

## **Workplace Religious Accommodations: EEOC Guidance and Court Developments**

Best Practices for Hiring, Policies and Employment Decisions Amid Increased Claims and Ambiguous Standards

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WEDNESDAY, MARCH 28, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Stephen E. Fox, Office Managing Partner, **Sheppard Mullin Richter & Hampton**, Dallas

J. Gregory Grisham, Partner, **FordHarrison**, Nashville & Memphis, Tenn.

Dionysia L. Johnson-Massie, Shareholder, **Little Mendelson**, Atlanta

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# Workplace Religious Accommodations: EEOC Guidance and Court Developments

Stephen E. Fox  
Sheppard Mullin Richter & Hampton  
[sfox@sheppardmullin.com](mailto:sfox@sheppardmullin.com)

J. Gregory Grisham  
FordHarrison  
[ggrisham@fordharrison.com](mailto:ggrisham@fordharrison.com)

Dionysia L. Johnson-Massie  
Littler Mendelson  
[jmorell@littler.com](mailto:jmorell@littler.com)

# Rising Number of EEOC Charges

- Since 2000, religious discrimination charges filed with the EEOC have doubled:
  - 2015: **3,502 charges**
  - 2016: **3,825 charges**
  - 2017: **3,436 charges**
- Since 2015, monetary benefits awarded through religious-based charges total over **\$30 million** (not including litigation awards)

# Prioritized Under Trump

- Executive Order 13798 (May 4, 2017)
  - “**All executive departments and agencies shall**, to the greatest extent practicable and to the extent permitted by law, respect and **protect the freedom of persons** and organizations **to engage in religious** and political speech.”
- *US v. Ozaukee Cnty*, No. 2:18-cv-00343 (E.D. Wis. March 6, 2018)
  - DOJ alleged county discriminated by failing to accommodate employee’s religious belief in requiring flu shot

# What is a “Religious Belief”?

- “[A]ll aspects of religious observance and practice, as well as belief” (42 USC 2000e(j))
- EEOC Compliance Manual
  - A belief that is “religious in the person’s own scheme of things,”... one that is “sincere and meaningful ... that occupies in the life of its possessor a place parallel to that filled by ... God”
- Is the belief “**sincerely held**,” and does it concern “**ultimate ideas**” about “**life, purpose and death**”?
- Atheism and individual beliefs are included

# EEOC Guidance: Definition of Religious Practice

- **Broad** definition of religious practice:
  - Includes “religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or may seem illogical or unreasonable to others”
  - Even if practice not common within religious group, protected as long employee has sincerely held belief
  - Employee need not be affiliated with formal religious organization
  - Includes “non-theistic moral or ethical beliefs that are sincerely held with the strength of traditional religious views”
  - Employees are protected even if their religious practice is new, or their practice is irregular or intermittent, as long as belief is sincerely held

# EEOC Guidance: Undue Hardship

- Employer obligated to provide reasonable accommodation for sincerely held religious practices, unless accommodation would cause undue hardship
- “Undue hardship” means **more than a *de minimis* cost** or burden on operation of business
- Far more employer-favorable standard than ADA standard

# EEOC Guidance: Undue Hardship

- “Undue hardship” includes safety, security, or health care risks that cannot be mitigated through reasonable accommodation
- But, customer preference, co-worker jealousy, and “image” are insufficient justifications for denying accommodations
- And, employer cannot hide employee out of sight of customers because of employee’s dress

# EEOC Guidance: Accommodations

- Employer may offer accommodation that includes covering religious symbol (such as covering a religious tattoo), but accommodation will not be considered reasonable if employee's belief forbids covering symbol
- If accommodation proposed by employee would cause undue hardship, employer should explore other possible accommodations that would be acceptable to both parties
- Accommodation may require exceptions to other general policies (e.g., weapons policies)

# Title VII – Protections

- Generally prohibits discrimination on basis of religious belief or practice
- Requires reasonable accommodation of religious belief or practice (unless undue hardship)

