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FEATURED CASE:

Fifth Circuit Rules on Title VII Religious Accommodations and Discrimination Post-*Groff*

***Hebrew v. Texas Department of Criminal Justice*, No. 22-20517 (5th Cir. Sept. 15, 2023).**

The Fifth Circuit Court of Appeals applied the recent Supreme Court's *Groff* decision to Title VII religious discrimination and failure to accommodate claims. Undue hardship, in the context of Title VII religious accommodations, requires the employer to prove that accommodating the employee's religious practice would impose a substantial burden on the overall operation of the business.

Background: Elimelech Shmi Hebrew, a devout follower of the Hebrew Nation religion who had vowed to keep his hair and beard long for over two decades, was fired as a correctional officer by the Texas Department of Criminal Justice (TDCJ) after refusing to violate his religious vow by complying with TDCJ's grooming policy. Hebrew filed a Title VII lawsuit alleging religious discrimination and failure to accommodate.

After being hired by the TDCJ in 2019, Hebrew was instructed to cut his hair and shave his beard in accordance with TDCJ's grooming policy, which prohibited male officers from having beards and long hair at the time. Hebrew, adhering to his religious vow, refused and was placed on administrative leave without pay while awaiting an accommodation decision to maintain his hair and beard. Two months later, the religious accommodation request was denied by TDCJ citing safety concerns related to gas mask use, security, and contraband detection. Hebrew continued to uphold his religious vow and was consequently terminated by TDCJ.

Appeal: Hebrew, appearing *pro se*, filed a Title VII suit, asserting religious discrimination and failure to accommodate claims in the district court. The trial court ultimately granted summary judgment in favor of the defendants, finding that TDCJ had legitimate safety reasons for his termination and that accommodating Hebrew's religious practices would pose an undue hardship. Hebrew appealed. The Fifth Circuit reversed and remanded the district court's entry of summary judgment.

Analysis: On appeal, Hebrew raised two key claims: failure to accommodate and religious discrimination. The district court made two critical findings that played a crucial role on appeal: Hebrew had established a prima facie case of religious discrimination, and TDCJ failed to accommodate his religious practice. Because the district court found Hebrew made a prima facie case of religious discrimination, the only question to resolve on the failure to accommodate question, was whether TDCJ has met its burden to show that granting Hebrew's requested accommodation (to keep his hair and beard) would place an undue hardship on TDCJ.

Failure to Accommodate Due to Undue Hardship

Title VII places a legal obligation on employers to accommodate "all aspects of religious observance and practice" of their employees unless doing so would result in an "undue hardship on the conduct of the employer's business" (42 U.S.C. § 2000e(j)). This statutory provision, along with the recent *Groff* decision, served as the core framework for the court's analysis when evaluating religious accommodation requests.

Prior to the *Groff* decision, several lower courts, including the district court that heard this case, had narrowly defined undue hardship as "any effort or cost that is 'more than... de minimis'". However, the Supreme Court, in *Groff*, rejected this interpretation, holding that an undue hardship, in the context of religious accommodations, requires the employer to prove that accommodating the employee's religious practice would impose a substantial burden on the overall operation of the business. In other words, the burden must be more than *de minimis*; it must rise to the level of significant additional costs or substantial expenditures for the employer. Furthermore, the Court emphasized that the assessment of undue hardship should consider all relevant factors in the case at hand, such as the nature of the accommodation, the size and resources of the employer, and the practical impact on business operations.

In light of *Groff*, the court analyzed whether TDCJ had met its burden of demonstrating that accommodating the correctional officer's religious practice of keeping long hair and a beard would result in undue hardship for the organization. The Fifth Circuit quickly disposed of TDJC's undue hardship claim. As a threshold issue, the court noted that TDCJ argued that the burden it would face was more than *de minimis,* the wrong legal standard considering *Groff.* Additionally, the court identified that TDJC failed to produce any evidence of costs for the accommodation, much less any substantial increased costs affecting the entire business. Finally, TDCJ did not present evidence that it had considered other accommodations. It is worth noting that this case was filed on September 30, 2022, well before the *Groff* decision. This timing is significant because the legal arguments and burden of proof in this case were framed prior to *Groff*, which subsequently clarified the standards for assessing religious accommodation claims.

