NO. 125656

IN THE

SUPREME COURT OF ILLINOIS

MARY REHFIELD,	**) On Review of the Opinion of the**
	) Appellate Court, Third Judicial
Plaintiff-Appellant,	**) District, Case No. 3-18-0354**
	)
v.	**) There on Appeal from the**
	) Circuit Court of the Twelfth
DIOCESE OF JOLIET,	**) Judicial Circuit, Will County, IL**
	) Case No. 2017 L 001000
Defendant-Appellee.	**)**
	) Honorable Raymond J. Rossi,
	) Judge Presiding

BRIEF OF DEFENDANT-APPELLEE

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

I.

THE APPELLATE COURT PROPERLY AFFIRMED THE TRIAL COURT'S APPLICATION OF THE ECCLESIASTICAL ABSTENTION DOCTRINE TO BAR PLAINTIFF'S CLAIMS OF RETALIATORY DISCHARGE AND VIOLATION OF THE ILLINOIS WHISTLEBLOWER ACT. MOREOVER, THE U.S. SUPREME COURT'S RECENT OPINION IN *OUR LADY OF GUADALUPE SCHOOL V. MORRISSEY-BERRU* RESOUNDINGLY DEFEATS PLAINTIFF'S ARGUMENT THAT HER CLAIMS COULD BE RESOLVED BY APPLICATION OF THE NEUTRAL PRINCIPLES OF LAW APPROACH.

1.

The U.S. Supreme Court's recent decision in *Our Lady of Guadalupe School v. Morrissey-Berru* is dispositive of Plaintiff's argument that the Third District erred in affirming the dismissal of her complaint based on the ecclesiastical abstention doctrine…… 12

3.

The Third District's refusal to address Plaintiff's retaliatory discharge claim was proper since the court determined that this claim was also barred by application of the ecclesiastical abstention doctrine. Moreover, the well-established law in Illinois is that the tort of retaliatory discharge is only available to at-will employees, and Plaintiff's employment was pursuant to an express written contract… 24

ISSUES PRESENTED FOR REVIEW

1. Whether the Third District Appellate Court properly affirmed the trial court's application of the ecclesiastical abstention doctrine to bar plaintiff's claims of retaliatory discharge and violation of the Illinois Whistleblower Act.

2. Whether the Third District Appellate Court's refusal to address Plaintiff's claim that the Diocese violated the Illinois Whistleblower Act was proper where the court determined that this claim was barred by application of the ecclesiastical abstention doctrine, and where Plaintiff's claim that she was a whistleblower has no basis in fact or law.

3. Whether the Third District Appellate Court's refusal to address Plaintiff's retaliatory discharge claim was proper where the court determined that this claim was also barred by application of the ecclesiastical abstention doctrine, and where the well-established law in Illinois is that the tort of retaliatory discharge is only available to at-will employees and Plaintiff's employment was pursuant to an express written contract.

STATEMENT OF FACTS

Mary Rehfield ("Plaintiff") was hired in 2012 by Rev. Daniel Bachner, Pastor of St. Raphael Catholic Parish in Naperville, Illinois ("Pastor"), to serve as principal of St. Raphael Catholic School ("St. Raphael") in the 2012-2013 school year. (R. C68) Plaintiff and the Pastor entered into a one-year express written employment contract. (R. C68) Plaintiff and the Pastor signed successive one-year employment contracts through June 30, 2018. (R. C68, C197) Plaintiff was relieved of her duties as principal of St. Raphael on June 9, 2017, prior to the contract termination date of June 30, 2017. (R. C68, C70-71, C195) St. Raphael nevertheless honored the 2016-2017 employment contract and paid Plaintiff through June 30, 2017. (R. C70-71) Moreover, since Plaintiff's employment contract for the 2017-2018 school year had already been signed by the Pastor and Plaintiff, St. Raphael honored the contract and paid Plaintiff her full contracted salary per the 2017-2018 contact. (R. C70-71)

The circumstances leading up to Plaintiff's removal as principal are as follows: On or about May 8, 2017, the *Naperville Sun*, a local community newspaper, ran a front-page story entitled "Man vowed to 'terrorize' Naperville school: authorities." (R. C85) The story referenced threatening email and voicemail messages left by one William Mackinnon, parent of a student at St. Raphael School. (R. C85) Mackinnon lived in Massachusetts. (R. C83)

The emails referenced in the *Naperville Sun* story were sent by Mackinnon beginning in January of 2016. (R. C83) His daughter, a student at St. Raphael School, had purportedly been bullied by other students and Mackinnon wanted her teacher to address the problem. (R. C83) This email was rude in tone but not threatening. (R. C83) However, additional emails sent by Mackinnon to the teacher and Plaintiff were threatening in nature,

and Plaintiff contacted the Naperville Police sometime in the Spring of 2016. (R. C83-84) The police took no action at that time, however, they provided Plaintiff with a photo of Mackinnon, which Plaintiff distributed to the parish and school staff and advised them to call "911" if they spotted Mackinnon on campus. (R. C84)

