IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

COLLEEN SIMON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1416-CV16699
	)	
MOST REVEREND ROBERT W. FINN, DD, *et al.*,	)	Division II
	)	
	)	
Defendants.	)	

DEFENDANT DIOCESE'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

This case presents a clear question of law: whether this Court may entertain claims that require the Court to second-guess a church's application of its own religious doctrine, policy, and practice where a church decides its ministerial employee is no longer able to minister. These are questions of law, not fact.

This lawsuit arises from the decision of St. Francis Xavier Church, a local parish within the Catholic Diocese of Kansas City-St. Joseph, to end Plaintiff's employment after a Kansas City *Star* article publicly disclosed that she was in a same-sex marriage while serving in a pastoral associate role at the church. Plaintiff contends that she was *defrauded* into believing her same-sex marriage was of no concern to the Catholic Church and could not affect her employment with the Diocese. She also claims overtime wages for her work at St. Francis Xavier, and alleges that a Service Letter falsely lists her same-sex marriage as the reason for her termination. The claims are failed attempts to

plead around the longstanding rule in Missouri: the law does not let courts handle ministerial firing disputes.

The United States Supreme Court, Missouri courts, and courts nationwide have made clear that, as a matter of constitutional law, courts cannot interfere with a church's right to control its internal affairs and choose its ministers—regardless of how the lawsuit before the court is labeled or fashioned. These well-settled constitutional principles compel summary judgment in favor of the Diocese and require this Court to dismiss Plaintiff's lawsuit in its entirety. Indeed, any other result will soon bring before this Court (and potentially a jury) complicated and, more importantly, constitutionally-prohibited questions about the Catholic Church's doctrine and teachings on homosexuality, same-sex marriage, and their relative importance and effect on employment within the Church. Thus, not only is summary judgment appropriate here, it is the only way to protect the Church's constitutional rights.

SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate when there is no genuine issue of material fact." *DeBaliviere Place Ass'n v. Veal*, 337 S.W.3d 670, 674 (Mo. banc 2011). Facts set forth in support of a party's motion are taken as true unless contradicted by the non-moving party's response, and a genuine issue exists only when the record shows a "real and substantial" dispute—"one consisting not merely of conjecture, theory and possibilities." *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376, 378 (Mo. banc 1993). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could

believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007); *see also Martin v. City of Washington*, 848 S.W.2d 487, 492 (Mo. banc 1993) ("[T]o overcome a properly made motion for summary judgment, the opposing party must demonstrate the existence of a factual question that would permit a reasonable jury to return a verdict for the opposing party.").

A defending party may establish a right to summary judgment by showing (1) "facts that negate any one of the claimant's elements facts," (2) that the non-movant is unable to produce "evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements," or (3) "that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense." *ITT Commercial Fin. Corp.*, 854 S.W.2d at 381.

Defendant Diocese is entitled to summary judgment on Plaintiff's fraud, wage and hour, and service letter claims. The summary judgment record shows that Plaintiff's fraud claim would necessarily entail consideration of impermissible religious questions; that Plaintiff fits within the ministerial exception for purposes of the fraud and wage and hour claims; that Plaintiff also was an exempt administrative and professional employee under Missouri's wage and hour law; and that Plaintiff cannot meet all of the elements needed to establish her fraud and service letter claims.

ARGUMENT

This Court should grant the Diocese summary judgment because Plaintiff's claims are barred as a matter of law. The core fraud claim asks the Court to determine the Catholic Church's "true" doctrine on marriage at the time Plaintiff was hired, that a priest knowingly misrepresented that doctrine to her, and that the Church was wrong in concluding that subsequent events affected Plaintiff's ability to represent that doctrine to the faithful. Questions of church doctrine, policy, and practice are constitutionally forbidden areas in which a court may not exercise jurisdiction. Moreover, Plaintiff's fraud claim impermissibly interferes with the Church's right to decide who is fit to represent and speak for it, potentially subjecting the Church to substantial penalties for parting ways with an unwanted minister. In addition, the undisputed facts show that Plaintiff cannot meet all of the elements for fraud, as the record demonstrates that the statements made to her were not fraudulent and Plaintiff did not actually or reasonably rely on them regardless.

Summary judgment is also appropriate on Plaintiff's wage and hour and service letter claims. As explained below, Plaintiff was a ministerial employee, employed in both administrative and professional capacities, and thus not subject to Missouri's wage and hour law. The service letter Plaintiff received from the Diocese truthfully addressed the three elements required under Missouri's Service Letter statute, and the record demonstrates that Plaintiff will be unable to establish actual or punitive damages for any purported violation of the statute.

I. THE DIOCESE IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S FRAUD CLAIM.

Plaintiff's fraud claim fails for at least three reasons. First, the First Amendment to the United States Constitution prohibits this Court from interfering with a church's internal affairs, and resolving Plaintiff's fraud claim would necessarily involve judicial decisions about Catholic teaching and doctrine on homosexuality, same-sex marriage, and its relationship to employment within the Catholic Church. Second, the ministerial exception, as outlined by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 132 S. Ct. 694 (2012), bars Plaintiff's fraud claim because it interferes with the church's right to select its ministers and attempts to punish the Catholic Church for not keeping an unwanted minister. Finally, Plaintiff is unable to establish the necessary elements for fraud because any representations made to her were not fraudulent, and she did not actually or reasonably rely on them. These are all matters of law that rest on undisputed facts. Accordingly, the Court should grant the Diocese summary judgment on Plaintiff's fraud claim.

A. The First Amendment to the United States Constitution Bars Consideration of Plaintiff's Fraud Claim Because it Necessarily Involves Questions About Catholic Church Doctrine, Policy, and Practice.

Plaintiff's fraud claim asks this Court to do something the Court is not permitted to do: interfere with a church's "doctrine, discipline, ordination and removal of personnel, and religious practice and polity." *State ex rel. Gaydos v. Blaeuer*, 81 S.W.3d 186, 193 (Mo. App. W.D. 2002).

The United States Supreme Court has long made clear that the Religion Clauses of the First Amendment protect the right of religious organizations to control their internal affairs. *See Watson v. Jones*, 80 U.S. 679, 728 (1872).[1] Although religious organizations are not automatically immune from civil liability, the Diocese has the "power to decide for [itself], free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). Indeed, a long line of Supreme Court cases prohibits courts from deciding "religious dispute[s]." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (refusing to reinstate bishop who had been removed); *see also Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 17-18 (1929) (refusing to install a chaplain whom the church had found unqualified); *Jones v. Wolf*, 443 U.S. 595, 603 (1979) (stating that a court cannot get involved in a church property dispute that would require it to "resolve a religious controversy"). As explained by the Missouri Supreme Court, where, like here, a claim involves "[q]uestions of hiring, ordaining, and retaining" ministers, the court's ruling will "necessarily" result in the prohibited "interpretation of religious doctrine, policy, and administration." *Gibson v. Brewer*, 952 S.W.2d 239, 246-47 (Mo. banc 1997). "Such excessive entanglement between church and state has the effect of inhibiting religion, in violation of the First Amendment." *Id.* at 247; *see also Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 203 (Utah 2001) ("[I]t is well settled that civil

[1] The First Amendment's guarantee of religious protection applies to the states through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Blaeuer*, 81 S.W.3d at 191.

tort claims … that require the courts to review and interpret church law, policies, or practices in the determination of the claims are barred by the First Amendment under the entanglement doctrine.").

"To establish fraud under Missouri law, plaintiff must show that defendants made misrepresentations concerning a past or existing fact." *Arthur v. Medtronic, Inc.*, No. 4:14-CV-52, 2015 WL 5012312, at *2 (E.D. Mo. Aug. 24, 2015). Plaintiff alleges that Ms. McCormally, Father Vowells, and Father Garcia *fraudulently induced* her into working at St. Francis Xavier by telling her—or at least implying—that her sexual orientation and same-sex marriage would not be a problem. *See* Am. Pet. ¶ 63. In other words, Plaintiff contends that she was misled about the effect her sexual orientation and same-sex marriage would have on employment within a Catholic church. But how could a fact finder—be it judge or jury—determine that Ms. McCormally, Father Vowells, or Father Garcia were lying or acting recklessly when they said what they said? And how could the fact finder evaluate whether Plaintiff knew the truth or reasonably relied on their statements? The way to do so is clear but forbidden: delve into matters of church doctrine, teaching, policy, and practice on homosexuality and same-sex marriage and what those mean for employment within the Catholic Church.

