RELIGIOUS ACCOMMODATION IN THE WORKPLACE

by James M. Shaker*

A. Introduction

The "average" workplace in the United States has more diversity than probably any other country in the world. That diversity comes in many forms, including race, national and/or ethnic origin and faith. Issues specifically related to faith are not only the issues of discrimination of one's faith beliefs and accommodating those beliefs, when appropriate, but also the issues of accommodating personal appearance based on an individual's faith as well.

Because our workplace reflects such a diversity and the issue of faith has become much more mainstream within the past decade, many employers have had to address these issues not only with respect to the workplace but also with respect to others who come in contact with those at the workplace.

The following outlines, in a very brief fashion, the current law and provides a basis for considering any request by an employee for accommodation and/or any complaint by an employee based on discrimination.

B. Current Law

1. Federal Law

Title VII, 42 U.S.C. §§ 2000 *et seq.*, prohibits employers from discriminating against an employee based on race, gender, national origin, or religion. § 2000e-2(a)-(b). Title VII applies to employers that retain at least fifteen employees.

Title VII requires the employer to accommodate religious beliefs "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." § 2000e(j).

2. Washington State Law

RCW 49.60.180, or the Washington Law Against Discrimination ("WLAD"), prohibits employer discrimination based on "age, sex, marital status, sexual orientation, race, creed, color, national origin, or the presence of any sensory, mental, or physical

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disability or the use of a trained dog guide or service animal by a disabled person." "Creed" refers to religion: the American Heritage Dictionary of the English Language defines creed as "[a] formal statement of religious belief; confession of faith. . . . [or a]ny statement or system of belief, principles, or opinions."

Washington State discrimination laws are very similar to the Federal laws, so Washington courts generally look to Federal law for guidance.

However, the WLAD does vary from Title VII in several ways. First, the Washington State law qualifies as employers those entities with only eight employees as opposed to the Title VII fifteen employee requirement. Second, Federal law imposes an affirmative duty to accommodate for religious beliefs and practices whereas Washington law does not.

3. Oregon Law

Under OR ST 659A.030, an employer cannot discriminate based on "race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older . . . However, discrimination is not unlawful . . . if the discrimination results from a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business."

Oregon courts have treated OR ST 659A.030 as identical to Title VII [1]. As such, the analysis of a religious discrimination claim under Oregon law will be the same as a Title VII analysis.

C. Religious Discrimination Claims

Claims of religious harassment, disparate treatment, and failure to accommodate all arise under Title VII.

1. Religious Harassment

The criteria for showing religious harassment is the same as that for harassment based on gender or race. "A plaintiff asserting a Title VII claim under a hostile work environment theory must show (1) the existence of a hostile work environment to which the plaintiff was subjected, and (2) that the employer is liable for the harassment that caused the hostile environment to exist [2]." The Sixth Circuit requires a showing that (1) the employee belongs to a protected class, (2) the employee was subject to harassment, (3) the harassment was based on religion, (4) the harassment unreasonably affected the employee's work by creating an intimidating or hostile work environment, and (5) the employer is liable. (*Hafford v. Seidner*, 183 F.3d 506 (1999).)

A hostile work environment requires "persuasive and severe" harassment, and that the employee perceived the work environment to be hostile and that a reasonable person would also. A Federal District Court in California in 2001 required the work environment be objectively and subjectively hostile. [3] And the Washington Supreme Court has adopted that test. [4]

The Ninth Circuit considers certain factors in determining a hostile work environment, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' 'Simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to'" harassment [5].

2. Disparate Treatment

While similar to "failure to accommodate" claims, disparate treatment claims involve a different prima facie showing by the employee plaintiff. "[A] plaintiff must present evidence of 'actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such action was based upon . . .impermissible criterion.'" [6] The burden then shifts to the employer to demonstrate that the actions were based on a "legitimate, nondiscriminatory reason."

3. Failure to Accommodate

Claims of failure to accommodate arise when an employee alleges that an employer denied a reasonable request for accommodation in violation of Title VII. In addition to showing that Title VII applies, there are three elements that the employee must prove: (1) the employee has a sincerely held religious belief, the practice of which conflicts with employment duties; (2) the employee gave notice of the conflict and the need for accommodation; and (3) that the employer subjected, or threatened to subject, the employee to discriminatory treatment because of the inability to fulfill the employment requirements. [7]

Upon a prima facie showing, the employer has the burden to "prove that it made good faith efforts to accommodate the employee's religious beliefs and, if those efforts were unsuccessful, to demonstrate that it was unable reasonably to accommodate his beliefs without undue hardship." [8]

(a) Sincerely Held Religious Belief

While an employer can challenge whether a religious belief or practice is "sincerely held," typically the employer will not chose to do so. Under Title VII, "the term 'religion' includes all aspects of religious observance and practice, as well as

belief." § 2000e(j). The Equal Employment Opportunity Commission ("EEOC") includes as religion "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views," including atheism and other non-traditional beliefs. [9] Further, there is no requirement that the employee's religion or practices coincide with any recognized religious group.

