ACCOMMODATING RELIGIOUS BELIEFS & PRACTICES IN THE WORKPLACE: SPEECH AND PROSELYTIZING

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I. Legal Authority for Religious Speech and Expression in the Workplace

A. First Amendment, U.S. Constitution

- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof

-Protects individuals against restrictions imposed by the government, not by private entities, and therefore does not apply to rules imposed on private sector employees by their employers.

-Most claims arise in the public employment setting, but the First Amendment also protects private sector employers from government interference with their free exercise and speech rights.

-Government employees' religious expression is protected by both the First Amendment and Title VII. *See* Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (Aug. 14, 1997) (http://clinton2.nara.gov/WH/New/html/19970819-3275.html).

-A government employer may contend that granting a requested religious accommodation would pose an undue hardship because it would constitute government endorsement of religion in violation of the Establishment Clause of the First Amendment.

B. Title VII of the Civil Rights Act of 1964

-Unlawful employment practice: "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion" 42 U.S.C. § 2000e-2(a)

C. State Laws

II. Obligation to Reasonably Accommodate

A. Title VII

-"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j).

-The law does not include, however, definitions of "reasonable accommodation" or "undue hardship."

The Supreme Court has held that under Title VII employers must reasonably accommodate an employee's religious needs unless to do so would create an undue hardship for the employer. The Court defines hardship as anything more than *de minimis* cost. *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977) (request for Saturdays off held to be undue hardship since the costs of paying overtime to other employees, or hiring a replacement worker, would have been more than de minimis).

B. EEOC Guidance, Accommodation of Proselytizing and Religious Expression

-Examples: display of religious icons or messages at work stations, proselytizing by engaging in one-on-one discussions regarding religious beliefs, distributing literature, or using a particular religious phrase when greeting others.

-Proselytize: to induce someone to convert to one's faith; to try to persuade people to join a religion, cause, or group

-Timing: accommodation requested in advance by employee or in response to complaints about religious expression by other employees or customers.

-No Zero Tolerance Policy. Employers should not try to suppress all religious expression in the workplace.

-Title VII requires that employers accommodate an employee's sincerely held religious belief in engaging in religious expression in the workplace to the extent that they can do so without undue hardship on the operation of the business.

-In determining whether permitting an employee to pray, proselytize, or engage in other forms of religiously oriented expression in the workplace would pose an undue hardship, relevant considerations may include the effect such expression has on co-workers, customers, or business operations.

-EEOC Guidance Examples:

If an employee's proselytizing interfered with work, the employer would not have to allow it.

If an employee complained about proselytizing by a co-worker, the employer can require that the proselytizing to the complaining employee cease.

If an employee was proselytizing an employer's customers or clients in a manner that disrupted business, or that could be mistaken as the employer's own message, the employer would not have to allow it.

Where the religiously oriented expression is limited to use of a phrase or greeting, it is more difficult for the employer to demonstrate undue hardship.

If the expression is in the manner of individualized, specific proselytizing, an employer is far more likely to be able to demonstrate that it would constitute an undue hardship to accommodate an employee's religious expression, regardless of the length or nature of the business interaction.

An employer can restrict religious expression where it would cause customers or co-workers reasonably to perceive the materials to express the employer's own message, or where the item or message in question is harassing or otherwise disruptive.

III. Permissible Religious Speech or Workplace Harassment?

A. Proselytizing

-An employee has a right to engage in religious conduct, including efforts to persuade others to join their religion, to the extent that it is not an undue hardship on the employer.

-Proselytizing will likely fail the undue hardship if it results in (a) harassment of another employee; or (b) occurs during work time.

-Important factors:

- the pervasiveness of the proselytizing;
- its impact on coworkers and work performance (including profitability) and;
- the capacity and willingness of the employer to take steps to accommodate the aggrieved parties, such as by moving the proselytizing employee and the offended employee to different work stations.

B. Proselytizing: Examples of Unprotected Speech

- *Weiss v. Ren Labs of Fla., Inc.,* 1999 U.S. Dist. LEXIS 23587, at *25 (S.D. Fla. 1999)
The plaintiff was discharged for proselytizing to coworkers and subordinates by condemning two who were homosexual, continually trying to convert a Muslim, attempting to lay hands on employees, and giving unsolicited Bibles at work. In firing him, the defendant had "not only the right, but a legal duty to keep its workplace free of religious harassment."

