Religious Discrimination in Employment Compliance Guide

EEO

Employer Knowledge Series

An in-depth analysis of the U.S. Equal Employment Opportunity Commission's regulations and enforcement policies prohibiting religious discrimination under Title VII of Civil Rights Act. This plain language guide-book takes a close look at the EEOC's new guidance and how it affects your business decisions.

personnel concepts
EMPLOYER KNOWLEDGE SERIES

Religious Discrimination in Employment Compliance Guide

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An anti-discrimination/harassment policy as outlined herein can only be effective if taken seriously and followed through. Each company is unique. The needs of your company should be examined and implemented into the program in order to make it successful. It is essential that the employer demonstrate at all times their personal concern for their employees and the priority placed on them in your workplace. The policy must be clear. The employer shows its importance through their own actions.

Although federal law requires at least 15 employees on staff to file a discrimination claim, individual state law may allow a discrimination claim with as little as one employee. Therefore, even if a company has less than 15 employees, a discrimination claim can still be filed with either the state's administrative agency, in court or both. Employers can abide by the federal laws outlined by the EEOC to ensure that they are in compliance with their state laws.

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Implementation Procedures

The following implementation procedures are intended to provide specific instructions for correctly utilizing the various components of our Religious Discrimination Compliance Kit. If you have additional questions about this guidebook or other kit components, please contact Personnel Concepts at 800-333-3795.

1. Post the enclosed Religious Discrimination is Unlawful Poster conspicuously in the workplace where notices to employees are customarily posted. The purpose of this poster is to acknowledge your coverage under Title VII and to notify affected workers that religious discrimination is strictly prohibited in the workplace.

2. Review the overview of Religious Discrimination and Frequently Asked Questions that are included in this section. This overview is intended to ensure that you understand your establishment's obligations under current religious discrimination law.

3. Review Section II, "Understanding Religious Discrimination and Harassment" with the individuals in your business who are responsible for recruiting, hiring, employment policies, time-off requests and help wanted advertisements.

4. Distribute the enclosed Religious Discrimination Training Handouts to supervisors, managers, and other affected individuals to ensure that your workforce understands what constitutes unlawful religious discrimination.

5. Review Section III, "Recent Religious Case Settlements" to determine if recent cases have involved situations, decisions, or issues that are currently present in your workplace.

6. Refer to the EEOC Enforcement Guidance and Regulatory Text contained in this guidebook on an as-needed basis when making employment decisions about individuals with religious accommodation requirements or when receiving a complaint from a protected individual.

7. Use the enclosed Religious Accommodation Request forms to document employee religious accommodation requests and employer response. This documentation can be used as evidence, in case of a lawsuit, that you adequately addressed an employee's request and provided a suitable response.

8. Contact a Compliance Specialist at 800-333-3795 to inquire about other products pertaining to employment discrimination, including the EEO Compliance Program, the Space Saver-7 All-On-One Workplace Policy Poster, and the Harassment in the Workplace Program.

Introduction to Religious Discrimination

Religion refers to a person's religious background, religious beliefs (or lack of them) or membership in a religious group. Under Title VII, an employer is required to reasonably accommodate the religious belief of an employee or prospective employee, unless doing so would impose an undue hardship. Possible accommodations include flexible scheduling, voluntary substitutions or swaps, job reassignments, lateral transfers, modification of grooming requirements and other workplace practices, policies and/or procedures.

The following are examples of requests that employees may make in order to follow their religious teachings:

- Observance of a Sabbath or religious holidays
- Need for prayer break during working hours
- Practice of following certain dietary requirements
- Practice of not working during a mourning period for a deceased relative
- Prohibition against medical examinations
- Prohibition against membership in labor and other organizations
- Practices concerning dress and other personal grooming habits

If an employee's religion requires time for prayer during the workday, an employer may accommodate this by finding a conference room or private area that the employee can utilize during their breaks for this purpose. This does not necessarily mean that the employer is required to open up areas for other employees to hold weekly Bible studies or prayer groups as these activities may easily be held during off hours and at another location.

Employers may not treat employees or applicants more or less favorably because of their religious beliefs or practices - except to the extent a religious accommodation is warranted. For example, an employer may not refuse to hire individuals of a certain religion, may not impose stricter promotion requirements for persons of a certain religion, and may not impose more or different work requirements on an employee because of that employee's religious beliefs or practices.

Scheduling examinations or other selection activities in conflict with a current or prospective employee's religious needs, inquiring about an applicant's future availability at certain times, maintaining a restrictive dress code or refusing to allow observance of a Sabbath or religious holiday is prohibited unless the employer can prove that not doing so would cause an undue hardship.

An employer can claim undue hardship when accommodating an employee's religious practices if allowing such practices:

- Require more than ordinary administrative costs
- Diminish efficiency in other jobs
- Infringe on other employee's job rights or benefits
- Impair workplace safety
- Cause co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work
- Conflict with another law or regulation

- If changing a bona fide seniority system to accommodate one employee's religious practices denies another employee the job or shift preference guaranteed by the seniority system

For example, if an employee is required to wear certain clothing because of their religious practice but that clothing poses a danger when worn around particular machinery, then permitting the employee to wear those clothes would be an undue hardship because of legitimate safety rules or concerns.

Employees cannot be forced to participate, or not participate, in a religious activity as a condition of employment. Mandatory "new age" training programs, designed to improve employee motivation, cooperation or productivity through meditation, yoga, biofeedback or other practices, may conflict with the non-discriminatory provisions of Title VII. Employers must accommodate any employee who gives notice that these programs are inconsistent with the employee's religious beliefs, whether or not the employer believes there is a religious basis for the employee's objection. An employee whose religious practices prohibit payment of union dues to a labor organization cannot be required to pay the dues, but may pay an equal sum to a charitable organization.

Since the attacks of September 11, 2001, the EEOC and state and local fair employment practices agencies have recorded a significant increase in the number of charges alleging discrimination based on religion and/or national origin. Many of the charges have been filed by individuals who are or are perceived to be Muslim, Arab, South Asian, or Sikh. These charges most commonly allege harassment and discharge.

While employers have an ongoing responsibility to address workplace discrimination, reaction to the events of September 11 may demand increased efforts to prevent discrimination. Some companies have avoided hiring employees that they perceive to be Muslim, Arab, South Asian or Sikh because they feel that their presence would make customers uncomfortable. Customer preference is never a justification for a discriminatory practice. Refusing to hire someone because customers or co-workers may be "uncomfortable" with that person's religion or national origin is just as illegal as refusing to hire that person because of religion or national origin in the first place.

According to the EEOC, religious based discrimination accounted for 3.4% of the claims filed in 2006. As shown below, discharge was the issue most often alleged in religious discrimination suits (75%) with reasonable accommodation next at 45%. Harassment was the issue in 40% of the cases filed with religion as a basis.

Religious Discrimination Issues	
	Percent
All Discharge	75.0%
Reas. Accom.	45.0%
Harassment	40.0%

Frequently Asked Questions

1. What is "religion" under Title VII?

Title VII protects all aspects of religious observance and practice as well as belief and defines religion very broadly for purposes of determining what the law covers. For purposes of Title VII, religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others. An employee's belief or practice can be "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief or practice, or if few – or no – other people adhere to it. Title VII's protections also extend to those who are discriminated against or need accommodation because they profess no religious beliefs.

Religious beliefs include theistic beliefs (i.e. those that include a belief in God) 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." Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held. Rather, religion typically concerns "ultimate ideas" about "life, purpose, and death." Social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII.

Religious observances or practices include, for example, attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, or refraining from certain activities. Whether a practice is religious depends on the employee's motivation. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons (*e.g.,* dietary restrictions, tattoos, etc.).

Discrimination based on religion within the meaning of Title VII could include, for example: not hiring an otherwise qualified applicant because he is a self-described evangelical Christian; a Jewish supervisor denying a promotion to a qualified non-Jewish employee because the supervisor wishes to give a preference based on religion to a fellow Jewish employee; or, terminating an employee because he told the employer that he recently converted to the Baha'i Faith.

Similarly, requests for accommodation of a "religious" belief or practice could include, for example: a Catholic employee requesting a schedule change so that he can attend church services on Good Friday; a Muslim employee requesting an exception to the company's dress and grooming code allowing her to wear her headscarf, or a Hindu employee requesting an exception allowing her to wear her bindi (religious forehead marking); an atheist asking to be excused from the religious invocation offered at the beginning of staff meetings; an adherent to Native American spiritual beliefs seeking unpaid leave to attend a ritual ceremony; or an employee who identifies as Christian but is not affiliated with a particular sect or denomination requests accommodation of his religious belief that working on his Sabbath is prohibited.

2. Are there any exceptions to who is covered by Title VII's religion provisions?

Yes. While Title VII's jurisdictional rules apply to all religious discrimination claims under the statute, "Threshold Issues," specially-defined "religious organizations" and "religious educational institutions" are exempt from certain religious discrimination provisions, and a "ministerial exception" bars Title VII claims by employees who serve in clergy roles.

Religious Organization Exception: Under Title VII, religious organizations are permitted to give employment preference to members of their own religion. The exception applies only to those institutions whose "purpose and character are primarily religious." Factors to consider that would indicate whether an entity is religious include: whether its articles of incorporation state a religious purpose; whether its day-to-day operations are religious (e.g., are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion?); whether it is not-for-profit; and whether it is affiliated with, or supported by, a church or other religious organization.

This exception is not limited to religious activities of the organization. However, it only allows religious organizations to prefer to employ individuals who share their religion. The exception does not allow religious organizations otherwise to discriminate in employment on the basis of race, color, national origin, sex, age, or disability. Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races.

Ministerial Exception: Courts have held that clergy members generally cannot bring claims under the federal employment discrimination laws, including Title VII, the Age Discrimination in Employment Act, the Equal Pay Act, and the Americans with Disabilities Act. This "ministerial exception" comes not from the text of the statutes, but from the First Amendment principle that governmental regulation of church administration, including the appointment of clergy, impedes the free exercise of religion and constitutes impermissible government entanglement with church authority. The exception applies only to employees who perform essentially religious functions, namely those whose primary duties consist of engaging in church governance, supervising a religious order, or conducting religious ritual, worship, or instruction. Some courts have made an exception for harassment claims where they concluded that analysis of the case would not implicate these constitutional constraints.

3. What is the scope of the Title VII prohibition on disparate treatment based on religion?

Title VII's prohibition against disparate (different) treatment based on religion generally functions like its prohibition against disparate treatment based on race, color, sex, or national origin. Disparate treatment violates the statute whether the difference is motivated by bias against or preference toward an applicant or employee due to his religious beliefs, practices, or observances – or lack thereof. For example, except to the extent permitted by the religious organization or ministerial exceptions:

> employers may not refuse to recruit, hire, or promote individuals of a certain religion, impose stricter promotion requirements for persons of a certain religion,

or impose more or different work requirements on an employee because of that employee's religious beliefs or practices

employers may not refuse to hire an applicant simply because he does not share the employer's religious beliefs, and conversely may not select one applicant over another based on a preference for employees of a particular religion

employment agencies may not comply with requests from employers to engage in discriminatory recruitment or referral practices, for example by screening out applicants who have names often associated with a particular religion (*e.g.*, Mohammed)

employers may not exclude an applicant from hire merely because he or she may need a reasonable accommodation that could be provided absent undue hardship.

The prohibition against disparate treatment based on religion also applies to disparate treatment of religious expression in the workplace. For example, if an employer allowed one secretary to display a Bible on her desk at work while telling another secretary in the same workplace to put the Quran on his desk out of view because co-workers "will think you are making a political statement, and with everything going on in the world right now we don't need that around here," this would be differential treatment in violation of Title VII. (As discussed below, Title VII also requires employers to accommodate expression that is based on a sincerely held religious practice or belief, unless it threatens to constitute harassment or otherwise poses an undue hardship on the conduct of the business.)

4. What constitutes religious harassment under Title VII?

Religious harassment in violation of Title VII occurs when employees are: (1) required or coerced to abandon, alter, or adopt a religious practice as a condition of employment (this type of "quid pro quo" harassment may also give rise to a disparate treatment or denial of accommodation claim in some circumstances); or (2) subjected to unwelcome statements or conduct that is based on religion and is so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive, and there is a basis for holding the employer liable.

It is necessary to evaluate all of the surrounding circumstances to determine whether or not particular conduct or remarks are unwelcome. For example, where an employee is upset by repeated mocking use of derogatory terms or comments about his religious beliefs or observance by a colleague, it may be evident that the conduct is unwelcome. In contrast, a consensual conversation about religious views, even if quite spirited, does not constitute harassment if it is not unwelcome.

Even unwelcome religiously motivated conduct is not unlawful unless the victim subjectively perceives the environment to be abusive and the conduct is severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive. Religious expression that is repeatedly directed at an employee can become severe or pervasive, whether or not the content is intended to be insulting or abusive. Thus, for example, persistently reiterating atheist views to a religious employee who has asked that this conduct stop can create a hostile environment.

The extent to which the expression is directed at a particular employee is relevant to determining whether or when it could reasonably be perceived to be severe or pervasive by that employee. For example, although it is conceivable that an employee may allege that he is offended by a colleague's wearing of religious garb, expressing one's religion by wearing religious garb is not religious harassment. It merely expresses an individual's religious affiliation and does not demean other religious views. As such, it is not objectively hostile. Nor is it directed at any particular individual. Similarly, workplace displays of religious artifacts or posters that do not demean other religious views generally would not constitute religious harassment.

5. When is an employer liable for religious harassment?

An employer is always liable for a supervisor's harassment if it results in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by showing that: (a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. An employer is liable for harassment by co-workers where it knew or should have known about the harassment, and failed to take prompt and appropriate corrective action. An employer is liable for harassment by non-employees where it knew or should have known about the harassment, could control the harasser's conduct or otherwise protect the employee, and failed to take prompt and appropriate corrective action.

6. When does Title VII require an employer to accommodate an applicant or employee's religious belief, practice, or observance?

Title VII requires an employer, once on notice that a religious accommodation is needed, to reasonably accommodate an employee who's sincerely held religious belief, practice, or observance conflicts with a work requirement, unless doing so would pose an undue hardship. Under Title VII, the undue hardship defense to providing religious accommodation requires a showing that the proposed accommodation in a particular case poses a "more than de minimis" cost or burden. Note that this is a lower standard for an employer to meet than undue hardship under the Americans with Disabilities Act (ADA) which is defined in that statute as "significant difficulty or expense."

7. How does an employer learn that accommodation may be needed?

An applicant or employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work.

Employer-employee cooperation and flexibility are key to the search for a reasonable accommodation. If the accommodation solution is not immediately apparent, the employer should discuss the request with the employee to determine what accommodations might be effective. If the employer requests additional information reasonably needed to evaluate the request, the employee should provide it. For example, if an employee has requested a schedule change to accommodate daily prayers, the employer may need to ask for information about the religious observance, such as time and duration of the daily prayers, in order to determine whether

accommodation can be granted without posing an undue hardship on the operation of the employer's business. Moreover, even if the employer does not grant the employee's preferred accommodation, but instead provides an alternative accommodation, the employee must cooperate by attempting to meet his religious needs through the employer's proposed accommodation if possible.

8. Does an employer have to grant every request for accommodation of a religious belief or practice?

No. Title VII requires employers to accommodate only those religious beliefs that are religious and "sincerely held," and that can be accommodated without an undue hardship. Although there is usually no reason to question whether the practice at issue is religious or sincerely held, if the employer has a bona fide doubt about the basis for the accommodation request, it is entitled to 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 gives rise to the need for the accommodation.

Factors that – either alone or in combination – might undermine an employee's assertion that he sincerely holds the religious belief at issue include: whether the employee has behaved in a manner markedly inconsistent with the professed belief; whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

However, none of these factors is dispositive. For example, although prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs – or degree of adherence – may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held. An employer also should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion.

9. When does an accommodation pose an "undue hardship"?

An accommodation would pose an undue hardship if it would cause more than de minimis cost on the operation of the employer's business. Factors relevant to undue hardship may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.

Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work. Whether the proposed accommodation conflicts with another law will also be considered.

To prove undue hardship, the employer will need to demonstrate how much cost or disruption a proposed accommodation would involve. An employer cannot rely on potential or hypothetical hardship when faced with a religious obligation that conflicts with scheduled work, but rather should rely on objective information. A mere assumption that many more people with the same religious practices as the individual being accommodated may also seek accommodation is not evidence of undue hardship.

If an employee's proposed accommodation would pose an undue hardship, the employer should explore alternative accommodations.

10. Does an employer have to provide an accommodation that would violate a seniority system or collective bargaining agreement?

No. A proposed religious accommodation poses an undue hardship if it would deprive another employee of a job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement (CBA). Of course, the mere existence of a seniority system or CBA does not relieve the employer of the duty to attempt reasonable accommodation of its employees' religious practices; the question is whether an accommodation can be provided without violating the seniority system or CBA. Often an employer can allow co-workers to volunteer to substitute or swap shifts as an accommodation to address a scheduling need without violating a seniority system or CBA.

11. What if co-workers complain about an employee being granted an accommodation?

Although religious accommodations that infringe on co-workers' ability to perform their duties or subject co-workers to a hostile work environment will generally constitute undue hardship, general disgruntlement, resentment, or jealousy of co-workers will not. Undue hardship requires more than proof that some co-workers complained; a showing of undue hardship based on co-worker interests generally requires evidence that the accommodation would actually infringe on the rights of co-workers or cause disruption of work.

12. Can a requested accommodation be denied due to security considerations?

If a religious practice actually conflicts with a legally mandated security requirement, an employer need not accommodate the practice because doing so would create an undue hardship. If a security requirement has been unilaterally imposed by the employer and is not required by law or regulation, the employer will need to decide whether it would be an undue hardship to modify or eliminate the requirement to accommodate an employee who has a religious conflict.

13. What are common methods of religious accommodation in the workplace?

Under Title VII, an employer or other covered entity may use a variety of methods to provide reasonable accommodations to its employees. Some of the most common methods are:

Scheduling Changes, Voluntary Substitutes, and Shift Swaps

An employer may be able to reasonably accommodate an employee by allowing flexible arrival and departure times, floating or optional holidays, flexible work breaks, use of lunch time in exchange for early departure, staggered work hours, and other means to enable an employee to make up time lost due to the observance of religious practices. Eliminating only part of the conflict is not sufficient, unless entirely eliminating the conflict will pose an undue hardship by disrupting business operations or impinging on other employees' benefits or settled expectations.

Moreover, although it would pose an undue hardship to require employees *involuntarily* to substitute for one another or swap shifts, the reasonable accommodation requirement can often be satisfied without undue hardship where a volunteer with substantially similar qualifications is available to cover, either for a single absence or for an extended period of time. The employer's obligation is to make a good faith effort to allow voluntary substitutions and shift swaps, and not to discourage employees from substituting for one another or trading shifts to accommodate a religious conflict. However, if the employer is on notice that the employee's religious beliefs preclude him not only from working on his Sabbath but also from inducing others to do so, reasonable accommodation requires more than merely permitting the employee to swap, absent undue hardship.

