

2013 Mid Year Seminar
Personnel Section Work Shop
April 14, 2013

Accommodation in the Public Workplace

Religious Accommodation

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IMLA 2013 Mid Year Seminar – Personnel Section Work Shop
Accommodation in the Public Workplace: Religious Accommodation
By Daniel D. Crean

According to the EEOC[1], its receipt of religion-based charges under Title VII more than doubled between 1997 and 2012; while a substantial number of cases were found to have no reasonable cause, during this period reasonable cause cases went from 95 to 300 and monetary benefits awarded (not including litigation) rose from $2.2 million to $9.9 million.

I. Title VII Legal Structure and Overview. According to the U.S. Equal Opportunity Commission (EEOC), federal law[2] addresses religion in the workplace in several respects[3]:

> *Religious Discrimination.* Religious discrimination involves treating a person (an applicant or employee) unfavorably because of his or her religious beliefs. The law protects not only people who belong to traditional, organized religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, but also others who have sincerely held religious, ethical or moral beliefs. Religious discrimination can also involve treating someone differently because that person is married to (or associated with) an individual of a particular religion or because of his or her connection with a religious organization or group.
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> *Religious Discrimination & Work Situations.* The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.
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> *Religious Discrimination & Harassment.* It is illegal to harass a person because of his or her religion. Harassment can include, for example, offensive remarks about a person's religious beliefs or practices. Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that aren't very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted). The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.
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> *Religious Discrimination and Segregation.* Title VII also prohibits workplace or job segregation based on religion (including religious garb and grooming practices), such as assigning an employee to a non-customer contact position because of actual or feared customer preference.

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[1] See http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm.
[2] Title VII, Civil Rights Act of 1967, codified beginning at 42 U.S.C. §2000e. See also see also 29 C.F.R. §l605. In 1972, the Act was amended to include section 2000e(j), which imposed the religious accommodation obligation.
[3] The following description of religion and the workplace under federal antidiscrimination law is taken from the EEOC website at: http://www.eeoc.gov/laws/types/religion.cfm.

Religious Discrimination & Reasonable Accommodation. The law requires an employer or other covered entity to reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause more than a minimal burden on the operations of the employer's business. This means an employer may be required to make reasonable adjustments to the work environment that will allow an employee to practice his or her religion. Examples of some common religious accommodations include flexible scheduling, voluntary shift substitutions or swaps, job reassignments, and modifications to workplace policies or practices.

Religious Accommodation/Dress & Grooming Policies. Unless it would be an undue hardship on the employer's operation of its business, an employer must reasonably accommodate an employee's religious beliefs or practices. This applies not only to schedule changes or leave for religious observances, but also to such things as dress or grooming practices that an employee has for religious reasons. These might include, for example, wearing particular head coverings or other religious dress (such as a Jewish yarmulke or a Muslim headscarf), or wearing certain hairstyles or facial hair (such as Rastafarian dreadlocks or Sikh uncut hair and beard). It also includes an employee's observance of a religious prohibition against wearing certain garments (such as pants or miniskirts). When an employee or applicant needs a dress or grooming accommodation for religious reasons, he should notify the employer that he needs such an accommodation for religious reasons. If the employer reasonably needs more information, the employer and the employee should engage in an interactive process to discuss the request. If it would not pose an undue hardship, the employer must grant the accommodation.

Religious Discrimination & Reasonable Accommodation & Undue Hardship. An employer does not have to accommodate an employee's religious beliefs or practices if doing so would cause undue hardship to the employer. An accommodation may cause undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work.

Religious Discrimination And Employment Policies/Practices. An employee cannot be forced to participate (or not participate) in a religious activity as a condition of employment.

This portion of the 2013 IMLA Mid-year Personnel Section workshop focuses on religious discrimination and accommodation. While accommodation is the focus, it must be remembered that the components of the law against discrimination are interconnecting and underscore the primary purpose of the law, to prevent and remedy discrimination based on prohibited criteria. The law's requirements as to accommodating religious belief (or non-belief) in the workplace, as listed in the words of the EEOC above, is for an employer to "reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause more than a minimal burden on the operations of the employer's business."