In *State ex rel. Gaydos v. Blaeuer*, 81 S.W.3d 186 (Mo. App. W.D. 2002), the court concluded that it did not have jurisdiction to entertain defamation claims involving statements made in connection with a church's nonrenewal of an employment contract with a school administrator. The court determined that the First Amendment prohibited judicial review of the defamatory statements because they were impossible to separate

from the non-renewal process. *Id.* at 198. To conclude otherwise, the court reasoned, would allow courts "to enter the back door" of churches and permit "judicial probing of procedure and church polity." *Id.* at 196. Especially because claims such as defamation involve "[q]uestions of truth, falsity, [and] malice" and "take on a different hue when examined in light of religious precepts and procedures that generally permeate controversies over who is fit to represent and speak for the church." *Id.* (quoting *Downs v. Roman Catholic Archbishop of Baltimore*, 683 A.2d 808, 812 (Md. Ct. Spec. App. 1996)). Dismissing the defamation claims for lack of jurisdiction, the court noted that the First Amendment protected the church from being left "at the mercy of the perceptions of outsiders, who are likely to be unable to relate to or understand the religious views and practices of the organization." *Id.* at 197.

Like the defamation claims in *Blaeuer*, Plaintiff's fraud claim must be dismissed because it would result in constitutionally forbidden "judicial probing" of Catholic doctrine and practice. For one thing, it would require this Court to analyze Church authority and hierarchy and determine its role in the hiring practices of local parishes, ultimately forcing the Court to make an improper judgment on whether the pastors exceeded the scope of their authority in making statements potentially at odds with official Church teaching or whether the Diocese should have been more involved and active in the hiring process. *See Li v. Metropolitan Life Ins. Co.*, 998 S.W.2d 828 (Mo. App. E.D. 1999) (holding that an employer can be liable for the fraudulent misrepresentations of an employee made only while the employee is acting within the

course and scope of employment). These are all forbidden inquiries that, no matter the outcome, substitute the court's judgment for that of the Church's.

It also would require the Court to proclaim the Church's *true* teachings on homosexuality and same-sex marriage, the relative importance of those beliefs, the extent and degree to which they apply in the employment context, and how well known all of this was to clergy, employees, and laypersons. Indeed, Plaintiff's fraud claim would fail if the statements made to her accurately conveyed the Catholic Church's position on same-sex marriage and employment at the time. *See Stevens v. Markirk Constr., Inc.*, 454 S.W.3d 875, 880 (Mo. banc. 2015) (falsity required element of fraud). The same would be true if the statements instead conflicted with the Catholic Church's position, but Plaintiff knew or should have known the truth about the Church's contradictory position. *See id.* (ignorance of falsity and reasonable reliance required elements of fraud). A judge or jury simply cannot determine whether Plaintiff's fraud claim meets the necessary elements without also interpreting Catholic teaching and doctrine on homosexuality, same-sex marriage, and its relationship to employment within the Catholic Church. The First Amendment expressly prohibits such an exercise.

Courts across the country agree, and refuse to entertain claims like this one. *See, e.g.*, *Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 254 (S.D.N.Y. 2014) (holding that First Amendment barred plaintiff's *per se* libel claim against the Archdiocese of New York because resolution of the claim would rest on "the truth or falsity of the Catholic Church's characterization of its own law or doctrine"); *Hartwig v. Albertus Magnus College*, 93 F. Supp. 2d 200, 218-19 (D. Conn. 2000) (holding that First Amendment

barred plaintiff's defamation claims because they would require the court to evaluate whether they truthfully conveyed the Catholic Church's teaching or doctrine); *Van Osdol v. Vogt*, 908 P.2d 1122, 1133 (Colo. 1996) ("In order to determine whether a church employed fraudulent or collusive tactics in choosing a minister, a court would necessarily be forced to inquire into the church's ecclesiastical requirements for a minister. The First Amendment makes such inquiry into religious beliefs impermissible."); *O'Connor v. Diocese of Honolulu*, 885 P.2d 361, 368 (Haw. 1994) ("The question whether the statements attributed to the appellees correctly reflect the church's views can be answered only by determining doctrinal correctness or by analyzing church law; these are determinations that cannot be made by civil courts…. [T]he secular law cannot determine … whether one has misrepresented the Roman Catholic faith."); *Ad Hoc Comm. of Parishioners of Our Lady of Sun Catholic Church, Inc. v. Reiss*, 224 P.3d 1002 (Ariz. Ct. App. 2010) (dismissing fraud claim under the ecclesiastical abstention doctrine because resolving whether representation was in fact fraudulent would require inquiry into Church doctrine)*; cf. Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990) ("The government may not … lend its power to one or the other side in controversies over religious authority or dogma."). The First Amendment requires this Court to follow their lead and decline Plaintiff's invitation to assess matters of Catholic doctrine, policy, and practice.

Plaintiff's fraud claim does not present a factual dispute, but rather is properly decided as a matter of law on summary judgment to avoid interfering with the Diocese's religious doctrine. Indeed, that is why courts frequently refer to this area as a matter

where the courts lack jurisdiction. *See, e.g., Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 492 (5th Cir. 1974) ("The people of the United States conveyed no power to Congress to vests its courts with jurisdiction to settle purely ecclesiastical disputes."). It does not matter what the facts of a particular case are; if the case necessitates an inquiry into religious doctrine, the court must dismiss it at the first opportunity to preserve the First Amendment rights of the church. This is the case here where the claim is inextricably intertwined with inquiries into religious doctrine. This Court should grant the Diocese judgment as a matter of law on Plaintiff's fraud claim.

B. The Ministerial Exception Also Bars Plaintiff's Fraud Claim Because it Seeks to Punish the Diocese for Getting Rid of an Unwanted Minister.

The ministerial exception to employment-based actions is well established. Three years ago, a unanimous Supreme Court affirmed its existence in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 132 S. Ct. 694 (2012). The ministerial exception recognizes that ministerial employment decisions pertain to the internal governance of a church and that state intrusion into this sacred arena violates both Religion Clauses of the First Amendment. *Id.* at 706. Whether the ministerial exception applies "is a pure question of law" that must be determined by this Court. *See Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 833 (6th Cir. 2015).

As Pastoral Associate for Justice and Life, the undisputed facts make clear that Plaintiff was a "minister" for purposes of the ministerial exception. Because her fraud claim arises entirely out of her hiring and firing, and seeks to punish the Diocese for

parting ways with an unwanted minister, the ministerial exception bars her claim as a matter of law.

i. Simon was a Ministerial Employee.

In *Hosanna-Tabor*, the Supreme Court held that the ministerial exception precluded discrimination and retaliation claims brought by a schoolteacher at a Lutheran school. Although the Court declined to "adopt a rigid formula for deciding when an employee qualifies as a minister," it made clear that "the ministerial exception is not limited to the head of a religious congregation" and that the employee's ministerial responsibilities need not be to the exclusion of all "secular" duties. 132 S. Ct. at 707, 708. The Court identified four factors in reaching its conclusion that the schoolteacher was a minister covered by the exception: (1) the formal title given to her by the church; (2) the substance reflected in that title; (3) her own use of that title; and (4) the important religious functions she performed for the church, such as duties reflecting a role in conveying the church's message and carrying out its mission. *Id.* at 708. The Court expressed its reluctance "to adopt a rigid formula for deciding when an employee qualifies as a minister," instead focusing on the "circumstances of her employment." *Id* at 707.

Courts applying *Hosanna-Tabor* have not viewed these factors as a rigid formula to follow. Instead, they have focused on the substance of the position at issue and, most importantly, whether it is connected to conveying the church's message and carrying out its mission. *See, e.g.*, *Conlon v. InterVarsity Christian Fellowship*, 777 F. 3d 829, 835 (6th Cir. 2015) (applying ministerial exception where two of four factors—formal title

and religious function—were present); *Preece v. Covenant Presbyterian Church*, No. 8:13CV188, 2015 WL 1826231, at *4 (D. Neb. Apr. 22, 2015) (stating "actual position in the church and duties" are more important than title and origin of ordination). Courts expansively interpret the ministerial exception to avoid interference with a church's employment decisions and to prevent the state from punishing a church for making a religious decision about who will speak for it. *See McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972) ("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.").

