Religious Discrimination
Religious Accommodation
Under Federal Law: The Essentials

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Why is this Important?

• Lesser-known provision of Title VII.
• Religious discrimination complaints in the workplace have increased.
• Conflicts arise between employer and employee as well as between co-workers.
Overview

• History and Critical Text of Title VII Religious Accommodation Provisions
• Elements of Religious Accommodation Claim
• Legal framework, including burdens placed on the parties
• Some of the more common factual settings
History

• Title VII of Civil Rights Act of 1964.
• Definition of “religion” changed in 1972 in response to *Dewey* decision to establish a duty to provide reasonable accommodation.
Definition of “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 religious observance or practice without undue hardship on the conduct of the employee’s business.”

Elements of Religious Accommodation Claim

(1) Employee holds sincere religious belief that conflicts with employment requirement;
(2) Employee has informed employer of the conflict;
(3) Employee was discharged or disciplined for failing to comply with the requirement.
Burden-shifting Analysis


• Once employee establishes prima facie case, burden shifts to employer to show could not reasonably accommodate employee without undue hardship.
Notice Given By Employee

• Enough information to put employer on notice of a need for accommodation due to conflict between religious beliefs and work requirements.

• No “magic words” are required.
Employer Inquiry and Investigation

• Once on notice, employer should take steps to obtain necessary information.
• The process should be interactive. Bilateral cooperation is appropriate and expected.
• Employee who fails to cooperate may be barred from bringing a claim.
Sincerely Held Religious Belief

• Investigation may be appropriate in some cases.
• Broad definition of religion. Not merely traditional, organized religions. Limited investigation is not for the employer to judge validity of a particular belief, so long as it is a religious one and sincerely held.
• Religious beliefs, rather than political or social, are protected by Title VII.
• Past conduct by the employee may be relevant to sincerity of the belief.
Reasonable Accommodation

- Fact-specific determination made on a case-by-case basis.
- Generally must eliminate the employee’s religious conflict to be reasonable.
- A few courts have taken a different view and not applied this as a bright-line rule. See, e.g., *Sturgill v. United Parcel Service, Inc.*, 512 F.3d 1024, 1033 (8th Cir. 2008).
- Specific accommodation requested by employee is not required, so long as the accommodation offered is reasonable.
- However, under EEOC regulations when more than one possible accommodation, employer must offer alternative that “least disadvantages the individual’s employment opportunities.” 29 C.F.R. § 1605.2 (c)(2)(ii).
Undue Hardship

• An “undue hardship” under Title VII is one that imposes more than a *de minimus* cost.
• Much lower than standard of “undue hardship” under the ADA (“significant difficulty or expense”).
• Rationale: more than *de minimus* cost would result in discrimination against other employees.
• Burden of establishing “undue hardship” is on the employer.
Factors Relevant to Undue Hardship

• Type of Workplace
• Nature of employee’s duties
• Identifiable cost of the accommodation in relation to size and operating costs of the employer
• Number of employees who will need accommodation.
• 29 C.F.R. 1605.2 (e).
Fact-Based Determinations

• Neither “reasonable accommodation” nor “undue hardship” are defined.
• Fact-based, case-by-case determinations.
• Devil is in the details!
Frequent Issues: Work Schedules

Possible Accommodations:
• Flexible Scheduling
• Voluntary Substitutes or Shift Swaps
• Lateral Transfers
• Modified job assignments
• Modified workplace policies and procedures
Work Schedules, Cont’d.

- Allowing employee to seek a voluntary swap is a frequent solution. Be aware of situations where employees’ religious beliefs prohibit them from inducing others to violate their religious tenets.
- Involuntary swaps unnecessary.
- Hiring of a substitute that costs substantially more likely an undue hardship.
Collective Bargaining Agreements

• Employers need not violate a CBA or bona fide seniority system.
• Seniority system in a CBA is a significant accommodation by employer to needs of employees.
Frequent Issues: Job Tasks

• Possible accommodations: transfer of a job task from one employee to another or transferring an employee to a different position.

• Accommodation in employee’s current position should be considered before transferring the employee. If transfer is necessary, transfer to an equivalent position should be made if possible.

