

Client Alert

A report
for clients
and friends
of the Firm September 2008

New EEOC Guidance Focuses on Eradicating Religious Discrimination in the Workplace

On July 22, 2008, the Equal Employment Opportunity Commission (“EEOC”) released a new Compliance Manual section clarifying its guidance in connection with religious discrimination in the workplace and conduct that might be violative of Title VII of the Civil Rights Act of 1964 (“Title VII”) (the “Compliance Manual”). The new section was issued as a response to a significant escalation in charges of religious discrimination, the sense that religious diversity has increased in the United States and its workplaces, and, at the behest of stakeholders and agency personnel coping with an ever growing volume of charges concerning religious discrimination, inadequate employer accommodations, and harassment. While the Compliance Manual does not create any new obligations, it does address several important and complex issues regarding how Title VII applies to issues of religion in the workplace including, among others:

- what constitutes “religion”;
- the scope of Title VII’s prohibition on disparate treatment and retaliation on account of religion;
- the duty to reasonably accommodate religious beliefs and practices;
- what constitutes religious harassment; and
- suggestions on how to balance an employee’s right to religious expression in the workplace against an employer’s need to maintain an efficient and productive workplace that is not offensive to co-workers and visitors.

At the same time, the EEOC also issued two summary documents of interest: an EEOC Fact Sheet on Religion and Title VII (in the form of questions and answers), along with a Best Practices Guide.

What Constitutes a “Religion” Under Title VII

According to the EEOC, as interpreted, Title VII broadly defines religion in ways some employers might least expect. Not only does the definition include traditional, organized, religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but it also includes other faiths that are new or uncommon, not part of a formal congregation, not practiced by many others, and even those that are perceived by others as irrational or unreasonable. Title VII’s protections extend both to those whose religions include the belief in a God (or Gods), as well as those whose beliefs are non-theistic but encompass “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views” and relate to concepts such as the meaning of life, purpose, and death (as opposed to economic, social, or political beliefs). Title VII also protects those who profess no religious beliefs.

Similarly, the key to whether a practice is a “religious observance” is the motivation of the actor – conduct which may be religious for one employee, may not be for another. Thus, managers and supervisors need to be apprised that Title VII may protect the employee who is a vegetarian for religious reasons, while another employee who may have adopted the same lifestyle due to health concerns is not within the law’s ambit of protection.

The Scope of Title VII’s Prohibition of Disparate Treatment Based on Religion

Under Title VII, disparate treatment is impermissible not only when such treatment is motivated by bias against someone on the basis of religion (or lack thereof) but also when it is driven by a preference towards someone for those same reasons. Thus, the

EEOC suggests, employers should avoid conduct including, but not limited to, the following:

- refusing to recruit, hire, or promote individuals because of their religious beliefs or practices (or lack thereof);
- favoring someone in the recruiting, hiring, or promotion process because of their religious beliefs or practices (or lack thereof);
- subjecting individuals with certain religious beliefs or practices to more stringent, or different, work or promotion requirements; or
- excluding an applicant from hire simply because that individual may require a reasonable accommodation that could be provided without posing an undue hardship.

Another form of prohibited disparate treatment on the basis of religion involves religious expression in the workplace. An employer cannot disparately enforce its policies and practices in a way that favors some religions at the expense of others. For example, if a supervisor permits a Christian employee to prominently display a bible or crucifix at his desk, then, as a general rule, the employer cannot then prohibit a Muslim employee from displaying a copy of the Koran at his work station.

Religious Harassment Under Title VII

Similar to its treatment of sexual harassment, Title VII prohibits two distinct types of religious harassment – (i) *quid pro quo* harassment, whereby an employee is coerced into altering, adopting, or abandoning a religious belief or practice as a condition of employment; and (ii) hostile work environment harassment in which an employee is subjected to unwelcome remarks or actions based on his or her religion that are so severe and pervasive that the employee being harassed reasonably finds the work environment to be abusive or hostile.

