Workplace Religious Discrimination: New EEOC Guidance and Court Developments

Best Practices for Hiring, Accommodation and Termination Given Increased Claims and Ambiguous Accommodation Standards

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Today’s faculty features:

Gayla C. Crain, Shareholder, Crain Wilson PLLC, Dallas
Stephen E. Fox, Principal, Fish & Richardson, Dallas
Michelle Seldin Silverman, Partner, Morgan Lewis & Bockius, Princeton, N.J.

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Gayla C. Crain  
Crain Wilson PLLC  
gcrain@ccwlawfirm.com

Stephen E. Fox  
Fish & Richardson  
sfox@fr.com

Michelle Seldin Silverman  
Morgan Lewis & Bockius  
msilverman@morganlewis.com
EEOC Guidance on Religious Garb and Grooming

- Two new “technical assistance publications” issued by EEOC on March 6, 2014
- Question and answer guide: “Religious Garb and Grooming in the Workplace: Rights and Responsibilities”
- Short “fact sheet”
EEOC Guidance on Religious Garb and Grooming

- Attire and grooming choices ordinarily associated with personal preference may actually constitute protected religious practices
- Examples include skirts (instead of pants), long hair, dreadlocks, tattoos, facial hair, headcoverings, jewelry, and knives (Sikh kirpan)
Definition of religious practice is very broad

- Includes “religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or may seem illogical or unreasonable to others”
- Even if practice not common within religious group, protected as long employee has sincerely held belief
- Employee need not be affiliated with formal religious organization
- Includes “non-theistic moral or ethical beliefs that are sincerely held with the strength of traditional religious views”
- Employees are protected even if their religious practice is new, or their practice is irregular or intermittent, as long as belief is sincerely held
EEOC Guidance on Religious Garb and Grooming

- Employer obligated to provide reasonable accommodation for sincerely held religious practices, unless the accommodation would cause an undue hardship
- “Undue hardship” means more than a *de minimis* cost or burden on operation of business
- Standard more favorable to employer than ADA standard
EEOC Guidance: Undue Hardship

- “Undue hardship” includes safety, security, or health care risks that cannot be mitigated through a reasonable accommodation
- Customer preference, co-worker jealousy, and “image” are insufficient justifications for denying accommodations
- Employer cannot hide employee out of sight of customers because of employee’s dress
EEOC Guidance: Accommodations

- Employer may offer accommodation that includes covering the religious symbol (such as covering a religious tattoo), but accommodation will not be considered reasonable if employee’s belief forbids covering the symbol.

- If accommodation proposed by employee would cause undue hardship, employer should explore other possible accommodations that would be acceptable to both parties.

- Accommodation may require exceptions to other general policies (e.g., weapons policies).
EEOC Guidance: Grooming

- If grooming choice is personal preference—for fashion—no Title VII religious protection

- Examples include:
  - Wearing of hijab or chunni
  - Having a beard or long hair
  - Wearing a cross
  - Having black ash mark on forehead for Ash Wednesday
EEOC Guidance: Employer Response

- Because religious attire and grooming may appear to be mere personal preference (such as dreadlocks, tattoos, and facial hair), employer is only obligated to make accommodations or refrain from discrimination if employer knows or reasonably believes attire/grooming is a religious practice.
EEOC Guidance: Employer Response

- Employer may tell employee that company policy forbids facial hair

- If employee informs employer that it is a religious practice, then employer must explore accommodations

- If employee fails to tell employer that facial hair has a religious basis and employer does not know or believe there is a religious purpose, employer is not obligated to accommodate

- If employer believes practice has a religious basis, then employer may not discriminate even if employee has not yet requested accommodations or told...
EEOC Guidance on Religious Garb and Grooming

- Title VII also protects employees from retaliation based on requests for religious accommodation
- Employees also protected against harassment in the workplace based on their religious attire or grooming
Religious Attire and “Image”

- Multiple EEOC cases against Abercrombie & Fitch based on its “Look Policy”
- Failed to accommodate (fired or refused to hire) Muslim women who wore headscarves
- Requires employees to wear “Abercrombie look”—“casual,” “preppy,” “East Coast collegiate”
- Required specific types of shoes (flip flops, Converse, or Vans); prohibited headwear, piercings, nail polish, heavy makeup, facial hair, and non-Abercrombie logos
Religious Attire and “Image”