Plaintiff's position at St. Francis Xavier was a ministerial one. To begin with, St. Francis Xavier held Plaintiff "out as a minister, with a role distinct from that of most of its members." *Id.* at 707. She was one of three pastoral associates at the church, and was "responsible for developing, directing, and supervising key aspects of the church's mission and outreach to the community." Statement of Uncontroverted Material Facts ("SUMF") ¶ 64. Her official titles—Director of Social Ministries and, later, Pastoral Associate for Justice and Life—conveyed to parishioners and those outside of the church that she spoke for the church on social justice issues. *See Conlon v. InterVarsity Christian Fellowship*, 777 F. 3d 829, 834-35 (6th Cir. 2015) ("'Pastor,' 'reverend,' 'priest,' 'bishop,' or 'rabbi' are clearly religious titles no different from 'minister.' Beyond that, courts need only determine whether the wording of the title conveys a religious—as opposed to secular—meaning."). St. Francis Xavier also formally commissioned her as

the Director of Social Ministries during weekend masses, where Plaintiff stood in front of the congregation and the pastor (Father Vowells) prayed a blessing over her and her ministry. *See* SUMF ¶¶ 20-22 ("We praise and thank you for the gift of Colleen and ask that you strongly bless her as she begins her work as Director of Social Ministries…. We ask that you bless her with all that she needs to be happy and to be holy in this ministry.").

St. Francis Xavier also held Plaintiff out as a minister in various other ways. For example, Plaintiff specifically was tasked with "[f]oster[ing] cooperation with the local churches and community organizations in social justice efforts," "[n]etwork[ing] with civic, state, ecumenical groups and individuals to obtain needed services," and "[e]stablish[ing] and maintain[ing] contact with resources, programs, and people to facilitate the growth of new ideas." SUMF ¶¶ 71, 72, 75. Father Garcia referred a reporter from the Kansas City Star to her to discuss the church's outreach to the poor and needy. *See* SUMF ¶ 46. And she participated in Father Rafael's installation ceremony, where she presented him with The Compendium of Social Doctrine of the Church in front of the entire congregation. SUMF ¶ 29. The record here is undisputed: Plaintiff had a ministerial title and the church held her out as one of its ministers.

Plaintiff's title also reflected a required level of religious training and knowledge. Indeed, the Director of Social Ministries and Pastoral Associate for Justice and Life position prefers an individual with a "Master's degree or its equivalent … in theology or ministry with course work in the social sciences" and requires "[w]ork experience in parish social ministry or related social justice field." SUMF ¶¶ 76, 80. The position also

requires a comprehensive knowledge and understanding of Catholic Social Teaching and social justice issues. SUMF ¶¶ 68, 80. Plaintiff fit the description. She graduated from the College of William and Mary with a Bachelor's Degree, and later obtained a Certification in Catholic Social Justice from the University of Dayton. SUMF ¶¶ 77-78. Her Certification in Catholic Social Justice took almost a full year to complete, and required her to take and complete courses on Parish and Social Action, Poverty in the U.S. and Around the World, Advanced Catholic Social Teaching, Scripture and Justice, and the History of Catholic Social Action. SUMF ¶ 79. Before working at St. Francis Xavier, Plaintiff taught courses on religious education, including confirmation and preconfirmation classes, at her local Catholic parish. SUMF ¶ 81. And after receiving her Certification in Catholic Social Justice, Plaintiff went to work as an Associate Director at the Catholic Diocese of Richmond, where part of her job was to "share Catholic social teachings with parishioners in the diocese" and help them "connect Catholic social teachings to the work they were doing." SUMF ¶ 82 (Simon Dep. 33:11-18; 34:8-12). Plaintiff's titles of Director of Social Ministries and Pastoral Associate for Justice and Life accurately reflected her training, experience, and knowledge of Catholic Social Teaching.

It is undisputed that Plaintiff also held herself out as a minister. In fact, she readily agreed to Father Garcia's idea to change her position title to Pastoral Associate for Justice and Life, *see* SUMF ¶ 61, and she referred to herself as Director of Social Ministries or Pastoral Associate for Justice and Life in both work and ***personal*** communications, *see, e.g.*, SUMF ¶¶ 39, 90, 96. Public news and blog articles also used her official titles and

described her ministry at St. Francis Xavier. *See* SUMF ¶¶ 39, 45. Plaintiff's own blog article included a biography stating that she is the "Pastoral Associate for Social Ministry at St. Francis Xavier in Kansas City, Missouri," where "[s]he oversees several justice programs, parish education around Catholic Social Teaching, and a food pantry feeding hundreds of hungry neighbors." SUMF ¶ 39. Her resume even describes her job position at St. Francis Xavier as "Pastoral Associate, Justice and Life," and states that she was an "[o]rganizer of parish outreach opportunities and justice education and action." SUMF ¶ 99.

Finally, Plaintiff's job duties reflected a role in conveying the church's teachings and carrying out its mission. As a pastoral associate, Plaintiff was responsible overseeing key aspects of the church's mission and outreach to the community. *See* SUMF ¶¶ 1, 64-65. In particular, she oversaw all of the social justice ministries at St. Francis Xavier, and was hired so that St. Francis Xavier, a Jesuit parish, could pursue its call and fulfill its commitment to social justice issues. *See, e.g.*, SUMF ¶¶ 65-66, 92-93, 97. According to her job description, Plaintiff was to "[e]mpower[] the parish to fulfill the church's mission of justice and reconciliation," "[p]lan[], organize[], and direct[] programs containing service, education, advocacy and action components," and "[p]rovide[] direct service for those in need." SUMF ¶ 69. As such, she was responsible for educating parishioners about the Catholic Church's social justice teachings and doctrine, analyzing social justice issues in light of the Church's teachings, developing programs for parishioners to become involved with social justice issues, and fostering cooperation with outside social justice organizations. SUMF ¶ 67. She also oversaw and managed the food

pantry and emergency assistance program at St. Francis Xavier, which was an important of the church's function and outreach to the community. SUMF ¶¶ 83, 87. On top of all that, Plaintiff created content for the weekly bulletin provided to parishioners at Sunday mass and published online, was expected to "[p]rovide[] pastoral care to parishioners, as needed," and would "[c]onsult[] with and advise[] [the] Pastor on matters that affect the parish." SUMF ¶¶ 75, 98; *see also* SUMF ¶ 30 (noting that Father Garcia consulted with Plaintiff about the social justice work at St. Francis Xavier).

Concluding that Plaintiff was a "minister" would be consistent with courts nationwide that broadly construe the ministerial exception to cover employees with religious functions. Examples include a communications director responsible for shaping the message that the Catholic Church presented to the Hispanic community, *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 704 (7th Cir. 2003); a professor of canon law who instructed students in ecclesiastical laws, *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 464 (D.C. Cir. 1996); a music director and part-time music teacher for a church, *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 803 (4th Cir. 2000); an administrator of a Salvation Army rehabilitation clinic, *Schleicher v. Salvation Army*, 518 F.3d 472 (7th Cir. 2008); and a kosher supervisor of a predominantly Jewish nursing home, *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 301 (4th Cir. 2004).

Plaintiff cannot avoid application of the exception by overemphasizing her secular duties and downplaying her religious ones. Indeed, the Supreme Court plainly rejected that approach in *Hosanna-Tabor*, concluding that the schoolteacher was a "minister"

even though her religious duties consumed only forty-five minutes of each workday. 132 S. Ct. at 708. The Court explained that the heads of congregations themselves often have a mix of secular and religious duties, and that the amount of time spent on secular ones "cannot be considered in isolation, without regard to the nature of the religious functions performed." *Id.* at 709.

Following the Supreme Court's lead, the U.S. Court of Appeals for the Fifth Circuit found unpersuasive a former music director's argument that "he merely played the piano at Mass and that his only responsibilities were keeping the books, running the sound system, and doing custodial work, none of which was religious in nature." *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012). The court reasoned that, even if he was "merely" an accompanist, he nevertheless "performed an important function during the service" and "played a role in furthering the mission of the church and conveying its message to its congregants." *Id.* at 180.

