

EEOC Issues New Compliance Manual Section Addressing Religious Discrimination

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As the American workplace has become increasingly diverse, religious discrimination and harassment charges have more than doubled nationwide over the past 15 years. In response, on July 22 the Equal Employment Opportunity Commission (EEOC) issued a new Compliance Manual Section addressing workplace discrimination on the basis of religion under Title VII of the Civil Rights Act of 1964. This section does not set new law, but it synthesizes recent developments in the relevant case law. Because the Compliance Manual is used by EEOC staff when investigating religious discrimination charges, employers that fail to satisfy the Manual's standards will likely face adverse determinations.

In this client alert, we will highlight some of the most common and complicated religious discrimination issues that the new Compliance Manual section addresses. The section itself is quite lengthy and is publicly available at www.eeoc.gov/policy/docs/religion.html.

Reasonable Accommodation

Religious discrimination and harassment claims are assessed under the same legal principles applicable to Title VII's prohibition on discrimination and harassment based on other protected characteristics, such as race, gender, and national origin—with one significant difference. Whereas treating all employees consistently will protect against discrimination suits based on the other protected statuses, Title VII imposes a duty on employers to accommodate an employee's sincerely held religious beliefs or practices. Thus, the fact that an employer has treated all employees the same may not be a safeguard against liability if the employer's evenhanded policy or practice burdens an employee's religious exercise.

The most common religious accommodation requests are for scheduling changes, such as to allow flexible departure times to enable Jewish employees to attend Shabbat services on Friday evenings; for excep-

tions to dress and grooming rules, such as to allow female Muslim employees to wear head or face coverings; for exemptions from participating in certain activities, such as to allow Jehovah's Witnesses to not join in office celebrations; and for the display of religious symbols, such as to allow a Christian employee to keep a copy of the New Testament on his or her desk.

An employer may refuse to provide a reasonable accommodation under Title VII only if it would pose an undue hardship. In this respect, however, Title VII's accommodation provision requires much less of employers than that of the Americans with Disabilities Act ("ADA"). Under the ADA, to establish an "undue hardship" that would justify denying a requested accommodation, an employer must demonstrate that the accommodation would pose "significant difficulty or expense." Under Title VII, by contrast, an employer does not need to accommodate an employee's religion if doing so would pose "more than *de minimis*" cost or burden.

The cases addressing accommodation of religion illustrate the expectations of employers. In *Trans World Airlines, Inc. v. Hardison*, for example, the religious beliefs of an employee who subscribed to the Worldwide Church of God required him to observe the Sabbath by refraining from any work from sunset on Friday until sunset on Saturday. TWA terminated him for refusing to work on Saturdays. The U.S. Supreme Court held that the termination did not violate Title VII because the proposed accommodations would pose more than a *de minimis* cost or burden. In rejecting the proposed accommodations, the Court noted that permitting the employee to work a 4-day week and utilizing a supervisor or another worker on duty elsewhere would cause other job functions to suffer. Alternatively, filling the employee's Saturday shift from other available personnel would require TWA to pay substantial premium overtime pay. Finally, mandating a swift "swap" between the employee and another employee would involve a breach of the seniority system. The categories of hardship identified in the *Hardison* case—impaired job productivity, financial burdens, and impositions on the rights of other employees—are commonly cited by other courts as justification for rejecting an employee's requested religious accommodation.

In contrast, in *Brown v. General Motors Corp.*, the U.S. Court of Appeals for the Eighth Circuit held that allowing an employee, who was also a member of the Worldwide Church of God, to leave work at sundown on Friday to observe the Sabbath did not pose more than a *de minimis* cost given the circumstances at General Motors. The court noted both that the employee did not receive any pay for the time he missed and that a replacement worker was readily available to fill in for him, as the company maintained "extra board men" who were at all time available to replace unscheduled absences of regular employees.

As under the ADA, an employer bears the burden of persuasion on the issue of whether a proposed accommodation poses an undue hardship. This burden must be met with evidence that the proposed accommodation would cause more than a *de minimis* cost. Courts have repeatedly rejected an employer's reliance on speculation about the level of hardship an accommodation would impose.

In *EEOC v. Alamo Rent-A-Car LLC*, for example, the U.S. District Court for the District of Arizona granted partial summary judgment for the EEOC because Alamo had failed to demonstrate that a religious accommodation would cause an undue hardship. In that case, a Muslim employee requested permission to wear a head covering at work during the Ramadan holiday. The court rejected Alamo's assertion that the accommodation "would have opened the floodgates to others violating the uniform policy," because Alamo failed to provide "any basis for concluding that those opinions were anything other than pure speculation."