The voicemail message referenced in the *Naperville Sun* story was left by Mackinnon on or about February 7, 2017, three months before the story ran. (R. C84) The message was for the Pastor; it consisted of a lengthy rant about Catholic priests and the Church in general and contained a threat against the Pastor. (R. C84) Plaintiff listened to the voicemail message and reported it to the Naperville Police. (R. C84) The matter was investigated, and an arrest warrant was issued for Mackinnon. (R. C84) None of these facts were communicated to the school parents at the time they took place, purportedly on the advice of the police and the Pastor. (R. C85) However, Plaintiff again distributed a photograph of Mackinnon to the parish and school staff and advised them to call "911" if they spotted Mackinnon. (R. C85)

Immediately after the *Naperville Sun* story ran on May 8, 2017, concerned parents began to call the school and parish. (R. C86) On May 9, 2017, Plaintiff sent a letter to the school parents explaining the situation, however, the letter is not included in the record on appeal. (R. C86) It was decided that a parent meeting should be scheduled. (R. C86) Prior to the parent meeting, a strategic discussion took place with school, parish and diocesan officials. (R. C86)

The parent meeting took place a few days after the story appeared in the Naperville Sun. (R. C86) The parent meeting was by all accounts, a debacle. (R. C86) Plaintiff presided over the meeting. (R. C87) The parents were volatile, explosive and aggressive

towards Plaintiff and some demanded that she be removed as principal. (R. C86) Subsequently, on June 9, 2017, Plaintiff was relieved of her duties as principal of St. Raphael. (R. C68)

Ministerial Nature of Plaintiff's Role as Principal

St. Raphael Catholic Parish and School are agents of the Roman Catholic Diocese of Joliet ("Diocese"). (R. C176) The Pastor's responsibilities include leading the Parish, administering the sacraments, saying mass, ministering to the spiritual needs of the Parish, managing Parish finances, managing and overseeing St. Raphael School, and supervising, hiring and contracting with the principal, teachers and other staff who work at St. Raphael School. (R. C176-177) Further, it is the Pastor's responsibility to ensure that St. Raphael School' s principal and his/her subordinate administrators and educators are, at all times, educating students in the teachings and principles of the Roman Catholic faith and always conducting themselves in a manner consistent with those same Roman Catholic faith teachings and principles. (R. C177) St. Raphael School exists to provide an education rooted in the Gospel of Jesus Christ where Catholic doctrine and values, as well as academic excellence, prepare each student for a life of faith, service and integrity. (R. C177) While the students of St. Raphael School are instructed in secular subjects, a critical aspect of their education is Roman Catholic faith-based instruction and moral inculcation. (R. C177)

In 2016, the Diocese updated the Catholic School Personnel Policy Handbook, which communicated the minimum qualifications and ecclesiastical job duties of Catholic school principals. (R. C181) The 2016-17 contract specifically incorporated these ecclesiastical job duties into its terms. (R. C181, C185) As specifically stated in the terms

of the Policy Handbook and the 2016-17 contract, and verified by the December 21, 2017 Declaration of Father Daniel Bachner (the "Bachner Declaration"), Plaintiff's contractually-mandated ecclesiastical job duties included "providing an atmosphere in the school which is identifiably Catholic," "developing and participating in ongoing programs to ensure religious and professional growth of the staff," and "establishing an instructional program which includes religious education to meet the needs of students." (R. C182) An essential, indeed indispensable, responsibility which Plaintiff held as principal of St. Raphael School was to serve as a lay educational minister. (R. C180) Under the direction and guidance of the Pastor, Plaintiff was responsible for the spiritual and religious education, development and growth of all pupils and staff in the principles of the Roman Catholic faith, as well as students' and staff's adherence to those same Roman Catholic principles. (R. C180)

Among the minimum contractual qualifications for Plaintiff's position, she was required to have a commitment to nurturing the Catholic identity of the school; possess teaching experience preferably at a Catholic school; and the ability to function as the spiritual educational leader of the Roman Catholic elementary school that she would serve. (R. C181-183) Pursuant to the 2016-17 contract, Plaintiff was responsible for representing the Diocese within the community by serving on the school board and fostering communication within the parish community, and she was chiefly responsible for school community relations on behalf of the Diocese. (R. C177-178) As a Principal within the Diocesan Board of Education, Plaintiff was expected to serve as the religious and educational leader of the St. Raphael School community. (R. C177) The Diocese considered Plaintiff's obligation to serve as an educational minister, by ensuring the

spiritual and religious education, development, and growth of all pupils and staff in the principles of the Roman Catholic faith, to be among the most important and solemn duties with which she was entrusted under her several employment contracts, including the 2016-17 contract. (R. C180)

