Summary Judgment pursuant to Fed.R.C.P. 12(c). Pursuant to Rule 12(c), the Complaint could be dismissed with prejudice because, based on this record, there are no genuine issues of material fact to be resolved at trial on this dispositive issue. Thus, on the strength of the ministerial exception, the Church is entitled to judgment as a matter of law on all three employment discrimination claims. See Stanziale v. Jargowsky, 200 F.3d 101, 105 (3d Cir. 2000).

case. Id. Thus, as stated above, the Court is not obliged to accept as true the allegations in the Complaint. See Patsakis, 339 F. Supp. 2d 689 (W.D. Pa. 2004). Moreover, the existence of disputed material facts concerning the underlying events does not preclude the Court from deciding whether Ms. Fassl has met her burden of persuasion with regard to the jurisdictional question. See id.

The Court of Appeals for the Third Circuit has not squarely decided a case on the claims at issue in the instant matter, *i.e.*, whether the ministerial exception applies to ADA and/or FMLA claims. However, our Court of Appeals has followed McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972), the case to first recognize the ministerial exception,[6] expressing its approval:

> courts have consistently found that Title VII **does not apply** to the relationship between ministers and the religious organizations that employ them, even where the discrimination is based on race or sex.

Little v. Wuerl, 929 F.2d 944, 947 (3d Cir. 1991) (emphasis added); Geary v. Visitation of the Blessed Virgin Mary Parish School, 7 F.3d 324, 331 (3d Cir. 1993). District courts in this circuit have also applied the ministerial exception. See Petruska v. Gannon University, 2004 WL 3021838 (W.D. Pa. 2004); Curay-Cramer v. The Ursuline Academy of Wilmington, 2004 WL

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[6] The ministerial exception exists because, as the McClure court found:

> [t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.

McClure, supra, at 558-59. Thus, consistent with the Free Exercise Clause, Congress may make no law prohibiting religious organizations' free exercise of governing such a ministerial relationship.

2632958 (D. Del. 2004); Patsakis, supra, 339 F. Supp. 2d at 694. Thus, because the ministerial exception is based upon the clear language of the Free Exercise Clause, it is entirely reasonable to conclude that it applies to all federal employment laws, not just those that have been directly addressed by the courts.

It is well established that a defendant may assert the ministerial exception through a 12(b)(1) motion. Id. (citing Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698 (7th Cir. 2003); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999); Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999); Bryce v. Episcopal Church of the Diocese of Colo., 121 F. Supp. 2d 1327 (D. Colo. 2000); Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694 (E.D.N.C. 1999); EEOC v. Roman Catholic Diocese, 48 F. Supp. 2d 505 (E.D.N.C. 1999).

Plaintiffs' Memorandum of Law in Opposition reflects no effort to argue that this Court has jurisdiction of the FMLA claim. Ms. Fassl not only failed to present any evidence to support the Court's exercise of jurisdiction, but she also failed to mount any credible attack with regard to Defendant's evidence challenging jurisdiction. Nevertheless, the Court holds that, as a matter of law, Ms. Fassl could not have met her burden of demonstrating jurisdiction in this case, inasmuch as the Free Exercise Clause precludes this Court's exercise of power and jurisdiction to address Ms. Fassl's allegations.[7]

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[7] Pursuant to Local Rule of Civil Procedure 7.1(c), as a result of Plaintiff Fassl's starkly deficient response, Defendant's Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) can be considered as unopposed. See Saxton v. Central PA Teamsters Pension Fund, 2003 WL 22952101at *24 (E.D. Pa. Dec. 9, 2003) (failure to adequately reply to section of defendant's motion to dismiss warrants dismissal under Local Rule 7.1(c)); Toth v. Bristol Township, 215 F. Supp. 2d 595, 598 (E.D. Pa. 2002) (same); Smith v. National Flood Ins. Program, 156 F. Supp. 2d 520, 522 (E.D. Pa. 2001). (footnote continued on next page)

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This is not the first occasion or case in which this counsel has completely ignored fundamental factual

B. Counts I and III are Withdrawn -- The Ministerial Exception Applies to the ADA

Plaintiff Fassl voluntarily withdrew her ADA claim in Count I and her PHRA claim in Count III of her Complaint. See Stipulation, ¶ 1.[8] Therefore, Plaintiff Fassl's ADA and PHRA claim are dismissed with prejudice.