The local government workplace, being construed as an arm of the state, also is subject to freedom of religion and equal protection doctrines as developed and applied over time.[4] As religious accommodation under Title VII largely mirrors constitutional issues, this paper focuses on those issues and concerns.

The touchstone of the accommodation requirement according to the EEOC is "any adjustment to the work environment that will allow the employee to practice his religion. Flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers are examples of accommodating an employee's religious beliefs."

Thus, again according to the EEOC, unless the employer can show that not doing so would cause an undue hardship. employers generally should not:

- Schedule examinations or other selection activities in conflict with a current or prospective employee's religious needs;
- Inquire about an applicant's future availability at certain times;
- Maintain a restrictive dress code; or
- Refuse to allow observance of a Sabbath or religious holiday.

The EEOC describes situations involving undue hardship as being exemplified by an employer, when asked to accommodate an applicant's or employee's religious practices , demonstrating that allowing such practices would:

- Require more than ordinary administrative costs;
- Diminish efficiency in other jobs;
- Infringe on other employees' job rights or benefits;
- Impair workplace safety; or
- Cause co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work.

An employer also may not have to provide a proposed accommodation if it would conflict with another law or regulation. Undue hardship also may be shown if the request for an accommodation violates the terms of a collective bargaining agreement or job rights established through a seniority system. For example:

[4] The First Amendment religion and speech clauses ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech") protect individuals against restrictions imposed by the government, not by private entities, and therefore do not apply to rules imposed on private sector employees by their employers. The First Amendment, however, does protect private sector employers from government interference with their free exercise and speech rights. Moreover, government employees' religious expression is protected by both the First Amendment and Title VII. See *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* (Aug. 14, 1997) (available at http://clinton2.nara.gov/WH/New/html/19970819-3275.html). For example, a government employer may contend that granting a requested religious accommodation would pose an undue hardship because it would constitute government endorsement of religion in violation of the Establishment Clause of the First Amendment.

- An employee whose religious practices prohibit payment of union dues to a labor organization cannot be required to pay the dues, but may pay an equal sum to a charitable organization.

It also is unlawful to retaliate against an individual for opposing employment practices that discriminate based on religion or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

II. Regulatory Guidance. [All text in the following is included in the CFR text but the emphasis (**bold-face**) is not and has been added by the author.] These provisions relate to 29 CFR Part 1605, with some internal citations omitted.

§ 1605.1 "Religious" nature of a practice or belief. In most cases, whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the **Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.** This standard was developed in *United States* v. *Seeger,* 380 U.S. 163 (1965) and *Welsh* v. *United States,* 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions. **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 or prospective employee.** The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in section 701(j), 42 U.S.C. 2000e(j).

§ 1605.2 **Reasonable accommodation without undue hardship as required by section 701(j) of title VII of the Civil Rights Act of 1964.**

(c) *Reasonable accommodation.*

(1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A **refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result** from **each available alternative method of accommodation**. **A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship**. (2) When there is **more than one method of accommodation available** which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable **by examining**: (i) The alternatives for **accommodation considered** by the employer or labor organization; and (ii) The alternatives for **accommodation, if any, actually offered** to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when **there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities**.

. . . .

(d) *Alternatives for accommodating religious practices*.

(1) Employees and prospective employees **most frequently request an accommodation because their religious practices conflict with their work schedules**. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation. See, for example, the Commission's finding number (3) from its Hearings on Religious Discrimination, in appendix A to §§ 1605.2 and 1605.3. The principles expressed in these Guidelines apply as well to such requests for accommodation.

(i) *Voluntary Substitutes and "Swaps."* Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes **that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications.** Some means of doing this which employers and labor organizations should consider are**: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.**

(ii) *Flexible Scheduling.* One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should consider is the creation of a flexible work schedule for individuals requesting accommodation. The following list is an example of areas in which flexibility might be introduced:

flexible arrival and departure times;
floating or optional holidays;
flexible work breaks;
use of lunch time in exchange for early departure;
staggered work hours; and
permitting an employee to make up time lost due to the observance of religious practices.