An employer does not have to permit a substitute or swap if it would pose more than *de minimis* cost or burden to business operations. If a swap or substitution would result in the employer having to pay premium wages (such as overtime pay), the frequency of the arrangement will be relevant to determining if it poses an undue hardship. The Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing reasonable accommodation. 29 C.F.R. Part 1605.

Changing an employee's job tasks or providing a lateral transfer

When an employee's religious belief or practice conflicts with a particular task, appropriate accommodations may include relieving the employee of the task or transferring the employee to a different position or location that eliminates the conflict. Whether such accommodations pose an undue hardship will depend on factors such as the nature or importance of the duty at issue, the availability of others to perform the function, the availability of other positions, and the applicability of a CBA or seniority system.

The employee should be accommodated in his or her current position if doing so does not pose an undue hardship. If no such accommodation is possible, the employer needs to consider whether lateral transfer is a possible accommodation.

Making an exception to dress and grooming rules

When an employer has a dress or grooming policy that conflicts with an employee's religious beliefs or practices, the employee may ask for an exception to the policy as a reasonable accommodation. Religious grooming practices may relate, for example, to shaving or hair length. Religious dress may include clothes, head or face coverings, jewelry, or other items. Absent undue hardship, religious discrimination may be found where an employer fails to accommodate the employee's religious dress or grooming practices.

Some courts have concluded that it would pose an undue hardship if an employer was required to accommodate a religious dress or grooming practice that conflicts with the public image the employer wishes to convey to customers. While there may be circumstances in which allowing a particular exception to an employer's dress and grooming policy would pose an undue hardship, an employer's reliance on the broad rubric of "image" to deny a requested religious accommodation may amount to relying on customer religious bias ("customer preference") in violation of Title VII. There may be limited situations in which the need for uniformity of appearance is so important that modifying the dress code would pose an undue hardship. However, even in these situations, a case-by-case determination is advisable.

Use of the work facility for a religious observance

If an employee needs to use a workplace facility as a reasonable accommodation, for example use of a quiet area for prayer during break time, the employer should accommodate the request under Title VII unless it would pose an undue hardship. If the employer allows employees to use the facilities at issue for non-religious activities not related to work, it may be difficult for the employer to demonstrate that allowing the facilities to be used in the same manner for religious activities is not a reasonable accommodation or poses an undue hardship. The employer is not required to give precedence to the use of the facility for religious reasons over use for a business purpose.

Accommodations relating to payment of union dues or agency fees

Absent undue hardship, Title VII requires employers and unions to accommodate an employee who holds religious objections to joining or financially supporting a union. Such an employee can be accommodated by allowing the equivalent of her union dues (payments by union members) or agency fees (payments often required from non-union members in a unionized workplace) to be paid to a charity agreeable to the employee, the union, and the employer. Whether a charity-substitute accommodation for payment of union dues would cause an undue hardship is an individualized determination based upon, among other things, the union's size, operational costs, and the number of individuals that need the accommodation.

If an employee's religious objection is not to joining or financially supporting the union, but rather to the union's support of certain political or social causes, possible accommodations include, for example, reducing the amount owed,

allowing the employee to donate to a charitable organization the full amount the employee owes or that portion that is attributable to the union's support of the cause to which the employee has a religious objection, or diverting the full amount to the national, state, or local union in the event one of those entities does not engage in support of the cause to which the employee has a religious objection.

Accommodating prayer, proselytizing, and other forms of religious expression

Some employees may seek to display religious icons or messages at their work stations. Others may seek to proselytize by engaging in one-on-one discussions regarding religious beliefs, distributing literature, or using a particular religious phrase when greeting others. Still others may seek to engage in prayer at their work stations or to use other areas of the workplace for either individual or group prayer or study. In some of these situations, an employee might request accommodation in advance to permit such religious expression. In other situations, the employer will not learn of the situation or be called upon to consider any action unless it receives complaints about the religious expression from either other employees or customers.

Employers should not try to suppress all religious expression in the workplace. Title VII requires that employers accommodate an employee's sincerely held religious belief in engaging in religious expression in the workplace to the extent that they can do so without undue hardship on the operation of the business. In determining whether permitting an employee to pray, proselytize, or engage in other forms of religiously oriented expression in the workplace would pose an undue hardship, relevant considerations may include the effect such expression has on co-workers, customers, or business operations.

For example, if an employee's proselytizing interfered with work, the employer would not have to allow it. Similarly, if an employee complained about proselytizing by a co-worker, the employer can require that the proselytizing to the complaining employee cease. Moreover, if an employee was proselytizing an employer's customers or clients in a manner that disrupted business, or that could be mistaken as the employer's own message, the employer would not have to allow it. Where the religiously oriented expression is limited to use of a phrase or greeting, it is more difficult for the employer to demonstrate undue hardship. On the other hand, if the expression is in the manner of individualized, specific proselytizing, an employer is far more likely to be able to demonstrate that it would constitute an undue hardship to accommodate an employee's religious expression, regardless of the length or nature of the business interaction. An employer can restrict religious expression where it would cause customers or co-workers reasonably to perceive the materials to express the employer's own message, or where the item or message in question is harassing or otherwise disruptive.

14. What if an employee objects on religious grounds to an employer-sponsored program?

Some private employers choose to express their own religious beliefs or practices in the workplace, and they are entitled to do so. However, if an employer holds religious services or programs or includes prayer in business meetings, Title VII requires that the employer accommodate an employee who asks to be excused for religious reasons, absent a showing of undue hardship.

Similarly, an employer is required to excuse an employee from compulsory personal or professional development training that conflicts with the employee's sincerely held religious beliefs or practices, unless doing so would pose an undue hardship. It would be an undue hardship to excuse an employee from training, for example, where the training provides information on how to perform the job, or how to comply with equal employment opportunity obligations, or on other workplace policies, procedures, or legal requirements.

15. Do national origin, race, color, and religious discrimination intersect in some cases?

Yes. Title VII's prohibition against religious discrimination may overlap with Title VII's prohibitions against discrimination based on national origin, race, and color. Where a given religion is strongly associated – or perceived to be associated – with a certain national origin, the same facts may state a claim of both religious and national origin discrimination. All four bases might be implicated where, for example, co-workers target a dark-skinned Muslim employee from Saudi Arabia for harassment because of his religion, national origin, race, and/or color.

16. Does Title VII prohibit retaliation?

Yes. Title VII prohibits retaliation by an employer, employment agency, or labor organization because an individual has engaged in protected activity. Protected activity consists of opposing a practice the employee reasonably believes is made unlawful by one of the employment discrimination statutes or of filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the statute. EEOC has taken the position that requesting religious accommodation is a protected activity.

17. How might First Amendment constitutional issues arise in Title VII religion cases?

The First Amendment religion and speech clauses ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech") protect individuals against restrictions imposed by the government, not by private entities, and therefore do not apply to rules imposed on private sector employees by their employers. The First Amendment, however, does protect private sector employers from government interference with their free exercise and speech rights. Moreover, government employees' religious expression is protected by both the First Amendment and Title VII. For example, a government employer may contend that granting a requested religious accommodation would pose an undue

hardship because it would constitute government endorsement of religion in violation of the Establishment Clause of the First Amendment.

18. What should an applicant or employee do if he believes he has experienced religious discrimination?

Employees or job applicants should attempt to address concerns with the alleged offender and, if that does not work, report any unfair or harassing treatment to the company. They should keep records documenting what they experienced or witnessed, as well as other witness names, telephone numbers, and addresses. Employees may file a charge with the EEOC, and are legally protected from being punished for reporting or opposing job discrimination or for participating in an EEOC investigation. Charges against private sector and local and state government employers may be filed in person, by mail, or by telephone by contacting the nearest EEOC office.

Understanding Religious Discrimination and Harassment in the Workplace

Discrimination

Discrimination in any aspect of employment is illegal and employees are protected from such conduct under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA) of 1963.

Black's Law Dictionary defines discrimination as the failure to treat all persons equally where no reasonable distinction can be found between those favored and those who are not favored. In other words, discrimination is the unfair treatment or denial of standard privileges of employment (such as benefits, working hours, pay increases, transfers, or promotions) based on one's race, age, sex, nationality, pregnancy, religion, marital or veteran status, or handicap whether physical or mental.

Discrimination is prohibited in all phases of employment including:

hiring and firing;
compensation, assignment, or classification of employees;
transfer, promotion, layoff, or recall;
job advertisements;
recruitment;
testing;
use of company facilities;
training and apprenticeship programs;
fringe benefits;
pay, retirement plans, and disability leave; or
other terms and conditions of employment.

Religious discriminatory practices under these laws also include:

Harassment on the basis of religion;

Retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;

Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain religion; and

Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular religion. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular religious group.

There are two categories under which most employment discrimination claims fall; disparate treatment and disparate impact. Disparate treatment occurs when an employer commits intentional discrimination such as harassment or refusing to promote or hire an individual because of their religion. Disparate impact is generally not intentional but results from an employment practice that on the surface appears to be neutral in treatment but actually treats one group of people more negatively than another. Furthermore, these practices are not justified by a business necessity.

An employer's best defense against discrimination is to develop a strong EEO policy that is clearly communicated and accepted by both managers and employees. Training is an important element and making sure to enforce the rules is pertinent. When business decisions need to be implemented, make sure that the decision is well defended and documented. Always explain employment decisions to affected individuals as thoroughly as possible.

Federal Law Prohibiting Discrimination

Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin. Employers engaged in an industry affecting commerce that has fifteen or more employees, labor organizations and employment agencies must comply with Title VII. The law (SEC. 2000e-2. *[Section 703]*) states that:

> It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The most common violation under Title VII is intentional discrimination, also known as disparate treatment. An employee may feel that they were unfairly fired or passed up for a promotion, but that doesn't mean that they were discriminated against. In order for it to be classified as religious discrimination, the employee had to be treated differently because of their religion.

Disparate treatment is usually proved circumstantially by convincing the court the employer's explanation for their action is unbelievable and it is thereby reasonable to infer the real explanation is discrimination. This is called evidence of pretext because the explanation given by the employer is proven to be a pretext to cover their discriminatory act. Pretext is generally proven through one of the following:

- Employer offers an explanation that they know is false
- Individuals with the same qualifications of a different class were treated differently than the complainant
- Evidence of bias such as knowledge that the employer has an issue with a particular class of people
- Statistical evidence such as the employer failing to have Muslims in management positions despite their availability

Another violation of Title VII occurs when an employer does not intend to exclude a particular group of people but engages in practices that have the effect of doing so. This is known as disparate impact. Typically, disparate impact will be determined by comparing the rate at which an employer's actions exclude a protected group to the rate at which others are excluded. An example of employment practices that may be challenged include a "no beard" policy.

State Specific Discrimination Laws

Although federal law requires at least 15 employees on staff to file a religious discrimination claim, individual state law may allow a religious discrimination claim with fewer employees. This is the most common difference between federal and state religious discrimination laws. Therefore, even if a company has less than 15 employees, a religious discrimination claim can still be filed with either the state's administrative agency, in court or both. The following list shows the minimum number of employees on staff needed file a claim in each state:

State	Minimum number of employees
Alabama	15
Alaska	1
Arizona	15
Arkansas	9
California	5
Colorado	15
Connecticut	3
Delaware	4
Florida	15
Georgia	15
Hawaii	1
Idaho	5
Illinois	15
Indiana	6
Iowa	4
Kansas	4
Kentucky	8
Louisiana	15
Maine	1
Maryland	15
Massachusetts	6
Michigan	1
Minnesota	1
Mississippi	15
Missouri	6
Montana	1
Nebraska	15
Nevada	15
New Hampshire	6
New Jersey	1
New Mexico	4
New York	4

North Carolina	1
North Dakota	1
Ohio	4
Oklahoma	15
Oregon	1
Pennsylvania	4
Rhode Island	4
South Carolina	15
South Dakota	1
Tennessee	8
Texas	15
Utah	15
Vermont	1
Virginia	1 (for state court actions 6-14 employees)
Washington	8
West Virginia	12
Wisconsin	1
Wyoming	2

Harassment

Under the same laws that govern discrimination, employers are also responsible for preventing harassment in the workplace. The same groups of people that are protected from discrimination are likewise protected from undergoing unwelcome offensive conduct based religion or other protected characteristics. These types of behavior create a hostile work environment and constitute discriminatory harassment.

To determine if an action is considered harassment, it must be viewed as such by the people that it affected, not by the ones responsible for it. An employee may not have seen or even meant their words or actions to be harassing in nature, but if the victim felt uncomfortable or insulted, then it would be classified as harassment. If the action is not welcomed by the victim, then an offense has occurred.

Accepting conduct is not the same as welcoming it. A person is not welcoming a conversation or action just because they fail to say anything. They may even participate in the conversation but they feel offended by what someone in the group is saying. Furthermore, just because a person likes something today doesn't mean that they will welcome it tomorrow.

Anyone, regardless of gender or job level can be guilty of harassment. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.

Harassment becomes unlawful where:

1) enduring the offensive conduct becomes a condition of continued employment, or

2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Harassment can occur in a variety of circumstances, including, but not limited to, the following:

The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.

The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.

Unlawful harassment may occur without economic injury to, or discharge of, the victim.

Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

Best Practices

Disparate Treatment Based on Religion

Employers can reduce the risk of discriminatory employment decisions by establishing written objective criteria for evaluating candidates for hire or promotion and applying those criteria consistently to all candidates.

During the interview process, restrict discussions about schedules to days, hours and shifts that would be expected to be worked. It is never acceptable during an interview to ask an applicant what religion they practice or what religious days they observe.

In conducting job interviews, employers can ensure nondiscriminatory treatment by asking the same questions of all applicants for a particular job or category of job and inquiring about matters directly related to the position in question.

Employers can reduce the risk of religious discrimination claims by carefully and timely recording the accurate business reasons for disciplinary or performance related actions and sharing these reasons with the affected employees.

When management decisions require the exercise of subjective judgment, employers can reduce the risk of discriminatory decisions by providing training to inexperienced managers and encouraging them to consult with more experienced managers or human resources personnel when addressing difficult issues.

If an employer is confronted with customer biases, e.g., an adverse reaction to being served by an employee due to religious garb, the employer should consider engaging with and educating the customers regarding any misperceptions they may have and/or the equal employment opportunity laws.

Religious Harassment

Employers should have a well-publicized and consistently applied anti-harassment policy that: (1) covers religious harassment; (2) clearly explains what is prohibited; (3) describes procedures for bringing harassment to management's attention; and, (4) contains an assurance that complainants will be protected against retaliation. The procedures should include a complaint mechanism that includes multiple avenues for complaint; prompt, thorough, and impartial investigations; and prompt and appropriate corrective action.

Employers should allow religious expression among employees to the same extent that they allow other types of personal expression that are not harassing or disruptive.

Once an employer is on notice that an employee objects to religious conduct that is directed at him or her, the employer should take steps to end the conduct because even conduct that the employer does not regard as abusive can become sufficiently severe or pervasive to affect the conditions of employment if allowed to persist in the face of the employee's objection.

If harassment is perpetrated by a non-employee assigned by a contractor, the supervisor or other appropriate individual in the chain of command should initiate a meeting with the contractor regarding the harassment and demand that it cease, that appropriate disciplinary action be taken if it continues, and/or that a different individual be assigned by the contractor.

To prevent conflicts from escalating to the level of a Title VII violation, employers should immediately intervene when they become aware of objectively abusive or insulting conduct, even absent a complaint.

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.

While supervisors are permitted to engage in certain religious expression, they should avoid expression that might – due to their supervisory authority – reasonably be perceived by subordinates as coercive, even when not so intended.

Reasonable Accommodation of Religious Beliefs and Practices

Reasonable Accommodation - Generally

Employers should inform employees that they will make reasonable efforts to accommodate the employees' religious practices.

Employers should train managers and supervisors on how to recognize religious accommodation requests from employees.

Employers should consider developing internal procedures for processing religious accommodation requests.

Employers should individually assess each request and avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate.

Employers and employees should confer fully and promptly to the extent needed to share any necessary information about the employee's religious needs and the available accommodation options.

An employer is not required to provide an employee's preferred accommodation if there is more than one effective alternative to choose from. An employer should, however, consider the employee's proposed method of accommodation, and if it is denied, explain to the employee why his proposed accommodation is not being granted.

Managers and supervisors should be trained to consider alternative available accommodations if the particular accommodation requested would pose an undue hardship.

When faced with a request for a religious accommodation which cannot be promptly implemented, an employer should consider offering alternative methods of accommodation on a temporary basis, while a permanent accommodation is being explored. In this situation, an employer should also keep the employee apprised of the status of the employer's efforts to implement a permanent accommodation.

Undue Hardship – Generally

The de minimis undue hardship standard refers to the legal requirement. As with all aspects of employee relations, employers can go beyond the requirements of the law and should be flexible in evaluating whether or not an accommodation is feasible.

An employer should not assume that an accommodation will conflict with the terms of a seniority system or CBA without first checking if there are any exceptions for religious accommodation or other avenues to allow accommodation consistent with the seniority system or CBA.

An employer should not automatically reject a request for religious accommodation just because the accommodation will interfere with the existing seniority system or terms of a CBA. Although an employer may not upset co-workers' settled expectations, an employer is free to seek a voluntary modification to a CBA in order to accommodate an employee's religious needs.

Employers should train managers to be aware that, if the requested accommodation would violate the CBA or seniority system, they should confer with the employee to determine if an alternative accommodation is available.

Employers should ensure that managers are aware that reasonable accommodation may require making exceptions to policies or procedures that are not part of a CBA or seniority system, where it would not infringe on other employees' legitimate expectations.

Schedule Changes

Employers should work with employees who need an adjustment to their work schedule to accommodate their religious practices.

Notwithstanding that the legal standard for undue hardship is “more than de minimis,” employers may of course choose voluntarily to incur whatever additional operational or financial costs they deem appropriate to accommodate an employee’s religious need for scheduling flexibility.

Employers should consider adopting flexible leave and scheduling policies and procedures that will often allow employees to meet their religious and other personal needs. Such policies can reduce individual requests for exceptions. For example, some employers have policies allowing alternative work schedules and/or a certain number of “floating” holidays for each employee. While such policies may not cover every eventuality and some individual accommodations may still be needed, the number of such individual accommodations may be substantially reduced.

Voluntary Substitutes or Swaps

An employer should facilitate and encourage voluntary substitutions and swaps with employees of substantially similar qualifications by publicizing its policy permitting such arrangements, promoting an atmosphere in which substitutes are favorably regarded, and providing a central file, bulletin board, group e-mail, or other means to help an employee with a religious conflict find a volunteer to substitute or swap.