TDCJ Counterarguments and Religious Discrimination

The court addressed three counterarguments raised by TDCJ regarding a religious accommodation request. First, TDCJ argued that granting this accommodation could lead to contraband concealment by Hebrew due to his long hair and beard. However, the court pointed out that TDCJ could easily address this concern by conducting searches, a practice they already employed, rendering this argument unpersuasive.

Second, TDCJ cited safety risks related to wearing gas masks with a beard. The court noted that the safety issue existed regardless of beard length, and TDCJ had already allowed quarter-inch beards for medical reasons, which undermined their safety argument.
Third, TDCJ claimed that long hair and a beard could be used against the individual in an attack. The court highlighted that TDCJ had exceptions for long hair for female officers, facing similar risks,

thus undermining the safety rationale. These exceptions did not provide neutral treatment to religious observers, as Title VII requires.

Finally, the court also addressed the religious discrimination claim under Title VII. The court cited *Abercrombie*, which established that an employer cannot consider an applicant's religious practice, whether confirmed or not, as a factor in employment decisions. *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 135 S. Ct. 2028, 192 L. Ed. 2d 35 (2015). This standard goes beyond the typical but-for causation and encompasses various religious discrimination claims. Even if an employer is unaware of the practice, so long as it takes the action “with the motive of avoiding the need for accommodating a religious practice,” Title VII is violated. *Id*.

Given this standard, the court quickly reached the conclusion that Hebrew's religious practice was the sole reason for his termination, constituting a clear violation of Title VII. The court again relied on the precedence in *Abercrombie*, which emphasized that religious practices must be accorded favored treatment, and that otherwise-neutral policies must yield to the necessity of accommodation.

Hebrew v. Texas Department of Criminal Justice

SHORT SUMMARIES:

6th Circuit – RLUIPA

Sometimes when you read a case you think "what were these guys thinking". At the same time having been a local government lawyer for more than 40 years, I recognize that courts often decide cases on only the facts that enable the result, so there's like more behind the scenes in this case than I will ever know. Essentially, as reported by the court the facts are these. The Township has a park in which it has a pleasant trail touting the pleasures of reading called the "Leopold the Lion Reading Trail" with fifteen stations along the path. A Catholic organization sought to build its own trail on its own 40 acre property to honor the stations of the cross – the Christian story depicting Christ's last days. The Township denied the organization's request asserting that the stations, etc. were structures under the zoning ordinance. The planned religious trail included an amphitheater for 95 and an altar, a mural and the 14 stations that were about the size of bird houses according to the court. The zoning ordinance defined a church as a structure within which people gathered to worship. Thus, despite the lower court ruling in favor of the Township, the 6th Circuit panel concluded this was not a structure and RLUIPA prohibited the denial of the zoning and an injunction should issue to prevent the Township from obstructing the trail. That the lower court ruled in favor of the Township suggests there may be more to this story than described by the panel, but it's not something I could figure out.

Catholic Healthcare v. Genoa Township

8th Circuit – Due Process – Employment – Constructive Discharge

A person hired by a city police department in South Dakota entered a contract that provided that she would remain an officer for 36 months or reimburse the city for its training expenses. The contract provided elsewhere that the city was not bound to continue the person in employment for the full 36 months or longer. Nevertheless, after being asked to resign (after being placed on a Brady/Giglio list by the local prosecutor), she sued for due process violations (among other causes of action). Pursuing her loss in the lower court on the due process claim, the 8th Circuit panel concluded that the State of South Dakota is an "at will" employment state and that it would require a contract to specifically modify that arrangement for a property right in employment under the contract to exist. Referring to the contract the court concluded that the Plaintiff could not establish a right in continued employment under the contract. As an aside, I'm pretty much dumbfounded by the pursuit of this appeal based on the language cited by the court as being the contract. If you write police employment contracts in at will states, you might consider this language.

LaCoe v. City of Sisseton