Breakout Sessions – Series 3

LOSING MY RELIGION

AN UPDATE ON RELIGIOUS DISCRIMINATION AND ACCOMMODATION ISSUES

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I. Brief Overview of Title VII Religious Discrimination Law

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers from discharging or otherwise discriminating against any individual with respect to his "compensation, terms, conditions, or privileges of employment" because of that individual's religion. 1 With only a few narrow exceptions (such as the clerical exception for non-profit religious employers like churches and mosques), it also prohibits employers from discriminating against employees for refusing to adopt, participate in, or agree with an employer’s religious beliefs and practices. 2

In order to establish a prima facie case of religious discrimination under Title VII, the employee must show that: (1) he held a sincere religious belief that conflicted with a job requirement; (2) he informed his employer of the conflict; and (3) he was disciplined or subject to an adverse employment action for failing to comply with the conflicting requirement. 3 If the plaintiff establishes a prima facie case, the burden then shifts to the employer to show that it offered a reasonable accommodation or, alternatively, that offering an accommodation would have resulted in undue hardship. 4 An accommodation would constitute an "undue hardship" if it would impose more than a de minimis cost on the employer. 5 This analysis considers both economic costs (e.g., lost business, having to hire additional employees, etc.) and non-economic costs (e.g., compromising the integrity of a seniority system). 6

This paper will highlight a few key developing issues in religious discrimination law under Title VII. Although not a comprehensive treatise, the paper will emphasize key cases and offer a starting place to employers considering these and similar issues.

II. What is a Religion Anyway?

The scope of “religion” under Title VII extends far beyond the more organized and common religious faiths (e.g., Christianity, Hinduism, Islam, Judaism, Sikhism, etc.). In fact, Title VII defines “religion” quite broadly to include “all aspects of religious observance and practice.” 7 Religious practices include any “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” 8 The mere fact “that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.” 9 It is therefore theoretically possible under Title VII that an employer might be required to accommodate an entirely new or unique religious belief held by only the requesting employee and by no other person on Earth.

Courts considering whether an employee’s nontraditional belief is religious under Title VII often ask the following question, first posed in a Supreme Court conscientious objector case during the Vietnam War: “[D]oes the claimed belief occupy the same place in the life of the [employee] as an orthodox belief in God holds in the life of one clearly qualified for

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2. See, e.g., Shaporia v. Los Alamos Nat. Laboratory, 992 F.2d 1033 (10th Cir. 1993).
5. Id. (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).
6. Id. (citations omitted).
8. Id. (citing 29 C.F.R. § 1605.1).
9. Id.
exemption?”  

Under this standard, courts differentiate between those beliefs which are “religious in nature” and those which are “essentially political, sociological, or philosophical.”  

It is not necessary that the employee actually believe in a God or divine beings such as angels or demons, and even nontheistic beliefs can be essentially religious in nature.

In an attempt to provide more clarity to this somewhat vague standard, some jurisdictions have adopted more detailed definitions of “religion,” such as the following definition adopted by the Third Circuit:

“First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.”

What is noticeably absent from all proposed definitions, however, is any requirement that the religion “make sense.” As the Supreme Court has repeated, it is not the place of courts to inquire into the validity or plausibility of an individual's religious beliefs; instead, the task of a court is “to decide whether the beliefs professed [...] are sincerely held and whether they are, in [the believer’s] own scheme of things, religious.”

III. Veganism and the Anti-Vaccination Movement

One increasingly frequent issue—particularly in the healthcare sphere—involves whether an employee’s anti-vaccination beliefs are a “religion” under Title VII, such that the employee might be eligible for an exemption from an employer’s routine vaccination requirements. The answer, applying the framework discussed above, is that whether the employee’s anti-vaccination beliefs are religious will depend on the employee’s underlying reasoning and the place of those beliefs in the employee’s life.

For example, if an employee’s reason for opposing vaccination is merely a belief that vaccination may be harmful to his or her health, this will typically not be sufficient to establish a “religion” under Title VII. In Fallon, an employee requested an exception from his hospital employer’s flu vaccine policy because he “worrie[d] about the health effects of the flu vaccine, disbelieve[d] the scientifically accepted view that it is harmless to most people, and wish[e]d to avoid this vaccine.” The court explained that “his concern that the flu vaccine may do more harm than good—is a medical belief, not a religious one.” Even if the employee’s beliefs were restated as a moral or ethical maxim (i.e., “Do not harm your own body”), this one moral commandment would be an isolated moral teaching, rather than a comprehensive system of beliefs about deep, fundamental, or ultimate matters. The employee was therefore not entitled to an exemption under Title VII. Notably, however, this decision did not hold that no employees could ever be exempt from flu vaccine requirements under Title VII, and in fact stated that...

