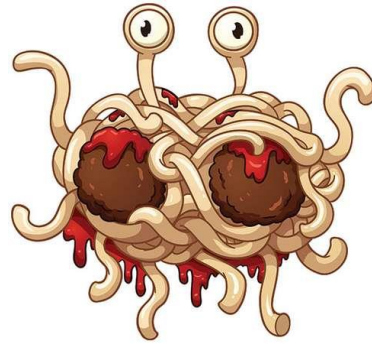


Religion and the Workplace

Thursday, October 11, 2018



What do these have in common?

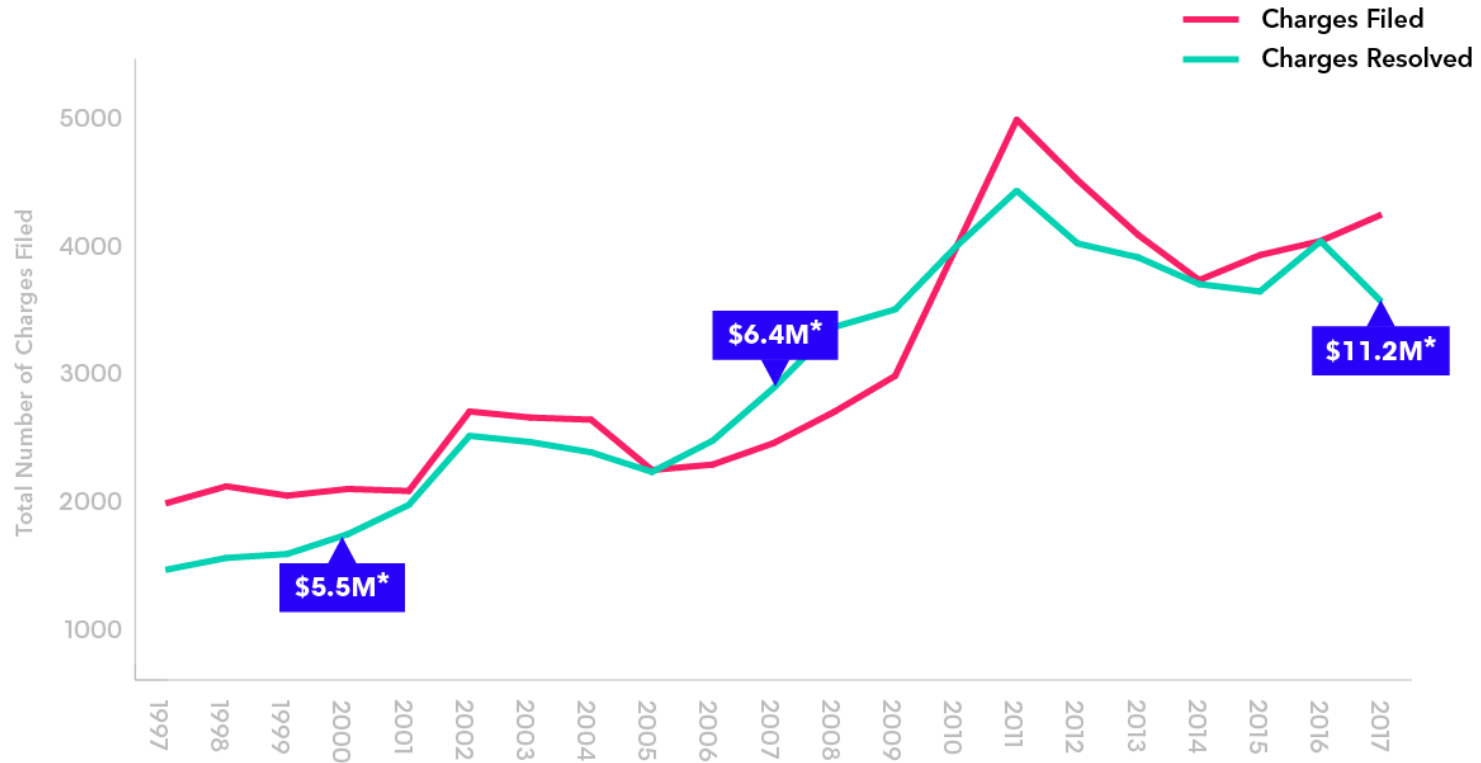


Sources of Relevant Law

- Title VII/Chapter 21 Texas Labor Code
 - Generally prohibits discrimination because of religious belief
 - Requires reasonable accommodation of religious belief and practice
- Religious Freedom Restoration Act of 1993
 - Federal law that “ensures that interests in religious freedom are protected”
- Executive Order 11246
 - Prohibits religious discrimination by government contractors
- First Amendment
 - Creates potential causes of action against government employers



