# IMLA ROCKS!

## Rock the Employment Law Update!: Religious Accommodation and Discrimination after Groth v. DeJoy


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WE WILL
ROCK
YOU

# DISCRIMINATION, ACCOMMODATION, AND RETALIATION LAW OVER THE SEVERAL YEARS



# EEOC 2020 Data

| |
|---|
| Retaliation: 37,632 (55.8 percent of all charges filed) |
| Disability: 24,324 (36.1 percent) |
| Race: 22,064 (32.7 percent) |
| Sex: 21,398 (31.7 percent) |
| Age: 14,183 (21.0 percent) |
| National Origin: 6,377 (9.5 percent) |
| Color: 3,562 (5.3 percent) |
| Religion: 2,404 (3.6 percent) |
| Equal Pay Act: 980 (1.5 percent) |
| Genetic Information: 440 (0.7 percent) |
| **Total Charges 67,448** |
| **Down each year over the last 4 years** |

# 2021 Data

| | |
|---|---|
| Total Charges | **61,331** |
| Race | 20,908 |
| | **34.10%** |
| Sex | 18,762 |
| | **30.60%** |
| National Origin | 6,213 |
| | **10.10%** |
| Religion | 2,111 |
| | **3.40%** |
| Color | 3,516 |
| | **5.70%** |
| Retaliation (All) | 34,332 |
| | **56.00%** |
| Retaliation (Title VII) | 25,121 |
| | **41.00%** |
| Age | 12,965 |
| | **21.10%** |
| Disability | 22,843 |
| | **37.20%** |
| EPA | 885 |
| | **1.40%** |
| GINA | 242 |
| | **0.40%** |




# Lies, Darn lies, and Statistics

- 2010 – 2012: Around 100K charges per year
- 2021: 61,331 charges; approximately 40% drop from 10 years earlier
- 11% drop in total charges from 2020
- Down in every category

# EEOC Discrimination Risks in Order Through 2021

- Disability
- Race
- Gender/Sex
- Age
- National Origin
- Color
- Religion
- EPA
- GINA




# Uh oh

2022 saw a 20% increase in charges

| | | |
|---|---|---|
| Total Charges | **73,485** | |
| Race | 20,992 | |
| | | **28.6%** |
| Sex | 19,805 | |
| | | **27%** |
| National Origin | 5,500 | |
| | | **7.5%** |
| Religion | 13,814 | |
| | | **18.8%** |
| Color | 4,088 | |
| | | **5.6%** |
| Retaliation (All) | 37,898 | |
| | | **51.6%** |
| Retaliation (Title VII) | 28,462 | |
| | | **38.7%** |
| Age | 11,500 | |
| | | **15.6%** |
| Disability | 25,004 | |
| | | **34%** |
| EPA | 955 | |
| | | **1.3%** |
| GINA | 444 | |
| | | **0.60%** |