Similarly, in *EEOC v. Red Robin Gourmet Burgers, Inc.*, the U.S. District Court for the Western District of Washington held that Red Robin failed to demonstrate undue hardship in a religious accommodation case. The employee in that case practiced "Kemet," a religion with roots in ancient Egypt. As part of his desire

to join the priesthood, the employee obtained two tattoos expressing his devotion to Ra, the Egyptian god of the sun. The employee did not cover his tattoos in violation of Red Robin's prohibition of visible tattoos or piercings. Red Robin argued that allowing the employee to work with his tattoos visible would have resulted in undue hardship because it would adversely affect its public image. However, Red Robin presented no evidence that any customers had complained or even noticed the employee's tattoos, nor that visible tattoos were inconsistent with its goals of being "family-oriented." Red Robin also argued that accommodating this employee would lead to a "slippery slope" of claims for exemption from the policy from other employees. In response, the court noted that: "the mere possibility that there would be an unfillable number of additional requests for similar accommodations by others cannot constitute undue hardship." The court, therefore, denied Red Robin's motion for summary judgment.

The issue of undue hardship can be a nuanced one when the claimed burden relates to the rights of co-workers. While co-workers cannot be forced to be unduly subjected to the religious views of others or to increase their workloads, co-worker bias is not a justification for refusing an accommodation. For example, in *Wilson v. U.S. West Communications*, the U.S. Court of Appeals for the Eighth Circuit held that the employer's requirement that an employee cover an anti-abortion button containing a graphic photograph of a fetus when she was outside of her cubicle did not violate Title VII. Although the employee had taken a religious vow to wear the button, some of her co-workers took great offense to the button. Notably, the co-workers were not objecting to her religious views, but rather to the disturbing image. The outcome of the case would have been quite different if the employer had required the employee to cover a pin depicting a cross or a Star of David simply because other employees found her expression of religious faith offensive. On the same principle, the U.S. Court of Appeals for the Ninth Circuit held in *Burns v. Southern Pacific Transportation Co.* that the mere grumblings of fellow workers were not sufficient to prove undue hardship where a Seventh Day Adventist requested to pay his portion of the union dues and fees to a charitable organization because it was against his religious beliefs to contribute to a union. The religious employee's request, the court noted, did not create an actual imposition on co-workers or infringe on their rights.

Discrimination

Title VII prohibits disparate treatment on the basis of religion. Disparate treatment violates Title VII whether it is motivated by bias against or preference toward an applicant or employee due to his or her religious beliefs, practices, or observances. Importantly, Title VII defines religion broadly for purposes of determining the statute's applicability. Thus, religion under Title VII includes not only traditional and organized religions such as Christianity, Judaism, and Islam, but also religious beliefs that are not part of a formal church or are only subscribed to by a small number of people. In addition, an individual's lack of religious beliefs, practices or observances are protected. While courts will examine the sincerity of an employee's religious belief if there is cause to question it, if the belief is sincerely held and religious in nature, it is protected. According to the Compliance Manual, moral and ethical beliefs and "ultimate ideas" about "life, purpose, and death" are considered religious in nature, but social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII.

Harassment

Religious harassment in violation of Title VII occurs when (1) an employee is either required or coerced to abandon, alter, or adopt a religious practice as a condition of his or her employment or (2) if the employee is subjected to a hostile work environment because of religion. To be unlawful, harassing conduct must be unwelcome and severe and pervasive. In addition, it is of particular relevance whether the harassing conduct was targeted at a particular employee.

Employers should be wary of situations in which an accommodation requested by one employee for his or her religion would lead to another employee feeling harassed because of religion. For example, in *Peterson v. Hewlett-Packard Co.*, the Ninth Circuit held that one employee's requested accommodation posed an undue hardship on Hewlett-Packard where it violated the company's anti-harassment policy. The plaintiff in that case described himself as a "devout Christian" who felt that homosexual activities violated the commandments in the Bible and that he had a duty "to expose evil when confronted with sin." After the company began displaying diversity posters, including a picture of an employee labeled "gay," the plaintiff began posting biblical scriptures in his cubicle that were large enough for other employees to read when passing by. According to the plaintiff, he meant these passages to be hurtful, and they were an effort to "save" his gay and lesbian co-workers. The plaintiff was ultimately terminated for insubordination after he refused to remove the passages. The court held that the plaintiff was not terminated because of his religion, but because of his violation of the company's harassment policy. In addition, the court held that it would create an undue hardship for the company to accommodate the employee by allowing him to post messages intended to harass his co-workers. By contrast, as the Compliance Manual explains, an employee who uses the religious phrase "Have a Blessed Day" in her general voicemail greeting is neither intending to harass anyone nor targeting a particular person. Even if another employee found that offensive, the employer would likely have to accommodate the religious employee's expression.

Retaliation

Title VII prohibits employers from retaliating against an individual who has engaged in a protected activity. Protected activity consists of opposing a practice that the employee reasonably believes is unlawful or of filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Title VII. The EEOC has taken the position that requesting religious accommodation is a protected activity. It is therefore unlawful under Title VII to retaliate against any employee on the basis of his or her requesting an accommodation.

Conclusion

As religious discrimination claims increase, employers would be well-advised to ensure that their managers and human resources staff are trained on how to deal with issues of religion in the workplace. Employers should not hesitate to seek legal advice when an employee requests religious accommodation or claims discrimination or harassment on the basis of religion.

Live Link

U.S. Equal Employment Opportunity Commission Compliance Manual; July 22, 2008

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