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# The Rise Of Employee Religious Discrimination Claims

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Title VII of the Civil Rights Act prohibits discrimination based on race, color, sex, national origin and religion. While the first four categories often dominate the news headlines and court dockets, the fifth category — religion — should not be underestimated.

Possibly due to the U.S. Supreme Court's June 2015 Abercrombie decision — a religious accommodation case — or the increasing focus on immigration laws and the challenges faced by people of different religions and ethnicities seeking to assimilate into the U.S., many employers are seeing an increase in requests for religious accommodations, as well as a rise in the number of different religious practices that need to be accommodated.[1] Further, employees who are rebuffed — told "no, we cannot accommodate you" — seem to be increasingly willing to file a charge or seek out a lawyer to challenge that decision.

In a separate phenomenon, clergy are also getting involved. An employer will often see the local imam or pastor writing a letter on an employee's behalf to explain the need for the accommodation and then supporting the employee before a court or agency. In addition, religious discrimination claims are often combined with retaliation claims, forcing employers to fight two battles at once.

In early 2017, the U.S. Equal Employment Opportunity Commission released its 2016 Enforcement and Litigation Data report, an annual report detailing the breakdown of workplace discrimination charges received during the fiscal year. While its 3,825 religion-based charges may seem low when compared to 32,309 race charges, religion-based claims have slowly and steadily crept up over time.[2] In 1997, the EEOC received just 1,709 religion-based charges.[3] In 2007, it received 2,880 religion-based charges, before surpassing 3,000 charges per year for each of the following years. While the EEOC's statistics do not include complaints filed with state or local fair employment agencies, they provide insight for employers into the rise in these claims. Thus, it is important for all employers to understand their obligations.

**Background: Title VII, State and Local Laws**

To review the basics, the EEOC states that Title VII prohibits the treatment of applicants or employees

differently based on their religious beliefs or practices (or lack thereof) in any aspect of employment; harassment of employees on the basis of their religious beliefs or practices (or lack thereof) (or the religion or religious beliefs of people with whom the employee associates); the denial of a requested reasonable accommodation of an applicant or of an employee's sincerely held religious belief or practice (or lack thereof) if the accommodation will not impose more than a de minimis cost or burden on the employer's business operations; and retaliation against an applicant or employee who has engaged in protected activity related to religion.[4]

In theory, the concept that an employer needs to accommodate an employee's religious practices and beliefs seems simple, but in practical application, this can be tricky. It is particularly challenging in the health care, retail and hospitality industries, which have 24/7 operations and often need employees to wear uniforms and comply with dress codes.

**Who Defines Religion and How?**

This may seem easy, but it is often a challenge in defining what constitutes a religion under the law. Title VII defines religion more broadly than one might think to include "all aspects of religious observance and practice, as well as belief."[5] However, what does that encompass? As an example of this concept, a federal judge in New York held in September 2016 that "Onionhead," a belief system that requires its followers to tell others "I love you," satisfied the test for a religion under Title VII.[6] The court compared Onionhead to the 12-step Alcoholics Anonymous program, which the Second Circuit had previously found to be a religion under the law.

The case began in 2014 when the EEOC sued United Health, claiming that the company had coerced and discriminated against employees at a Long Island facility who did not adhere to the Onionhead belief system by forcing them to engage in certain activities while at work. Those activities included prayer, mentioning God, burning candles and expressing love within the workplace.

United Health argued that Onionhead was not a religion but was just a multipurpose conflict resolution tool. However, in her decision, the judge found that it could be a religion because of email references to God, demons and "divine destinies" and references in the "Onionhead Dictionary" to "divinity, spirituality, souls and heaven." She also noted that there were spiritual references made during workplace presentations.

**Employer Obligations: Reasonable Religious Accommodations**

Once an employer determines that the employee belongs to a religion or has a "sincerely held" religious belief, the law requires the employer to accommodate that belief, unless an employer demonstrates that it is unable to reasonably accommodate "without undue hardship on the conduct of the employer's business."[7] The "undue hardship" standard under Title VII (more than de minimis cost or burden) is a lower standard than the "undue hardship" standard applicable to Americans with Disabilities Act cases ("significant difficulty or expense").[8] However, if the employer denies the requested accommodation, it becomes the employer's burden to prove that hardship.

Also, when weighing this issue, courts and agencies will consider a number of factors, including the size and relative wealth of the employer. Fortunately for employers, the law will also consider whether granting a requested accommodation would violate obligations under a union collective bargaining agreement, obligations under employment contracts and policies, and factors such as employee seniority systems.[9]

Beyond Title VII, employers must familiarize themselves with state and local laws and ordinances, which may have similar protections based on religion, complete with different standards of proof and higher damages. For example, in addition to Title VII, a New York City employer with four or more employees must be familiar and compliant with both the New York State Human Rights Law and the New York City Human Rights Law. Each law contains its own take on religious discrimination within the scope of employment. The New York City Human Rights Law, especially, protects employees to a much greater extent than its federal and state counterparts.