# Religion v. Personal Preference

- Requires more than a mere personal preference
- *Brown v. Pena*, 441 F.Supp. 1382 (SD Fla. 1977)
  - Employee claimed discrimination based on a “personal religious creed” of eating cat food, as it contributed “significantly” to his energy and overall well-being
  - Court held personal preference—not religion
- Political beliefs/social philosophies do not qualify

# Key Inquiry: Is the Belief ‘Sincerely Held?’

- Factors to determine whether belief is sincerely held
  - Whether employee has behaved in a manner inconsistent with professed belief
  - Whether accommodation sought is particularly desirable benefit likely to be sought for secular reasons
  - The timing of the request
  - Any other reason employer has to believe that request is not sought for religious reasons

# Offensive Viewpoints

- Tenets of a belief do not qualify/disqualify it as ‘religious’ ... it is only the sincerely-held nature of the underlying belief
- *Peterson v. Wilmur Commc’sns, Inc.*, 205 F.Supp.2d 1014 (E.D.Wis. 2002)
  - “Creativity” – belief system based on ideals of white supremacy was held to be a religion pursuant to Title VII

# Problems Challenging Sincerity

- *US v. Seeger*, 380 U.S. 163 (1965)
  - “These are matters of interpretation where the law must tread lightly.”
- Courts reluctant to pass judgment on sincerity
- Do prior statements/course of conduct align with professed belief?
- Expansive definition of “religion” through legal holdings and EEOC guidance make it difficult to obtain summary judgment on the grounds the belief is not sincerely held

# Problems Challenging Sincerity

- Statute's definition of religion is broad, leaving "little room for a party to challenge the religious nature of an employee's professed beliefs"
  - Employee's belief or practice need not be widely held or recognized by others as religious in order to be protected
  - EEOC Guideline: "... The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee ..."
- Courts often reluctant to pass judgment on sincerity of religious belief

# Challenging Sincerity

- If facts merit, challenge to sincerity may be worthwhile
- *Hussein v. Waldorf-Astoria*, 134 F.Supp.2d 591 (SDNY 2001)
  - Plaintiff claimed beard was part of his religion, yet...
  - Had never worn a beard in prior 14-years of employment, had never mentioned his beliefs to anyone at the hotel, and simply showed up for work one night asking for an exception to the facial-hair policy
  - Summary judgment based on lack of sincerity

# Challenging Sincerity

- *Fallon v. Mercury Catholic Med. Ctr. Of Southeastern Penn.*, 2017 U.S. App. LEXIS 25241 (3d Cir. Dec. 14, 2017)
  - P, a hospital worker, refused to comply with employer requirement that he receive a flu shot
  - P claimed anti-vax stance was religious, cited Buddhism, and stated “one should not harm [his] own body” and receiving the vaccine would “violate his conscience”
  - Court held the belief was **not sincerely religious**, noting P “simply worries about the health effects of the flu vaccine ... and wishes to avoid [it].”
  - P’s moral commandment to not harm his body was “an isolated moral teaching” and not a comprehensive system of beliefs about fundamental matters

# Challenging Sincerity

- *EEOC v. Consol Energy, Inc.*, 860 F.3d 131 (4th Cir. 2017)
  - \$600k Judgment against employer
  - P claimed religious belief regarding “mark of the beast” prevented him from using biometric hand-scanner system installed by employer to monitor attendance and hours worked
    - P believed using system would “show allegiance to the Antichrist”
  - P submitted letter from his pastor confirming this, along with written explanation of beliefs
  - Court upheld jury verdict, finding ample evidence from which jury could find participation in scanner system
  - Court’s opinion suggests employers should **generally assume** the sincerity of an employee’s stated religious belief

# Accommodation of Employees' Religious Practices and Beliefs

- Requires accommodation of **both** belief and practices (unless undue hardship)
- Similar concept and methodology to ADA accommodation

# The Interactive Process

- Employee has burden to request accommodation, although no “magic language” is required
- Employer should engage in dialogue to determine possibility of providing reasonable accommodation
- If employer has bona fide reason to question sincerity of belief, it may make a ...
  - “limited inquiry into the facts and circumstances of the employee’s claim that the belief/practice is religious and sincerely held [and] gives rise to need for accommodation.”
  - EEOC Compliance Manual on Religious Discrimination

