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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CARMEN E. NICOSIA,) 3:10-cv-00667-HDM-RAM
)
Plaintiff,)
) ORDER
vs.)
)
DIOCESE OF RENO,)
)
Defendants.)
_____)

Before the court is the defendant Diocese of Reno's ("defendant") motion to dismiss, or in the alternative, motion for summary judgment (#6). Plaintiff Carmen "Nick" Nicosia ("plaintiff") has opposed (#14), defendant has replied (#20), and plaintiff has filed a surreply (#26).

Also before the court is plaintiff's motion to strike exhibits attached to defendant's reply (#27).¹ Defendant has opposed (#32). Plaintiff indicates he will not be filing a reply (#34).

¹ Although plaintiff refers to this document as objections, the document is entitled both "Objections to Evidence" and "Motion to Strike." Moreover, the plaintiff moves the court to strike a number of defendant's exhibits. (Doc. #27 1:21-22). Accordingly, defendant properly responded to the motion.

1 Finally, the plaintiff has filed a first amended complaint.
2 The defendant has filed a motion to dismiss that complaint (#35),
3 which incorporates by reference the arguments made in its initial
4 motion to dismiss (#6) and reply (#20). Plaintiff has opposed the
5 motion (#36), incorporating by reference its original opposition
6 (#14), sur-reply (#26), and motion to strike (#27). As this matter
7 has been extensively briefed, the court finds that no reply is
8 required.

9 Plaintiff filed his amended complaint without securing
10 defendant's written consent or leave of court. See Fed. R. Civ. P.
11 15(a)(2). Although plaintiff asserts that his amended complaint is
12 properly filed as a matter of right, Federal Rule of Civil
13 Procedure 15(a)(1) now imposes a time limit on amendments of right.
14 Under the current version of Rule 15, which has been in effect
15 since December 2009,

16 [a] party may amend its pleading once as a matter of
17 course within: (A) 21 days after serving it, or (B) if
18 the pleading is one to which a responsive pleading is
19 required, 21 days after service of a responsive
20 pleading or 21 days after service of a motion under
21 Rule 12(b), (e), or (f), whichever is earlier.
22 Fed. R. Civ. P. 15(a)(1). Defendant filed its motion to dismiss on
23 December 17, 2010. Plaintiff's right to file an amended complaint
24 without defendant's written consent or the court's leave thus
25 terminated on January 7, 2011. Notwithstanding the unfortunate
26 procedural history of this case, the court grants plaintiff leave
27 to file his first amended complaint *nunc pro tunc* to March 25,
28 2011. The first amended complaint filed on that date (#28) is now
properly before the court.

Because an amended complaint supersedes the original

1 complaint, it will generally moot any pending motions to dismiss.
2 See *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438,
3 129 S. Ct. 1109, 1123 n.4 (2009) ("Normally, an amended complaint
4 supersedes the original complaint."). The defendant is granted
5 leave to file its motion to dismiss the first amended complaint
6 (#34) *nunc pro tunc* to April 11, 2011. Because the motion to
7 dismiss incorporates by reference the original motion to dismiss,
8 and because all substantive allegations in the amended complaint
9 are identical to those in the original complaint, the court has
10 considered all briefs filed in connection with the original motion
11 to dismiss as well as those filed in connection with the renewed
12 motion to dismiss.

13 Plaintiff's first amended complaint asserts a single cause of
14 action arising out of his termination from defendant's employ:
15 retaliation under the False Claims Act, 31 U.S.C. § 3730(h). The
16 sole basis for defendant's motion to dismiss is that plaintiff's
17 claim is barred by the "ministerial exception," which prevents
18 courts from adjudicating employment disputes between religious
19 organizations and individuals who fulfilled ministerial roles
20 therein. The Ninth Circuit has recognized a ministerial exception
21 but has not adopted a test to determine when it applies.²

22 In the Ninth Circuit, the ministerial exception is properly
23 raised in a motion to dismiss for failure to state a claim pursuant
24 to Fed. R. Civ. P. 12(b)(6) as opposed to a motion to dismiss for
25 lack of subject matter jurisdiction. *Bollard v. Calif. Province of*

26
27 ² The Supreme Court has recently granted a petition for a writ of
28 certiorari in a case involving the scope of the ministerial exception.
Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C., -- S. Ct.
--, 2011 WL 1103380 (Mar. 28, 2011).

1 *the Soc'y of Jesus*, 196 F.3d 940, 951 (9th Cir. 1999). However,
2 where application of the exception cannot be determined on the
3 pleadings and requires instead consideration of evidence, the court
4 should convert the motion to one for summary judgment.³ See
5 *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1242
6 (10th Cir. 2010) (affirming district court's treatment of motion to
7 dismiss based on ministerial exception as Rule 12(b)(6) motion and
8 conversion of such to motion for summary judgment). Here, both
9 parties have recognized that the court cannot determine whether the
10 exception applies on the basis of the pleadings alone.

11 Plaintiff's complaint successfully asserts a claim for
12 retaliation under the False Claims Act, 31 U.S.C. § 3730(h).
13 Therefore, the limited basis on which the complaint could be
14 dismissed at this stage is the ministerial exception. As plaintiff
15 was a lay employee and not an ordained minister, a determination as
16 to whether the exception applies here requires a factual analysis
17 that the court is not required, or indeed allowed, to undertake on
18 a motion to dismiss. Since the parties are engaged in discovery,
19 the court will not convert the motion to dismiss to a motion for
20 summary judgment. The defendant may file its motion for summary
21 judgment on the basis of the ministerial exception at the close of

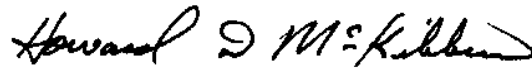
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23 ³ Defendant asserts that application of the exception is always decided
24 at the outset of a case, but it provides no direct legal authority in
25 support of this assertion. The Tenth Circuit has likened the ministerial
26 exception to the qualified immunity defense. See *Skrzypczak v. Roman*
27 *Catholic Diocese of Tulsa*, 611 F.3d 1238, 1242 (10th Cir. 2010). Defendant
28 asserts that as such, whether the ministerial exception applies must be
decided at the outset of a case. *Skrzypczak's* likening of the ministerial
exception to qualified immunity was done in the context of whether the
exception is a bar to jurisdiction or whether it is simply a "barrier to
plaintiff's claims" - that is, whether it is an affirmative defense.
Skrzypczak did not hold that application of the exception must be determined
at the outset of a case.

1 discovery after all the facts have been fully developed.

2 Accordingly, the defendant's motion to dismiss, or in the
3 alternative motion for summary judgment, is construed only as a
4 motion to dismiss and is denied (#6, #35). The plaintiff's motion
5 to strike (#27) is denied without prejudice as moot. The parties
6 are not precluded from filing motions for summary judgment at the
7 close of discovery.

8 IT IS SO ORDERED.

9 DATED: This 14th day of April, 2011.

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11 UNITED STATES DISTRICT JUDGE

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