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11 Id.
12 Id. (citing Welsh v. United States, 398 U.S. 333, 340 (1970)).
14 Fallon, 877 F.3d at 492.
15 Id.
16 Id.
Christian Scientists might qualify under Title VII for exemptions from vaccination requirements to the extent their objections stemmed from truly religious beliefs.\textsuperscript{17}

Another increasingly common reason for employees to request exemptions from flu vaccines is veganism, since many vaccines are created from or contain animal byproducts. At least one district court denied a hospital’s motion to dismiss a terminated worker’s Title VII religious discrimination claim and held that the worker should be given the opportunity to show that her vegan beliefs were religious.\textsuperscript{18} Other courts have avoided directly addressing whether veganism is a philosophical belief or a religious one.\textsuperscript{19}

Meanwhile, the EEOC has continued to aggressively oppose mandatory flu shot policies for employees, on the grounds that such blanket policies might infringe on employees’ religious beliefs and practices. As described in a 2018 article in \textit{The New England Journal of Medicine} entitled “Vaccination without Litigation – Addressing Religious Objections to Hospital Influenza-Vaccination Mandates,”\textsuperscript{20} the EEOC has routinely sued hospitals that deny employee requests for religious exemptions to vaccination requirements. The article focused on 14 religious discrimination cases filed since 2011. Results of the cases have been mixed, indicating that this is far from a settled issue.

Employers faced with an employee requesting an exemption from flu shot requirements should meet with the employee regarding the underlying reason for his or her request. If the employee is requesting an exemption merely because of a medical belief that vaccines are dangerous or may cause harm, that belief is likely not a protected religion under Title VII, and the potential legal risk associated with denying the employee’s request should be relatively low.

However, if the belief is rooted in veganism, Christian Science, or any other potentially religious belief, the employer should consider first whether any potential accommodations would be feasible or whether the exemption would pose an undue hardship. For example, is the employee an office worker (\textit{e.g.}, accountant, HR personnel, etc.) or someone engaging in frequent contact with sick or at-risk individuals (\textit{e.g.}, doctor, nurse, social worker, etc.)? Is there any way to safely mitigate the risk (\textit{e.g.}, by requiring the employee to wear a face mask, transfer to a different location, frequently wash hands, etc.), or do the nature of the employee’s job duties mean that the potential risk would be unacceptably high even with such accommodations (\textit{e.g.}, the employee is a pediatric nurse working with immunocompromised patients)? Particularly in the healthcare environment, employers may be able to argue that accommodating a religious employee’s request for vaccine exemption would be an undue hardship imposing more than a \textit{de minimis} cost.\textsuperscript{21}

\textsuperscript{17} \textit{Id.} (citing \textit{Boone v. Boozman}, 2127 F. Supp. 2d 938, 947 n. 20 (E.D. Ark. 2002); \textit{Kolbeck v. Kramer}, 202 A.2d 889, 891 (1964)).


\textsuperscript{21} See, \textit{e.g.}, \textit{Robinson v. Children's Hospital Boston}, 2016 WL 1337255 (D. Mass. Apr. 5, 2016) (finding that it would be an undue hardship for employer hospital to exempt a vegan employee from flu shot requirement where the employee worked in emergency patient care area and was required to touch and sit in close proximity to very ill patients).
IV. Religious Discrimination Cases Where the Employee or Applicant Never Expressly Discusses Her Religion or Requests an Accommodation

The key recent Supreme Court case on this issue is *EEOC v. Abercrombie & Fitch Stores, Inc.* That case involved a Muslim job applicant who arrived to her interview for a retail store position wearing a religious headscarf. Although the applicant did not expressly identify herself as Muslim or discuss her headscarf during the interview, the store’s assistant manager later admitted that “I just assumed that she was Muslim because of the head scarf was [sic] for religious reasons.” She rated the applicant “qualified” after the interview, but was concerned about whether the religious headscarf would violate Abercrombie’s “Look Policy” prohibiting employees from wearing caps. Abercrombie ultimately determined that the headscarf would violate the Look Policy and, for that reason, decided not to hire the applicant.