Change of Job Assignments and Lateral Transfers

An employer should consider a lateral transfer when no accommodation which would keep the employee in his or her position is possible absent undue hardship. However, an employer should only resort to transfer, whether lateral or otherwise, after fully exploring accommodations that would permit the employee to remain in his position.

Where a lateral transfer is unavailable, an employer should not assume that an employee would not be interested in a lower-paying position if that position would enable the employee to abide by his or her religious beliefs. If there is no accommodation available that would permit the employee to remain in his current position or an equivalent one, the employer should offer the available position as an accommodation and permit the employee to decide whether or not to take it.

Modifying Workplace Practices, Policies, and Procedures

Employers should make efforts to accommodate an employee’s desire to wear a yarmulke, hijab, or other religious garb. If the employer is concerned about uniform appearance in a position which involves interaction with the public, it may be appropriate to consider whether the employee’s religious views would permit him to resolve the religious conflict by, for example, wearing the item of religious garb in the company uniform color(s).

Managers and employees should be trained not to engage in stereotyping based on religious dress and grooming practices and should not assume that atypical dress will create an undue hardship.

Employers should be flexible and creative regarding work schedules, work duties, and selection procedures to the extent practicable.

Employers should be sensitive to the risk of unintentionally pressuring or coercing employees to attend social gatherings after the employees have indicated a religious objection to attending.

Permitting Prayer, Proselytizing, and Other Forms of Religious Expression

Employers should train managers to gauge the actual disruption posed by religious expression in the workplace, rather than merely speculating that disruption may result. Employers should also train managers to identify alternative accommodations that might be offered to avoid actual disruption (e.g., designating an unused or private location in the workplace where a prayer session or Bible study meeting can occur if it is disrupting other workers).

Employers should incorporate a discussion of religious expression, and the need for all employees to be sensitive to the beliefs or non-beliefs of others, into any anti-harassment training provided to managers and employees.

Retaliation

Employers can reduce the risk of retaliation claims by training managers and supervisors to be aware of their anti-retaliation obligations under Title VII, including specific actions that may constitute retaliation.

Employers can help reduce the risk of retaliation claims by carefully and timely recording the accurate business reasons for disciplinary or performance related actions and sharing these reasons with the employee.

Recent Religious Discrimination Settlements

Reasonable Accommodation

In Jonesboro, Arkansas, the U.S. Equal Employment Opportunity Commission (EEOC) announced a favorable jury verdict of $756,000 in a religious discrimination lawsuit brought against AT&T Inc. on behalf of two male customer service technicians who were suspended and fired for attending a Jehovah's Witnesses Convention.

The jury of nine women and three men awarded the two former employees, Jose Gonzalez and Glenn Owen (brothers-in-law), $296,000 in back pay and $460,000 in compensatory damages under Title VII of the 1964 Civil Rights Act. During the four-day trial, the jury heard evidence that both men had submitted written requests to their manager in January 2005 for one day of leave to attend a religious observance that was scheduled for Friday, July 15, to Sunday, July 17, 2005. Both men testified that they had sincerely held religious beliefs that required them to attend the convention each year. Both men had attended the convention every year throughout their employment with AT&T -- Gonzalez worked at the company for more than eight years and Owen was employed there for nearly six years.

Commenting on the case, in U.S. District Court for the Eastern District of Arkansas, Jonesboro Division (Case No. 3:06-cv-00176), before Judge Leon Holmes, former employee Joe Gonzalez said, "I am very pleased with the jury's verdict." Glenn Owen added, "I'm glad that the justice system works and that the jury saw what was going on and corrected it."

Title VII of the Civil Rights Act of 1964 prohibits religious discrimination and requires employers to make reasonable accommodations to employees' and applicants' sincerely held religious beliefs as long as this does not pose an undue hardship.

"In this case, AT&T forced Mr. Gonzalez and Mr. Owen to choose between their religion and their job," said Faye A. Williams, regional attorney for the EEOC Memphis District Office. "Title VII does not require that an employee make that choice in order to maintain gainful employment."

Source: EEOC Press Release 10/23/07

Reverse Religious Discrimination

In *Noyes v. Kelly Services. Inc*., 488 F.3d 1163 (9th Cir. 2007), the plaintiff alleged "reverse religious discrimination" when she was not promoted because she did not follow the religious beliefs of her supervisor and management, who were members of the Fellowship, a small religious group, and favored and promoted other members of the religious group.

Kelly Services provides temporary workers to other companies. Noyes worked as a permanent employee at Kelly Services in its computer software and multimedia department from October 1994 until May 2004, when she was laid off. At the time of the lay-off, she held the title of Software Developer. In April 2001, Noyes was passed over for a promotion to the position of Software Development Manager. Noyes challenged Kelly Services' failure to promote her in April 2001, not her termination in May 2004.

In April 2001, the position of Software Development Manager became available at Kelly Services. William Heinz, a top-level management employee and a member of the Fellowship, was in charge of filling the position. Several employees were considered for the position including Noyes, Donna Walker and Joep Jilesen. Neither Noyes nor Walker were members of the Fellowship; Jilesen was a member of the Fellowship. No outside candidates were considered for the position.

Although Heinz had final decision-making authority over the promotion, during the selection process, he received input from other employees. Heinz told at least two of those employees that Noyes was not interested in receiving the promotion. Even when Noyes was recommended for the position by another employee they were told that Noyes was not interested in the position.

Noyes claimed that she never told anyone at Kelly Services that she was not interested in becoming a manager, and that Heinz's statements to that effect were simply not true. In fact, Noyes wanted to become a manager and, in 2000, she applied for the only management position that was previously openly advertised in her field. Mario Fantoni, a Fellowship member, received that promotion.

Heinz originally offered the Software Development Manager position to Walker, who declined the job because she had already held a similar position and thought that it would be a professional step backwards. After Walker declined, another employee recommended to Heinz that he promote Jilesen. Heinz expressed some reluctance because there had been "issues raised in the past with Fellowship members being perceived as being given favoritism." Heinz ultimately offered the promotion to Jilesen, who accepted.

Noyes claimed that she was more qualified for the Software Development Manager position than Jilesen, because she had worked at Kelly Services for nearly six years longer and she had an MBA, which Jilesen did not. According to Noyes, Heinz had also shown other preferential treatment to Jilesen, including paying him a higher salary, which Heinz told Noyes was necessary for Jilesen's "lifestyle."

Noyes lodged a verbal complaint about Heinz's discriminatory employment practices with Kelly Services' Human Resources Department in May 2001. She claimed Kelly Services did nothing in response, and Kelly Services pointed to no evidence in the record indicating otherwise. Noyes then filed an administrative charge of discrimination with the California Department of Fair Employment and Housing in August 2001.

Although the District court found in favor of Kelly Services this decision was reversed by the United States Court of Appeal. The court ruled that the fact that Noyes did not share the employer's religious beliefs was the basis for the alleged discrimination against her, and the evidence was sufficient to create an issue for trial on whether the employer's decision to promote another employee was a pretext for religious discrimination.

Source: United States Court of Appeals for the Ninth Circuit

Religious Attire

A Phoenix jury has awarded more than $287,000 in a religious discrimination suit against Alamo Car Rental brought by U.S. Equal Employment Opportunity Commission (EEOC), the agency announced today. The EEOC had charged Alamo committed post-9/11 backlash discrimination based on religion when it fired a Somali customer sales representative in December 2001 for refusing to remove her head scarf during the Muslim holy month of Ramadan.

Alamo was ordered to pay $21,640 in back pay, $16,000 in compensatory damages, and $250,000 in punitive damages to Bilan Nur. According to the EEOC's lawsuit (CIV 02-1908-PHX-ROS in U.S. District Court for the District of Arizona), Alamo refused to permit Nur to continue to cover her head, as she had done in previous years, even if she wore an approved Alamo-logo scarf. The jury also heard evidence that, although wearing a head scarf did not violate the company's dress policy, Alamo fired Nur in December, 2001, only eight days before Ramadan was over, and declared her ineligible for rehire. The jury reached its verdict after also hearing testimony about the damages Nur, who was 22 years old at the time, suffered as a result of being fired.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against individuals because of their religion in hiring, firing, and other terms and conditions of employment. Employers must reasonably accommodate employees' sincerely held religious beliefs or practices unless doing so would impose an undue hardship on the employer.

In the first post-9/11 backlash case brought by the EEOC's Phoenix District Office, Judge Roslyn Silver took the unusual step of finding the religious discrimination so clear-cut, based on the pleadings, that the question of whether Alamo had violated the law did not need to be resolved by a jury. In the subsequent trial, which began on May 29, the jury was only asked to decide the amount of monetary damages to which Nur was entitled.

"For nearly six years, Alamo has continued to deny that it violated the law when it refused to accommodate Ms. Nur's religious beliefs and fired her," said Mary Jo O'Neill, regional attorney for the EEOC Phoenix District Office. "Judge Silver had already disagreed with Alamo, as did the jury with its award. Title VII protects people of all religious beliefs, and no one should ever have to sacrifice her religious beliefs in order to keep a job."

According to EEOC Phoenix District Director Chester Bailey, "Employers need to remember that Title VII protects the religious practices and beliefs of all employees regardless of the nature of their faith."

EEOC trial attorney David Lopez, who tried this case with Valerie Meyer, said after the verdict, "Bilan Nur is truly a remarkable woman. A refugee from war-torn Somalia when she came to this country as a young woman, Ms. Nur viewed America as the country that offered her hope, safety, and equality. With the jury's findings, Ms. Nur has been reassured that, even after 9/11, Americans still believe in justice for all people.

Source: EEOC Press Release 6/4/07

Religious Expression that Violates Harassment Policy

Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004), presents the case of whether an employer can enforce its policies even at the expense of an employee's religious expression. Peterson was employed in the Boise, Idaho office of Hewlett-Packard for almost 21 years prior to his termination. The parties do not dispute that Peterson's job performance was satisfactory. The conflict between Peterson and Hewlett-Packard arose when the company began displaying "diversity posters" in its Boise office as one component of its workplace diversity campaign. The first series consisted of five posters, each showing a photograph of a Hewlett-Packard employee above the caption "Black," "Blonde," "Old," "Gay," or "Hispanic." Posters in the second series included photographs of the same five employees and a description of the featured employee's personal interests, as well as the slogan "Diversity is Our Strength."

Peterson describes himself as a "devout Christian," who believes that homosexual activities violate the commandments contained in the Bible and that he has a duty "to expose evil when confronted with sin." In response to Hewlett-Packard's diversity posters which addressed homosexuality, Peterson posted Biblical scriptures in his cubicle. One scripture read:

If a man also lie with mankind, as
he lieth with a woman, both of
them have committed an abomination;
they shall surely be put to
death; their blood shall be put
upon them.

After his supervisor removed the scripture, Peterson responded by replacing it with similar scriptures. Peterson was given time off with pay to reconsider his position. When he returned to work, he again posted the scriptural passages and refused to remove them saying that he wanted to condemn "gay behavior". After further meetings with Hewlett-Packard managers, Peterson was terminated for insubordination. Peterson responded by suing the employer for religious discrimination under Title VII and the Idaho Human Rights Act.

An employer's duty to negotiate possible accommodations ordinarily requires it to take "some initial step to reasonably accommodate the religious belief of that employee." Peterson contends that the company did not do so in this case even though Hewlett-Packard managers convened at least four meetings with him. In these meetings, they explained the reasons for the company's diversity campaign, allowed Peterson to explain fully his reasons for his postings, and attempted to determine whether it would be possible to resolve the conflict in a manner that would respect the dignity of Peterson's fellow employees. Peterson, however, repeatedly made it clear that only two options for accommodation would be acceptable to him, either that (1) both the "Gay" posters and anti-gay messages remain, or (2) Hewlett-Packard remove the "Gay" posters and he would then remove the anti-gay messages.

The court found in Hewlett-Packard's favor ruling that Peterson's first proposed accommodation would have compelled Hewlett-Packard to permit an employee to post messages intended to demean and harass his co-workers. His second proposed accommodation would have forced the company to exclude sexual orientation from its

workplace diversity program. Either choice would have created undue hardship for Hewlett-Packard because it would have inhibited its efforts to attract and retain a qualified, diverse workforce, which the company reasonably views as vital to its commercial success; thus, neither provides a reasonable accommodation.

This case demonstrates that an employer must have a legitimate business justification for prohibiting religious items in the workplace. Mere concern that the religious object is "too religious" generally will not suffice. Instead, an employer must show that the religious object violates an established company policy and/or intentionally disparages other individuals as was successfully shown by Hewlett-Packard.

Source: United States Court of Appeals for the Ninth Circuit

Religious Harassment

In *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306 (4th Cir. 2008) reversing summary judgment for the employer and remanding the case for trial, the court ruled that a reasonable fact finder could conclude that Clinton Ingram, a Muslim employee, who wore a kufi as part of his religious observance was subjected to a hostile work environment and religious harassment when fellow employees repeatedly called him "Taliban" and "towel head," made fun of his appearance, questioned his allegiance to the United States, suggested he was a terrorist, and made comments associating all Muslims with senseless violence.

During his time at Sunbelt, Ingram claimed he was subjected to a hostile work environment on the basis of his religion. According to Ingram, the abusive environment was marked by a steady stream of demeaning comments and degrading actions directed against him by his coworkers; conduct that went unaddressed and unpunished by Sunbelt supervisors.

For instance, coworkers used religiously-charged epithets and often called Ingram names such as "Taliban" and "towel head." In addition, fellow employees frequently made fun of Ingram's appearance, challenged his allegiance to the United States, suggested he was a terrorist, and made comments associating all Muslims with senseless violence. Sometimes Ingram's supervisors personally participated in the harassment. Sunbelt responded, in turn, that Ingram also used profane and derogatory language in the workplace.

In addition to these explicitly religious incidents, Ingram suffered from other forms of harassment. For example, his timecard, which was used to punch time in and out, was frequently hidden, especially on Fridays when he went to congregational prayer. Likewise, coworkers constantly unplugged his computer equipment and, on one occasion, defaced his business card by writing "dumb ass" over his name.

After nearly every incident of harassment, Ingram verbally complained to his supervisors. However, these complaints proved futile, and the religious harassment persisted. After he complained to his HR department, Ingram's direct supervisors conducted an investigation but supposedly found no evidence of religious discrimination. Instead, they allegedly told him that his problems stemmed from his personality and performance and that he was "paranoid" and "seeing things." The harassment allegedly continued until Ingram's termination in February 2003.

On May 13, 2005, the EEOC filed an amended complaint on behalf of Ingram alleging that Sunbelt had violated Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 by subjecting Ingram to a hostile work environment based on his religion. Specifically, the EEOC claimed that Ingram suffered “pervasive, unwelcome harassment based on his religion,” including “demeaning comments about his religious beliefs and practices by Sunbelt employees.” In addition, the EEOC alleged that Sunbelt and its managers had notice of the harassment but failed to take corrective action with respect to the hostile working environment.

On December 1, 2006, the district court held a hearing on the motion for summary judgment filed by Sunbelt. At the conclusion of the hearing, the district court issued an oral ruling in favor of Sunbelt. The court held that based on the facts alleged, it did not believe the harassment was severe or pervasive enough to establish a prima facie case of a hostile work environment.

"There's a lot of coarse behavior that goes on in the workplace," the court said, adding that the EEOC did not show that the alleged harassment was severe or pervasive enough to establish a prima facie case of a hostile work environment.

The agency appealed to the 4th Circuit, which reversed and remanded. In the 4th Circuit’s own words:

> Title VII extends the promise that no one should be subject to a discriminatorily hostile work environment. In the wake of September 11th, some Muslim Americans, completely innocent of any wrongdoing, became targets of gross misapprehensions and overbroad assumptions about their religious beliefs. But the event that shook the foundations of our buildings did not shake the premise of our founding-that here, in America, there is no heretical faith.

The Court went on to say that, “The mere existence of an anti-harassment policy does not allow Sunbelt to escape liability. While the adoption of an effective anti-harassment policy is an important factor in determining whether it exercised reasonable care, the policy must be effective in order to have meaningful value”.

Source: United States Court of Appeal, Fourth Circuit

Proselytizing (attempting to convert to one’s faith)

Ms. Tammy Powell began her employment at Yellow Book as a data-entry processor. After an interview, Yellow Book promoted her to a financial service representative. In this new job she sat next to Ms. Kreutz. According to Ms. Powell, Ms. Kreutz, among other offenses, sought to convert her to Ms. Kreutz's religion.

Soon after Ms. Powell moved to the cubicle next to hers, Ms. Kreutz experienced a religious conversion. Subsequent to her conversion, Ms. Kreutz began to tell Ms. Powell about her religious beliefs. While Ms. Powell was receptive at first, she later told Ms. Kreutz that she did not wish to discuss any more religious matters.

Ms. Kreutz testified by deposition that she abided by Ms. Powell's wishes. Some months later, however, Ms. Powell complained to Yellow Book management about continued proselytizing by Ms. Kreutz. Yellow Book's manager of corporate employer relations met with Ms. Kreutz and told her that she was not to broach religious matters with Ms. Powell, either in person or through email. Ms. Powell also complained of religious sayings that were posted in Ms. Kreutz's cubicle. Yellow Book management reviewed the sayings, found that they did not violate company policy, and therefore did not order their removal.

Despite Yellow Book's intervention with respect to the proselytizing, Ms. Powell continued to feel aggrieved by Ms. Kreutz's religious outspokenness. Over the course of two months, Ms. Powell complained to Yellow Book management at least eight more times. Each time, according to Yellow Book management, Ms. Powell confirmed that Ms. Kreutz was not talking to her or emailing her about religious matters. But she still felt that the religious messages in Ms. Kreutz's cubicle were inappropriate and distracting. Even when Yellow Book moved Ms. Powell away from Ms. Kreutz's desk so that she would not be next to the religious sayings, Ms. Powell continued to insist that Yellow Book order their removal.

The day before a mediation session, Ms. Powell emptied her desk and departed the office on FMLA leave. When she failed to return, Yellow Book terminated her. Following her termination, Ms. Powell sued Yellow Book and Ms. Kreutz for sexual harassment, religious harassment, and retaliation.

The district court, after considering this evidence, granted the defendants' motion for summary judgment on the religious harassment claim. "Once an employer becomes aware of [harassing conduct], it must promptly take remedial action which is reasonably calculated to end [it]." *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993). It was undisputed that Yellow Book, upon learning of Ms. Powell's complaints, promptly held a meeting with Ms. Kreutz and told her to stop discussing religious matters with Ms. Powell. As a result, the court held that Yellow Book's actions were prompt and proper. The court also concluded that Yellow Book continued to monitor the situation to ensure that any improper conduct by Ms. Kreutz did not resume.

Ms. Powell appealed the decision of the District Court. The Court of Appeal for the Eighth Circuit also believed that Ms. Powell's religious-harassment claim failed because Ms. Kreutz's communications to her about religion did not amount to severe or pervasive harassment that altered the terms of her employment. Although Ms. Powell continued to complain to Yellow Book management, but in those complaints she repeatedly confirmed that Ms. Kreutz was no longer discussing religious matters with her and instead focused on Ms. Kreutz's religious postings. An employer, however, has no legal obligation to suppress any and all religious expression merely because it annoys a single employee. The Court of Appeal upheld the District Court’s ruling.

