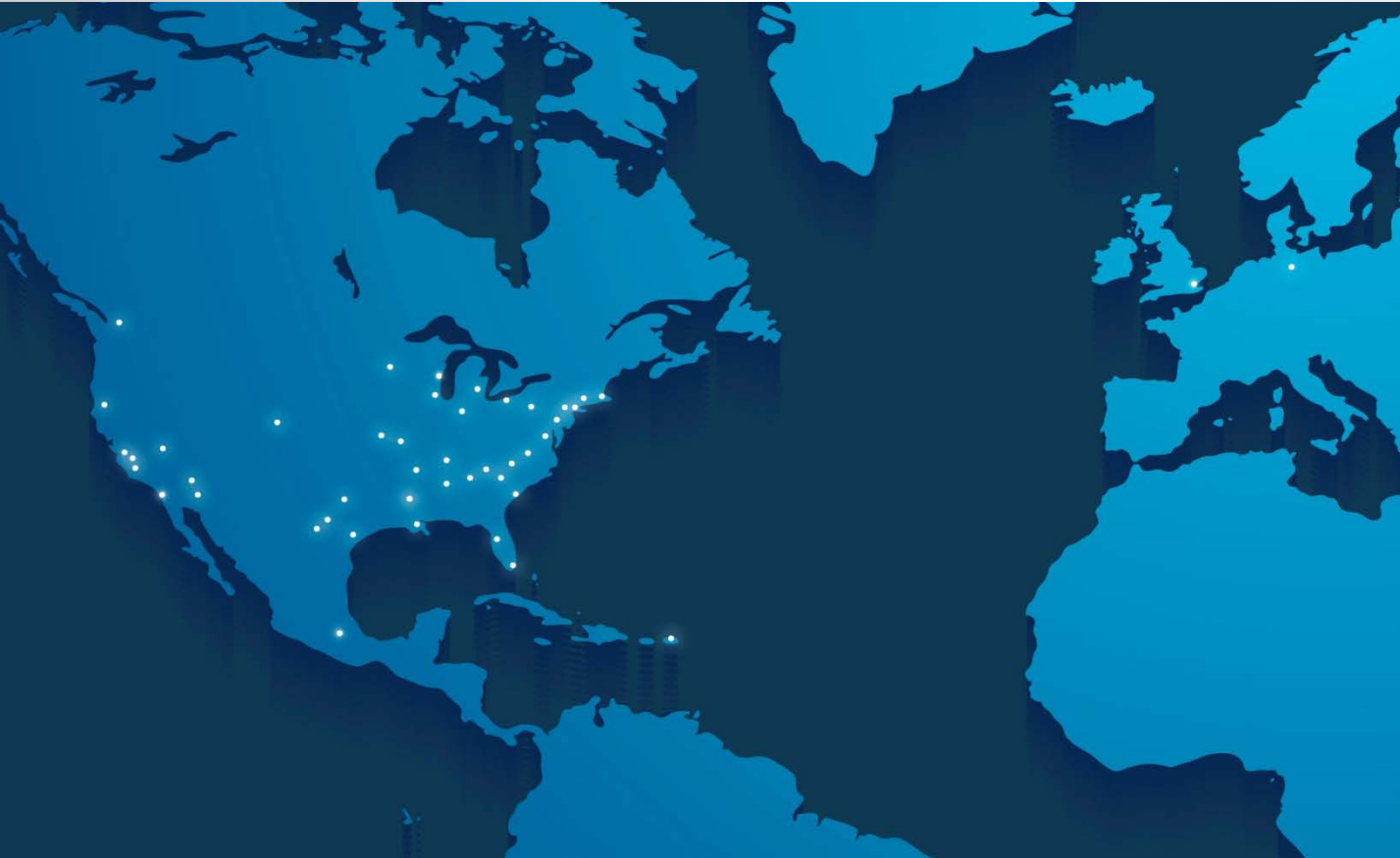


Finding (or Losing) One's Religion at Work: What Should Our Clients Do (or Not Do)?