The EEOC filed a religious discrimination suit on the applicant’s behalf, asserting that Abercrombie had refused to hire her because of her religion and to avoid providing an accommodation. Abercrombie defended itself by arguing that the applicant never told the manager that her religious beliefs would conflict with the Look Policy or that she would need an accommodation. In other words, Abercrombie alleged it could not have discriminated against the applicant on the basis of her religion or to avoid providing her with an accommodation because it was never placed on notice by the employee. The case wound its way up to the Supreme Court, which ultimately held that this defense would not hold water. As the Court explained, while an explicit request for accommodation or discussion of religious beliefs “may make it easier to infer [an employer’s discriminatory] motive, [it] is not a necessary condition of liability.”

As the Abercrombie case makes clear, what matters in a religious discrimination case is the employer’s underlying motive for an adverse employment action—even if the employer’s beliefs about an employee’s or applicant’s religion are incorrect or unsupported. An employer’s suspicion or belief that an employee may be religious or may hypothetically need an accommodation in the future should not be grounds for any adverse employment action. Religious discrimination is prohibited even if the employee or applicant has never explicitly informed the employer of his or her religious beliefs or submitted a formal request for accommodation.

V. Prayer and Meal Breaks

Some religions, including branches of Islam, require adherents to pray or eat at certain times throughout the day. Permitting religious employees to take brief prayer breaks subject to supervisor discretion, or rescheduling regular breaks to coincide with employees’ prayer times, may be a reasonable accommodation if such breaks do not interfere with the employer’s regular operations or impose more than a *de minimis* burden. For example, if an employee is already entitled to 45 minutes of break time each day, a reasonable accommodation might be permitting him to take those 45 minutes on the schedule dictated by his religion. If employers already

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24 135 S.Ct. at 2033.
25 See, e.g., *EEOC v. JBS USA, LLC*, 339 F. Supp. 3d 1135, 1180 (D. Colo. 2018) (employer’s practice of permitting Muslim employees to take brief unscheduled prayer breaks, subject to supervisor discretion and with preference given to bathroom breaks, was a reasonable accommodation).
provide employees with unscheduled breaks for other reasons (e.g., smoke breaks, bathroom breaks, coffee breaks, etc.), it is more likely that brief prayer breaks will be reasonable.27

Employers are not required to make any schedule changes that would impose more than a de minimis burden, however. Thus, a Muslim employee’s request to reschedule a beef processing plant’s regularly scheduled meal time to coincide with sunset during Ramadan—where such a change would result in complete rework of the shift system and significant unrest among non-religious employees—was an undue burden on the employer.28

In fact, caution may be warranted when requested breaks or schedule changes could involve a more than de minimis cost to the employer—such as when the breaks are frequent and paid. A handful of federal courts have found that providing paid breaks solely to religious employees, but not others, may constitute religious discrimination against employees who do not receive such breaks.29 The courts’ reasoning was that, if the employer is incurring more than de minimis costs to provide such paid breaks only to religious employees, it may be effectively discriminating against non-religious employees based solely on their lack of belief.

VI. Work Schedule Accommodations

A similar issue arises when a religious employee requests a regular change to his or her weekly work schedule—for example, weekly time off for the Sabbath. As always, the question is whether the employee’s request can be accommodated without a more-than-de minimis cost to the employer. This is largely determined on a case-by-case basis, as demonstrated below.

For example, the Tenth Circuit Court of Appeals found that an employer reasonably accommodated an employee truck driver’s request not to work on the Sabbath when it suggested a method by which the employee could work his regularly assigned number of trips each week prior to the Sabbath, and permitted him to use his vacation time on any occasions when this would not work.30 The court noted that the employer was not required to grant the driver’s request to skip assignments, which would then have to be worked by other drivers. Nor was the employer required to permit the driver to work fewer hours than other full-time drivers, or to transfer him to a different position with no loss of seniority—which would violate a collective bargaining agreement.

Another common means of accommodating an employee with similar religious needs is offering the employee the opportunity to swap shifts with another employee.31 If, however, no other employee volunteers to swap shifts and there is no other way to accommodate the

28 Id.
29 See, e.g., Menuel v. Hertz Corp., 2008 WL 11322934 (N.D. Ga. Nov. 10, 2008) (plaintiff had stated a claim for religious discrimination where he alleged that Hertz provided paid prayer breaks only for Muslim employees while denying paid breaks to non-Muslim employees—who were expected to work without breaks for the same pay); Kuan v. City of Chicago, 563 F. Supp. 255 (N.D. Ill. 1983) (denying motion to dismiss plaintiff’s discrimination claim based on paid prayer breaks because, “when an employer bears more than a de minimis cost to accommodate a religious belief, it in effect discriminates against its other employees on the basis of their religious beliefs”).
30 Lee v. ABF Freight Sys., Inc., 22 F.3d 1019 (10th Cir. 1994).
religious employee’s request without incurring a more-than-de minimis cost, an employer does not violate the religious employee’s rights by terminating his or her employment.\textsuperscript{32}

