IMLA 2013 Mid-Year Seminar
Washington, DC
Personnel Section Workshop

Accommodation in the Public Workplace

Religious Accommodation

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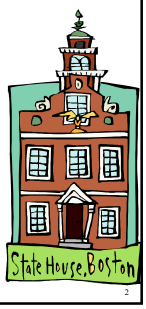
Legal Basis

- Title VII
- Federal and State Constitutions
- State Laws
  - The latter are briefly discussed in part III of paper and are mentioned only briefly in this presentation.





EEOC Comments

- What is religion that is protected?
- What is religious discrimination?
- What aspects of employment are covered?
- What is prohibited? Harassment, Segregation?
- What accommodation is required?
- Don't forget retaliation.

The Constitution

- The local government workplace, as an arm of the state, also is subject to freedom of religion and equal protection doctrines.
- Religious accommodation under Title VII largely mirrors constitutional issues, so paper focuses primarily on Title VII.
- See also *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



Focus here is accommodation



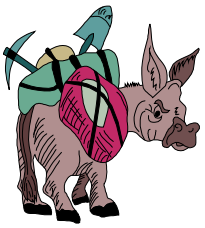
- Law is interconnecting, with purposes to
  - Eliminate discrimination and provide remedy.
- As to accommodating religious belief (or non-belief) in the workplace, per EEOC, an employer must
  - "reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause more than a minimal burden on the operations of the employer's business."

EEOC & Accommodation

- The touchstone of the accommodation requirement 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.

Undue Burden

- Accommodation required unless doing so would cause more than a minimal burden on the operations of the employer's business
  - Question of fact
  - More than "de minimus"



EEOC Examples of "Don'ts"

- 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.

EEOC View of Hardship

- Require more than ordinary administrative costs;
- Diminish efficiency in other jobs;
- Infringe on other employees' job rights or benefits;
- Impair workplace safety;
- Cause co-worker(s) to carry accommodated employee's share of potentially hazardous or burdensome work;
- Conflict with other law or regulation; or
- Violate CBA or seniority rule.

29 CFR §1605 Regulatory Guidance

- 1605.1 Religious nature
- 1605.2 Reasonable accommodation
  - Need not be only what employee seeks if there is more than one way to accommodate
  - Interactive discussion as with other EEOC matters
  - Examples – Employees and Prospective employees
    - Voluntary substitute/swap – more than just "allow"
    - Flexible scheduling
    - Lateral transfer/change of job assignments
    - Union dues
  - Undue hardship
- 1605.3 Selection practices

ADL Workplace Scenario #1

- A local government's public works department refuses to hire a Jewish man as a driver because of his beard, which he wears for religious purposes. The government requires him to either shave his beard or apply for an "inside," lower paying position that would not have contact with the public. The local government's populace by and large is very conservative and Christian.

ADL Scenario #1 Response

- 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 municipality cannot show why a bearded employee is a hardship, it must hire the man as a driver (if otherwise qualified).
- Notably, the municipality may not argue that its residents would prefer non-bearded drivers as this would be similar to "customer preference," which is not a valid basis for a hardship.

ADL Workplace Scenario #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 municipality 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 .

ADL Scenario #4 Response

- Co-worker's actions:
  - Municipality may not be liable for a hostile work based on co-worker's actions.
    - The harassment was neither severe or pervasive and did not affect her terms and conditions of employment.
- Manager's actions:
  - Probably rise to a hostile work environment.
    - Constant criticism plus physical assault both likely meet "severe or pervasive" test; and
  - Clear adverse employment action (move to back office).
    - Employer will not be able to avoid liability because there was supervisor action that had tangible adverse employment effect and there was no reporting mechanism.

ADL Workplace Scenario #5

- A municipality decides it will further its view of tolerance by requiring all employees to sign a workplace pledge concerning tolerance of differences, including gender preference.
- One employee refuses to sign because he believes it is immoral and against God's word to tolerate homosexuals.
- The manager orders him to sign it and he refuses. He fires him on the spot.

ADL Scenario #5 Response

- 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.
- Another consideration:

  If employer mandates pledge out of religious or faith conviction, could there be a First Amendment "establishment" issue.

ADL Workplace Scenario #6

- Employee has a religious belief that requires her to wear anti-abortion button that shows a color photograph of an eighteen to twenty-week old fetus. The button causes disruptions in the workplace, and co-workers complain about button.
- Employer offers employee 3 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.
- When she refused these accommodations, she is terminated.

ADL Scenario #6 Response

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

Final Thoughts/Practical Guidance

- Not just tolerance but making employees aware of opportunity for accommodation.
- Assistance in providing accommodation (e.g., notice boards for voluntary swaps).
- Awareness training for supervisors.
- Have procedures & policies in place now, not after a complaint arises.
- Act promptly, but not rashly, and only after considering alternatives and interactive discussion.
- Undue hardship cannot be imagined.

Questions or Comments?

Thank you.

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