The First Circuit has reasoned that it is important for an employer to question whether an employee's belief is sincerely held because "if the religious beliefs that apparently prompted a request are not sincerely held, there has been no showing of a religious observance or practice that conflicts with an employment requirement." [10]

(b) Notice

The employee must provide notice to the employer of the conflict between employment and the employee's religion. "[A]n employee need only inform his employer about his religious needs for the employer to understand the conflict between the employer's expectations and the employee's religious practices." *Lawson* at 804.

As the Seventh Circuit explained, "[i]t is difficult to see how an employer can be charged with discrimination on the basis of an employee's religion when he doesn't know the employee's religion (or lack thereof, which, as we have noted, is in the eyes of the law a form of religion)." [11]

(c) Discriminatory Treatment

Upon notice, an employer must provide "reasonable accommodation." ("We accordingly hold that an employer has met its obligation under § 701(j) when it demonstrates that it has offered a reasonable accommodation to the employee"). [12] An accommodation is not reasonable if it results in undue hardship on the employer. [13] In other words, the employer need not make accommodations that rise to an "undue hardship."

"As undue hardship is not defined within the language of Title VII, courts have had to determine it on a case-by-case basis." [14] However, the EEOC has provided guidance on what qualifies as an undue hardship in 29 C.F.R. § 1605.2(e). If an accommodation would require more than a *de minimus* cost, then the accommodation is an undue hardship. [15] What is *de minimus* is determined by considering "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." [16] In addition, "[u]ndue hardship would also 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." [17] Thus, an accommodation creates an undue hardship when it is too costly or when it forces a change in the seniority rights.

D. FAQ

1. Are there different standards for an employer that is or is affiliated with a religious group?

Yes. Title VII does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e(1).

In accordance with the above exception, a Washington State court upheld the discharge of a Muslim receptionist in *EEOC v. Presbyterian Ministries, Inc.*, 788 F.Supp. 1154, 1156 (1992). The Court reasoned that Presbyterian Ministries did not have to employ the receptionist, who had to wear a headdress in accordance with her religion, because the employer was religiously affiliated and thus able to rely on the Title VII exception. *Id.* It is important to note that this lawsuit was brought under the federal statute of Title VII. A similar suit may be decided differently now, fifteen years later, or if brought under the Washington State statute of WLAD.

2. What are legally acceptable forms of accommodations when an employee notifies the company of a conflict?

The EEOC has expressly approved of (1) voluntary substitutes, (2) flexible scheduling, and (3) lateral transfers. [18]

Voluntary substitutes with substantially similar qualifications is valid and "employers and labor organizations [should] facilitate the security of a voluntary substitute."[19] This includes taking action "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." [20]

Another reasonable accommodation is to provide flexibility in arrival and departure time, holidays, work breaks, use of lunch time in exchange for early departure, staggered work hours, and allowing time off for holidays in exchange for making-up that lost time later. [21]

As a last resort, an employee can be given a new job assignment or a lateral transfer. [22]

3. Does the employer have to accommodate unlawful conduct by an employee in the name of religious accommodation?

No. The Ninth Circuit has held that an employer does not have to: (1) permit an employee to display religious items in his cubicle where clients sit [23]; (2) allow an employee to discuss religion with clients or otherwise "create a danger of violations of the Establishment Clause," [24]; (3) continue to employ an employee who engaged in unlawful conduct such as sit-in strikes, trespass, or destruction of property [25]; (4) allow an employee to make anti-gay statements amounting to harassment of other employees [26]; or (5) "make extraordinary efforts to talk [an employee] out of leaving." [27]

4. Does the employer have to accommodate conduct that conflicts with company policy on diversity or tolerance?

No. In *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 608 (2004), the Ninth Circuit held that the employer would incur undue hardship if forced to permit an employee to hang anti-gay Bible verses on his cubicle. Distinguishing between harassment and merely "irritating or unwelcome" conduct, the Court explained that "an employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights." *Peterson* at 607.

5. Does an employer have to always accommodate religious holidays and days off?

No, if an accommodation would create an undue hardship on the "conduct of the business" or on co-workers, the employer does not have to accommodate the religious practice. [28] However, if shifting schedules to accommodate holidays would not result in a privilege for the religious employee nor impose more than a *de minimus* burden on co-workers, the employer must shift schedules to adjust for religious holidays.

If there is undue hardship as a result of accommodating for religious holidays, an employer does not have to provide accommodation. In *Ansonia Bd. of Educ*, teachers were granted three days annually for religious holidays. The teachers were not allowed to use accumulated sick days for religious observance. Mr. Philbrook, however, took off approximately six days for religious observance even after the school board denied his request for paid leave. The Supreme Court upheld the policy that required additional days off be taken as unpaid leave, reasoning that:

> In enacting § 701(j), Congress was understandably motivated by a desire to assure the individual additional opportunity to observe religious practices, but *it did not impose a duty on the employer to accommodate at all*

> *costs*. The provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work.