There are several instance where an employer can be held liable for religious harassment at the workplace. *First*, an employer is always liable for a supervisor's harassment if it results in a tangible employment action. *Second*, an employer is liable for religious harassment by co-workers where the employer knew or should have known about the harassment and failed to promptly take corrective action. *Third*, an employer is liable for religious harassment by non-employees (e.g., vendors or customers) where it knew or should have known about the harassment, could control the harasser's conduct or otherwise protect the employee, and failed to take prompt and appropriate corrective action. Therefore, to best shield against potential liability, employers are advised to have a well-disseminated anti-harassment and anti-discrimination policy in place (which specifically prohibits religious

discrimination and harassment), provide training on that policy, identify multiple avenues in the chain-of-command to whom complaints about harassment can be addressed, and – once a complaint of harassment is raised – employers should timely investigate and take prompt and appropriate corrective action, as necessary.

The Obligation to Accommodate Religious Beliefs, Practices, and Observances

It is well-established under Title VII that an employer must provide an employee with a reasonable religious accommodation regarding that employee's sincerely held religious belief, practice, or observance, if the employee affirmatively makes such a request, *and* providing the accommodation would not pose an undue hardship. An employer can establish an undue hardship by demonstrating that the requested accommodation poses "more than a *de minimis*" cost or burden. As some state laws, such as in New York, impose a greater burden on employers to accommodate religious beliefs of applicants and employees, it is a good idea to check with counsel as to the applicable state of the law in your jurisdiction.

To commence the accommodation process, an employee is responsible for asking the employer for an accommodation and, in doing so, s/he must explain that the accommodation is being requested because of a conflict between a religious belief, practice, or observance and work requirements. In turn, the employer is permitted to ask questions about the purported conflict to determine whether an accommodation is necessary, and, if so, how best to accommodate the employee. An employer need not grant the employee's preferred accommodation; rather, it is perfectly acceptable for an employer to propose an alternative accommodation if it would also effectively resolve the employee's concern. In this circumstance, the EEOC counsels, the employee must cooperate and attempt to resolve the concern through the employer's suggested accommodation.

In assessing whether an accommodation would pose an *undue hardship*, the EEOC identifies several factors to be considered including, but not limited to: the type of workplace; the nature of the employee's duties; the number of employees who would require the accommodation; and the identifiable cost of the accommodation in relation to the size and operating costs of the employer. For these purposes, "cost" includes both monetary cost *and* the burden to the business, other employees, and even customers that may arise from granting the accommodation (e.g., diminished efficiency; diminishing the rights or benefits of other employees; impairing workplace safety; impeding provision of client services; or forcing other employees to take on additional work). However, to establish an undue hardship, the employer cannot rely on speculation, it must be prepared to present objective business considerations for denying an employee's request for accommodation.

Undue hardship may also exist when a proposed religious accommodation would deprive another employee of a job preference or other benefit guaranteed by a *bona fide* seniority system or collective bargaining agreement (though the employer would still have to attempt to find an alternative effective accommodation). Additionally, the employer does not have to provide an accommodation if it conflicts with a legally mandated security requirement. However, if the security requirement has been imposed by the employer, and is not required by law or regulation, an accommodation must still be provided unless granting it would cause an undue hardship.

In its Compliance Manual, the EEOC cautions that while requests for religious accommodations, such as those discussed below, may lead to conflicts among co-workers, an employer cannot resist making a reasonable accommodation based on the expressed anger or jealousy voiced by co-workers because this would not qualify as an undue hardship for the employer.

Common Methods of Religious Accommodation in the Workplace

While there are countless solutions available under Title VII for those whose religious beliefs require accommodation, the EEOC highlights, in the Compliance Manual, several common methods available to employers. While we identify, below, some accommodation options, employers should recognize that there will almost always be exceptions to the norm and, therefore, each business is well advised to conduct an individualized inquiry when considering the reasonableness of an accommodation request and whether, in its particular circumstances, the accommodation might be reasonable or constitute an undue hardship. Also, keep in mind that context matters, and that similar behaviors acted out in two different business environments can result in different legal outcomes.