Another way employers can meet their obligation to accommodate an employee’s religious schedule needs is by using a neutral vacation or time-off policy applicable to all employees, if that policy is sufficient to cover the employee’s needs. Thus, for example, the district court in \textit{City of Albuquerque} found that a fire department’s neutral time off policy reasonably accommodated a firefighter’s weekly Sabbath observance, where the firefighter could effectively obtain time off each week by (1) using a day of vacation; (2) taking leave without pay; or (3) trading shifts.\textsuperscript{33}

Similarly, a former employer met its obligation under Title VII to accommodate a religious employee training instructor by shifting its regular training schedule and—for those unusual training sessions that still needed to be conducted on the Sabbath—permitting the employee to find others to cover his assigned training session.\textsuperscript{34} When the employee failed to find anyone to cover a Sabbath shift and did not attend, the employer was entitled to terminate his employment.\textsuperscript{35}

The takeaway is that employers should be willing to discuss possible options with an employee to accommodate schedule changes, but are not required to retain an employee who cannot perform the job. Depending on the circumstances, options for accommodations may include, for example, rearranging the employee’s schedule, allowing him to use accrued leave or vacation, offering him an opportunity to transfer to a different position, or permitting him to swap shifts. If the employer considers these options and finds that they would impose an undue hardship, however, the employer is not required to retain an employee who cannot be present when required.

\section*{VII. Knives and Ceremonial Weapons in the Workplace}

Employers must also consider how to accommodate religious beliefs that require the carrying of knives and/or ceremonial weapons. This issue frequently arises, for example, for employees whose Sikh religion requires them to carry a kirpan—a small sword or dagger—at all times as an article of faith. Kirpans are frequently made of steel or iron, have a single cutting edge that may be either blunt or sharp, and are most often between 3 and 9 inches long.

Most cases involving kirpans and other symbolic religious weapons have arisen so far in the school context, rather than the workplace. For example, the Ninth Circuit has held that Sikh students in public school have a right to wear a kirpan,\textsuperscript{36} and the New York Board of Education currently permits students to wear religious knives as long as they are secured within sheaths with adhesives that make the knives impossible to draw.

The Fifth Circuit Court of Appeals first considered the kirpan issue in the employment context where an IRS public employee was prohibited from wearing her 9-inch (and later a 3-inch) kirpan to work under a federal statute prohibiting weapons with blades exceeding 2.5

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\item See, e.g., \textit{Genas v. Dep’t of Correctional Services}, 75 F.3d 825 (2d Cir. 1996) (employer did not violate law by dismissing employee who refused to work on Saturdays for religious reasons, after the employee failed to shift swap and did not arrive for his Saturday shift).
\item \textit{U.S. v. City of Albuquerque}, 545 F.2d 110 (10th Cir. 1976).
\item \textit{Id.}
\item \textit{Rajinder Singh Cheema, et al. v. Harold H. Thompson}, 36 F.3d 1102 (9th Cir. 1994).
\end{enumerate}
\end{footnotesize}
inches in certain federal buildings. The employee suggested three potential accommodations, which the IRS refused to accept: (1) wearing a duller kirpan; (2) working from home; or (3) working from a different federal building with lower security requirements. The court held that the IRS did not fail to accommodate the employee under Title VII, even assuming her religious beliefs required her to carry a kirpan longer than 2.5 inches, because the proposed accommodations would impose an undue hardship on the IRS. In particular, the IRS could potentially be required to break a federal statute and take time each day to ascertain whether her kirpan was dull or sharp. The agency also determined that she could not effectively perform her duties from a different location. Given these facts, the court found that the employer was not required to accommodate the employee.

Most circuits, however, have not yet considered this issue in the employment context, and it remains an unsettled area of law. The EEOC’s website lists symbolic weapons as examples of potential accommodations that employers might be required to provide. The agency recently settled a claim against a hospital for prohibiting a Sikh dietary aide from wearing her 6-inch kirpan to work, even though the blade had been dulled and was worn sheathed under her clothing.