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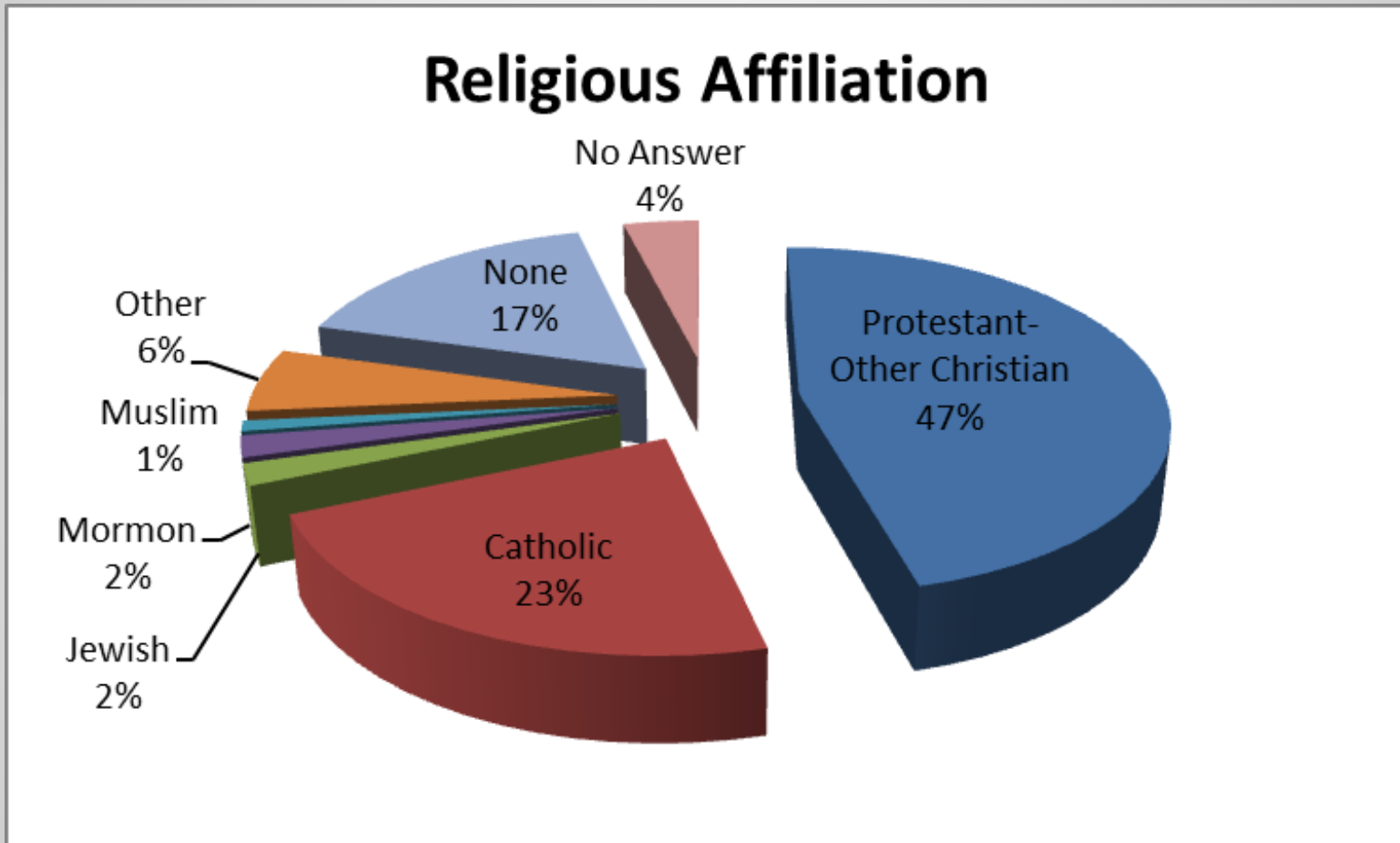
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Religion in the United States

- 78% of people in U.S. say religion is “very” or “fairly” important to them
 - Source: Gallup, 2015

Religiously Diverse Workforce

Source: Gallup 2015



Some Workplace Perceptions

- 50% of non-Christians surveyed believe that their employers ignore their “religious needs.”
- 60% of Evangelical Protestants believe discrimination against Christians has become as “big a problem” as discrimination against religious minorities.
 - Source: *Tanenbaum Center for Interreligious Understanding*, 2013 as reported in *HR Magazine*, Dec. 2013.