# EEOC Discrimination Risks in Order From 2022

1. Disability
2. Race
3. Gender/Sex
4. Religion
5. Age
6. National Origin
7. Color
8. EPA
9. GINA

**RELIGION JUMPED FROM 7 TO 4**

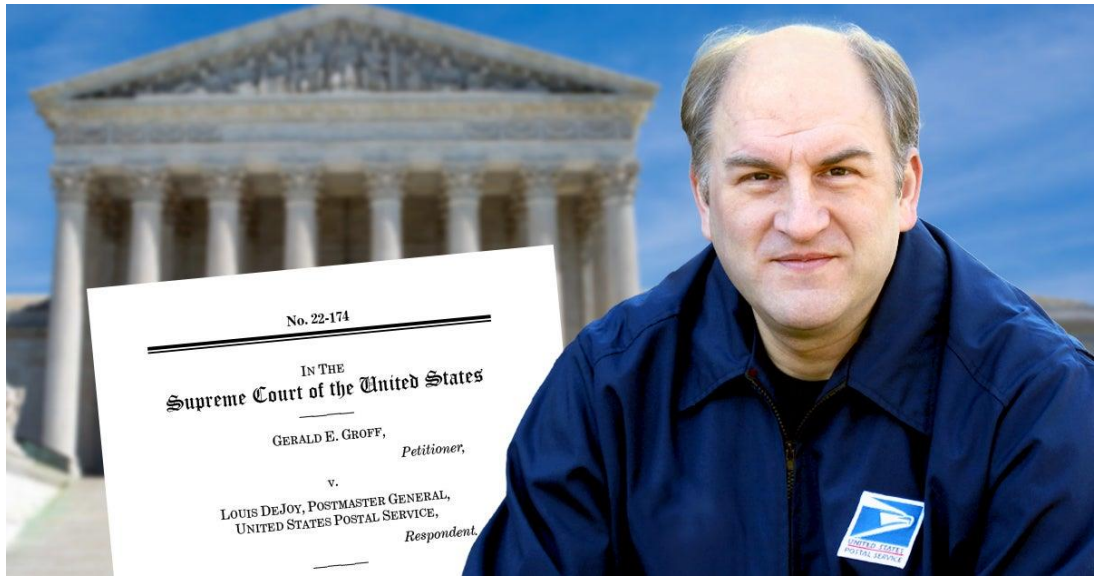
**FROM 3.4% OF ALL CHARGES IN 2021 TO 18.8% OF ALL CHARGES IN 2022**

**2,111 TO 13,814 = 654% INCREASE**


WELCOME
TO
HELL

# Groff v. DeJoy

- Let’s talk about the facts



# Groff v. DeJoy

- **HELD:**
- New standard for undue hardship.



# What is Undue Hardship?




- **<u>Undue Hardship</u>**: Shown when an accommodation would result in a ***substantial increase in costs in relation to the conduct of the particular business***.
- Rejected: “more than a de minimis cost” standard.

# Factors to Consider

- The undue hardship test must be applied by considering “all relevant factors in the case at hand, including the particular accommodations at issue and their ***practical impact*** in light of the ***nature, size, and operating cost*** of an employer.”



# What about others?



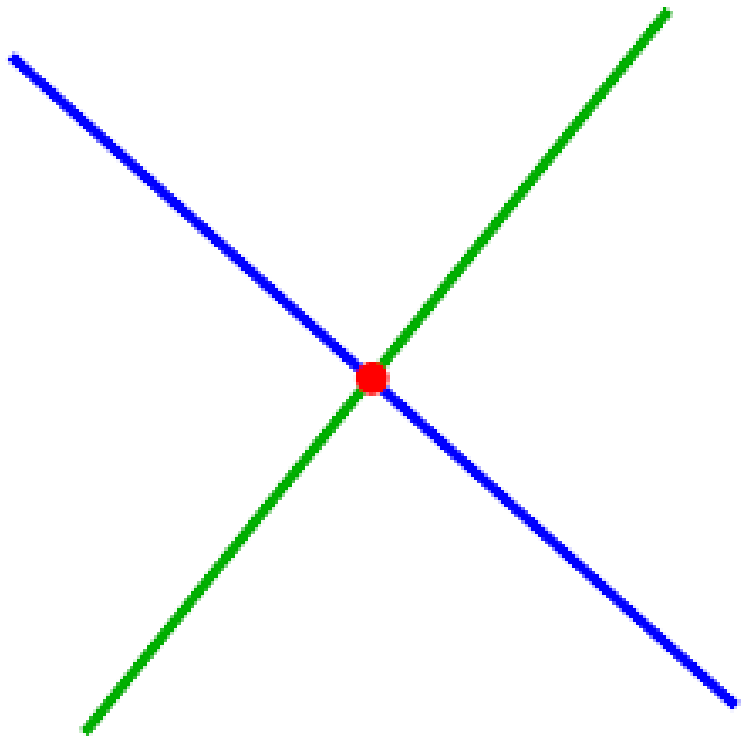

- The impact on others is only (legally) relevant to the extent those impacts go on to affect the ***conduct of the business***.
- Employee hostility toward the request cannot be considered a burden under the analysis.