Like the schoolteacher in *Hosanna-Tabor* and music director in *Cannata*, Plaintiff played an important role in furthering the mission of the church and conveying its message. Indeed, Plaintiff admits to overseeing the church's social justice programs, *see* SUMF ¶ 66, and her own resume touts that, while working at St. Francis Xavier, she was an "[o]rganizer of parish outreach opportunities and justice education and action," SUMF ¶ 99. Specific communications and events further show that she plainly was involved in furthering the church's mission and conveying its message. For example:

- On September 14, 2013, Plaintiff sent an e-mail to friends informing them that she and the Director of Religious Education at St. Francis Xavier were "working with MADP [Missourians for Alternatives to the

Death Penalty] and the Diocese to discern ways to bring parishioners – both young and the young of heart – the message of the Church's teaching on the Death Penalty." SUMF ¶ 90.

- On March 21, 2014, Plaintiff told Father Garcia of her goal "to put together a fall and spring Fall Break/Spring Break Urban Immersion for High School Students complete with Prayer, Scripture, Catholic Social Teachings and Reflection." SUMF ¶ 95.

- On March 26, 2014, Plaintiff sent an e-mail to parishioners and volunteers, "strongly encourag[ing]" them to review various religious and Church-related websites, including one on the Compendium of the Social Doctrine of the Church, so that they could "gain more information about Church history and teachings." SUMF ¶ 96.

- On May 1, 2014, Plaintiff provided Father Garcia with a "Ministry Opportunity write up," identifying fifteen different "ways that parishioners and friends can volunteer, compelled by faith, to give direct aid and work on justice issues for long term change for the world" and noting that "[w]e are growing this ministry." SUMF ¶ 97.

Simply put, the undisputed facts show that Plaintiff was a "minister." St. Francis Xavier gave her a formal ministerial title and held her out as one of its ministers; her title and role at the church accurately conveyed her religious education, experience, and understanding of Catholic Social Teaching; she readily accepted her position and referred to her pastoral associate position both inside and outside of the church; and she performed important religious functions at the church, as she was responsible for developing and directing all of the church's social justice ministries. Because all four *Hosanna-Tabor* factors for ministerial employees are present here, Plaintiff easily qualifies as a "minister" for purposes of the exception. *See, e.g.*, *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir. 2015) (applying ministerial exception when only two of the four *Hosanna-Tabor* factors—formal title and religious function—

were present); *Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012) (applying ministerial exception to religious school teacher even though she was not a rabbi, was not a "called" teacher, and the record was silent as to the extent of her religious training).

ii. The Ministerial Exception Applies to Plaintiff's Fraud Claim Because it Seeks to Impose an Unwanted Minister and is Inextricably Linked to her Hiring and Firing.

Plaintiff's fraud claim is inextricably linked to her hiring and firing at St. Francis Xavier. Although Plaintiff claims that she was fraudulently induced into believing that her same-sex marriage would not affect her employment, she could not possibly claim fraud until she was fired. The damages she seeks—lost wages and fringe benefits, as well as emotional damages—makes plain the purpose and effect of her fraud claim: punish the Diocese for getting rid of her. Because the ministerial exception expressly prohibits courts from interfering with a church's hiring and firing decisions, and protects churches from punishment for choosing to part ways with an unwanted minister, the Court should deny Plaintiff's fraud claim as a matter of law.

While the Court in *Hosanna-Tabor* expressed no view on "whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortuous conduct by their religious employers," *Hosanna-Tabor*, 132 S. Ct. at 710, courts addressing the issue after *Hosanna-Tabor* have concluded that the exception applies more broadly, *see, e.g.*, *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 890 (Wis. 2012) (concluding that ministerial exception barred breach of contract and promissory estoppel claims); *Mills v. Standing Gen. Comm'n on Christian Unity & Interreligous*

Concerns, 117 A.D.3d 509 (N.Y. App. Div. 2014) (holding that ministerial exception applied to wrongful termination claim based on breach of employment contract).

Indeed, courts generally have been unwilling to limit the ministerial exception solely to discrimination claims, and have recognized that the exception "also relates to the broader relationship between an organized religious institution and its clergy." *Werft v. Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099, 1103 (9th Cir. 2004). Thus, courts have readily applied the exception to a wide variety of claims, including common law fraud, defamation, breach of contract, and other tort claims. *See, e.g.*, *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986); *Klouda v. Sw. Baptist Theological Seminary*, 543 F. Supp. 2d 594 (N.D. Tex. 2008). The key inquiry is whether the claims arise from the ministerial employee's hiring, firing, or discipline:

> [I]t is clear that ***regardless of how the claims set forth in the plaintiffs' complaint may be labeled***, resolving plaintiffs' claims would require this court to enter into areas implicating the First Amendment. [Plaintiff's] claims of breach of implied contract, tortious interference with business relationships, conspiracy, invasion of privacy, and defamation … all implicate the [church's] internal disciplinary proceedings. As a result, this court cannot have subject matter jurisdiction over them.

Ogle v. Church of God, 153 Fed. App'x 371, 375-76 (6th Cir. 2005) (emphasis added); *see also Klouda*, 543 F. Supp. 2d at 613 ("[A]ll claims asserted by plaintiff against defendants are derivative of or intimately related to the employment action taken against her by defendants."); *DeBruin*, 816 N.W.2d at 890 (applying ministerial exception to breach of contract and promissory estoppels claims because they "would require a court to evaluate *why* [the church] terminated its ministerial employee"); *Gunn v. Mariners*

Church, Inc., 84 Cal. Rptr. 3d 1, 9 (Cal. Ct. App. 2008) (holding that the ministerial exception applies to defamation, intentional infliction of emotional distress, and invasion of privacy claims that arise from employer statements made in the course of hiring, firing, or discipline).

The principles underlying the ministerial exception, as well as the Supreme Court's decision in *Hosanna-Tabor*, show why this must be the case. At its core, the First Amendment requires courts to remain neutral in matters concerning religious doctrine, beliefs, organization, and administration. So when a state requires "a church to accept or retain an unwanted minister," or "punish[es] a church for failing to do so," the state "intrudes upon more than a mere employment decision." *Hosanna-Tabor*, 132 S. Ct. at 706. It unconstitutionally "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id.*; *see also Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 118 (1952) (holding that matters of church government, including the selection of clergy, are strictly religious and the civil government fundamentally lacked the power to interfere in such matters); *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 709, 713 (1976) (declining to review the removal of an Archbishop for arbitrariness because any arbitrariness analysis must "inherently entail inquiry" into the procedures and substantive religious criteria by which the religious institution is supposedly to decide the religious question).

Simply put, civil courts must refuse to hear cases that require the evaluation of religious questions, and especially religious questions that are intertwined with

employment decisions regarding ministers. This rule, which is thoroughly affirmed in *Hosanna-Tabor*, does not consider the relative rights of the parties. 132 S. Ct. at 705. Rather, it relies on an institutional interest in protecting the structural features expressed by the First Amendment. *See, e.g., State ex rel. Gaydos v. Blaeuer*, 81 S.W.3d 186, 193 (Mo. App. W.D. 2002) (explaining that the U.S. Supreme Court has noted that secular notions of "fundamental fairness" cannot be borrowed from civil law and impressed upon internal church governance without violating the First Amendment).

At bottom, Plaintiff's fraud claim is an attempt to end-around the ministerial exception and these well-established constitutional principles. Plaintiff asks this Court to hold the Diocese liable because two pastors knew about her same-sex relationship and indicated to her that they did not think it would be a problem at St. Francis Xavier. Under Plaintiff's theory of fraud, her same-sex marriage could *never* factor into an adverse employment decision after these conversations took place. The ministerial exception is not so limited and is not so easy to circumvent.