(iii) *Lateral Transfer and Change of Job Assignments.* When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer.

(2) *Payment of Dues to a Labor Organization.* Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices do not

permit compliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.

(e) *Undue hardship.*

(1) *Cost.* An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require **"more than a *de minimis* cost."** The Commission will determine what constitutes "more than a *de minimis* cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the *Hardison* decision[5] to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison,* would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a *de minimis* cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(2) *Seniority Rights.* Undue hardship also would be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. *Hardison, supra (n.4),* 432 U.S. at 80. Arrangements for voluntary substitutes and swaps (see paragraph (d)(1)(i) of this section) do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Statute or these Guidelines precludes an employer and a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.

§ 1605.3 Selection practices.

(a) *Scheduling of tests or other selection procedures.* When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the user of the test should be aware that the principles

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[5] *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). According to a 1985 Law Review article, an "examination of the cases since 1977 suggests that courts typically use one of three different models of interest balancing to analyze the varied factual contexts in which religious accommodation issues are presented. One model balances the interests of the individual religious observer against those of the group in which he works. A second balances constitutional concerns of free exercise of religion against the first amendment's vigorous prohibition of the establishment of religion. The third model balances the religious interests of the employee against the business interests of the employer." Sara L. Silbiger, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since Trains World Airlines v. Hardison*, 53 Fordham L. Rev. 839 (1985). Available at: http://ir.lawnet.fordham.edu/flr/vol53/iss4/5. (Internal citations omitted.)

enunciated in these guidelines apply and that it has an obligation to accommodate such employee or prospective employee unless undue hardship would result.

(b) Inquiries which determine an applicant's availability to work during an employer's scheduled working hours.

(1) The **duty to accommodate pertains to prospective employees as well as current employees.** Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

(2) As a result of the oral and written testimony submitted at the Commission's Hearings on Religious Discrimination, discussions with representatives of organizations interested in the issue of religious discrimination, and the comments received from the public on these Guidelines as proposed, the Commission has concluded that **the use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on the employment opportunities of persons with certain religious practices.** The use of such inquiries will, therefore, be considered to **violate title VII unless the employer can show that it:** (i) Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for the same religious practices; or (ii) Was otherwise justified by business necessity. Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest and which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these Guidelines, whether an accommodation is possible. This type of inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of the usually small number of applicants who require an accommodation.

(3) The **Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when**: (i) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification; and (ii) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.

III. Rules Governing Municipal Employment. In addition to Title VII, as briefly noted above, public employees can seek religious accommodations under the First Amendment. The First Amendment's free exercise clause may require a public employer to accommodate an

employee's religious observance or practice. If an employer adversely treats religiously-motivated conduct compared to similar secular conduct, it can justify its actions only by demonstrating a narrow and compelling interest. Demonstrating that level of interest may be significantly more difficult than establishing undue burden under Title VII. Thus, the Third Circuit invalidated a police department policy prohibiting officers from wearing beards for religious reasons, but allowing beards for medical reasons.[6]

Additionally, approximately twenty[7] states protect, either by statute or court decision, religious interests so as to require the government to demonstrate a narrow and compelling interest where a religious observance or practice is substantially burdened by a law, rule or practice. For the purposes of these laws, it is irrelevant whether or not the law, rule or practice is general in nature or neutral towards religion. Though the scope and applicability of some of these laws to public employment may not be fully developed, they may provide another avenue for public employees to seek religious accommodations.

The First Amendment's free speech clause also may require a public employer to accommodate an employee's religious expression. To be protected by the free speech clause, the expression must not be made pursuant to the employee's official duties. Furthermore, the employee must demonstrate that his or her expression is a matter of legitimate public concern, and the employee's interest in commenting on the matter must outweigh the employer's interests in operating efficiently and effectively.[8] Though the law is largely in a developing state in this area, it is safe to say that most reviewing courts will apply analysis similar to the traditional first amendment speech analysis. A converse of protection for exercising free speech is the freedom to be protected from imposition of views of others.