# Nothing to See Here?

- Duty to **proactively** consider accommodations.
- It is not enough to review a particular request and determine it would impose an undue hardship. Employers must also consider whether other accommodations (not requested) are possible to accommodate the employee's religious beliefs.



# Religious vs. Disability Accommodations



- While the case is not expressly binding in ADA cases, how might the “undue hardship” analysis cross over?

# EEOC Guidance on Religious Discrimination – Employer Best Practices (Issued January 2021)

- "Employers should encourage managers to intervene proactively and discuss whether particular religious expression is welcome if the manager believes the expression is likely to be construed as unwelcome to a reasonable person."
  - Be careful now….

# EEOC Guidance on Religious Discrimination – Employer Best Practices (Issued January 2021)

- "Employers should allow religious expression among employees at least to the same extent that they allow other types of personal expression that are not harassing or disruptive to the operation of the business."
  - Again, be careful about what may be harassing or disruptive.

# EEOC Guidance on Religious Discrimination – Employer Best Practices (Issued January 2021)

- "Once an employer is on notice that religious expression by an employee is unwelcome to another employee, the employer should investigate and, if appropriate, take steps to ensure that the expression in question does not become sufficiently severe or pervasive to create a hostile work environment."
  - Be very, very careful….

# EEOC Guidance on Religious Discrimination – Employer Best Practices (Issued January 2021)

- "While supervisors are permitted to engage in certain religious expression, they should avoid expression that might – due to their supervisory authority – reasonably be perceived by subordinates as coercive, even when not so intended."
  - Be very, extraordinarily, massively, super, careful….

# Quiz Time



# Hypothetical from EEOC Guidance

- Rashid, a janitor, tells his employer on his first day of work that he practices Islam and will need to pray at several prescribed times during the workday in order to adhere to his religious practice of praying at five times each day, for several minutes, with hand washing beforehand. The employer objects because its written policy allows one fifteen-minute break in the middle of each morning and afternoon. Rashid's requested change in break schedule will not exceed the 30 minutes of total break time otherwise allotted, nor will it affect his ability to perform his duties or otherwise cause an undue hardship for his employer.
- Rashid is entitled to accommodation.

# Prior Hypo Similar to EEOC Lawsuit

The EEOC's lawsuit claimed that an employer discriminated against employees because they were Muslim, immigrants from Somalia, and Black, and denied Muslim employees the ability to pray as required by their religion, and that Muslim employees were harassed when they tried to pray during scheduled breaks or bathroom breaks.

The lawsuit alleged that Black, Somali, and Muslim employees were harassed on the job because of their race, religion and national origin. Among other things, employees regularly called Somali employees offensive names because of their race, national origin, and religion and that the employer tolerated offensive graffiti in restrooms at the facility, with racially harassing and obscene statements against Somalis, such as "Somalis are disgusting," "F*** Somalians," "F*** Muslims," and "N*****."

June 2021: $5.5M settlement, with decree that requires "clean, quiet, and appropriate locations other than bathrooms for employees' religious observances, including daily prayers, and must also allow employees to use locker rooms or other locations that do not pose a safety risk for observation of their religious practices."

# Hypothetical from EEOC Guidance

- Jim agreed to take his employer's drug test but was terminated because he refused to sign the accompanying consent form. After his termination, Jim filed a charge alleging that the employer failed to accommodate his religious objection to swearing an oath. Until it received notice of the charge, the employer did not know that Jim's refusal to sign the form was based on his religious beliefs.
- Has the employer violated the law?
- Because the employer was not notified of the conflict at the time Jim refused to sign the form, or at any time prior to Jim's termination, it did not have an opportunity to offer to accommodate him. The employer has not violated Title VII.