Through her fraud claim, Plaintiff seeks recovery of front pay, compensatory and punitive damages, and attorney's fees. *See* Am. Pet., Prayer for Relief. The Supreme Court, however, has made clear that such relief is inappropriate and "would operate as a penalty on the Church for terminating an unwanted minister"—a penalty "no less prohibited by the First Amendment than an order overturning the termination." 132 S. Ct. at 709. The ruling Plaintiff seeks is exactly the type of ruling barred by the ministerial exception. *See id.* ("Such relief would depend on a determination that Hosanna-Tabor was wrong to have relieved Perich of her position, and it is precisely such a ruling that is

barred by the ministerial exception."). Indeed, the key to opening the door to this constitutionally prohibited relief cannot be simply relabeling Plaintiff's claims:

> Just as the ministerial exception precludes [Plaintiff] from alleging … *claims* that implicate the Defendants' protected ministerial decisions, it similarly precludes her from seeking *remedies* that implicate those decisions…. [T]he termination of [Plaintiff's] ministry and her inability to find other pastoral employment are consequences of protected employment decisions. Consequently, a damage award based on lost or reduced pay [Plaintiff] may have suffered from those decisions would necessarily trench on the Church's protected ministerial decisions. The same would be true of emotional distress or reputational damages attributable to those decisions.

Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 966 (9th Cir. 2004); *see also DeBruin*, 816 N.W.2d at 889 ("[I]f a court were to award damages on [plaintiff's] claim, which does not relate to services she has already provided, [the church] would be required, by the State, to pay for its decision to terminate an unwanted ministerial employee. This, the First Amendment does not permit.").

Because it is impossible to separate Plaintiff's fraud claim from her hiring and firing, and because her claim seeks to impose an unwanted minister on the church, the ministerial exception bars her claim. *See, e.g.*, *Blaeuer*, 81 S.W.3d at 197 (dismissing defamation claim made against church because alleged statements occurred in connection with non-renewal of employment contract and it was "impossible" to separate the two, "not only as to the issue of the reasonableness of the statements made, but also as to damages"). The Diocese is entitled to judgment as a matter of law.

C. Plaintiff is Unable to Establish the Necessary Elements for Fraud.

Besides the fact that this Court should not wade into the necessarily religious inquiry required to decide Plaintiff's fraud claim, it is clear that there is no evidence in the summary judgment record from which a reasonable finder of fact could find that the Diocese engaged in any fraudulent conduct toward Plaintiff.

Under Missouri law, the elements of fraud are:

> (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted on by the person in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation being true; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximately caused injury.

Stevens v. Markirk Constr., Inc., 454 S.W.3d 875, 880 (Mo. banc 2015) (quoting *Renaissance Leasing, LLC v. Vermeer Mfg. Co.*, 322 S.W.3d 112-131-32 (Mo. banc 2010)). "A failure to establish any one of the essential elements is fatal to recovery." *Verni v. Cleveland Chiropractic College*, 212 S.W.3d 150, 154 (Mo. banc 2007) (quoting *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. banc 1988)).

Here, Plaintiff is unable to establish that any statements made to her were actually false when made. Moreover, the uncontested facts show that Plaintiff did not actually or reasonably rely on them. Because Plaintiff cannot satisfy all of the fraud elements, this Court should reject her claim as a matter of law for that reason too.

i. Statements Made About Plaintiff's Same-Sex Marriage and Her Employment at St. Francis Xavier Were Not Fraudulent.

The truth or falsity of a representation must be determined as of the time it was made. *See Stevens*, 454 S.W.3d at 881. Thus, courts determine the truth or falsity of representations "in the light of the meaning which the plaintiffs would reasonably attach to them in existing circumstances" and consider the words "against the background and in the context in which they were used." *Renaissance Leasing, LLC*, 322 S.W.3d at 133 (quoting *Haberstick v. Gordon A. Gundaker Real Estate Co.*, 921 S.W.2d 104, 109 (Mo. App. E.D. 1996)). When an *existing fact* is misrepresented, the plaintiff must show that the speaker actually knew the statement was untrue or acted recklessly as to whether the statement was true or false. *See Stevens*, 454 S.W.3d at 881. But where, like here, the alleged misrepresentation concerns a statement of *intent as to future performance or events*, the plaintiff must establish that the speaker "actually knew, when making the representation as to a future event or act, that the representation was false." *Id.* at 881-82. While an employer can be liable for the fraudulent misrepresentations of an employee made while the employee is acting within the course and scope of employment, the plaintiff must show that the ***employee*** making the representation (not the employer) knew of the falsity of the representations—unless the plaintiff can prove that the employer expressly directed the making of the statements. *See Li v. Metropolitan Life Ins. Co.*, 998

S.W.2d 828 (Mo. App. E.D. 1999) (emphasis added); *see also O'Neal v. Stifel, Nicolause & Co.*, 996 S.W.2d 700 (Mo. App. E.D. 1999).[2]

In this case, the representations at issue were statements of intent as to future performance or events. Mariann McCormally told Plaintiff that her application for the Director of Social Ministries position would be considered based on merit after learning that she had a same-sex partner; Father Vowells said he did not think Plaintiff's sexual orientation and same-sex marriage would be a problem at St. Francis Xavier; and Father Garcia said "okay" after learning about Plaintiff's same-sex marriage. *See* SUMF ¶¶ 3-8, 10-14, 31-37. Although Plaintiff initiated all of these conversations because she knew that her same-sex relationship violated Catholic doctrine, *see* SUMF ¶¶ 4, 12, 15, 19, 31-33, she claims that they *intentionally defrauded* her into thinking her same-sex marriage could never affect her employment. Yet the undisputed facts show that no one promised her permanent employment; no one told her that she could disclose her same-sex marriage to officials at the Diocese without consequence; and no one discussed what would happen if her same-sex marriage and employment at St. Francis Xavier were publicly disclosed in a newspaper article. *See* SUMF ¶¶ 8, 14, 35, 36.

Whatever vague personal statements McCormally, Father Vowells, or Father Garcia told Plaintiff does not constitute actionable fraud. And for good reason. Encouraging Plaintiff to apply for a job, expressing no objection to her same-sex marriage, or generally stating that her same-sex marriage should be "okay" should not

[2] Again, as argued above, the court cannot make the determination as to whether McCormally, Father Vowells, or Father Garcia knew their statements to Plaintiff were false without inquiring into the doctrine of the Catholic Church. Thus, Plaintiff's claim is barred.

(and does not) make one a fraudster. *See, e.g.*, *Marsh v. Coleman Co.*, 774 F. Supp. 608, 614 (D. Kan. 1991) (holding that statements to plaintiff that he should not worry about job security and that everything would be fine were "vague personal assurances" and "fall short of actionable fraudulent promises"); *Woodring v. Bd. of Grand Trustees of the Benevolent & Protective Order of Elks*, 633 F. Supp. 583, 591-92 (W.D. Va. 1986) (concluding that statement "not to worry about [termination]" was "inherently vague," did not amount to a fraudulent representation, and "could not justifiably be relied on").

In *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985), the Eighth Circuit, applying Missouri law, held that an employee failed to submit an actionable claim for fraudulent inducement based on representations from its employer that it "liked everything about her appearance" and "intended no makeover or substantial changes in her appearance." *Id.* at 1217-18. The employee in that case was a female news anchor, who was contacted by a local Kansas City news station asking her if she was interested in auditioning for a co-anchor position with the station. *Id.* at 1208. The employee made clear to the news station that she was not interested in the position if it intended a "makeover" of her appearance. *Id.* She continued to stress that point during her audition, and the vice president and general manager of the station assured her that they planned no such changes. *Id.* Almost immediately after she accepted the co-anchor position, however, the vice president and general manager began expressing concerns about her appearance and instituted a variety of measures, such as hiring consultants to work on her makeup and wardrobe, to address their concerns. *Id.* at 1208-09. They eventually

reassigned her to a reporter position based in large part on the appearance issues. She refused to accept the reassignment and quit. *Id.* at 1209.

Concluding that the employer did not fraudulently induce the news anchor into accepting employment, the Eighth Circuit explained that the "critical element" of a fraud claim "based on a statement of present intent is proof that the speaker at the time of utterance actually did not intend to perform consistently with his words." *Id.* at 1219. Absent such intent, "there is no misrepresentation of fact or state of mind but only a breach of promise or failure to perform." *Id.* Because there was insufficient evidence for a reasonable jury to conclude that the vice president and general manager contemplated such extensive measures as to the news anchor's appearance *when they made their representations*, the court denied her fraud claim as a matter of law. *Id.* at 1220-21. The court reasoned that, even if the "actions differed from those promised," the record merely suggested that the employer changed its mind "because of the difficulties it experienced with [the employee]." *Id.* at 1221.