• Public safety employees sometimes treated differently by courts.
Frequent Issues: Training Requirements and Policy Statements

• Possible Accommodations: Relieving an employee of a training requirement or allowing the employee not to sign a policy.

• If the training or policy is based on a legal requirement, excusing the employee from complying is likely an undue hardship.

• Nuances in content of training or language of a policy statement may be critical.
Union Dues

- Possible accommodation by union: allowing employee to pay equivalent to charity.
- Depends on size of union, number of persons needing accommodation, and associated costs.
Frequent Issues: Proselytizing and Religious Expression

• Public employer not required to violate Establishment Clause.
• Employer may consider impacts on customers and business.
• Employer may be able prohibit employee’s expression if customers or the public would mistakenly believe the expression is the employer’s.
• Employer may consider potential workplace disruption.
Adverse Employment Action

• “Disciplined or discharged”
• “Adverse employment action” - materially changed the terms and conditions of employment
• Discriminatory Treatment or Threat
• Employee who accedes to employer and gives up accommodation request may still have an actionable claim.
Unpaid Leave

• In some cases, unpaid leave by itself has not been viewed as giving rise to an actionable claim. *Ansonia Board of Educ. v. Philbrook*, 479 U.S. 60, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986).

• However, discriminatory treatment may suffice to establish adverse employment action. There may be a Title VII violation if the employer allows employees to take paid leave for all purposes other than religious ones.
Constructive Discharge

• Where the employee resigns, the employee may be able to show constructive discharge.
• Some courts require showing that employer deliberately created intolerable working conditions, as perceived by a reasonable person, with the intention of forcing the employee to quit.
• Other courts require only an objective showing of intolerable working conditions and no showing of subjective intent by employer.
Religious Discrimination: The protection of religious minorities

Kris D. Meade, Crowell & Moring LLP
Protection of Religious Minorities


• But I digress...
Disparate Treatment Analysis

• Tracks Title VII Framework for Other Protected Characteristics
  – Direct evidence
  – Indirect evidence – *McDonnell-Douglas*

• As Applied to Religious Minorities
  – Conduct targeted against particular religion
  – Conduct against those who do not share a particular religious belief
Disparate Treatment Analysis

• Representative Cases
  – *Campos v. City of Blue Springs*, Missouri, 289 F.3d 546 (8th Cir. 2002)
    • Native American spirituality
    • Excluded from meetings, verbal abuse, removed from assignments because not use scripture
  – *Reed v. Mineta*, 93 F. App’x 195 (10th Cir. 2004)
    • Plaintiff a member of Worldwide Church of God
    • Supervisor converted position to part-time, quizzed him about beliefs, referred to his religion as a “scam”
Religious Harassment

• Follows Framework for Sexual Harassment
  – Conduct based on religion; unwelcome; severe or pervasive; chargeable or imputed to the employer
  – *Faragher* affirmative defense available

• Representative Cases
  – *Abramson v. William Patterson College of New Jersey*, 260 F.3d 265 (3rd Cir. 2001)
    • Supervisor scheduled meetings on Jewish holidays, made pointed statements about plaintiff’s faith, criticized her for lack of availability during Sabbath
Religious Harassment

• Representative Cases (continued)
  – *Jones v. United Space Alliance*, 2006 WL 250761 (11th Cir. 2006)
    • Employee of Apostolic/Pentecostal faith told to remove lanyard with word “Jesus” on it, remove Bible from desk, and turn down religious music; alleged conflict based on pastoral duties
    • Kufi-wearing Muslim called “Taliban” and “towel head”; others questioned allegiance to US, suggested he was terrorist and associated Muslims with senseless violence
Discrete Issues of Note

- Disciplining Employees Who Espouse Anti-gay Views - Claimed Expression of Religious Beliefs
  - Courts generally unsympathetic
  - *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004)
    - Plaintiff posted anti-gay Biblical scripture in cubicle in response to employer’s diversity campaign, claimed diversity campaign was targeting him based on religious beliefs
Discrete Issues of Note

• Anti-Gay Sentiment as Religious Expression (cont.)
• *Matthews v. Wal-Mart Stores, Inc.*, 417 F. App’x 552 (7th Cir. 2011)
  – Apostolic Christian employee terminated for violating discrimination and harassment policy
  – “Screamed over” gay co-worker that God does not accept homosexuality, that gays should not “be on earth” and that they will go to hell
Discrete Issues of Note