Given the uncertainty surrounding this issue, employers facing similar requests for accommodations should at least consider whether potential accommodations are feasible or whether they would impose an undue hardship given the nature of the employee’s job. Ideas for accommodations might include: (1) requiring that the blade be short and/or dulled; (2) requiring that the blade be fastened in a sheath with adhesive or via other means; (3) requiring that the blade be kept out of sight or under clothing in a manner not easily accessible; or (4) permitting the employee to telecommute if the employee could effectively work from home.

VIII. Body Modification and Dress Code Issues

Another frequent area of contention in religious discrimination law is requests for accommodations or exemptions from company dress codes and look policies. The key, as always, is whether the employer would suffer an undue hardship by providing the accommodation. Generally the law is fairly favorable to employers on this issue.

An accommodation of a dress code will commonly be an undue hardship when, for example, the accommodation could result in potential safety issues or result in serious impairment of an employer’s valid mission or purpose. For example, a private prison employer was not required to provide a female Muslim employee with an exemption to the employer’s prohibition against head coverings where the employee’s head scarf could pose a serious safety risk were a prisoner to grab it. Similarly, a city was not required to permit police officers to wear religious clothing or ornamentation over their uniforms because the police department’s religious neutrality was vital in both dealing with the public and working together cooperatively.

Employers may be creative when considering possible accommodations or exemptions to dress codes. In Cloutier v. Costco Wholesale Corp., a former cashier sued the store for religious discrimination after she was discharged for wearing facial jewelry in violation of her

37 Tagore v. U.S., 735 F.3d 324 (5th Cir. 2013).
38 Id.
39 Id.
41 See https://www1.eeoc.gov/eeoc/newsroom/release/6-8-10a.cfm?renderforprint=1.
42 EEOC v. GEO Group, Inc., 616 F.3d 265 (3d Cir. 2010).
religious beliefs as a member of the Church of Body Modification. At the time Costco’s employee dress code included a blanket prohibition of all facial jewelry except for earrings. Nevertheless, Costco offered the employee at least two potential accommodations: she could cover her facial piercing with a band-aid while at work, or she could replace it with a clear retainer that would be less noticeable to customers. The court found that, by offering these reasonable alternatives, Costco had fulfilled its obligations under Title VII. It would have been an undue hardship to require Costco to abandon its general policy requiring “professional attire.”

On the other hand, there are also cases finding in favor of the employee on dress code issues—most frequently where the requested accommodation would have little to no effect on the employer’s business or where the employer treated religious employees differently than non-religious employees. For example, the district court in Muhammad v. New York City Transit Authority denied an employer’s Motion for Summary Judgment where the employer transferred all employees with religious objections to its head covering policy out of passenger service, but did not transfer any employees who had objected to the same policy on secular grounds.

IX. Religious Use of Peyote and Marijuana

Employers may occasionally encounter requests for exemption from workplace drug policies for ceremonial or religious use of certain Schedule I drugs. Use of peyote, for example, is legal under federal law if used in a bona fide religious ceremony of the Native American Church. Religious use of peyote is also explicitly made legal by state statute in New Mexico and Colorado. The Tenth Circuit Court of Appeals held that an employer trucking company violated Title VII when it refused to hire a Native American applicant for a truck driver position who admitted using peyote in religious ceremonies twice per year, even though reasonable accommodations were available and would not cause an undue hardship (i.e., requiring the employee to take a day off after each ceremony so that the peyote could dissipate safely from his system). The court did not address whether its analysis would have differed if, for example, the employee had engaged in peyote use on a much more frequent basis.

The situation is quite different for marijuana, which remains illegal under federal law. Although the issue is less commonly raised in the employment context, multiple older criminal cases found that an individual’s beliefs in the so-called “Church of Marijuana” were not sufficiently comprehensive to constitute a religion because such beliefs were most often focused on the growth, use, possession, and distribution of marijuana for personal therapeutic effect, rather than to attain a state of religious, spiritual, or revelatory awareness.

More recently, new organizations such as the International Church of Cannabis—an organization with several hundred members located in Denver—have proliferated following the legalization of marijuana under certain state laws. The International Church of Cannabis presents itself as a religious organization and requires its members to engage in ritual use of cannabis as a “sacrament,” but claims no divine law or dogma other than the “Golden Rule.” There appear to be no Title VII cases involving members of this or similar organizations; however, because marijuana use remains illegal under federal law, employers should be able to argue successfully that—even if such use of marijuana was religious under Title VII—

44 Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004).
46 21 C.F.R. § 1307.31.
49 See, e.g., U.S. v. Meyers, 906 F. Supp. 1494 (D. Wyo. 1995) (holding that defendant’s belief in Church of Marijuana was not a religion).
accommodation of such a practice would be an undue hardship because it would require violating a federal law.

