Finding (or Losing) One's Religion at Work: What Should Our Clients Do (or Not Do)?

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Of the five original protected classes under Title VII, religion and color have always been the smallest in terms of number of claims filed. Still, compared to 1997, the number of charges of religious discrimination filed with the EEOC in FY 2015 has doubled both in absolute numbers and as a percentage of all charges filed.[1]

Linus had it right in 1961 when he said, "There are three things I have learned never to discuss with people ... religion, politics, and the Great Pumpkin." Certainly raising religion in the workplace can and frequently leads to conflict.

As with most areas of workplace conflict there are areas where the law of religious discrimination is well developed but other areas where at this point the impact is mostly one of conjecture.

I. WHAT IS A SINCERELY HELD RELIGIOUS BELIEF OR PRACTICE?

A. Courts do not relish making religious decisions.

The logical starting point in the examination of any issue of potential religious discrimination is: does it involve religion. Although basic, it also is an area where courts have shown significant hesitancy in addressing the issue.

More than a decade ago, an employee challenged an employer's policy prohibiting her from wearing her eyebrow piercing, claiming it was required by her religious beliefs as a member of the Church of Body Modification (CBM). *Cloutier v. Costco*, 390 F. 3d 126 (1st Cir. 2004). According to the Court's opinion:

> The CBM was established in 1999 and counts approximately 1000 members who participate in such practices as piercing, tattooing, branding, cutting, and body manipulation. Among the goals espoused in the CBM's mission statement are for its members to "grow as individuals through body modification and its teachings," to "promote growth in mind, body and spirit," and to be "confident role models in learning, teaching, and displaying body modification."

The Court also found that the CBM's website was its primary mode of attracting adherents. Included on the website is an application to become a minister of the CBM. When Cloutier was terminated for refusing to remove her eyebrow piercing while working, she filed a charge of religious discrimination with the EEOC which found her belief in the CBM creed to be "religiously based as defined by the EEOC."

Given that background one might think the central question to be addressed by the Court was the first element of a prima facie case of religious discrimination, did a bona fide religious practice conflict with an employment requirement? However, that question was decided by neither the district nor the appeals court. In the latter's words:

> Determining whether a belief is religious is "more often than not a difficult and delicate task," one to which the courts are ill-suited. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981). Fortunately, as the district court noted, there is no need for us to delve into this thorny question in the present case. Even assuming, arguendo, that Cloutier established her prima facie case, the facts here do not support a finding of impermissible religious discrimination.

Cloutier's only accepted accommodation was a complete exemption from Costco's ban on facial jewelry. Why would that be an undue hardship? The Court's answer:

> Granting such an exemption would be an undue hardship because it would adversely affect the employer's public image. Costco has made a determination that facial piercings, aside from earrings, detract from the "neat, clean and professional image" that it aims to cultivate. Such a business determination is within its discretion. As another court has explained, "Even assuming that the defendants' justification for the grooming standards amounted to nothing more than an appeal to customer preference, . . . it is not the law that customer preference is an insufficient justification as a matter of law." *Sambo's of Georgia, Inc*., 530 F. Supp. at 91.

Although customer preference clearly no longer works as a defense for other types of discrimination, see *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908 (7th Cir. 2010)[2], the First Circuit was willing to use it here rather than take on the "thorny question" of whether the Church of Body Modification could qualify as a religion.

Courts have also stumbled when trying to decide whether or not individual acts qualify as religious actions. In a 2-1 decision, written by Judge Prado two years ago, the Fifth Circuit overturned summary judgment where the district court had found that an employee's absence on a Sunday to attend a ground breaking ceremony for her church was not a religious practice.

Her employer, Fort Bend County had argued, and the district court found that: "being an avid and active member of church does not elevate every activity associated with that church into a legally protectable religious practice."

But instead, the 5th Circuit's majority opinion[3] focused on what it called a historical reluctance of courts to delve too deeply into an individual's professed religious belief:

> This court has cautioned that judicial inquiry into the sincerity of a person's religious belief "must be handled with a light touch, or judicial shyness." *Tagore*, 735 F.3d at 328 .... "[E]xamin[ing] religious convictions any more deeply would stray into the realm of religious inquiry, an area into which we are forbidden to tread." Id. .... Indeed, "the sincerity of a plaintiff's engagement in a particular religious practice is rarely challenged," and "claims of sincere religious belief in a particular practice have been accepted on little more than the plaintiff's credible assertions." Id.

Judge Jerry Smith, politely, but vigorously disagreed with the Court's limited view:

> In its well-written opinion, the majority errs in holding that our inquiry is limited to the sincerity of an employee's alleged religious belief; we must also consider whether that belief is "religious" in nature or merely a personal preference or a secular social or economic philosophy.

It is clear that ifthere is a serious issue about whether or not the belief in question is religious, it is not necessarily going to be an easy call for the courts.

B. What is a religious belief?

Only "beliefs rooted in religion are protected by the Free Exercise Clause."[4] Whether an asserted belief or practice is "religious" can be straightforward or complicated. Courts are constitutionally precluded from adjudicating the validity of religious beliefs or practices, yet they are often called upon to determine whether an asserted practice or belief is "religious" at all. These inquiries are highly fact-specific. The most commonly used standard, announced by the United States Supreme Court, is as follows: "*The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.*"[5]

The EEOC Definition of Religious Beliefs. According to the EEOC, Title VII protects theistic beliefs as well as non-theistic "*moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views*." 29 C.F.R. § 1605.1 (2006). Just because a particular belief is strongly held does not mean that it is a protected religious belief. A religious belief usually concerns "ultimate ideas" about "life, purpose, and death." *Id.* Likewise, whether an observance or practice is "religious" depends on the motivation of an employee. For example, a practice may be followed by one employee for religious reasons (i.e. adhering to kosher food restrictions) while another employee may follow same or similar practices for purely secular dietary reasons. According to the EEOC, examples of religious observances or practices include "attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, or refraining from certain activities."[6] The belief does not have to be recognized by an organized religion or faith community in order to be protected: "*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 employee or prospective employee.*" *Id.*

Religious Beliefs Are Different From Ethical Viewpoints. The courts tend to distinguish religious beliefs from general ethical principles, protecting the former but not the latter. Protected religious beliefs typically reflect more than personal preferences or choices unrelated to any religious mandate. For many courts, the belief or practice must have some theological predicate as opposed to social, political or cultural preferences in order to be considered religiously grounded. Title VII protects unconventional religious beliefs held by individuals as well as traditional beliefs held by large groups within structured and organized religions, but they must fall within the regulations coverage. For example, an employee claiming a "Universal Belief System" prompting him to wear a myriad of religious symbols and traditional garb at work was not exercising a religious belief or practice and the employer properly disciplined him for violating the company's dress code. Likewise, an employee's personal choice to wear dreadlocks was not a protected religious practice under Title VII and did not insulate him from his employer's dress code and grooming rules.[7] Several courts have held that the tenets of the Ku Klux Klan are not religious beliefs.[8] And, as one court explained, an employee's desire

to display the confederate flag at work stemmed from pride in his heritage and not his religious beliefs.[9] An interesting recent example occurred in *Chenzira v. Cincinnati Children's Hospital Medical Center*, where a health care worker in a hospital refused to obtain a mandatory flu shot on the grounds that it contained animal products contrary to her vegan beliefs. While the employer argued that veganism was a viewpoint or philosophy and not a religious belief, relying on the EEOC's guidance, the Court held that vegan beliefs could be sincerely held religious beliefs.[10]