C. The Ministerial Exception To Federal And State Employment Laws

The Free Exercise Clause of the First Amendment to the Constitution precludes the application of the ADA, FMLA and PHRA and all other employment laws to religious organization employees such as ministers, teachers and other individuals whose duties are "integral to the spiritual and pastoral mission." EEOC v. Roman Catholic Diocese of Raleigh, 213 F.2d 795, 797 (4th Cir. 2000) (Director of Music for a Roman Catholic church). On this record, Ms. Fassl's responsibilities as Director of Music at the Defendant Church were significant to the spiritual and pastoral mission of that Church. Plaintiff herself acknowledged as much. Therefore, Ms. Fassl's former position falls squarely within the so-called "ministerial exception" to various federal and state employment statutes such as the ADA, FMLA and PHRA.

The Court of Appeals for the Fifth Circuit first recognized the ministerial exception in

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and/or legal issues in the cases he has brought in this Court. See, e.g., Helfrich v. Lehigh Valley Hosp., 2005 WL 1715689 (E.D. Pa. July 21, 2005); Helfrich v. Lehigh Valley Hosp., 2005 WL 670299 (E.D. Pa. Mar. 18, 2005); Rizzo v. PPL Service Corp., 2005 WL 1397217 (E.D. Pa. Jun. 10, 2005); Wetherhold v. Radioshack Corp., 339 F. Supp. 2d 670 (E.D. Pa. Oct. 19, 2004) (multiple failures to cite to the applicable law underlying plaintiff's stated cause of action). At a minimum, this history suggests that, perhaps, greater professional care and consideration should be devoted at the inception of litigation.

[8] The analysis for the ADA and the PHRA claims are similar. See Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir.1999).

McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972). The purpose of the "ministerial exception" is to prevent encroachment by the government into an area of religious freedom which it is forbidden to enter by the principles established by the Free Exercise Clause. See id.

The Free Exercise Clause requires that the government refrain from interfering with matters of church discipline, faith, practice and religious law. Fraser v. Salvation Army, 1998 WL 13272 at *3 (E.D. Pa. Jan. 15, 1998) (citing Watson v. Jones, 80 U.S. 679 (1871)). "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." McClure, 460 F.2d at 558-59; Diocese of Raleigh, 213 F.2d at 797 (relationship with a minister is "the most spiritually intimate grounds of a religious community's existence"); Fraser, supra at *10 (citing Lewis v. Seventh-Day Adventists, 978 F.2d 940, 942-43 (6th Cir. 1992)) ("a minister's employment relationship with the church implicates internal church discipline, faith and organization, all of which are governed by ecclesiastical rule, custom and law, therefore jurisdiction by agencies or courts over a ministerial employment dispute is impermissible because it would excessively inhibit religious liberty.").

Moreover, although the Supreme Court has not specifically discussed the ministerial exception in the context of the federal employment laws, most of the federal appellate courts have embraced it. See, e.g., Shaliehsabou v. Hebrew Home of Greater Wash., 369 F.3d 797 (4th Cir. 2004); Werft v. Desert Southwest Annual Conf. Of United Methodist Church, 377 F.3d 1099 (9th Cir. 2004); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1301-1304 (11th Cir. 2000); Combs v. Central Texas Annual Conf. of United Methodist Church, 173 F.3d

343, 345-350 (5th Cir. 1999); Young v. Northern Illinois Conf. of United Methodist Church, 21 F.3d 184, 188 (7th Cir. 1994); Sharon v. St. Luke' Episcopal Presbyterian Hospitals, 929 F.2d 360, 363 (8th Cir. 1991); Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F.2d 1354, 1358 (D.C. Cir. 1990).

The ministerial exception is not limited in application only to certain federal or state employment claims. Rather, because the ministerial exception is based on the First Amendment, it may apply "to *any* federal or state cause of action that would otherwise impinge on the Church's prerogative to choose its ministers." Werft, 377 F.3d at 1100 n.1 (alleged constructive discharge for failure to accommodate disabilities under ADA, Title VII, Rehabilitation Act and state law) (emphasis added); Diocese of Raleigh, 213 F.3d at 800. As the Patsakis court recently observed, "this court is unaware of *any* case that has declined to apply the ministerial exception to other federal employment statutes such as the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA") or the Fair Labor Standards Act ("FLSA")". Patsakis, 339 F. Supp. 2d 689, 694 (W.D. Pa. 2004) (emphasis added) (citations omitted).