Procedural Background

On November 21, 2017, Plaintiff filed the original Complaint, therein alleging a single count of common law retaliatory discharge against the Diocese. (R. C4-14) On January 5, 2018, the Diocese filed Defendant Diocese of Joliet's Combined 735 ILCS §§ 2-615 and 2-619 Motion to Dismiss (R. C23-73) Rather than responding to the First Motion to Dismiss, Plaintiff elected to amend her Complaint. (R. C77-79)

On February 27, 2018, Plaintiff filed her First Amended Complaint (the "Amended Complaint") alleging two counts against the Diocese: (1) common law retaliatory discharge; and (2) a violation of the Illinois Whistleblower Act, 740 ILCS 174 et. seq. (C80-92) On March 16, 2018, the Diocese filed Defendant Diocese of Joliet's Combined 735 ILCS §§ 2-615 and 2-619 Motion to Dismiss Plaintiff's Amended Complaint. (C94-100) The Diocese also filed a Memorandum in Support, which included as exhibits the sworn declarations of Nancy Siemers, Director of Human Resources for the Diocese, and Rev. Daniel Bachner, Pastor of St. Raphael Parish. (R. C101-144) On April 16, 2018, Plaintiff filed Plaintiff's Opposition to Defendant's Combined 735 ILCS 5/2-615 and 2-619 Motion to Dismiss Plaintiff's Amended Complaint. (R. C145-161) Plaintiff offered no affidavits or declarations in support of her Opposition and did not serve or seek leave to serve any discovery, either for purposes of responding to the Motion to Dismiss the Amended Complaint or otherwise. On April 30, 2018, the Diocese filed Defendant Diocese

of Joliet's Reply in Support of Its Combined Motion to Dismiss Plaintiff's Amended Complaint. (C162-197)

After considering all written submissions and the Diocese's evidentiary submissions, the Circuit Court heard oral argument on May 14, 2018. (R1-10) The Circuit Court ruled that (1) common law retaliatory discharge claims may only be asserted by employees terminable at will, (2) Plaintiff was employed pursuant to a written contract, and (3) it would abstain from exercising jurisdiction over either of Plaintiff's claims pursuant to the ecclesiastical abstention doctrine, finding that Plaintiff was employed in a ministerial role as the spiritual and educational leader of St. Raphael School. (R8) On those bases, the trial court granted the Diocese's Motion to Dismiss the Amended Complaint and dismissed Plaintiff's action and all claims asserted in her Amended Complaint with prejudice.

On June 11, 2018, Plaintiff filed her Notice of Appeal (R. C201) The Third District Appellate Court heard oral argument on April 3, 2019 and issued its opinion on December 10, 2019, affirming the trial court's dismissal of the Amended Complaint with prejudice. Plaintiff filed a Petition for Leave to Appeal on January 13, 2020, which this Court allowed on March 25, 2020.

STANDARD OF REVIEW

The standard of review of a trial court's decision to grant a §2-615 or a §2-619 motion to dismiss is *de novo*. *Bruss v. Przybylo*, 385 Ill. App. 3d 399, 404-405 (2d Dist. 2008). An abuse of discretion standard applies to the trial court's decision to dismiss Plaintiff's Amended Complaint with prejudice. *Id*.

ARGUMENT

I.
THE APPELLATE COURT PROPERLY AFFIRMED THE TRIAL COURT'S APPLICATION OF THE ECCLESIASTICAL ABSTENTION DOCTRINE TO BAR PLAINTIFF'S CLAIMS OF RETALIATORY DISCHARGE AND VIOLATION OF THE ILLINOIS WHISTLEBLOWER ACT. MOREOVER, THE U.S. SUPREME COURT'S RECENT OPINION IN *OUR LADY OF GUADALUPE SCHOOL V. MORRISSEY-BERRU* RESOUNDINGLY DEFEATS PLAINTIFF'S ARGUMENT THAT HER CLAIMS COULD BE RESOLVED BY APPLICATION OF THE NEUTRAL PRINCIPLES OF LAW APPROACH.

Plaintiff argues that the Appellate Court erred in affirming the trial court's dismissal of her claim that her "termination" from employment was in retaliation for the reporting of William Mackinnon's criminal conduct to the police as a "whistleblower," based on the ecclesiastical exemption doctrine. Plaintiff argues that the Appellate Court's decision gives religious institutions *carte blanche* to terminate employees for any reason whatsoever, even if such action would render a secular employer liable for valid claims of discrimination or retaliatory discharge.

Plaintiff's argument is premised on two falsehoods, i.e. that she was terminated from employment and that she was a whistleblower. Neither is true. These points will be addressed in detail in Arguments (2) and (3) below.