Religious Discrimination Charges Filed with the EEOC



* Monetary benefits don't include awards obtained through litigation

Source: Equal Employment Opportunity Commission

Bloomberg Law



Religious Liberty – A Trump Administration Priority

- *U.S. v. Ozaukee Cnty.*, No. 2:18-cv-00343 (E.D. Wis. March 6, 2018)
 - DOJ alleges that county discriminated against employee and failed to accommodate her religious belief by requiring her to get a flu shot.
- *EEOC v. Walmart, Inc.*, No. 3:18-cv-00804 (W.D. Wis. 10/1/2018)
 - EEOC alleges Walmart failed to consider request for day off to observe the Sabbath



Title VII – Religious Protections for Employees

- (1) Prohibits discrimination on the basis of religious belief/practice
 - Except in limited circumstances
- (2) Requires reasonable accommodation of religious belief/practice
 - Unless undue hardship



Title VII – What qualifies as a “religious belief”?

- Title VII definition –
 - “all aspects of religious observance and practice, as well as belief” – 42 U.S.C. § 2000e(j)
- EEOC Compliance Manual –
 - A belief that is “religious in the person’s own scheme of things,” *i.e.*, it is “a sincere and meaningful belief that occupies in the life of its possessor a place parallel to that filled by ... God.”
 - Includes theistic beliefs as well as non-theistic “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”
- Is the belief “sincerely held” and does it concern “ultimate ideas” about “life, purpose, and death”?



A religion of one?

- Formal recognition not required; the number of practitioners is irrelevant as a matter of theory
- *EEOC v. Allendale Nursing Centre*, 996 F. Supp. 712 (W.D. Mich. 1998)
 - Belief that social security program is unbiblical and that obtaining a social security number would be a sin.
 - Court held that this was a sincerely held religious belief—despite having no other adherents in the record.
- Practically, proving the religion of one may be more difficult



Religion or political view?

- A religion is something more than a political view.
- E.g. – Ku Klux Klan has been held to be a political view, not a religious belief
 - “the proclaimed racist and anti-semitic ideology of the organization to which [the plaintiff] belongs takes on . . . , a narrow, temporal and political character inconsistent with the meaning of 'religion' as used in § 2000e.”
 - *Slater v. King Soopers*, 809 F. Supp. 809 (D. Colo. 1992)



A belief may be religious despite offensive viewpoints

- The tenets of the belief do not determine whether the belief is a religion; it is the sincerely held nature of the belief.
- Even offensive viewpoints may be a religion
- *Peterson v. Wilmur Commc'ns, Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002)
 - “Creativity” —a belief system based on ideals of white supremacy—held to be a religion for purposes of Title VII



Religion or personal preference?

- Religion requires something more than a mere personal preference.
- *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977)
 - Employee claimed discrimination based on a “personal religious creed” of eating Kozy Kitten People/Cat Food
 - Employee claimed that doing so contributed “significantly” to his well-being and energy
 - Court holds that this is a personal preference; not a religion



Religion or satire?

- *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819 (D. Neb. 2016)
 - Plaintiff claims failure to accommodate his belief system – Church of the Flying Spaghetti Monster (“FSMism”)
 - FSMism = a response to the theory of “Intelligent Design” that posits that the creator, if any, is just as likely to be a flying spaghetti monster as anything else.
 - Court holds that FSMism is a satirical response to theistic religion, not an actual religious belief.
 - “[A]n asserted belief might be so bizarre, so clearly non-religious in motivation, as not to be entitled to protection.”¹



Is the belief “sincerely” held?

- Typically, this is the key question
- *Hussein v. Waldorf-Astoria*, 134 F. Supp. 2d 591 (S.D.N.Y. 2001)
 - Plaintiff claimed wearing a beard was “part of his religion” – but . . .
 - Plaintiff had not worn a beard at any time in his fourteen years of employment, had never mentioned his religious beliefs to anyone at the hotel, and simply showed up for work one night and asked for an on-the-spot exception to the no-beard policy
 - Summary judgment for employer based on lack of a sincerely held religious belief.