• Tenure Decisions

• Adelman-Reyes v. Saint Xavier University, 500 F.3d 662 (7th Cir. 2007)
  – “In the absence of clear discrimination, we are generally reluctant to review the merits of tenure decisions”
  – Employer remarks that plaintiff was a “liberal union-oriented Jew” and employer complaints of missed work and campus events due to Jewish holidays not sufficient to show denial of tenure due to religion
Religious Discrimination: Religious Dress and Expression at Work

Rebecca S. Stith, Senior Trial Attorney
U.S. Equal Employment Opportunity Commission (EEOC)
Coverage under Title VII of the Civil Rights Act of 1964

– Employers with 15 or more employees
– Employment Agencies, Unions
– Cannot discriminate based on race, color, sex, national origin, religion, or retaliate because of protected activity

Exceptions

– Religious organizations may prefer to employ co-religionists (persons of same faith)
  • The ministerial exception bars employment discrimination/retaliation suits against religious employers by their “ministers.”
  • Totality of the circumstances to determine whether the employee is a “minister”
Title VII Provisions

• Section 703 (42 USC § 2000e-2): it is unlawful for covered entities to discriminate against an employee or applicant for employment because of religion.

• Section 701(j) (42 USC § 2000e(j)): The term religion includes all aspects of religious observance, practice and belief, unless an employer shows that it cannot reasonably accommodate the employee’s practice without undue hardship on the conduct of the business.
Religion Accommodation under Title VII

• An employer is obligated to provide a reasonable accommodation of an employee's religious beliefs or practices

• An employer is not obligated to provide an accommodation that would impose an undue hardship
  – A hardship is undue if it will have more than de minimis impact on operations or costs
  – But it must be more than a speculative hardship
What does this really mean for employees and employers?
The employee must have a bona fide religious belief/practice

  - Beliefs must be both religious and sincerely held
  - Beliefs typically incorporate ultimate ideas about right and wrong, life, purpose, and death
  - Practices are typically actions supporting, manifesting, or required by the beliefs
Bona fide beliefs and practices need not be required by a particular faith or widely accepted

- Is the belief part of a moral or ethical understanding that is *sincerely* held with the *strength* of traditional religious views
- The belief does not have to be widely held or recognized by others
- The belief (or practice of such belief) does not have to be required by a church or sect
- The belief does not have to appear reasonable to non-believers
Example: Employer found liable where religious practice was not widely followed

- Employee was fired for refusing to cover his religious tattoos in “family-friendly” workplace
- Employee followed Kemeticism
  - a religion devoted to the worship of the ancient Egyptian sun god, Ra
  - He considered it a sin to cover Coptic-language tattoos including name “Ra”
  - Under 10 adherents of his sect
- Defendant moved for summary judgment on ground employee lacked a *bona fide* religious belief
- Court denied motion because no undue hardship where employee worked 6 months with no customer complaints
Religious tattoos of employee in *Red Robin Gourmet Burgers* suit:

My father Ra is Lord
I am the son who exists of his father; I am the father who exists of his son

Payot Ra Neb
Anok pe-shere pee tai-shope em pef-yet; anok pe-yot e tai-shope em tef-shere

The accommodation must eliminate the conflict and be “reasonable”

- It’s adjustment to the work environment which:
  - Eliminates the conflict between the employee’s religion and the work rule
  - Does not unnecessarily disadvantage the employee’s terms, conditions, or privileges of employment

Employer need not provide employee’s preferred accommodation if it can provide another reasonable accommodation

- An employer never has to provide an accommodation that would pose an undue hardship
Examples of possible religious accommodations

For prayer/worship, permit:
- breaks, time off, shift transfer to accommodate attending worship services, observing religious holidays, praying at work

For appearance, permit:
- religious garb (turban)
- religious symbols (cross)
- body adornments (tattoos, piercings)

Activity restrictions, permit:
- special foods (kosher)
- not working certain days/hours (Sabbath)
**Tips: Best Practices for Employers**

- Inform employees that you will make reasonable efforts to accommodate employees’ religious practices
- Train managers on accommodation needs and responding to requests
- Develop internal procedures for handling religious accommodation requests
- Assess each request individually
- Avoid assumptions about a belief or practice, or the “best” accommodation
- Once on notice, initiate good faith efforts to accommodate
Tips: Best Practices for Employers – Is a reasonable accommodation possible?