Ansonia Bd.. at 70 (emphasis added). Thus, under reasoning similar to the seniority rights cases, an employer need not accommodate requests that would create an undue hardship. Of course, "undue hardship requires more than proof of some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief. An employer would have to show . . . an actual imposition on co-workers or disruption of the work routine." [29]

6. Can an employer enforce a particular dress code?

Generally, yes. However, this is a complex area of law. For example, the First Circuit upheld dress codes requiring the cover-up or removal of religious based facial piercings in *Cloutier v. Costco*, 390 F.3d 126, 137 (2004). In *Costco*, the Court reasoned that dress codes "designed to appeal to customer preference or to promote a professional public image" are not only reasonable but very valuable to a company. However, in an unpublished decision, a Washington State court acknowledged *Costco* but disagreed, overruling a dress code requiring the cover-up of religious tattoos. In *Red Robin* [30], an employee was fired due to his failure to cover up religious tattoos. The Court held that the employer failed to demonstrate that allowing the particular religious tattoos to be visible would create undue hardship. The Court said the tattoos were small and in an archaic language, no customers had complained, and there was no evidence the tattoos adversely affected the family atmosphere of the restaurant.

This issue also arises with grooming standards. An Oregon court explained that "[g]rooming standards, when used as a pretext for discriminatory animus, can and do implicate Title VII. Similarly, grooming standards may implicate Title VII if connected to race or religion." [31] (upholding a "no-beard" policy for machinists because to permit a beard, even for religious reasons, would create an undue hardship due to safety).

E. Conclusion

As individuals have more freely and openly expressed their religious beliefs and practices in the workplace, employers have been put to task to ensure that those employees are not discriminated against because of those practices and are required to accommodate those religious beliefs where it does not cause undue hardship. Therefore, employers have had to be more sensitive to these issues, which include proper training within the workforce, as well as implementing policies and practices similar to those which most employers have implemented regarding other issues of

discrimination and harassment. An employer who understands the general guidelines of issues regarding religious discrimination and accommodation based on religious beliefs will be better prepared to address these issues when these issues are raised in the workplace.

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1. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1437 n.2 (9th Cir.1993).
2. *Freitag v. Ayers*, 468 F.3d 528, 539 (9th Cir.2006).
3. *Erdmann v. Tranquility Inc.*, 155 F.Supp.2d 1152, 1161 (N.D.Cal.2001) (requiring the work environment be objectively and subjectively hostile)
4. *Antonius v. King County*, 153 Wn.2d 256, 267, 103 P.3d 729 (2004) (stating the analysis applies in Washington state specifically).
5. *Dominguez-Curry*, 424 F.3d at 1034 (internal citations omitted).
6. *Bodett v. Coxcom*, 366 F.3d 736, 743 (9th Cir.2004) (citing *Gay v. Waiters' Union*, 694 F.2d 531, 538 (9th Cir.1982)).
7. *Lawson v. Wash.*, 296 F.3d 799, 804 (9th Cir.2002).
8. *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 614 (9th Cir.1988) (internal citation omitted).
9. 29 C.F.R. § 1605.1 (2004) (citing *U.S. v. Seeger*, 380 U.S. 163 (1965); *Welsch v. U.S.*, 398 U.S. 333 (1970)).
10. *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.2d 49, 56 (2002).
11. *Reed v. Great Lakes Cos., Inc.*, 330 F.3d 931, 934 (7th Cir.2003).
12. *Ansonia Bd. of Edu. v. Philbrook*, 479 U.S. 60, 69 (9th Cir.1986).
13. *Berry* v. *v. Dep't of Soc. Servs.*, 447 F.2d 642, 655 (9th Cir.2006); 29 C.F.R. § 1605.2(b)(2).
14 *Berry*, 447 F.2d at 655.
15. 29 C.F.R. § 1605.2(e)(1).
16. 29 C.F.R. § 1605.2(e)(1).
17. 29 C.F.R. § 1605.2(e)(2).
18. 29 C.F.R. § 1605.2(d)(1)(i)-(iii).
19. 29 C.F.R. § 1605.2(d)(1)(i).
20. 29 C.F.R. § 1605.2(d)(1)(i).
21. 29 C.F.R. § 1605.2(d)(1)(ii).
22. 29 C.F.R. § 1605.2(d)(1)(iii).
23. *Berry*, 447 F.2d at 655.
24. *Berry*, 447 F.2d at 655.
25. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).
26. *Bodett*, 366 F.3d at 746.
27. *Lawson*, 296 F.3d at 805.
28. *Opuku-Boateng v. State of Cal.*, 95 F.3d 1461, 1468 (9th Cir. 1996).
29. *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir.1978).
30. *E.E.O.C. v. Red Robin*, 2005 WL 2090677, 5.
31. *Barrett v. Am. Med. Response, N.W., Inc.*, 230 F.Supp.2d 1160, 1167 (D.Or. 2001) (citation omitted); *see Bhatia v. Chevron U.S.A.*, 734 F.2d 1382, 1384 (9th Cir. 1984)