-*But See Dixon v. Hallmark Cos.,* 627 F.3d 849, 855 (11th Cir. 2010)
Another Florida district court was overruled by the Eleventh Circuit, which held that there was evidence that the plaintiffs "are sincere, committed Christians who oppose efforts to remove God from public places," thereby allowing trial to continue to determine whether the plaintiffs had the "right" to hang religious messages in the workplace against the employer's policy.

-Query: Does the Eleventh Circuit make legal distinctions between oral proselytizing and written proselytizing? What if the plaintiff in *Weiss* had not verbally condemned his coworkers, but had worn a shirt to work every day that read, "My coworkers are homosexuals, sinners, and are going to hell"?

-*Banks v. Service Am. Corp.,* 952 F. Supp 703 (D. Kan. 1996)
The Tenth Circuit that determined it was a reasonable accommodation to allow cashiers to say "God Bless You" in violation of company policy, warnings, and more than twenty complaints in a three month period by customers.

- *Whatley v. S.C. Dep't of Pub. Safety,* 2007 U.S. Dist. LEXIS 2391, at *17-18 (D.S.C. 2007)
The court held the proselytizer put the employer "'between a rock and a hard place,' and thus any attempt to reasonably accommodate plaintiff's proselytizing would have imposed an undue burden upon defendants."

-*Explaining Inconsistencies: Sprague v. Adventures Inc.,* 121 Fed. Appx. 813, 817 (10th Cir. 2005) (Tymkovich, J., concurring) "While Title VII rightly condemns acts of religious discrimination in the workplace, the line between permissible religious commentary in the workplace and a religiously hostile workplace quickly becomes fuzzy."345

C. Religious Expression: Posters, Bible quotes, and Religious Slogans

- Title VII does not confer absolute freedom of expression on employees merely because that expression is religiously motivated.

-Public or Private Space? Most employers will not be able to show that it would be an undue hardship to permit one employee to display religious materials or symbols in his or her private office.

-Public Image of Company. Employers are generally entitled to define what public image they wish to project and to determine what displays or expressions will be used to reflect that image. Title VII does not compel employers to accommodate employees' religious expression that could reasonably be perceived by patrons as an expression of the employer's views. *E.g., Anderson v. U.S.F. Logistics (IMC), Inc.,* 274 F.3d 470, 476 (7th Cir. 2001) (employer reasonably accommodated plaintiff's religious practice of sporadically using the phrase "Have a Blessed Day" when it permitted her to use the phrase with co-workers and supervisors who did not object, but employer lawfully prohibited her from using the phrase with customers where a regular client objected, since allowing such a practice in the face of objections would have posed an undue hardship); *Chemers v. Minar Ford, Inc.,* 2001 WL 951366 *5 (Minn. 2001) (business owner who imbued his car dealership with his Christian religious beliefs need not alter his practices to accommodate non-Christian employees who objected, as long as employees were not required to observe or participate in the employer's religion as a condition of employment).

-Public employers are also governed by the First Amendment, which both protects employees' right to expression and limits expression that can reasonably be perceived to constitute government endorsement of a particular religion. *Tucker v. California Dept. of Education,* 97 F.3d 1204, 1216 (9th Cir. 1996) (state employer could not impose a total ban on religious expression where it allows other personal expression; the ban must be limited to expression that could reasonably convey an impression of state endorsement). *See also Draper v. Logan County Public Library,* No. 1:02CV-13-R (W.D. Ky. Aug. 29, 2003) (public library could not prohibit employee from wearing a necklace with a cross; such unobtrusive displays of religious adherence could not be interpreted by a reasonable observer as government endorsement of religion) and *Peloza v. Capistrano Unified School Dist.,* 37 F.3d 517, 522 (9th Cir. 1994) (school district was justified in prohibiting a teacher from talking with students about religion during the school day because of the likelihood that students would equate the teacher's views with those of the school).

-Disruption of Services. An employer can also restrict expression that disrupts operations. In *Wilson v. U.S. West Communications,* 58 F.3d 1337 (8th Cir. 1995), the court concluded that it would be an undue hardship for the employer to allow an employee to wear a graphic anti-abortion button where doing so disrupted the

workplace. In Wilson, the court found that the employer had reasonably accommodated the employee by allowing her to wear the button in her cubicle, but requiring her to take it off or cover up the picture when she left her cubicle. Wilson refused the proposed accommodation and she was terminated.