1.
The U.S. Supreme Court's recent decision in *Our Lady of Guadalupe School v. Morrissey-Berru* is dispositive of Plaintiff's argument that the Third District erred in affirming the dismissal of her complaint based on the ecclesiastical abstention doctrine.

Plaintiff's assertion that the trial court erred in dismissing the complaint based on the ecclesiastical abstention doctrine has been decimated by the U.S. Supreme Court's opinion in *Our Lady of Guadalupe School V. Morrissey-Berru*, ___ U.S. ___, 140 S.Ct.

2049 (2020) ("*Guadalupe*"). In *Guadalupe*, the Court held that the First Amendment does not permit courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith.

In *Guadalupe*, the Court decided consolidated cases involving two lay Catholic schoolteachers in the Archdiocese of Los Angeles. Agnes Morrissey-Berru, a 5th and 6th grade teacher at Our Lady of Guadalupe School (OLG), taught all subjects including religion. She signed one-year employment contracts with OLG which provided "the school's hiring and retention decisions would be guided by its Catholic mission" and "teachers were expected to 'model and promote' Catholic 'faith and morals.'" *Guadalupe*, 140 S.Ct. at 2056. Morrissey-Berru was considered a catechist defined as one who is "responsible for the faith formation of the students in their charge each day." *Id*. She prayed with her students each day and prepared them for Mass, Confession and Communion. *Id*. at 2057.

In 2014, OLG asked Morrissey-Berru to move from a full-time to a part-time position, and the next year, the school declined to renew her contract. She filed a claim with the Equal Employment Opportunity Commission (EEOC) and filed suit under the Age Discrimination in Employment Act of 1967, claiming the school had demoted her and failed to renew her contract so she could be replaced with a younger teacher. The school maintained that Morrissey-Berru's contract was not renewed because of poor performance. *Id*. at 2057-2058.

Kristin Biel was a teacher at St. James School. For one year she was a long-term substitute teacher in 1st grade, and she taught 5th grade the next year. *Id*. at 2058. She signed one-year employment contracts with St. James, which were virtually identical to the

contracts signed by Morrissey-Brewer. She taught all subjects to her students, including religion. She prayed with her students each day, prepared them for monthly school Masses and taught them about the sacraments of Confession and Communion. *Id*. at 2058-2059.

St. James declined to renew Biel's contract after her second year at the school. She filed charges with the EEOC and sued St. James School, alleging she was discharged because she had requested a leave of absence to obtain treatment for breast cancer. The school maintained that Biel's contract was not renewed because of performance issues. *Id*. at 2059.

Two different district courts granted summary judgment in favor or OLG and St. James based on the ministerial exception, and the plaintiffs, respectively, appealed to the Ninth Circuit Court of Appeals. Two different panels of the Ninth Circuit reversed both trial courts.

In deciding *Guadalupe*, the Supreme Court first engaged in a historical overview of the First Amendment's guarantee of the independence of religious institutions in matters of faith and doctrine. The Court noted "[t]his does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles." *Id*. at 2061.

The Court then reviewed and explained its decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U. S. 171 (2012) noting that in *Hosanna*, the Court declined to adopt "a rigid formula" for determining whether an employee qualifies as a minister. *Id*. at 2062. Rather, the Court identified facts it found relevant such as the

teacher's title of "Minister," her extensive religious training, she held herself out as a minister of the Lutheran faith, and, her job duties reflected a role in conveying the Church's message and carrying out its mission. *Id*. at 2062-2063. In *Guadalupe*, the Court noted that these facts, "while instructive in *Hosanna-Tabor*, are not inflexible requirements and may have far less significance in some cases. *What matters, at bottom, is what an employee does*. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Id*. at 2064. (Emphasis added)

The *Guadalupe* Court chastised the Ninth Circuit for treating the *Hosanna-Tabor* circumstances as "checklist items" to be assessed and weighed against each other, stating "[t]hat approach is contrary to our admonition that we were not imposing any "rigid formula. [citation omitted] Instead, we called on courts to take all relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of the exception." *Id*. at 2067. In essence, the Ninth Circuit missed the forest for the trees. Conversely, in *Sterlinski v. Catholic Bishop of Chicago*, 934 F. 3d 568 (7th Cir. 2019), the 7th Circuit got it right.

The *Guadalupe* Court noted that "[i]n the Catholic tradition, religious education is 'intimately bound up with the whole of the Church's life.' Catechism of the Catholic Church 8 (2d ed. 2016). Under canon law, local bishops must satisfy themselves that "those who are designated teachers of religious instruction in schools . . . are outstanding in correct doctrine, the witness of a Christian life, and teaching skill." Code of Canon Law, Canon 804, §2 (Eng. transl. 1998)." *Guadalupe*, 140 S.Ct. at 2065.