Similarly, state courts, relying on the free exercise guarantees of the respective federal and state constitutions, have consistently recognized a similar ministerial exception to actions brought pursuant to state laws proscribing discrimination in employment. See, e.g., Egan v. Hamline United Methodist Church, 679 N.W.2d 350 (Minn. Ct. App. 2004); Schmoll v. Chapman University, 70 Cal. App. 4 th 1434, 1438-44 (Cal. App. 1999); Hiles v. Episcopal Diocese of Massachusetts, 773 N.E.2d 929 (Mass. 2002); Jocz v. Sacred Heart School, 538 N.W.2d 588 (Wisc. App. 1995); Van Osdol v. Vogt, 892 P.2d 402 (Colo. App. 1994); Assemany v. Archdiocese of Detroit, 434 N.W.2d 233 (Mich. Ct. App. 1988).

To determine whether an employee should be considered a "minister" for purposes of applying this exception, it is not proper for the Court to consider whether the religious entity's motivation for its decision was religious or secular in nature. See Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698, 703 (7th Cir. 2003). Ruling that a church choir director fell within the ministerial exception in a Title VII case, the Court of Appeals for the Fourth Circuit explained:

> The ministerial exception is robust where it applies. . . . **The exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision**. The church need not, for example, proffer any religious justification for its decision, for the Free Exercise Clause 'protects the act of the decision rather than a motivation behind it.'

Diocese of Raleigh, 213 F.3d at 802 (quoting Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985)) (emphasis added); Werft, 377 F.3d at 1103. Nor is it proper for the Court to "look to ordination" or require that the minister in question be ordained. Rather, the focus should focus on the function of the position. Alicea-Hernandez, 320 F.3d at 703-04; Diocese of Raleigh, supra, 213 F.3d at 801 ("Our inquiry thus focuses on 'the function of the position' at issue and not on categorical notions of who is or is not a 'minister'"); Young, 21 F.3d at 186. "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy." Rayburn, 772 F.2d at 1169. Thus, the federal appellate courts routinely have applied the ministerial exception in cases involving individuals who were not ordained, but whose duties were those functionally equivalent to those of a minister. See Diocese of Raleigh, (director of music for Catholic Church); Catholic Bishop of Chicago, (Hispanic Communications Director for Catholic Church);

EEOC v. Catholic University of America, 83 F.3d 455, 461 (D.C. Cir. 1996) (Professor of Canon Law at Catholic University); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999), cert. denied, 121 S.Ct. 49 (2000) (director of music for United Methodist Church); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981) (faculty at seminary); Clapper v. Chesapeake Conference of Seventh-Day Adventists, 1998 WL 904528 (4th Cir. 1998) (teacher at private, church-affiliated elementary school) (unpublished disposition).

As discussed supra, the Court may consider and weigh evidence outside of the pleadings to consider and answer the jurisdictional question. Gould Electronics Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000) (citing Mortensen, 549 F.2d at 891). With regard to a jurisdictional challenge, the plaintiff always bears the burden of convincing the court, by a preponderance of evidence, that the court has jurisdiction. Id.; see also, McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). Here, where the moving party has challenged jurisdiction with supporting evidence, the plaintiff must respond to the facts as stated. Armstrong World Industries v. Adams, 961 F.2d 405, 410 (3d Cir. 1992) (holding that "[a] conclusory response or a restatement of the allegations of the complaint is not sufficient.") (emphasis added). This Plaintiff provided no response to any evidence presented in support of the 12(b)(1) portion of Defendant's Motion. Ms. Fassl failed to dispute or even address the statements that Defendant Church argues clearly establish that the ministerial exception applies to the remainder of the instant matter.