Source: United States Court of Appeal for the Eighth Circuit

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SECTION 12: RELIGIOUS DISCRIMINATION

OVERVIEW

This Section of the Compliance Manual focuses on religious discrimination under Title VII of the Civil Rights Act of 1964 (Title VII). Title VII protects workers from employment discrimination based on their race, color, religion, sex, national origin, or protected activity. Solely with respect to religion, Title VII also requires reasonable accommodation of employees' sincerely held religious beliefs, observances, and practices when requested, unless accommodation would impose an undue hardship on business operations. Undue hardship under Title VII is defined as "more than *de minimis*" cost or burden -- a substantially lower standard for employers to satisfy than the "undue hardship" defense under the Americans with Disabilities Act (ADA), which is defined instead as "significant difficulty or expense."

The prohibition on discrimination and the requirement of reasonable accommodation apply whether the religious views in question are mainstream or non-traditional, and even if not recognized by any organized religion. These protections also extend to those who profess no religious beliefs.

Questions about religion in the workplace have increased as religious pluralism has increased. In a 2001 survey of human resource professionals conducted by the Society for Human Resource Management and the Tanenbaum Center for Interreligious Understanding, 36% of human resource professionals who responded reported an increase in the religious diversity of their employees in the preceding five years. Further, the number of religious discrimination charges filed with EEOC has more than doubled from 1992 to 2007, although the total number of such charges remains relatively small compared to charges filed on other bases. Many employers seek legal guidance in managing the issues that arise as religious diversity in the American workplace continues to increase.

This Section of the Compliance Manual is designed to be a practical resource for employers, employees, practitioners, and EEOC enforcement staff on Title VII's prohibition against religious discrimination. The Section defines religious discrimination, discusses typical scenarios in which religious discrimination may arise, and provides guidance to employers on how to balance the needs of individuals in a diverse religious climate. The Section is organized by legal topic, as follows:

1. **I - Coverage issues, including the definition of "religion" and "sincerely held," the religious organization exception, and the ministerial exception.**
2. **II - Disparate treatment analysis of employment decisions based on religion, including recruitment, hiring, promotion, discipline, and compensation, as well as differential treatment with respect to religious expression; customer preference; security requirements; and bona fide occupational qualifications.**
3. **III - Harassment analysis, including religious belief or practice as a condition of employment or advancement, hostile work environment, and employer liability issues.**
4. **IV - Reasonable accommodation analysis, including notice of the conflict between religion and work, scope of the accommodation requirement and undue hardship defense, and common methods of accommodation.**
5. **V - Related forms of discrimination, including discrimination based on national origin, race, or color, as well as retaliation.**

Some charges of religious discrimination may raise multiple claims, for example requiring analysis under disparate treatment, harassment, and denial of reasonable accommodation theories of liability. In addition, there are some instances where Title VII religious discrimination cases implicate federal constitutional provisions. For example, a government employer may contend that granting a requested religious accommodation would pose an undue hardship because it would constitute government endorsement of religion in violation of the Establishment Clause of the First Amendment. A private sector employer may contend that its own First Amendment rights under the Free Exercise or Free Speech Clauses would be violated if it is compelled by Title VII to grant a particular accommodation. In addition, government employees often raise claims under the First Amendment parallel to their Title VII accommodation claims. Defining the exact parameters of the First Amendment is beyond the scope of this document. However, these First Amendment issues are referenced throughout this document in order to illustrate how they often arise in Title VII cases.

12-I COVERAGE

Title VII prohibits covered employers, employment agencies, and unions from:

1. (1) treating applicants or employees differently (disparate treatment) based on their religious beliefs or practices – or lack thereof – in any aspect of employment, including recruitment, hiring, assignments, discipline, promotion, and benefits;
2. (2) subjecting employees to harassment because of their religious beliefs or practices – or lack thereof – or because of the religious practices or beliefs of people with whom they associate (*e.g.*, relatives, friends, etc.);
3. (3) denying a requested reasonable accommodation of an applicant's or employee's sincerely held religious beliefs or practices – or lack thereof – if an accommodation will not impose an undue hardship on the conduct of the business; and,
4. (4) retaliating against an applicant or employee who has engaged in protected activity, including participation (*e.g.*, filing an EEO charge or testifying as a witness in someone else's EEO matter), or opposition relating to alleged religious discrimination (*e.g.*, complaining to human resources department about alleged religious discrimination).

Although more than one of these theories of liability may apply in a particular case, they are discussed in separate parts of this manual for ease of use.

· NOTE TO EEOC INVESTIGATORS ·

Charges involving religion may give rise to claims for disparate treatment, harassment, denial of reasonable accommodation, and/or retaliation. Therefore, these charges should be investigated and analyzed under all four theories of liability to the extent applicable, even if the charging party only raises one claim.

A. Definitions

Overview: Religion is very broadly defined under Title VII. Religious beliefs, practices, and observances include those that are theistic in nature, 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." Religious beliefs can include unique views held by a few or even one individual; however, mere personal preferences are not religious beliefs. Title VII requires employers to accommodate religious beliefs, practices, and observances if the beliefs are "sincerely held" and the reasonable accommodation poses no undue hardship on the employer.

1. Religion

Title VII defines "religion" to include "all aspects of religious observance and practice as well as belief." Religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others. Further, a person's religious beliefs "need not be confined in either source or content to traditional or parochial concepts of religion." A belief is "religious" for Title VII purposes if it 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." An employee's belief or practice can be "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief or practice, or if few – or no – other people adhere to it.

Religious beliefs include 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." Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held. Rather, religion typically concerns "ultimate ideas" about "life, purpose, and death." Social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII.

Religious observances or practices include, for example, attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, or refraining from certain activities. Determining whether a practice is religious turns not on the nature of the activity, but on the employee's motivation. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons. Whether or not the practice is "religious" is therefore a situational, case-by-case inquiry. For example, one employee might observe certain dietary restrictions for religious reasons while another employee adheres to the very same dietary restrictions but for secular (*e.g.*, health or environmental) reasons. In that instance, the same practice might in one case be subject to reasonable accommodation under Title VII because an employee engages in the practice for religious reasons, and in another case might not be subject to reasonable accommodation because the practice is engaged in for secular reasons.

The following examples illustrate these concepts:

EXAMPLE 1
Employment Decisions Based on "Religion"

An otherwise qualified applicant is not hired because he is a self-described evangelical Christian. A qualified non-Jewish employee is denied promotion because the supervisor wishes to give a preference based on religion to a fellow Jewish employee. An employer terminates an employee based on his disclosure to the employer that he has recently converted to the Baha'i Faith. Each of these is an example of an employment decision based on the religious affiliation of the applicant or employee, and therefore is based on "religion" within the meaning of Title VII.

EXAMPLE 2
Religious Practice versus Secular Practice

A Seventh-day Adventist employee follows a vegetarian diet because she believes it is religiously prescribed by the scriptural passage "[b]ut flesh with the life thereof, which is the blood thereof, shall ye not eat," (Genesis 9:4). Her vegetarianism is a religious practice, even though not all Seventh-day Adventists share this belief or follow this practice, and even though many individuals adhere to a vegetarian diet for purely secular reasons.

EXAMPLE 3
Types of Religious Practice or Observance

A Catholic employee requests a schedule change so that he can attend church services on Good Friday. A Muslim employee requests an exception to the company's dress and grooming code allowing her to wear her headscarf, or a Hindu employee requests an exception allowing her to wear her bindi (religious forehead marking). An atheist asks to be excused from the religious invocation offered at the beginning of staff meetings. An adherent to Native American spiritual beliefs seeks unpaid leave to attend a ritual ceremony. An employee who identifies as Christian but is not affiliated with a particular sect or denomination requests accommodation of his religious belief that working on his Sabbath is prohibited. Each of these accommodation requests relates to a "religious" belief or practice within the meaning of Title VII. By contrast, a request for a schedule change to help set up decorations or prepare food for a church event, for instance, typically does not involve a "religious" belief or practice within the meaning of Title VII.

EXAMPLE 4
Supervisor Considers Belief Illogical

Morgana asks for time off on October 31 to attend the "Samhain Sabbat," the New Year observance of Wicca, her religion. Her supervisor refuses, saying that Wicca is not a "real" religion but an "illogical conglomeration" of "various aspects of the occult, such as faith healing, self-hypnosis, tarot card reading, and spell casting, which are not religious practices." The supervisor's refusal to accommodate her on the ground that he believes her religion is illogical violates Title VII unless the employer can show her request would impose an undue hardship. The law applies to religious beliefs even though others may find them "incorrect" or "incomprehensible."

EXAMPLE 5
Unique Belief Can Be Religious

Edward practices the Kemetic religion, based on ancient Egyptian faith, and affiliates himself with a tribe numbering fewer than ten members. He states that he believes in various deities, and follows the faith's concept of Ma'at, a guiding principle regarding truth and order that represents

physical and moral balance in the universe. During a religious ceremony he received small tattoos encircling his wrist, written in the Coptic language, which express his servitude to Ra, the Egyptian god of the sun. When his employer asks him to cover the tattoos, he explains that it is a sin to cover them intentionally because doing so would signify a rejection of Ra. These can be religious beliefs and practices even if no one else or few other people subscribe to them.

EXAMPLE 6
Personal Preference That is Not a Religious Belief

Sylvia wears several tattoos and has recently had her nose and eyebrows pierced. A newly hired manager implements a dress code that requires that employees have no visible piercings or tattoos. Sylvia says that her tattoos and piercings are religious because they reflect her belief in body art as self-expression and should be accommodated. However, the evidence demonstrates that her tattoos and piercings are not related to any religious belief system. For example, they do not function as a symbol of any religious belief, and do not relate to any "ultimate concerns" such as life, purpose, death, humanity's place in the universe, or right and wrong, and they are not part of a moral or ethical belief system. Therefore, her belief is a personal preference that is not religious in nature.

2. Sincerely Held

Title VII requires employers to accommodate only those religious beliefs that are "sincerely held." Therefore, whether or not a religious belief is "sincerely held" by an applicant or employee is only relevant to religious accommodation, *not* to claims of disparate treatment or harassment because of religion. In those claims, it is the motivation of the discriminating official, not the actual beliefs of the individual alleging discrimination, that are typically relevant in determining if the discrimination that occurred was because of religion. A detailed discussion of reasonable accommodation of sincerely held religious beliefs appears in § IV, but the meaning of "sincerely held" is addressed here.

Like the "religious" nature of a belief or practice, the "sincerity" of an employee's stated religious belief is usually not in dispute. Nevertheless, there are some circumstances in which an employer may assert as a defense that it was not required to provide accommodation because the employee's asserted religious belief was not sincerely held. Factors that – either alone or in combination – might undermine an employee's assertion that he sincerely holds the religious belief at issue include: whether the employee has behaved in a manner markedly inconsistent with the professed belief; whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; whether the timing of the request renders it suspect (*e.g.*, it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons. However, none of these factors is dispositive. For example, although prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs – or degree of adherence – may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held. An employer also should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion.

3. Employer Inquiries into Religious Nature or Sincerity of Belief

Because the definition of religion is broad and protects beliefs and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely-held religious belief. If, however, an employee requests religious accommodation, and an employer has an objective basis for

questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information. *See infra* § IV-A-2.

·NOTE TO EEOC INVESTIGATORS ·

If the Respondent (R) disputes that the Charging Party's ("CP's") belief is "religious," consider the following:

⇒ **Begin with the CP's statements.** What religious belief or practice does the CP claim to have? In some cases, the CP's credible testimony regarding his belief or practice will be sufficient to demonstrate that it is religious. In other cases, however, the investigator may need to ask follow-up questions about the nature and tenets of the asserted religious beliefs, and/or any associated practices, rituals, clergy, observances, etc., in order to identify a specific religious belief or practice or determine if one is at issue.

⇒ **Since religious beliefs can be unique to an individual, evidence from others is not always necessary.** However, if the CP believes such evidence will support his or her claim, the investigator should seek evidence such as oral statements, affidavits, or other documents from CP's religious leader(s) if applicable, or others whom CP identifies as knowledgeable regarding the religious belief or practice in question.

⇒ **Remember, where an alleged religious practice or belief is at issue, a case-by-case analysis is required.** Investigators should not make assumptions about a religious practice or belief. In some cases, to determine whether CP's asserted practice or belief is "religious" as defined under Title VII, the investigator's general knowledge will be insufficient, and additional objective information will have to be obtained, while nevertheless recognizing the intensely personal characteristics of adherence to a religious belief.

If the Respondent disputes that CP's belief is "sincerely held," the following evidence may be relevant:

⇒ Oral statements, an affidavit, or other documents from CP describing his or her beliefs and practices, including information regarding when CP embraced the belief or practice, as well as when, where, and how CP has adhered to the belief or practice; and/or,

⇒ Oral statements, affidavits, or other documents from potential witnesses identified by CP or R as having knowledge of whether CP adheres or does not adhere to the belief or practice at issue (*e.g*., CP's religious leader (if applicable), fellow adherents (if applicable), family, friends, neighbors, managers, or co-workers who may have observed his past adherence or lack thereof, or discussed it with him).

B. Covered Entities

Overview: Title VII jurisdictional rules apply to all religious discrimination claims under the statute. However, specially-defined "religious organizations" and "religious educational institutions" are exempt from certain religious discrimination provisions, and a "ministerial exception" bars Title VII claims by employees who serve in clergy roles.

Title VII's prohibitions apply to employers, employment agencies, and unions, subject to the statute's jurisdictional requirements. *See EEOC Compliance Manual, "Threshold Issues,"* http://www.eeoc.gov/policy/docs/threshold.html. Those covered entities must carry out their activities in a nondiscriminatory manner and provide reasonable accommodation unless doing so would impose an undue hardship. Unions also can be liable if they knowingly acquiesce in

employment discrimination against their members, join or tolerate employers' discriminatory practices, or discriminatorily refuse to represent employees' interests.

C. Exceptions

1. Religious Organizations

Under Title VII, religious organizations are permitted to give employment preference to members of their own religion. The exception applies only to those institutions whose "purpose and character are primarily religious." That determination is to be based on "[a]ll significant religious and secular characteristics." Although no one factor is dispositive, significant factors to consider that would indicate whether an entity is religious include:

> Do its articles of incorporation state a religious purpose?
>
> Are its day-to-day operations religious (*e.g.*, are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion)?
>
> Is it not-for-profit?
>
> Is it affiliated with or supported by a church or other religious organization?

This exception is not limited to religious activities of the organization. However, it only allows religious organizations to prefer to employ individuals who share their religion. The exception does not allow religious organizations otherwise to discriminate in employment on protected bases other than religion, such as race, color, national origin, sex, age, or disability. Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races. Similarly, a religious organization is not permitted to deny fringe benefits to married women but not to married men by asserting a religiously based view that only men can be the head of a household.

EXAMPLE 7
Sex Discrimination Not Excused

Justina works at Tots Day Care Center. Tots is run by a religious organization that believes that, while women may work outside of the home if they are single or have their husband's permission, men should be the heads of their households and the primary providers for their families. Believing that men shoulder a greater financial responsibility than women, the organization pays female teachers less than male teachers. The organization's practice of unequal pay based on sex constitutes unlawful discrimination.

2. Ministerial Exception

Courts have held, based on First Amendment constitutional considerations, that clergy members cannot bring claims under the federal employment discrimination laws, including Title VII, the Age Discrimination in Employment Act, the Equal Pay Act, and the Americans with Disabilities Act, because "[t]he relationship between an organized church and its ministers is its lifeblood." This "ministerial exception" comes not from the text of the statutes, but from the First Amendment principle that governmental regulation of church administration, including the appointment of clergy, impedes the free exercise of religion and constitutes impermissible government entanglement with church authority. Thus, courts will not ordinarily consider whether a church's employment decision concerning one of its ministers was based on discriminatory grounds, although some courts have allowed ministers to bring sexual harassment claims.

The ministerial exception applies only to those employees who perform essentially religious functions, namely those whose primary duties consist of engaging in church governance, supervising a religious order, or conducting religious ritual, worship, or instruction. The exception is not limited to ordained clergy, and has been applied by courts to others involved in clergy-like roles who conduct services or provide pastoral counseling. However, the exception does not necessarily apply to everyone with a title typically conferred upon clergy (*e.g.*, minister). In short, in each case it is necessary to make a factual determination of whether the function of the position is one to which the exception applies.

12-II EMPLOYMENT DECISIONS

A. General

Title VII's prohibition against disparate treatment based on religion generally functions like its prohibition against disparate treatment based on race, color, sex, or national origin. Disparate treatment violates the statute whether motivated by bias against or preference toward an applicant or employee due to his religious beliefs, practices, or observances – or lack thereof. Thus, for example, except to the extent permitted by the religious organization and ministerial exceptions, an employer may not refuse to recruit, hire, or promote individuals of a certain religion, may not impose stricter promotion requirements for persons of a certain religion, and may not impose more or different work requirements on an employee because of that employee's religious beliefs or practices. The following sub-sections address work scenarios that may lead to claims of religious discrimination.

1. Recruitment, Hiring, and Promotion

Employers that are not religious organizations may neither recruit individuals of a particular religion nor adopt recruitment practices, such as word-of-mouth recruitment, that have the purpose or effect of discriminating based on religion. Title VII permits employers that are not religious organizations to hire and employ employees on the basis of religion only if religion is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

For example, an employer may not refuse to hire an applicant simply because he does not share the employer's religious beliefs, and conversely may not select one applicant over another based on a preference for employees of a particular religion. Similarly, employment agencies may not comply with requests from employers to engage in discriminatory recruitment or referral practices, for example by screening out applicants who have names often associated with a particular religion (*e.g.,* Mohammed). Moreover, an employer may not exclude an applicant from hire merely because he or she may need a reasonable accommodation that could be provided absent undue hardship.

EXAMPLE 8
Recruitment

Charles, the president of a company that owns several gas stations, needs managers for the new convenience stores he has decided to add to the stations. He posts a job announcement at the Hindu Temple he attends and asks other members of the temple to refer only Hindu friends or family members who may be interested in the position. He does no other recruitment. By limiting his recruitment to Hindus, Charles is engaging in unlawful discrimination.

EXAMPLE 9
Hiring

Mary is a human resources officer who is filling a vacant administrative position at her company. During the application process, she performs an Internet search on the candidates and learns that one applicant, Jonathan, has written an article for the local chapter of the Ethical Society setting forth his view that religion has been historically divisive and explaining why he subscribes to no religious beliefs or practices. Although Mary believes he is the most qualified candidate, she does not hire him because she knows that many current company employees are observant Christians like her, and she believes they would be more comfortable working with someone like-minded. By not hiring Jonathan because of his lack of religious identification, the company violated Title VII.