-Harassment. Employers also need not accommodate religious expression that is hostile or demeaning to patients or colleagues. In *Peterson v. Hewlett-Packard Co.,* 358 F.3d 599 (9th Cir. 2004), the court held that the employer could terminate an employee who refused to remove anti-gay scriptural passages that he had posted in his personal workspace, where they were visible to co-workers and demeaned homosexual employees.

IV. Efforts to Expand Workers' Religious Freedoms

A. Workplace Religious Freedoms Act

-Bill sponsored by Sens. John Kerry (D-Mass.) and Rick Santorum (R-Pa.) to amend Title VII and narrow the definitions of reasonable accommodation and undue hardship. The bill would have expanded workers' religious freedoms by defining undue hardship as "an accommodation requiring significant difficulty or expense." The bill failed to be voted out of committee several times between 2001-2010 and has not been re-introduced since then.

B. State Religious Freedom/Restoration Acts: Will they try to trump State Discrimination Laws?

Jurisdiction	**Statute**
Alabama	Ala. Const. Art. I, §3.01
Arizona	Ariz. Rev. Stat. §41-1493.01
Arkansas	2015 SB 975, *enacted April 2, 2015*
Connecticut	Conn. Gen. Stat. §52-571b
Florida	Fla. Stat. §761.01, *et seq.*
Idaho	Idaho Code §73-402
Illinois	Ill. Rev. Stat. Ch. 775, §35/1, *et seq.*
Indiana	2015 SB 101, 2015 SB 50, *enacted 2015*
Kansas	Kan. Stat. §60-5301, *et seq.*
Kentucky	Ky. Rev. Stat. §446.350
Louisiana	La. Rev. Stat. §13:5231, *et seq.*

Mississippi	Miss. Code §11-61-1
Missouri	Mo. Rev. Stat. §1.302
New Mexico	N.M. Stat. §28-22-1, *et seq.*
Oklahoma	Okla. Stat. tit. 51, §251, *et seq.*
Pennsylvania	Pa. Stat. tit. 71, §2403
Rhode Island	R.I. Gen. Laws §42-80.1-1, *et seq.*
South Carolina	S.C. Code §1-32-10, *et seq.*
Tennessee	Tenn. Code §4-1-407
Texas	Tex. Civ. Prac. & Remedies Code §110.001, *et seq.*
Virginia	Va. Code §57-2.02

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A SHORT RETROSPECTIVE ON THE EARLY YEARS: 1965-1986

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Title VII, as enacted in 1964, makes it unlawful for an employer to fail or refuse to hire or to discharge any individual because of such individual's religion. 42 U.S.C. § 2000e-2(a)(1). The Act, as originally enacted, was silent as to what conduct would violate this particular provision of the law.

Soon after the law was enacted a question arose as to whether it was impermissible to discharge or refuse to hire a person who, for religious reasons, refused to work during an employer's normal work-week. In 1966, the EEOC issued guidelines addressing this question. Section 1605.1(a) of those guidelines stated, in part: "the Commission believes that an employer is free under Title VII to establish a normal work week ... generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees." 29 C.F.R. § 1605.1(a) (1966). The EEOC also concluded that "[t]he employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to

discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alternations in such requirements to accommodate his religious needs." 29 C.F.R. § 1605.1(b) (1966).

But, in 1967 the Commission changed its guidelines. Then the EEOC declared that an employer had an obligation under the statute "to make reasonable accommodations to the religious needs of employees ... where such accommodation can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1(b) (1968). The EEOC did not identify what sort of accommodations were "reasonable" or when a hardship becomes "undue." The EEOC did opine that "undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer." 29 C.F.R. § 1605.1(b) (1968).

Not unexpectedly, this question found its way into the judicial system. *Dewey v. Reynolds Metals Co.*, 300 F.Supp. 709 (W.D. Mich. 1969). Mr. Dewey, a member of the U.A.W., was employed by Reynolds Metals, working as a die repairman. In 1965, the Reynolds' plant operated on a six-day schedule, with numerous Sunday work schedules. Under the controlling collective bargaining agreement, Reynolds could set overtime schedules and make overtime compulsory for all employees unless

they had a substantial and justifiable reason for not doing so. After the Union objected to this provision, Reynolds agreed to relieve any employee assigned to overtime if that employee arranged for another qualified employee to replace him. Dewey, as a member of the Faith Reformed Church, could not work on Sundays. On one occasion he refused to work as scheduled and on other occasions he obtained qualified replacements. But, on August 28, 1966, when again required to work on Sunday, Dewey refused to work because of his religious beliefs and refused to find a replacement, also due to his religious beliefs. (Dewey believed that it was sinful for any person to work on the Sabbath and refused to assist others in committing this sin.) After not showing up for his first Sunday assignment, Dewey was issued a written warning for violating plant rules. Dewey refused to work on two subsequent Sundays, receiving a three day disciplinary lay off after the first refusal and termination after the second. Dewey then sued, alleging that Reynolds have violated Title VII.

