Proskauer

newsletter

International HR Best Practices

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in this issue

A monthly "best practices" alert for multinationals confronting the challenges of the global workplace.

This Month's Challenge

Laws that sound the same may work differently in different countries. Location matters when you're trying to determine if conduct is permitted or prohibited.

Best Practices Tip of the Month

Don't assume that because you know the law in one country, you know how a similarly sounding law will work in another country. For example, discrimination on the basis of religion means different things in the U.S. and the U.K.

Tip of the Month

Religious Discrimination Claim Roils UK

It has been said that the U.S. and the U.K. are two nations "divided by a common language," and the same observation also could be applied to their discrimination laws. Prohibitions that sound the same may operate in very different ways, as a recent decision from the UK Court of Appeal illustrates.

The issue concerned discrimination in employment on the basis of religion, which is prohibited in the U.S. by Title VII of the 1964 Civil Rights Act, and in the U.K. by the Employment Equality (Religion or Belief) Regulations 2003. The particular case was brought by Nadia Eweida, a check-in agent for British Airways in London, who wanted to wear a silver cross on a chain as a symbol of her Christianity. The company's rules prohibited employees in public contact positions, who were required to wear a company uniform, from wearing visible jewelry. The company made exceptions for religious attire that could not be concealed under the uniform – hijabs, turbans and yarmulkes – but insisted that Ms. Eweida's cross had to be worn out of sight. Ms. Eweida refused to comply with the policy, and was sent home. After being pilloried in the press and pulpit for its allegedly anti-Christian position, BA changed its policy to permit religious lapel pins and other religious jewelry, and Ms. Eweida returned to work. The company refused to pay her for her three months without pay, and she brought a claim for religious discrimination.

In the U.S., such a claim would be analyzed under the reasonable accommodation requirements of Title VII. According to the EEOC *Compliance Manual*, "[a]bsent undue hardship, religious discrimination may be found where an employer fails to accommodate the employee's religious dress or grooming practices." Whether Ms. Eweida would prevail on her claim under this standard would depend on BA's ability to show that making an exception to its uniform policy would cause an "undue hardship."

The U.K. statute, however, does not have a reasonable accommodation requirement. The case was therefore evaluated as a claim of "indirect" discrimination (in U.S. terms, "disparate impact" discrimination), which the law defines as the application of a "provision, criterion or practice" that "puts or would put persons" of a particular religion or belief "at a particular disadvantage when compared with other persons," where the employer cannot show that the provision, criterion or practice complained of is "a proportionate means of achieving a legitimate aim."

Ms. Eweida argued that forbidding her to wear a visible symbol of her religion while allowing other employees to wear visible symbols of theirs constituted discrimination against Christians as a group. The Court of Appeal, affirming a judgment of the Employment Appeal Tribunal, did not agree.

As the justices saw it, Ms. Eweida's claim foundered on the fact that she was the only Christian who claimed to be disadvantaged by BA's uniform policy. The law's use of the plural "persons" means that "some identifiable section of a workforce, quite possibly a small one, must be shown to suffer a particular disadvantage which the claimant shares." The Employment Appeal Tribunal had rejected the argument that one could assume that there must be other employees in the workforce who felt as Ms. Eweida did, and the Court of Appeal refused to overturn this determination.

The moral of this story, for multinational corporations and their counselors, is that laws of different countries that seem the same may have very different terms, may require different modes of analysis, and may lead to different results.

Proskauer Rose LLP's International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

For more information about this practice, click here or contact:

Bettina B. Plevan
212.969.3065 – bplevan@proskauer.com

Aaron J. Schindel
212.969.3090 – aschindel@proskauer.com

Howard Z. Robbins
212.969.3912 – hrobbins@proskauer.com

Yasmine Tarasewicz
33.1.53.05.60.18 – ytarasewicz@proskauer.com

Anthony J. Oncidi
310.284.5690 – aoncidi@proskauer.com

Jeremy M. Mittman
310.284.5634 – jmittman@proskauer.com

Allan H. Weitzman
561.995.4760 – aweitzman@proskauer.com

Daniel Ornstein
44.20.7539.0604 – dornstein@proskauer.com