EEOC Religious Discrimination Claims

- Charges Doubled in 18 years:
 - 3,502 in FY 2015 (3.9 % of all charges)
 - 1,709 in FY 1997 (2.1% of all charges)
- Since FY 2010, Commission has recovered \$4,000,000 + injunctive relief
- In FY 2014, EEOC filed 10 religious bias lawsuits; 10% of all the Title VII suits

Legal Sources

- Title VII, TCHRA
 - Disparate treatment
 - Reasonable accommodation
- Constitutional right to free exercise
- Religious Freedom Restoration Acts

EEOC Religious Accommodation Guidance (Dress and Grooming)

- Issued on March 6, 2014
- Q&A format + “Fact Sheet”
- Clarified and amplified existing regulations
- Provides specific examples
- July 22 – “Youth at Work” Religion & Your Job Rights
 - Attending mass
 - Wearing hijab
 - Has a bindi (red dot on forehead)

Some Exemptions

- Ministerial Exemption
 - U.S. Constitution, 1st Amendment
 - *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* (S. Ct. 2012)

- Title VII, TCHRA
 - Preference in hiring

- ADA
 - Preference in hiring
 - Conformity to religious tenets



Courts Hate the Religious Question



Courts Hate This Question

- What is a religious belief?
 - Case in point – The Church of Body Modification

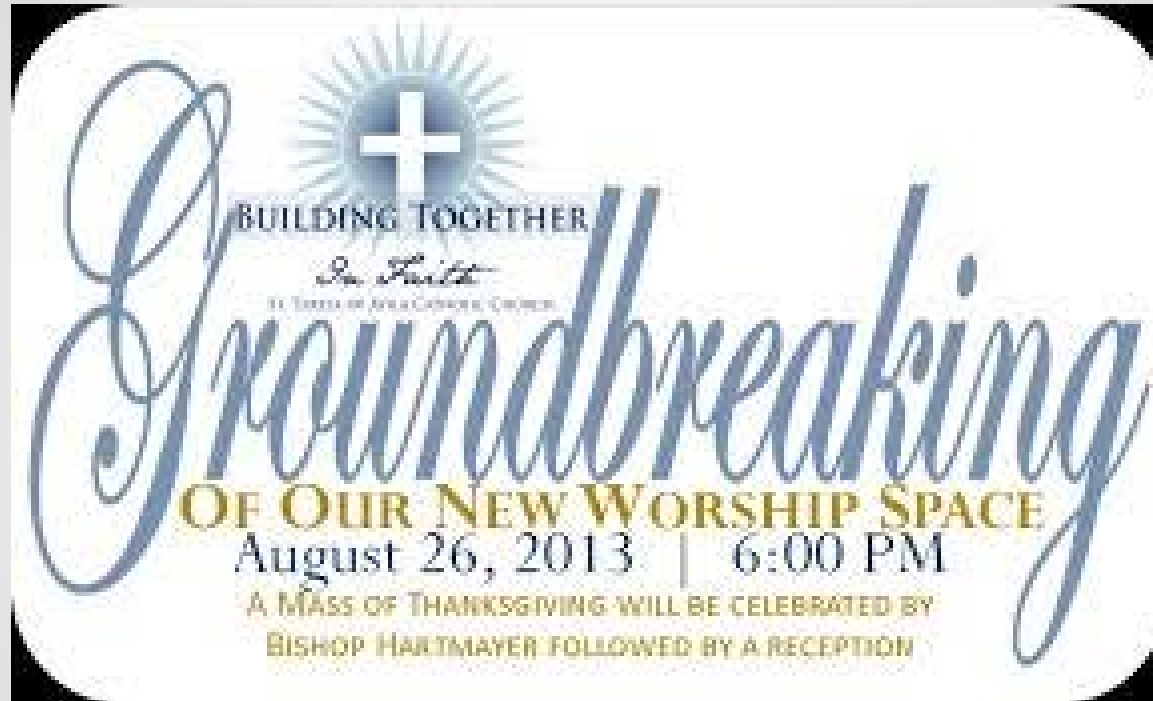
The CBM was established in 1999 and counts approximately 1000 members who participate in such practices as piercing, tattooing, branding, cutting, and body manipulation. Among the goals espoused in the CBM's mission statement are for its members to "grow as individuals through body modification and its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

Courts Hate This Question

- Cloutier v. Costco (1st Cir. 2004)

“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.”