# Recent 9th Cir. Case

**Brianna BOLDEN-HARDGE, Plaintiff-Appellant,**
**v.**
**OFFICE OF THE CALIFORNIA STATE CONTROLLER, et al., Defendants-Appellees.**

“This appeal concerns a state agency’s decision to revoke a job offer it had made to a candidate after she objected to swearing a government loyalty oath based on her religious beliefs as a Jehovah’s Witness. Although the district court nowhere doubted the sincerity of Plaintiff’s beliefs or that the state and its agencies make accommodations or exceptions to the oath in other cases, it dismissed her claims under Title VII of the Civil Rights Act of 1964, the First Amendment to the United States Constitution, and their state-law analogues.”

# Employee Wins



The 9th Circuit agreed that the oath could be understood as requiring government employees to place their allegiance to the federal and state Constitutions over their allegiance to God.



The court also found that the plaintiff had presented a *prima facie* case that the oath had a disparate impact based on religion under Title VII.



Undue hardship? State constitution requires the oath!

Court held that modification to oath would not violate the law.

# Hypothetical from EEOC Guidance

- Diane requests that her employer schedule her for “fewer hours” so that she can “attend church more frequently.” The employer denies the request because it is not clear what schedule Diane is requesting or whether the change is sought due to a religious belief or practice.
- While Diane’s request lacked sufficient detail for the employer to make a final decision, it was sufficient to constitute a religious accommodation request. Rather than denying the request outright, the employer should have obtained the information from Diane that it needed to make a decision. The employer could have inquired of Diane precisely what schedule change was sought and for what purpose, and how her current schedule conflicted with her religious practices or beliefs. Diane would then have had an obligation to provide sufficient information to permit her employer to make a reasonable assessment of whether her request was based on a sincerely held religious belief, the precise conflict that existed between her work schedule and church schedule, and whether granting an accommodation would pose an undue hardship on the employer’s business.

# Hypothetical from EEOC Guidance

- Rachel, who worked as a ticket agent at a sports arena, asked not to be scheduled for any Friday night or Saturday shifts, to permit her to observe the Jewish Sabbath from sunset on Friday through sunset on Saturday. The arena wanted to give Rachel this time off only every other week.
- The arena's proposed adjustment does not fully eliminate the religious conflict and therefore cannot be deemed a reasonable accommodation in the absence of a showing that giving Rachel the requested time off every week poses an undue hardship for the arena. If the arena makes that showing, it must still accommodate Rachel's religious practice to the extent it can without suffering an undue hardship, which could include granting some, but not all, Friday evenings and/or Saturdays off.

# Hypothetical from EEOC Guidance

- Tina, a newly hired part-time store cashier whose sincerely held religious belief is that she should refrain from work on Sunday as part of her Sabbath observance, asked her supervisor never to schedule her to work on Sundays.  Tina specifically asked to be scheduled to work Saturdays instead.  In response, her employer offered to allow her to work on Thursdays, which she found inconvenient because she takes a college class on that day.
- Even if Tina preferred a different schedule, the employer is not required to grant Tina’s preferred accommodation.

# Hypothetical from EEOC Guidance

- David wears long hair pursuant to his Native American religious beliefs. David applies for a job as a server at a restaurant which requires its male employees to wear their hair “short and neat,” in order to provide a certain image to its customers. When the restaurant manager informs David that if offered the position he will have to cut his hair, David explains that he keeps his hair long based on his religious beliefs and offers to wear it held up with a clip or under a hair net. The manager refuses this accommodation and denies David the position based on his long hair.
- Since the evidence indicated that David could have been accommodated, without undue hardship, by wearing his hair in a ponytail or held up with a clip, the employer will be liable for denial of reasonable accommodation and discriminatory failure to hire.

# Hypothetical from EEOC Guidance

- Patricia alleges she was terminated from her job as a steel mill laborer because of her religion (Pentecostal) after she notified her supervisor that her faith prohibits her from wearing pants, as required by the mill's dress code, and requested as an accommodation to be permitted to wear a skirt. Management contends that the dress code is essential to the safe and efficient operation of the mill and has evidence that it was imposed following several accidents in which skirts worn by employees were caught in the same type of mill machinery that Patricia operates.
- Because the evidence establishes that wearing pants is truly necessary for safety reasons, the accommodation requested by Patricia poses an undue hardship.

