



RELIGIOUS BELIEF: THE OTHER ACCOMMODATION

RODNEY KLEIN

RODNEY KLEIN EEO TRAINING

The Basics

An employer must accommodate the **sincerely held religious beliefs** of its employees unless doing so creates an **undue hardship**



How does Title VII define religious belief?

May Not Be What You Think

- ▶ Defined more along the lines of how we define personal faith
- ▶ Has an explanatory and normative quality:
 - ▶ Life
 - ▶ Death
 - ▶ Purpose

May Not Be What You Think

- ▶ Deistic/non-Deistic/non-faith (**Sincerely held**)
 - ▶ Sincere beliefs held with the strength of traditional religious views
 - ▶ May have two people of same “religion” who hold different beliefs
- ▶ **Protected even if you are the only person in the world to hold those beliefs**

May Not Be What You Think

- ▶ More latent bias around religious beliefs than around any other protected class. Why?
 - ▶ Nothing defines us like our beliefs (tightly held)
 - ▶ For most of us our beliefs are exclusive (other beliefs must be wrong)
 - ▶ Gut reaction to other beliefs is disbelief
- ▶ **The religious bigotry we must guard against is our own**

Religious Belief

- ▶ Title VII and the Courts have not offered a way to confirm a sincerely held belief
- ▶ **You should assume the stated belief is sincerely held unless you have objective evidence showing the belief is not sincere.**
- ▶ This is different than the ADA and PWFA, which allow employers to confirm conditions and limitations



What is Religious Expression?

Religious Expression

- ▶ We all have the right to religious expression. We don't necessarily have the right to a job, though. Title VII balances these two competing interests
- ▶ Expressed religious beliefs should be viewed through two different lenses: **discrimination and reasonable accommodation**

Religious Expression

▶ Discrimination

- ▶ Key word is **consistency**
- ▶ Employer can restrict religious expression to the same extent that it restricts other forms of personal expressions (consistency)
- ▶ Or, if the employee's religious expression is being confused with the organization's expression

Religious Expression

- ▶ Can religious expression become harassment?
- ▶ Yes, mainly under two conditions:
 - ▶ **When expression about a religion changes from positive to negative**
 - ▶ **When expression changes from general to specifically targeted (unwelcome proselytizing)**
- ▶ Must create a hostile environment
- ▶ Brief, anonymous interactions do not usually create a hostile work environment

Bob works in the company's reception area. The company does not allow any forms of personal expression to be displayed in the reception area. One day, though, Bob comes to work with a five-foot wooden cross and places it behind his desk in clear view of anyone entering the room.

You tell Bob that the company does not allow any personal or religious expression in the reception area, and you ask him to take the cross home.

He then tells you that his religious beliefs require him to display the cross in his workspace.

Religious Expression

- ▶ **Reasonable Accommodation**

- ▶ No longer about consistency

- ▶ Can deny only if providing the accommodation creates an undue hardship



Religious Accommodation

(Issues with “sincerely held” and undue hardship)

Religious Accommodation

- ▶ An employer must accommodate a sincerely held religious belief unless doing so creates an undue hardship.
- ▶ This means we must understand two concepts that on the surface can seem somewhat nebulous and not well defined:
 - ▶ **Sincerely held religious belief**
 - ▶ **Undue hardship**

Undue Hardship – Title VII

- **Groff v DeJoy – US Supreme Court, 06/23**
 - Opinion addressed the concept of undue hardship under Title VII
 - Before Groff, the standard was more than a de minimus
 - This was widely interpreted as a very low standard – barely any
 - Groff opinion raised the standard

Undue Hardship – Title VII

- **Groff v DeJoy – US Supreme Court, 06/23**
 - Groff held a sincerely held religious belief that he could not work on Sundays.
 - His employer allowed an accommodation that did not create more than a de minimus hardship – the voluntary shift swap. But this proved unworkable.
 - His employer would not adopt an involuntary shift swap because forcing other employees to work Sundays for Groff would impose more than a de minimus hardship

Undue Hardship – Title VII

- **Groff v DeJoy – US Supreme Court, 06/23**
 - SCOTUS says undue hardship is something more than mere burden
 - Doesn't say how much more
 - Not as high as the ADA, though
 - **Substantial increased costs in relation to the conduct of its particular business**

Undue Hardship – Title VII

- **Groff v DeJoy – US Supreme Court, 06/23**
 - “Impacts on coworkers are relevant only to the extent those impacts go on to affect the conduct of the business.”
 - “Hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice, cannot be considered ‘undue.’”
- SCOTUS is allowing the lower courts to better define undue hardship

John is a Police Captain, and he's hiring patrol officers. Currently, John has 30 patrol officers working under his command.

Bob comes in for an interview. He has a sincerely held religious belief that prohibits him from working on Sundays. During the interview, John tells Bob that patrol officers work rotating shifts that require them once a month to work weekends. Then, he asks Bob if he can work weekends. Bob says, no.

John no longer considers Bob a viable candidate for the position because he thinks that the other patrol officers will not like pulling extra weekend shifts to cover for Bob.

Analysis

- ▶ SCOTUS has been clear about a couple of things regarding religion:
 - ▶ Don't consider someone's religion, or lack thereof, when hiring
 - ▶ An employer can deny a reasonable accommodation for a sincerely held religious belief only if the accommodation creates an undue hardship. SCOTUS says that grouchy employees are not part of an employer's undue hardship analysis

So, John hires Bob because he is the best qualified candidate. Bob then requests an accommodation for his sincerely held religious belief that he not work on Sundays.