What about individual acts?



What about individual acts?

- Davis v. Fort Bend County (5th Cir. 2014)

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."..."Examining religious convictions any more deeply would stray into the realm of religious inquiry, an area into which we are forbidden to tread." 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."



Reasonable Accommodation



Basic Analysis

1. Sincerely held religious belief or practice?

What Is a Protected Belief or Practice?

- Must be religious in nature
- Distinguish social, political, or cultural preferences
- “Ultimate ideas about life, purpose and death.”

Some examples

- Ku Klux Klan
 - Confederate flag
- Veganism
 - Flu shot contained animal products
- Wiccans
- Hand scan suit
 - Mark of the Devil
- Failure to provide social security number
- Sun Worshiping Atheism

My (current) favorite

The Church of the Flying Spaghetti Monster
aka Pastafarians



Religion According to EEOC

29 CFR Sec. 1605.1

- Based on (1) theistic beliefs; or (2) non-theistic moral or ethical beliefs as to what is right and wrong that are sincerely held with the strength of traditional religious views.
- Entirely subjective to the individual employee:
 - Need not be a belief espoused by a religious group; need not be accepted by the religious group to which employee claims to belong.
 - Need not be acceptable, consistent, or comprehensible to others.

Is It Sincerely Held?

- How would I know?
- Whether the belief or practice is “true” “reasonable” or part of an organized religion is NOT relevant

Basic Analysis

1. Sincerely held religious belief or practice?
2. Collide with a job requirement?



Dress Codes and Grooming Standards

- Religious clothing or adornments conflict with dress codes or grooming standards
 - Example: “clean shaven” rule and religiously mandated beards
 - Example: “no hats,” “no loose clothing,” and religious turbans, khimars, hijabs, yarmulkes
- Safety or Sanitation Risks?
 - Example: “clean shaven” rule and religiously mandated beards
 - Example: religious garb that increases the risk of injury

Sabbath or Other Schedule Conflicts

- Can't work on Sabbath
- Religious holidays or ceremonies
- Prayer time during the course of the day

Prayer and Proselytizing at Work

- Display of religious items or icons in workstations?
- Allow religious discussions with other employees or customers?
- Provide a prayer room?
- Allow a bible study?

Conscientious Objection

- Assisting with an abortion
- Filling a birth control prescription
- Attending a (secular) ceremony at a Muslim mosque

Basic Analysis

1. Sincerely held religious belief or practice?
2. Collide with a job requirement?
3. Notice to the employer of the conflict?

Who has the burden to raise?

- EEOC v. Abercrombie & Fitch (Supreme Court 2015)
- Applicant wore hijab to interview
- No discussion of why or future use
- Who wins? Employee, if the reason is clear that it was religious practice that was reason for discrimination.

Basic Analysis

1. Sincerely held religious belief or practice?
2. Collide with a job requirement?
3. Notice to the employer of the conflict?
4. Reasonable accommodation without an undue hardship on the business?

What Is an Undue Hardship?

- Much lower threshold than an undue hardship under the ADA
- Anything more than a *de minimis* cost or disruption of business operations is an “undue hardship”

Undue Hardship: Would the Accommodation....

- Create safety or sanitation risks?
- Violate a collective bargaining agreement?
- Deprive other employees of their seniority rights?
- Jeopardize customer relations or trigger complaints?
- Disrupt the flow of products or services?

Undue Hardship: When Are Costs More Than Minor?

- Overtime costs
- Allowing employee to work overtime to accrue more vacation
- Hiring a substitute
- Interrupting production

Undue Hardship: Would the Accommodation...

- Require the employer to shift work to other employees?
- “Establish” or prefer one religion over another?
- Violate state law or the legal rights of other employees?
- Adversely affect the “company image?”
 - **Caution:** customer preference is rarely a justification



Religious Freedom Restoration Acts

Federal Act, 1993 – the Reason

- *Employment Division v. Smith* (S.Ct. 1990)
 - Held peyote use by Native Americans was not protected
- Supreme Court abandoned a pro-religious standard
 - Strict scrutiny no longer the standard where religious practice impacted

Majority opinion – Justice Scalia

The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." ... To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" -- permitting him, by virtue of his beliefs, "to become a law unto himself," ... -- contradicts both constitutional tradition and common sense.