While *Guadalupe* involved summary judgment rulings based on the ministerial exception affirmative defense, the doctrine of ecclesiastical abstention prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116-17, 73 S.Ct. 143 (1952). The "church autonomy" line of cases began with *Watson v. Jones*, 1871 WL 14848, 80 U.S. 679 (1871), in which the Court declined to intervene in a property dispute between two factions of a church. The Court found that secular courts are bound by the decision of the highest church judicatory in internal matters of faith or ecclesiastical rule.

In *Gabriel v. Immanuel Evangelical Lutheran Church*, 266 Ill. App. 3d 456, 640 N.E.2d 681 (4th Dist. 1994), the court recognized that "[t]he basic freedom of religion is guaranteed not only to individuals but also to churches in their collective capacities which must have 'power to decide for themselves, free from [S]tate interference, matters of church government as well as those of faith and doctrine.' (*Kedroff, supra.*)" *Gabriel*, 640 N.E. 2d at 458. "Ecclesiastical decisions are generally inviolate; 'civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchal polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.' *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976) [citation]." *Id* at 458-459.

"The right to choose ministers without government restriction underlies the well-being of the religious community. (See *Kedroff*, [citation] The Supreme Court has consistently concluded certain civil rights protected in secular settings are not sufficiently compelling to overcome certain religious interests. (See *Gonzalez v. Roman Catholic Archbishop* (1929), 280 U.S. 1, 16, 50 S.Ct. 5, 7, 74 L.Ed. 131, 136-37.) "[Decisions of

church authorities concerning] the essential qualifications of [clergy] and whether the candidate possesses them * * * although affecting civil rights, are accepted in litigation before the secular courts as conclusive * * *." *Gonzalez*, 280 U.S. at 16, 50 S.Ct. at 7, 74 L.Ed. at 137." *Gabriel*, 640 N.E.2d at 459.

Applying these well-established legal principles to the case at bar, there is no question that the trial court correctly found that Plaintiff was employed in a ministerial role as the spiritual and educational leader of St. Raphael School, and abstained from exercising jurisdiction over either of Plaintiff's claims pursuant to the ecclesiastical abstention doctrine. The Third District's decision affirming the trial court's ruling was likewise correct.

Plaintiff does not concede that she was a ministerial employee, however, she appears to accept that the "Appellate Court's opinion is 'heavily grounded' in its conclusion that [Plaintiff] "was not a secular employee' and constituted 'a member of the clergy.'" (Plaintiff's Brief, P. 16) Rather, Plaintiff's position is that a resolution of this lawsuit turns on neutral principles of law that do not require the court to meddle in religious decision-making and therefore, the ecclesiastical abstention doctrine should not be part of the analysis.

In support of this position, Plaintiff relies on *Jackson v. Mount Pisgah Missionary Baptist Church Deacon Board*, 2016 IL App (1st) 143045, 59 N.E.3d 76. The plaintiff, Jackson, a former pastor with the defendant Church, sued the Church for breach of the parties' oral employment agreement, which provided that Jackson's employment would be governed by the church's bylaws. Jackson alleged the Church breached the oral agreement

when they terminated him because they did not follow the procedural steps required by the bylaws for terminating a pastor.

Although neither party in *Jackson* raised the issue of jurisdiction on appeal, the Court was obliged to address it. Initially, the *Jackson* Court noted "[a] civil court may not exercise jurisdiction over an employment dispute between a church and a church member if the parties are bound by the church's law, which provides its own procedures for entering into employment contracts, and the plaintiff alleges a violation of only civil law," citing *Gabriel, supra. Jackson* ¶51. However, since *Jackson* involved the question of whether the Church violated its own bylaws, the Court held that it had jurisdiction to decide this question since it did not involve the interpretation of religious doctrine. *Id*. ¶52.

The other authorities upon which Plaintiff relies upon in support of her neutral principles of law argument are similarly inapposite to the instant case. *Bivin v. Wright*, 275 Ill. App. 3d 899, 656 N.E.2d 1121 (5th Dist. 1995), a sexual misconduct tort action, and *Duncan v. Peterson*, 408 Ill. App. 3d 911, 947 N.E.2d 305 (2d Dist. 2010), a false light invasion of privacy tort action, did not involve the interpretation of religious doctrine. *Jones v. Wolf*, 443 U.S. 595, 99 S.Ct. 3020 (1979) was a church property dispute sounding in equity that turned on an interpretation of Georgia law, not an interpretation of religious doctrine. *Apostolic New Life Church of Elgin v. Dominguez*, 292 Ill. App. 3d 879, 686 N.E.2d 1187 (2d Dist. 1997) was also a church property dispute that did not involve the interpretation of church doctrine, polity, or practice. Finally, *Minker v. Baltimore Annual Conference of United Methodist Church*, 1990 WL 9870, 894 F. 2d 1354 (D.C. Cir. 1990) actually supports the Third District's opinion. The *Minker* Court upheld the trial court's dismissal of the plaintiff's federal and state age discrimination claims on the basis that the

application of the Age Discrimination in Employment Act (ADEA) or its comparable state statute would violate the free exercise clause of the First Amendment.