# What is a Reasonable Accommodation?

- Employee's preferred accommodation does not have to be granted – only a reasonable accommodation must be made
- Examples:
  - Modified schedules
  - Shift swaps
  - Job or job-duties transfer
  - Modifying certain policies
- Ultimately: Case-by-case assessment

# What is an Undue Hardship?

- Anything more than a de-minimis cost to accommodate religious practice
  - *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977)
- Note: This is a **lower standard** than provided by the ADA, which defines undue hardship as any action requiring “significant” difficulty or expense

# Accommodation Examples

- *Bruff v. N. Miss Health Servs.*, 244 F.3d 495 (5th Cir. 2001)
  - P counselor objected to providing counseling to homosexuals and others on that basis that it violated her religious beliefs
  - Requested she be excused from providing such counseling
  - Court held **requested accommodation was an undue hardship** – imposing more than de minimis cost
  - Reasoned other employees would have to cover duties, may cause staffing/logistical problems

# Accommodation Examples

- *Tagore v. U.S.*, 735 F.3d 324 (5th Cir. 2013)
  - P was Sikh who sought to wear ceremonial blade (kirpan) to work
  - Size of blade violated rules concerning weapon possession in federal buildings
  - P proposed:
    - (1) wearing dull blade
    - (2) working from home
    - (3) working in different federal building
  - Court found **undue hardship** – reasoning (1) dull blade would require security checks, (2) working from home not feasible, and (3) same standards at all federal buildings

# Accommodation Examples

- *Davis v. Fort Bend County*, 765 F.3d 480 (5th Cir. 2014)
  - P requested day off to attend religious service on July 3
  - P offered to come into work after service and procured volunteer to cover the work while she attended service; employer fired her after she did not report to work on July 3
  - 5th Cir reversed trial court's award of summary judgment for employer
  - Causing employer to be short-staffed is typically undue hardship as a matter of law, but employee's presentation of a volunteer to cover the shift mitigated that concern

# Accommodation Examples

- *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004)
  - P was member of church of body modification, requiring her to wear facial jewelry
  - Conflicted with employer's "appearance" policy
  - Employer-offered accommodation of wearing band aids to cover up piercings or using clear plastic retainers
  - Accommodation proposed held reasonable

# Accommodation Examples

- *Peterson v. Hewlett Packard.*, 358 F.3d 599 (9<sup>th</sup> Cir. 2004)
  - Peterson alleged religious discrimination after he was fired in wake of posting in his cubicle several biblical passages condemning homosexuality
    - Passages posted in large font/placed in plain view of his co-workers
    - Subsequently explained to HP that he had done so with intent to be “hurtful” and with hope that his gay/lesbian co-workers would see passages and “be saved”
  - HP sought to accommodate P’s religious beliefs by clarifying that company did not want him to change his opinions, but just wanted him to follow policy ... which included posting of diversity initiative and tolerance signs
  - Peterson refused, insisting that as long as company’s diversity signs were hung, he would post his religious beliefs in response

# Peterson v. Hewlett Packard (cont.)

- Ninth Circuit upheld termination
- Court found several key facts significant:
  - Company had explicitly stated that it did not require Peterson to change his personal beliefs, only his conduct
  - Company limited itself to regulating P's workplace conduct ... (i) HP had not objected to P's expression of anti-gay views in local newspaper in which he condemned both homosexuality and HP's diversity program; (ii) HP had not tried to prohibit P from parking his car in company lot even though he displayed bumper sticker stating, 'Sodomy is Not a Family Value.'
  - P's failure to accept any accommodation short of company removing diversity signs indicated that P sought to impose an "undue burden" on HP
- Held: "[A]n employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers."
  - "Title VII [does not] require an employer to accommodate an employee's desire to impose his religious beliefs upon his co-workers."

