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The EEOC recently issued a new Compliance Manual section regarding religious discrimination in the workplace. The agency also issued two new summary documents: *Questions and Answers: Religious Discrimination in the Workplace* and *Best Practices for Eradicating Religious Discrimination in the Workplace*. These new resources are useful tools for employers in creating a work environment free of religious discrimination and harassment.

EEOC Issues New Compliance Assistance on Religious Discrimination

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Introduction

On July 22, 2008, “[i]n response to an increase in charges of religious discrimination, increased religious diversity in the United States, and requests for guidance from stakeholders and agency personnel investigating and litigating claims of religious discrimination,” the Equal Employment Opportunity Commission (EEOC) issued a new Compliance Manual section regarding religious discrimination in the workplace. The new section does not reflect a drastic change in EEOC policies, but it is more comprehensive and user friendly than the prior version. The section covers five major legal topics: coverage issues, disparate treatment, harassment, reasonable accommodation, and related forms of discrimination. The new section:

- attempts to articulate what religion is and when an employer may inquire into the religious nature or sincerity of an employee’s beliefs;
- adds meaningful discussion of two exceptions to Title VII: the statutory “religious organization” exception and the First Amendment-based “ministerial” exception;
- radically expands the prior version’s disparate treatment analysis by discussing discipline, compensation, religious expression, customer preferences, bona fide occupational qualifications, and conflict with security requirements;
- delves deeply into an employer’s obligation to provide reasonable accommodation for religious beliefs and practices by commenting on modification of dressing

and grooming standards, use of employer facilities for religious purposes, use of tests and other selection procedures, religious-based refusal to provide social security numbers, and other religious expression in the workplace;

- analyzes the undue hardship defense, including how coworker complaints and security concerns factor in;
- adds a completely new, comprehensive discussion of religious harassment from managers, supervisors, coworkers, and third parties; and
- addresses special considerations for employers when balancing anti-harassment and accommodation obligations with respect to religious expression.

Along with the new Compliance Manual section, the EEOC issued two summary documents: *Questions and Answers: Religious Discrimination in the Workplace* and *Best Practices for Eradicating Religious Discrimination in the Workplace*. These documents, as well as the new Compliance Manual section, are available on the EEOC’s website at www.eeoc.gov.

Questions and Answers: Religious Discrimination in the Workplace

Questions and Answers: Religious Discrimination in the Workplace (the “Q&A”) is a quick resource guide, providing plain language answers to common questions. It begins with: “[w]hat is religion?” According to the Q&A, “religion typically concerns ultimate ideas about life, purpose, and death.” While there is case law supporting this position, in some jurisdictions, courts continue to apply a much

more liberal test for “religious belief” - asking only whether an individual’s beliefs “occupy the same place in the life of the individual as an orthodox belief in God holds in the life of [one who practices a monotheistic religion].” In other words, in some parts of the country, a set of beliefs and practices is a religion if the beliefs and practices are sincerely held and religious in an individual’s own scheme of things - regardless of whether or not the purported religion speaks to “ultimate ideas.” See, e.g., *Peterson v Wilmur Communications, Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002). As a practical matter, employers should not jump to the conclusion, particularly without the benefit of legal counsel, that any given set of beliefs and practices - no matter how unusual - are not religious.

Further, the Q&A states that Title VII prohibits “subjecting employees to harassment because of ... the religious practices or beliefs of people with whom they associate (e.g., relatives, friends, etc.).” This is a holdover from the EEOC’s failed attempt in 1994 to publish seriously flawed religious harassment guidelines. The most glaring concern was the “association” language (as above). How can an employer be expected to properly identify an employee’s friends, relatives and associates; learn about their religious beliefs and practices; and ensure that nothing derogatory is said about such beliefs or practices in the workplace that might offend the employee and lead to a harassment claim? Indeed, Congress thought so little of these flawed guidelines that, although the comment period had expired, Congress passed a nearly unanimous resolution that if the EEOC did not withdraw the guidelines, Congress would withdraw the agency’s funding. The EEOC withdrew the guidelines to receive its funding, and the proposed 1994 guidelines never saw the light of day. The resurrection of this concept in this recent guidance is troubling and remains problematic. Apart from this point, the Q&A can be helpful to employers in working through religious issues in the workplace.