IV. Harassment and Retaliation. Religious harassment is treated in a similar manner as sexual harassment. Thus, there are two types of harassment: hostile environment and *quid pro quo*. Employers are generally held to being liable to harassment when they knew or should have known it occurred or where they did not take reasonable action to prevent or stop harassment from occurring. The exception, like a situation involving sexual harassment, may impose strict liability upon an employer where the harassment is by a supervisor and has tangible job consequences.

Retaliation, in a similar vein, is a growing fertile area for employer liability. As is the case with other forms of discrimination, retaliation provisions of the law forbid an employer from "discriminat[ing] against" an employee or job applicant because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation.

An employer retaliates against an employee if, because the employee engaged in "protected activity," (such as opposing, complaining about, or testifying about discrimination)

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[6] *Fraternal Order of Police Newark Lodge No. 12; Faruq Abdul-Aziz; Shakoor Mustafa v. City of Newark*, 170 F.3d 359 (3d Cir., 1999).

[7] See *Religious Accommodation in the Workplace: Your Rights and Obligations, supra, n. 10.*

[8] *Pickering v. Board of Education of Township High School Dist.* 205, 391 U.S. 563 (1968); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); and other cases encompassed within public employee free speech doctrine.

the employer took an adverse employment action against the employee. The importance of retaliation doctrine is notable due to the rapid rise in retaliation charges. Over 37% of all EEOC filings contain a retaliation charge, and retaliation charges are the fastest growing category of complaint. The U.S. Supreme Court's 2006 *Burlington Northern v White*[9] decision makes it even more likely that more retaliation charges will be filed (may succeed) because it expands the kinds of actions that will be counted as retaliation.

V. Selected Court and Administrative Rulings.[10]

Nature of Accommodation Required. The employer is not mandated to provide the specific accommodation requested by the employee. As long as the employer has reasonably accommodated an employee's religious needs, the employer need not consider the employee's alternative suggested accommodations even if the employee's preferred accommodation would not cause undue hardship to the employer.[11]

An employer is not required to provide an accommodation that causes it an undue hardship. The U.S. Supreme Court has ruled that this means that an employer need not incur more than minimal costs in order to accommodate an employee's religious practices.[12] The EEOC's interpretation of this requirement is summarized in part I, *supra*.

Although the law is still evolving regarding employee objections to diversity programs on religious views, an employer may have to accommodate the objecting employee's religious point of view, but not to the extent that it causes the employer an undue hardship. As in a "typical" accommodation request, employers are obligated to (1) try in good faith to resolve the conflict between the employee's religious needs and the employer's needs; and, where an accommodation cannot be granted, (2) identify an actual, minimal monetary or administrative expense.[13]

In addition to Title VII, public employees can seek religious accommodations under the First Amendment and other state laws. The First Amendment's free exercise clause may require a public employer to accommodate an employee's religious observance or practice. If the employer adversely treats religiously-motivated conduct compared to similar secular conduct, it can justify its actions only by demonstrating a narrow and compelling interest.[14]

Though many more decisions could be reviewed and cited, readers are referred to the ADL article included in the materials for this work shop.

VI. Sample Situations. (These are derived from the Anti-Defamation League, ***www.adl.org***, and are used with permission.[15])

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[9] 548 U.S. 53 (200).

[10] Some of these rulings are described in the separate document included in the materials for this workshop, *Religious Accommodation in the Workplace: Your Rights and Obligations*, published by the Anti-Defamation League and included with permission.

[11] *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986).

[12] *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977), *supra,* n. 5.

[13] See, e.g, *Buonanno v. AT&T Broadband, LLC,* 313 F.Supp.2d 1069, 1083 (D. Colo. 2004); and *Peterson v Hewlett-Packard*, 358 F.3d 599 (9th Cir. 2005).

[14] See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993); *Rex Shrum v. City of Coweta,* 449 F.3d 1132 (10th Cir. 2006); *FOP Newark Lodge No. 12 v. City of Newark*, supra, n. 6.

[15] See n. 8, *supra*.

1. A shipping company refused to hire a Jewish man as a driver because of his beard, which he wears for religious purposes. The company required him to either shave his beard or apply for an "inside," lower paying position that would not have contact with the public.

