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COURT OF APPEALS

STATE OF NEW YORK

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SANDER,

Appellant,

-against-

NO. 100

WESTCHESTER REFORM TEMPLE,

Respondent.

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20 Eagle Street  
Albany, New York  
November 18, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Good afternoon. The first  
2 case on today's calendar, Sander v. Westchester Reform  
3 Temple.

4 Counsel?

5 MR. HERBST: Yes, good afternoon. Bob Herbst for  
6 Jessie Sander. May it please the Court, we'd like to  
7 reserve three minutes for rebuttal, if we may?

8 CHIEF JUDGE WILSON: Yes, absolutely.

9 MR. HERBST: Your Honor, we have four contentions  
10 on this appeal. One, that blogging outside of work without  
11 compensation is a hobby and a recreational activity under  
12 Section 201(d) is broad statutory language.

13 JUDGE SINGAS: Does it matter that she was  
14 blogging for her organization as opposed to her personal  
15 view?

16 MR. HERBST: It's not even clear what from this  
17 record that there was an organization. It was, as I  
18 understand it, two women blogging.

19 JUDGE SINGAS: I mean, they called themselves - -  
20 - yeah.

21 MR. HERBST: Under the name Making - - - under  
22 the name Making Mensches, Your Honor.

23 JUDGE SINGAS: Right.

24 MR. HERBST: So I don't think it - - - I don't  
25 think it would matter at all, because it's not - - - it's

1 not a job related organization. There's no compensation  
2 for it. So I don't think that would matter.

3 JUDGE TROUTMAN Is the - - - is it - - - is both  
4 the act and the content of the blogging protected?

5 MR. HERBST: Yes, it is. And that's our second  
6 contention.

7 JUDGE GARCIA: But Counsel, before you get there  
8 - - - here - - - let's say I'm a baseball fan. That's what  
9 I do, my pastime. I have season tickets right behind the  
10 visitor's dugout. And I go there, and I yell racial slurs  
11 at the visiting players. That's how I root for my team,  
12 and I'm caught on TV. Is that covered? I'm being a fan.

13 MR. HERBST: If it is a recreational activity,  
14 that's a hard case and a much tougher case than ours.

15 JUDGE GARCIA: Well, it's the case you're asking  
16 us to decide, right? I mean, that's not - - - that's  
17 content. I'm a fan.

18 MR. HERBST: It is - - -

19 JUDGE GARCIA: I'm a baseball fan.

20 MR. HERBST: Yes, and I would say to Your Honor,  
21 that content is protected because the broad structure of  
22 the statute is - - - is to define recreation activities  
23 broadly. The legislative history is clear that content  
24 should be protected, in our view. And they set forth  
25 exceptions --

1 JUDGE GARCIA: So I'm caught on camera doing  
2 that. My employer has no recourse for that.

3 MR. HERBST: Well, no, there are in the  
4 subsequent subdivisions of the - - - of the statute, there  
5 are six or seven exceptions.

6 JUDGE GARCIA: Which one would apply in my case  
7 that I gave you?

8 MR. HERBST: Well, one might.

9 JUDGE GARCIA: Which one might?

10 MR. HERBST: I - - - it might be a conflict of  
11 interest depending on - - - on the employer and what the  
12 employer does. After a full record was - - -

13 JUDGE HALLIGAN: What do you think the employer  
14 would have to do to show a material conflict? If the  
15 employer showed, for example, that some of its customers  
16 were unhappy, not inclined to patronize that business  
17 anymore, would that be sufficient?

18 MR. HERBST: I think it depends on the on the  
19 facts.

20 JUDGE HALLIGAN: Well, I just gave you some facts  
21 as an example, let's assume that the - - - a business is  
22 able to show that some public expression of content by an  
23 employee means that some of its customers are unhappy, and  
24 some of them will no longer continue to patronize the  
25 business; is that sufficient to show a conflict in your

1 view?

2 MR. HERBST: I think it might. But no such  
3 business interest has even been identified in these papers.

4 JUDGE HALLIGAN: Can I ask you also about the  
5 legislative history?

6 MR. HERBST: Yes, Your Honor.

7 JUDGE HALLIGAN: You know, I went and looked at  
8 the origins of this bill, and it seems to me that it  
9 started actually as a smoker's rights bill. And then, you  
10 know, there - - - there was some broad language which was  
11 vetoed twice, and then this bill was adopted that was  
12 intended, I believe, to be narrower than the initial  
13 broader bills. And so that - - - that seems to me to be  
14 some intention - - - intention somewhat with your view that  
15 this is intended to be a very broad protection. What's --

16 MR. HERBST: I think the narrowness came in  
17 identifying four areas, as opposed to a much broader fabric  
18 of recreational activity - - -

19 JUDGE HALLIGAN: But you - - -

20 MR. HERBST: - - - of legal activities.

21 JUDGE HALLIGAN: You agree, don't you, that - - -  
22 that the initial impetus, and this was true in a number of  
23 states, not just in New York, was an effort to ensure that  
24 employees who were engaged in behavior that employees - - -  
25 employers might find risky, like smoking, could not be

1 fired for that conduct, yes?

2 MR. HERBST: Well, I'm not clear on whether that  
3 was the narrowing. My understanding was - - -

4 JUDGE HALLIGAN: I mean, was - - - that was the  
5 initial impetus, though, yes?

6 MR. HERBST: I don't know if that was the initial  
7 impetus. My - - -

8 JUDGE TROUTMAN: What about the fact that section  
9 201(d)(2)(A) protects, specifically, political activities.  
10 So if the speech - - - the content of the speech itself  
11 were protected, the legislature surely knows how to do it.  
12 So tell me where in the labor law it specifically says  
13 content is protected.

14 MR. HERBST: Well, actually, right there, the - -  
15 - part of the legislative history says that an employer  
16 should not have the right to forbid a person from engaging  
17 in a legal activity - - -

18 JUDGE TROUTMAN: Legislative history, with  
19 respect to the statute itself, where specifically does it  
20 mention the content of the speech?