There is no evidence that the Diocese or Bishop Finn directed or intended that McCormally, Father Vowells, or Father Garcia make any representations to Plaintiff about her sexual orientation or same-sex marriage. In fact, the record demonstrates the opposite—that the Diocese and Bishop Finn had no role whatsoever in Plaintiff's hiring. *See* SUMF ¶ 18. McCormally, Father Vowells, and Father Garcia simply expressed their personal views that Plaintiff's sexual orientation and same-sex marriage would not be a problem for them or the parish—a view that they fully believed at the time given the current makeup of the congregation and history of the parish. *See* SUMF ¶¶ 6, 13, 37.

They never represented to Plaintiff that her same-sex marriage would not be a problem for the Diocese. *See* SUMF ¶¶ 8, 14, 36. Nor did they tell Plaintiff that her employment would be secure if her same-sex marriage was trumpeted in the newspaper. *See* SUMF ¶¶ 14, 35. At that time, they simply had no way of knowing that Plaintiff's same-sex marriage, and her relationship to St. Francis Xavier, would subsequently appear in a Kansas City *Star* article. Nothing in the record remotely suggests that they told her that her same-sex marriage was "okay" while at the same time intending to fire her for it. In fact, Father Garcia regrets Plaintiff's conduct resulted in her termination. *See* SUMF ¶ 51. At most, the record shows a change of mind as to whether Plaintiff's same-sex marriage affected her ability to represent the Church—a change that occurred ten months after Plaintiff was hired and shortly after the Kansas City Star publicized her same-sex marriage to the world. A change of mind and circumstance is not fraud. *See Craft*, 766 F.2d at 1219 ("It is not enough if for any reason, good or bad, the speaker changes his mind and fails or refuses to carry his expressed intention into effect.").

Because Plaintiff is unable establish fraudulent intent, the Court should dismiss her fraud claim. *See, e.g.*, *Woods v. Wills*, 400 F. Supp. 2d 1145, 1186 (E.D. Mo. 2005) (granting summary judgment where there was no proof, other than conclusory assertions, of a current intention not to perform); *Engstrom v. John Nuveen & Co.*, 668 F. Supp. 953, 964 (E.D. Pa. 1987) (granting summary judgment on fraud claim where defendant presented uncontradicted testimony that, at the time promises concerning salary bonuses, and permanency of employment were made, person making promises intended to carry them out).

ii. Plaintiff Knew or Should Have Known that Her Same-Sex Marriage Could Result in Her Termination if it Became Public.

To bring a claim of fraud against an employer, the plaintiff must also have reasonably relied on the alleged misrepresentation. Actual reliance is required. *See Verni v. Cleveland Chiropractic College*, 212 S.W.3d 150, 216 (Mo. banc 2007); *Trimble v. Pracna*, 167 S.W.3d 706 (Mo. banc 2005); *see also Restatement Second*, Torts § 537 (1977). A plaintiff therefore may not claim a right to rely on the truth of a representation if the plaintiff knows the representation to be false, or if it is obviously false.

Although Plaintiff claims that she understood the statements made to her to mean that her same-sex marriage could never affect her employment, the record is full of facts showing otherwise:

- Plaintiff knew that Catholic Church doctrine prohibited same-sex marriage both before and after she was hired. SUMF ¶ 19.

- Plaintiff told others, both before and after she was hired, that she would be discreet and keep her personal life private. *See, e.g.*, SUMF ¶¶ 15, 53.

- Plaintiff told others, both before and after she was hired, that she would not publicize her same-sex relationship. *See, e.g.*, SUMF ¶¶ 32, 53.

- Plaintiff discussed her marriage with only a small group of co-workers and parishioners at St. Francis Xavier. SUMF ¶¶ 54-55.

- After being fired, Plaintiff told a news reporter that, "There were no pictures in my office. There's no rainbow flag in my office, there's no rainbow flag on my bumper, so it wasn't something that I publicized." SUMF ¶ 56.

- When Plaintiff told Father Garcia about her same-sex marriage, she stated that she would leave quietly if it caused any problems. SUMF ¶ 33.

- Plaintiff subsequently e-mailed Father Garcia to give him a "heads up" about a blog article she wrote. She was concerned about a reference to her same-sex marriage in her biography and stated to Father Garcia, "[h]opefully there will be no problems." SUMF ¶¶ 38-40.

- Plaintiff also forwarded her blog article to a friend, informing her that she "won't be able to share [the article] with most of the Church" because of the "cute" reference to her same-sex marriage. She then stated, "[m]y days may be numbered – but I am going to live my life as fully as I can." SUMF ¶¶ 42-43.

- Plaintiff knew if someone sent her blog article into the Diocese, then she might have "problems." SUMF ¶ 44.

- After her termination, Plaintiff told another news reporter that, "You don't want your legacy to be one of division and ugliness … It's awful. But there are laws, and until that law gets changed in the church, it is what it is." SUMF ¶ 52.

As demonstrated by the undisputed facts above, Plaintiff always knew that her same-sex marriage could cause "problems" if it became too public, and she understood that it could jeopardize her employment with St. Francis Xavier if the Diocese learned of it. Her undisputed statements and actions, both before and after she was hired, show this to be the case. Because Plaintiff did not actually rely on the statements made by McCormally, Father Vowells, and Father Garcia, the Court should dismiss her fraud claim.

In addition to the fact that she did not believe that her same-sex marriage would never affect her employment, such a belief, if held, was unreasonable given the circumstances. To begin with, it is undisputed that all of the representations at issue took place during private, one-on-one conversations initiated by Plaintiff. *See* SUMF ¶¶ 3, 10, 31. They were made in light of St. Francis Xavier's reputation as a progressive parish that

is welcoming to gays and lesbians, *see* SUMF ¶¶ 6, 13, 37, and did not involve any discussion about whether Plaintiff could or should disclose her same-sex marriage to others outside of St. Francis Xavier, including the press or the Diocese, *see* SUMF ¶¶ 8, 14, 35, 36. Instead, everyone, including Plaintiff, understood the need for discretion in light of the Catholic Church's official position on same-sex marriage. *See, e.g.*, SUMF ¶¶ 15, 16, 32, 33, 37. Stating privately that Plaintiff's same-sex marriage was "okay" and should not be a problem is plainly not the same thing as saying, "it's okay; it won't be a problem if the *Star* publicly discloses your same-sex marriage in connection with your pastoral position with the parish; the Diocese won't care." Interpreting the first statement to mean anything like the latter is unreasonable, especially for someone who knew that Catholic Church doctrine prohibited same-sex marriage.

What's more, Plaintiff signed the "Commitment to Ethics and Integrity in Ministry" form required of all employees and volunteers, agreeing to follow the "rules and guidelines" of the Diocese's Policy on Ethics and Integrity in Ministry ("EIM"). SUMF ¶¶ 23-24. In so doing, Plaintiff acknowledged that she could be fired for failing to follow the EIM, which prohibits (among other things) employees and volunteers from engaging in "[c]onduct that is contrary to the discipline and teachings of the Catholic Church and which may result in scandal to the faithful or harm to the ministry of the Catholic Church." SUMF ¶ 27. Ignoring this explicit statement in favor of a vague one is unreasonable. *See, e.g.*, *Shelby v. Zayre Corp.*, 474 So.2d 1069, 1071 (Ala. 1985) (holding that terminated employee did not justifiably rely on assistant manager's statement that she would be permanently employed where employee signed application

informing her that employment was "at-will"). Accordingly, this Court should dismiss her fraud claim as a matter of law.

II. THE DIOCESE IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S WAGE AND HOUR CLAIM.

Like her fraud claim, Plaintiff's wage and hour claim asks this Court to involve itself in the internal affairs of St. Francis Xavier—specifically, how the church pays its ministers in light of the weekly demands of the job

Under Missouri law, an employee must be paid overtime if he or she works a workweek longer than forty hours. *See* RSMo. 290.505.1. However, because courts are to interpret Missouri law regulating overtime compensation in accordance with the Fair Labor Standards Act ("FLSA"), *Stanbrough v. Vitek Sols., Inc.*, 445 S.W.3d 90, 97 (Mo. App. E.D. 2014), Missouri's overtime requirements do not apply to ministerial employees or employees employed in an executive, administrative, or professional capacity.

