

Got Religion?

Accommodating America's Diverse Religious Beliefs and Practices in the Workplace

Oh ye of little faith, count yourselves in the minority. Religion is here, big time. According to a recent Gallup Poll, Americans are more religious now than ten years ago. And religious diversity is increasing, with more than 1,500 distinct religious denominations and faith groups now in the United States.

Many Americans believe that God's will shapes their lives. Their everyday lives are filled with rituals, prayers and observances that they feel bring them into contact with the divine—at home, at play ... and at work.

A majority of Americans report that religion is "very important" to them. Almost sixty percent say that belief in God is a prerequisite to personal morality. Ninety-two percent profess a religious preference, ninety-five percent believe in God or a "universal spirit" and sixty-eight percent are members of a church or synagogue.

The events of September 11, 2001, raised our awareness concerning religious diversity and zeal and its overarching impact on global politics. At bottom, it appears that religious affiliation—not geographic boundaries or political parties—may represent the most significant way in which people throughout the world are affiliated or divided. Perhaps this has long been the case in other countries, but Americans are just becoming wise to it and, indeed, becoming active participants.

This focus on faith is everywhere apparent—even in the highest echelons of the government. President George W. Bush is reported to have said that it was God who told him to strike al-Qaida and oust Saddam Hussein. U.S. Supreme Court Justice Antonin Scalia has observed that our current democracy has obscured "the divine authority behind the government."

Even before the events of September 11, key White House political operatives, including the President's staff and even White House interns, began meeting together at work for weekly prayer and Bible study. Another weekly prayer and Bible

study group involves career employees who work at the White House complex. These gatherings at a government worksite reportedly are designed to give Christians an opportunity "to break away from their high-stress work" and "remember in whose kingdom they really serve."

As faith takes on greater significance for more and more Americans, employers and employees are struggling to understand what it means to appreciate and respect religious convictions in the workplace. For employers this means complying with federal and state laws concerning religious discrimination and accommodation while adhering to sound management practices.

AN EMPLOYER'S DUTY

How is an employer to reconcile employees' religious needs with their company's business goals? What accommodations does the law require?

Can an employee really do the job if he or she can't work on Saturdays? This was the issue many Americans pondered when Joe Lieberman ran for Vice President in 2000 and announced his intention not to do the job when it conflicted with practicing his Judaism.

May an employer scope out a potential employee's religious beliefs during a job interview? May a devout Christian wear an anti-abortion pin every day to work because of her religious convictions if it makes other employees uncomfortable? What about group prayer at work? Unfortunately, there are no easy answers to these questions and no bright line tests in this area of the law.

LEGAL PRINCIPLES

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a), and state and local laws prohibit discrimination based on religion in all aspects of employment.

Many claims of religious discrimination arise from the alleged failure of an employ-

er to accommodate an employee's religious observance. Title VII provides that an employer has a duty to reasonably accommodate an employee's or prospective employee's religious observances, practices and beliefs unless the employer can demonstrate that the accommodation would result in an undue hardship for its business. 42 U.S.C. § 2000e (j); 29 C.F.R. § 1605.2(b)(1).

The term "religion" means all aspects of religious practice as well as belief. 42 U.S.C. § 2000e (j). Religious practices include "moral or ethical beliefs as to what is right or wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.

What is a religion anyway? And what falls within "sincerely held" beliefs? Courts interpret these terms broadly. Even an action that may appear to the employer to be politically motivated may be an expression of an employee's sincerely held religious belief. This was the case in *Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995), where an employee took a religious vow to wear an anti-abortion button depicting a fetus at all times, including at work. Even though the button espoused a political message, the U.S. Court of Appeals for the Eighth Circuit held that wearing the button was motivated by "a sincerely held belief that was religious in nature" and, therefore, the employer's duty of reasonable accommodation was triggered. *Id.* at 1342 [employer's proposal that employee cover anti-abortion button at work represented reasonable accommodation].

UNDUE HARDSHIP

The U.S. Supreme Court has held that, in the context of a request to accommodate an employee's religious practices, an accommodation that results in more than a de minimus cost to the employer imposes an undue hardship. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

The Equal Employment Opportunity Commission (EEOC), the agency that administers Title VII, determines what constitutes more than a de minimus cost with regard to the "identifiable cost in relation to the size and operating cost of the employer."