# Accommodation Examples

- *Matthews v. Wal-Mart Stores, Inc.*, 417 Fed. Appx. 552 (7th Cir. 2011)
  - Employer fired Apostolic Christian employee after she told a gay coworker that “gays are sinners condemned to hell”
  - Employer investigated and concluded that employee violated its harassment prevention policy
  - Employee sued, claiming a failure to accommodate her religious beliefs
  - Court **affirmed summary judgment for employer**
    - Employers need not relieve workers from complying with neutral workplace rules as a religious accommodation if it would create an undue hardship
    - Exposing employer to claims of allowing workplace harassment would have created an undue hardship

# Accommodation Examples

- *Buonanno v. AT&T Broadband*, 313 F. Supp.2d 1069 (D. Colo. 2004)
  - Devout Christian employee fired for refusing to sign employer's diversity statement, which stated that employees were "charged with the responsibility to fully recognize, respect and value the differences among all of us"
  - Rather than sign statement, P wrote letter affirming he would not discriminate against or harass any person, and he would comply with principles of diversity policy except to the extent it required him to "value" behaviors that are condemned by his religion
  - Court ruled in favor of P
    - Found no undue hardship, opining that employer could have met its legitimate diversity goals **without requiring the employee to repudiate his beliefs**

# Accommodation Examples

- *Patterson v. Walgreen Co, No. 16-16923 (11th Cir., Mar. 9, 2018)*
  - P, a Seventh-day Adventist, fired after refusing to work on the religion's Sabbath (runs from Friday sundown to Saturday sundown)
  - P told employer when hired he could not work on the Sabbath
  - Walgreens previously allowed P to change shifts, and offered him chance to have other employment opportunities that would help with possible religious scheduling conflicts
  - P refused these accommodations and ultimately missed an emergency training shift
  - Evidence also showed business demands made it impossible for Walgreens to accommodate P's scheduling requests

# Accommodation Examples: Patterson, cont'd

- Summary judgment upheld in favor of employer
  - Key language from the Court's holding:
    - “Because of his refusal to ever work on his Sabbath and his refusal to look for another position at Walgreens that would make it more likely that his unavailability could be accommodated, he was suspended and then terminated”
    - “The evidence does not even suggest that Walgreens acted with a retaliatory animus in firing [P]”
    - “[P] cannot turn down Walgreens’ reasonable accommodations and then claim retaliation when it fires him for unwillingness to use those accommodations”

# EEOC on Accommodation

- EEOC has taken hard stance on employers' duty to accommodate religious expression, even if it means loss of customers or business
- According to EEOC guidance:

**11. What if co-workers complain about an employee being granted an accommodation?**

*Although religious accommodations that infringe on co-workers' ability to perform their duties or subject co-workers to a hostile work environment will generally constitute undue hardship, general disgruntlement, resentment, or jealousy of co-workers will not. Undue hardship requires ... evidence that the accommodation would actually infringe on the rights of co-workers or cause disruption of work.*

[http://www.eeoc.gov/policy/docs/qanda\\_religion.html](http://www.eeoc.gov/policy/docs/qanda_religion.html)

# EEOC Guidance, Cont.

## 14. What if an employee objects on religious grounds to an employer-sponsored program?

[A]n employer is required to excuse an employee from compulsory personal or professional development training that conflicts with the employee's sincerely held religious beliefs or practices, unless doing so would pose an undue hardship. ***It would be an undue hardship to excuse an employee from training, for example, where the training provides information on how to perform the job, or how to comply with equal employment opportunity obligations, or on other workplace policies, procedures, or legal requirements.***

[http://www.eeoc.gov/policy/docs/qanda\\_religion.html](http://www.eeoc.gov/policy/docs/qanda_religion.html)

# Lessons to be Learned

- These decisions serve as lesson to employers not to take rigid approach to achieving diversity goals
  - Employers should focus company policies on regulation of overt hostile conduct rather than on policing employees' passive objections, thoughts or values
  - Religious beliefs should be accommodated where they do not overtly challenge an employer's diversity goals