Title VII of the Civil Rights Act of 1964 requires employers to make reasonable accommodations to employees' and applicants' sincerely held religious beliefs as long as this does not pose an undue hardship. If the company cannot show why a beard is a hardship, it must hire the man as a driver. Notably, the company may not argue that its customers would prefer non-bearded drivers as "customer preference" is not a valid basis for a hardship.

2. A restaurant chain fires a server because he has small, quarter-inch wide ring of tattoos on his wrist. He wears these tattoos as a part of his sincerely held belief that his faith, the Kemetic religion, requires them. Once he explained his religion to management, he was fired. At a corporate meeting, management stated that the company has "Christian" values and that the company seeks out "that all-American kid" from the suburbs for its server positions. The restaurant maintained that any change to its dress code, including prohibitions on tattoos, would detract from its "wholesome image," and would thus be an undue hardship.

An employer is required to support its claims of undue hardship with more than hypothetical hardships based on unproven assumptions about image. Moreover, customer preference is not a legitimate reason for not accommodating a religious need.

3. An employer of a particular faith requires her employees to read passages from her preferred religious text out loud at company meetings, offers paid days off to attend religious gatherings, and works closely to help advance the careers those employees who adopt her faith.

An employee who refuses to participate in such activity must not be penalized. An employer is not permitted to treat acceptance of religion or participation in religious rituals as a condition of employment, including advancing the careers of adherents or providing benefits not open to non-adherents, such as paid days off.

4. A co-worker occasionally teases a Muslim employee about her *hijab* (headscarf). Although the Muslim employee is offended and tells her colleague to stop, she continues to work productively and does not report it because the company has no reporting process in place. Later, a manager begins to constantly criticize her for wearing the *hijab*, and, as a consequence of his disapproval of her wearing it, moves her into a lower-paying back office position. In addition, in a fit of anger, he grabs at the *hijab* and tears it and knocks the employee down to the floor.

The company is probably not liable for a hostile work environment on the basis of the co-worker's actions. The harassment was neither severe or pervasive and did not effect her terms and conditions of employment. The manager's actions probably give rise to a hostile work environment. The constant criticism plus the physical assault are both likely to meet the "severe or pervasive" test. Moreover, there was a clear adverse employment action (the move to the back office). The employer will not be able to avoid liability because there was an adverse employment action and there was no reporting mechanism.

5. A co-worker refuses to sign a workplace pledge concerning tolerance of differences because he believes it is immoral and against God's word to tolerate homosexuals. Her manager orders him to sign it and he refuses. He fires him on the spot.

The employer has an obligation to determine whether his refusal to sign the pledge could be accommodated. By immediately firing him, the employer failed to determine if there was an accommodation available.

6. An employee had a religious belief that required her to wear an anti-abortion button that showed a color photograph of an eighteen to twenty-week old fetus. The button caused disruptions in the workplace, and the employee's co-workers complained about the button. In response, the employer offered the employee three accommodations: (1) wear the button only in her cubicle; (2) cover the button while at work; or (3) wear a different button with the same message but without the photograph. She refused these accommodations and was terminated.

Title VII does not require an employer to allow an employee to impose her religious views on others. The employer is only required to reasonably accommodate an employee's religious views. In light of the workplace disruption and complaints, and given that the proposed accommodations allowed her religious expression, she was offered a reasonable accommodation and her refusal to accept them justified her termination.

VI. Practical Guidance: Reasonable Accommodation of Religious Beliefs and Practices {Again, adapted from the ADL guidance document.}

Reasonable Accommodation - Generally

- Employers should inform employees that they will make reasonable efforts to accommodate the employees' religious practices.
- Employers should train managers and supervisors on how to recognize religious accommodation requests from employees.
- Employers should consider developing internal procedures for processing religious accommodation requests.
- Employers should individually assess each request and avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate.
- Employers and employees should confer fully and promptly to the extent needed to share any necessary information about the employee's religious needs and the available accommodation options.
- An employer is not required to provide an employee's preferred accommodation if there is more than one effective alternative to choose from. An employer should, however, consider the employee's proposed method of accommodation, and if it is denied, explain to the employee why his proposed accommodation is not being granted.
- Managers and supervisors should be trained to consider alternative available accommodations if the particular accommodation requested would pose an undue hardship.
- When faced with a request for a religious accommodation which cannot be promptly implemented, an employer should consider offering alternative methods of accommodation on a temporary basis, while a permanent accommodation is being

explored. In this situation, an employer should also keep the employee apprised of the status of the employer's efforts to implement a permanent accommodation.