Courts generally agree an employer is not required to interfere with the job preferences of other employees to accommo-

date one employee's religious observance. Seniority rights pursuant to a collective bargaining agreement trump a request for reasonable accommodation for religious practice in the workplace. The accommodation the employer offers does not have to be the one the employer most prefers. Paying overtime is generally an undue hardship where its purpose is to obtain a replacement for an employee taking leave to accommodate the employee's religion even where the replacement is found among current staff. Likewise, paying premium wages to hire a replacement for the days while such leave is requested is generally not required.

Paid time off is not required to meet the requirement of reasonable accommodation because under the more-than-de-minimus cost test, it would be an undue hardship for the employer. The majority view is that the law does not require an employer to provide paid time off for Jewish and Muslim employees, for instance, for their religious holidays even where the employer's holiday schedule includes paid time off for Christmas and Good Friday, thereby accommodating and appearing to benefit Christian employees' religious beliefs. See, e.g., *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986); *Greenfield v. Miami Beach*, 844 F. Supp. 1519 (S.D. Fla. 1992), *aff'd w/o opinion*, 20 F.3d 1174 (11th Cir. 1994), *cert. denied*, 513 U.S. 868 (1994).

The seminal case defining the standards for religious accommodation in the workplace is *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, (1977), wherein the U.S. Supreme Court held that the employer did not violate Title VII by failing to excuse Mr. Hardison from working on Saturdays. Hardison belonged to the Worldwide Church of God. One of the tenets of the church is that one must observe the Sabbath by refraining from work of any kind from sunset on Fridays

until sunset on Saturdays.

The evidence showed that Hardison's job was essential and that on weekends he was the only available person on his shift to perform it. If Hardison was excused from working on Saturdays, the court reasoned, the employer would either have to fill his position with supervisors, with qualified personnel from other departments or with employees from his department paid at overtime wages. These alternatives would

Employers who ask during the interview process about the need for accommodations for religious beliefs or practices do so at their own peril.

involve cost to the company due either to lost efficiency in other jobs or to higher wages. The court concluded that these alternatives would require the company to expend more than a de minimus cost to give Hardison Saturdays off and would, therefore, constitute an undue hardship.

The U.S. Court of Appeals for the Third Circuit reached the opposite conclusion in a case involving an employee's request for accommodation similar to Hardison's. In *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986), the court held that an employee's request for a guarantee of never having to work Saturdays did not relieve an employer of the duty to accommodate the employee's religion under the particular facts of the case. In *Protos*, Volkswagen regularly maintained employees assigned to specific posts

on its assembly line. A crew of roving absentee relief operators stood ready to be deployed as substitutes for absent employees. Protos' job was easily learned and the line operated as efficiently when a replacement served in her place as when she performed her job herself. Considering the nature of her position and the employer's method of providing substitutes for absences on the line, the court held that the company failed to establish it would suffer undue hardship by granting Saturday leave to Protos. It distinguished Hardison on the grounds that the company did not have to pay higher wages to replace Protos during her absence.

Concerning work schedules, the EEOC suggests the following alternatives for accommodating religious practices because their cost to the employer is de minimus:

- facilitate voluntary substitutes or swaps whereby the individual seeking the accommodation in work schedule is responsible for finding another worker to fill in for him or her;
- provide flexible work schedules and breaks;
- allow an employee to make up time lost due to the observance of a religious practice; and
- offer lateral transfers and change of job assignments.

LEGISLATIVE CHANGES

The law with respect to reasonable accommodation for religion has always been controversial. As originally enacted, Title VII did not require employers to reasonably accommodate their employees' religious practices. In 1967, the EEOC adopted the reasonable accommodation rule and, in 1972, Congress codified it in Title VII. 42 U.S.C. § 2000e(j). Then, in 1977, the U.S. Supreme Court interpreted "undue hardship" to mean more than de minimus cost to the employer. Since then courts have struggled with balancing the needs of workers for accommodation of their religious practices and beliefs with the needs of employers' businesses within the constraint of the de minimus cost standard.