John works with HR and his legal team and determines that it does not create an undue hardship to keep Bob off the Sunday schedule. So, he grants Bob's accommodation request.

Two weeks later 15 of the remaining 30 patrol officers request exemptions from Sunday shifts. All cite a sincerely held religious belief that they not work on Sundays.



Religious Accommodation

(When religion causes performance issues)

You hire Soraya for a sales rep position. The position sells very expensive electrical components to its clients, who are manufacturers. So, the sales reps are expected to maintain close, professional relationships with the clients. Soraya is Muslim and wears a hijab.

After six months, Soraya has the lowest sales numbers of all the reps, by far. You learn that two of her biggest clients stopped buying components from Soraya because they are not comfortable doing business with Muslims.

Can you fire Soraya for low sales?

Do you keep Soraya even though she is not meeting her sales quota?

Is there another alternative?



Religious Accommodation

(When our beliefs may influence our analysis)

Harvinder, a Sikh, works in a hospital as an orthopedist. She wears a small (4-inch), dull, and sheathed kirpan (symbolic miniature sword) strapped and hidden underneath her clothing, as a symbol of her religious commitment to defend truth and moral values. When Harvinder's director, Bill, learns about her kirpan from a co-worker, he instructs Harvinder not to wear it at work because it violates the hospital policy against weapons in the workplace.



Religious Accommodation

(When religious rights bump into LGBT rights)

LGBT Discrimination

-Bostock

- ▶ SCOTUS very clear that its ruling rests entirely on Title VII's recognition of two sexes.
- ▶ No discussion of gender ideology or multitudes of sexes.
- ▶ In a practical sense, SCOTUS created two new protected classes: sexual orientation and gender identity.
- ▶ Legally, though, SCOTUS's ruling was simply about sex.

LGBT Discrimination

-Bostock

▶ How?

▶ Title VII is a mixed motive law – sex must be a motivating factor, but it doesn't need to be the only or primary motivating factor.

▶ Sex is baked into the definitions of gender identity and sexual orientation.

- ▶ -a person who identifies with a gender inconsistent from their biological sex
- ▶ -a person attracted to persons of the same biological sex

LGBT Discrimination

-Bostock

- ▶ The important legal point in *Bostock* is that an employer who harms an applicant or employee entirely or partially because of their sex violates Title VII.
- ▶ This means, SCOTUS ruled that sexual orientation and gender identity are unambiguously protected.

LGBT Discrimination

-Beyond Bostock

- ▶ SCOTUS declined to address other issues related to sexual orientation and gender identity
 - ▶ Probably because there are some unique issues connected to gender identity that require some nuance.
- ▶ **Names**
- ▶ **Pronouns**
- ▶ **Restrooms/locker rooms**

LGBT Discrimination -Beyond Bostock

▶ Harassment legal standards

- ▶ Based primarily on the impact the behavior has on the victim
- ▶ To be illegal, behavior must be both subjectively and objectively hostile (individual and societal standards)

One day one of your employees, Mike, comes to work presenting as a woman. She announces that she is transgender and asks everyone to call her Mary. Jane, one of Mary's co-workers, continues to call Mary, Mike, purposely and repeatedly.

Two days later another one of your employees, Bill, says that it violates his sincerely held religious belief to call Mary, Mary. He requests a religious accommodation: to continue to call Mary, Mike.

Reasonable Accommodation

Must provide the accommodation unless doing so creates an undue hardship. So, the question is, will being repeatedly and purposely called a name other than the one the employee requested eventually create a hostile environment?

If yes, the requested accommodation creates an undue hardship. If no, the requested accommodation does not create an undue hardship.

Reasonable Accommodation

In a practical sense this scenario requires the employer to accurately assess three legal terms that are somewhat ambiguously determined:

Sincerely held belief (Confirmation)

Undue Hardship (Title VII)

Hostile Environment Harassment (LGBT)



So, in Summary...

Good luck with all of that!

Questions?

Reasonable Accommodation

Some key things to remember:

Any situations involving undue hardship under Title VII or LGBT harassment involving names, pronouns or restrooms are potentially precedent setting cases. **This means your attorneys will make the decisions, because no one wants to be a precedent.**

Focus your attention on impacts – impact in terms of hostile environment, and impact in terms of undue hardship. This means be cautious in applying black and white rules. Look first at those impacts and then respond appropriately.

Now I'm done

Training for Managers

Handle with Care: Managing Behavior and Building Teams Culturally

Legal Training for Managers

EEO Basics for Supervisors

(Discrimination, Harassment, Retaliation, ADA)



Rodney Klein
EEO Training

rk@rodneykleineeotraining.com
210 827 0991

More Titles

What We Should Be Telling Our Managers About The ADA

Reasonable Accommodations Under the ADA

You Want Me to Investigate What? Internal EEO Investigations

Harassment and Retaliation

The Most Difficult Thing about Working with People Is...?

How to Get Along with Others at Work: Some Tools You Can Use

The Wonderful World of Accommodations – Training for Managers

What is Wrong with Our Workplace Behavior Policies?

How to Improve Your Internal Investigations



Rodney Klein
EEO Training

rk@rodneykleineeotraining.com
210 827 0991

Attempts: Brief Observations on Civil Rights, EEO, and the Difficulties of Difference

To receive updates on my latest trainings for HR professionals, send an email to:

rk@rodneynkleineetraining.com