The District Court concluded that Reynolds Metals had violated Dewey's Title VII rights. Significantly, years before *Griggs v. Duke Power Co.*, the District Court recognized that, even if a rule applies equally to all employees, it does not necessarily have an equal impact on them. Relying upon Supreme Court constitutional precedent, the District Court concluded that, in the realm of religious discrimination,

the uniform application of a rule may still run afoul of the law due to its impact. The District Court held that Reynolds' rule limited Dewey's free exercise of his religion and, therefore, was discriminatory in its effect. In addition, the District Court, relying upon recently enacted EEOC guidelines, held that an employer must make reasonable accommodation to the religious needs of its employees unless such accommodation will cause undue hardship on the conduct of the employer's business. *Dewey*, 300 F.Supp. at 714. The court concluded that Reynolds could not meet this burden because there were always several available employees who could perform Dewey's work.

The Sixth Circuit reversed. 429 F.2d 325 (6th Cir. 1970). While the Circuit agreed with the District Court that Reynolds' rule was not discriminatory on its face, it disagreed with the conclusion that it had a discriminatory impact. First, the Circuit ruled that the District Court erred by relying upon the EEOC guidelines, as changed in 1967, rather than as they were when Reynolds acted.[1] Second, the Circuit concluded that "[t]o accede to Dewey's demands would require Reynolds to discriminate against its other employees by requiring them to work on Sundays in the place of Dewey ... . This would constitute unequal administration of the collective

[1]The court also suggested that the authority of the EEOC to issue regulations prohibiting conduct not included in the statute might be doubted.

bargaining agreement among the employees ... ." *Id.* at 331. The Circuit also found that by permitting Dewey to find a replacement, Reynolds had accommodated his need to observe Sunday as his Sabbath.

In a special concurrence, two of the circuit judges concluded that to construe Title VII as proposed by Dewey, "which would coerce or compel an employer to accede to or accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment. ... No one disputes Dewey's right to his religious beliefs. The question is whether he has the right to impose his religious beliefs on his employer and interfere with the operation of its plant." *Id.* at 335.

Judge Combs dissented, concluding that the EEOC guidelines should be given great deference. In addition, he concluded that it was error to blame Dewey for stubbornly refusing to arrange for his replacements. "This 'stubborn' refusal on Dewey's part was grounded in his belief that working on Sunday is inherently wrong and that it would be a sin for him to induce another to work in his place. The replacement system was therefore no solution to Dewey's problem." *Id.* at 333.

Dewey petitioned for *certiorari*, which petition was granted. 400 U.S. 1008 (1971). After argument, the judgment of the Sixth Circuit was affirmed "by an equally divided Court. Mr. Justice Harlan took no part in the consideration or

decision of this case."

The issue left unresolved by *Dewey* was addressed in the 1972 amendments to Title VII. There Congress added a definition of religion that creates a special theory of liability for religious discrimination. Section 701(j) provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, 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.

42 U.S.C. § 2000e(j).

Despite its broad formation, the Supreme Court has read this provision quite narrowly. In *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), a teacher claimed he needed six days off to attend required religious services and asked the employer, as an accommodation, to permit him to use three of his paid personal days for this purpose. The employer refused because the collective bargaining agreement already specified three paid days off for "religious" observances. The Supreme Court held that the collective bargaining agreement offered a reasonable accommodation of religion through the time provided for religious observance, even though it did not completely satisfy plaintiff's religious-based needs. "We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation. By its very terms the statute directs that any reasonable

accommodation by the employer is sufficient to meets its accommodation obligation." *Id.* at 68.

The Court has also defined "undue hardship" narrowly. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), a case in which a Saturday Sabbatarian asked that a shift schedule requiring Saturday work be modified for him, the Court rejected each of the alternatives proposed by the employee on the grounds that they involved an undue hardship on the employer. "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 84. As the Circuit Court had done in *Dewey*, the Supreme Court focused on the unequal treatment which such accommodations would create. "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far." *Id.* at 80.

Despite this overall guidance provided by the Supreme Court, district courts continue to wrestle with issues arising out of the intersection of nondiscrimination and reasonable accommodation.