Best Practices for Managing Religious Diversity in the Workplace

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Key Statutes

• Title VII of the Civil Rights Act of 1964
  ▫ Non-discrimination
  ▫ Non-harassment
  ▫ Reasonable accommodation
  ▫ Non-retaliation

• State non-discrimination statutes
“Religious Belief”

- *Welsh v. US* (1970) – belief occupying “a place parallel to that filled by the God of those admittedly qualifying for the exception”

- EEOC (29 CFR § 1605.1)
  - A non-theistic “moral or ethical beliefs…sincerely held with the strength of traditional religious views”
  - Not determinative that no religious group espouses the belief in question
  - Protected individual may have no religion
“Sincerely Held”

- Individual adherence to the belief, not “objective” reasonableness

- An employer who has a legitimate reason for questioning whether a belief is sincerely held *may* ask for information to evaluate the request

- BUT N.B.: whether an individual’s past behavior is inconsistent with a presently described belief, or whether that belief has evolved, is a *question of fact.*
Hypo: Wellness Program

- One World Company, an EEO employer, adopts a wellness program, and institutes mandatory weekly yoga classes to promote physical fitness and team building.

- The classes do not contain any overtly religious component.

- Sylvia tells her supervisor that she believes yoga is a Hindu practice, and that participating in these classes would conflict with her personal beliefs, so she wants to be excused.
Discrimination & Harassment…

• Traditional burden-shifting analysis for claims of disparate treatment and religion-based harassment

• Overview available at
  http://www.eeoc.gov/policy/docs/qanda_religion.html
  http://www.eeoc.gov/policy/docs/religion.html
...vs. Permissible Differentiation

• Religious Organizations
  ▫ Institutions whose “purpose and character are primarily religious” can prefer members of their own religion in employment decisions

• Ministerial Exception of clergy members from certain federal non-discrimination laws based on the Free Exercise Clause
  ▫ Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 181 L.Ed. 2d 650 (2012)

• BFOQ: Bona fide occupational qualification
Reasonable Accommodation

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<tr>
<th>Applicant/Employee</th>
<th>Employer</th>
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<td>• Must notify employer of bona fide religious belief</td>
<td>• Must consider possible accommodations that do not require violating individual’s beliefs/practices</td>
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<td>• Need not expressly request specific accommodation</td>
<td>• Need not offer accommodation that would pose undue hardship but must present proof of hardship</td>
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Potential Accommodations

- **Dress**
  - Uniform Requirements
  - Garb & Grooming
    - EEOC March 2014 Guidance

- **Scheduling**
  - Weekly worship
  - Holidays
  - Extended time off

- **Responsibilities/Work Rule Changes**

- **Religious Expression**
  - Displays
  - Affinity Groups

- **Religious Observance**
  - Prayer/Meditation Rooms
  - Dietary concerns
Potential “Hardships”

- Diminished efficiency

- Infringement of co-workers’ rights/benefits
  - Seniority systems, CBAs may provide basis

- Impairment of safety
  - Legal requirements vs. employer policies

- Conflict with other legal requirements
Hypo: Undercover?

• Kim has nose, brow & lip piercings. Her employer, Big Box Stores, adopts a new dress code that prohibits facial jewelry, other than earrings.

• Kim says she belongs to the Church of Body Modification, which upholds self-expression through piercing and branding.

• Big Box asks Kim to cover the facial piercings; Kim refuses; Big Box fires her.

• What if the facial piercings were tattoos, and Kim claimed that covering them would signify a rejection of her religion?
Hypo: When We Assume…

• Niche Retailer, Inc. expects employees to project an image in keeping with its brand

• Applicant wears a headscarf to interview for a sales floor position

• Neither Applicant nor hiring manager mentions the headscarf or the reason for it, though hiring manager “assumes” it is based on Islam

• Applicant is denied employment and sues for denial of accommodation
  ▫ *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013)

• What if the applicant were hired for a backroom position, rather than a sales floor position?
Hypo: Safety

- Jaspreet wears a kirpan, a religious sword that is an article of her Sikh faith. The kirpan’s blade is 4 inches long and about as sharp as a letter opener. She wears it sheathed and strapped to her torso, out of view beneath her clothing.