C. How Do I Know If the Religious Belief or Practice Is "Sincerely Held?"

A religious belief or practice is sincerely held or "*bona fide*" if the employee subjectively perceives it as religious and genuinely adheres to the practice. The employer (or the court) may not adjudicate the "reasonableness" or "truth" of the underlying religious belief or practice. The only focus is whether the religious belief or practice is "truly held" by the employee. As one court explained, the appropriate inquiry is "whether the beliefs professed by a claimant are sincerely held and whether they are, in his own scheme of things, religious."[11] An employee who sporadically or inconsistently adheres to professed religious beliefs may open himself or herself up to a challenge that the asserted belief is not sincerely held. Reported cases in which employees asked to be relieved of working on the Sabbath provide examples. In *Hansard v. Johns-Manville Products Corp.*, 1973 WL 129 (E.D. Tex. 1973), the employee sued for religious discrimination after his employer refused to accommodate his request to be scheduled off work on Sundays due to his religious convictions. While the employee's religious practice did preclude Sunday work, the company was not required to accommodate the request because the employee could not prove the "requisite sincerity of religious convictions" because he had worked on Sundays for years.

II. Types of Religious Discrimination

A. Disparate treatment

As initially passed, Title VII only prohibited religious discrimination under the theory of disparate treatment. In 1966, Robert Dewey was fired for missing work on Sundays and he filed a charge of discrimination under the then newly enacted Title VII. Although he prevailed at the district court, the Sixth Circuit reversed finding in a 2-1 decision that there was no discrimination on the basis of his religion, rather he had been fired for not working assigned overtime in accordance with the collective bargaining agreement that was in place.

The holding was affirmed in a per curiam decision by the Supreme Court which reads in its entirety: "The judgment is affirmed by an equally divided Court."[12]

That one line opinion had substantial consequences however, as in response Congress amended Title VII to obligate employers to accommodate an employee's religious practices unless it could show to do so would be an undue hardship by adding the following definition:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[13]

B. Failure to Reasonably Accommodate is a Form of Religious Discrimination

under Title VII

Employees of covered employers are protected from discrimination at work because of sincerely held religious beliefs or practices under Title VII of the Civil Rights Act of 1964. Not only are underlying religious beliefs protected at work, practices used to carry out those beliefs are within the umbrella of Title VII coverage and protection. Absent an undue hardship, employers must reasonably accommodate a religious belief or practice that is in conflict with a job requirement or rule. Often, the issue arises after an employee has been discharged or disciplined (or threatened with discharge or discipline) for not complying with a job requirement that is at odds with the employee's religious beliefs. Whether an accommodation is "reasonable" under a given set of facts is the pivotal question and one that the courts have grappled with for years. In this paper, we explore the types of religious accommodation requests under Title VII that have been considered reasonable and unreasonable by the courts and the EEOC.

C. Many State Laws Also Prohibit Religious Discrimination

While this paper focuses on accommodation obligations under Title VII, the federal civil rights statute, many states have similar workplace protections against religious discrimination and harassment. Some states simply prohibit discrimination at work because of religion, but do not require an employer to affirmatively attempt to accommodate an employee's religious practices at work.[14] Texas however has adopted the same language as the 1972 amendment to Title VII, so like a number of other states it specifically requires an employer to make reasonable modifications to policies or procedures to accommodate religious beliefs and practices. [15]

D. Where Do I Start?

The first step in any accommodation analysis is to determine whether the employee is entitled to an accommodation at all. Under Title VII, an employee can show a preliminary (or "*prima facie*") case of religious discrimination for failure to accommodate a religious belief or practice by establishing the following: (1) the employee "has a *bona fide* religious belief that conflicts with an employment requirement;" (2) the employee "informed the employer of this belief;" and (3) the employee was discharged or disciplined for failing to comply with a job requirement in conflict with his or her religious belief or practice. *Virts v. Consol. Freightways Corp. of Delaware,* 285 F.3d 508, 516 (6th Cir. 2002). If the employee makes the above preliminary showing, the employer must demonstrate that it reasonably accommodated the employee's religious belief or practice, or that the employee's request was unreasonable because any accommodation would impose an undue burden on the employer's business.

The second element may get adjusted as a result of a case heard by the Supreme Court last term. In *EEOC v. Abercrombie & Fitch*[16], the Supreme Court was faced with who has the obligation to raise the issue of a possible accommodation. The 10th Circuit held that an applicant who was not hired after wearing a hijab to her interview, could not establish a prima facie case of discrimination, because she did not make a request for an accommodation.[17]

The Supreme Court did not agree with the 10th Circuit's view that the applicant had the obligation to ask for an accommodation, holding instead that she could prevail as long as she showed the "motive" for the employer in not hiring her was to avoid having to make an accommodation to her religious practice. Although it might sometimes be difficult to show such motive without an applicant having made the request known, here there was no dispute that the employer considered the religious practice aspect in making its decision.[18]

Here is a way to look at the issue:

1. Does the employee have a sincerely held religious belief or practice?

2. Does the belief or practice collide with a work-related requirement? Does the employee's objection to the job requirement stem from a *bona fide* religious belief or practice?

3. Did the employee notify the employer of the religious belief or practice? Does the employer have actual knowledge that a job requirement conflicts with a religious belief or practice?

4. Can the employer reasonably accommodate the employee's religious belief or practice without creating an undue hardship on the employer's business operations?

III. THE REASONABLE ACCOMMODATION PROCESS

A. The Duty To Accommodate Is Embedded In The Definition of "Religion" Under Title VII

The duty to reasonably accommodate a *bona fide* religious belief or practice stems from the 1972 amendment to Title VII's definition of religion in 42 U.S.C. § 2000e(j):

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The EEOC enforces Title VII's prohibition of religious discrimination in the workplace. Through its regulations and interpretive written guidelines, the EEOC explains the scope of an employer's duty to reasonably accommodate religious-based objections to workplace policies and rules. The EEOC's Religious Discrimination Guidelines are found at 29 C.F.R. Part 1605 and apply to employers and unions. See, http://www.eeoc.gov/policy/docs/religion.html.[19]

B. Religious Accommodation: Know The Ground Rules

An employer must be notified that a religious belief or practice collides with a job requirement. An employee must generally notify his or her employer that a workplace requirement conflicts with a religious practice (for example, working on the Sabbath) and request an accommodation from the employer (e.g. a schedule modification).[20] However, some courts have concluded that the *employer* must initiate the reasonable accommodation process even where the employee does not expressly request a religious accommodation (or a specific accommodation) as long as the employer has sufficient information "about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements."[21] This can be a dangerous slippery slope. Employers should *not* make assumptions about the religious beliefs or practices of employees, or make inquiries as to their beliefs or practices on the hunch that they may need an accommodation. Rather, once an employer has actual notice of a conflict either from the

employee directly or another source (for example, a co-worker) it should generally initiate a dialogue focused on possible accommodations. While it was hoped the *Abercrombie & Fitch* decision from the Supreme Court would bring clarity to the issue, it basically refused to set a bright line requirement, leaving it in each case an evidentiary question.