21 MR. HERBST: Well, the statute doesn't  
22 necessarily mention the content of the speech, but the - -  
23 - but it doesn't - - -

24 JUDGE TROUTMAN: Do you agree that the legis - -  
25 -

1 MR. HERBST: But it doesn't - - - but it doesn't  
2 exclude the speech.

3 JUDGE TROUTMAN: But do you agree that the  
4 legislature does know how to specifically say so when they  
5 want to? They said so with political speech. Why would it  
6 be - - - why would they not do so for content if that's  
7 what they meant?

8 MR. HERBST: Well, they did say, I - - - I think,  
9 with respect to recreational speech, that this bill will  
10 ensure that employers do not tell us how to think and play  
11 on our own time. Thinking means if you're going to protect  
12 how the employer - - - employee thinks, you have to extend  
13 the protection to the - - -

14 JUDGE CANNATARO: But Counsel - - -

15 MR. HERBST: - - - to the thinking that - - -  
16 that is involved.

17 JUDGE CANNATARO: - - - getting back to the  
18 actual legislation, to the words of the statute. My review  
19 of it seems to be that they went out of their way to avoid  
20 mentioning expressive activities. Even when they talk  
21 about political activities, they talk about running for  
22 office or political matters. They talk about joining  
23 parties, but they never really, in any of these sections  
24 that they protect, seem to refer to expressive conduct.  
25 And I walk away from that thinking they - - - they actually

1           avoided - - - they intentionally avoided expressive  
2           conduct. Why is that an incorrect reading?

3                   MR. HERBST: I think it's incorrect because, for  
4           example, no employer is going to - - - is going to fire  
5           someone for sitting on a sofa and physically engaging in  
6           reading. No employer - - -

7                   JUDGE CANNATARO: That's not expressive conduct.  
8           So we're talking about - - -

9                   MR. HERBST: It is expressive.

10                  JUDGE CANNATARO: Reading is expressive conduct?

11                  MR. HERBST: Reading is expressive. If you're  
12           reading Karl Marx or you're reading Karl Rove, the - - -  
13           the employer can draw inferences as to some of your  
14           beliefs.

15                  JUDGE HALLIGAN: What about playing - - -

16                  MR. HERBST: We do that when we select a jury as  
17           well, Your Honor.

18                  JUDGE HALLIGAN: What about playing in a symphony  
19           orchestra? Would that be protected? On your own time?  
20           Playing - - -

21                  MR. HERBST: Well, in a recreational orchestra.

22                  JUDGE HALLIGAN: Yeah.

23                  MR. HERBST: Not a not a professional one.

24                  JUDGE HALLIGAN: No, no, no. I mean, playing in  
25           the local community orchestra; is that protected?

1 MR. HERBST: It might well be.

2 JUDGE HALLIGAN: Well, that would be expressive,  
3 I assume, yes?

4 MR. HERBST: I think that's a more subtle  
5 expressive. But for example, hang gliding, which was our -  
6 - - my learned friend emphasized, hang gliding is normally  
7 not considered an expressive recreational activity, but it  
8 does express - - -

9 JUDGE HALLIGAN: Yeah, I guess - - -

10 MR. HERBST: - - - one's view of risks - - -  
11 risk, for example, and - - - and an employer could fire an  
12 employee because of how much resources are involved in  
13 training that - - - that employee and - - - and he doesn't  
14 want to take that risk.

15 CHIEF JUDGE WILSON: Can I divert you for a  
16 minute? I'm straight ahead of you. Can I divert you for a  
17 minute to the ministerial exception?

18 MR. HERBST: Yes, Your Honor.

19 CHIEF JUDGE WILSON: And to subsection 9 of the  
20 statute, which was added subsequently to this litigation?  
21 And I guess my question is, why there isn't enough in the  
22 record here to say that your client fits within the  
23 ministerial exception. And shouldn't we take something  
24 from the legislature's amendment to add section 9 to the  
25 statute to suggest they didn't really mean for this statute

1 to apply in your circumstance?

2 MR. HERBST: I don't think that's true, Your  
3 Honor, because it is a very limited statute. It actually  
4 permits the employer to speak without restriction to  
5 employees. It doesn't say anything about the employee's  
6 speech. It's a very, very narrow addition which was not in  
7 place, by the way, at the time of this. And it has not  
8 been invoked by the other side, I think, for that reason,  
9 Your Honor.

10 CHIEF JUDGE WILSON: And then getting back to the  
11 ministerial exception generally in your pleadings?

12 MR. HERBST: Yes, the ministerial exception,  
13 first of all, as this Court decided last year, it needs to  
14 be decided on a - - - on a full factual analysis with a  
15 full factual record. And we would commend the DeWeese  
16 analysis, the Massachusetts Supreme Court's analysis, which  
17 I think is the is the best example we have of a state high  
18 court performing the kind of factual analysis that's  
19 necessary. They analyzed ten factors, and if those factors  
20 were applied to - - - to this case and these pleadings - -  
21 -

22 JUDGE RIVERA: What if - - - what if the job  
23 description is clear on its face? It may not use the title  
24 minister, but the actual description of what the person was  
25 going to do fits squarely within the ministerial exception.

1 MR. HERBST: Yes, it - - -

2 JUDGE RIVERA: Do you still need to do fact  
3 finding?

4 MR. HERBST: If it is clear - - - there are a few  
5 cases that on the pleadings, invoke the ministerial  
6 exception where it was clear that the person was a  
7 minister. This is not that case. This is a case in which  
8 almost all of the duties were administrative and secular;  
9 programing, social justice programing, arranging for food  
10 after - - - after services, a liaison between the teams - -  
11 -

12 JUDGE TROUTMAN: Does it matter who you're  
13 working for when you're making that definition?

14 MR. HERBST: I'm sorry, Your Honor.

15 JUDGE TROUTMAN: When you're saying it's not  
16 ministerial, does it matter that the people that she's  
17 working - - - the entity that she's working for is a  
18 religious entity?

19 MR. HERBST: Well, it does matter that it's a  
20 religious entity, because the issue, I don't think would  
21 come up if it were not a religious institution.

22 JUDGE TROUTMAN: So when you're making that  
23 definition, doesn't the fact that it is a religious entity  
24 impact that determination as to whether or not - - -  
25 although in a different setting, the activities may not be

1 ministerial, but because they are done for religious  
2 entity, that one could consider that they are?

3 MR. HERBST: Well, the cases - - - the  
4 ministerial exception cases all arise, as I understand it,  
5 in the constant - - - context of religious institutions and  
6 religious schools. But the question is - - - is - - -

7 JUDGE RIVERA: Well, what about the fact that - -  
8 - that you can see this. That is her view that really the  
9 - - - the core of her job was teaching and tutoring in  
10 Hebrew. What about the link between Hebrew and Judaism,  
11 that link - - - religious link?

12 MR. HERBST: Well - - -

13 JUDGE RIVERA: Why doesn't that inform the  
14 analysis on its face?

15 MR. HERBST: It doesn't form the analysis on its  
16 face, because this particular teacher was not required to  
17 teach classes on religion or religious doctrine or  
18 religious curriculum. She was - - -

19 JUDGE SINGAS: I think her offer letter indicated  
20 that she was supposed to support certain religious  
21 practices and activities like confirmation or religious  
22 text study, supporting bat mitzvah education. That's  
23 religious.

24 MR. HERBST: I - - - all we have on that is the  
25 unsworn assertions of counsel on the other side. We don't

1 have any evidence yet as to - - - as to what her real job  
2 duties were.

3 JUDGE HALLIGAN: Well, we have the offer letter.

4 JUDGE SINGAS: We have that letter.

5 JUDGE RIVERA: The letter.

6 MR. HERBST: We have the letter, but we don't - -

7 -

8 JUDGE RIVERA: It describes her - - -

9 MR. HERBST: We don't have any interpretation of  
10 what the - - - of what the - - -

11 JUDGE SINGAS: But the letter describes - - -

12 MR. HERBST: - - - of what those terms mean.

13 JUDGE SINGAS: - - - her responsibilities, if she  
14 were to accept the offer.

15 MR. HERBST: Yes.

16 JUDGE SINGAS: Yes. So why isn't that  
17 sufficient?

18 MR. HERBST: And they're virtually all secular.  
19 They're not - - -

20 JUDGE SINGAS: No, no. I just pointed out a few  
21 - - -

22 JUDGE HALLIGAN: No, didn't - - -

23 JUDGE SINGAS: - - - a few things that weren't  
24 secular, that were very much religious.

25 MR. HERBST: Well, the question, as I understand

1 it, the way these cases are - - - are generally decided is  
2 the person has to be propagating essentially religious  
3 doctrine. They have to be - - - they have to be a key  
4 employee teaching - - - you know, teaching religion,  
5 doctrine - - -

6 JUDGE HALLIGAN: Do the case - - -

7 MR. HERBST: - - -and so forth.

8 JUDGE HALLIGAN: Do the cases shed any light on -  
9 - - on an employee who may spend some of their time engaged  
10 in religious activity and some engaged in other activity?  
11 Is some amount of religious activity enough to invoke the  
12 ministerial exception?

13 MR. HERBST: It's an overall analysis in - - - of  
14 the circumstances. But the key - - - the key question is  
15 whether she is - - - is someone who is playing a key  
16 religious role in the institution. After all, it has a  
17 name, ministerial exception, for a reason.

18 JUDGE CANNATARO: Where do you get the key  
19 religious role requirement? Where - - - what's the law  
20 that informs the significance of the religious role?

21 MR. HERBST: The what's - - - the what's the  
22 case, you're saying, Your Honor?

23 JUDGE CANNATARO: What's the case, statute,  
24 whatever you have?

25 MR. HERBST: Well, the DeWeese case interpreted

1 the Guadalupe case, the latest Supreme Court case, and it  
2 went through, you know, all of the deposition testimony  
3 that was cited, all of the documents that - - - that - - -  
4 that were explained by the - - -

5 JUDGE HALLIGAN: This is the Massachusetts case?

6 MR. HERBST: The Massachusetts case, Your Honor.  
7 And it went through and - - - and it essentially decided  
8 that, you know, because in looking at these ten factors,  
9 they were not able to find that - - - that she met the  
10 ministerial exception.

11 JUDGE RIVERA: Well, let's assume for one moment  
12 it doesn't satisfy the test, or there's some factual issue  
13 around that. Why isn't the blog, her blog statements, in  
14 conflict of the business interest?

15 MR. HERBST: It - - -

16 JUDGE RIVERA: I mean, it's a Zionist institution  
17 and she understands that such.

18 MR. HERBST: Yes, and she said that she would  
19 respect it and not share her contrary views at work and - -  
20 -

21 JUDGE RIVERA: But this is about what she  
22 actually posted, what she wrote and those words. Whether  
23 or not moving forward her conduct is going to take a  
24 different path is another issue. It's about the blog  
25 itself.

1 MR. HERBST: Right, and I think this is - - -  
2 what this statute properly interpreted, and not narrowly  
3 interpreted to exclude conduct, says that - - - that the  
4 expressive conduct - - - the expressive, you know, views,  
5 thinking that are revealed to the employer should not be a  
6 grounds - - -

7 JUDGE RIVERA: Except there was an exception.

8 MR. HERBST: - - - for firing unless.

9 JUDGE RIVERA: Yes, except you recognized there  
10 were exceptions. That was your response to Judge Garcia.  
11 I'm asking you about this particular exception.

12 MR. HERBST: It's a conflict of interest  
13 exception. And I would say - - -

14 JUDGE RIVERA: Yes, this interest.

15 MR. HERBST: That Rabbi Levy, who is the director  
16 of the school that hired her, that knew her job duties, he  
17 wrote the job description, he read the entire blog post,  
18 and he explored her views.

19 JUDGE RIVERA: Well, the fact that one person in  
20 the institution would not view it as a conflict - - -

21 MR. HERBST: Well, he's the - - -

22 JUDGE RIVERA: - - - resolves the issue?

23 MR. HERBST: Well, he's the director of the  
24 school, and right now we don't have any evidence from the  
25 other side.

1 JUDGE RIVERA: Well, he's also the one who told  
2 her she was fired.

3 MR. HERBST: I'm sorry, Your Honor?

4 JUDGE RIVERA: He's also the one who told her she  
5 was fired, as I recall.

6 MR. HERBST: Yes. That's true. We don't know  
7 yet what the circumstances were. We don't know what the  
8 emails and communications were that went back and forth.  
9 We don't really know what the thinking was of the people  
10 that fired her.

11 JUDGE RIVERA: I'm just saying on its face. If  
12 she - - - she agrees it's a Zionist institution, and that's  
13 the institution, right, views itself that way and has that  
14 conversation with her, and her statements are anti-Zionist,  
15 how is it not a conflict?

16 MR. HERBST: Well, it's not a conflict, in part,  
17 because this temple states that it is open to people of all  
18 views. And one of the three rabbis professed himself to be  
19 - - -

20 JUDGE RIVERA: It's possible that view is not the  
21 one that undermines their existence, right?

22 MR. HERBST: If it turns out after a factual - -  
23 - you know, after we get discovery in the case that they  
24 can prevail on the conflict of interest exception, the case  
25 will be lost. That's fine.

1 JUDGE RIVERA: Well, what would you find in  
2 discovery? What would be what the parties are looking for  
3 in discovery to either show or show that there's not a  
4 conflict of the business interest?

5 MR. HERBST: Well, we want to find out - - - we  
6 want to find out what it was that caused Rabbi Levy, after  
7 he read the blog post and talked to her for forty-five  
8 minutes about her views, and said that he agreed with  
9 ninety percent of what she said. And would she reconsider,  
10 you know, the anti-Zionist label and - - - and would she  
11 read people like Peter Beinart, who calls himself a non-  
12 Zionist or a post-Zionist or a cultural Zionist? Why did  
13 he write an email, which we haven't seen in four years, in  
14 this case; it's been hidden by the other side. Why did he  
15 write an email fully endorsing her as a good role model for  
16 her students and a fine educator? Why did he conclude that  
17 there was no conflict of interest? That is - - - that's  
18 what this - - - the allegations in this complaint say.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. HERBST: Thank you.

21 CHIEF JUDGE WILSON: Your rebuttal.

22 MR. REED: Good afternoon, Your Honors. Michael  
23 Reed, Yankwitt LLP, on behalf of the  
24 defendants/respondents. The Second Department got it  
25 exactly right in this case. The plaintiff failed to state

1 a cause of action because she alleged that she was fired  
2 for her viewpoint, not for the act of blogging. The  
3 blogging is a complete red herring in this case. The case  
4 is identical to the case that Judge Garcia mentioned  
5 earlier, perhaps even stronger, where somebody at a  
6 baseball stadium and they're out there making racist  
7 remarks. The employer under section 201(d) can fire that  
8 person - - -

9 JUDGE HALLIGAN: So what exactly is the line you  
10 would have us draw? Is it that all content is unprotected,  
11 or that content that is objectionable to some is  
12 unprotected?

13 MR. REED: The line that was drawn by the  
14 legislature is that viewpoints are not protected by the  
15 statute. Activities are protected.

16 JUDGE HALLIGAN: Okay. And so if I, you know,  
17 participate in a community theater, for example, it strikes  
18 me as a hobby, fair to say?

19 MR. REED: Yes.

20 JUDGE HALLIGAN: Okay. And the community theater  
21 performs a play, and that play may well express a  
22 viewpoint. So does that become unprotected because there's  
23 a viewpoint? It seems difficult for me to draw those  
24 lines.

25 MR. REED: So Judge, there might be difficult

1 cases, I understand, where that line drawing - - -

2 JUDGE HALLIGAN: Well, just take that example.

3 MR. REED: That example I don't think is a  
4 difficult one at all because - - -

5 JUDGE HALLIGAN: So is it protected or  
6 unprotected, the community theater?

7 MR. REED: The act of participating in the  
8 community theater is protected as a hobby. But if the  
9 termination was because of the viewpoint that the employer  
10 thought was being expressed in that theater, then that was  
11 not protected by 201(d).

12 JUDGE HALLIGAN: Gee, there's - - - it seems like  
13 there's a lot of conduct that we might think of as hobbies.  
14 What if - - - to go to go back to Judge Garcia's  
15 hypothetical, what if my point of view is not a racist slur  
16 or some view that - - - that would be viewed as  
17 reprehensible, but you know that I'm rooting for the  
18 Yankees instead of the Mets. That's a point of view,  
19 right?

20 MR. REED: Yes.

21 JUDGE HALLIGAN: And so that would be  
22 unprotected, and I could be fired because I'm rooting for  
23 the wrong baseball team?

24 MR. REED: The answer is yes. I mean, that seems  
25 very unlikely, but that's what at will employment is.

1 CHIEF JUDGE WILSON: So I'm having trouble with  
2 your idea that this doesn't - - - doesn't concern the  
3 content of the expression at all because if that's right,  
4 then I don't understand why you would need the exception  
5 for things that are incompatible with the business  
6 interest, right? That seems to me to actually invoke  
7 content.

8 MR. REED: So no, Judge, if we are right on the  
9 content part for the recreational activities prong, you can  
10 imagine situations where people are engaging in activities  
11 that are contrary to what their employers want. You can  
12 imagine somebody works for an auto safety group and they're  
13 out there not wearing their seat belt. You can imagine.

14 JUDGE HALLIGAN: But reading necessarily - - - it  
15 seems to me what books I choose to read reveal my selection  
16 of content, and so does that mean that even with reading  
17 and watching TV or movies like hobbies, the employer can  
18 say, I think that - - - that you're reading the wrong Karl,  
19 whether that's Karl Marx or Karl Rove, and so I'm going to  
20 terminate you for that?

21 MR. REED: Yes, the employer can do that because  
22 that is a viewpoint, and that's not what's protected by the  
23 statute. Activities are - - -

24 JUDGE HALLIGAN: It seems surprising that the  
25 legislature would protect reading expressly, but reserve to

1 the employer the right to fire, because the employer  
2 doesn't like the book that I happen to pick.

3 MR. REED: Well - - -

4 JUDGE RIVERA: Or put another way, what reading  
5 is protected?

6 MR. REED: The act of reading is protected. Now,  
7 you might say that it is unlikely, which I take the import  
8 of Your Honor's question that an employer would fire  
9 someone just for the act of reading. But the same thing  
10 can be said about the other parts of the statute. No, it's  
11 very unlikely an employer will fire you for playing  
12 monopoly, but that's covered, that an employer will fire  
13 you for rock collecting or stamp collecting or going  
14 jogging. These are all things that are covered. The  
15 legislature didn't say writing. It didn't say the creation  
16 of content.

17 CHIEF JUDGE WILSON: But your example seemed to  
18 me to suggest that the legislature was trying to protect  
19 something more than the narrow thing that you're saying is  
20 protected, right?

21 MR. REED: I don't think so. The legislature was  
22 trying to protect - - -

23 CHIEF JUDGE WILSON: If the - - - if people are  
24 not likely in the real world to be fired for playing  
25 monopoly, for example, then we can presume, I think, the

1 legislature wasn't trying to protect that because it's not  
2 happening.

3 MR. REED: Judge, I don't think we can, because  
4 the plain language of the statute and the canons, which  
5 tell us to read the narrative - - -

6 CHIEF JUDGE WILSON: So your reading, is that the  
7 legislature was trying to prevent employers from firing  
8 people for things that employers never fire people for?

9 MR. REED: The reading is that they were trying  
10 to fire people for activities, some of which might be very  
11 unlikely and some of which might be likelier. They could  
12 have protected viewpoint. They made a choice not to do  
13 that, and it's improper, I would submit, for - - - for us  
14 to say just because you would expect perhaps reading - - -  
15 a reading-based termination to have to do with content that  
16 we can read - - - read out - - - or read a viewpoint into  
17 the other parts of the statute, which we can't.

18 JUDGE RIVERA: Well, it would - - - it would mean  
19 that an employer can basically circumvent that law easily.  
20 Oh, it's not. It's not about reading. It's because they  
21 read that.

22 MR. REED: Judge - - -

23 JUDGE RIVERA: It doesn't sound like the - - -  
24 they read that is exactly what the legislature was  
25 concerned about.

1 MR. REED: Judge, on the facts of these cases - -  
2 - on the facts of this case, it's pretty clear what  
3 happened, which was the Second Depart - - -

4 JUDGE RIVERA: No, I'm just asking you about - -  
5 - we're just saying on this particular thread of the  
6 argument.

7 MR. REED: Could you ask your question, please?

8 JUDGE RIVERA: Well, all I'm saying is it sounds  
9 like an employer - - - under your interpretation, employer  
10 can easily circumvent even the limited protection that  
11 you're recognizing.

12 MR. REED: How so? I don't follow.

13 JUDGE RIVERA: Well, it's not about the reading.  
14 It's about what they read. Well, then reading is never  
15 covered because you can always say - - -

16 MR. REED: Well - - - well, Judge - - -

17 JUDGE RIVERA: - - - it's about what they read.

18 MR. REED: Well, Judge, I respectfully disagree  
19 because in certain cases, it might be difficult to figure  
20 out where to draw that line. And in those cases, you'd  
21 have discovery and figure it out. You don't need that  
22 here. They allege that she was fired because of her  
23 viewpoint. The blogging is a red herring. There's no  
24 allegation that the synagogue was anti-blogging, which it  
25 obviously was not.

1 JUDGE RIVERA: So - - -

2 JUDGE CANNATARO: Well, Counsel, what about the  
3 ministerial exception? Can we avoid all these thorny  
4 issues around which types of conduct are covered and which  
5 aren't, by just going through the ministerial exception?

6 MR. REED: The Court could. That wasn't passed  
7 on below. And we would submit that, if that were to be  
8 ruled on, the lower courts should rule first. But I'll  
9 answer the question put to me, Judge. Yes, you could rule  
10 under the ministerial exception. She's clearly a minister  
11 under that exception. What we were told by my friend  
12 earlier about the exception in large part was incorrect.  
13 He said that this court decided it needed to be ruled on a  
14 full factual record. Not true. The Court decided that it  
15 was - - -

16 CHIEF JUDGE WILSON: So what's - - - what is the  
17 record here that we could rely on?

18 MR. REED: The record here is the complaint and  
19 the blog - - - and the - - -

20 CHIEF JUDGE WILSON: I mean the substance of it,  
21 not the fact of - - -

22 MR. REED: Sorry. Sorry. The - - - what we have  
23 here is a job description that gives her the title of a  
24 full time Jewish educator in the Jewish Learning Lab of a  
25 synagogue. Her duties in that role included a parsha of



1 the week, a weekly scripture portion. She was tasked with  
2 working on social justice. She was tasked with pre-bar-  
3 mitzvah studies. All of these things are inherently  
4 religious.

5 JUDGE CANNATARO: And they're all in the letter?

6 MR. REED: They're all in the offer letter,  
7 Judge, yeah. And - - - and the idea that one would be a  
8 full time Jewish educator in the Jewish Learning Lab and  
9 have - - -

10 JUDGE TROUTMAN: So are you arguing that you  
11 don't have to serve in a formal ministerial title - - -

12 MR. REED: Oh, absolutely.

13 JUDGE TROUTMAN - - - to - - - to do actual  
14 ministerial duties?

15 MR. REED: Yes. Yes, Judge, absolutely. So the  
16 Supreme Court in the Guadalupe decision said just that.  
17 That title is something to be considered, but it's not  
18 necessary or sufficient. What matters is whether the  
19 person is performing a religious function. And these  
20 duties are clearly religious. You can't say that having  
21 someone teach children to read scripture is some kind of  
22 secular project.

23 CHIEF JUDGE WILSON: And is there a fraction that  
24 becomes de minimis in your view?

25 MR. REED: No, I don't think so. And what the

1 Supreme Court told us is that there's no stopwatch test.  
2 There's no core duty test. The question is, is a person  
3 performing a religious function? And while, again, there  
4 might be difficult line drawing cases there, the job duty  
5 says - - - the job description here says she's teaching  
6 fifteen hours a week and she's also doing social justice  
7 work, which in a reform - - -

8 JUDGE SINGAS: Wouldn't it be better to wait and  
9 get a factual development of those facts as opposed to  
10 relying on the letter? She might not be doing any of those  
11 in practice, so why not - - - why decide it here at a  
12 motion to dismiss and not allow for development of facts?

13 MR. REED: Yeah, I - - - we are asking the Court  
14 to rule first and foremost on the statutory ground. I  
15 think that's our strongest argument. And that's where we'd  
16 ask the Court to rule. But if the Court were to get there,  
17 you don't need discovery because the job description tells  
18 us what she was supposed to do.

19 JUDGE RIVERA: Well, let's say we disagree with  
20 you on that. What about the conflict on the business  
21 interest? That seems almost more straightforward than the  
22 ministerial question.

23 MR. REED: There's a conflict that is clear on  
24 its face. What we learned in the complaint is that the  
25 synagogue is a Zionist synagogue. She went and posted a

1           blog post that was about as far to the - - - 180 degrees  
2           from that as you could possibly imagine. You couldn't  
3           imagine a more material conflict for a synagogue today - -  
4           -

5                   JUDGE RIVERA: What about his argument that the  
6           reality, or at least what she has argued, is that the  
7           institution was open to different viewpoints?

8                   MR. REED: Yeah, what's alleged in the complaint  
9           is that the institution is open to different viewpoints in  
10          its membership. There's no allegation that the institution  
11          said, we're going to let someone whose views are  
12          antithetical to our fundamental principles come teach our  
13          kids religion.

14                   JUDGE HALLIGAN: To return to Judge Singas'  
15          question, it looks to me that Our Lady of Guadalupe was  
16          decided on summary judgment, yes? So why shouldn't we - -  
17          - why shouldn't we allow for the development of a record  
18          just like the courts did there?

19                   MR. REED: Because I would ask the Court to rule  
20          first and foremost on the statutory ground.

21                   JUDGE HALLIGAN: I'm saying - - - I'm saying I  
22          appreciate that. But if we're going to look at the  
23          defenses.

24                   MR. REED: If you're going to look at the  
25          defenses, you should look at what is in the offer letter.

1 Those are her duties.

2 JUDGE HALLIGAN: Okay. So you're saying that  
3 that alone without any understanding of how that would  
4 actually play out, that a record would give us and allow  
5 for ruling on summary judgment?

6 MR. REED: Yeah. For these duties, I would say  
7 yes. It's impossible to be teaching kids scripture - - -

8 JUDGE HALLIGAN: It seems like the cases, you  
9 know, there's some line drawing questions about when I am  
10 employed as an instructor at a religious institution and  
11 when my obligations really are more those of a minister, in  
12 other words, involving the teaching of religious principles  
13 or doctrine, how do we know which side it falls on?

14 MR. REED: I mean, in this case, it's pretty  
15 obvious because she's not just teaching at a parochial  
16 school, like a K through 12 school, which is where the  
17 Supreme Court cases come from. In those schools, you're  
18 teaching geography, you're teaching math, you're teaching  
19 secular subjects. Here, she's a full-time Jewish educator.

20 JUDGE HALLIGAN: Okay. But - - - but she could,  
21 I think, maybe have a different view. But she could be  
22 teaching at that institution. And if she's not doing  
23 anything that touches on religious principles, might be  
24 difficult to argue she's a minister. So what specifically,  
25 in terms of the duties set forth in the offer letter, do

1           you think are plainly about teaching religious principles?

2                   MR. REED: The title, the fact that she's  
3           responsible for Shabbat and Havdala programing, religious  
4           ceremonies, that she's doing pre-bar mitzvah tutoring, that  
5           she's working on a weekly Torah portion with these kids.  
6           Those are the things that I would submit. If I - - - if I  
7           may - - -

8                   JUDGE HALLIGAN: And on the weekly Torah portion,  
9           is it - - - why is it clear that what she is doing is  
10          something that is in part religious teaching as opposed to  
11          simply helping them master the Hebrew in the Torah portion  
12          in a - - - in a way that somebody could teach any language  
13          without it being imbued with religious doctrine?

14                   MR. REED: Well, she wasn't just teaching  
15          language, she was teaching them how to read the Torah. And  
16          that's a fundamentally religious activity. You can't just  
17          say she's teaching them how to read the words in a secular  
18          way. There are choices that one makes when one teaches in  
19          translation. And those are religious - - -

20                   JUDGE HALLIGAN: But wouldn't that be - - -  
21          wouldn't that be developed and then presented on summary  
22          judgment? I mean, we would have to, I take it, read the  
23          offer letter along the lines of what you're laying out for  
24          us to reach that conclusion.

25                   MR. REED: Could it - - - I don't think so,

1 Judge. I think that this is an inherently religious  
2 activity, and this is - - - this is what we have to  
3 consider on the motion to dismiss. I'd like to just touch  
4 on the issue of this not being a recreational activity. We  
5 haven't spoken to that, I believe. So this - - - this was  
6 pure and simple a protest, even if you could say that the  
7 firing was caused by the blogging, which it was not, this  
8 still wouldn't satisfy the statute because she wasn't  
9 engaging in recreation. She was engaging in a protest.