As more Americans "get religion," the need for religious accommodations in the workplace is growing. Reflecting this trend, policy-makers have been concerned that the bar is too low for employers to establish that a particular accommodation is an undue hardship in the context of accommodating religious practices or

observance in the workplace. Legislation has repeatedly been introduced in Congress to raise the mere de minimus standard for “undue hardship” to one that creates a higher standard. The Workplace Religious Freedom Act (WRFA), for example, would amend Title VII to require employers to reasonably accommodate an employee’s religious observance or practice unless it posed “significant difficulty or expense” to the employer. Although efforts to convince Congress to pass WRFA have failed so far, supporters intend to reintroduce the bill in the next Congress.

IN JOB INTERVIEWS

An employer’s duty to accommodate also pertains to prospective employees. An employer may not let a job applicant’s need for a religious accommodation affect its decision whether or not to hire an applicant. 29 C.F.R. § 1650. The EEOC’s position on this issue is that the use of questions during the interview process about an applicant’s availability for work may have “an exclusionary effect on the employment opportunities of persons with certain religious practices.”

Instead of asking job applicants about the possible need for such accommodation, the regulations state that an employer should simply “state the normal work hours for the job,” and, “after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours.” Only after the employer offers the job to the applicant, but before the applicant is hired, may the employer inquire into the need for a religious accommodation and determine whether an accommodation is possible.

Employers who ask during the interview process about the need for accommodations for religious beliefs or practices do so at their own peril. Where an interviewer ignores the EEOC’s admonition in this regard and rejects a qualified applicant, the commission takes the position that it will infer that the need for such accommodation “discriminatorily influenced the decision to reject an applicant” unless the

employer can demonstrate otherwise.

RELIGIOUS GARB AND PRAYER

May an employee dress in his or her religious garb at work? Employers must reasonably accommodate employees’ wearing particular clothing or grooming themselves in certain ways for religious reasons. Making exceptions to dress codes to accommodate an employee’s religious practice of wearing a yarmulke, hijab or turban, for instance, usually falls within the scope of reasonable accommodation without undue hardship to the employer.

But these entitlements are not absolute. Typically, safety concerns constitute undue hardship. Courts have generally not required the restaurant or food industry to allow food handlers to wear dreadlocks, long hair or beards for religious reasons unless alterations are made to keep hair away from the food. Likewise, courts commonly have not required employers to accommodate an employee’s wearing of religious attire where the safety of the employee, other workers or the public is sacrificed. See *Kalsi v. New York City Transit Auth.*, 62 F. Supp. 2d 745 (E.D.N.Y. 1998), *aff’d*, 189 F.3d 461 (2d Cir. 1999) [employer did not discriminate against Sikh employee when it fired him for refusing to wear required hard hat over his turban].

What about the effect, real or perceived, that employees wearing religious garb may have on the public “image” of a business? May an employer require a recep-

tionist to remove her hijab or change her duties to keep her out of public view? The answer is absolutely not. Such notions about customer or client preference do not constitute undue hardships.

Since September 11, 2001, the EEOC and state and local agencies have documented a significant increase in the number of charges alleging workplace discrimination based on religion filed by individuals who are Muslim, Arab, South Asian or Sikh. To clarify the employment rights of these workers and to prevent September 11-related workplace backlash, the EEOC issued a “Fact Sheet on Employee Rights Regarding Religious and National Origin Bias.”

There is a sizable and growing body of law concerning accommodating employees’ religious beliefs and practices in the workplace. This article introduces, in broad strokes, federal law concerning employee entitlements and employer responsibilities, primarily as applicable to private workplaces. Because freedom from religious discrimination is a civil right, federal law is a floor, not a ceiling. Some state constitutions, employee rights laws and case law as well as civil service statutes provide greater entitlements for employees than do federal law. ■

Deborah Weinstein is a member of The Philadelphia Lawyer Editorial Board. She also teaches employment law and introduction to the law and legal studies at the University of Pennsylvania’s Wharton School of Business.

FOR MORE INFORMATION ON RELIGION IN THE WORKPLACE

- Visit the U.S. Equal Employment Opportunity Commission at www.eeoc.gov.
- The two-volume set *Religion in the Workplace*, Vol. I, A Comprehensive Guide to Legal Rights and Responsibilities, and Vol. II, A State-by-State Survey of the Law on Religion in the Workplace, is available from ALI-ABA’s Web site at www.ali-aba.org/aliaba/VMB1116K.htm.
- *Religious Accommodation in the Workplace: Your Rights and Obligations* is an online guide provided by the Anti-Defamation League. Visit www.adl.org/issue_religious_freedom/religious_ac/accommodation_QA.asp.