• Confer with employee about his/her religious needs and proposed accommodation

• Consider possible accommodations and choose employee’s preference if possible

• Educate employees about workplace diversity and employer obligations to provide reasonable accommodations
**Tips: Best Practices for Employers**

- If applicable, work with union reps to find accommodations and to educate other employees about obligations.

- Do not assume that an accommodation will conflict seniority system or collective bargaining agreement.
  - Title VII requires that where CBA provides for assignments based on seniority, the employer must allow voluntary shift substitutes and swaps as a religious accommodation.
  - Some Cabs have strong management-rights clauses with discretion to provide accommodations.
  - Best practice is still to confer with the union regarding accommodations.
Tips: Best Practices for Employers

• Allow employees to wear a yarmulke, heap, or other religious garb even if it means an exception to a dress policy

• Do not assign employee with religious garb to a non-contact position because of “customer preference”

• Train all staff to avoid stereotyping based on religious dress and grooming

• Do not assume that atypical dress will create an undue hardship

• Be flexible and creative regarding work schedules, work duties, and selection procedures, to the extent practicable
Cause of Action: Failure to provide reasonable accommodation of religious belief or practice

This young woman has on a modified Disney uniform. Upon learning that she would have to wait five months for a custom uniform – the length of her internship – she was allowed to wear her blue head scarf with a beret-style hat over it after seeking assistance from CAIR-LA in approaching the employer. http://multiamerican.scpr.org/tag/hijab
Basic elements of claim of failure to accommodate religious belief or practice

- Employee has bona fide, sincerely-held religious belief or practice
- Conflicts with work requirement
- Employee informed employer or employer otherwise had notice of accommodation need
- Employee was denied an accommodation
Notice of Religious Conflict

• There are no magic words an employee must say to put employer on notice of need for accommodation

○ The applicant or employee must provide sufficient information for employer to become aware of a conflict between the individual's religious belief and a workplace requirement
Case: An employer is on “notice” of the “obvious”

- **EEOC v. White Lodging Services**, No. 3:06CV-353-S, slip op. (WD KY 2010)
- Staffing service brought Somali Muslim women to hotel to interview for housekeeping positions
- Employer’s dress code forbade wearing hats while on the job
- Director of housekeeping asked if women would remove headscarves while working
- Women refused and were not interviewed.
- Court denied employer’s summary judgment motion and rejected employer’s contention that it lacked notice of need for accommodation, finding the need “obvious” in context
Other cases: Employer was on notice despite no “magic words”

- Employee's request for leave to participate in religious conversion ceremony of his wife and children was sufficient to place employer on notice that this request was due to a religious practice or belief. *Heller v. EBB Auto*, 8 F.3d 1433 (9th Cir. 1993).

- Although applicant did not inform employer of religious conflict on his application, employer learned from job reference that applicant had refused to sell condoms at prior job due to a religious objection. *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359 (S.D. Fla. 1999).
Cases: Insufficient notice to the employer

- Employee's request to leave work early for Christmas play at her church was insufficient because it was more in the nature of a social activity or family obligation that happened to be associated with the church. *Wessling v. Kroger*, 554 F. Supp. 548 (E.D. Mich. 1982)

- Employee failed to explain prior to discharge that his tardiness was due to attending prayer services. *Elmenayer v. ABF Freight Sys.*, 2001 WL 1152815 (E.D.N.Y. Sept. 20, 2001), *aff'd on other grounds*, 318 F.3d 130 (2d Cir. 2003).
Accommodation of religious dress or expression

Examples of religious dress/appearance practices:

- Head coverings (yarmulke, hijab)
- Certain hairstyles or facial hair (Rastafarian dreadlocks, Sikh uncut hair and beard)
- Types of clothing (modest attire)
Case: Religious headscarf

EEOC v. Abercrombie & Fitch Stores, Inc., 798 F.Supp.2d 1272 (N.D.Ok. 2011) Summary judgment for EEOC on liability because Muslim applicant had bona fide religious belief that she had to wear a headscarf; applicant informed employer of belief; granting applicant exception to headwear prohibition would not cause undue hardship to “look” policy. **Verdict:** $20,000
Same retailer/different result