An employer does not have to provide the accommodation requested by the employee if a reasonable alternative exists. If several accommodations would be reasonable, the accommodation preferred by the employee is not required in order for the employer to satisfy Title VII. The employer does not have to show that the employee's preferred accommodation would impose an undue hardship as a condition to offering another reasonable alternative. For example, in *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998), a police officer asked to be exempt from any assignment that required him to guard an abortion clinic based on his religious beliefs. The city refused, asserting that the applicable collective bargaining agreement allowed the officer to transfer to another district (where no abortion clinics were located) thus a reasonable alternative was available to him.[22] In determining what is "reasonable" when several alternatives exist, the EEOC will look to the alternatives considered by the employer and compare them to the accommodations actually offered to the employee. In doing so, the "employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities." 29 C.F.R. § 1605.2 (c)(2)(ii).

An employer may not rely on speculation, stereotypes or assumptions in deciding whether an accommodation is reasonable or imposes an undue hardship. A common mistake employers make is to refuse to consider an accommodation based on speculation and assumptions rather than actual facts or data as to its impact of that accommodation at work. Employers' failure to provide sufficient and specific "proof" of an undue hardship is typically fatal to the employer's defense and undermines the reasonableness of the employer actions. Speculation or assumptions may also provide evidence of a pretext for religious bias by the employer.[23] *See, Haliye v. Celestica*, 717 F. Supp. 2d 873 (D. Minn. 2010) (denying summary judgment because employer presumptions ignored the fact that some Muslims have a large window for prayer while for others it must be conducted in a fairly limited window).

Employers and employees must confer and cooperate in the accommodation process. The fact that the employer's attempt to accommodate proved unsuccessful may nonetheless preclude liability. For example, the Supreme Court concluded that an employer made reasonable attempts to accommodate an employee's religious practices by: (1) conferring with the employee several times in an effort to resolve the conflict; (2) attempting without success to re-assign the employee to another position; (3) permitting the union to search for another employee to swap shifts with the employee; and (4) allowing the employee time off work to observe religious holidays whenever feasible. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). Likewise, employees seeking an accommodation for religious acts or beliefs must cooperate in good faith in the accommodation process. An employer is relieved of its obligation to identify and provide an accommodation in situations where the employee fails to participate in the process in good faith.[24] However, the duty to cooperate is not synonymous with compromise, and an employee is not required to accept an accommodation that would violate her religious beliefs.[25]

IV. TYPES OF REASONABLE ACCOMMODATIONS

Reasonable accommodations typically fall into three broad categories: (1) modifying work schedules or leave polices to accommodate religious practices; (2) relieving or exempting

employees from work rules, policies or procedures that conflict with religious practices, and (3) allowing employees to transfer to positions that reduce the potential for conflict. Whether an accommodation is reasonable or an undue hardship is highly fact-specific. What may be reasonable in one context may be unreasonable in another, and employers should avoid blanket rules or across-the-board assumptions. For example, offering an employee a flexible schedule in order to observe his or her religious holidays or Sabbath practices may be reasonable in one situation, but not another.[26]

A. Voluntary Shift and Schedule "Swapping"

A common conflict exists between religious beliefs/practices and work schedules. Many religious practices require specific times of prayer, attendance at religious services or other observances. In these situations, employees often ask not to be scheduled for certain shifts or for time off when they would have otherwise been required to work. According to the suggested *Best Practices* issued by the EEOC in 2008, an employer should facilitate and encourage voluntary shift substitutions or swaps between employees of substantially similar qualifications by "publicizing its policy permitting such arrangements, promoting an atmosphere in which substitutes are favorably regarded, and providing a central file, bulletin board, group e-mail, or other means to help an employee with a religious conflict find a volunteer to substitute or swap." 29 C.F.R. § 1605.2(d)(i). Most courts consider *voluntary* shift swapping a reasonable accommodation.[27] Involuntarily requiring other employees to cover a shift, however, is typically not required. Often, the reasonableness of the employer's response turns on how actively the employer facilitated the swapping process, such as advertising on bulletin boards and at roll call for swaps.[28]

B. Flexible Scheduling and Leave Policies

The EEOC also provides that employers "should consider adopting flexible leave and scheduling policies and procedures that will often allow employees to meet their religious and other personal needs. Such policies can reduce individual requests for exceptions." 29 C.F.R. § 1605.2(d)(ii). Examples of possible accommodations include:

- Providing paid or unpaid leave[29]
- Granting extended or scheduled break periods
- Providing flexible departure and arrival times
- Use of lunch time in exchange for early departure
- Allowing staggered work hours
- Providing neutral rotating shifts
- "Splitting" or "balancing" truck loads with other drivers[30]
- Advertising on bulletin boards and at roll call for swaps
- Permitting employees to "make up" time lost due to religious practices[31]

C. Lateral Transfers and Voluntary Demotions

An employer should consider transferring an employee to a comparable, open position that better accommodates the religious needs (and does not disrupt operations, violate seniority rules, or create more than minor costs) as a reasonable accommodation.[32] If reassignment to a comparable position is not feasible, employers should also consider offering the employee an alternative position even if it would result in a decrease in pay, benefits and responsibility.[33] There are, however, limits on whether the proposed transfer is reasonable. As one court

concluded, transferring an employee whose religious beliefs collided with the employer's "clean shaven" rule to a "cold, uncomfortable, isolated work site, with significantly diminished responsibilities" was not reasonable.[34]

D. Modifying Dress Codes or Grooming Standards

A frequently litigated area involves employer-mandated dress codes, uniforms and grooming standards. Often, the issue arises where an employer's dress code, uniform, grooming or safety rules conflict with an employee's religious practice to wear certain clothing or adornments such as turbans, hijabs, khimar, yarmulkes, medals, headdress or similar items. Other religious practices that sometimes collide with workplace uniform and grooming rules include requirements that men wear beards, or that hair for men and women be a sufficient length or worn in braids. In these situations, employees often ask to be exempt from the employer's dress or grooming requirements for religious reasons.[35]

As a general rule, courts have not required employers to create exceptions to uniform or grooming standards that are predicated on safety. For example, in *Bhatia v Chevron,* 734 F.2d 1382 (9th Cir. 1984), the Ninth Circuit concluded that the employer did not have to create an exception to its safety policy which required "all employees whose duties involved potential exposure to toxic gasses to shave any facial hair that prevented them from achieving a gas-tight face seal when wearing a respirator." The plaintiff, a devout Sikh whose religious practices prohibited him from cutting his beard, was a machinist prior to the imposition of the new respirator safety rule. After accepting a transfer to a lower paying job that did not require respirator use, he sued, claiming that he should be allowed to continue his machinist duties without complying with the respirator standard. The court disagreed. First, the court noted that the employer made numerous reasonable efforts to accommodate the plaintiff by: 1) suspending rather than terminating plaintiff for refusing to shave, although it had terminated others who refused to shave; (2) actively seeking to transfer him to a job with comparable pay that would not require use of a respirator; and (3) when a job of comparable pay could not be found, offering plaintiff three lower paying jobs. Second, requiring the employer to assign plaintiff to duties as a machinist would have increased the company's risk to liability under OHSA: "Chevron has established that retaining Bhatia as a machinist unable to use a respirator safely would cause an undue hardship."

E. Contributing Union Dues to a Substituted Charity

In 1980, Congress amended the National Labor Relations Act (NLRA) to permit union employees whose religious observances preclude them from paying union dues to donate an equivalent sum to a non-religious charity. 29 U.S.C. § 169. This provision, referred to as the "religious objector" provision, was declared unconstitutional by the Sixth Circuit in 1990 because it was limited to employees with "a particular sectarian affiliation and a particular theological position." Only employees who were members of a religion that had historically held conscientious objections to union membership could invoke the statutory exemption. *Wilson v. National Labor Relations Board*, 920 F.2d 1282 (6th Cir. 1990). Although the NLRA statutory exemption was deemed unconstitutional due to its limited protection, many courts (including those within the Sixth Circuit) have subsequently held that diverting a sum equal to the union dues to a substituted charity is a reasonable accommodation under Title VII "because it lets the union enjoy the benefits of a union security provision while permitting employees 'to practice in accordance with their religious convictions.'"[36] Many collective bargaining agreements have provisions allowing substituted charity accommodations based on *bona fide* religious objections.