Here, the ministerial exception bars Plaintiff's wage and hour claim because she was a "minister" for purposes of the exception. Her job duties and qualifications also demonstrate that she was employed in both administrative and professional capacities and thus an exempt employee under Missouri's wage and hour law. As such, this Court should grant the Diocese judgment as a matter of law on Plaintiff's wage and hour claim. *See Cort v. Kum & Go, L.C.*, 923 F. Supp. 2d 1173, 1176 (W.D. Mo. 2013) ("The question whether [employees] particular activities excluded them from the overtime

benefits of the FLSA is a question of law….") (quoting *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (8th Cir. 2000)).

A. The Ministerial Exception Bars Wage and Hour Claims.

Courts have unanimously decided that the ministerial exception bars wage and hour claims. *See, e.g.*, *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288 (9th Cir. 2010) (applying ministerial exception to Washington's wage and hour laws); *Schleicher v. Salvation Army*, 518 F.3d 472 (7th Cir. 2008) (applying ministerial exception to federal wage and hour laws); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. 2004) (same).

These courts, like the Supreme Court in *Hosanna-Tabor*, based their rulings on the First Amendment right of religious organizations to control their internal affairs without state interference. *See, e.g.*, *Alcazar*, 627 F.3d at 1291; *Schleicher*, 518 F.3d at 475. Some also note that "the congressional debate" about the federal wage and hour law and the corresponding "guidelines issued by the Labor Department" compel application of the ministerial exception. *Shaliehsabou*, 363 F.3d at 305 (quoting *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396 (4th Cir. 1990)); *see also E.E.O.C. v. First Baptist Church*, No. S91-179M, 1992 WL 247584, at *12 (N.D. Ind. 1992) ("In an effort to balance the important policies underlying the FLSA and the Equal Pay Act with the policies underlying the First Amendment, Congress and the agencies charged with enforcing those statutes have decided that people who perform certain functions within a religious faith do not act as employees protected by government regulation."). Indeed,

pursuant to the legislative history of the Fair Labor Standards Action, the Department of Labor explicitly exempts ministerial employees:

> Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be "employees."

Shaliehsabou, 363 F.3d at 305 (quoting *Field Operations Handbook*, Wage and Hour Division, U.S. Dep't of Labor, § 10b03 (1967)). The Eighth Circuit has explained that the Department of Labor, "following the intent of Congress, created this so-called ministerial exemption to lessen any danger of excessive governmental entanglement with pure religious functions." *DeArment v. Harvey*, 932 F.2d 721, 722 n.3 (8th Cir. 1991).

Because Plaintiff's job as Director of Social Ministries and Pastoral Associate for Justice and Life was a "ministerial" position, *see supra* Section I.B.i., the Court should also dismiss her wage and hour claim as a matter of law.

B. Plaintiff was Employed in an Administrative and Professional Capacity and is Thus Exempted from Missouri's Wage and Hour Law.

Missouri's wage and hour law also does not apply to employees "who are exempt from federal minimum wage or overtime requirements including, but not limited to the exemptions or hour calculation formulas specified in 29 U.S.C. Sections 207 and 213, and any regulations promulgated thereunder." RSMo. 290.505.3. The federal minimum wage and overtime requirements expressly exempt "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1); *see also* RSMo. 290.500 (stating that the term "employee" does not include "[a]ny individual

employed in a bona fide executive, administrative, or professional capacity"). Plaintiff qualifies as both an administrative and professional employee under the regulations.

i. Administrative Exemption

An administrative employee is any employee (1) compensated on a salary basis or fee basis at a rate of not less than $455 per week, (2) whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer, and (3) whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200(a).

Plaintiff plainly meets the first element because she earned a weekly salary of more than $455 while working at St. Francis Xavier. *See* SUMF ¶ 101 (showing Plaintiff earned a yearly salary of $37,000, which amounts to a weekly salary of over $700).

Plaintiff also meets the second element. According to the regulations, the phrase "directly related to the management or general business operations" refers to the type of work performed by the employee, and the employee "must perform work directly related to assisting with the running or servicing of the business" to meet this requirement. 29 C.F.R. § 541.201(a). This includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; and legal and regulatory compliance. *Id.* § 541.201(b) As Director of Social Ministries and, later,

Pastoral Associate for Justice and Life, Plaintiff had a variety of duties and responsibilities directly related to the running or servicing of the church. For example, Plaintiff was responsible for preparing, overseeing, and administering the annual budget for St. Francis Xavier's social justice ministries, including the food pantry and emergency assistance program. *See* SUMF ¶¶ 73, 85. She also was in charge of ordering, purchasing, and distributing supplies for all of the social justice programs. *See* SUMF ¶¶ 73, 83-85. And she was responsible for recruiting and training volunteers, directing publicity for the church's social justice programs and events, and networking and fostering cooperation with civic, state, and ecumenical groups. *See* SUMF ¶¶ 72, 74, 86.

Plaintiff satisfies the third element in that she exercised discretion and independent judgment with respect to matters of significance. Factors to consider when determining whether an employee meets the third element include, but are not limited to:

- Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
- Whether the employee carries out major assignments in conducting the operations of the business;
- Whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;
- Whether the employee has authority to commit the employer in matters that have significant financial impact;
- Whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
- Whether the employee has authority to negotiate and bind the company on significant matters;

- Whether the employee provides consultation or expert advice to management;

- Whether the employee is involved in planning long- or short-term business objectives;

- Whether the employee investigates and resolves matters of significance on behalf of management; and

- Whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. § 541.202(b). As previously noted, Plaintiff oversaw the church's social justice ministries. She was tasked with "[e]mpower[ing] the parish to fulfill the church's mission of justice and reconciliation," "[p]lan[ing], organiz[ing], and direct[ing] programs containing service, education, advocacy and action components," and "[p]rovid[ing] direct service for those in need." SUMF ¶ 69. To accomplish these important goals, Plaintiff had wide-ranging social justice, direct service, financial, and administrative responsibilities. *See* SUMF ¶¶ 70-74. Among other things, she oversaw and administered the budget, purchased supplies for social justice programs and events, and consulted with and advised the pastor on matters that affected the parish. *See* SUMF ¶¶ 73, 75.

The record leaves no doubt that St. Francis Xavier employed Plaintiff in an administrative capacity. She therefore was exempt from Missouri's overtime requirements, and her wage and hour claim should be denied as a matter of law.

ii. Professional Exemption

Plaintiff also qualified as an exempt "learned professional" under the regulations, and the Court should dismiss her wage and hour claim for that reason too. To be considered a "learned professional" under the regulations, the employee must be "(1) [c]ompensated on a salary or fee basis at a rate of not less than $455 per week …; (2) [w]hose primary duty is the performance of work: (i) [r]equiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction …." 29 C.F.R. §§ 541.300, .301.

Plaintiff meets the first element here because she earned a weekly salary of more than $700 while working at St. Francis Xavier. *See* SUMF ¶ 101.

As to the second element, the regulations explain that an employee's "primary duty" must be the performance of (1) "work requiring advanced knowledge" (2) "in a field of science or learning" (3) that is "customarily acquired by a prolonged course of specialized intellectual instruction." 29 C.F.R. § 541.301(a). The regulations define the phrase "work requiring advanced knowledge" as "work which is predominately intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work." *Id.* § 541.301(b). Fields of science or learning include, among other things, "traditional professions of … theology" and "other similar occupations that have a recognized professional status." *Id.* § 541.301(c). And the phrase "customarily acquired by a prolonged course of specialized intellectual instruction" limits

the exemption "to professions where specialized academic training is a standard prerequisite for entrance into the profession." *Id.* § 541.301(d).