In conclusion, the *Guadalupe* Court held, "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." *Guadalupe*, 140 S.Ct. at 2069. The Court expanded the scope of *Hosanna-Tabor, supra* to include all employment disputes between a faith-based school and its ministerial employees. It therefore bars Plaintiff's claim that she was discharged from employment for being an alleged whistleblower.

Accordingly, the opinion of the Third District Appellate Court must be affirmed.

2.

The Third District's refusal to address Plaintiff's claim that the Diocese violated the Illinois Whistleblower Act was proper since the court determined that this claim was barred by application of the ecclesiastical abstention doctrine. Moreover, Plaintiff's assertion that she was a whistleblower has no basis in fact or law.

Plaintiff alleges that the Third District Appellate Court erred in failing to address her claim that she was fired for being a whistleblower. She further argues that application of the ecclesiastical abstention doctrine in this case is against public policy. Plaintiff's argument in this regard is premised on an untrue statement that has no basis in fact or law. Plaintiff was not a whistleblower.

The Whistleblower Act does not define the term "whistleblower." However, in Sardiga v. Northern Trust Co., 409 Ill. App. 3d 56, 948 N.E.2d 652 (1st Dist. 2011), the court stated that the Whistleblower Act protects "employees who call attention in one of

two specific ways to illegal activities *carried out by their employer*. It protects employees who either contact a government agency to report the activity or refuse to participate in that activity. An employee who does not perform either of the specifically enumerated actions under the [Whistleblower] Act cannot qualify for its protections." (emphasis added). *Sardiga*, 948 N.E.2d at 657.

Plaintiff was not a whistleblower and her assertion that she was a whistleblower is a red herring. She reported to the police the criminal actions of William Mackinnon, a school parent who lived one thousand (1,000) miles away in Massachusetts. She did not report criminal activities of any employee of the Diocese or St. Raphael Parish or School.

Plaintiff did not have to choose between reporting Mackinnon's activities to the police and keeping her job, nor did she. Plaintiff first reported Mackinnon's threatening emails in the Spring of 2016. (R. C84) At that time, she consulted with the police and the Pastor. (R. C84) Both approved Plaintiff's dissemination of Mackinnon's photograph to the St. Raphael school and parish staff as well as her instructions that they call "911" if they saw Mackinnon on campus. (R. C84) If the Diocese or the Pastor intended to fire Plaintiff over reporting Mackinnon's criminal actions to law enforcement authorities, she would have been fired in 2016.

Similarly, in February of 2017 when Mackinnon left a threatening message for the Pastor on the parish's voicemail and Plaintiff reported it to the police, she simultaneously consulted with the Pastor and the Superintendent of Schools. (R. C84) She states in her Amended Complaint that "they were very sensitive to the issue of communicating with parents and students appropriately, with a focus on ensuring safety and also on avoiding unnecessary distress." (R. C 84) Plaintiff thus admits that the Pastor and Superintendent

were focused on the safety of students, yet she claims that she was fired for attempting to keep them safe. Her position is internally inconsistent.

Assuming, *arguendo*, that this Court finds Plaintiff to be a whistleblower based on the record before the Court, *Guadalupe*, *supra* is equally applicable to Plaintiff's claim that she was discharged for being an alleged whistleblower. The Illinois Whistleblower Act, 740 ILCS 174/1 et seq. is an employment statute. The *Guadalupe* Court held, "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into *disputes between the school and the teacher* threatens the school's independence in a way that the First Amendment does not allow." *Guadalupe*, 140 S.Ct. at 2069. (Emphasis added.) The Court did not limit this ruling to discrimination claims; on the contrary, the Court expanded the scope of *Hosanna-Tabor* to include all employment disputes between a faith-based school and its ministerial employees.

In her brief, Plaintiff argues that the holding in *Hosanna-Tabor* was very narrow and only applies to claims of employment discrimination. (Plaintiff's Brief, P. 13) This is the same position taken by the two Ninth Circuit panels who decided the Morrissey-Brewer and Biel decisions, which the *Guadalupe* Court soundly rejected. Plaintiff also states that the case at bar presents this Court with "the opportunity to address the very issue that the Supreme Court expressly identified as an unsettled issue." (Plaintiff's Brief, P. 14) This statement may have been true when it was written, but it is no longer. The U.S. Supreme Court has spoken and has rendered moot Plaintiff's invitation to this Court to address this no longer "unsettled issue."

