

RELIGIOUS DISCRIMINATION IN THE WORKPLACE

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Broad based religious freedom is a core value of the United States—it is the “first freedom” listed in the First Amendment to the Constitution. Central to the founding father’s vision for America was the belief that all people had the right to participate fully in the benefits and privileges of society without facing discrimination based on their religion. It was the founding fathers’ intent to establish a legal system that protected an individual’s rights and beliefs, while at the same time protecting others from being improperly subjected to those individual rights and beliefs. Thus, in America, individuals are free both to practice or engage in religion or *not* to practice or engage in religion, and the U. S. Constitution and laws protect those rights.

As a result, a widely diverse set of practices and views relating to religion and God are interwoven into and reflected in all aspects of American society, including American politics, schools, workplaces, public gatherings and society at large. For example, the religious preference of U.S. politicians is a subject of much discussion during an election campaign. At many sporting events, the event starts with a prayer. Public school children recite the Pledge of Allegiance, which refers to “one nation under God, ” and our money is emblazoned with the phrase “In God We Trust.”

Religious freedom is, first and foremost, guaranteed by the U.S. Constitution. The First Amendment contains the religion clauses, which provide that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Further, direct references to religion are found in Articles 2 and 6 of the Constitution, and the Fourteenth Amendment indirectly addresses religion, as it guarantees freedom from discrimination, which has been interpreted to include religious protections.

In addition to protections afforded by the Constitution, several U.S. laws also address religious freedom. These laws typically focus on specific issues or contexts in which religious freedom arises (*e.g.*, education, employment, housing). Some of the most significant laws addressing religion are the workplace civil rights laws and regulations.

The principal U.S. workplace civil rights law is Title VII of the Civil Rights Act of 1964 (“Title VII”), which bans discrimination in the workplace. The Equal Employment Opportunity Commission (“EEOC”) is the federal agency charged primarily with enforcing Title VII, and the EEOC has issued regulations addressing prohibited employment discrimination. In addition, a 1972 amendment to Title VII established, for the first time, an affirmative duty imposed on employers to “reasonably accommodate” the religions and religious beliefs and practices of employees.

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Title VII prohibits employers from making employment-related decisions based on religion (as well as based on other protected categories, such as race, national origin, etc.). Thus, for example, an employer may not refuse to hire an employee, impose stricter promotion requirements or different work requirements on an employee because of his/her religion.

Further, an employer may not force an employee to participate, or not participate, in a religious activity as a condition of employment. Additionally, employers must permit employees to engage in religious expression at work, particularly if employees are permitted to engage in other personal expression at work.

While the U.S. Constitution does not define religion, Title VII defines it as “all aspects of religious observance and practice, as well as belief.” The EEOC, in its Guidelines on Discrimination Because of Religion, 29 C.F.R. §1605.1, further defines “religious practices” to “include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965). 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...” 29 C.F.R.

§1605.1. It is not enough that the belief be sincerely held; it must be more than merely “secular.” It “must consider man’s nature or the scheme of his existence as it relates in a theological framework.” *Edwards v. School Board*, 483 F. Supp. 620, 624. Thus, religious beliefs do NOT include mere personal and secular-based preferences (based on economics or social values); cultural beliefs (wearing native dress); beliefs based on political or social organizations or clubs (e.g., Ku Klux Klan); or beliefs contrary to public safety or workplace fairness. Moreover, religious beliefs do not include beliefs that are not sincere—i.e., the employee professes one belief but his/her actions demonstrate another. For example, the beliefs of a Seventh Day Adventist, who objected to the payment of union dues used to fund certain activities that he claimed were contrary to his religion, were not found to be “sincerely held,” because his actions belied his statements: he worked seven days a week, had been divorced and had sworn an oath before a notary—all of which were contrary to being a Seventh Day Adventist. However, religious beliefs can change over time. The fact that an employee seeks recognition of his/her current religious beliefs, even when he/she has never before held or practiced such beliefs, does not prevent those beliefs from being sincerely held religious beliefs.

In the face of an employee’s sincerely held religious belief and his/her request that a workplace accommodation is needed to allow him/her to practice or uphold that belief, employers generally have an affirmative duty of “reasonable accommodation” with regard to the employee’s request, unless to do so would impose an “undue hardship” on the employer’s business or on other employees. Of course, the employer must be notified of the desire for an accommodation, and while the employer is not required by Title VII to discuss the situation with the employee, it is an employment “best practice” for the employer to engage in a meaningful dialogue with the requesting employee. This will allow the employer to understand the exact nature of the religious limitation claimed by the employee, and, therefore, will allow the employer to best determine if and to what extent an accommodation is reasonable. EEOC

Compliance Manual, Section 12-IV, Religious Discrimination. The employer does enjoy a limited right to inquire as to whether the employee's beliefs are indeed religious in nature and "sincerely held."