F. Allowing Religious Expression at Work – Proselytizing and Prayer

Employers may be confronted with situations where an employee wants to wear religious symbols at work, engage in religious phrases when communicating with employees or customers at work (e.g., "Have a Blessed Day") or use a room in the employer's facility for religious worship during the workday. Under the EEOC's latest guidance, religious proselytizing includes: (1) display of religious items in an employee's work area (e.g. Bible or Koran); (2) one-on-one discussions about religious beliefs; and (3) displaying religious icons or messages at work stations (e.g. posters). Whether these practices, including those for workplace prayer, can be reasonably accommodated depends on the facts.

Employers are not typically required to make such accommodations if it would create disruption to the workforce, create divisions at work along religious lines, make other employees feel "shunned," or trigger co-worker or customer complaints.[37] Prayer groups and/or prayer at meetings may be permissible if participation is completely voluntary and there are no employment-related consequences of opting out.[38] However, employers may incur liability if participating employees get preferential treatment (or appear to receive preferential treatment).[39] As one court explained, an employer's uniform treatment of all religious groups in the workplace does not constitute religious discrimination or violate Title VII. See, *Moranski v. General Motors*, 433 F.3d 537 (7th Cir. 2005)(GM did not violate Title VII when it denied affinity group program status under its diversity initiative to "GM Christian Network" where its affinity program guidelines precluded programs based on any religious issues, including groups advocating agnosticism).

Whether it is an undue hardship to allow employees to engage in verbal religious expression with customers is also a fact-driven inquiry. Brief, anonymous greetings such as "Have a blessed day" are permitted if it has a minimal impact on customers, but undue hardship may be found where religious expression is part of the regular business interaction with a customer. For example, in *Botnik v. HearingPlanet, Inc*., the court granted summary judgment in favor of the employer who discharged an employee for violating the company's anti-harassment policy after she was recorded discussing religion with customers over the phone on two occasions and after co-workers complained.[40] However, an employer does not have a legal obligation to suppress religious expression merely because it annoys a co-worker. For example, in *Powell v. Yellow Book,* there was no Title VII violation where, in response to a co-worker's complaint about an employee's religious postings in her cubicle, the employee was relocated and the postings were allowed to remain.[41] Likewise, in *Ross v. Colorado Dept. of Transp,* the court held that an employee's religious objection to the re-scheduling of an employee appreciation lunch in order to include those observing Ramadan did not have to be accommodated where the employee's request would have trampled on the religious rights of co-workers (i.e. by not rescheduling lunch). [42]

These issues are even more acute in the public sector where employees' free speech rights under the First Amendment are implicated. For instance, in one case, a Christian social worker at a state health department was observed giving spiritual advice and discussing the Bible with clients seeking treatment. The health department prohibited further religious counseling by the employee. The court held that the employer's prohibition was warranted based on the undue hardship of a potential establishment clause violation.[43] Significantly, the court noted that the employer did not impose a "general ban" on the employee's religious speech, but merely prohibited religious counseling. However, where accommodating a sincerely held religious belief could not reasonably be interpreted as espousing the belief of an

employer, courts have consistently held that Title VII's religious accommodation provision does not violate the Establishment Clause. In *Hickey v. State Univ. of New York*, the court declined to find a valid establishment clause concern where a Born Again Christian hospital worker defied instructions to remove a lanyard that said "Jesus loves you"[44]

It is important to remember that an employer has a parallel duty to maintain a work environment that is free of religious harassment. Striking a balance can be difficult because failure to respond to employee complaints about proselytizing could lead to charges of religious harassment, but requiring a religious employee to cease proselytizing could result in liability for failure to accommodate. In an interesting case illustrating the tension between religious accommodation and harassment, *Shatkin v. Univ. of Tex. at Arlington,* the plaintiffs prayed after-hours at the cubicle of a co-worker they felt needed to be "dispossessed" of her demonic spirit, and were fired for violating the University's harassment policy.[45] The court refused to summarily dismiss the case because fact questions remained whether an undue hardship on the employer existed (since the prayer occurred after-hours, not during the work day) and whether the harassment policy had been violated given the fact that the co-worker did not know about the prayer.

G. Selection Procedures

The duty to accommodate applies to current employees as well as applicants for employment. 42 U.S.C. § 2000e(j). Thus, an employer has a duty to reasonably accommodate an applicant's religious practices when scheduling pre-hire tests or other selection procedures unless it would create an undue hardship to do so. 29 C.F.R. § 1605.3.[46]

V. THE LIMITS OF REASONABLE ACCOMMODATIONS: UNDUE HARDSHIP ON THE EMPLOYER'S BUSINESS OPERATIONS

An employer's duty to reasonably accommodate religious beliefs and practices is not unlimited and is generally considered to be less demanding than the duty to reasonably accommodate disabilities under the ADA. Because the definition of "undue hardship" as developed in the context of religious accommodation cases provides a lower threshold than the "significant difficulty or expense" standard under the ADA, religious accommodations requiring more than *de minimis* monetary costs or administrative/operational burdens are not required. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

In determining whether an undue hardship exists, the courts have considered the factors identified below. Keep in mind, however, that an employer's insistence that an employee comply with a workplace requirement – or similar insistence that modifying or relaxing that requirement would be an undue hardship – may be a pretext for religious discrimination if the employer has offered the same or similar accommodation to other employees for non-religious reasons.[47]

A. Would the Employer Incur More than Minor Costs in Providing the Accommodation?

In one of the first cases to address an employer's reasonable accommodation obligation, the Supreme Court held that an accommodation imposing more than a *de minimis* cost, both monetarily and in terms of administrative or operational burden, is not required. *Trans World Airlines, Inc. v. Hardison*, *supra.* For example, an accommodation that requires the employer to incur overtime costs is usually an undue hardship.[48] *Id.* Likewise, costs incurred in hiring a substitute to cover the employee's shift are generally considered to impose an undue

hardship.[49]

B. Would the Accommodation Create Safety or Sanitation Risks?

As mentioned above, an employer does not have to exempt employees from workplace rules or policies that are premised on legitimate safety concerns. Accommodations that create or increase safety risks are routinely considered by courts as unreasonable and imposing an undue hardship on the employer.[50] Most courts require actual proof that relaxing the dress code, uniform, or grooming rule, or exempting the employee from a particular policy or practice, will create a genuine safety risk. Speculation and assumptions, including the concern that allowing the accommodation will "open the floodgates," are not enough. Even if an undue hardship exists, employers are still required to offer other reasonable accommodations that do not undermine safety.[51]

In certain industries such as the hospitality industry, grooming standards (for example, "no beard" policies) are often justified by sanitation concerns. As such, requiring an employer to modify or relax those standards may create an undue hardship; provided, however, that the employer uniformly applied its grooming requirements and is not asserting the workplace rule as a pretext for discrimination against particular religious beliefs or practices. [52]

C. Would the Accommodation Violate the Terms of a Collective Bargaining Agreement or Deprive Other Employees of their Seniority Rights?