EXAMPLE 10
Promotion

Darpak, who practices Buddhism, holds a Ph.D. degree in engineering and applied for a managerial position at the research firm where he has worked for ten years. He was rejected in favor of a non-Buddhist candidate who was less qualified. The company vice president who made the promotion decision advised Darpak that he was not selected because "we decided to go in a different direction." However, the vice president confided to co-workers at a social function that he did not select Darpak because he thought a Christian manager could make better personal connections with the firm's clients, many of whom are Christian. The vice president's statement, combined with the lack of any legitimate non-discriminatory reason for selecting the less qualified candidate, as well as the evidence that Darpak was the best qualified candidate for the position, suggests that the proffered reason was a pretext for discrimination against Darpak because of his religious views.

2. Discipline and Discharge

Title VII also prohibits employers from disciplining or discharging employees because of their religion.

EXAMPLE 11
Discipline

Joanne, a retail store clerk, is frequently 10-15 minutes late for her shift on several days per week when she attends Mass at a Catholic Church across town. Her manager, Donald, has never disciplined her for this tardiness, and instead filled in for her at the cash register until she arrived, stating that he understood her situation. On the other hand, Yusef, a newly hired clerk who is Muslim, is disciplined by Donald for arriving 10 minutes late for his shift even though Donald knows it is due to his attendance at services at the local Mosque. While Donald can require all similarly situated employees to be punctual, he is engaging in disparate treatment based on religion by disciplining only Yusef and not Joanne absent a legitimate nondiscriminatory reason for treating them differently.

A charge alleging the above facts might also present a claim for denial of reasonable accommodation. While the employer may require employees to be punctual, it may have to accommodate an employee who seeks leave or a schedule change to resolve the conflict between religious services and a work schedule, unless the accommodation would pose an undue hardship.

3. Compensation and Other Terms, Conditions, or Privileges of Employment

Title VII prohibits discrimination on a protected basis "with respect to . . . compensation, terms, conditions, or privileges of employment," for example, setting or adjusting wages, granting benefits, and/or providing leave in a discriminatory fashion.

EXAMPLE 12
Wages and Benefits

Janet, who practices Native American spirituality, is a newly hired social worker for an agency. As a benefit to its employees, the agency provides tuition reimbursement for professional continuing education courses offered by selected providers. Janet applied for tuition reimbursement for an approved course that was within permitted cost limit. Janet's supervisor denied her request for tuition reimbursement, stating that since Janet believes in "voodoo" she "won't make a very good caseworker." By refusing, because of Janet's religious beliefs, to provide the tuition reimbursement to which Janet was otherwise entitled as a benefit of her employment, Janet's supervisor has discriminated against Janet on the basis of religion.

Title VII's prohibition on disparate treatment based on religious beliefs also can apply to disparate treatment of religious expression in the workplace.

EXAMPLE 13
Religious Expression

Eve is a secretary who displays a Bible on her desk at work. Xavier, a secretary in the same workplace, begins displaying a Quran on his desk at work. Their supervisor allows Eve to retain the Bible but directs Xavier to put the Quran out of view because, he states, co-workers "will think you are making a political statement, and with everything going on in the world right now we don't need that around here." This differential treatment of similarly situated employees with respect to the display of a religious item at work constitutes disparate treatment based on religion in violation of Title VII.

Charges involving religious expression may present claims not only of disparate treatment, but also of harassment and/or denial of reasonable accommodation. Investigation of claims of harassment and denial of reasonable accommodation are addressed respectively in §§ III and IV of this document. As discussed in greater detail in those sections, Title VII requires employers to accommodate expression that is based on a sincerely held religious practice or belief, unless it threatens to constitute harassment or otherwise poses an undue hardship on the conduct of the business. Thus, for example, an employer can restrict religious expression where it would cause customers or co-workers reasonably to perceive the materials to express the employer's own message, or where the item or message in question is harassing or otherwise disruptive. *For further discussion of how to analyze when accommodation of religious expression would pose an undue hardship, refer to the sections on Harassment at § III-C and Accommodation at § IV-C-6.*

B. Customer Preference

If an employer takes an action based on the discriminatory preferences of others, including co-workers or clients, the employer is unlawfully discriminating.

EXAMPLE 14
Employment Decision Based on Customer Preference

Harinder, who wears a turban as part of his Sikh religion, is hired to work at the counter in a coffee shop. A few weeks after Harinder begins working, the manager notices that the work crew from the construction site near the shop no longer comes in for coffee in the mornings. When he inquires, the crew complains that Harinder, whom they mistakenly believe is Muslim, makes them uncomfortable in light of the September 11th attacks. The manager tells Harinder that he has to let him go because the customers' discomfort is understandable. The manager has subjected Harinder to unlawful religious discrimination by taking an adverse action based on customers' preference not to have a cashier of Harinder's perceived religion. Harinder's termination based on customer preference would violate Title VII regardless of whether he was Muslim, Sikh, or any other religion.

C. Security Requirements

In general, an employer may adopt security requirements for its employees or applicants, provided they are adopted for nondiscriminatory reasons and are applied in a nondiscriminatory manner. For example, an employer may not require Muslim applicants to undergo a background investigation or more extensive security procedures because of their religion while not imposing the same requirements on similarly situated applicants who are non-Muslim, unless such job requirements are imposed by federal statute or Executive Order in the interest of national security.

D. Bona Fide Occupational Qualification

Title VII permits employers to hire and employ employees on the basis of religion if religion is "a bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal operation of that particular business or enterprise." Religious organizations do not typically need to rely on this BFOQ defense, however, because the "religious organization" exception in Title VII permits them to prefer their co-religionists. *See supra* § I-C. It is well settled that for employers that are not religious organizations and therefore seek to rely on the BFOQ defense to justify a religious preference, the defense is a narrow one and can rarely be successfully invoked.

· Employer Best Practices ·

Employers can reduce the risk of discriminatory employment decisions by establishing written objective criteria for evaluating candidates for hire or promotion and applying those criteria consistently to all candidates.

In conducting job interviews, employers can ensure nondiscriminatory treatment by asking the same questions of all applicants for a particular job or category of job and inquiring about matters directly related to the position in question.

Employers can reduce the risk of religious discrimination claims by carefully and timely recording the accurate business reasons for disciplinary or performance-related actions and sharing these reasons with the affected employees.

When management decisions require the exercise of subjective judgment, employers can reduce the risk of discriminatory decisions by providing training to inexperienced managers and encouraging them to consult with more experienced managers or human resources personnel when addressing difficult issues.

If an employer is confronted with customer biases, *e.g.,* an adverse reaction to being served by an employee due to religious garb, the employer should consider engaging with and educating the customers regarding any misperceptions they may have and/or the equal employment opportunity laws.

12-III HARASSMENT

Overview: Religious harassment is analyzed and proved in the same manner as harassment on other Title VII bases, e.g., race, color, sex, or national origin. However, the facts of religious harassment cases may present unique considerations, especially where the alleged harassment is based on another employee's religious practices – a situation that may require an employer to reconcile its dual obligations to take prompt remedial action in response to alleged harassment and to accommodate certain employee religious expression.

A. Prohibited Conduct

Religious harassment in violation of Title VII occurs when employees are: (1) required or coerced to abandon, alter, or adopt a religious practice as a condition of employment (this type of "quid pro quo" harassment may also give rise to a disparate treatment or denial of accommodation claim in some circumstances), or (2) subjected to unwelcome statements or conduct that is based on religion and is so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive, and there is a basis for holding the employer liable.

1. Religious Coercion That Constitutes a Tangible Employment Action

Title VII is violated when an employer or supervisor explicitly or implicitly coerces an employee to abandon, alter, or adopt a religious practice as a condition of receiving a job benefit or avoiding an adverse action.

EXAMPLE 15
Religious Conformance Required for Promotion

Wamiq was raised as a Muslim but no longer practices Islam. His supervisor, Arif, is a very devout Muslim who tries to persuade Wamiq not to abandon Islam and advises him to follow the teachings of the Quran. Arif also says that if Wamiq expects to advance in the company, he should join Arif and other Muslims for weekly prayer sessions in Arif's office. Notwithstanding this pressure to conform his religious practices in order to be promoted, Wamiq refused to attend the weekly prayer sessions, and was subsequently denied the promotion for which he applies even though he was the most qualified. Arif's conduct indicates that the promotion would have been granted if Wamiq had participated in the prayer sessions and had become an observant Muslim. Absent contrary evidence, the employer will be liable for harassment for conditioning Wamiq's promotion on his adherence to Arif's views of appropriate religious practice. This would also be actionable as disparate treatment based on religion. In addition, if the prayer sessions were made mandatory and Wamiq had asked to be excused on religious grounds, Arif would have been required to excuse him from the prayer sessions as a reasonable accommodation.

A claim of harassment based on coerced religious participation or non-participation, however, only arises where it was intended to make the employee conform to or abandon a religious belief or practice. By contrast, an employer would not be engaging in coercion if it required an employee to participate in a workplace activity that conflicts with the employee's sincerely held religious belief, so long as the employer demonstrates that it would impose an undue hardship to accommodate the employee's request to be excused. However, the same fact pattern may give rise to claims of disparate treatment, harassment, and/or denial of accommodation. For example,

terminating rather than accommodating an employee may give rise to both denial of accommodation and discriminatory discharge claims. For discussion of the accommodation issue, *see* § IV, *infra*.

2. Hostile Work Environment

Title VII's prohibition against religious discrimination can also be violated if the employee is subjected to a hostile work environment because of religion. An unlawful hostile environment based on religion might take the form of either verbal or physical harassment or unwelcome imposition of religious views or practices on an employee. A hostile work environment is created when the "workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." To establish a case of religious harassment, an employee must show that the harassment was: (1) based on his religion; (2) unwelcome; (3) sufficiently severe or pervasive to alter the conditions of employment by creating an intimidating, hostile, or offensive work environment; and, (4) that there is a basis for employer liability.

a. Based on Religion

To support a religious harassment claim, the adverse treatment must be based on religion. This standard can be satisfied regardless of whether the harassment is motivated by the religious belief or observance – or lack thereof – of either the harasser or the targeted employee. Moreover, while verbally harassing conduct clearly is based on religion if it has religious content, harassment can also be based on religion even if religion is not explicitly mentioned.

EXAMPLE 16
Harassing Conduct Based on Religion – Religion Mentioned

Mohammed is an Indian-born Muslim employed at a car dealership. Because he takes scheduled prayer breaks during the work day and observes Muslim dietary restrictions, his co-workers are aware of his religious beliefs. Upset about the 9/11 terrorist attacks, his co-workers and managers began making mocking comments about his religious dietary restrictions and need to pray during the workday. They repeatedly referred to him as "Taliban" or "Arab" and asked him "why don't you just go back where you came from since you believe what you believe?" When Mohammed questioned why it was mandatory for all employees to attend a United Way meeting, his supervisor said: "This is America. That's the way things work over here. This is not the Islamic country where you come from." After this confrontation, the supervisor issued Mohammed a written warning stating that he "was acting like a Muslim extremist" and that the supervisor could not work with him because of his "militant stance." This harassment is "based on" religion and national origin.

EXAMPLE 17
Harassing Conduct Based on Religion – Religion Not Mentioned

Shoshanna is a Seventh-day Adventist whose work schedule was adjusted to accommodate her Sabbath observance, which begins at sundown each Friday. When Nicholas**,** the new head of Shoshanna's department, was informed that he must accommodate her, he told a colleague that "anybody who cannot work regular hours should work elsewhere." Nicholas then moved the regular Monday morning staff meetings to late Friday afternoon, repeatedly scheduled staff and client meetings on Friday afternoons, and often marked Shoshanna AWOL when she was not scheduled to work. In addition, Nicholas treated her differently than her colleagues by, for example, denying her training opportunities and loudly berating her with little or no provocation. Although Nicholas did not mention Shoshanna's religion, the evidence shows that his conduct

was because of Shoshanna's need for religious accommodation, and therefore was "based on" religion.

b. Unwelcome

To be unlawful, harassing conduct must be unwelcome. Conduct is "unwelcome" when the employee did not solicit or incite it and regards it as undesirable or offensive. It is necessary to evaluate all of the surrounding circumstances to determine whether or not particular conduct or remarks are unwelcome. For example, where an employee is upset by repeated mocking use of derogatory terms or comments about his religious beliefs or observance by a colleague, it may be evident that the conduct is unwelcome. This would stand in stark contrast to a situation where the same two employees were engaged in a consensual conversation that involves a spirited debate of religious views, and neither employee indicates that he was upset by it.

The distinction between welcome and unwelcome conduct is especially important in the religious context in situations involving proselytizing of employees who have not invited such conduct. Where a religious employee attempts to persuade a non-religious employee of the correctness of his belief, or vice versa, the conduct may or may not be welcome. When an employee objects to particular religious expression, unwelcomeness is evident.

EXAMPLE 18
Unwelcome Conduct

Beth's colleague, Bill, repeatedly talked to her at work about her prospects for salvation. For several months, she did not object and discussed the matter with him. When he persisted even after she told him that he had "crossed the line" and should stop having non-work related conversations with her, the conduct was clearly unwelcome.

c. Severe or Pervasive

Even unwelcome religiously motivated conduct is not unlawful unless "the victim . . . subjectively perceive[s] the environment to be abusive" and the conduct is "severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive." Whether a reasonable person would perceive the conduct as abusive turns on common sense and context, looking at the totality of the circumstances. Relevant factors include whether the conduct was abusive, derogatory, or offensive; whether the conduct was frequent; and whether the conduct was humiliating or physically threatening.

EXAMPLE 19
Reasonable Person Perceives Conduct To Be Hostile

Although he hired employees of all religions, the Director of "Get Drug Free Today" required employees to sign a statement that they would support the values of the Church of Scientology. He regularly chastised those whose conduct did not conform to those values. A reasonable person would perceive this to be a religiously hostile work environment.

To "alter the conditions of employment," conduct need not cause economic or psychological harm. It need not impair work performance, discourage employees from remaining on the job, or impede their advancement. The presence of one or more of those factors would buttress the claim, but is not required.

However, Title VII is not a general civility code, and does not render all insensitive or offensive comments, petty slights, and annoyances illegal. Offhand or isolated incidents (unless extremely serious) will not rise to the level of illegality.

EXAMPLE 20
Insensitive Comments Not Enough To Constitute Hostile Environment

Marvin is an Orthodox Jew who was hired as a radio show host. When he started work, a co-worker, Stacy, pointed to his yarmulke and asked, "Will your headset fit over that?" On a few occasions, Stacy, made other remarks about the yarmulke, such as: "Nice hat. Is that a beanie?" and "Do they come in different colors?" Although the co-worker's comments about his yarmulke were insensitive, they were not sufficiently severe or pervasive to create a hostile work environment for Marvin.

EXAMPLE 21
Isolated Comments Not Enough to Constitute Hostile Environment

Bob, a supervisor, occasionally allowed spontaneous and voluntary prayers by employees during office meetings. During one meeting, he referenced Bible passages related to "slothfulness" and "work ethics." Amy complained that Bob's comments and the few instances of allowing voluntary prayers during office meetings created a hostile environment. The comments do not create an actionable harassment claim. They were not severe, and because they occurred infrequently, they were not sufficiently pervasive to state a claim.

The severity and pervasiveness factors operate inversely. The more severe the harassment, the less frequently the incidents need to recur. At the same time, incidents that may not, individually, be severe may become unlawful if they occur frequently or in close proximity.

Although a single incident will seldom create an unlawfully hostile environment, it may do so if it is unusually severe, particularly if it involves physical threat.

EXAMPLE 22
One Instance of Physically Threatening Conduct Is Enough to Constitute Hostile Environment

Ihsaan is a Muslim. Shortly after the terrorist attacks on September 11, 2001, Ihsaan came to work and found the words "You terrorists go back where you came from! We will avenge the victims!! Your life is next!" scrawled in red marker on his office door. Because of the timing of the statement and the direct physical threat, this incident, alone, is sufficiently severe to constitute hostile environment harassment based on religion and national origin.

EXAMPLE 23
Persistent Offensive Remarks Constitute Hostile Environment

Betty is a Mormon. During a disagreement regarding a joint project, a co-worker, Julian, tells Betty that she doesn't know what she is talking about and that she should "go back to Salt Lake City." When Betty subsequently proposes a different approach to the project, Julian tells her that her suggestions are as "flaky" as he would expect from "her kind." When Betty tries to resolve the conflict, Julian tells her that if she is uncomfortable working with him, she can either ask to be transferred, or she can "just pray about it." Over the next six months, Julian regularly makes similar negative references to Betty's religion. His persistent offensive remarks create a hostile environment.

Religious expression that is repeatedly directed at an employee can become severe or pervasive, whether or not the content is intended to be insulting or abusive. Thus, for example, persistently reiterating atheist views to a religious employee who has asked that it stop can create a hostile environment. However, the extent to which the expression is directed at a particular employee is relevant to determining whether or when it could reasonably be perceived to be severe or pervasive by that employee. For example, although it is conceivable that one employee may allege that he is offended by a colleague's wearing of religious garb, expressing one's religion by wearing religious garb is not religious harassment. It merely expresses an individual's religious affiliation and does not demean other religious views. As such, it is not objectively hostile. Nor is it directed at any particular individual. Similarly, workplace displays of religious artifacts or posters that do not demean other religious views generally would not constitute religious harassment.

EXAMPLE 24
No Hostile Environment from Comments That Are Not Abusive and Not Directed at Complaining Employee

While eating lunch in the company cafeteria, Clarence often overhears conversations between his co-workers Dharma and Khema. Dharma, a Buddhist, is discussing meditation techniques with Khema, who is interested in Buddhism. Clarence strongly believes that meditation is an occult practice that leads to devil worship and complains to their supervisor that Dharma and Khema are creating a hostile environment for him. Such conversations do not constitute severe or pervasive religious harassment of Clarence because they do not insult other religions and they were not directed at him.

B. Employer Liability

Overview: An employer is always liable for a supervisor's harassment if it results in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements: (a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. In cases of harassment by a co-worker or a third party over whom the employer had some control, an employer is liable if it knew or should have known about the harassment and failed to take immediate and appropriate corrective action.

1. Harassment by Supervisors or Managers

Employers are automatically liable for supervisory harassment that results in a tangible employment action such as a denial of promotion, demotion, discharge, or constructive discharge. If the harassment does not result in a tangible employment action, the employer can attempt to prove, as an affirmative defense to liability, that: (1) the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

EXAMPLE 25
Supervisory Harassment with Tangible Employment Action

George, a high level official in a state agency, is an atheist who has frequently been heard to say that he thinks anyone who is deeply religious is a zealot with his own agenda and cannot be trusted to act in the best interests of the public. George particularly ridicules Debra, a devoutly observant Jehovah's Witness, and consistently withholds the most desirable assignments from

her. He denies her request for a promotion to a more prestigious job in another division, saying that he can't let her "spread that religious poppycock any further." Debra files a religious harassment charge. Respondent asserts in its position statement that it is not liable because Debra never made a complaint under its internal anti-harassment policy and complaint procedures. Because the harassment culminated in a tangible employment action (failure to promote), the employer is liable for the harassment even if it has an effective anti-harassment policy, and even if Debra never complained. Additionally, the denial of promotion would be actionable as disparate treatment based on religion.