Nevertheless, counsel for Ms. Fassl argues that her remaining FMLA claim is not subject to the ministerial exception. However, counsel's own words belie that argument. See Letter from Donald P. Russo, Esq. to Monsignor Sacks ("Ms. Fassl has served in the Music Ministry for

twenty-five years." (Def. Ex. "A") (emphasis added). Furthermore, Fassl's Memorandum in Opposition attached a document in which Ms. Fassl states that she considered her job as part of the ministry. Id. Specifically, on page two of Exhibit "A" to Fassl's Memorandum in Opposition, in the second full paragraph, Fassl stated that she needed modifications in her duties so that "she could continue her ministry." Id. (emphasis added). Therefore, not only did Ms. Fassl failed to carry her burden of offering evidence to establish the Court's jurisdiction in this case, but she and her counsel actually supplied evidence to defeat jurisdiction.

With respect to the evidence of Catholic Church doctrine regarding the role of music in the Church's ministry, Ms. Fassl did not address, let alone attempt to refute, this evidence. Likewise, Ms. Fassl failed to produce any evidence to refute Monsignor Sacks' affidavit. Counsel for Ms. Fassl did not attempt to address, much less distinguish, any of the cases cited by the defendant Church that specifically hold that music and choir directors fall within the ministerial exception. The only cases cited by Plaintiff in which the ministerial exception did not apply involved allegations of sexual harassment. See, e.g., Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999); McKelvey v. Pierce, 800 A.2d 840 (N.J. 2002). None of these cases involved a Rule 12(b)(1) challenge to jurisdiction. In fact, in each of these cases, the courts found that only the sexual harassment allegation was actionable because the offending conduct clearly could not be considered part of religious teaching or belief. However, these courts also specifically held that the respective plaintiffs could not seek any damages resulting from wrongful termination or failure to hire under various employment statutes because allowing a plaintiff to pursue such damages actions would constitute an unconstitutional intrusion into the

ministerial relationship with the religious organization. See Elvig, 397 F.3d at 791-792; McKelvey, 800 A.2d at 856. The case at bar does not involve allegations of sexual harassment in any respect. Thus, Elvig and McKelvey are inapposite, lending no legal support to Ms. Fassl's position here.

E. Fassl's FMLA Claim

Ms. Fassl also argues that the "ministerial exception" does not apply to her FMLA claim. However, in her Memorandum in Opposition, counsel for Ms. Fassl cited no cases to support this proposition that, while the ministerial exception might apply to the ADA and Title VII, the same rule of law would not necessarily apply to the FMLA. The upshot of Ms. Fassl's position seems to be that because no court has ever directly applied to ministerial exception to the FMLA, Ms. Fassl's FMLA claim should be permitted to move forward. The Court finds no logic or legal argument to distinguish the Free Exercise Clause principle upon which the "ministerial exception" is based with regard to an application of that rule to some laws proscribing employment discrimination but not to others.

In Shaliehsabou v. Hebrew Home of Greater Wash., 366 F.3d 299, reh'g denied, 369 F.3d 979 (4th Cir. 2004), the Court of Appeals for the Fourth Circuit specifically held that the ministerial exception applies to FLSA claims. This Court finds Shaliehsabou instructive here. The Shaliehsabou court stated:

> We have recognized that there is a ministerial exception to the FLSA . . . this exemption is derived from the congressional debate [about the FLSA] and delineated in guidelines issued by the Labor Department's Wage and House Administrator.

366 F.3d at 305 (applying ministerial exception to FLSA claim by a kosher inspector at a Hebrew living facility); see also, e.g., Werft v. Desert Southwest Annual Conference of the United Methodist Church, 377 F.3d 1099, 1100 f.1 (9th Cir. 2004) ("[j]ust as there is a ministerial exception to Title VII, there must also be one to ***any*** federal or state cause of action that would otherwise impinge on the Church's prerogative to choose its ministers.") (emphasis supplied). Indeed, another district court within the Third Circuit recently reviewed the applicable case law and observed that " . . . this court is unaware of any case that has declined to apply the ministerial exception to other federal employment statutes such as the Americans With Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA) or the Fair Labor Standards Act (FLSA)." Patsakis, 399 F. Supp. 2d at 694 (citations omitted). Plaintiff has produced no legal authority to the contrary.