# Hypothetical from EEOC Guidance

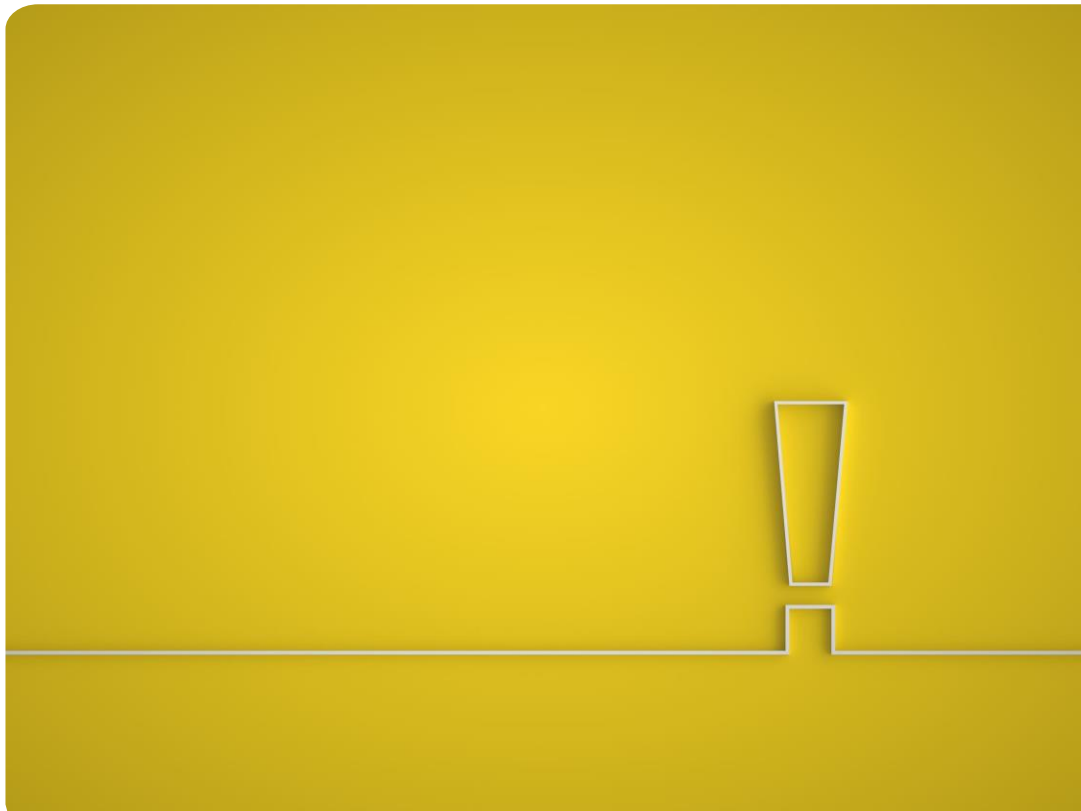
- Patrick is employed as a correctional officer at a state prison, and his brother William is employed as a grocery store manager. Both Patrick and William seek permission from their respective employers to wear a fez at work as an act of faith on a particular holy day as part of their religious expression. Both employers deny the request, citing a uniformly applied workplace policy prohibiting employees from wearing any type of head covering. The prison's policy is based on security concerns, supported by evidence, that head coverings may be used to conceal drugs, weapons, or other contraband, and may spark internal violence among prisoners. The grocery store's policy is based on a stated desire that all employees wear uniform clothing so that they can be readily identified by customers.
- If both brothers file EEOC charges challenging the denials of their accommodation requests, the EEOC likely will not find reasonable cause in Patrick's case because the prison's denial of his request was based on legitimate, evidence-based security considerations posed by the particular religious garb sought to be worn. The EEOC likely will find cause in William's case because there is no indication it would pose an undue hardship for the grocery store to modify its policy with respect to his request.