Practice Pointers

- A belief may be “religious” for purposes of Title VII, *even though* the belief may be:
 - Non-traditional;
 - Offensive; and
 - Shared by no one else
- In most instances, the question should not be whether a belief or practice is a “religious”
- Instead, the question will usually be if and whether a reasonable accommodation can be made



Title VII – Religious Protections for Employees

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Religious Discrimination

- Title VII prohibits taking adverse employment actions because of an employee's religious beliefs or practices (includes disparate treatment & hostile work environment)
- Cannot fire, demote, suspend, etc. because of religious belief



Reverse Religious Discrimination

- Theory that employer discriminates against employees by imposing employer's religious views on employees
- *EEOC v. United Health Programs of America*, No. 14-cv-3673 (E.D.N.Y.)
 - EEOC alleges that employer imposed system of religious belief called "Onionhead" on employees
 - Employer claimed Onionhead was a "conflict resolution" tool to improve corporate culture
 - EEOC contends it was a religion and that employees were required to light candles, chant, pray, and attend Onionhead counseling sessions.
 - Court says it is a religion.



Exceptions to Religious Discrimination Provision

- (1) Where religion is a bona fide occupational qualification
 - Jesuit school could give preference to Jesuit priests. *Pime v. Loyola Univ. of Chicago*, 803 F.2d 351 (7th Cir. 1986)
 - Requirement that pilots flying pilgrims to Mecca be Muslims was lawful. *Kern v. Dynallectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983)
- (2) Employer is a religious organization
- (3) Institutions of higher learning supported by religious organizations or whose mission is propagation of particular religious beliefs



Accommodation of Religious Beliefs and Practices

- Title VII also requires accommodation of religious belief and practice
 - Unless accommodation would cause an undue hardship
- Analogous concept to ADA accommodation obligations with some differences



Interactive Process

- Employee has the burden to request accommodation, but no “magic words” are needed
 - Except, if need for accommodation is reasonably obvious – *EEOC v. Abercrombie*
- Upon request, Employer should engage in dialogue to assess possibility of reasonable accommodation.
- If employer has objective basis to question the sincerity of the employee’s religious belief, the employer may “make a limited inquiry into the facts and circumstances of the employee’s claim that the belief or practice at issue is religious and sincerely held, and that the belief or practice gives rise to the need for the accommodation.”



Religious Accommodation – What is reasonable?

- Case-by-case assessment
- Employee's preferred accommodation does not have to be granted; only a reasonable accommodation must be made
- Exs: modified schedules, shift swaps, job transfer or transfer of duties, modifying policies, etc.



Religious Accommodation – What is undue hardship?

- Undue hardship = anything more than de minimis cost to accommodate religious practice. *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977)
- Note, this is a lower standard than the ADA, which defines undue hardship as an action requiring “significant” difficulty or expense



Religious Accommodation – Examples

- *Bruff v. N. Miss. Health Servs.*, 244 F.3d 495 (5th Cir. 2001)
 - Plaintiff = counselor who objected to providing counseling to homosexuals and others who would violate her religious beliefs
 - Requested that she be excused from providing such counseling
 - Court held that requested accommodation imposed more than a de minimis cost and was undue hardship
 - Other employees would have to cover duties and request presented other logistical problems with staffing, coverage, etc.



Religious Accommodation – Examples

- *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013)
 - Plaintiff is a Sikh who sought to wear a ceremonial blade (kirpan) at work
 - The size of the blade violated rules concerning possession of weapons in federal buildings
 - Plaintiff proposed three accommodations: (1) wearing a dulled blade; (2) working from home; or (3) working in a different federal building
 - Court affirmed finding of undue hardship: (1) dull blade would require security checks; (2) working from home was not feasible; and (3) same standards applied at all federal buildings



Religious Accommodation – Examples

- *Davis v. Fort Bend County*, 765 F.3d 480 (5th Cir. 2014)
 - Employee requested day off to attend religious service on July 3.
 - Employee offered to come into work after service and also lined up a volunteer to cover the work while she attended the service; employer fired her after she did not report on July 3.
 - Fifth Circuit reversed trial court's summary judgment
 - While causing employer to be short-staffed is typically undue hardship as a matter of law, that concern was mitigated by employee's presentation of a volunteer to cover the shift.



Religious Accommodation – Examples

- *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004)
 - Plaintiff was a member of the Church of Body Modification, which required her to wear facial jewelry
 - This conflicted with an employer's appearance policy
 - Employer offered accommodation of wearing band aids to cover up piercings or using clear plastic retainers
 - Accommodation was reasonable



Religious Accommodation – Practice Pointers

- Recall that even non-traditional practices may require accommodation
- Following *EEOC v. Abercrombie & Fitch*, employers may need to approach subject of accommodation where it has grounds to suspect that employee's religious practices may conflict with employment requirements
 - Lack of actual notice unlikely to be a viable defense
- Undue hardship is typically easier to establish than in the ADA context.



Questions?

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