Any accommodation that would adversely affect or deprive another employee of his or her rights under a neutral seniority system or the terms of a collective bargaining agreement creates an undue hardship.[53] For example, a bus driver who was denied his religious-based request not to drive on Sundays was not discriminated against where accommodation would have required the employer to shift Sunday driving to other drivers in breach of the seniority provisions of the collective bargaining agreement.[54] Employers should be careful, however, not to summarily reject a requested accommodation based on an overbroad application of a seniority system. Just because Title VII allows employers to rely on *bona fide* seniority systems in 42 U.S.C. § 2000e-2(h), other reasonable accommodations may exist and should be explored, including but not limited to, seeking waivers from the union or other union members.[55]

D. Would the Accommodation Jeopardize Customer Relations, Disrupt Business Operations or Require the Employer to Shift Work to Other Employees?

Accommodations that would disrupt business operations, undermine customer service or burden other employees by increasing their workload are usually considered an undue hardship. For example, in *Noesen v. Medical Staffing, Inc*., 232 Fed.Appx. 581, 2007 WL 1302118 (7th Cir. 2007), the court held that the employer properly fired a Catholic pharmacist who refused to speak to customers or doctors with telephone inquiries about birth control. Among other things, shifting the pharmacist's responsibility to answer telephone calls and initially respond to any such request to other employees and thus diverting them from other duties created an undue hardship. Likewise, the employee's insistence that he be relieved of all counter and telephone duties unless customers were "pre-screened" to ensure that they were not seeking birth control was unreasonable.[56]

E. Would the Accommodation Require the Employer to Violate State Law or the Rights of Other Employees?

Any accommodation that would require an employer to violate the workplace rights of other employees is most likely an undue hardship. The issue often arises in the context of religious expression at work, where one employee's religious expression is perceived as harassing or retaliatory toward another employee. For example, in *Bodett v. CoxCom, Inc*., 366 F.3d 736 (9th Cir. 2004), the court held that an employer did not discriminate on the basis of religion by discharging an Evangelical Christian supervisor who repeatedly confronted a lesbian subordinate with statements that the Bible denounced her lifestyle. Title VII did not require the employer to accommodate the employee's asserted religious beliefs by suspending its policy against workplace harassment. [57] Additionally, an accommodation that would create the appearance that the employer is establishing or favoring one religion over another is most likely an undue hardship, particularly for state or government employers whose actions are limited by the First Amendment. [58]

F. Would the Accommodation Adversely Affect "Company Image" or Customer Preferences?

The EEOC insists that concerns about company image or customer reaction cannot create an undue hardship or permit an employer from refusing to relax its uniform or grooming standards to accommodate religious clothing or practices. In its guidance, the EEOC explains: "Customer preference is never a justification for a discriminatory practice. Refusing to hire someone because customers or co-workers may be 'uncomfortable' with that person's religion or national origin is just as illegal as refusing to hire that person because of religion or national origin in the first place." [59] In specific situations, however, some courts have held that an employer may insist that employees adhere to a particular grooming or dress codes even where they collide with religious practices. See, e.g., *Cloutier v Costco Wholesale Corp*., 390 F.3d 126(1st Cir. 2004)(Costco was not required to exempt employee from its dress code rule against facial jewelry that conflicted with her religious practices as a member of the Church of Body Modification: "Costco has a legitimate interest in presenting a workforce to its customers that is, at least in Costco's eyes, reasonably professional in appearance.")

VI. EXEMPTIONS FOR RELIGIOUS ORGANIZATIONS

A. Title VII Exemption for Religious Institutions

Title VII generally allows religious corporations and educational institutions to discriminate on the basis of religion relative to employment decisions, including employment decisions beyond hiring or firing. 42 U.S.C. § 2000e-1(a). Because of this, a religious corporation or educational institution may give preference in hiring decisions to those of a particular religion. 42 U.S.C. § 2000e-2(e)(2).[60] Religious institutions may also make religious-based employment decisions where the employee's conduct is at odds with the religious principles of the employing organization.[61] Whether a corporation or educational institution is a religious entity entitled to the exemption is highly fact-specific, with courts often closely comparing the institutions secular and sectarian activities.[62]

B. The Ministerial Exemption

The ministerial exception is a constitutionally-based doctrine that prohibits "ministerial" employees from using Title VII or state discrimination laws to sue the religious institutions that employ them. The ministerial exemption stems from the Free Exercise Clause of the United States Constitution and, in some states, from a similar provision under a state constitution. In

essence, the constitutional right to freely exercise a religion protects religious institutions from judicial review and trumps workplace discrimination laws when it comes to employees engaged in ministerial activities. For example, the United States Supreme Court upheld application of the ministerial exemption to bar an ADA claim by a "called" Lutheran teacher against a Lutheran school.[63]

VII. PUBLIC EMPLOYERS AND FEDERAL CONTRACTORS

A. First Amendment Guarantees of Free Speech and the Free Exercise of Religion

The First Amendment to the United States Constitution generally guarantees individuals the right to freely exercise religious beliefs free from unwarranted government interference, while simultaneously prohibiting state action that "establishes" or favors religion in general or one religion over another.[64] Public employees may challenge employment actions (or inaction) by their government employers that violate or interfere with their First Amendment rights, both as to the freedom of speech (i.e., freedom to express religious beliefs at work) and the free exercise of religion (for example, the right not to work on their Sabbath).[65] In turn, other public employees may assert under Title VII or the Constitution the right to be free from religious proselytizing or other religious expressions at work. While a full discussion of the constitutional interplay in this area is beyond the scope of this paper, public employers often walk a constitutional tightrope when asked to accommodate religious activities and expression at work. Many courts have applied the Title VII balancing framework in evaluating claims of religious discrimination brought by public employees under the Free Speech and Free Exercise Clauses of the United States Constitution.[66]

B. Religious Freedom Restoration Act of 1993 (RFRA)

The RFRA statutorily imposes a strict scrutiny test. It provides that "government" may not substantially burden a person's exercise of religion even where the burden is caused by a "rule of general applicability" unless the government demonstrates a compelling interest and the burden is the least restrictive means available to further the government's interest. 42 U.S.C. § 2000bb-1. The RFRA does not apply to state governments and was generally considered to limit the actions of the federal government.[67] More recently, the RFRA has been used by private parties challenging application of a federal law that burdens the exercise of a religious belief or practice.[68] For example, in *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that the regulations under the Affordable Care Act that required employers to provide health-insurance coverage for methods of contraception violated the RFRA because the government could not show that they were the least restrictive way for the government to serve a compelling government interest.[69]

C. Federal Contractors and Sub-Contractors

OFFCP guidelines prohibit federal contractors and subcontractors from engaging in religious bias in connection with federal contracts. Federal contractors and subcontractors must make affirmative efforts to reasonably accommodate religious beliefs and practices, specifically an employee's Sabbath and religious holiday observances, unless it would impose an undue hardship. Considerations of undue hardship must take into account (1) financial costs and expenses; (2) business necessity and (3) "resulting personnel problems." See, 41 C.F.R. § 60-50.3.

VIII. CONCLUSION AND BEST PRACTICES

- Develop and implement a written policy prohibiting workplace discrimination based upon religion and informing employees that the company will make reasonable efforts to accommodate the employee's religious practices.

- Dress code and grooming policies, including any safety-imposed limitations, should be clearly and unambiguously stated in writing and distributed to employees. Employees should be required to acknowledge in writing that they received and agree to comply with company policies.