**Belief Versus Technology: A Recent Decision**

A recent religious discrimination case exemplifies the unexpected ways in which an employer may find itself tasked with defending a religious discrimination claim. In June of this year, the Fourth Circuit affirmed a jury verdict of almost $600,000 in EEOC v. Consol Energy Inc.[10] The facts of the case are relevant to all employers, as companies increasingly bring technological advances into the workplace.

The case involved Beverly R. Butcher Jr., a 37-year employee who worked as a coal miner at a mine owned by Consol Energy. After years of satisfactory employment, an issue arose when, in 2012, Consol implemented a biometric hand-scanner system at the mine. The intent of the system was to more successfully monitor the attendance and work hours of mine employees and worked by linking the shape of an employee's right hand to a unique personnel number. When employees checked in or out of a shift, they were required to scan the right hand. For Butcher, a lifelong evangelical Christian, ordained minister and associate pastor, the practice was in conflict with his strongly held religious beliefs. Specifically, citing to the biblical Book of Revelation and his belief that the "mark of the beast" "brands followers of the Antichrist, allowing the Antichrist to manipulate them." Butcher asserted that his use of Consol's scanning system would result in his being "marked" and his identification with the Antichrist.

Butcher discussed his concerns with his union representative, who, in turn, relayed the issue to Consol's human resources department. Consol requested a letter from Butcher's pastor explaining the need for a religious accommodation, which Butcher obliged. In addition, Butcher drafted his own letter, which outlined his views on the ways in which the scanner would "associate him with the Mark of the Beast, causing him through his will and actions to serve the Antichrist." Following dialogue between Butcher and Consol's human resources department regarding whether the use of the left hand would be similarly objectionable to Butcher, Consol decided that Butcher would be required to use his left hand. However, this decision did not take into consideration the fact that Consol had made the decision to allow two other employees to entirely forgo the scanner system due to hand injuries. Instead, Consol simply required these employees to enter their personnel numbers on a keypad connected to the system. In response to Consol's continued assertion that Butcher would be required to use the scanner system — with either hand — Butcher retired under protest.

Eventually, Consol's actions resulted in the EEOC's initiation of an enforcement action against the company, alleging that the company had violated Title VII by failing to accommodate Butcher's religious beliefs and constructively discharging him. After a long and complicated procedural history, the company filed three post-verdict motions, which were ultimately addressed by the Fourth Circuit in its June 2017 decision. The court reasoned that Butcher had proven the three elements necessary to establish a violation of an employer's obligation to provide a reasonable accommodation for a religious belief — namely, that the employee has a bona fide religious belief that conflicts with an employment requirement; the employee informed the employer of this belief; and the employee was disciplined for failure to comply with the conflicting requirement.

In its lengthy opinion, the Fourth Circuit carefully analyzed each argument made by the parties, eventually concluding that the jury verdict should be upheld and that the EEOC had not established that Consol's actions rose to the level where punitive damages should be awarded.

A petition for certiorari was filed on Sept. 11, 2017, with responses due in November 2017. If the petition is granted, the case may be reviewed by the U.S. Supreme Court.

**Lessons Learned From Consol**

The Consol case highlights several significant areas relevant to religious discrimination claims.

An understanding of Consol's defense and the court's subsequent rejection of it is valuable to employers in all industries. Consol argued that it did not fail to reasonably accommodate Butcher's religious beliefs because "there was in fact no conflict between Butcher's beliefs and its requirement that Butcher use the hand scanner system." The company relied on the fact that the system would not actually leave a "physical mark" on Butcher for its assertion that the EEOC had failed to establish that Butcher could not use the scanner without compromising his beliefs. However, what Consol failed to grasp, according to the court's decision, is that "[i]t is not Consol's place as an employer, nor, ours as a court, to question the correctness or even the plausibility of Butcher's religious understandings." For the court, all that was necessary was that Butcher's beliefs were sincerely held and conflicted with Consol's employment requirement. Employers must remember this when evaluating requests for reasonable accommodations rather than simply attempting to argue an employee's possible misunderstanding of a religious text.

In addition, the company's decision to allow other employees to bypass the scanning system as a reasonable accommodation for disabilities, while denying the same accommodation to Butcher, did not help the company's case. When faced with a request for a religious accommodation, employers must be mindful of accommodations granted to employees on different bases when considering religion-based requests. Finally, the Consol case presents an interesting conundrum between employers looking to accurately track employee hours to comply with a web of wage and hour laws in new and innovative ways and their obligations to reasonably accommodate on religious bases. As more employers look to use scanning technologies, religious discrimination claims remain traps for the unwary.