The Q&A provides useful guidance regarding the scope of religious disparate treatment and harassment. The answers describe a wide range of situations in which disparate treatment may occur, including hiring, discharge, and all other terms and conditions of employ-

ment. The answers also specifically advise that treating the religious expression of persons of different faiths differently is illegal. In other words, if one employee is allowed to display a Bible in his cubicle, the similarly situated employee in the next cubicle must not be prevented from displaying her Koran.

Religious harassment also may arise in varied situations: (1) when a manager requires an employee to abandon or change a religious practice to keep his job; (2) when supervisors, fellow employees, or customers create a hostile work environment because of an employee’s religious beliefs or practices; or (3) when supervisors, fellow employees, or customers create a hostile work environment by overzealously seeking to impose their own faith on an employee. The Q&A emphasizes, however, that a work environment is not made hostile because employees wear religious garb or display religious materials so long as such materials do not demean other religious views.

Most of the Q&A focuses on reasonable accommodation of religious beliefs and practices. The EEOC reiterates that an employer must provide a reasonable accommodation for any employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless doing so would pose an undue hardship. Undue hardship is anything that poses “more than a de minimis” cost or burden to the employer. An employer needs to show real evidence of either direct monetary costs or other burden on its business, such as lowered productivity, decreased workplace safety, or infringement of the rights of other employees. Speculation will not suffice.

The Q&A states that if a religious practice “conflicts with a *legally mandated* security requirement,” accommodation of such a practice would automatically be an undue hardship (emphasis added). If, however, a security requirement is of the employer’s own making, the employer will need to either modify the requirement or demonstrate that the accommodation requested would pose an undue hardship. The Q&A also advises that other employees’ complaints (or expected complaints) about an accommodation will rise to the level of undue hardship only if the accommodation would infringe on the other employees’ rights or disrupt their work.

According to the Q&A, when an employee requests an accommodation, there “is usually no question whether the practice at issue is religious or sincerely held.” However, an employer with a “bona fide doubt” about the basis for a request may make a limited inquiry into the facts and circumstances relevant to whether the belief or need for a practice is religious and sincerely held. The agency cautions employers against relying too heavily on past inconsistent conduct to question the sincerity of religious beliefs because employees’ beliefs and practices may change over time. Prudent employers will avoid making determinations about what belief or need for a practice is religious or sincerely held unless there is no way to avoid these issues.

Finally, the Q&A poses the question, “[w]hat are common methods of religious accommodation in the workplace?” The multi-page answer explores scheduling changes, voluntary substitutes, and shift swaps. The answer also advises that it may be necessary to remove tasks from employees or move them to other positions, but it notes that there may be many factors (i.e., lack of replacement workers, lack of other available positions, and the application of a collective bargaining agreement or seniority system) that could contribute to a finding that removing tasks or changing positions would present an undue hardship. See, e.g., *Aron v. Quest Diagnostics Inc.*, 174 Fed. Appx. 82 (3d Cir.), cert. denied, 127 S.Ct. 393 (2006); *George v. Home Depot*, 2001 U.S. Dist. LEXIS 20627 (E.D. La. Dec. 6, 2001), *aff’d*, 2002 U.S. App. Lexis 21824 (5th Cir. 2002). Dress and grooming standards are an area in which the EEOC expects employers to be liberal in their provision of accommodations. For example, in *EEOC v. Alamo Rent-A-Car, LLC*, a jury awarded a Muslim woman more than \$287,000 in damages after her employer refused to allow her to wear a headscarf while at work and failed to demonstrate what steps it took to attempt to accommodate her. *EEOC v. Alamo Rent-A-Car LLC*, No. CIV 02-01908-PHX-ROS (D. Ariz. June 2007) (jury verdict); see also *EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006) (summary judgment for plaintiff on liability).

While the agency notes that courts have sometimes found undue hardship because a particular accommodation conflicted with the public

image that an employer wished to convey, it cautions employers not to rely on “image,” as it may well equate to relying on “religious bias.” From the Q&A, it is clear that the agency will not abide customer preference as the basis for denial of an accommodation. However, there is relatively little case law in this area, and employers have had some victories relying on poor public image as the basis for an undue hardship finding. *See, e.g., Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004) (accommodating religiously motivated facial piercings would be an undue hardship because the piercings detracted from the “neat, clean and professional image” that Costco sought to project).