- Abercrombie claimed accommodating would cause undue hardship.
- District court in the 9th Circuit rejected undue hardship defense in case brought by EEOC for discharging employee who refused to not wear hijab (No. 11-cv-03162-YGR, 2013 U.S. Dist. LEXIS 125628 (N.D. Cal. Sept. 3, 2013))
  - No evidence of impact on sales, customer complaints or confusion, or damage to brand.
  - Subjective belief, speculation, personal experience not enough without reports, surveys, complaints.
  - Rejected free speech defense when employee’s role was folding clothing, placing and replacing clothing.
  - Noted employees not required to wear the clothes being sold.
  - Abercrombie later settled with EEOC and agreed to change “Look Policy” to allow for religious accommodations.
Religious Attire and “Image”

- 10th Circuit held that Abercrombie had no obligation to accommodate woman who wore hijab to interview because she did not tell the interviewer she was wearing it for religious reasons (No. 11-5110 (10 Cir., Oct. 1, 2013))
  - Even though interviewer knew that it was religious and did not hire her because of fear she would ask for accommodation
- Other circuits (8th, 9th, 11th) reject this approach
- EEOC not happy with decision so issued guidance (which gives this exact fact pattern and says that this is forbidden)
- 10th Circuit failed to defer to EEOC’s interpretation and noted that EEOC had not given prior notice or warning of its interpretation (maybe Guidance is the EEOC now giving notice!)
- Strong dissent in 10th Circuit opinion; EEOC’s request for rehearing denied (judges were evenly divided on whether to grant rehearing)
Challenging Sincerity of Belief

- Statute’s definition of religion is broad, leaving “little room for a party to challenge the religious nature of an employee’s professed beliefs”
- Employee’s belief or practice need not be widely held or recognized by others as religious in order to be protected
- EEOC Guideline: “…The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee …”
- Unsurprisingly, courts often reluctant to pass judgment on sincerity of religious belief
Challenging Sincerity of Belief

• Factors to determine whether belief is sincerely held
  • Whether employee has behaved in a manner inconsistent with professed belief
  • Whether accommodation sought is particularly desirable benefit likely to be sought for secular reasons
  • The timing of the request
  • Any other reason employer has to believe that request is not sought for religious reasons
Challenging Sincerity of Belief

- Courts often decline to address
- *Cloutier v. Costco*, 390 F.3d 126 (1st Cir. 2004)
  - Employee—claiming to be member of “Church of Body Modification”—refused to remove facial piercings which violated dress code
  - Employee did not mention any religious beliefs when first asked to remove
  - Employee joined “on-line” church after she was asked to comply with dress code
  - Employee changed her position on what actions were religiously required of her
Challenging Sincerity of Belief

- If facts merit, effort to challenge sincerity of belief is worthwhile

  - Employer refused to permit employee to work as banquet waiter with beard (in violation of appearance policies) (shaving was against his religion)
  - In previous 14 years of employment at hotel without beard, employee never mentioned religion (and did not claim that he has recently converted)
  - Employee shaved beard within 3 months of growing it, and shaved daily until date of deposition
Regulation of Religious Organizations & Ministerial Exception

- First Amendment prohibits courts from interfering with purely religious disputes
- The Ministerial Exception affects application of federal and state employment laws & regulations including Title VII, ADEA, ADA, FLSA, FMLA
- Person who performs a ministerial function may not sue employer/church or other religious employer over adverse employment decisions
Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S.Ct. 694 (2012)

- On 1/12/12, unanimous US Supreme Court found for church involving female commissioned minister (Perich) who taught at the school
- EEOC brought suit on her behalf alleging disability discrimination
- Lower courts had denied the ministerial exception because Perich only spent 45 minutes of her day in religious duties
Hosanna-Tabor cont’d

- She spent the rest of her day teaching secular subjects
- She led religious services at School
- Court said under the First Amendment, government must keep its nose out of the hiring and firing of clergy
- The Establishment and Free Exercise Clauses of First Amendment bar suits brought on behalf of ministers against their churches, claiming termination in violation of employment discrimination laws
Why was Perich a Minister?

- Church/School held Perich out as a minister, with a role distinct from that of most of its members
  - That title represented a significant degree of religious training followed by a formal process of commissioning
- Perich also held herself out as a minister by, for example, accepting the formal call to religious service
Who is a Minister?