Scheduling Changes, Voluntary Substitutes, and Shift Swaps

- allowing an employee to work a flexible schedule, whereby they are allowed to miss a portion of the traditional work day for religious observance and then make up that lost time (e.g., by coming to work early or by working late);
- not scheduling an employee to work on his or her day of Sabbath; and
- permitting co-workers to voluntarily swap shifts (or longer periods of time) on a schedule with an employee requesting time off for religious reasons.

Changing An Employee's Job Tasks or Providing a Lateral Transfer

- if an employee's religious beliefs conflict with a particular job responsibility, the employee may be relieved of the specific task or moved to a different position or location to eliminate the conflict.

Exceptions to Dress & Grooming Rules

- an employer with a "clean-shaven" policy would have to make an exception for employees, such as Sikh men, who are required by their faiths to keep a beard; and
- an employer who prohibits employees from wearing anything on their heads would have to allow Jewish men to wear a yarmulke.

Of course, if a particular exception to a dress code would create a safety concern, then an employer would not have to grant that request. For example, an employer probably can reject the request of a Pentecostal employee who works in a steel mill to wear a long skirt instead of pants if doing so would pose safety risks in that environment (while the same accommodation would likely be granted to an employee who worked in retail).

Employers are also advised *not* to deny reasonable accommodation requests on grounds that an accommodation conflicts with the employer's "image", and/or is contrary to or undermines customer preferences, as the EEOC is apt to consider such rationales violative of Title VII.

Use of a Work Facility for Religious Observance

- an employer who makes a break room available to its employees would be required to allow a Muslim employee to use that space to pray, however, the employer would not have to give that employee priority to use the room (and, therefore, might allow the employee who wishes to pray to use an empty conference room in instances where the break room is already in use).

Accommodating Prayer, Proselytizing, and Other Forms of Religious Expression

- allowing the display of religious icons or messages at an employee's work station;
- permitting an employee to utilize a particular religious phrase when greeting co workers; or
- allowing the employee to pray at his or her desk.

The EEOC cautions employers not to suppress all religion in the workplace and notes that prayer, proselytizing, and other forms of religious expression do not *per se* cause disruption or constitute an undue hardship. Concomitantly, the EEOC acknowledges that employers are permitted to draw a line to prevent religious expression from interfering with work or placing an undue hardship on the business. For example, an employer need not permit an employee to engage in religious discussions with customers when that employee's message could become confused with the company's message or policy. An employer also has the right to control speech that threatens to impede provision of effective and efficient services. As noted earlier, however, context matters. Thus, while an employer would be required to permit a Christian employee to display a cross on her desk (even if coworkers objected), it would not necessarily have to permit such a display if that employee was the receptionist sitting at the front desk for the employer, *and* it could be shown that it would confuse customers and cause them to believe that the display was an official message from the employer.

Similarly, the EEOC cautions, while an employer must permit proselytizing if it goes without objection, it need not ignore complaints from other employees or customers that such overtures are either disruptive, harassing, or impede services.

Excusing Attendance From Company-Sponsored Programs or Events

- if an employer holds group religious services or programs in the workplace, it must allow employees who do not want to participate to be excused; and
- an employer is also required to excuse an employee from compulsory personal or professional development training that conflicts with the employee's genuine religious beliefs or practices; however, if the training provides critical information for performing the job or explains how to comply with legal requirements or sets forth corporate policies, the EEOC advises that in most instances an employer would not need to excuse the employee because doing so would cause an undue hardship.

In sum, whether an employer must accommodate prayer, proselytizing or other religious expression in the workplace is a fact-specific inquiry that will depend on the nature of the expression, the nature of the employer's business, and the extent of the impact on co-workers or customers.

Retaliation

Title VII prohibits an employer from retaliating against an individual who has engaged in protected activity. Protected activity can include, among other things, requesting a religious accommodation, raising a complaint of religious

discrimination and/or harassment internally or with a government agency (e.g., the EEOC), or assisting in the investigation of a complaint or pursuit of a charge.