Undue Hardship – CBA & Seniority. As with all aspects of employee relations, employers can go beyond the requirements of the law and should be flexible in evaluating whether or not an accommodation is feasible.

- An employer should not assume that an accommodation will conflict with the terms of a seniority system or CBA without first checking if there are any exceptions for religious accommodation or other avenues to allow accommodation consistent with the seniority system or CBA.
- An employer should not automatically reject a request for religious accommodation just because the accommodation will interfere with the existing seniority system or terms of a CBA. Although an employer may not upset co-workers' settled expectations, an employer is free to seek a voluntary modification to a CBA in order to accommodate an employee's religious needs.
- Employers should train managers to be aware that, if the requested accommodation would violate the CBA or seniority system, they should confer with the employee to determine if an alternative accommodation is available.
- Employers should ensure that managers are aware that reasonable accommodation may require making exceptions to policies or procedures that are not part of a CBA or seniority system, where it would not infringe on other employees' legitimate expectations.

Schedule Changes

- Employers should work with employees who need an adjustment to their work schedule to accommodate their religious practices.
- Notwithstanding that the legal standard for undue hardship is "more than *de minimis*," employers may choose voluntarily to incur whatever additional operational or financial costs they deem appropriate to accommodate an employee's religious need for scheduling flexibility.
- Employers should consider adopting flexible leave and scheduling policies and procedures that may allow employees to meet their religious and other personal needs. Such policies can reduce individual requests for exceptions. For example, some employers have policies allowing alternative work schedules and/or a certain number of "floating" holidays for each employee. While such policies may not cover every eventuality and some individual accommodations still may be needed, the number of such individual accommodations may be substantially reduced.

Voluntary Substitutes or Swaps

- An employer should facilitate and encourage voluntary substitutions and swaps with 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.

Change of Job Assignments and Lateral Transfers

- An employer should consider a lateral transfer when no accommodation which would keep the employee in his or her position is possible absent undue hardship. However, an employer should resort to transfer, whether lateral or otherwise, only after fully exploring accommodations that would permit the employee to remain in his position.
- Where a lateral transfer is unavailable, an employer should not assume that an employee would not be interested in a lower-paying position if that position would enable the employee to abide by his or her religious beliefs. If there is no accommodation available that would permit the employee to remain in his current position or an equivalent one, the employer should offer the available position as an accommodation and permit the employee to decide whether or not to take it.

Modifying Workplace Practices, Policies, and Procedures

- Employers should make efforts to accommodate an employee's desire to wear a yarmulke, hijab, or other religious garb. If the employer is concerned about uniform appearance in a position which involves interaction with the public, it may be appropriate to consider whether the employee's religious views would permit him to resolve the religious conflict by, for example, wearing the item of religious garb in the company uniform color(s).
- Managers and employees should be trained not to engage in stereotyping based on religious dress and grooming practices and should not assume that atypical dress will create an undue hardship.
- Employers should be flexible and creative regarding work schedules, work duties, and selection procedures to the extent practicable.
- Employers should be sensitive to the risk of unintentionally pressuring or coercing employees to attend social gatherings after the employees have indicated a religious objection to attending.

Permitting Prayer, Proselytizing, and Other Forms of Religious Expression

- Employers should train managers to gauge the actual disruption posed by religious expression in the workplace, rather than merely speculating that disruption may result. Employers should also train managers to identify alternative accommodations that might be offered to avoid actual disruption (e.g., designating an unused or private location in the workplace where a prayer session or Bible study meeting can occur if it is disrupting other workers).
- Employers should incorporate into any anti-harassment training provided to managers and employees a discussion of religious expression, and the need for all employees to be sensitive to the beliefs or non-beliefs of others.