**Cases on the Horizon**

The EEOC recently sued a Tim Horton's franchisee and mission hospital for religious discrimination.

*Sleneem Enterprises: Employer Uniform Is Not One Size Fits All*

At the end of July, another religious discrimination case brought by the EEOC appeared on the federal docket. On July 18, 2017, the EEOC filed a complaint against Sleneem Enterprises LLC, a franchisee of Tim Horton's (the Canadian chain known for its donuts and coffee), alleging that Sleneem failed to accommodate the religious beliefs of an employee.[11]

Sleneem hired Amanda Corley to begin work on Nov. 16, 2015. When Corley showed up to work for her assigned first shift, she was wearing a skirt, rather than the required pants. Corley informed her manager that it was necessary for her to wear a skirt due to her Pentecostal Apostolic religious beliefs and further attempted to present a letter from her pastor to the defendant's manager regarding these religious beliefs. The manager, however, fired Corley, stating that "Corley's pastor did not run her place

of business." Sleneem also failed to provide a reason regarding why the business was unable to accommodate Corley's need to wear a skirt, rather than pants. Following Corley's filing of a charge with the EEOC and unsuccessful conciliation efforts, the EEOC filed the late-July complaint. The suit sought injunctive relief, compensatory and punitive damages and reinstatement.

Just two months after the federal litigation was initiated, Sleneem agreed to pay $22,500 to settle the lawsuit. The consent decree that was executed ending the litigation also prohibits similar discrimination in the future and requires Sleneem to train shift supervisors and managers on all forms of discrimination prohibited by Title VII, including reasonable religious accommodations, for three years by an outside consultant (which Sleneem must hire). Sleneem must provide information to the EEOC related to all requests for religious accommodations for a period of three years and post workplace notices as well.

In the agency's Sept. 18, 2017, press release, an EEOC trial attorney for the Detroit Field Office stated, "[u]nder federal law, an employer has an obligation to fairly balance an employee's right to practice religion with operating its business. … When this obligation is not met, the EEOC will step in and protect workers." Employers should bear in mind the agency's stance when faced with requests for reasonable accommodations from their own employees, including in the form of changes to the dress code.

*Just in Time for Flu Season: Hospital Flu Prevention and Religious Beliefs*

Mandatory vaccines and flu shots are yet another area presenting challenges to employers attempting to accommodate the sincerely held religious beliefs of employees. In April of 2016, the EEOC sued Mission Hospital Inc., in connection with its annual flu vaccination program for employees.[12] By order dated Aug. 7, 2017, a district judge in the Western District of North Carolina denied Mission's motion for summary judgment, sending the case toward trial.[13] The district judge succinctly described the case and its posture in the concluding paragraphs of the order as "a case about flu shots and religious exemptions thereto."

The case centers on Mission's requirement that all employees receive a flu vaccination. Mission employees were required to request accommodation from the vaccine by Sept. 1 of each year. Three employees requested a religious exemption but missed the Sept. 1 deadline. Thus, each request was rejected as untimely, and the three plaintiffs were fired for failing to obtain their flu vaccinations.

It was this rigid adherence to the deadline that proved "deadly" for Mission.

According to the court, "[t]his is not a case of whether the defendant hospital did or did not believe the claimant's religious beliefs." On a positive note for Mission, the court held that there was no evidence that Mission was "prejudiced" against religions or hostile to religious accommodations, as Mission had approved a high percentage of religious exemption requests. However, the court found that a reasonable jury could find that Mission was treating individuals differently if they did not request the exemption. On that basis, the court held that the issue should go to a jury. This, however, is not the only case analyzing this flu vaccine issue.

In 2016, the EEOC brought a number of cases challenging hospital requirements that employees obtain a flu vaccine. For example, in September 2016, the EEOC sued Saint Vincent Health Center, a part of the Allegheny Health Network, claiming that the hospital had unlawfully fired six employees who were denied a religious exemption from the hospital's mandatory flu vaccine policy.[14]

The EEOC alleged that from October 2013 to January 2014, six employees requested religious

exemptions from the hospital's flu vaccination requirement based on sincerely held religious beliefs and that the health center denied their requests. When the employees continued to refuse the vaccine based on their religious beliefs, the health center fired them. It should be noted that the hospital granted 14 employee requests for exemption based on medical contraindication during this same period. According to an EEOC press release on Dec. 23, 2016, the case was resolved by a consent decree, resulting in a payment of $300,000 by the hospital, as well as the provision of injunctive relief.