Of course, "the FMLA is based on the provisions of the FLSA." Lloyd v. Wyoming Valley Health Care System, Inc., 994 F. Supp. 288, 292 (M.D. Pa. 1998). The FMLA tracks the statutory language of the FLSA. Kilvitis v. County of Luzerne, 52 F. Supp. 2d 403, 412 (M.D. Pa. 1999). In particular, the FMLA adopts the definition of "employee" provided by the FLSA. See 29 U.S.C. § 2611(3); 29 U.S.C. § 203(c), (e), (g). Therefore, it is appropriate for this Court to look to the FLSA to determine how it has been interpreted for guidance as to the application of the ministerial exception in the instant matter. Federal courts have routinely applied the ministerial exception in FLSA cases. See Shaliehsabou, 363 F.3d at 301; Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990), cert. denied, 498 U.S. 846 (1990); EEOC v. First Baptist Church, 1992 WL 247584 (N.D. Ind. June 8, 1992); EEOC v. Tree of Life Christian School, 751 F. Supp. 700 (S.D. Ohio 1990). Therefore, the application of the ministerial

exception to Plaintiff's FMLA claim by this Court is consistent with overwhelming precedent supplied by other courts.

Counsel for the Church contends that research failed to uncover *any* case that has declined to apply the ministerial exception to other federal employment statutes. See Patsakis, 339 F. Supp. 2d at 693. Counsel for Ms. Fassl has cited no case declining to apply the ministerial exception. The Court's independent research produced the same negative result.

Therefore, Ms. Fassl's FMLA claims cannot proceed because the First Amendment and the Free Exercise Clause prohibit this Court from exercising jurisdiction over those claims.

V. CONCLUSION

Pursuant to Fed. R. Civ. P. 12(b)(1), the entire instant matter is dismissed with prejudice because the Free Exercise Clause "ministerial exception" applies to the underlying allegations by Plaintiff Fassl. Plaintiff Fassl failed to meet her burden to provide evidence to support her contention that the Court has the power to maintain jurisdiction over her employment discrimination claims. When the ministerial exception applies, the Court lacks subject matter jurisdiction. Diocese of Raleigh, 213 F.3d at 800; Patsakis, 339 F. Supp. 2d at 692-93.

Additionally, the Court notes the following:

* Plaintiff refused to acknowledge the clear principle of law applicable here;

* Plaintiff refused to acknowledge, in the face of incontrovertible factual and documentary evidence (some of which was supplied by Plaintiff and her counsel),[9] that Ms. Fassl

[9] Moreover, as discussed, supra, Plaintiff (1) refused to acknowledge her burden pursuant to Rule 12(b)(1) and (2) improperly attempted to deny the propriety of the Defendant's use of extrinsic documents in conjunction with its Rule 12(b)(1) Motion to Dismiss.

was, in fact, a Catholic "minister" for the Church; and

* Plaintiff, in her Opposition to the Motion to Dismiss, ignored the Rule 12(b)(1) argument, only addressing the Church's "ministerial exception" argument with regard to Rule 12(b)(6).

Therefore, because it may be that this entire matter is the result of maintaining a frivolous filing, the Court will entertain an application by Defendant for an award of attorneys' fees and costs for having had to defend this case.

Defendant's Motion to Dismiss is granted. An appropriate Order follows.

BY THE COURT:

/S/_____
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALETHA FASSL,	:	
Plaintiff,	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
OUR LADY OF PERPETUAL HELP ROMAN CATHOLIC CHURCH,	:	
Defendant.	:	NO. 05-cv-0404

ORDER

OCTOBER 4, 2005

PRATTER, District Judge

AND NOW, this 4th day of October, 2005, upon consideration of the Complaint (Docket No. 1), Defendant's Motion To Dismiss Plaintiff Fassl's Complaint (Docket No. 2), Plaintiff's Memorandum of Law in Opposition (Docket No. 5), the parties' representations at oral argument held on April 14, 2005, the parties' post-hearing memoranda (Docket Nos. 11 and 12), and the joint Stipulation of Counsel (Docket No. 10) in which Plaintiff's counsel acknowledged that Ms. Fassl served in a ministerial capacity for Defendant Church, it is hereby ORDERED that:

1. Count I is DISMISSED with prejudice;

2. Count II is DISMISSED with prejudice; and

3. Count III is DISMISSED with prejudice.

It is so ORDERED.

BY THE COURT:

/S/_____
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE