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Religion in the Workplace: A Nuanced Jurisprudence

Employers walk delicate line in accommodating different beliefs while ensuring fairness.

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WHETHER we wish it or not, religion permeates our daily lives and our interactions with others. Questions of faith and religion are embedded in most aspects of politics, and not always in a subtle fashion. Gay marriage and abortion, as examples, clash with traditional faith-based teachings in contemporary society. And some believe that the events of 9/11 and the aftermath have made people more openly religious, as well as had the effect of directing a focus on Islam (and not necessarily in a positive manner).

Against this background, it is not surprising that employees are unable or unwilling to segregate their religious beliefs from their occupation, and consequently, the American workplace is teeming with issues related to faith. Indeed, the number of religious discrimination cases filed annually with the Equal Employment Opportunity Commission increased by 27 percent from 2000 to 2005, while the number of race and sex discrimination cases actually decreased.1

Employees are starting to appreciate that federal, state and local laws place affirmative obligations on employers to accommodate their employees' religious beliefs and practices. Employers often find themselves with difficulty attempting to accommodate an individual's religious requests while simultaneously maintaining efficiency of operations, and ensuring fairness to all the work force. How should companies resolve these issues, and be prophylactic regarding religious harassment, discrimination, and accommodation claims?

Religious Accommodations

Common religious accommodation requests involve attendance conflicts, dress or grooming codes, and religious speech in the workplace. Attendance conflicts (i.e., with respect to the Sabbath and other religious observances) trigger the most requests for accommodation. Problems also arise when employers encounter employees whose dress or appearance may constitute a religious expression, yet contravene company policy. Employees who wish to engage in religious speech at the workplace can pose a unique conundrum, requiring the employer to balance an individual's sincerely held belief with

other employees' rights to work in an environment free of religious harassment. Regardless of the type of request, the analysis will be fact-specific.

The term "religion" is defined to include "all aspects of religious observance and practice, as well as belief."2 Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to be protected.3 As long as a belief is "sincerely held," and occupies in the life of that person a place parallel to that of God in traditional religions, an employer must try to accommodate it.4 The fact that no established religious group espouses a certain belief does not mean that that belief is not a "sincerely held religious belief."5 Moreover, if a religious group to which an individual professes to belong does not accept a certain belief, that does not necessarily mean that it is not a "sincerely held religious belief."6

Of course, Title VII protects persons who are not members of organized religious groups, as well as atheists. While this definition of religion is very broad, religion does not include personal preferences or political beliefs. For example, the Southern District of New York held that an employee's Protestantism and Nubian beliefs did not require a religious accommodation of the employee's desire to wear dreadlocks at work because the employee expressed the choice as one of lifestyle rather than religion.7 Similarly, the U.S. Court of Appeals for the Second Circuit held that a supposed Muslim requirement that an employee wear a beard was not a sincerely held religious belief since the employee had not worn one for the past 14 years.8

As a practical matter, however, courts focus more on the "undue hardship" analysis than on the "sincerely held belief" analysis. For example, in Cloutier v. Costco Wholesale Corp.9 an employee claimed that she was a member of the Church of Body Modification, whose tenets required her to display numerous facial piercings. Although the piercings conflicted with Costco's dress code, the employee refused to remove them, and refused to wear clear plastic retainers (which would prevent the piercings from closing), in place of the facial jewelry.

In affirming the lower court's award of summary judgment in favor of the employer, the First Circuit did not base its holding on whether the employee's piercings and/or membership in the Church of Body Modification comprised protected religious practice. Instead, the court focused on the fact that Costco, in allowing the employee the option of wearing plastic retainers in her piercings, offered her an accommodation that was reasonable as a matter of law. Employers would be well-served to focus their attention on the nature of the conflict and whether a feasible reasonable accommodation exists, rather than on the legitimacy of the employee's claimed religious belief or practice.