- Jaspreet’s employer, a hospital, has a zero-tolerance policy forbidding weapons of any kind in the workplace. Employees have been fired in the past for violating this policy.

- Jaspreet’s supervisor, Bill, learns about her kirpan from a co-worker and instructs her not to wear it at work because of the no-weapons policy.

- Jaspreet gives Bill literature explaining that wearing a kirpan is a core article of faith and shows him the kirpan itself. Nevertheless, Bill tells Jaspreet that her employment will be terminated if she continues to wear the kirpan at work.

Hypo: Safety II

- David is an observant Jew and wears a long beard as an article of faith. He applies for a position at a pharmaceutical manufacturer.

- The hiring manager informs him that because of certain compounds that are used in the manufacturing process, all employees are required to be able to wear a tight-fitting respirator, and that he will need to shave off his beard in order for the respirator to seal properly.

- David says that he cannot shave off or trim his beard. He is not hired.
  - Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382 (9th Cir. 1984)
Hypo: A Room of One’s Own

- George, an FLSA-exempt lab scientist, shares office space with several other employees. His religious practice includes 3 to 5 prayers during the workday, depending upon the lunar calendar.

- George requests that the employer set aside a room where he can pray privately.

- The employer determines that the only open space is located at the opposite end of the building from George’s office.

- George would prefer a room closer to his regular workspace.
Hypo: Room for One More?

- George accepts the offered room as an accommodation.

- Steve, a member of George’s church, is an entry-level non-exempt lab employee who also wishes to pray 3 to 5 times per workday.

- Because the room is located at the other end of the building, Steve would require at least 60 minutes in break time per day to travel back and forth and to complete his prayers.

- Hourly employees are normally allotted two 15 minute breaks per day – one morning and one afternoon.
Hypo: Congregation

- George accepts the offered room, and word spreads.

- Other exempt employees also begin using the space: some who belong to George’s church, some who are not, and some practicing yoga or meditation.

- George’s manager Mike comes to the lab and finds that it is empty for large portions of the day, because all of the scientists are in the prayer space. He complains to HR that this accommodation has gotten out of hand.
Hypo: Taking One’s Time

- Noor, a devout Muslim who lives in California, has planned to make the *hajj* with her family this year.

- The *hajj* is a pilgrimage to Mecca, to be made by all adult Muslims at least once in their lifetime, and can only be made during one month of the Islamic calendar in each year.

- Noor requests 4 consecutive weeks off from work in order to make this trip.

- Noor is only entitled to 3 weeks of paid vacation per year, and company policy does not allow employees to take more than 2 weeks in a row.
Hypo: In this Together

- Compliant Inc., a Texas company, annually trains all of its employees on EEO laws and Compliant’s own internal anti-discrimination policy, which prohibits sexual orientation and gender identity discrimination though Texas law does not.

- Gina asks to be excused from all portions of the training that relate to sexual orientation and gender identity, based on her sincere religious belief that “homosexuality and transgenderism are immoral and sinful.”
Burwell v. Hobby Lobby Stores, Inc.

• Interpreting Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq., which applies strict scrutiny to questions of whether the federal government has violated the Free Exercise clause

• Holding that closely-held for-profit corporations which operate under religious principles are “persons” within the meaning of RFRA, and cannot be required to comply with the contraceptive coverage mandate of PPACA to the extent it impinges their religious belief

• Permitting Hobby Lobby to rely on a sincerely-held belief that certain contraceptives act as abortifacients, such that being compelled to provide them would violate its owners’ religious principles

• 2014 WL 2921709 (June 30, 2014)
Questions?