Plaintiff nevertheless urges this Court to reject the ecclesiastical abstention doctrine for public policy reasons. She argues that application of this well-established doctrine should not be applied to a retaliatory discharge claim made by a whistleblower.

In *Darchak v. City of Chi. Bd. of Educ*., 580 F.3d 622 (7th Cir. 2009), the 7th Circuit addressed the issue of public policy in a retaliatory discharge case brought by a contracted employee. *Darchak* involved a Polish bilingual teacher who filed a retaliatory discharge action claiming violations of the Americans with Disabilities Act (ADA), national origin discrimination in violation of Title VII of the Civil Rights Act of 1964, retaliatory discharge, and retaliation for exercise of her First Amendment rights in violation of 42 U.S.C. §1983. The plaintiff argued the public policy underlying the No Child Left Behind Act required the Polish students at her school to be provided the same access to "high quality" education as the Hispanic students.

The *Darchak* Court initially noted, "[W]hat counts as a clearly mandated public policy is not precisely defined, see, e.g., *Palmateer v. Int'l Harvester Co*., [citation]; *Carty v. Suter Co., Inc*., [citation], the tort has been narrowly construed in Illinois to include only discharges in retaliation for certain activities, such as reporting an employer's criminal violations, *Palmateer*, [citation], or violations of health and safety standards, *Wheeler v. Caterpillar Tractor Co*., [citation]. See also *Kelsay v. Motorola, Inc*., [citation]. The Illinois Supreme Court has defined "public policy" only within these limited bounds and thus "has consistently sought to restrict the common law tort of retaliatory discharge." *Fisher v. Lexington Health Care, Inc*., [citation] (citing *Buckner v. Atlantic Plant Maintenance, Inc*., [citation]. *Darchak,* 580 F.3d at 629.

Rejecting plaintiff's argument that providing all children with a fair, equal, and significant opportunity to obtain a high-quality education was a public policy that required the court to reject well-established principles of employment law in Illinois, the *Darchak* Court stated: "Educational quality is doubtless an important social objective, but Illinois courts have never recognized a claim for retaliatory discharge based on a reported violation of that policy or any like it, nor do we have reason to believe that they would do so in an appropriate case." *Darchak*, 580 F.3d at 629.

Plaintiff relies on *Palmateer v. International Harvester Co. (IH)*, 85 Ill. 2d 124, 421 N.E. 2d 876 (1981) in support of her argument. In *Palmateer*, the Plaintiff alleged that he was fired for supplying information to a local law-enforcement agency that an IH employee might be violating the Criminal Code, for agreeing to gather further evidence implicating the employee, and for intending to testify at the employee's trial, if it came to that. The Plaintiff was an *actual* whistleblower. The Court found the discharge of this at-will employee to be in contravention of a clearly mandated public policy, i.e. protection of the lives and property of the citizens of Illinois. *Palmateer* is inapposite to the case at bar since the plaintiff was employed at-will.

Accordingly, this Court should find that Plaintiff's claim that she was fired for being a whistleblower is disingenuous at best. Further, consideration of this claim is precluded by the ecclesiastical abstention doctrine and by *Guadalupe's* holding that "judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." *Guadalupe*, 140 S.Ct. at 2069. For all these reasons, this Court should affirm the judgment of the Third District Appellate Court.

3.

The Third District's refusal to address Plaintiff's retaliatory discharge claim was proper since the court determined that this claim was also barred by application of the ecclesiastical abstention doctrine. Moreover, the well-established law in Illinois is that the tort of retaliatory discharge is only available to at-will employees and Plaintiff's employment was pursuant to an express written contract.

Plaintiff claims that under Illinois common law, a contracted employee may bring a claim for retaliatory discharge if she was discharged in retaliation for her activities and the discharge violates a clear public policy mandate. She alleges that she was fired in retaliation for reporting William Mackinnon's conduct to the police. This is the second fiction propounded by Plaintiff; she was neither discharged nor fired.

Plaintiff was relieved of her duties as principal of St. Raphael School on June 9, 2017. St. Raphael continued to pay Plaintiff her full salary through June 30, 2017 in accordance with the terms of her 2016-2017 employment contract. In good faith, St. Raphael also paid Plaintiff her full salary through June 30, 2018 in accordance with the terms of her 2017-2018 employment contract, which the Pastor and Plaintiff had both signed prior to the events in question. At best, Plaintiff's contract for the 2018-2019 school year was not renewed. How Plaintiff characterizes a full payout of a year's salary for not working a single day as a "termination of employment" is incomprehensible.