EXAMPLE 26
Supervisory Harassment Without Tangible Employment Action

Jennifer's employer, XYZ, had an anti-harassment policy and complaint procedure that covered religious harassment. All employees were aware of it, because XYZ widely and regularly publicized it. Despite his knowledge of the policy, Jennifer's supervisor frequently mocked her religious beliefs. When Jennifer told him that his comments bothered her, he told her that he was just kidding and she should not take everything so seriously. Jennifer never reported the problem. When one of Jennifer's co-workers eventually reported the supervisor's harassing conduct, the employer promptly investigated, and acted effectively to stop the supervisor's conduct. Jennifer then filed a religious harassment charge. Because the harassment of Jennifer did not culminate in a tangible employment action, XYZ may assert as an affirmative defense that it is not liable because Jennifer failed to make a complaint under its internal anti-harassment policy and complaint procedures. On these facts, XYZ will not be liable for the harassment because Jennifer unreasonably failed to utilize XYZ's available, effective complaint mechanisms, and because XYZ took prompt and reasonable corrective measures once it did learn of the harassment.

2. Harassment by Co-Workers

An employer is liable for harassment by co-workers where it:

> knew or should have known about the harassment, and failed to take prompt and appropriate corrective action.

EXAMPLE 27
Harassment by Co-Workers

John, who is a Christian Scientist, shares an office with Rick, a Mormon. Rick repeatedly tells John that he is practicing a false religion, and that he should study Mormon literature. Despite John's protestations that he is very happy with his religion and has no desire to convert, Rick regularly leaves religious pamphlets on John's desk and tries to talk to him about religion. After vainly asking Rick to stop the behavior, John complains to their immediate supervisor, who dismisses John's complaint on the ground that Rick is a nice person who believes that he is just being helpful. If the harassment continues, the employer is liable because it knew, through the supervisor, about Rick's harassing conduct but failed to take immediate and appropriate corrective action.

3. Harassment by Non-Employees

An employer is liable for harassment by non-employees where it:

> knew or should have known about the harassment,
>
> could control the harasser's conduct or otherwise protect the employee, and

failed to take prompt and appropriate corrective action.

EXAMPLE 28
Harassment by a Contractor

Tristan works for XYZ, a contractor that manages Crossroads Corporation's mail room. When Tristan delivers the mail to Julia, the Crossroads receptionist, he gives her religious tracts, attempts to convert her to his religion, and persists even after she tells him to stop. Julia reports Tristan's conduct to her supervisor, who tells her that he cannot do anything because Tristan does not work for Crossroads. If the harassment continues, the supervisor's failure to act will subject Crossroads to liability because Tristan's conduct is pervasive and Crossroads refused to take preventive action within its control. Options available to Julia's supervisor or the appropriate individual in the supervisor's chain of command might include initiating a meeting with Tristan and XYZ management regarding the harassment and demanding that it cease, that appropriate disciplinary action be taken if it continues, and/or that a different mail carrier be assigned to Julia's route.

C. Special Considerations for Employers When Balancing Anti-Harassment and Accommodation Obligations With Respect to Religious Expression

While some employees believe that religion is intensely personal and private, others are open about their religion. There are employees who may believe that they have a religious obligation to share their views and to try to persuade co-workers of the truth of their religious beliefs, *i.e.*, to proselytize. Some employers, too, may wish to express their religious views and share their religion with their employees. As noted above, however, some employees may perceive proselytizing or other religious expression as unwelcome harassment based on their own religious beliefs and observances, or lack thereof. This mix of divergent beliefs and practices can give rise to conflicts requiring employers to balance the rights of employees who wish to express their religious beliefs with the rights of other employees to be free from religious harassment under the foregoing Title VII harassment standards.

As discussed in more detail in § IV-C-6 of this document, an employer never has to accommodate expression of a religious belief in the workplace where such an accommodation could potentially constitute harassment of co-workers, because that would pose an undue hardship for the employer. Therefore, while Title VII requires employers to accommodate an employee's sincerely held religious belief in engaging in religious expression (*e.g.*, proselytizing) in the workplace, an employer does not have to allow such expression if it imposes an undue hardship on the operation of the business. For example, it would be an undue hardship for an employer to accommodate proselytizing by an employee if it constituted potentially unlawful religious harassment of a co-worker who found it unwelcome, or if it otherwise interfered with the operation of the business.

Because employers are responsible for maintaining a nondiscriminatory work environment, they are liable for perpetrating or tolerating religious harassment of their employees. An employer can reduce the chance that employees will engage in conduct that rises to the level of unlawful harassment by implementing an anti-harassment policy and an effective procedure for reporting, investigating, and correcting harassing conduct. Even if the policy does not prevent all such conduct, it will likely limit the employer's liability where the affected employee allows the conduct to rise to the level of illegality by failing to report it. However, Title VII violations may result if an employer tries to avoid potential co-worker objections to employee religious expression by preemptively banning all religious communications in the workplace, since Title VII requires that employees' sincerely held religious practices and beliefs be accommodated as long as no undue hardship is posed.

· Employer Best Practices ·

Employers should have a well-publicized and consistently applied anti-harassment policy that: (1) covers religious harassment; (2) clearly explains what is prohibited; (3) describes procedures for bringing harassment to management's attention; and, (4) contains an assurance that complainants will be protected against retaliation. The procedures should include a complaint mechanism that includes multiple avenues for complaint; prompt, thorough, and impartial investigations; and prompt and appropriate corrective action.

Employers should allow religious expression among employees to the same extent that they allow other types of personal expression that are not harassing or disruptive.

Once an employer is on notice that an employee objects to religious conduct that is directed at him or her, the employer should take steps to end the conduct because even conduct that the employer does not regard as abusive can become sufficiently severe or pervasive to affect the conditions of employment if allowed to persist in the face of the employee's objection.

If harassment is perpetrated by a non-employee assigned by a contractor, the supervisor or other appropriate individual in the chain of command should initiate a meeting with the contractor regarding the harassment and demand that it cease, that appropriate disciplinary action be taken if it continues, and/or that a different individual be assigned by the contractor.

To prevent conflicts from escalating to the level of a Title VII violation, employers should immediately intervene when they become aware of objectively abusive or insulting conduct, even absent a complaint.

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.

While supervisors are permitted to engage in certain religious expression, they should avoid expression that might – due to their supervisory authority – reasonably be perceived by subordinates as coercive, even when not so intended.

· Employee Best Practices ·

Employees who are the recipients of unwelcome religious conduct should inform the individual engaging in the conduct that they wish it to stop. If the conduct does not stop, employees should report it to their supervisor or other appropriate company official in accordance with the procedures established in the company's anti-harassment policy.

Employees who do not wish to personally confront an individual who is directing unwelcome religious or anti-religious conduct towards them should report the conduct to their supervisor or other appropriate company official in accordance with the company's anti-harassment policy.

12-IV REASONABLE ACCOMMODATION

Overview: Title VII requires an employer, once on notice, to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship. However, the Title VII "undue hardship" defense is defined very differently than the

"undue hardship" defense for disability accommodation under the Americans with Disabilities Act (ADA). Under Title VII, the undue hardship defense to providing religious accommodation requires a showing that the proposed accommodation in a particular case poses a "more than de minimis" cost or burden, which is a far lower standard for an employer to meet than undue hardship under the ADA, which is defined in that statute as "significant difficulty or expense."

A religious accommodation claim is distinct from a disparate treatment claim, in which the question is whether employees are treated equally. An individual alleging denial of religious accommodation is seeking an adjustment to a neutral work rule that infringes on the employee's ability to practice his religion. The accommodation requirement is "plainly intended to relieve individuals of the burden of choosing between their jobs and their religious convictions, where such relief will not unduly burden others."

A. Religious Accommodation

A reasonable religious accommodation is any adjustment to the work environment that will allow the employee to comply with his or her religious beliefs. However, it is subject to the limit of more than *de minimis* cost or burden. The need for religious accommodation most frequently arises where an individual's religious beliefs, observances, or practices conflict with a specific task or requirement of the job or the application process. The employer's duty to accommodate will usually entail making a special exception from, or adjustment to, the particular requirement so that the employee or applicant will be able to practice his or her religion. Accommodation requests often relate to work schedules, dress and grooming, or religious expression or practice while at work.

1. Notice of the Conflict Between Religion and Work

An applicant or employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work. The employee is obligated to explain the religious nature of the belief or practice at issue, and cannot assume that the employer will already know or understand it. Similarly, the employer should not assume that a request is invalid simply because it is based on religious beliefs or practices with which the employer is unfamiliar, but should ask the employee to explain the religious nature of the practice and the way in which it conflicts with a work requirement.

No "magic words" are required to place an employer on notice of an applicant's or employee's conflict between religious needs and a work requirement. To request an accommodation, an individual may use plain language and need not mention any particular terms such as "Title VII" or "religious accommodation." However, the applicant or employee must provide enough information to make the employer aware that there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job.

EXAMPLE 29
Failure to Advise Employer That Request Is Due to Religious Practice or Belief

Jim agreed to take his employer's drug test but was terminated because he refused to sign the accompanying consent form. After his termination, Jim filed a charge alleging that the employer failed to accommodate his religious objection to swearing an oath. Until it received notice of the charge, the employer did not know that Jim's refusal to sign the form was based on his religious beliefs. Because the employer was not notified of the conflict at the time Jim refused to sign the form, or at any time prior to Jim's termination, it did not have an opportunity to offer to accommodate him. The employer has not violated Title VII.

2. Discussion of Request

While an employer is not required by Title VII to conduct a discussion with an employee before denying the employee's accommodation request, as a practical matter it can be important to do so. Both the employer and the employee have roles to play in resolving an accommodation request. In addition to placing the employer on notice of the need for accommodation, the employee should cooperate with the employer's efforts to determine whether a reasonable accommodation can be granted. Once the employer becomes aware of the employee's religious conflict, the employer should obtain promptly whatever additional information is needed to determine whether an accommodation is available that would eliminate the religious conflict without posing an undue hardship on the operation of the employer's business. This typically involves the employer and employee mutually sharing information necessary to process the accommodation request. Employer-employee cooperation and flexibility are key to the search for a reasonable accommodation. If the accommodation solution is not immediately apparent, the employer should discuss the request with the employee to determine what accommodations might be effective. If the employer requests additional information reasonably needed to evaluate the request, the employee should provide it.

Failure to confer with the employee is not an independent violation of Title VII but, as a practical matter, such failure can have adverse legal consequences for both an employee and an employer. For example, in some cases where an employer has made no effort to act on an accommodation request, courts have found that the employer lacked the evidence needed to meet its burden of proof to establish that the plaintiff's proposed accommodation would actually have posed an undue hardship. Likewise, courts have ruled against employees who refused to cooperate with an employer's requests for reasonable information when, as a result, the employer was deprived of the information necessary to resolve the accommodation request. For example, if an employee requested a schedule change to accommodate daily prayers, the employer might need to ask for information about the religious observance, such as time and duration of the daily prayers, in order to determine if accommodation can be granted without posing an undue hardship on the operation of the employer's business. Moreover, even if the employer does not grant the employee's preferred accommodation but instead provides an alternative accommodation, the employee must cooperate by attempting to meet his religious needs through the employer's proposed accommodation if possible.

Where the accommodation request itself does not provide enough information to enable the employer to make a determination, and the employer has a bona fide doubt as to the basis for the accommodation request, it is entitled to 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. *See* "Sincerely Held" and "Employer Inquiries into Religious Nature or Sincerity of Belief," *supra* §§ I-A-2 and I-A-3. Whether an employer has a reasonable basis for seeking to verify the employee's stated beliefs will depend on the facts of a particular case.

EXAMPLE 30
Sincerity of Religious Belief Questioned

Bob, who had been a dues-paying member of the CDF union for fourteen years, had a work-related dispute with a union official and one week later asserted that union activities were contrary to his religion and that he could no longer pay union dues. The union doubted whether Bob's request was based on a sincerely held religious belief, given that it appeared to be precipitated by an unrelated dispute with the union, and he had not sought this accommodation in his prior fourteen years of employment. In this situation, the union can require him to provide additional information to support his assertion that he sincerely holds a religious conviction that precludes him from belonging to – or financially supporting – a union.

When an employer requests additional information, employees should provide information that addresses the employer's reasonable doubts. That information need not, however, take any specific form. For example, written materials or the employee's own first-hand explanation may be sufficient to alleviate the employer's doubts about the sincerity or religious nature of the employee's professed belief such that third-party verification is unnecessary. Further, since idiosyncratic beliefs can be sincerely held and religious, even when third-party verification is needed, it does not have to come from a church official or member, but rather could be provided by others who are aware of the employee's religious practice or belief.

An employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation. By the same token, employers who unreasonably request unnecessary or excessive corroborating evidence risk being held liable for denying a reasonable accommodation request, and having their actions challenged as retaliatory or as part of a pattern of harassment.

It also is important to remember that even if an employer concludes that an individual's professed belief is sincerely held and religious, it is only required to grant those requests for accommodation that do not pose an undue hardship on the conduct of its business.

EXAMPLE 31
Clarifying a Request

Diane requests that her employer schedule her for "fewer hours" so that she can "attend church more frequently." The employer denies the request because it is not clear what schedule Diane is requesting or whether the change is sought due to a religious belief or practice. While Diane's request lacked sufficient detail for the employer to make a final decision, it was sufficient to constitute a religious accommodation request. Rather than denying the request outright, the employer should have obtained the information from Diane that it needed to make a decision. The employer could have inquired of Diane precisely what schedule change was sought and for what purpose, and how her current schedule conflicted with her religious practices or beliefs. Diane would then have had an obligation to provide sufficient information to permit her employer to make a reasonable assessment of whether her request was based on a sincerely held religious belief, the precise conflict that existed between her work schedule and church schedule, and whether granting the accommodation would pose more than a *de minimis* burden on the employer's business.

3. What is a "Reasonable" Accommodation?

Although an employer never has to provide an accommodation that would pose an undue hardship, *see infra* § IV-B, the accommodation that is provided must be a reasonable one. An accommodation is not "reasonable" if it merely lessens rather than eliminates the conflict between religion and work, provided eliminating the conflict would not impose an undue hardship. Eliminating the conflict between a work rule and an employee's religious belief, practice, or observance means accommodating the employee without unnecessarily disadvantaging the employee's terms, conditions, or privileges of employment.

Where there is more than one reasonable accommodation that would not pose an undue hardship, the employer is not obliged to provide the accommodation preferred by the employee. However, an employer's proposed accommodation will not be "reasonable" if a more favorable accommodation is provided to other employees for non-religious purposes, or, for example, if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment and there is an alternative accommodation that does not do so.

Ultimately, reasonableness is a fact-specific determination. "The reasonableness of an employer's attempt at accommodation cannot be determined in a vacuum. Instead, it must be determined on a case-by-case basis; what may be a reasonable accommodation for one employee may not be reasonable for another . . . . 'The term 'reasonable accommodation' is a relative term and cannot be given a hard and fast meaning; each case . . . necessarily depends upon its own facts and circumstances, and comes down to a determination of 'reasonableness' under the unique circumstances of the individual employer-employee relationship.'"

EXAMPLE 32
Employer Violates Title VII if it Offers Only Partial Accommodation Where Full Accommodation Would Not Pose an Undue Hardship

Rachel, who worked as a ticket agent at a sports arena, asked not to be scheduled for any Friday night or Saturday shifts, to permit her to observe the Jewish Sabbath from sunset on Friday through sunset on Saturday. The arena wanted to give Rachel only every other Saturday off. The arena's proposed accommodation is not reasonable because it does not fully eliminate the religious conflict. The arena may deny the accommodation request only if giving Rachel every Saturday off poses an undue hardship for the arena.

EXAMPLE 33
Employer Not Obligated To Provide Employee's Preferred Accommodation

Tina, a newly hired part-time store cashier whose sincerely held religious belief is that she should refrain from work on Sunday as part of her Sabbath observance, asked her supervisor never to schedule her to work on Sundays. Tina specifically asked to be scheduled to work Saturdays instead. In response, her employer offered to allow her to work on Thursday, which she found inconvenient because she takes a college class on that day. Even if Tina preferred a different schedule, the employer is not required to grant Tina's preferred accommodation.

EXAMPLE 34
Accommodation By Transfer Where Accommodation in Current Position Would Pose Undue Hardship

Yvonne, a member of the Pentecostal faith, was employed as a nurse at a hospital. When she was assigned to the Labor and Delivery Unit, she advised the nurse manager that her faith forbids her from participating "directly or indirectly in ending a life," and that this proscription prevents her from assisting with abortions. She asked the hospital to accommodate her religious beliefs by allowing her to trade assignments with other nurses in the Labor and Delivery Unit as needed. The hospital concluded that it could not accommodate Yvonne within the Labor and Delivery Unit because there were not enough staff members able and willing to trade with her. The hospital instead offered to permit Yvonne to transfer, without a reduction in pay or benefits, to a vacant nursing position in the Newborn Intensive Care Unit, which did not perform any such procedures. The hospital's solution complies with Title VII. The hospital is not required to grant Yvonne's preferred accommodation where it has offered a reasonable alternative solution that eliminates the conflict between work and a religious practice or belief under its existing policies and procedures. If there had been no other position to which she could transfer, the employer would have been entitled to terminate her since it would pose an undue hardship to accommodate her in the Labor and Delivery Unit.

Title VII is violated by an employer's failure to accommodate even if to avoid adverse consequences an employee continues to work after his accommodation request is denied. "An employee does not cease to be discriminated against because he temporarily gives up his religious practice and submits to the employment policy." Thus, the fact that an employee

acquiesces to the employer's work rule, continuing to work without an accommodation after the employer has denied the request, should not defeat the employee's legal claim.

In addition, the obligation to provide reasonable accommodation absent undue hardship is a continuing obligation. Employers should be aware that an employee's religious beliefs and practices may evolve over time, and that this may result in requests for additional or different accommodations. Similarly, the employer has the right to discontinue a previously granted accommodation that is no longer utilized for religious purposes or poses an undue hardship.

B. Undue Hardship

An employer can refuse to provide a reasonable accommodation if it would pose an undue hardship. Undue hardship may be shown if the accommodation would impose "more than *de minimis* cost" on the operation of the employer's business. The concept of "more than *de minimis* cost" is discussed below in sub-section 2. Although the employer's showing of undue hardship under Title VII is easier than under the ADA, the burden of persuasion is still on the employer. If an employee's proposed accommodation would pose an undue hardship, the employer should explore alternative accommodations.