- Determine with advice of counsel whether state laws impose additional or different limitations on the company's duty to accommodate religious practices at work.

- Develop an internal process for responding to requests for religious accommodations. Make sure the person leading the response effort is well-trained relative to religious accommodations and has a full scope of knowledge regarding the company's business operations.

- Make decisions about the reasonableness of an accommodation based on the facts rather than assumptions or speculation. Do your homework. For example, do not automatically assume that the requested accommodation will violate the terms of a collective bargaining agreement. Even if a violation is likely, do other alternatives exist that would be consistent with the collective bargaining agreement?

- Engage the employee to the fullest extent possible in the accommodation process by seeking the employee's input on possible accommodations. Make sure the process is confidential and do not disclose the employee's underlying religious beliefs beyond a strict "need to know" basis.

- Avoid the appearance that the decision to accommodate or not accommodate was based on the employer's assessment of the validity or reasonableness of the underlying religious beliefs or practices. The accommodation, not the underlying religious belief or practice, must be reasonable.

- Train managers and supervisors how to recognize and respond to requests for religious accommodations. Generally, managers and supervisors should be advised to forward all requests for accommodation to Human Resources or any other centralized office.

- Document the reasons for the decisions to accommodate or not accommodate the employee's religious beliefs. Explain why an accommodation would impose and undue hardship. Be specific.

- Before granting or denying an accommodation for religious practices, public employers should consult with counsel to determine if any

additional limitations exist under federal or state constitutional Free Exercise, Free Speech or Establishment Clauses.

ENDNOTES

[1] EEOC Charge Statistics FY 1997 through FY 2015 (http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm).

[2] "It is now widely accepted that a company's desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race."

[3] *Davis v. Fort Bend County,* (No.13-20610) (5th Cir. 2014).

[4] *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 834 (1989).

[5] *Welsh v. U.S.*, 398 U.S. 333, 339 (1970).

[6] EEOC, *Questions and Answers: Religious Discrimination in the Workplace,* p.1 (July 22, 2008); http://www.eeoc.gov/policy/docs/qanda_religion.html.

[7] *Lorenz v. Wal-Mart Stores, Inc.*, 2006 WL 1562235 (W.D. Tex. 2006), aff'd 225 Fed.Appx. 302 (5th Cir. 207); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Eatman v. United Parcel Service*, 194 F.Supp. 2d 256 (S.D.NY. 2002).

[8] See, *Slater v. King Soopers, Inc.*, 809 F.Supp. 809 (D. Colo. 1992)(employer did not discriminate on the basis of religion or otherwise violate Title VII by discharging a Ku Klux Klan member following his initiation of an Adolf Hitler rally at work).

[9] *Storey v. Burns Intern. Security Services,* 390 F.3d 760 (3rd Cir. 2004).

[10] 2012 WL 6721098 (S.D. Ohio Dec. 27, 2012).

[11] *Bailey v. Associated Press*, 2003 WL 22232967, at * 7 (S.D.N.Y. 2003).

[12] *Dewey v. Reynolds Metals Company,* 402 U.S. 698 (1971). Justice Harlan had recused himself leaving eight justices to hear the case.

[13] 42 U.S.C. 2000e(j).

[14] For example, Michigan law prohibits religious discrimination in employment but does not require a covered employer to modify policies or practices to accommodate those beliefs or practices. *Wessling v. Kroger Co.,* 554 F.Supp. 548 (1982).

[15] Texas Labor Code §21.108.

[16] *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc* (14-86 pending).

[17] *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.,* No. 11-5110, (10th Cir. 2013), *cert. granted.*

[18] *EEOC v. Abercrombie & Fitch Stores, Inc.* __ U.S. __ (June 1, 2015).

[19] *Questions and Answers About Employer Responsibilities Concerning the Employment of Muslims, Arabs, South Asians, and Sikhs* (March 21, 2005) found at http://www.eeoc.gov/facts/backlash-employer.html; *Questions and Answers: Religious Discrimination in the Workplace* (July 23, 2008) found at http://www.eeoc.gov/policy/docs/qanda_religion.html; *Best Practices for Eradicating Religious Discrimination in the Workplace (*July 23, 2008) found at http://www.eeoc.gov/policy/docs/best_practices_religion.html.

[20] 29 C.F.R. § 1605.2.

[21] See, for example, *Brown v. Polk County*, 61 F.3d 650, 654 (8th Cir. 1995) cert. den. 516 U.S. 1158 (1996); *Cary v. Carmichael*, 116 F.3d 472 (4th Cir. 1997)(employee does not have to identify or request a specific accommodation but must inform his employer of the need for accommodation and cooperate in good faith in determining a reasonable accommodation).

[22] See also, *Cosme v. Henderson*, 287 F.3d. 152, 158 (2nd Cir. 2002)("to avoid Title VII liability, the employer need not offer the accommodation the employee prefers. Instead, when any reasonable accommodation is provided, the statutory inquiry ends.")

[23] See, *EEOC v. Red Robin Gourmet Burgers, Inc.*, 2005 WL 2090677 (W.D.Wash. 2005)("unproven assumption" did not satisfy employer's burden to establish undue hardship); *Ford v. City of Dallas*, 2007 WL 2051016 (N.D. Tex. 2007)(employer's "unsubstantiated assertion" that it would incur more than minor costs in creating a position for the plaintiff who could not work on her Sabbath did not establish an undue burden).

[24] *Bush v. Regis Corp.*, 2007 WL 4230693 (11th Cir. 2007)(unpublished)(summary judgment of plaintiff's claims of religious discrimination affirmed where the employer offered several reasonable scheduling alternatives and plaintiff did not participate in good faith in seeking an accommodation).

[25] *Crider v. University of Tennessee, Knoxville*, 2012 WL 3002756 (6th Cir. 2012).

[26] Compare: *Cosme v Henderson,* supra (allowing an employee who bid for a job that he knew involved Saturday work in contravention of his religious practices to routinely skip scheduled Saturday shifts was not required by Title VII) *with Bush v. Regis Corp*., *supra* (relieving employee of scheduled Sunday shifts in conflict with her religious observances or allowing her to start her shift after her religious services ended was a reasonable accommodation).

[27] See, e.g., *Opuku-Boateng v. State of Cal.,* 95 F.3d 1461 (9th Cir. 1996)(voluntary shift trade system was feasible and reasonable); *Morrissette-Brown v. Mobile Infirmary Medical Center*, 506 F.3d 1317 (11th Cir. 2007)(employer reasonably accommodated an employee's need to be off work on Friday afternoons and evenings for religious observances where employer used neutral rotating schedule, allowed the employee to swap her Friday shifts and provided her with a master schedule to do so, and offered her a position which did not require work on Friday).

[28]See, *EEOC v. Robert Bosch Corp*., 169 Fed.Appx. 942 (6th Cir. 2006)(unpublished)(employer's failure to actively seek out substitutes to cover an employee's shift was evidence of religious discrimination); *Kenner v. Domtar Industries, Inc*., 2006 WL 522468 (W.D. Ark. 2006)(question of fact whether employer acted reasonably before terminating the plaintiff, a preacher, for refusing to work on Sunday where employer merely referred the plaintiff to the collective bargaining agreement provision allowing employees to swap shifts with management approval).