**EEOC v. Abercrombie & Fitch Stores, Inc., 2009 WL 3517587 (E.D. Mo. 2009).** Court denied summary judgment for EEOC on liability because of a question on the sincerity of employee’s Christian belief that she had wear pants or skirts below the knee where employer’s “look” policy required employees to dress in less modest styles similar to that sold in stores. **Verdict:** defense
Two more examples of EEOC cases involving headwear:

*EEOC v Alamo Rent-A-Car, LLC*, No. CV-02-1908-PHX (D.AZ.): Suit alleged Muslim employee was fired for refusing to remove headscarf during Ramadan. Court granted EEOC summary judgment on liability. A trial on damages followed.

**Jury Verdict**

**Lost Wages**: $21,640.00  
**Compensatory Damages**: $16,000.00  
**Punitive Damages**: $250,000.00

*June 11, 2007*
A Muslim “woman said she was fired for the way she dressed and now a lawsuit has been filed on her behalf. The company, St. Charles-based Client Services, Inc., said it has a dress code. The woman...said it's a matter of religious freedom.” 9/14/07  www.ksdk.com/news/story.aspx?storyid=129452

EEOC v. Client Services, 4:07-cv-01592 (E.D.Mo. 2007): Settled:  $65,000
Additional information on religion and religious accommodations in the workplace at www.eeoc.gov

www.eeoc.gov/laws/types/religion.cfm
www.eeoc.gov/policy/docs/religion.html
http://www.eeoc.gov/policy/docs/qanda_religion.html
Best Practices for Preventing Workplace Religious Discrimination

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Religious Discrimination Claims:

1. Disparate Treatment
2. Disparate Impact
3. Religious Harassment (Hostile Environment)
4. Retaliation
5. Failure to Accommodate
Best Practices for Accommodation Claims

• Interactive Process: Obligation to engage in an interactive process with the employee to determine if an accommodation can be made.

• Undue Hardship: No more than a “de minimus cost.”
Four primary types of religious accommodation requests:

- Employer’s policies regarding dress or appearance
- Employee’s scheduled work time
- Refusal to perform certain job functions based on religious objections
- Religious-based communications in the workplace
Religious Accommodation Best Practices

Case decisions require accommodations or find undue hardship – often on similar facts.

That reality focuses the opportunity: Cases with similar facts can break in different direction based on how the employer responds.
Dress or Appearance

• Compare: *EEOC v. Abercrombie & Fitch Stores, Inc.* and *Finnie v. Lee County*

• Safety concerns are more likely to justify denying an accommodation

• Employers should ensure that they have specific reasons and examples to back up their claims

• A specific request from an employee for an accommodation may not be necessary
Scheduled Work Time

• Compare: *Maroko v. Werner Enterprises* and *Crider v. Univ. of Tenn.*

• Other employees do not have to take on additional job duties to accommodate an employee’s religious requests

• Note the importance of the interactive process
Scheduled Work Time

• Possible Accommodations
  – Lateral transfer
  – Allowing the employee to use vacation time
  – Allowing the employee to trade shifts (employer assistance)
  – Exploring voluntary waiver of seniority rights
  – Allowing a flexible work schedule
Refusal to Perform Certain Job Functions

• Compare: *Slater v. Douglas County* and *Walden v. CDC & Prevention*

• Are other employees willing to take on that task?

• The employee and the employer each have an obligation to find an accommodation that will work.
Refusal to Perform Certain Job Functions

• Medical and research situations
• Examples: Objections to abortion, birth control or the “morning after pill,” or stem cell research.
• Lateral transfers or shifting work to other non-objecting qualified employees may be reasonable accommodations.
Religious-Based Communications in the Workplace


• Employers should not assume that all request to express religious views in the workplace would be harassing or create a hostile environment.

• Avoid: “Don’t discuss religion at work any more.”
Religious-Based Communications in the Workplace

• Employers should be careful not to dismiss an employee’s request for accommodation simply because it involves a non-traditional religion or viewpoint.

• Public Universities: Interplay with issues of academic freedom and the First Amendment.