X. Time Off for Kwanzaa and Secular Holidays

One of the most frequently requested accommodations for religious beliefs is time off for religious holidays, and employers often face questions regarding which holidays are considered religious for purposes of Title VII. Multiple plaintiff employees, for example, have claimed that Kwanzaa (a holiday celebrating family and community life and African-American traditions) should be considered religious under the statute. In general, courts have found otherwise and hold that the holiday celebrates moral, social, and ethical values—but not religious ones. Employers are generally not required to accommodate employees’ requests for time off for holidays that are not religious in nature.

XI. Reverse Discrimination Issues

With only a few narrow exceptions (such as the clerical exception for certain religious non-profit employers including churches and mosques), Title VII generally prohibits so-called “reverse religious discrimination” in the workplace. This means that employers may not discriminate against employees for refusing to adopt, participate in, or agree with an employer’s religious beliefs and practices. As described below, there have been several significant recent cases focusing on an employer’s religious beliefs or practices—in contrast to the more common discrimination cases involving religious employees.

A. Wellness Programs That Cross Into Religious Territory

One recent federal reverse religious discrimination case focused on a mandatory employee wellness initiative that crossed the line from advocating employee health and wellness to advocating spirituality. Because Title VII defines religion broadly, employers should be careful to ensure that their policies—including employee health and wellness initiatives—do not mandate participation in activities that could be broadly interpreted as religious in nature.

On April 26, 2018, a jury awarded $5.1 million in compensatory and punitive damages to plaintiffs after finding that an employer had hired a consultant to implement an allegedly secular conflict resolution and wellness program (colorfully titled “Onionhead”) requiring employees to participate in prayer, chanting, and workplace cleansing rituals. The program further encouraged employees to engage in discussions of spirituality, divine destinies, God, and the soul as part of an alleged method to transform negative thinking. When one employee refused to participate in the program, she was let go.

The fact that this was an allegedly “secular” program and not part of any established religion did not matter. As the district court noted in its decision denying the employer’s motion for summary judgment on reverse religious discrimination, Title VII defines “religion” broadly to


51 See, e.g., Shaporia v. Los Alamos Nat. Laboratory, 992 F.2d 1033 (10th Cir. 1993).
include “all aspects of religious observance and practice.” Religious practice, in turn, includes any “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views,” and “[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.” The prayers, chanting, cleansing rituals, and spirituality discussions mandated by the employer to combat employees' negative thinking fell within this broad definition, and the employer violated the law by discriminating against employees who declined to participate.

B. LGBTQ+ Issues

One area of law in rapid flux is the intersection of religious discrimination law with LGBTQ+ discrimination issues. There is currently a nationwide circuit split regarding whether Title VII’s prohibition against “sex discrimination” should be interpreted by courts to prohibit LGBTQ+ discrimination in the employment context. The United States Supreme Court may resolve the dispute this year if it decides to accept certiorari and review a relevant trio of employment cases currently pending petition. Aside from federal law, a patchwork of numerous state and local laws already expressly prohibit LGBTQ+ employment discrimination throughout much of the country.

In jurisdictions where courts find that Title VII prohibits LGBTQ+ discrimination, some employers have recently asserted a defense under the Religious Freedom Restoration Act ("RFRA"). The RFRA precludes the government from “substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability,” unless the government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest.” In other words, an RFRA defense requires a two-step burden-shifting analysis. First, a defendant must demonstrate that complying with a generally applicable law would substantially burden his religious exercise. If this showing is made, the government must then establish that applying the law to the burdened individual is the least restrictive means of furthering a compelling government interest.