- Ministerial exception applies to those whose primary duties consist of engaging in:
  - 1. Church governance; or
  - 2. Leading or supervising a religious organization; or
  - 3. Conducting religious ritual, worship or instruction; or
  - 4. Serving as a messenger or teacher of a Church’s faith
Specific Exceptions under Title VII for Religious Organizations

- Church can choose to employ persons of same religion and beliefs (or)
- Church schools can employ persons of a particular religion if such institution is owned, supported, controlled, or managed by a particular religious entity (42 U.S.C. 2000e-1 (702))
- Church and church schools can give preference to persons of their own religion
Religious Organization

• Factors:
  • If articles of incorporation state a religious purpose
  • Whether day-to-day operations are religious (are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion?)
  • Whether it is not-for-profit; and whether it is affiliated with, or supported by, a church or other religious organization
Title VII Religious Exception

- All other protections of Title VII remain applicable to religious employers
- A church, church school or educational institution or other religious employer cannot discriminate against its non-ministerial employees on the basis of sex, national origin, age and or disability under federal law
- Most state anti-discrimination laws have similar religious exceptions
Title VII Requires Accommodation of Employees’ “Moral or Ethical Beliefs”

- Religious discrimination prohibition of Title VII requires employers to act affirmatively to accommodate employees’ religious beliefs and practices

- Terms “beliefs and practices” are defined broadly to include “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views”

42 U.S.C. 2000e, § 701(j); 29 C.F.R. §§ 1605.1, 1605.2(b).
EEOC Guidance

- The EEOC has taken a hard stance on employers’ duty to accommodate employee religious expression, even if it means a loss of customers or business.

- But, according to EEOC guidance:

  11. What if co-workers complain about an employee being granted an accommodation?

    Although religious accommodations that infringe on co-workers’ ability to perform their duties or subject co-workers to a hostile work environment will generally constitute undue hardship, general disgruntlement, resentment, or jealousy of co-workers will not. Undue hardship requires …evidence that the accommodation would actually infringe on the rights of co-workers or cause disruption of work.

    http://www.eeoc.gov/policy/docs/qanda_religion.html
14. What if an employee objects on religious grounds to an employer-sponsored program? An employer is required to excuse an employee from compulsory personal or professional development training that conflicts with the employee’s sincerely held religious beliefs or practices, unless doing so would pose an undue hardship. *It would be an undue hardship to excuse an employee from training, for example, where the training provides information on how to perform the job, or how to comply with equal employment opportunity obligations, or on other workplace policies, procedures, or legal requirements.*

http://www.eeoc.gov/policy/docs/qanda_religion.html
Peterson v. Hewlett Packard, 358 F.3d 599 (9th Cir. 2004)

- Plaintiff brought a religious discrimination claim alleging that company discriminated against him on basis of religion when it fired him for posting in his cubicle several biblical passages condemning homosexuality.
- Peterson had posted passages in protest of a company-led diversity initiative that involved wall signs proclaiming, among other things, HP’s support for its gay and lesbian employees.
- Peterson printed biblical passages in large font/placed them in plain view of his co-workers, and subsequently explained to HP that he had done so with intent to be “hurtful” and with hope that his gay and lesbian co-workers would see the passages and “be saved.”
- HP determined that Peterson had violated company policy, which prohibited comments or conduct that failed to respect dignity and feelings of gay and lesbian employees.
- At the same time, HP sought to accommodate Peterson’s religious beliefs by clarifying that company did not want him to change his opinions, but just wanted him to follow policy.
- Peterson refused, insisting that as long as company’s diversity signs were hung, he would post his religious beliefs in response.
**Peterson v. Hewlett Packard**

- Ninth Circuit upheld termination concluding that company’s efforts to eradicate discrimination against homosexuals in its workplace entirely consistent with goals and objectives of civil rights statutes generally

- Court found several key facts significant:
  - Company had explicitly stated that it did not require Peterson to change his personal beliefs, only his conduct
  - Company had limited itself to regulating Peterson’s workplace conduct; HP had not objected to Peterson’s expression of anti-gay views in local newspaper in which he condemned both homosexuality and HP’s diversity program; likewise, HP had not tried to prohibit Peterson from parking his car in company lot “even though he had affixed to it a bumper sticker stating, ‘Sodomy is Not a Family Value.’”
  - Peterson’s failure to accept any accommodation short of company removing diversity signs indicated that Peterson sought to impose an “undue burden” on HP