A "reasonable accommodation" is any adjustment to the work environment that will allow the employee to practice his/her religion. According to the EEOC, in its Compliance Manual:

"Ultimately, reasonableness is a fact-specific determination. "The reasonableness of an employer's attempt at accommodation cannot be determined in a vacuum. Instead, it must be determined on a case-by-case basis; what may be a reasonable accommodation for one employee may not be reasonable for another.... The term 'reasonable accommodation' is a relative term and cannot be given a hard and fast meaning; each case... necessarily depends upon its own facts and circumstances, and comes down to a determination of 'reasonableness' under the unique circumstances of the individual employer-employee relationship."

EEOC Compliance Manual, Section 12-IV(A)(3), Religious Discrimination.

Thus, for example, an employer might be required to accommodate an employee's religious beliefs by allowing flexible scheduling; exceptions to rules regarding personal appearances; voluntary substitutions or job swapping; job reassignments or lateral transfers; or modifying workplace practices, policies and/or procedures, etc.

In the event a "reasonable accommodation" would cause an "undue hardship" to the employer or its other employees, however, the accommodation need not be made. According to the EEOC, "undue hardship" "may be shown if the accommodation would impose []more than *de minimis* cost[] on the operation of the employer's business." EEOC Compliance Manual, Section 12-IV (B). In assessing "*de minimis*" cost, the EEOC considers various factors, including "the identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation." EEOC Compliance Manual, Section 12-IV (B)(2). Generally, the EEOC considers that "payment of administrative costs necessary for an accommodation, such as costs associated with rearranging schedules and recording substitutions for payroll purposes or infrequent or temporary payment of premium wages (*e.g.*, overtime rates) while a more permanent accommodation is sought" does not constitute "more than *de minimis* cost, whereas the regular payment of premium wages or the hiring of additional employees to provide an accommodation will generally cause an undue hardship to the employer." *Id.* Further:

"[c]osts to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work. Whether the proposed accommodation conflicts with another law will also be considered." *Id.*

Historically, employers generally could be confident that any request that might cause disruption or require involuntary transfers or assignments would be considered an "undue hardship," and the employer was not required to grant such accommodation. In more recent years, however, and particularly

since September 11, 2001 perhaps in response to perceived “backlash” discriminatory actions against Muslims in America the EEOC has expanded the concept of “reasonable accommodation.” The EEOC’s current position seems to be that employers must provide accommodation that imposes no cost, imposes no safety concerns, or creates only modest disruption (such as providing a time and place for prayer).

Notwithstanding the above, there are some circumstances where discrimination in the workplace based on religion is tolerated by the law, where Title VII does not apply. Such instances involve religious organizations who seek to employ persons of the same religion to carry on the function and purpose of the organizations; employment by clergy of their church or religious organization and instances where religion is a “bona fide occupational qualification” of a particular job. For example, a Catholic school could refuse to hire a Protestant teacher, because Catholicism is essential to the function/purpose (*i.e.*, teaching) of the school. On the other hand, that same school would likely not be able to refuse to hire a janitor who was Protestant, because the nature of his job is not essential to the essence or purpose of the school. Similarly, Title VII will not apply to protect a minister who sues his church for employment- related decisions. Finally, a synagogue can make Judaism a bona fide occupational qualification of the job of Rabbi and refuse to hire anyone for that position who is not Jewish.

In summary, the protection of sincerely held religious beliefs and practices in American society, including the workplace, is a value to which America is committed, by its Constitution and its laws. In determining whether an employee has a belief that is religious, which he/she sincerely holds, the facts of each case must be analyzed carefully. Similarly, whether an accommodation is warranted, being reasonable, or whether it will result in undue hardship to the employer, is also a matter of careful factual analysis. Moreover, post 9-11, there has been far greater focus, both by the EEOC and society at large, on the role of religious beliefs in America. Open and honest dialogue between employer and employee will best ensure the protection of interests and rights of both parties in the workplace and go a long way to upholding America’s longstanding commitment to religious freedom by all.