# Hypothetical from EEOC Guidance

- Harvinder, a Sikh, wears a small sheathed kirpan (religious article of faith resembling a knife) strapped and hidden underneath her clothing, as a symbol of her religious commitment to defend truth and moral values. When Harvinder's supervisor, Bill, learned about her kirpan from a coworker, he instructed Harvinder not to wear it at work because it violated the employer's policy against weapons in the workplace. Harvinder explained to Bill that her faith requires her to wear a kirpan in order to comply with the Sikh Code of Conduct and gave him literature explaining that the kirpan is a religious article of faith, not a weapon. She also showed him the kirpan, allowing him to see that it was no sharper than scissors, box cutters, cake knives, paper cutters, and other secular objects in the workplace. Nevertheless, Bill told her that she would be terminated if she continued to wear the kirpan at work.
- Absent evidence that allowing Harvinder to wear the kirpan would pose an undue hardship in the factual circumstances of this case, the employer is liable for denial of accommodation.

# Hypothetical from EEOC Guidance

- Susan and Roger are members of the same church and are both employed at XYZ Corporation. Susan works as an architect in a private office on an upper floor, where she occasionally interacts with coworkers, but not with clients. Roger is a security guard stationed at a desk in the front lobby of the XYZ building through which all employees, clients, and other visitors must enter. At a recent service at Susan and Roger's church, the minister distributed posters with the message "Jesus Saves!" and encouraged parishioners to display the posters at their workplaces in order to "spread the word." Susan and Roger each display the poster on the wall above their respective workstations. XYZ orders both to remove the poster despite the fact that both explained that they felt a religious obligation to display it, and despite the fact that there have been no complaints from coworkers or clients.
- Susan and Roger file charges alleging denial of religious accommodation. The employer will probably be unable to show that allowing Susan to display a religious message in her personal workspace posed an undue hardship, unless there was evidence of disruption to the business or the workplace which resulted. By contrast, because Roger sits at the lobby desk and the poster is the first thing that visitors see upon entering the building, it would appear to represent XYZ's views and would therefore likely be shown to pose an undue hardship.



# Hypothetical from EEOC Guidance

- Helen, an employee in a mental health facility that served a religiously and ethnically diverse clientele, frequently spoke with clients about religious issues and shared religious tracts with them as a way to help solve their problems, despite being instructed not to do so. After clients complained, Helen's employer issued her a letter of reprimand stating that she should not promote her religious beliefs to clients and that she would be terminated if she persisted.
- Helen's belief in the need to evangelize to clients cannot be accommodated without undue hardship. The employer has the right to control speech that threatens to impede provision of effective and efficient services. Clients, especially in a mental health setting, may not understand that the religious message represents Helen's beliefs rather than the facility's view of the most beneficial treatment for the patient.

# Final Hypothetical from EEOC Guidance

- Employer XYZ holds an annual training for employees on a variety of personnel matters, including compliance with EEO laws and also XYZ's own internal anti-discrimination policy, which includes a prohibition on sexual orientation discrimination. Lucille asks to be excused from the portion of the training on sexual orientation discrimination because she believes that it "promotes the acceptance of homosexuality," which she sincerely believes is immoral and sinful based on her religion. The training does not tell employees to value different sexual orientations but simply discusses and reinforces laws and conduct rules requiring employees not to discriminate against or harass other employees based on sexual orientation and to treat one another professionally.
- Because an employer needs to make sure that its employees know about and comply with such laws and workplace rules, it would be an undue hardship for XYZ to excuse Lucille from the training.