10 JUDGE SINGAS: Well, what if she had just posted  
11 an article from this organization on her blog and said, I  
12 think - - - and this article was anti-Zionist, and she  
13 said, I think this article - - - I read this, I find this  
14 very interesting. I think it made some good points; is it  
15 recreational then?

16 MR. REED: In that case it wouldn't be a protest.  
17 She could still be terminated for it because it would be a  
18 viewpoint termination. But if you look at what she pled  
19 here, the language of this blog calls upon all American  
20 Jews to join her in her anti-Zionist journey to speak out  
21 against what she calls genocide, what she calls the  
22 American-Israeli military industrial complex.

23 JUDGE RIVERA: So if I - - - if I'm at dinner, at  
24 the dinner table during Thanksgiving and I'm having a  
25 political debate with members of my family and friends, am

1 I recreating - - -

2 MR. REED: Are you - - -

3 JUDGE RIVERA: - - - or am I lodging a protest,  
4 vociferously, by the way?

5 MR. REED: If you are - - -

6 JUDGE RIVERA: Yes.

7 MR. REED: - - - at Thanksgiving dinner?

8 JUDGE RIVERA: Yes.

9 MR. REED: I mean, I tend to think of a protest  
10 as, you know, a public act, which is what this very much  
11 was. I view that not as a protest. I mean, if the  
12 employer somehow - - -

13 JUDGE RIVERA: So if the blog was limited to the  
14 recipients, that would not make it - - - that would make it  
15 recreational?

16 MR. REED: It's - - - no, not this blog. There's  
17 no way this blog could be recreational, because if you look  
18 at what she says, she even admits in the blog before she  
19 comes to court and says that this was all about fun and  
20 games. She says in the blog what I'm doing is an exercise  
21 in truth, justice, and tikkun olam, which is repairing the  
22 world. This blog post was not recreational.

23 JUDGE CANNATARO: And why can't that be  
24 recreational? I'm struggling with this idea that something  
25 can't be two things at one time, even if it's an expression

1 of protest, if it's something you're not doing for pay, and  
2 you're, you know, compelled for other reasons to put it out  
3 there, you must be deriving some measure of satisfaction  
4 out of doing it, which to me puts it more on the  
5 recreational side, even though it might have some elements  
6 of protest to it.

7 MR. REED: It - - - it's possible, certainly,  
8 that you could be blogging for recreation, but here, the  
9 whole point was to get her message out and get people to  
10 join in her - - -

11 JUDGE CANNATARO: But I'm saying you might be  
12 protesting for recreation. You might, you know, enjoy,  
13 derive some good feeling out of going out into the world or  
14 even writing a blog and you know, issuing a statement of  
15 protest.

16 MR. REED: You know, certainly, I - - - I would  
17 think you could say that about any activity that - - -

18 JUDGE CANNATARO: Yeah.

19 MR. REED: - - - you could do. And you know, if  
20 that were the case, then there'd be no lines to draw at  
21 all, because everything would be recreational. And what we  
22 know from what we heard earlier from one of your  
23 colleagues, is that the view was that the statute needed to  
24 be narrow.

25 JUDGE CANNATARO: Well, not all things would be

1 recreational. It would be different if you did it at work,  
2 if you went in front - - -

3 MR. REED: Yeah.

4 JUDGE CANNATARO: - - - of your class and  
5 expressed all these anti-Zionist views that, you know, like  
6 I said, you're getting - - - now, you're paid by your  
7 employer and you're doing your employer's business. But  
8 this is something she does in the privacy of her own home,  
9 on her own time.

10 MR. REED: So .I disagree that this was - - - I  
11 mean, maybe she typed it in the privacy of her home, but  
12 the whole project was to put a protest on the most public  
13 medium possible, and make it as public as possible so  
14 people would join her and affect social change. That's a  
15 protest, pure and simple. That even - - -

16 CHIEF JUDGE WILSON: You know, Judge Cannataro is  
17 probably thinking of the fact that I grew up in Berkeley in  
18 the 1960s and '70s, and everybody I knew was protesting for  
19 fun.

20 JUDGE CANNATARO: That's exactly what I was  
21 referring to.

22 MR. REED: The thought did not occur to me,  
23 judge, but I'll respond to it. I mean, to the extent you  
24 do anything, there could be some kind of fun component.  
25 But again, that doesn't mean that nothing - - - that

1 doesn't mean that everything is recreational. The statute  
2 started off as a bill to make legal all activities outside  
3 of work, which is essentially what I think the hypothetical  
4 would become. And the legislature said, no, we're not - -  
5 -

6 CHIEF JUDGE WILSON: Well, maybe recreational  
7 just means not for pay.

8 MR. REED: Recreational doesn't mean just not for  
9 pay, Judge, I respectfully say, because then the  
10 recreational is surplusage. The statute says that  
11 recreational activities that are performed not for pay  
12 outside of the employer's premises are protected.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. HERBST: I'd ask this Court not to avoid the  
15 issue of content. I've been a civil rights lawyer for more  
16 than forty years. When I brought this case in the twilight  
17 of my career, I did not think I was defenestrating the  
18 protections for recreational activity in this statute. The  
19 - - - there are two causes, two but/for causes of this  
20 termination. One is the blogging, and the other is the  
21 message contained in the blogging. They're both but/for  
22 causes. We know that if we apply the rule of the Bostock  
23 case on - - - on determining but/for causation. You change  
24 one thing and see what happens.

25 If she weren't engaging in recreational blogging,

1 she would not have been fired. If she had not blogged out  
2 this particular blog post, she would not have been fired.  
3 They're both but/for causes, and you can have more than one  
4 but/for cause. This blogging should be protected. The  
5 blog post should be protected.

6 JUDGE RIVERA: Well, if she had just, old school,  
7 had printed up something and then, you know, nailed it to  
8 the trees, that's not blogging. But if it's the same  
9 content, they could - - - they may very well have fired  
10 her, right?