[29] See, *Getz v. Commonwealth of Penn.*, 802 F.2d 72 (3rd Cir. 1986)(allowing an Orthodox Jewish employee to take paid leave under the applicable collective bargaining agreement to observe certain religious holidays was a reasonable accommodation); *Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60 (1986)(remand to determine whether employer's permission to use unpaid but not paid leave as a religious accommodation was reasonable and whether employer offered paid leave to other employees for secular purposes in a way that discriminates against religious practices).

[30] See, *Sturgill v United Parcel Service, Inc.*, 102 FEP Cases 707 (8th Cir. 2008)(jury verdict that employer violated Title VII by discharging UPS driver who failed to complete his delivery route in December because it would have required him to work past sundown in violation of his Sabbath practices affirmed where evidence showed that employer could have reasonably accommodated the employee by balancing his truck load and/or splitting his load with other employees in a manner that would not have violated the union contract or imposed other than minimal costs on the employer).

[31] In 1978, Congress statutorily required federal employers to allow federal employees compensatory time off for religious observances. 5 U.S.C. § 5550a.

[32] See, *Cosme v. Henderson*, 287 F.3d. 152, 160 (2nd Cir. 2002)(employer's offers to transfer employee, who successfully bid for a job that required occasional Saturday work in conflict with his Sabbath observances, to another route that did not require Saturday work or to an "unassigned regular" position which would not result in work on Saturdays were reasonable accommodations).

[33] *Cosme v. Henderson, supra*., (offer to transfer employee to other shifts that would not require Saturday work was reasonable even though employee would have forfeited seniority for the first 90 days in the new position); *Vaughn v. Waffle House, Inc*., 263 F.Supp. 2d 1075(N.D. Tex. 2003)(employer's offer to transfer employee to a new position that would better accommodate religious practice was reasonable even though it would have resulted in a wage reduction).

[34] *Brown v. F. L. Roberts & Co*., 419 F.Supp.2d 7 (D. Mass. 2006).

[35] See, *EEOC v. Alamo Rent-A-Car, LLC*, 432 F.Supp.2d 1006 (D. Ariz. 2006)(employee who wore a headscarf at work as part of her month long observance of Ramadan stated a claim of religious discrimination where employer forbade the practice after September 11, 2001 even though there was no express corporate policy prohibiting headscarf's at work and plaintiff had been doing so prior to the September 11 attacks).

[36] See, *Bushouse v. Local Union 2209*, 164 F.Supp.2d 1066 (N.D. Ind. 2001); *Reed v. International Union*, UAW, 523 F.Supp.2d 592 (E.D. Mich. 2007)(provision of collective bargaining agreement allowing religious objector to pay sum equal to union dues to a substituted charity provided a reasonable accommodation and Title VII did not require employer to allow employee to pay a reduced amount to charity proportionate to the amount paid by non-union members who made *Beck* objections).

[37] See, *Anderson v. USF Logistics, Inc.*, 274 F.3d. 470 (7th Cir. 2001)(employer properly precluded employee from telling customers "Have a Blessed Day" in written correspondence following a customer complaint, although employee was allowed to use the phrase with co-workers).

[38] EEOC Compliance Manual Section 12, Examples 50-51 ("EEOC Compliance").

[39] *See Panchoosing v. General Labor Staffing Servs., Inc.*, No. 07-80818, 2009 WL 961148, at *7 (S.D. Fl. April 8, 2009).

[40] No. 3-11-0591, 2012 U.S. Dist. LEXIS 91862 (M.D. Ten. July 3, 2012)

[41] 445 F.3d 1074 (8th Cir. 2002)

[42] No. 11-cv-02603, 2012 WL 5975086, at *8 (D. Colo. Nov. 14, 2012)

[43] *Moore v. Metropolitan Human Servs. Dist.*, No. 09-6470, 2010 WL 3982312 (E.D. La. Oct. 8, 2010).

[44] No. 10-CV-1282(JS)(AKT), 2012 WL 3064170, at *9 (E.D.N.Y. July 27, 2012)

[45] No. 4:06-CV-882-Y, 2010 U.S. Dist. LEXIS 68500 (N.D. Tex. July 9, 2010)

[46] According to the EEOC, an employer should not make pre-offer inquiries about an applicant's availability to work certain hours in a way that would compel the applicant to disclose his or her religious practices. However, an employer may "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 work hours, ask the applicant whether he or she is otherwise available to work those hours." *Id*. Inquiries into reasonable accommodations may only occur post-offer.

[47] See, *Hedum v Starbucks Corp*., 546 F.Supp.2d 1017 (D. Oregon 2008)(summary judgment of employee's claim of religious discrimination under Title VII was properly denied where employee, who

practiced Wiccan religion and wore religious necklaces to work, was subjected to repeated comments by her supervisors about her religion and religious necklaces while employees who wore Christian crucifix necklaces were not; question of fact existed whether the employer's attendance policy was applied to employee as a pretext for religious discrimination); *Nead v. Board of Trustees of Eastern Illinois University*, 2006 WL 1582454 (C.D. Ill 2006)(nurse employee who was known to be religious stated *prima facie* case of religious discrimination under Title VII where she was asked in promotion interview whether she had any objections to dispensing the "morning-after" pill and was denied the promotion when she stated she was religiously opposed to emergency contraceptives).

[48] *TWA v. Hardison, supra*., (requiring employer to incur overtime costs to cover a shift imposed an undue burden); *Getz v Commonwealth of Penn*., 802 F.2d 72 (employer not required to permit employee to work overtime in order to accumulate more vacation time for use in observing religious holidays).

[49] *Brener v. Diagnostic Center Hosp*., 671 F.2d 141 (5th Cir. 1982).

[50] See, *Bhatia v. Chevron*, supra.(retaining a machinist who was unable to use a respirator safely created an undue hardship); *EEOC v. Kelly Services*, ___F.3d.___ (8th Cir. 2010)(Case No. 08-3880, March 25, 2010)(summary judgment for employer affirmed where requiring commercial printing facility to exempt plaintiff, whose religious practices required her to wear a khimar, from its dress policy prohibiting all hats, loose long hair or other items that could become caught in fast-moving conveyor belts, would impose an undue hardship).

[51] *See, Potter v. District of Columbia*, 101 FEP Cases 1302 (D.D.C. 2007).

[52] Compare, *EEOC v. Sambo's of Georgia, Inc*., 530 F. Supp. 86 (N.D. Ga. 1981)(restaurant employer did not violate Title VII when it refused to create an exception to its grooming policy proscribing excessive facial hair for management candidate whose Sikh faith required him to wear a beard) with *Mohhamed Sheik v. Golden Foods & Golden Brands*, 2006 WL 709573 (W.D. Ky. 2006)(question of fact existed whether employer discriminated on the basis of religion where, shortly after September 11, 2001, it suspended its earlier accommodation allowing female employees whose religious beliefs precluded them from tucking in their shirts to wear clothing untucked; evidence existed that employer's safety and sanitation concerns were a pretext for religious discrimination).

[53] *Trans World Airlines, Inc. v. Hardison*, *supra; Stolley v. Lockheed Martin Aeronautics*, *Co., 228 Fed.Appx. 379,* 2007 WL 1010418 (5th Cir. 2007)(reassigning the employee to another department and shift to better accommodate his Sabbath observances, although acceptable to the transferee department, was not required where the seniority provisions of the collective bargaining agreement prohibited such reassignments).

[54] *Fouche v. New Jersey Transit*, 2012 US App Lexis 14524 (3rd Cir 2012).

[55] *Balint v. Carson City*, 180 F.3d 1047 (9th Cir. 1999); See also, *Cosme v. Henderson*, 287 F.3d at 161 ("Simply because employers are not required to breach a seniority agreement does not mean that they cannot opt to do so in appropriate circumstances.").