In yet another lawsuit, this time in the U.S. District Court in Massachusetts, the EEOC claimed Baystate Medical Center Inc., violated Title VII when the only accommodation it allegedly offered to an employee who sought an exemption to the flu shot — wearing a mask over her nose and mouth at all times while at work — reportedly was not effective.[15] According to Jeffrey Burstein, regional attorney for the EEOC's New York District Office (which covers Massachusetts), in an EEOC press release on June 2, 2016, "[f]or an accommodation to be meaningful under Title VII, it both must respect the employee's religious beliefs and permit her to do her job effectively."

In the Baystate case, the employee, Stephanie Clarke, did not work in a patient-care area. When Clarke wore the mask as instructed, she allegedly received complaints that she was hard to understand. She allegedly was suspended without pay when she was caught not wearing the mask and then terminated and coded as "ineligible for rehire."

It remains to be seen how the Massachusetts district court will rule in this lawsuit (where the parties are currently engaged in discovery), just as the outcome for Mission Hospital remains to be determined. In the meantime, however, these lawsuits reiterate the importance of analyzing the duty of health care employers to accommodate under Title VII based on the particular facts and circumstances of the individual situation.

To argue for the other side, religious accommodation is important, but equally important is the protection of patients. Health care employers are in a unique position, wherein they must be concerned with both accommodating their employees as well as protecting their patients. Thus, the goal of every hospital is to maximize the number of employees who are vaccinated. It is important for a health care employer to make sure that an employee seeking a religious exemption does have a sincerely held religious belief and a valid ground for seeking the exemption. Given the EEOC's aggressive position on this issue, it is critical for any employer who is going to deny an employee's request for an exemption to first carefully explore what accommodations can be offered to the employee and, second, document the reasons for the denial. If disciplinary action against an employee is contemplated, employers should consult their legal counsel.

**Conclusion**

Religious discrimination claims will not drop off the radar in the near future, particularly due to the rise of social activism related to the current presidential administration. Human resources departments and general counsel must be well-versed in the subject of religious accommodations, just as they are in the area of disability accommodations. Such potential accommodations may include time off due to religious observance, modification to required uniforms or dress codes, and requests related to food at company-sponsored events. Because applicants often do not raise (and under Abercrombie do not need to raise) the need for these reasonable accommodations during job interviews, employers may find themselves caught unaware once the employee begins work.

Employers and their human resources and legal departments must remain ready and knowledgeable in this developing area of the law.

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[1] E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 192 L. Ed. 2d 35 (2015).

[2] EEOC Press Release, 1-18-17, EEOC Releases Fiscal Year 2016 Enforcement and Litigation Data.

[3] Religion-Based Charges (Charges filed with EEOC) FY 1997 – FY 2016.

[4] Questions and Answers: Religious Discrimination in the Workplace, EEOCCM s 12-QA. But contrast the agency's guidance with the recent decision of a district court in Minnesota in Equal Employment Opportunity Comm'n v. N. Mem'l Health Care, No. CV 15-3675(DSD/KMM), 2017 WL 2880836, (D. Minn. July 6, 2017) (appeal filed Sept. 5, 2017), which concluded that requesting a religious accommodation is not a protected activity under Title VII.

[5] 42 U.S.C. § 2000e(j).

[6] Equal Opportunity Employment Comm'n v. United Health Programs of Am. Inc., 213 F. Supp. 3d 377 (E.D.N.Y. 2016).

[7] 42 U.S.C. § 2000e(j).

[8] Compare Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1997) ("To require TWA to bear more than a de minimis cost … is an undue hardship") with 42 U.S.C. § 12111(10)(A) ("[t]he term 'undue hardship' means an action requiring significant difficulty or expense").

[9] See generally, Questions and Answers: Religious Discrimination in the Workplace, EEOCCM s 12-QA.

[10] U.S. Equal Employment Opportunity Comm'n v. Consol Energy Inc., 860 F.3d 131 (4th Cir. 2017).

[11] Complaint and Jury Trial Demand, Equal Employment Opportunity Comm'n v. Sleneem Enterprises LLC, dba Tim Horton's Café & Bake Shop, No. 17-cv-12337-DPH-RSW (E.D. Mich. July 18, 2017).

[12] Complaint, Equal Employment Opportunity Comm'n v. Mission Hospital Inc., No. 16-cv-00118-MOC-DLH (W.D.N.C. April 28, 2016).

[13] Equal Employment Opportunity Comm'n v. Mission Hosp. Inc., No. 1:16-CV-00118-MOC-DLH, 2017 WL 3392783, at *5 (W.D.N.C. Aug. 7, 2017).

[14] Complaint and Jury Trial Demand, Equal Employment Opportunity Comm'n v. Saint Vincent Health Center, No. 16-cv-00234-BR (W.D. Pa. Sept. 22, 2016).

[15] Amended Complaint, Equal Employment Opportunity Comm'n v. Baystate Medical Center, Inc., d/b/a Baystate Health, No. 16-cv-30086-MGM (D. Mass. Aug. 26, 2016).