11 MR. HERBST: Well, if it doesn't - - - doesn't  
12 come - - -

13 JUDGE RIVERA: It is about the content.

14 MR. HERBST: Yeah, but it also needs to be a  
15 recreational activity. It needs to be both. So I just  
16 wanted to - - - to respond to one argument that was made  
17 that there's a difference between the congregants and - - -  
18 and the leadership, you know? One of these three rabbis -  
19 - -

20 JUDGE RIVERA: Wait a minute. Let me go back to  
21 this thing that must be both content and the activity.  
22 Let's take an example that Judge Halligan gave you before,  
23 performing in some kind of musical endeavor. And the  
24 employer says, well, I just don't like any music. I don't  
25 care what music you were playing. I just don't like anyone

1 playing music. Why - - -

2 MR. HERBST: Well - - -

3 JUDGE RIVERA: But that's not about the content,  
4 I think, right?

5 MR. HERBST: I think that would be prohibited  
6 also. But that's very unlikely to happen.

7 JUDGE RIVERA: Because you said it has to be  
8 both. That's why I'm asking you about it.

9 MR. HERBST: Yeah, it has to be a recreational  
10 activity.

11 JUDGE RIVERA: Well, you agree if someone just  
12 did - - - if an employer just doesn't like anybody  
13 blogging, they don't care if you were blogging about your  
14 favorite turkey stuffing - - -

15 MR. HERBST: I do agree.

16 JUDGE RIVERA: - - - it doesn't matter to them.

17 MR. HERBST: I do agree.

18 JUDGE RIVERA: They just don't like this idea,  
19 right?

20 MR. HERBST: Right. Yeah, I - - - I meant - - -

21 JUDGE RIVERA: They fired you for that. You  
22 would - - - to the extent that your position is blogging as  
23 a recreational activity, you'd say, well, that's covered.

24 MR. HERBST: Yes.

25 JUDGE RIVERA: Right? But your - - - your point

1 is also that even if they have no problem with the act, if  
2 - - - if they wouldn't fire her for the stuffing recipe,  
3 but they would fire her for what she actually did post - -  
4 -

5 MR. HERBST: Yes.

6 JUDGE RIVERA: - - - that that is also covered?

7 MR. HERBST: Yes, and I'm also saying that  
8 because really, no employer is going to fire someone, you  
9 know, because they're sitting - - - they're blogging - - -

10 JUDGE RIVERA: Then, why doesn't it say - - - but  
11 then why doesn't it say that you're protected for your  
12 speech?

13 MR. HERBST: Because I don't think the  
14 legislature thought it had to say that in the text - - -

15 JUDGE RIVERA: I don't - - -

16 MR. HERBST: - - - because there was no other  
17 reason to - - - to protect recreational activity the way it  
18 is. If you're only going to protect the acts, no one is  
19 really going to be fired for the acts. That's the thing.  
20 As Judge - - - Judge Halligan, I believe, said - - -

21 JUDGE RIVERA: Well, it's kind of like sports.  
22 Who's going to fire them for sports? I mean, you know?

23 MR. HERBST: Well, I think in terms of hang  
24 gliding, for example, I think an employer could fire  
25 someone because of - - - of the tolerance for risk. The

1 employer doesn't like it. That's prohibited. That should  
2 be prohibited under the statute.

3 JUDGE GARCIA: But Judge Halligan gave the  
4 example of smoking earlier, and in fact, they added  
5 something about smoking marijuana to the statute. Isn't  
6 that a pure recreational act?

7 MR. HERBST: It would be - - - it would be a  
8 recreational act and it would be covered.

9 JUDGE GARCIA: Right.

10 MR. HERBST: But that doesn't exclude - - -

11 JUDGE GARCIA: That's one.

12 JUDGE RIVERA: And it's not even listed. But  
13 it's not even listed.

14 MR. HERBST: Well, it's - - - it's separate - - -  
15 it's separately listed, I think - - -

16 JUDGE RIVERA: In the cannabis - - -

17 MR. HERBST: - - - in the cannabis portion.

18 JUDGE HALLIGAN: Might not part of the - - - the,  
19 you know, question we have to sort through here be that  
20 when this statute was drafted, I don't think that there  
21 were easy mechanisms for an employee to widely disseminate  
22 their point of view, right? And - - - and now, in the face  
23 of social media and the internet, that can fairly readily  
24 happen, and so maybe the legislature just didn't  
25 contemplate the particular question presented by this sort

1 of - - - this set of facts.

2 MR. HERBST: Well, I think that that is true at  
3 the time, but they have amended the statute a number of  
4 times. And if they were concerned about the breadth of it  
5 - - -

6 JUDGE HALLIGAN: Well, it may not come - - -

7 MR. HERBST: - - - they could have narrowed it.

8 JUDGE HALLIGAN: And - - - but it may not have  
9 come to their attention that it could be applied in this  
10 way.

11 MR. HERBST: Well, I think it's been clear for -  
12 - - for actually decades, as long as the internet's been -  
13 - - been going, that there's a real danger of people being  
14 fired for what they post.

15 JUDGE HALLIGAN: Well, if there had been cases  
16 along those lines, I think I missed them, but - - -

17 MR. HERBST: Well, I agree this statute has not  
18 been used that very much. And part of it, I think, is  
19 because of some of the rulings in the lower courts that  
20 sort of tended because of - - - of the romantic  
21 relationship issues tended to - - - to advocate for a  
22 narrow -- a narrow reading. But I think in terms of this,  
23 I think this is a really, really important issue. And I  
24 hope that Your Honors will take it up and - - - and not  
25 avoid it.

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And I would also ask you to, if Your Honors are going to reverse, to remand for full discovery, not for a reconsideration of whether on a motion to dismiss the ministerial exception or the conflict of interest exception can be ruled on because then we might be back up before an appellate court in two or three years. This case is already four years old.

CHIEF JUDGE WILSON: Thank you.

MR. HERBST: Thank you very much, Your Honor.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Sander v. Westchester Reform Temple, No. 100 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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