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53 Id. (citing 29 C.F.R. ¶ 1605.1).
54 See Wittmer v. Phillips 66 Co., 915 F.3d 328, 330 (5th Cir. 2019) (describing current circuit split and noting that three circuits have construed Title VII as prohibiting sexual orientation discrimination).
56 State and local laws on this issue are numerous. Currently at least twenty-one state legislatures have passed statutes prohibiting public and private employment discrimination based on sexual orientation and gender identity, including California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, and Washington. Michigan and Pennsylvania currently prohibit such discrimination through a combination of executive orders, court rulings, and civil rights commission decisions. Indiana and Wisconsin prohibit discrimination on the basis of sexual orientation but not gender identity. Other states prohibit such discrimination only by public—not private—employers. At least 400 city and county governments also have passed local laws and ordinances prohibiting sexual orientation and gender identity discrimination in employment.
59 Id.
Although few courts have considered this issue, the Sixth Circuit Court of Appeals recently granted partial summary judgment against a Christian-owned funeral home that had asserted an RFRA defense against its former transgender employee’s Title VII discrimination claims.\(^60\) (The employer has since filed a petition with the Supreme Court, but it remains to be seen whether the Court will grant certiorari). In that case, a transgender woman had requested that she be allowed to wear the standard uniform for female funeral directors, but her employer denied her request and terminated her employment.\(^61\) In addition to holding that Title VII protects transgender employees, the Sixth Circuit Court of Appeals also held that: (1) requiring the funeral home to permit a transgender woman to wear a woman’s uniform and prohibiting the funeral home from firing the employee because of her transgender status would not create a substantial burden on the employer’s religion; (2) the government had a compelling interest in the elimination of workplace discrimination; and (3) enforcing Title VII is usually the least restrictive means for eradicating discrimination in the workplace.\(^62\)

Although it remains to be seen whether the Supreme Court will review and/or reverse this decision, employers nevertheless should be aware that many jurisdictions in the United States currently prohibit employment discrimination on the basis of sexual orientation and gender identity, and at least one Court of Appeals has found that the RFRA does not create an exception to that prohibition. At a minimum, employers should review their policies for compliance in any jurisdictions already prohibiting such discrimination and should attempt to stay abreast of future changes as they come.

C. Contraception Coverage

The United States Supreme Court itself has weighed in on whether the RFRA exempts employers from the Patient Protection and Affordable Care Act of 2010’s ("ACA") requirement that specified employers’ group health plans include preventative care—including contraceptives.

In the highly-publicized *Burwell v. Hobby Lobby* decision, the Court held specifically that the RFRA did prevent the United States Department of Health and Human Services ("HHS") from requiring three closely held corporations to provide contraception coverage, where such coverage would violate the sincerely held religious beliefs of the companies’ owners.\(^63\) The Court emphasized that its holding was “very specific” and applied only to closely held corporations whose owners sincerely held religious beliefs opposed to contraception. The Court did not hold that other for-profit corporations and commercial enterprises could opt out of the ACA contraception mandate. The Court further emphasized that its decision to apply the RFRA to this case was influenced heavily by the fact that HHS already had provided multiple exceptions to the mandate—including to certain religious non-profit organizations and grandfathered health plans—and by the fact that Hobby Lobby employees had other viable, affordable options for obtaining birth control outside their employer-sponsored health plans.

The upshot of this decision is that the ACA contraceptive mandate still applies to most private employers, absent a specific exception under the statute and regulations, unless the employer is a closely held corporation whose owners can provide evidence of their personal religious beliefs.

\(^60\) Id.
\(^61\) Id.
\(^62\) Id.
Losing My Religion—An Update on Religious Discrimination and Accommodation Issues

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Title VII and Religion

- Employers are forbidden from discharging or otherwise discriminating with respect to “compensation, terms, conditions, or privileges of employment.”
Exceptions?

- There are limited exceptions such as the ministerial exception for not-for-profit religious employers like churches and mosques
  - Limited in scope

What if no exception?

- If there is no exception then an employer must comply with Title VII and may need to consider whether there is a reasonable accommodation that will avoid a conflict between the employee’s religious belief and the employer’s job requirement.
Reasonable accommodation

- Lower standard than that of the Americans with Disabilities Act
- Does the accommodation create an undue hardship for the employer?
  - Does it impose more than a *de minimis* cost to the employer?

What is the standard for religious discrimination?

1) Employee has a sincerely held religious belief that conflicts with a job requirement;
2) Employee has informed employer of the conflict; and
3) Employee was disciplined or subject to adverse employment action for failing to comply with the conflicting requirement.
What IS a religion under Title VII?

- Federal and state law may differ
  - Some states include seriously held *personal* beliefs

- Who gets to decide?
  - The employee?
  - The employer?

Broad definition

- All aspects of religious observance and practice
- May include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views
A religion of one?

- The mere fact that no religious group espouses such beliefs or the fact that religious group to which the individual professes to belong may not accept such a belief will not determine whether the belief is a religious belief of the employee or prospective employee.

Is this covered?