The discussion of common methods of religious accommodation continues with the advice that employee requests to use employer facilities for prayer and other practices during the work day must be accommodated unless the use would pose an undue hardship. Also, if employers allow employees to use facilities for non-work-related, non-religious activities, they will be hard pressed to deny use of the same facilities for non-work-related, religious activities.

Absent undue hardship, employees with objections to paying union dues or agency fees must be accommodated by allowing payment of an equivalent amount to a charity agreeable to the employer, the union, and the employee.

Finally, the Q&A seeks to explore means of accommodating “prayer, proselytizing, and other forms of religious expression.” Unfortunately, the question, “[w]hat is proselytizing?” is not posed in the Q&A. However, the new Compliance Manual section says the following: “[t]here are employees who may believe that they have a religious obligation to share their views and to try to persuade coworkers of the truth of their religious belief, i.e., to proselytize.” From this definition, the Q&A advises that employees should be allowed to display religious icons or messages in their work areas, engage in discussions regarding religious beliefs, distribute literature, and use religious phrases when greeting others. In other words, “employers should not try to suppress all religious expression in the workplace.”

The check on religious expression comes when an undue hardship is created. The Q&A

advises that if a coworker complains about “proselytizing,” the employer may require that the “proselytizing to the complaining employee cease.” (emphasis added). An employer may also limit an employee’s religious expression when the expression could be mistaken for the employer’s message rather than the private sentiments of the communicator. Finally, religious expression may be limited where the expression is “harassing or otherwise disruptive.” Exactly what “otherwise disruptive” means is left for a case-by-case analysis. Without question, this is still the area in which lines are the least clearly drawn. Employers should investigate thoroughly, seek counsel, and make informed decisions about how and when to limit religious expression in the workplace.

Best Practices for Eradicating Religious Discrimination in the Workplace

Best Practices for Eradicating Religious Discrimination in the Workplace (the “Best Practices document”) is a list of “best practices” for employers and employees to adopt in their quest to avoid workplace religious discrimination. Like the Q&A, the Best Practices document is divided into disparate treatment, religious harassment, and accommodation sections, with the accommodation section generating the most “best practices.”

Perhaps the most useful “best practice” in the area of religious harassment is the direction to “allow religious expression among employees to the same extent that [employers] allow other types of personal expression that are not harassing or disruptive.” Interestingly, the EEOC also suggests that “employers should encourage managers to intervene proactively and discuss with subordinates whether particular religious expression is welcome if the manager believes the expression might be construed as harassing to a reasonable person.” Certainly, only managers who have received training regarding both accommodation of religious expression and religious harassment should be engaging in such proactive behavior. In many workplaces, it may be more effective for a manager to seek assistance from human resources rather than personally intervening if he or she perceives that religious expression may be offensive to others.

The EEOC’s recommended best practices in the area of reasonable accommodation/undue

hardship include the following proactive steps that many employers may consider taking:

- inform employees (perhaps as part of general non-discrimination policies) that the employer will make reasonable efforts to accommodate religious practices;
- train management to recognize religious accommodation requests;
- develop internal procedures for processing religious accommodation requests (many employers have such forms for disability accommodation requests, but they have not yet developed them for religious accommodation requests);
- if an employee who wants to wear religious garb has regular interaction with customers, consider whether it might be possible for the employee to wear the garb in the company’s uniform colors;
- train management not to engage in stereotyping based on religious dress and grooming practices;
- train management “to gauge the actual disruption posed by religious expression in the workplace, rather than merely speculating that disruption may result;”
- be sensitive to the risk of pressuring employees to attend social gatherings after they make a religion-based objection to attending; and
- incorporate a discussion of religious expression into anti-harassment training for both managers and employees.

Summary

Religious pluralism continues to increase. The number of religious discrimination charges filed with the EEOC more than doubled between 1992 and 2007. Fortunately, the EEOC’s new Compliance Manual section, Questions and Answers: Religious Discrimination in the Workplace, and Best Practices for Eradicating Religious Discrimination in the Workplace, while not perfect, are helpful tools for employers as they proactively attempt to create work environments where religious discrimination, including harassment, can be avoided and religious beliefs and practices can be accommodated to promote productivity and workplace harmony.

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