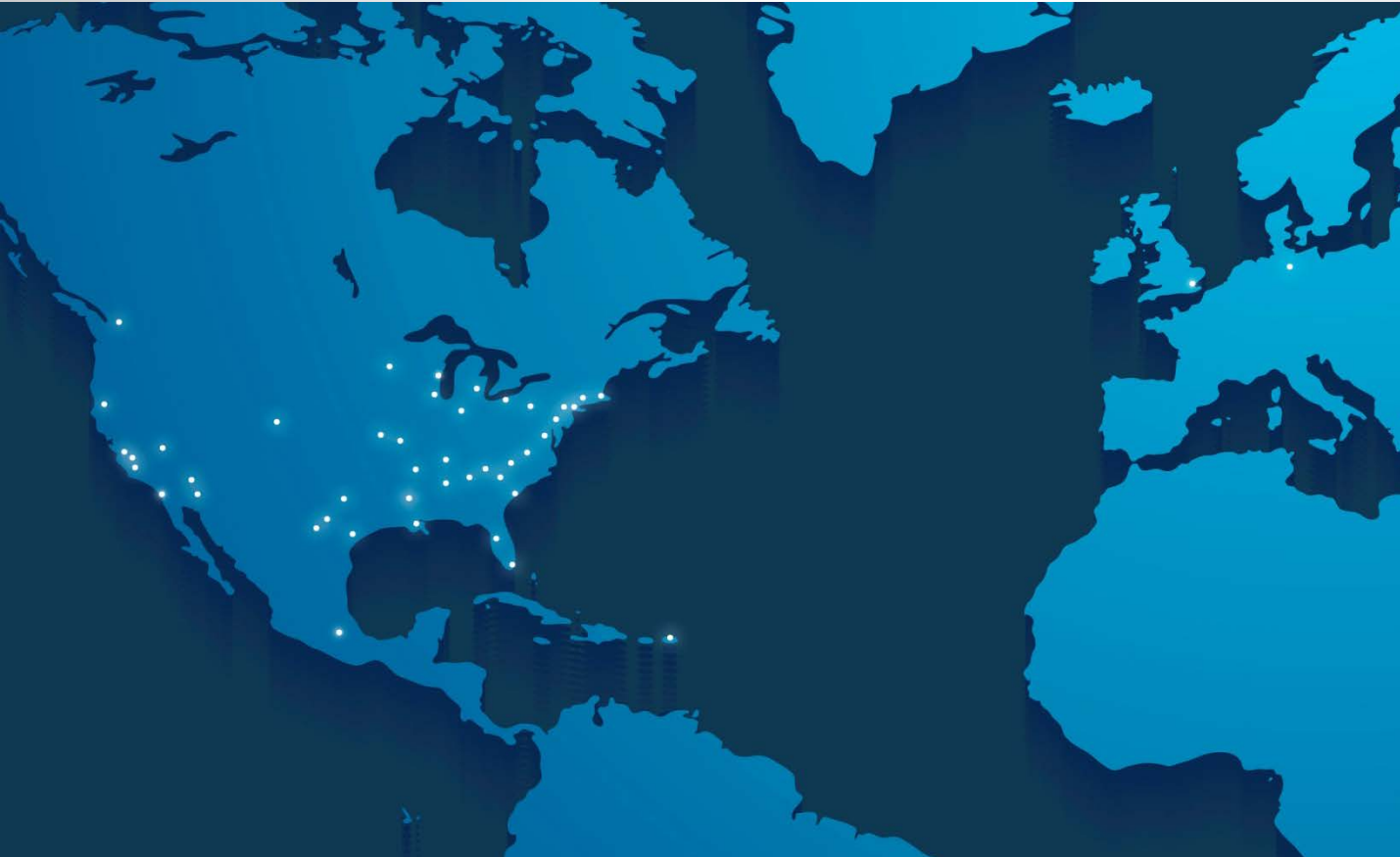
Federal Act, 1993

- Federal act required strict scrutiny to be applied where religious practice impacted

State Acts (Two waves)

- Federal act held not applicable to states
 - Texas, Civil Practice & Remedies Code §110
- More recently, passed to protect
 - Religious objections to marriage equality

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