1. Case-by-Case Determination

The determination of whether a particular proposed accommodation imposes an undue hardship "must be made by considering the particular factual context of each case." Relevant factors may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation. For example, an employer with multiple facilities might be better able than another employer to accommodate a Muslim employee who seeks a transfer to a location with a nearby mosque that he can attend during his lunch break.

To prove undue hardship, the employer will need to demonstrate how much cost or disruption the employee's proposed accommodation would involve. An employer cannot rely on potential or hypothetical hardship when faced with a religious obligation that conflicts with scheduled work, but rather should rely on objective information. A mere assumption that many more people with the same religious practices as the individual being accommodated may also seek accommodation is not evidence of undue hardship. The determination of whether a proposed accommodation would pose an undue hardship is based on concrete, fact-specific considerations.

2. More than "*De Minimis*" Cost

To establish undue hardship, the employer must demonstrate that the accommodation would require more than *de minimis* cost. Factors to be considered are "the identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation." Generally, the payment of administrative costs necessary for an accommodation, such as costs associated with rearranging schedules and recording substitutions for payroll purposes or infrequent or temporary payment of premium wages (*e.g.*, overtime rates) while a more permanent accommodation is sought, will not constitute more than *de minimis* cost, whereas the regular payment of premium wages or the hiring of additional employees to provide an accommodation will generally cause an undue hardship to the employer. "[T]he Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing reasonable accommodation."

Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work. Whether the proposed accommodation conflicts with another law will also be considered.

EXAMPLE 35
Religious Need Can Be Accommodated

David wears long hair pursuant to his Native American religious beliefs. David applies for a job as a server at a restaurant which requires its male employees to wear their hair "short and neat." When the restaurant manager informs David that if offered the position he will have to cut his hair, David explains that he keeps his hair long based on his religious beliefs, and offers to wear it in a pony tail or held up with a clip. The manager refuses this accommodation, and denies David the position based on his long hair. Since the evidence indicated that David could have been accommodated, without undue hardship, by wearing his hair in a ponytail or held up with a clip, the employer will be liable for denial of reasonable accommodation and discriminatory failure to hire.

EXAMPLE 36
Safety Risk Poses Undue Hardship

Patricia alleges she was terminated from her job as a steel mill laborer because of her religion (Pentecostal) after she notified her supervisor that her faith prohibits her from wearing pants, as required by the mill's dress code, and requested as an accommodation to be permitted to wear a skirt. Management contends that the dress code is essential to the safe and efficient operation of the mill, and has evidence that it was imposed following several accidents in which skirts worn by employees were caught in the same type of mill machinery that Patricia operates. Because the evidence establishes that wearing pants is truly necessary for safety reasons, the accommodation requested by Patricia poses an undue hardship.

3. Seniority Systems and Collectively Bargained Rights

A proposed religious accommodation poses an undue hardship if it would deprive another employee of a job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement (CBA). Of course, the mere existence of a seniority system or CBA does not relieve the employer of the duty to attempt reasonable accommodation of its employees' religious practices; the question is whether an accommodation can be provided without violating the seniority system or CBA. Allowing voluntary substitutes and swaps does not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system or CBA.

EXAMPLE 37
Schedules Based on a Seniority System or Collectively Bargained Rights

Susan, an employee of QRS Corp., asks not to work on her Sabbath. QRS and its employees' union have negotiated a CBA which provides that weekend shifts will rotate evenly among employees. If Susan can find qualified co-workers voluntarily willing to swap shifts to accommodate her sincerely held religious beliefs, the employer could be found liable for denial of reasonable accommodation if it refuses to permit the swap to occur. The existence of the collectively bargained system for determining weekend shifts should not result in the denial of accommodation if a voluntary swap can be arranged by the employee without violating the system or otherwise posing an undue hardship. The result would be the same if QRS had a

unilaterally imposed seniority system (rather than a CBA) pursuant to which weekend shifts are determined.

However, if other employees were unwilling to swap shifts or were otherwise harmed by not requiring Susan to work on the shift in question, or the employer would be subject to other operational costs that were more than *de minimis* by allowing Susan to swap shifts, then the employer can demonstrate undue hardship.

4. Co-worker Complaints

Although infringing on co-workers' ability to perform their duties or subjecting co-workers to a hostile work environment will generally constitute undue hardship, the general disgruntlement, resentment, or jealousy of co-workers will not. Undue hardship requires more than proof that some co-workers complained; a showing of undue hardship based on co-worker interests generally requires evidence that the accommodation would actually infringe on the rights of co-workers or cause disruption of work. *See also* §§ III-C and IV-C-6 (discussing specifically complaints regarding proselytizing and other forms of religious expression), *infra*.

5. Security Considerations

If a religious practice actually conflicts with a legally mandated federal, state, or local security requirement, an employer need not accommodate the practice because doing so would create an undue hardship. If a security requirement has been unilaterally imposed by the employer and is not required by law or regulation, the employer will need to decide whether it would be an undue hardship to modify or eliminate the requirement to accommodate an employee who has a religious conflict.

EXAMPLE 38
Accommodation Implicating Security Concerns

Patrick is employed as a correctional officer at a state prison, and his brother William is employed as a grocery store manager. Both Patrick and William seek permission from their respective employers to wear a fez at work as an act of faith on a particular holy day as part of their religious expression. Both employers deny the request, citing a uniformly applied workplace policy prohibiting employees from wearing any type of head covering. The prison's policy is based on security concerns that head coverings may be used to conceal drugs, weapons, or other contraband, and may spark internal violence among prisoners. The grocery store's policy is based on a stated desire that all employees wear uniform clothing so that they can be readily identified by customers. If both brothers file EEOC charges challenging the denial of their accommodation requests, Patrick will likely not prevail because the prison's denial of his request was based on legitimate security considerations posed by the particular religious garb sought to be worn. William will likely prevail because there is no indication it would pose an undue hardship for the grocery store to modify its policy with respect to his request.

EXAMPLE 39
Kirpan

Harvinder, a baptized Sikh who works in a hospital, wears a small (4-inch), dull and sheathed kirpan (miniature sword) strapped and hidden underneath her clothing, as a symbol of her religious commitment to defend truth and moral values. When Harvinder's supervisor, Bill, learned about her kirpan from a co-worker, he instructed Harvinder not to wear it at work because it violated the hospital policy against weapons in the workplace. Harvinder explained to Bill that her faith requires her to wear a kirpan in order to comply with the Sikh Code of Conduct, and gave him literature explaining that the kirpan is a religious artifact, not a weapon. She also

showed him the kirpan, allowing him to see that it was no sharper than butter knives found in the hospital cafeteria. Nevertheless, Bill told her that she would be terminated if she continued to wear the kirpan at work. Absent any evidence that allowing Harvinder to wear the kirpan would pose an undue hardship in the factual circumstances of this case, the hospital is liable for denial of accommodation.

C. Common Methods of Accommodation in the Workplace

Under Title VII, an employer or other covered entity may use a variety of methods to provide reasonable accommodations to its employees. The most common methods are: (1) flexible scheduling; (2) voluntary substitutes or swaps of shifts and assignments; (3) lateral transfer and/or change of job assignment; and, (4) modifying workplace practices, policies, and/or procedures.

1. Scheduling Changes

An employer may be able to reasonably accommodate an employee by allowing flexible arrival and departure times, floating or optional holidays, flexible work breaks, use of lunch time in exchange for early departure, staggered work hours, and other means to enable an employee to make up time lost due to the observance of religious practices. However, EEOC's position is that it will be insufficient merely to eliminate part of the conflict, unless eliminating the conflict in its entirety will pose an undue hardship by disrupting business operations or impinging on other employees' benefits or settled expectations.

EXAMPLE 40
Break Schedules/Prayer at Work

Rashid, a janitor, tells his employer on his first day of work that he practices Islam and will need to pray at several prescribed times during the workday in order to adhere to his religious practice of praying at five specified times each day, for several minutes, with hand washing beforehand. The employer objects because its written policy allows one fifteen-minute break in the middle of each morning and afternoon. Rashid's requested change in break schedule will not exceed the 30 minutes of total break time otherwise allotted, nor will it affect his ability to perform his duties or otherwise cause an undue hardship for his employer. Thus, Rashid is entitled to accommodation.

EXAMPLE 41
Blanket Policies Prohibiting Time Off for Religious Observance

A large employer operating a fleet of buses had a policy of refusing to accept driver applications unless the applicant agreed that he or she was available to be scheduled to work any shift, seven days a week. This policy violates Title VII to the extent that it discriminates against applicants who refrain from work on certain days for religious reasons, by failing to allow for the provision of religious accommodation absent undue hardship.

2. Voluntary Substitutes and Shift Swaps

Although it would pose an undue hardship to require employees *involuntarily* to substitute for one another or swap shifts, the reasonable accommodation requirement can often be satisfied without undue hardship where a volunteer with substantially similar qualifications is available, either for a single absence or an extended period of time. The employer's obligation is to make a good faith effort to allow voluntary substitutions and shift swaps, under circumstances which do not discourage employees from substituting for one another or trading shifts to accommodate a religious conflict. However, if the employer is on notice that the employee's religious beliefs

preclude him not only from working on his Sabbath but also from inducing others to do so, reasonable accommodation requires more than merely permitting the employee to swap. Nevertheless, an employer does not have to permit a substitute or swap if it would pose more than *de minimis* cost or burden to business operations. As noted above, if a swap or substitution would result in the employer having to pay premium wages (such as overtime pay), the frequency of the arrangement will be relevant to determining if it poses an undue hardship; "the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing reasonable accommodation."

An employer may have to make an exception to its scheduling policies, procedures, or practices in order to grant religious accommodation. For example, if it does not pose an undue hardship, an employer must make an exception to its policy of requiring all employees, regardless of seniority, to work an "equal number of weekend, holiday, and night shifts," and instead permit voluntary shift swaps between qualified co-workers in order to accommodate a particular employee's sincerely held religious belief that he should not work on the Sabbath. Of course, if allowing a swap or other accommodation would not provide the coverage the employer needs for its business operations or otherwise pose an undue hardship, the accommodation does not have to be granted.

3. Change of Job Tasks and Lateral Transfer

When an employee's religious belief or practice conflicts with a particular task, appropriate accommodations may include relieving the employee of the task or transferring the employee to a different position or location that eliminates the conflict with the employee's religion. Whether or not such accommodations pose an undue hardship will depend on factors such as the nature or importance of the duty at issue, the availability of others to perform the function, the availability of other positions, and the applicability of a CBA or seniority system.

EXAMPLE 42
Restaurant Server Excused from Singing Happy Birthday

Kim, a server at a restaurant, informed her manager that she would not be able to join other waitresses in singing "Happy Birthday" to customers because she is a Jehovah's Witness whose religious beliefs do not allow her to celebrate holidays, including birthdays. There were enough servers on duty at any given time to perform this singing without affecting service. The manager refused any accommodation. If Kim files a Title VII charge alleging denial of religious accommodation, she will prevail because the restaurant could have accommodated her with little or no expense or disruption.

EXAMPLE 43
Pharmacist Excused from Providing Contraceptives

Neil, a pharmacist, was hired by a large corporation that operates numerous large pharmacies at which more than one pharmacist is on duty during all hours of operation. Neil informed his employer that he refused on religious grounds to participate in distributing contraceptives or answering any customer inquiries about contraceptives. The employer reasonably accommodated Neil by offering to allow Neil to signal to a co-worker who would take over servicing any customer who telephoned, faxed, or came to the pharmacy regarding contraceptives.

EXAMPLE 44
Pharmacist Not Permitted to Turn Away Customers

In the above example, assume that instead of facilitating the assistance of such customers by a co-worker, Neil leaves on hold indefinitely those who call on the phone about a contraceptive rather than transferring their calls, and walks away from in-store customers who seek to fill a contraceptive prescription rather than signaling a co-worker. The employer is not required to accommodate Neil's request to remain in such a position yet avoid all situations where he might even briefly interact with customers who have requested contraceptives, or to accommodate a disruption of business operations. The employer may discipline or terminate Neil for not meeting legitimate expectations.

The employee should be accommodated in his or her current position if doing so does not pose an undue hardship. If no such accommodation is possible, the employer needs to consider whether lateral transfer is a possible accommodation. For example, if a pharmacist who has a religious objection to dispensing contraceptives can be accommodated without undue hardship by allowing the pharmacist to signal a co-worker to assist customers with such prescriptions, the employer cannot choose instead to accommodate by transferring the pharmacist to a different position. Moreover, if the pharmacist cannot be accommodated within his position, the employer cannot transfer the pharmacist to a position that entails less pay, responsibility, or opportunity for advancement unless a lateral transfer is unavailable or would otherwise pose an undue hardship.

EXAMPLE 45
Lateral Transfer Versus Transfer to a Lower-Paying Position

An electrical utility lineman requests accommodation of his Sabbath observance, but because the nature of his position requires being available to handle emergency problems at any time, there is no accommodation that would permit the lineman to remain in his position without posing an undue hardship. The employer can accommodate the lineman by offering a lateral transfer to another assignment at the same pay, if available. If, however, no job at the same pay is readily available, then the employer could satisfy its obligation to reasonably accommodate the lineman by offering to transfer him to a different job, even at lower pay, if one is available.

4. Modifying Workplace Practices, Policies and Procedures

a. Dress and Grooming Standards

When an employer has a dress or grooming policy that conflicts with an employee's religious beliefs or practices, the employee may ask for an exception to the policy as a reasonable accommodation. Religious grooming practices may relate, for example, to shaving or hair length. Religious dress may include clothes, head or face coverings, jewelry, or other items. Absent undue hardship, religious discrimination may be found where an employer fails to accommodate the employee's religious dress or grooming practices.

EXAMPLE 46
Facial Hair

Prakash, who works for CutX, a surgical instrument manufacturer, does not shave or trim his facial hair because of his Sikh religious observance. When he seeks a promotion to manage the division responsible for sterilizing the instruments, his employer tells him that, to work in that division, he must shave or trim his beard because otherwise his beard may contaminate the sterile field. When Prakash explains that he cannot trim his beard for religious reasons, the employer offers to allow Prakash to wear two face masks instead of trimming his beard. Prakash thinks that wearing two masks is unreasonable and files a Title VII charge. CutX will prevail because it offered a reasonable accommodation that would eliminate Prakash's religious conflict with the hygiene rule.

Some courts have concluded that it would pose an undue hardship if an employer was required to accommodate a religious dress or grooming practice that conflicts with the public image the employer wishes to convey to customers. While there may be circumstances in which allowing a particular exception to an employer's dress and grooming policy would pose an undue hardship, an employer's reliance on the broad rubric of "image" to deny a requested religious accommodation may in a given case be tantamount to reliance on customer religious bias (so-called "customer preference") in violation of Title VII.

EXAMPLE 47
Religious Garb

Nasreen, a Muslim ticket agent for a commercial airline, wears a head scarf, or hijab, to work at the airport ticket counter. After September 11, 2001, her manager objected, telling Nasreen that the customers might think she was sympathetic to terrorist hijackers. Nasreen explains to her manager that wearing the hijab is her religious practice and continues to wear it. She is terminated for wearing it over her manager's objection. Customer fears or prejudices do not amount to undue hardship, and the refusal to accommodate her and the termination, therefore, violate Title VII. In addition, denying Nasreen the position due to perceptions of customer preferences about religious attire would be disparate treatment based on religion in violation of Title VII, because it would be the same as refusing to hire Nasreen because she is a Muslim. *See supra* § II-B.

There may be limited situations in which the need for uniformity of appearance is so important that modifying the dress code would pose an undue hardship. However, even in these situations, a case-by-case determination is advisable.

b. Use of Employer Facilities

If any employee needs to use a workplace facility as a reasonable accommodation, for example use of a quiet area for prayer during break time, the employer should accommodate the request under Title VII unless it would pose an undue hardship. If the employer allows employees to use the facilities at issue for non-religious activities not related to work, it may be difficult for the employer to demonstrate that allowing the facilities to be used in the same manner for religious activities is not a reasonable accommodation or poses an undue hardship.

EXAMPLE 48
Use of Employer Facilities

An employee whose assigned work area is a factory floor rather than an enclosed office asks his supervisor if he may use one of the company's unoccupied conference rooms to pray during a scheduled break time. The supervisor must grant this request if it would not pose an undue hardship. An undue hardship would exist, for example, if the only conference room is used for work meetings at that time. However, the supervisor is not required to provide the employee with his choice of the available locations, and can meet the accommodation obligation by making any appropriate location available that would accommodate the employee's religious needs if this can be done absent undue hardship, for example by offering an unoccupied area of the work space rather than the conference room.

c. Tests and Other Selection Procedures

An employer has an obligation to accommodate an employee or prospective employee when scheduling a test or administering other selection procedures, where the applicant has informed the employer of a sincerely held religious belief that conflicts with a pre-employment testing requirement, unless undue hardship would result. An employer may not permit an applicant's

need for a religious accommodation to affect its decision whether or not to hire the applicant unless the employer can demonstrate that it cannot reasonably accommodate the applicant's religious practice without undue hardship.

d. Providing Social Security Numbers

It will typically pose an undue hardship for an employer to accommodate an applicant or employee's asserted religious belief against providing or using a social security number.

5. Excusing Union Dues or Agency Fees

Absent undue hardship, Title VII requires employers and unions to accommodate an employee who holds religious objections to joining or financially supporting a union. Such an employee can be accommodated by allowing the equivalent of her union dues (payments by union members) or agency fees (payments often required from non-union members in a unionized workplace) to be paid to a charity agreeable to the employee, the union, and the employer. Whether a charity-substitute accommodation for payment of union dues would cause an undue hardship is an individualized determination based upon, among other things, the union's size, operational costs, and the number of individuals that need the accommodation.

If an employee's religious objection is not to joining or financially supporting the union, but rather to the union's support of certain political or social causes, the employee may be accommodated if it would not pose an undue hardship by, for example, reducing the amount owed and/or by allowing the employee to donate to a charitable organization the full amount the employee owes or that portion that is attributable to the union's support of the cause to which the employee has a religious objection, or by diverting the full amount to the national, state, or local union in the event one of those entities does not engage in support of the cause to which the employee has a religious objection.

6. Permitting Prayer, Proselytizing, and Other Forms of Religious Expression

Some employees may seek to display religious icons or messages at their work stations. Others may seek to proselytize by engaging in one-on-one discussions regarding religious beliefs, distributing literature, or using a particular religious phrase when greeting others. Still others may seek to engage in prayer at their work stations or to use other areas of the workplace for either individual or group prayer or study. In some of these situations, an employee might request accommodation in advance to permit such religious expression. In other situations, the employer will not learn of the situation or be called upon to consider any action unless it receives complaints about the religious expression from either other employees or customers. As noted in §§ II-A-4 and III-C of this document, prayer, proselytizing, and other forms of religious expression do not solely raise the issue of religious accommodation, but may also raise disparate treatment or harassment issues.