[56] See also, *Aron v. Quest Diagnostics, Inc.*, 174 Fed. Appx. 82 (3rd Cir. 2006)(employer was not required to make an exception to its policy requiring all employees to work on Saturday for employees whose Orthodox religious practices proscribed Saturday work where employer could not reasonably limit employee to only those clients who were closed on Saturday and relieving the plaintiff from Saturday work would unduly undermine the morale of other employees); *West v. Shands Hospital*, 2006 WL 763213 (N.D. Fla. 2006)(employer did not discriminate on the basis of religion by firing employee who celebrated a supervisor's death by making comments at work about "God's revenge" and "divine judgment" – the employee's rude and inappropriate celebration at work disrupted the workplace).

[57] See also, *Peterson v. Hewlett-Packard Co*., 2004 U.S.App. LEXIS 72 (9th Cir. 2004)(employee's request to either (1) hang an anti-homosexual poster quoting biblical scriptures next to the company's diversity poster identifying the rights of gay employees, or (2) require the employer to remove reference to homosexuality from its diversity posters, both created an undue hardship).

[58] *Berry v. Department of Social Services*, 447 F.3d 642 (9th Cir. 2006)(Department of Social Services did not discriminate against an employee by precluding employee, an evangelical Christian, from engaging in religious discussion with clients, holding prayer meetings in a conference room or displaying a Bible or "Happy Birthday Jesus" sign in his cubicle because the risk of violating the establishment clause in the First Amendment created an undue hardship); *Moranski, v. GM*, supra (declining affinity group program status to Christian group did not violate Title VII).

[59] See, EEOC Guidance, 2008; http://www.eeoc.gov/policy/docs/religion.html.

[60] *Killinger v. Samford University*, 113 F.3d 196 (11th Cir. 1997)(Title VII statutory exemption for religious educational institutions broadly interpreted to apply to a university whose mission was to foster Christianity).

[61] For example, in *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410 (6th Cir. 1996), the court held that a religious school could lawfully terminate a pregnant, unmarried teacher where extra-marital sex violated religious precepts of the school that employed her. While the statutory exemption under Title VII permits discrimination on the basis of religion in certain circumstances, it does not generally insulate a religious institution from claims for other types of discrimination, such as race or gender. See, *Cline v. Catholic Diocese of Toledo,* 206 F.3d 651, 658 (6th Cir. 2000)(statutory exemption did not shield a Catholic school from claim of gender discrimination if it did not uniformly apply the rule against pre-marital sex to male teachers).

[62] See, for example, *Hall v. Baptist Memorial Health Care Corp*., 215 F.3d 618 (6th Cir. 2000).

[63] *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S.Ct. 694 (2012). See also, *Herzog v. St. Peter Lutheran Church*, 2012 WL 3134337 (N.D. Ill Aug, 1 2012)("called" teacher was exempt from civil rights coverage where she taught secular subjects and well as engaged in religious activities and held religious training). But see, *Dias v. Archdiocese of Cincinnati,* 2012 WL 1068165 (S.D. Ohio 2012)(computer teacher at Catholic school did not qualify for ministerial exception when he was not Catholic and was not allowed to teach religious components).

[64] *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985)(Connecticut statute that gave employees broad rights not to be compelled to work on their Sabbath unconstitutionally established religion). There are a number of cases addressing whether unemployment benefits may be properly denied to employees who were discharged or quit work due to the employer's inability to accommodate their religious practices. See, for example *Hobbie v. Unemployment Appeals Com'n of Florida,* 430 U.S. 136 (1987).

[65] See, e.g. *Spratt v. Kent County,* 621 F.Supp. 594 (W.D. Mich. 1985) aff'd 810 F.2d 203 (1986), (6th Cir. 1986)(unpublished)(social worker employed by the Department of Corrections did not have a claim of religious discrimination where she was fired for engaging in prayer, Bible study and spiritual counseling at work); *Piggee v. Carl Sandburg College*, 464 F.3d. 667 (7th Cir. 2006)(cosmetology instructor did not state a constitutional or statutory claim in challenging her discharge for providing religious booklets banning homosexuality to openly gay students).

[66] *Booth v. Maryland,* 327 F.3d 377 (4th Cir. 2003); *Delisle v. Brimfield Tp. Police Dept.*, 94 Fed.Appx. 274, 2004 WL 445181 (6th Cir. 2004)(unpublished)(employee who claimed he was demoted in retaliation for complaining about Police Chief's proselytizing at work stated a claim under Title VII and the First Amendment). See, *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* (August 14, 1997).

[67] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[68] See, for example, *Hankins v. Lyght*, 441 F.3d 96 (2nd Cir. 2006)(RFRA properly asserted as a defense to ADEA lawsuit brought by Methodist minister against the National Methodist Church); *Redhead v. Conference of Seventh-Day Adventists*, 440 F.Supp.2d 211 (E.D.N.Y. 2006)(fact question whether teacher was fired because of sex and/or pregnancy or due to evenly applied religious and moral code).

[69] 134 S.Ct. 2751 (2014).

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Mr. Fox has represented employers for more than forty years. He has been Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization since 1980 and is a Fellow in the College of Labor and Employment Lawyers. He has been regularly listed in Best Lawyers in America in Labor and Employment Law, as a *Texas Monthly "Super Lawyer"* in employment litigation and as one of America's Leading Lawyers for Business by *Chambers USA,* where he was characterized by clients as a "great trial lawyer" with a "knack of identifying the points in the case to focus on."

Mr. Fox defends employers in employment law litigation including successfully defending the first male on male sexual harassment case tried to a jury in Texas. He has had jury trials in the four largest cities in Texas as well as other parts of the state including Amarillo, Texarkana and El Paso, and outside the state in New Mexico, Las Vegas, New Orleans and Winston-Salem, North Carolina.

In addition to jury trials, he has represented employers in more than 25 arbitration hearings on non-labor matters including race, sex and national origin discrimination, wage and hour claims, breach of contract and enforcement of covenants not to compete.

Mr. Fox also has extensive experience representing employers in collective actions under the FLSA. In 2008, he was successful in decertifying a class of more than 1,000 opt-ins and then obtaining a favorable jury verdict in the claims of the named plaintiffs.

In November, 2009 Mr. Fox was called as an expert witness to testify before the Senate Judiciary Committee based on his extensive experience with jury trials and arbitration. His testimony provided a strong defense of arbitration of employment claims as well as support for the Supreme Court's "common sense" limitation of the mixed motive instruction in jury trials under the ADEA.

In July, 2002, Mr. Fox started the first employment law related web log, Jottings By An Employer's Lawyer. Mr. Fox is also the Editor of *HR Specialist, Texas Employment Law,* a National Institute of Business Management publication.

Admitted to Practice:

Texas
U.S. Supreme Court
U.S. Court of Appeals, Fifth Circuit, Ninth Circuit, Tenth Circuit
U.S. District Court, Eastern, Northern, Southern and Western Districts of Texas

Honors and Awards:

Order of the Coif

Board Certified, Labor and Employment Law, Texas Board of Legal Specialization

Fellow, College of Labor and Employment Lawyers

Fellow, Texas State Bar Foundation

Listed in Texas Labor and Employment Lawyers, *Chambers USA* Client Guide (since 2004)

Best Lawyers in America (since 1999)
Super Lawyer by *Texas Monthly* (since 2003)