Plaintiff's job as Director of Social Ministries and Pastoral Associate for Justice and Life was "predominately intellectual in character" for all of the reasons set forth above. Moreover, the position required a thorough knowledge and understanding of Catholic Social doctrine, as well as the ability to convey the Church's social teachings to others. *See, e.g.*, SUMF ¶¶ 68, 80, 88. To that end, the church sought an individual with a "Master's degree or its equivalent … in theology or ministry with course work in the social sciences," SUMF ¶ 76, a requirement that Plaintiff clearly met with her Certification in Catholic Social Justice from the University of Dayton and Bachelor's Degree in Philosophy and Government from the College of William and Mary, *see* SUMF ¶¶ 77-78.

Because Plaintiff also qualifies as an exempt "learned professional" within the meaning of the regulations, the Court should dismiss her wage and hour claim as a matter of law for this reason as well.

III. THE DIOCESE IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S SERVICE LETTER CLAIM.

The purpose of Missouri's Service Letter statute is to discourage corporate employers from damaging the employability of former employees by furnishing false information about their service or discharge. *See Ryburn v. Gen. Heating & Cooling, Co.*, 887 S.W.2d 604, 607 (Mo. App. W.D. 1994). If properly requested, an employer must issue a letter signed by a manager or superintendent addressing (1) the nature and

character of the employment service; (2) the duration of the employment service; and (3) the cause, if any, the employee was discharged or voluntarily left service. RSMo. 290.140.1. "Whether a service letter is sufficiently specific on its face is a question of law suitable for decision on motion for summary judgment." *Newton v. State Farm Mut. Auto. Ins. Co.*, 700 F.2d 419, 420 (8th Cir. 1983).

A. The Letter Issued to Plaintiff Adequately Addresses All Three Elements Required Under Missouri's Service Letter Statute.

Plaintiff's service letter claim falls short because the Diocese adequately addressed all three elements in a letter to Plaintiff. In response to Plaintiff's request, the Diocese issued a letter stating:

> You served St. Francis Xavier parish from 07/01/2013 to 05/14/14, in the position of Parish Social Concerns Minister (aka, Director of Social Ministries, and Pastoral Associate for Justice and Life). The nature and character of the work included the management and oversight of the parish social and justice outreach ministry to community families, as well as providing pastoral care and education on Church teaching to parishioners, as more fully described in the position description.
>
> The reason for your involuntary separation of employment was based upon an irreconcilable conflict between the laws, discipline, and teaching of the Catholic Church and your relationship—formalized by an act of marriage in Iowa—to a person of the same sex. Such conduct contradicts Church laws, discipline, and teaching and the diocesan Policy on Ethics and Integrity in Ministry.

SUMF ¶ 58.

Plaintiff does not dispute that she received this letter from the Diocese. Rather, she claims the letter was deficient in that it (1) did not state whether her performance was

satisfactory or unsatisfactory; (2) did not list her dates of service at St. James (the parish she worked at before St. Francis Xavier), and (3) gives a false reason for her termination. *See* Am. Pet. ¶¶ 78, 80.

The letter sufficiently identifies the nature and character of Plaintiff's work at St. Francis Xavier, explaining that it "included the management and oversight of the parish social and justice outreach ministry to community families, as well as providing pastoral care and education on Church teaching to parishioners." Contrary to Plaintiff's assertion, the statute does not require an employer to use magic terms, such as "satisfactory" or "unsatisfactory." In fact, such a requirement would be duplicative of the requirement that the letter also address the cause, if any, the employee was discharged or voluntarily left service.

Although the letter does not mention St. James, Plaintiff specifically requested a service letter with "regards to my dismissal from my position as Pastoral Associate for Justice and Life, May 14th, 2014 by Father Rafael Garcia from *St. Francis Xavier Parish*." SUMF ¶ 57 (emphasis added). Plaintiff requested a letter about a particular position and location. The Diocese's letter therefore properly responds to Plaintiff's request. This Court should reject Plaintiff's draconian interpretation of the first two requirements of the service letter statute as inconsistent with the general approach of Missouri courts. *See Worth v. Monsanto Co.*, 680 S.W.2d 379 (Mo. App. S.D. 1984) ("We also keep in mind that since the [service letter] statute is penal in nature, it must be strictly construed, and that it is plaintiff's burden to bring herself within the terms of the statute."); *Horstman v. Gen. Elec. Co.*, 438 S.W.2d 18, 20 (Mo. App. 1969) ("It has long

been recognized that the service letter statute is a penal statute and should be strictly construed in favor of the employer.").

Finally, there is no evidence suggesting that the stated reason for Plaintiff's termination was false. And the Court may not second-guess the church's reasons for firing Plaintiff. *See, e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 715 (Alito, J., concurring) ("In order to probe the *real reason* for [employee's] firing, a civil court—and perhaps a jury—would be required to make a judgment about church doctrine…. It would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission."); *Leavy v. Congregation Beth Shalom*, 490 F. Supp. 2d 1011, 1025 (N.D. Iowa 2007) (reasoning that a court's inquiry into whether a religious employer's stated reasons for an employee's discharge are the actual reasons "invites improper scrutiny by the Court of the Defendants' administration and expectations as a religious institution").

B. Even a Technical Violation of the Service Letter Statute Does not Support a Claim for Actual or Punitive Damages.

Even with a technical violation of the service letter statute, Plaintiff would only be entitled to one dollar in nominal damages because she cannot establish the right to recover actual or punitive damages. The Court, therefore, should at least grant the Diocese partial summary judgment on Plaintiff's service letter claim on actual and punitive damages.

i. Actual Damages

No genuine issue of material fact exists with respect to whether Plaintiff can prove actual damages. To recover actual damages based upon a service letter, Plaintiff must establish that she "was refused or hindered in obtaining employment due to the absence or inadequacy of a service letter, that the position [she] was refused or hindered in obtaining was actually open and the rate of pay for such position." *Uhle v. Sachs Elec.*, 831 S.W.2d 774, 777 (Mo. App. E.D. 1992). While Plaintiff may use circumstantial evidence to support her theory that she was refused employment based on the letter, "the circumstances must sustain the inference to be drawn and must rise above the level of mere guess and speculation." *Grasle v. Jenny Craig Weight Loss Centres, Inc.*, 167 F.R.D. 406, 414 (E.D. Mo. 1996).

In *Grasle*, the court granted an employer's motion for summary judgment on the actual damages issue where the plaintiff failed to produce any evidence to support her claim that her job search was hindered or that she was refused employment because she did not have a service letter. 167 F.R.D. at 414. In that case, a potential employer requested a service letter, but the plaintiff was unable to provide one. *Id.* Although plaintiff thought that the failure to produce a service letter resulted in her rejection of employment, the court concluded that her "beliefs are insufficient to prove the elements of actual damages" and noted that "the inquiry must focus on what the prospective employer thought about the service letter and not on what Plaintiff thinks." *Id.*

Plaintiff has not put forth any evidence showing that the service letter hindered her ability to obtain employment. In contrast, Plaintiff admitted that she has not shown the

letter to any potential employer and that no potential employer has asked to see it. SUMF ¶ 59.

ii. Punitive Damages

Punitive damages are not available if the service letter addresses the required three elements, even if the information is incorrect. *See* RSMo. 290.140.2 (content of letter cannot be basis for punitive damages); *Ryburn*, 887 S.W.2d at 607. Here, there is no question that the letter addressed all three elements. Nor is there any indication that the Diocese intended not to comply with the statute or acted with "legal or actual malice" in issuing the service letter. *See Grasle*, 167 F.R.D. at 415. Rather, the record shows that the Diocese timely responded to Plaintiff's request and issued a letter reasonably believing that it addressed everything it had to under Missouri law. *See* SUMF ¶¶ 57-58; *see also Grasle*, 167 F.R.D. at 415 ("The fact that Defendant responded to the request at all is strong evidence of an absence of malice."). Thus, the Diocese is entitled to partial summary judgment on the issue of punitive damages for Plaintiff's service letter claim. *See Grasle*, 167 F.R.D. at 415 (granting summary judgment on the issue of punitive damages where "[t]here is no evidence in the record that Defendant intended not to comply with the statute, that Defendant's failure to comply was based on evil motive or that such failure rose to the level of reckless disregard").

CONCLUSION

Based on the foregoing, Defendant Diocese respectfully requests that this Court grant its Motion for Summary Judgment.

Dated: November 9, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on November 9, 2015, I served the foregoing by filing it through the Court's e-filing system, which will automatically transmit notice to the following case participants:

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