Donald informs payroll that he believes it is a constitutional violation and also against his religion to pay taxes. Accordingly, he does not authorize the Company to withhold city, state, or federal taxes from his pay and demands the Company immediately accommodate his sincerely held beliefs.
What should US Company do?

a) Ignore him
b) Ask for a statement from his priest, minister, or religious leader supporting that such belief is legitimate
c) Tell Donald to tell it to the IRS

Some courts have defined religion as:

- A religion addresses fundamental and ultimate questions having to do with deep and imponderable matters
- A religion is comprehensive in nature; it consists of a belief system as opposed to an isolated teaching
- Can be recognized by the presence of certain formal and external signs
Clear as mud!

- Does US Company yet know whether Donald has a covered religious belief or the Church of No Taxation constitutes a covered religion/religious belief?

Does the religious belief have to make sense?

- The United States Supreme Court has said that it is not the task of courts to decide whether the beliefs professed are sincerely held and whether they are in the believer’s own scheme of things, religious.
Beliefs conflict with job

US Company has been given an opportunity to pitch its services to Big Fish for possibly its largest account ever. The Company expects its VP of Sales, Matt Pious, to head up the pitch along with your top sales person in that product line, Karen Knowledge. This will require the two to work together to prepare the proposal and to travel to Big Fish to pitch the work.

Matt tells you that it is unacceptable in his religion to work one-on-one with a woman to prepare the pitch and certainly against his beliefs to travel with Karen.

What does US Company do?
a) Ask for a statement from Mike’s religious leader
b) Ask Mike to prove his beliefs
c) Tell Karen she has to prepare another sales rep on all aspects of the product so that he can go on the pitch with Matt
d) Consider the situation and the burden it may place on the Company and consider other accommodations

Vaccinations

- Religious exemption for mandatory vaccinations?
  - Harmful to health
  - Veganism
  - Is there an accommodation
No weapons

- Employer may be required to consider how to accommodate religious beliefs that require the carrying of knives and/or ceremonial weapons
- Kirpan – a small sword or dagger

Company dress codes and appearance policies

- Undue hardship?
  - Safety issues
  - Serious impairment of employer’s valid mission or purpose
Workplace drug policies

- Native American Church
  - Peyote
  - State law may allow (New Mexico, Colorado)
- International Church of Cannabis
  - Marijuana
  - Remains illegal under federal law

Holidays

- Religious holiday
- Secular holiday
  - Celebrating moral, social, and ethical values
Reverse discrimination

Terrance has a deep Christian faith and strongly adheres to the practices that he believes are required by his faith. As the sole owner of his business, he requires all of his employees to participate in a prayer service at the beginning of each work day held at the work site. Afraiz is a practicing Hindu and asks to be excused. Terrance tells Afraiz that if he does not participate he will be terminated. What is a Hindu to do?

Are either Terrance or Afraiz protected?

- With very few exceptions, there is no reverse discrimination
- Generally means employers may not discriminate against employees for refusing to adopt, participate in, or agree with an employer’s religious beliefs and practices
- The Company, however, may have to accommodate practices related to Afraiz’s Hindu beliefs
Wellness programs

- Employers should ensure that employee health and wellness initiatives do not mandate participation in activities that could be broadly interpreted as religious in nature:
  - Program requiring prayer, chanting, and workplace cleansing rituals
  - Program encouraging employees to discuss spirituality, divine destinies, God, and the soul
  - Intended to combat negative thinking

LGBTQ+

- Title VII and sex discrimination
- Religious Freedom Restoration Act
  - Precludes the government from substantially burdening a person’s exercise of religion even if the burden results from a rule of general applicability unless the government demonstrates that applications of the burden of the person is in furtherance of a compelling government interest; and is the least restrictive means of furthering that interest.
How would you handle?

Fred is the shift supervisor of a manufacturing plant. Edith was recently hired to run a machine that is critical to that shift’s productivity and is the only one who knows how to run the machine. She informs Fred that as winter approaches she will no longer be able to work past 4:00 p.m. on Fridays because she must be home by sundown and cannot work on Saturday because of her religion.

a) Edith is so essential you stop the conversation there and tell her that once her allowed PTO is exhausted she will be terminated.

b) Obtain sufficient information to determine if this is a valid religious issue and if an accommodation is possible without undue hardship.

c) Have Edith bring in support of her teaching and a letter from her faith leader detailing why this is required and cannot finish out the business day.

d) Decide to retire, this may be an omen!
Questions?

Losing My Religion—An Update on Religious Discrimination and Accommodation Issues

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