By her own admission, Plaintiff signed one-year express written employment contracts with the Pastor of St. Raphael Parish for each school year that she served as principal. Plaintiff understood that, in order to remain employed as principal of the school, she had to sign a new contract every year. Plaintiff's allegation that she relied on previous discussions with the Pastor concerning her expectation that she would remain as principal

at the school until the age of seventy (70), is disingenuous. (R. C87) As an educator with more than forty-three (43) years of experience, Plaintiff had presumably signed at least forty-three (43) employment contracts. She knew how the business of education worked.

Although not addressed by the Third District, the law is well-settled in Illinois on retaliatory discharge claims brought by contracted employees. In short, such claims are not permitted.

Illinois courts evaluating retaliatory discharge claims have refused "to recognize a claim in any injury short of actual discharge." *Bajalo v. Northwestern Univ*., 369 Ill. App. 3d 576, 860 N.E.2d 556, 561 (Ill. App. Ct. 2006). "Actual discharge" means termination of an "at-will" employee - one whose employment has a nonspecific duration that can be terminated for any reason - not nonrenewal of a fixed-term employment contract. *Krum v. Chi. Nat'l League Ball Club, Inc*., 365 Ill. App. 3d 785, 851 N.E.2d 621, 624 (Ill. App. Ct. 2006). Indeed, Illinois appellate courts have expressly refused to extend the reach of the retaliatory discharge tort to cover the nonrenewal of a fixed-term contract. *Id*. at 625. See also *Bajalo*, 860 N.E.2d at 559–63.

Taylor v. City of Chi. Bd. of Educ., 2014 IL App (1st) 123744, 10 N.E.3d 383 is also particularly germane to the case at bar. Taylor involved an *actual* whistleblower who reported to DCFS that a special education teacher allegedly abused a student. The Court flatly rejected the plaintiff's retaliatory discharge claim since he was a contracted employee. *Taylor* ¶34. See also *Darchak v. City of Chi. Bd. of Educ*., *supra.*

But for her status as a ministerial employee of a religious institution, Plaintiff is indistinguishable from the plaintiffs in *Taylor* and *Darchak*. The terms and duration of her Diocesan employment were stipulated in express, written employment contracts. Plaintiff

was paid all monies due under both the 2016-2017 and 2017-2018 contracts. She nevertheless unjustifiably demands common law tort damages, which are exclusively available to non-contracted at-will employees.

Plaintiff asserts that she was "actually fired" unlike the plaintiffs in *Darchak,* whose contract was "not renewed," *Bajalo,* who was "not invited back to continue her research," and *Krum*, who was "not rehired." These are distinctions without a difference. Indeed, just as the Diocese relieved Plaintiff of her job responsibilities with full pay under her Diocesan employment agreements, the *Krum* and *Bajalo* plaintiffs were both discharged before the expiration of their employment contracts, compensated through the expiration of those employment contracts, and their employment contracts subsequently were not renewed. *Krum,* 365 Ill. App. 3d at 787 ("[T]he Cubs 'terminated' Krum … [and] continued to pay Krum's salary pursuant to his employment contract until … [it] expired."); *Bajalo,* 369 Ill. App. 3d at 578 (the university informed plaintiff that it would not renew her contract after its expiration and "terminated" her the same day by instructing her not to return to the campus for the remainder of her contract). Just as the Appellate Court in *Krum* and *Bajalo* concluded that the tort of retaliatory discharge was unavailable to the plaintiffs employed pursuant to the employment contracts in those cases, the trial court below properly applied the same principle in dismissing Plaintiff's claims.

Plaintiff has failed to cite a single case in support of her argument that, as a contracted employee, she is entitled to pursue a retaliatory discharge claim. Plaintiff points out that this Court has had many opportunities to embrace this view and has declined to do so. She again urges this Court to turn well-established Illinois law on its head for public policy reasons that are not even supported by the facts of this case. For the reasons set

forth in Argument (2), *supra*, this Court should also reject this ill-conceived public policy argument.

For all these reasons, the Circuit Court properly found that Plaintiff was employed by the Diocese pursuant to an express written contract, and, that common law retaliatory discharge claims may only be asserted by employees terminable at will. The Third District's opinion affirming the judgment of the trial court should be affirmed.

CONCLUSION

Defendant-Appellee respectfully requests that this Court affirm the judgment of the Third District Appellate Court.

August 12, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 25 pages.

/s/ Maureen A. Harton
Maureen A. Harton

CERTIFICATE OF SERVICE AND NOTICE OF FILING

I certify under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, that on August 12, 2020, a copy of the foregoing Brief of Defendant-Appellee was filed and served upon the Clerk of the Illinois Supreme Court via the electronic filing system through an approved electronic filing service provider and was served on counsel of record below in the manner indicated:

Via email to:
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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct.

/s/ Maureen A. Harton
Maureen A. Harton

Based upon this Court's April 2, 2020 Order regarding COVID-19, Appellee will not send any paper copies of this filing to this Court unless so requested.