Tips For Avoiding Religious Discrimination Claims

While the newly-issued EEOC Compliance Manual chapter on religious discrimination breaks no new ground, its publication underscores the complexities of an employer's obligation to respect, and at times accommodate, its employees' religious beliefs and practices (or lack thereof), even allowing them to express their religious beliefs in the workplace. Furthermore, employers are required to provide reasonable accommodations to employees involving their religious beliefs and/or practices, so long as these accommodations do not impose an undue burden on their business.

To promote a workplace free from religious discrimination and harassment, the EEOC urges that employers articulate a commitment to providing reasonable accommodations to an employee's religious practices and observances. Employers should also explain that reasonable accommodations may be provided only so long as the requests do not constitute an undue burden. Further, the EEOC recommends that employers include in their employee handbooks, or as part of employee anti-discrimination training, examples of religious conduct in the workplace that are permitted from conduct that is disruptive. The employer's anti-discrimination and anti-harassment policies should also set forth a complaint procedure with multiple avenues for reporting offensive conduct to ensure that potential harassment and discrimination is dealt with quickly and effectively. Such policies should be widely disseminated and, it is recommended, that employees and management are trained to follow them. Indeed, supervisory training is important in order to avoid discrimination/harassment complaints based on mere speculation that religious observances or accommodations disrupt the workplace. In addition, prudence dictates that employers create a procedure for addressing religious accommodation requests, as line supervisors may not be in the best position to make sound judgments in this sensitive area.

Finally, employers must take note of any applicable state or local laws addressing religious discrimination and harassment. Indeed, many states have adopted requirements that are more stringent than those imposed by federal law. For example, in New York, an employer wishing to assert an undue hardship defense to avoid granting an accommodation, including a religious accommodation, must demonstrate "significant expense or difficulty" – a much stricter standard than Title VII's "*de minimis*" threshold.

Maintaining a work environment free of religious harassment and discrimination requires vigilance in an ever more diverse workplace. This new guidance on religious discrimination

should assist employers in managing the fine line between respecting their employees' beliefs and maintaining a civil, hospitable, and productive workplace.

[Click here](#) to view the EEOC Fact Sheet and [click here](#) to view the Best Practices Guide.

**BOCA RATON • BOSTON • CHICAGO • LONDON
LOS ANGELES • NEW ORLEANS • NEW YORK • NEWARK
PARIS • SÃO PAULO • WASHINGTON, D.C.**

Client Alert

The Proskauer Rose Employment Law Counseling and Training Practice Group is a multidisciplinary practice group throughout the national and international offices of the Firm which advises and counsels clients in all facets of the employment relationship including compliance with federal, state and local labor and employment laws; review and audit of employment practices, including wage-hour and independent contractor audits; advice on regulations; best practices to avoid workplace problems and improve employee satisfaction; management training; and litigation support to resolve existing disputes.

For more information, please contact:

New York

Elise M. Bloom

212.969.3410 – ebloom@proskauer.com

Fredric C. Leffler

212.969.3570 – fleffler@proskauer.com

Joshua A. Stein

212.969.3552 – jstein@proskauer.com

Newark

Lawrence R. Sandak

973.274.3256 – lsandak@proskauer.com

John P. Barry

973.274.6081 – jbarry@proskauer.com

Washington, D.C.

Lawrence Z. Lorber

202.416.6891 – llorber@proskauer.com

Boston

Mark W. Batten

617.526.9850 – mbatten@proskauer.com

Boca Raton

Allan H. Weitzman

561.995.4760 – aweitzman@proskauer.com

New Orleans

Charles F. Seemann

504.310.4091 – cseemann@proskauer.com

Los Angeles

Anthony J. Oncidi

310.284.5690 – aoncid@proskauer.com

Harold M. Brody

310.284.5625 – hbrody@proskauer.com

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

You can also visit our Website at www.proskauer.com

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice or render a legal opinion.

© 2008 PROSKAUER ROSE LLP. All rights reserved. Attorney Advertising.