# General Principles (From EEOC)

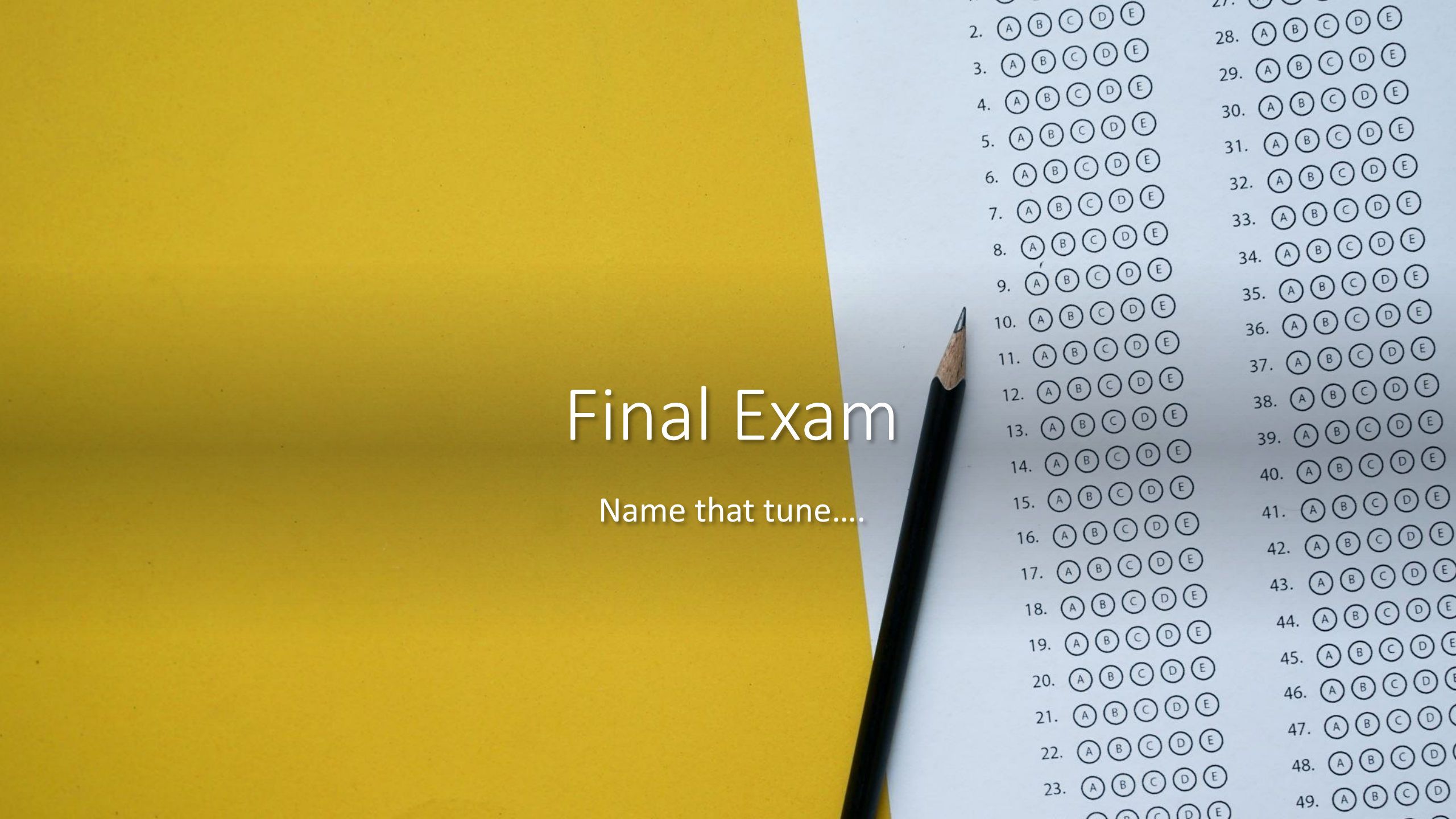
- Employers should inform employees and applicants that they will make reasonable efforts to accommodate religious practices.
- Employers should train managers and supervisors on how to recognize religious accommodation requests from employees.
- Employers should consider developing internal procedures for processing religious accommodation requests.  Where the employer relies on a staffing firm or other entity for any of its staffing needs, the employer and the staffing entity should coordinate in advance how they will handle accommodating applicants' or employees' religious beliefs or practices, consistent with these best practices.
- 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.

# General Principles (continued)

- 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 reasonable alternative. 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.

# Final Exam

Name that tune….



# CLASS DISMISSED!