Title VII requires an employer to make a religious accommodation if doing so does not impose more than a minimal burden upon the employer. For example, if an employee wishes to work a different shift because of a religious reason, and an accommodation would result in no more than a minimal expense to the employer, the employer must grant the accommodation. However, where an accommodation will cause

a hardship—even an administrative hardship or a fairness problem—Title VII and the New York Human Rights Law, New York Executive Law §290 et seq., do not require the employer to grant the accommodation.

Generally, "reasonable accommodation" refers to some suitable adjustment or exception to employment policy or behavior that meets both the employer's requirements and the employee's needs. Cases addressing the question of an employee's refusal to work designated shifts have generally held that an employer does not have to incur more than minimal expense, considering factors such as loss of efficiency or extra costs, to accommodate an employee's religious needs.10 Each request is different, and its impact on the business must be assessed on a case-by-case basis.

It should be noted that courts reject the idea of a speculative or hypothetical undue hardship.11 For example, if an employee requests a one-week leave of absence, an employer may not deny the request on the grounds that if granted, it would encourage similar requests that would harm the employer.12 A "speculative hardship" is not evidence of an actual hardship.13 Employers must be able to show actual harm that would result from granting the requested accommodation.14

When faced with an employee's suggested accommodation, companies should focus on alternatives and should calculate the cost—both administrative and monetary—of the employee's suggested accommodation. Importantly, courts consistently have held that the law does not require the employer to accommodate an employee according to the employee's suggestion. If the employer's offered accommodation is reasonable, it may use its plan for accommodation over the plan suggested by the employee. The duty ends once the employer offers a reasonable accommodation.

Under current law, employers can usually avoid liability as long as they (1) try in good faith to resolve the conflict between the employee's religion and the job requirement; and (2) can point to an actual, minimal monetary or administrative expense in the event they cannot accommodate the employee. Most employers will not have difficulty in avoiding liability as long as they meet these requirements.
However, the current definition of "undue hardship" as merely a minimal burden may well become a thing of the past. Proposed legislation threatens to eradicate this definition of "undue hardship."

On March 17, 2005, a bipartisan Workplace Religious Freedom Act (WRFA) bill was introduced. If passed, the WRFA will expand employers' obligations in this area. The bill redefines "undue hardship" by replacing the current standard that holds that anything above a minimal cost or inconvenience is an undue hardship, with a definition that such undue hardship would require significant difficulty or expense. The bill requires that the cost of accommodation be quantified and considered in relation to the size of the employer, in similar fashion to the Americans with Disabilities Act.

Indeed, some state courts already seem to be drifting toward the WRFA's more rigorous proposed definition of undue hardship. The Oregon Court of Appeals in

Nakashima v. Board of Education recently rejected the minimal standard for undue hardship with respect to the Oregon School Activities Association's refusal to adjust the schedule of a state basketball tournament so that it would not conflict with the day that several team members celebrated the Sabbath.15

The court held that the defendant would have to accommodate the team members unless it could show that it would result in "significant" difficulty or expense. While Nakashima involved the educational arena, this higher standard could also apply to workplace religious accommodations under the Oregon anti-discrimination statute. If the WRFA becomes law, employers will need to carefully reassess their policies and practices with respect to addressing employees' requests for religious accommodations, and undue hardship claims or objections.

Proselytizing

"Proselytize" is defined as taking action to induce someone to convert to one's own religious faith.16 It is distinguished from simply talking about one's own beliefs, although such discussions can easily morph into inducement efforts. Some members of evangelical religions believe that their "sincerely held religious beliefs" require them to "save" non-adherents around them. Indeed, as an example, an employee may claim that as part of their religious expression, they must espouse the "immorality" of homosexuality, and they must do so during working hours and on work premises.