- Court wrote: “[A]n employer need not accommodate an employee’s religious beliefs if doing so would result in discrimination against his co-workers.” “Nor does Title VII require an employer to accommodate an employee’s desire to impose his religious beliefs upon his co-workers.”
**Buonanno v. AT&T Broadband, 313 F. Supp.2d 1069 (D. Colo. 2004)**

- Devout Christian employee fired for refusing to sign his employer’s diversity statement, which stated that employees were “charged with the responsibility to fully recognize, respect and value the differences among all of us”

- Rather than sign statement, plaintiff wrote letter affirming he would not discriminate against or harass any person, and he would comply with principles of diversity policy except to the extent it required him to “value” behaviors that are condemned by his religion

- Company considered the alternative to be an undue hardship

- Court disagreed, opining that employer could have met its legitimate diversity goals without requiring the employee to repudiate his beliefs

- Employer fired Apostolic Christian employee after she told a gay coworker that “gays are sinners condemned to hell”
- Employer investigated and concluded that employee violated its harassment prevention policy
- Employee sued, claiming a failure to accommodate her religious beliefs
- Court affirmed summary judgment for employer, noting that employers need not relieve workers from complying with neutral workplace rules as a religious accommodation if it would create an undue hardship
  - In this case, exposing employer to claims of allowing workplace harassment would have created an undue hardship

- Court granted summary judgment for employer who terminated Hasidic Jewish employee who sent several religious emails denigrating homosexuality to his supervisor in protest of event sponsored by company’s gay and lesbian affinity group.

- Court rejected plaintiff’s claim of religious discrimination because “Mellon [did not] require[] or even suggest[] that Plaintiff change his beliefs with regard to homosexuality or that he support or condone homosexuality.”

- Rather, Mellon simply required the plaintiff to treat gay and lesbian colleagues “with respect” and to refrain from “proselytizing.”
Walden v. Centers for Disease Control & Prevention, 669 F.3d 1277 (11th Cir. 2012)

- Plaintiff was an Employee Assistance Program counselor, charged with providing support and counseling to co-workers.
- She refused to counsel co-workers in same-sex relationships and did so in a manner that expressed disapproval, and clients complained.
- Employer encouraged her to try to find an alternate position with company and offered her assistance in that process.
- Court held that this was sufficient accommodation to meet the employer’s Title VII obligations.
Altman v. Minn. Dep’t of Corr., 251 F.3d 1199 (8th Cir. 2001)

- Plaintiffs protested mandatory training program on gays and lesbians in the workplace by quietly reading their bibles during session.
- They were disciplined, and alleged that the discipline was unfair because other inattentive (non-religious employees) were not so disciplined.
- Court allowed plaintiffs to proceed with their discrimination claims on this basis.
Harassment over Competing Religious Values-A New Kind of Claim

- Plaintiff, a gay man, alleged that his supervisor (a conservative Catholic) had told him “putting you ... closer to God is my effort to encourage you to save your worldly behind”
- Supervisor allegedly called lengthy meetings with plaintiff for stated purpose of “educating [Plaintiff] on Hell and that it is a sin to be a homosexual . . . [, that] homosexuality was wrong[,] and that [Plaintiff] would be going to Hell”
- Plaintiff sued under Title VII alleging religious harassment, claiming that he was targeted because his own religious beliefs supported homosexuality and could not be reconciled with his supervisor’s more conservative beliefs
- Court denied employer’s motion to dismiss (so case will be litigated)
Lessons to be Learned

• These decisions serve as lesson to employers not to take rigid approach to achieving diversity goals
• Employers should focus company policies on regulation of overt hostile conduct rather than on policing employees’ passive objections, thoughts or values
• Religious beliefs should be accommodated where they do not overtly challenge an employer’s diversity goals
Best Practices For Employers

- Employers may restrict religious expression where the expression is in violation of law or company policy
- Company policies prohibiting harassment or discrimination should be clear and explicit
- Company policies should seek to regulate overt, hostile conduct, not thoughts, values or beliefs
- Employers should approach requests for religious accommodation with some flexibility by exploring ways to accommodate religious expression without retreating from company policies