# The *Abercrombie* Decision

- *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028 (2015)
- **Most important religious discrimination case in years** ... relates to employer best practices with respect to hiring, firing, and notice
- Key Facts
  - 17-year old job Muslim applicant sought to work at Abercrombie in Tulsa, OK
  - During interview, wore a hijab (headscarf), but subject of religion was not broached, nor was any accommodation requested
  - After interview, hiring manager in Tulsa presented question to district manager of whether headscarf was “appropriate” based on Abercrombie’s now-defunct “look policy”
  - District manager stated headscarf violated policy and recommended applicant not be hired
  - Hiring manager in Tulsa “assumed” **but did not confirm** that applicant wore headscarf for religious reasons

# The *Abercrombie* Decision, cont.

- Held 8-1 that Abercrombie violated Title VII in its hiring decision
- Keys from holding:
  - Title VII requires only that P show that need for a religious accommodation was a **motivating factor** in employer's/prospective employer's adverse decision
  - **Actual notice** of employee/applicant's need for religious accommodation **not required**
  - Applicant/employee need not specifically request an accommodation
  - Even if employer has **no more than "unsubstantiated suspicion"** of applicant/employee's religious beliefs or practices, employer violates Title VII **where its action is motivated by desire to avoid a potential accommodation**
  - Employer may not make an applicant's religious belief or practice, **confirmed or otherwise**, a factor in employment decisions

# After *Abercrombie*

- *Nobach v. Woodland Vill. Nursing Ctr., Inc.* 799 F.3d 374 (5th Cir. 2015)
  - Nursing home aide fired after refusing to pray the Rosary with patient because it conflicted with her religious beliefs as a Jehovah's Witness
  - Employer **admitted** that P's refusal to pray the Rosary **was a factor** in her discharge, but ...
  - Using SC's analysis in *Abercrombie*, ***Court ruled in favor of employer*** on per-se discrimination grounds

## *Nobach, cont...*

- 5th Cir. Found no evidence that anyone involved with P's termination suspected her refusal to pray Rosary was “**because of**” a religious practice
  - Rather, Court found the termination was due to perceived insubordination by Plaintiff in refusing supervisor's order to pray Rosary with resident
  - Importantly, P did not broach religious nature of refusal to pray the Rosary with employer/supervisor until after she was fired
- Perplexing holding in light of Abercrombie's expanding notice requirements under Title VII and seeming implausibility that—during firing process—employer did not question P's refusal to engage in highly-religious practice (i.e., pray Rosary)

# Lessons Post *Abercrombie*

- Communication among employers and employees paramount importance, where employer has grounds to suspect need for accommodation
- Employers should NOT look to the *Nobach* decision as a reprieve from *Abercrombie*'s expansion of what constitutes employer 'notice' of employee's need for accommodation
- Unwise to rely on "timing" defense of *Nobach*, and rash decisions without dialogue should be avoided at all costs—especially when employee religious beliefs or practices may be implicated

# Faith-Based Businesses?

- Employers may affirm their faith in business objectives
- The law “does not, and could not, require individual employers to abandon their religion.”
  - *EEOC v. Townley Eng'g. & Mfg. Co.*, 859 F.2d 610, 621 (9th Cir. 1988)
- Family-owned corporations can base health-care policy decisions on religious convictions of owners
  - *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).
- Employers improve chances of establishing religious-liberty defense by including statements of faith and/or religious purpose in company bylaws or policies

# Faith-Based Businesses?

- **Cautions:**
  - Employers **must not** condition employment, benefits, or advancements on employee's agreement with or acquiescence to employer's religious beliefs
  - Employers must not take any adverse employment actions against employees for refusing to agree with employer's religious beliefs
  - In expressing their own beliefs, employers must take care not to create hostile work environment for those who do not share such beliefs
  - Be **ready to accommodate** employee's objections to religious speech by employer

# Best Practices For Employers

- Employers may restrict religious expression where expression violates law or company policy
- Company policies prohibiting harassment or discrimination should be clear and explicit
- Company policies should seek to regulate overt, hostile conduct, not thoughts, values or beliefs
- Employers should approach requests for religious accommodation with some flexibility by exploring ways to accommodate religious expression without retreating from company policies