It is apparent that proselytizing may likely result in discomfort among the rest of the work force subjected to it. Courts have been largely supportive that employers do not violate Title VII by terminating employees for engaging in proselytizing.17 This is especially true where the proselytizing is done by a supervisor who intones that a worker is going to "go to hell" because of their beliefs or non-beliefs.18

Importantly, however, employers may not screen out applicants whom they believe have a penchant for proselytizing. The EEOC recently brought suit in the Southern District of New York against an employer who rejected an applicant on the grounds that the employer was concerned the applicant, who was a Christian Evangelist, would proselytize to clients of the firm. Apparently, the applicant had advised the employer that she did not impose her religious beliefs on anyone else, but, remarkably, the employer told the applicant that they were still concerned, and therefore declined her hire.19

An employee proselytizing at work can result in employer liability for religious harassment. The potential for liability is particularly significant when the person proselytizing is a supervisor. However, the EEOC has held that an employer may also be liable for religious harassment committed by a co-worker.20 As a practical matter, employers should make sure that an employee who is truly proselytizing is appropriately counseled and that company diversity policies are discussed. This is particularly true if the employee is a supervisor or if the substance of the proselytizing is unusually provocative.

In sum, employers must be very mindful of the deeply held religious convictions of employees. Accommodation in the appropriate case is warranted, but the employer must provide a workplace that is both efficient and tolerant—up to a point. Each case turns on its own facts. In the end, just as in most social situations, discussion of religion and politics is best kept at a minimum in the diversity of the workplace.

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1. See EEOC, Charge Statistics, FY 1992 Through FY 2004 (Jan. 27, 2005), http://www.eeoc.gov/stats/charges.html (1,939 suits were filed in 2000 while 2,466 suits were filed in 2004).
2. 42 U.S.C.A. §2000e(j).
3. Thomas v. Review of Board of Indiana Employment Security Div., 450 U.S. 707 (1981).
4. Welsh v. United States, 398 U.S. 333 (1970).
5. 29 C.F.R. §1605.1.
6. Id.
7. Eatman v. United Parcel Service, 194 F.Supp.2d 256 (S.D.N.Y. 2002).
8. Hussein v. Waldorf Astoria Hotel, 31 Fed.Appx. 740 (2d Cir. 2002).
9. 390 F.3d 126 (1st Cir. 2004).
10. Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977).
11. See e.g., Buonanno v. AT&T Broadband, LLC, 313 F.Supp.2d 1069, 1081 (D. Colo. 2004) (citing Banks v. Service America Corp., 952 F.Supp. 703, 709 (D. Kan. 1996)); see also Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1492 (10th Cir. 1989). An employer's costs of accommodation "must mean present undue hardship, as distinguished from anticipated or multiplied hardship." Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992).
12. See e.g., U.S. v Board of Trustees of Southern Illinois University, No. 92-733-WLB, 1995 WL 311336, *14 (S.D. Ill, Jan. 13, 1995) (employer failed to demonstrate undue hardship where it denied plaintiff's request for leave because it felt that granting the request would leave it no grounds to deny similar requests in the future).
13. See fn 11, supra.
14. 29 C.F.R. §1605.2(c)(1).
15. Nakashima v. Board of Education, 204 Or.App. 535 (2006).
16. The American Heritage Dictionary of the English Language, Fourth Edition, Copyright (c) 2000 by Houghton Mifflin Company.
17. Helland v. South Bend Comm'ty School Corp., 93 F.3d 327 (7th Cir. 1996) (dismissing plaintiff's religious discrimination claim where a substitute teacher was removed from the list for proselytizing in his classes); Lotosky, Baz v. Walters, 599 F.Supp. 614 (C.D. Ill. 1984, aff'd 782 F.2d 701 (7th Cir. 1986)) (dismissing religious discrimination action where plaintiff was discharged for proselytizing in a medical facility that treated psychiatric patients).
18. See e.g., Peterson v. Hewlett Packard Co., 358 F.3d 599 (9th Cir. 2004); Knight v. Connecticut Dept. of Public Health, 275 F.3d 156 (2d Cir. 2001); Erdmann v. Tranquility Inc., 155 F.Supp.2d 1152 (N.D. Cal. 2001).
19. EEOC v. Pathways to Housing, Inc., No. 04-Civ-7687 (NRB), 2006 WL 617980 (S.D.N.Y., March 9, 2006).
20. See EEOC Dec. No. 83-1, 1982, EEOC LEXIS 8, at *9 n. 3 (Oct. 7, 1982).