To determine whether allowing or continuing to permit an employee to pray, proselytize, or engage in other forms of religiously oriented expression in the workplace would pose an undue hardship, employers should consider the potential disruption, if any, that will be posed by permitting this expression of religious belief. As explained below, relevant considerations may include the effect such expression has had, or can reasonably be expected to have, if permitted to continue, on co-workers, customers, or business operations.

a. Effect on Workplace Rights of Co-Workers

Expression can create undue hardship if it disrupts the work of other employees or constitutes – or threatens to constitute – unlawful harassment. Since an employer has a duty under Title VII to

protect employees from religious harassment, it would be an undue hardship to accommodate such expression. As explained in § II-A-2-b of this document, religious expression directed toward co-workers might constitute harassment in some situations, for example where it is facially abusive (*i.e.*, demeans people of other religions), or where, even if not abusive, it persists even though the co-workers to whom it is directed have made clear that it is unwelcome. It is necessary to make a case-by-case determination regarding whether the effect on co-workers actually is an undue hardship. However, this does not require waiting until the alleged harassment has become severe or pervasive. As with harassment on any basis, it is permitted and advisable for employers to take action to stop alleged harassment *before* it becomes severe or pervasive, because while isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful.

b. Effect on Customers

The determination of whether it is an undue hardship to allow employees to engage in religiously oriented expression toward customers is a fact-specific inquiry and will depend on the nature of the expression, the nature of the employer's business, and the extent of the impact on customer relations. For example, one court found that it did not impose an undue hardship for a private sector employer to allow a cashier to use the general religious greeting "Have a Blessed Day" in accepting payment where it was said in the context of brief anonymous interactions and had little demonstrable adverse impact on customers or the business. However, other courts have found undue hardship where religiously oriented expression was used in the context of a regular business interaction with a client. Whether or not the client objects, this may be an undue hardship for an employer where the expression could be mistaken as the employer's message. Where the religiously oriented expression is not limited to use of a phrase or greeting, but rather is in the manner of individualized, specific proselytizing, an employer is far more likely to be able to demonstrate that it would constitute an undue hardship to accommodate an employee's religious expression, regardless of the length or nature of the business interaction.

EXAMPLE 49
Display of Religious Objects By an Employee

Susan and Roger are members of the same church and are both employed at XYZ Corporation. Susan works as an architect in a private office on an upper floor, where she occasionally interacts with co-workers, but not with clients. Roger is a security guard stationed at a desk in the front lobby of the XYZ building through which all employees, clients, and other visitors must enter. At a recent service at Susan and Roger's church, the minister distributed posters with the message "Jesus Saves!" and encouraged parishioners to display the posters at their workplaces in order to "spread the word." Susan and Roger each display the poster on the wall above their respective work stations. XYZ orders both to remove the poster despite the fact that both explained that they felt a religious obligation to display it, and despite the fact that there have been no complaints from co-workers or clients.

Susan and Roger file charges alleging denial of religious accommodation. The employer will probably be unable to show that allowing Susan to display a religious message in her personal workspace posed an undue hardship, because there was no evidence of any disruption to the business or the workplace which resulted. By contrast, because Roger sits at the lobby desk and the poster is the first thing that visitors see upon entering the building, it would appear to represent XYZ's views and would therefore likely be shown to pose an undue hardship.

EXAMPLE 50
Undue Hardship to Allow Employee to Discuss Religion with Clients

Helen, an employee in a mental health facility that served a religiously and ethnically diverse clientele, frequently spoke with clients about religious issues and shared religious tracts with them as a way to help solve their problems, despite being instructed not to do so. After clients complained, Helen's employer issued her a letter of reprimand stating that she should not promote her religious beliefs to clients and that she would be terminated if she persisted. Helen's belief in the need to evangelize to clients cannot be accommodated without undue hardship. The employer has the right to control speech that threatens to impede provision of effective and efficient services. Clients, especially in a mental health setting, may not understand that the religious message represents Helen's views rather than the clinic's view of the most beneficial treatment for the patient.

7. Employer-Sponsored Programs

Some employers have integrated their own religious beliefs or practices into the workplace, and they are entitled to do so. However, if an employer holds religious services or programs or includes prayer in business meetings, Title VII requires that the employer accommodate an employee who asks to be excused for religious reasons, absent a showing of undue hardship. Excusing an employee from religious services normally does not create an undue hardship because it does not cost the employer anything and does not disrupt business operations or other workers.

EXAMPLE 51
Prayer at Meetings

Michael's employer requires that the mandatory weekly staff meeting begin with a religious prayer. Michael objects to participating because he believes it conflicts with his own sincerely held religious beliefs. He asks his supervisor to allow him to arrive at the meeting after the prayer. The supervisor must accommodate Michael's religious belief by either granting his request or offering an alternative accommodation that would remove the conflict between Michael's religious belief and the staff meeting prayer, even if other employees of Michael's religion do not object to being present for the prayer.

EXAMPLE 52
Employer Holiday Decorations

Each December, the president of XYZ corporation directs that several wreaths be placed around the office building and a tree be displayed in the lobby. Several employees complain that to accommodate their non-Christian religious beliefs, the employer should take down the wreaths and tree, or alternatively should add holiday decorations associated with other religions. Title VII does not require that XYZ corporation remove the wreaths and tree or add holiday decorations associated with other religions. The result under Title VII on these facts would be the same whether in a private or government workplace.

Similarly, an employer is required, absent undue hardship, to excuse an employee from compulsory personal or professional development training where it conflicts with the employee's sincerely held religious beliefs or practices. There may be cases, however, where an employer can show that it would pose an undue hardship to provide an alternative training or to excuse an employee from any part of a particular training, even if the employee asserts it is contrary to his religious beliefs to attend (*e.g.*, where the training provides information on how to perform the job, on how to comply with equal employment opportunity obligations, or on other workplace policies, procedures, or applicable legal requirements).

EXAMPLE 53
Religious Objection to Training Program –
Employee Must Be Excused

As part of its effort to promote employee health and productivity, the new president of a company institutes weekly mandatory on-site meditation classes led by a local spiritualist. Angelina explains to her supervisor that the meditation conflicts with her sincerely held religious beliefs, and asks to be excused from participating. Because it would not pose an undue hardship, the company must accommodate Angelina's religious belief by excusing her from the weekly meditation classes, even if the company and other employees believe that this form of meditation does not conflict with any religious beliefs.

EXAMPLE 54
Religious Objection to Training Program –
Employee Need Not Be Excused

Employer XYZ holds an annual training for employees on a variety of personnel matters, including compliance with EEO laws and also XYZ's own internal anti-discrimination policy, which includes a prohibition on sexual orientation discrimination. Lucille asks to be excused from the portion of the training on sexual orientation discrimination because she believes that it "promotes the acceptance of homosexuality," which she sincerely believes is immoral and sinful based on her religion. The training does not tell employees to value different sexual orientations but simply discusses and reinforces the employer's conduct rule requiring employees not to discriminate against or harass other employees and to treat one another professionally. Because an employer needs to make sure that its employees know about and comply with such employer workplace rules, it would be an undue hardship for XYZ to excuse Lucille from the training.

·NOTE TO EEOC INVESTIGATORS ·

While not all of the following issues will be in dispute in every charge alleging denial of religious accommodation, if CP alleges that R failed to accommodate CP's religious beliefs or practices, the investigator should generally follow this line of inquiry, considering these steps:

⇒ Ascertain the nature of the belief or practice that CP claims R has failed to accommodate (*e.g.*, dress, grooming, holy day observance, etc.) and what accommodation was sought (e.g., exception to dress code, schedule change, leave, etc.).

⇒ If disputed by R, determine whether CP's beliefs are "religious" in nature.

⇒ If disputed by R, determine whether CP "sincerely holds" the particular religious belief or practice at issue.

⇒ Ascertain whether CP actually notified R of the need for a religious accommodation, *i.e.*, whether it was made known to R that an accommodation was needed and that it was for religious reasons. The investigator should seek evidence of when, where, how, and to whom such notice was given, and the names of any witnesses to the notification.

⇒ If R claims that it was not notified of CP's need for an accommodation, the investigator should attempt to resolve the discrepancies between R's contention and CP's allegation by gathering additional available evidence corroborating or refuting CP's and R's contentions.

⇒ Determine R's response, if any, to the accommodation request. Was an accommodation offered, and if so, what? The investigator should obtain R's statement of all attempts to accommodate CP, if any attempts were made.

⇒ The investigator should seek a specific and complete explanation from R as to the facts on which it relied (*e.g.*, why R concluded CP did not have a sincerely-held religious belief or practice, or why R concluded that accommodation would have posed an undue hardship in terms of cost, disruption, effect on co-workers, or any other reason). For example, in the event R is a union and the accommodation claim relates to payment of agency fees or union dues, the investigator should obtain any relevant information regarding how the particular union at issue may have handled payment by this religious objector in order to provide accommodation.

⇒ If R asserts that it did not accommodate CP's request because it would have posed an undue hardship, obtain all available evidence regarding whether or not a hardship would in fact have been posed, *i.e.*, whether the alleged burden is more than *de minimis*. If R's undue hardship defense is based on cost, ascertain the cost of the accommodation in relation to R's size, nature of business operations, operating costs, and the impact, if any, of similar accommodations already being provided to other employees. If R's undue hardship defense is based on a factor other than cost (*i.e.*, disruption, production or staffing levels, security, or other factor), similarly ascertain the impact of the accommodation with respect to R's particular workplace and business.

⇒ When there is more than one method of accommodation available that would not cause undue hardship, the investigator should evaluate whether the accommodation offered is reasonable by examining: (1) whether any alternative reasonable accommodation was available; (2) whether R considered any alternatives for accommodation; (3) the alternative(s) for accommodation, if any, that R actually offered to CP; and (4) whether the alternative(s) the employer offered eliminated the conflict.

⇒ If R asserts CP failed to cooperate with R in reaching an accommodation, obtain any available evidence regarding the relevant communications, including whether CP refused any offer of reasonable accommodation.

· Employer Best Practices ·

Reasonable Accommodation - Generally

Employers should inform employees that they will make reasonable efforts to accommodate the employees' religious practices.

Employers should train managers and supervisors on how to recognize religious accommodation requests from employees.

Employers should consider developing internal procedures for processing religious accommodation requests.

Employers should individually assess each request and avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate.

Employers and employees should confer fully and promptly to the extent needed to share any necessary information about the employee's religious needs and the available accommodation options.

An employer is not required to provide an employee's preferred accommodation if there is more than one effective alternative to choose from. An employer should,

however, consider the employee's proposed method of accommodation, and if it is denied, explain to the employee why his proposed accommodation is not being granted.

Managers and supervisors should be trained to consider alternative available accommodations if the particular accommodation requested would pose an undue hardship.

When faced with a request for a religious accommodation which cannot be promptly implemented, an employer should consider offering alternative methods of accommodation on a temporary basis, while a permanent accommodation is being explored. In this situation, an employer should also keep the employee apprised of the status of the employer's efforts to implement a permanent accommodation.

Undue Hardship – Generally

The *de minimis* undue hardship standard refers to the legal requirement. As with all aspects of employee relations, employers can go beyond the requirements of the law and should be flexible in evaluating whether or not an accommodation is feasible.

An employer should not assume that an accommodation will conflict with the terms of a seniority system or CBA without first checking if there are any exceptions for religious accommodation or other avenues to allow accommodation consistent with the seniority system or CBA.

An employer should not automatically reject a request for religious accommodation just because the accommodation will interfere with the existing seniority system or terms of a CBA. Although an employer may not upset co-workers' settled expectations, an employer is free to seek a voluntary modification to a CBA in order to accommodate an employee's religious needs.

Employers should train managers to be aware that, if the requested accommodation would violate the CBA or seniority system, they should confer with the employee to determine if an alternative accommodation is available.

Employers should ensure that managers are aware that reasonable accommodation may require making exceptions to policies or procedures that are not part of a CBA or seniority system, where it would not infringe on other employees' legitimate expectations.

Schedule Changes

Employers should work with employees who need an adjustment to their work schedule to accommodate their religious practices.

Notwithstanding that the legal standard for undue hardship is "more than *de minimis*," employers may of course choose voluntarily to incur whatever additional operational or financial costs they deem appropriate to accommodate an employee's religious need for scheduling flexibility.

Employers should consider adopting flexible leave and scheduling policies and procedures that will often allow employees to meet their religious and other personal needs. Such policies can reduce individual requests for exceptions. For example, some employers have policies allowing alternative work schedules and/or a certain number of "floating" holidays for each employee. While such

policies may not cover every eventuality and some individual accommodations may still be needed, the number of such individual accommodations may be substantially reduced.

Voluntary Substitutes or Swaps

An employer should facilitate and encourage voluntary substitutions and swaps with employees of substantially similar qualifications by publicizing its policy permitting such arrangements, promoting an atmosphere in which substitutes are favorably regarded, and providing a central file, bulletin board, group e-mail, or other means to help an employee with a religious conflict find a volunteer to substitute or swap.

Change of Job Assignments and Lateral Transfers

An employer should consider a lateral transfer when no accommodation which would keep the employee in his or her position is possible absent undue hardship. However, an employer should only resort to transfer, whether lateral or otherwise, after fully exploring accommodations that would permit the employee to remain in his position.

Where a lateral transfer is unavailable, an employer should not assume that an employee would not be interested in a lower-paying position if that position would enable the employee to abide by his or her religious beliefs. If there is no accommodation available that would permit the employee to remain in his current position or an equivalent one, the employer should offer the available position as an accommodation and permit the employee to decide whether or not to take it.

Modifying Workplace Practices, Policies, and Procedures

Employers should make efforts to accommodate an employee's desire to wear a yarmulke, hijab, or other religious garb. If the employer is concerned about uniform appearance in a position which involves interaction with the public, it may be appropriate to consider whether the employee's religious views would permit him to resolve the religious conflict by, for example, wearing the item of religious garb in the company uniform color(s).

Managers and employees should be trained not to engage in stereotyping based on religious dress and grooming practices and should not assume that atypical dress will create an undue hardship.

Employers should be flexible and creative regarding work schedules, work duties, and selection procedures to the extent practicable.

Employers should be sensitive to the risk of unintentionally pressuring or coercing employees to attend social gatherings after the employees have indicated a religious objection to attending.

Permitting Prayer, Proselytizing, and Other Forms of Religious Expression

Employers should train managers to gauge the actual disruption posed by religious expression in the workplace, rather than merely speculating that disruption may result. Employers should also train managers to identify alternative accommodations that might be offered to avoid actual disruption (*e.g.*, designating

an unused or private location in the workplace where a prayer session or Bible study meeting can occur if it is disrupting other workers).

Employers should incorporate a discussion of religious expression, and the need for all employees to be sensitive to the beliefs or non-beliefs of others, into any anti-harassment training provided to managers and employees.

· Employee Best Practices ·

Employees should advise their supervisors or managers of the nature of the conflict between their religious needs and the work rules.

Employees should provide enough information to enable the employer to understand what accommodation is needed, and why it is necessitated by a religious practice or belief.

Employees who seek to proselytize in the workplace should cease doing so with respect to any individual who indicates that the communications are unwelcome.

12-V RELATED FORMS OF DISCRIMINATION

A. National Origin, Race, and Color

Title VII's prohibition against religious discrimination may overlap with Title VII's prohibitions against discrimination based on national origin, race, and color. Where a given religion is strongly associated – or perceived to be associated – with a certain national origin, the same facts may state a claim of both religious and national origin discrimination. All four bases might be implicated where, for example, co-workers target a dark-skinned Muslim employee from Saudi Arabia for harassment because of his religion, national origin, race, and/or color.

B. Retaliation

Title VII prohibits retaliation by an employer, employment agency, or labor organization because an individual has engaged in protected activity. Protected activity consists of opposing a practice the employee reasonably believes is made unlawful by one of the employment discrimination statutes or of filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the statute. EEOC has taken the position that requesting religious accommodation is protected activity.

EXAMPLE 55
Retaliation for Requesting Accommodation

Jenny requests that she be excused from daily employer-sponsored Christian prayer meetings because she is an atheist. Her supervisor insists that she attend, but she persists in her request that she should be excused, and explains that requiring her to attend is offensive to her religious beliefs. She takes her request to human resources, and informs them that requiring her to attend these prayer meetings is offensive to her religious beliefs. Despite her supervisor's objections, the human resources department instructs the supervisor that in the circumstances no undue hardship is posed and he must grant the request. Motivated by reprisal, her supervisor shortly thereafter gives her an unjustified poor performance rating, and denies her requests to attend training that is approved for similarly situated employees. This violates Title VII.

· Employer Best Practices ·

Retaliation

Employers can reduce the risk of retaliation claims by training managers and supervisors to be aware of their anti-retaliation obligations under Title VII, including specific actions that may constitute retaliation.

> Employers can help reduce the risk of retaliation claims by carefully and timely recording the accurate business reasons for disciplinary or performance related actions and sharing these reasons with the employee.

APPENDIX A
HOW APPLICANTS OR EMPLOYEES CAN FILE A CHARGE

If you believe you have been discriminated against by a private sector or state or local government employer, labor union, or employment agency when applying for a job or while on the job because of your race, color, religion, sex, national origin, age (40 or over), or disability, or believe that you have been discriminated against because you opposed unlawful discrimination or participated in an equal employment opportunity (EEO) proceeding, you may file a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC). Charges against private sector and local and state government employers may be filed in person, by mail, or by telephone by contacting the nearest EEOC office. If there is no EEOC office in the immediate area, call toll free 1-800-669-4000 or 1-800-669-6820 (TTY) for more information. To avoid delay, call or write beforehand if you need special assistance, such as an interpreter, to file a charge. Federal sector employees and applicants should contact the EEO office of the agency responsible for the alleged discrimination to initiate EEO counseling.

There are strict time frames in which charges of employment discrimination must be filed or your agency's EEO office must be contacted. When charges or complaints are filed beyond these time frames, you may not be able to obtain any remedy. Charges against private sector or state or local governments must be filed with EEOC within 180 days of the alleged discriminatory act. The time frame is extended to 300 days if the alleged discrimination arose in a state or locality that has a fair employment practices agency (FEPA) with the authority to grant or seek relief for the alleged discrimination. Federal sector employees and applicants must initiate EEO counseling at the agency responsible for the alleged discrimination within 45 days of the alleged discriminatory event. Allegations of harassment based on race, color, religion, sex, or national origin are timely if at least one incident of harassment that is part of the larger pattern of harassment occurred within the filing period.

If you wish to remain anonymous during the period when an EEOC charge is being processed involving a private sector or state or local government employer, another individual or an organization may file a charge on your behalf. In some circumstances, an EEOC Commissioner may file a charge against a private sector or state or local government employer. Federal sector employees and applicants may remain anonymous during EEO counseling, but lose the right to anonymity after filing a formal complaint.

APPENDIX B
WHEN A CHARGE IS FILED AGAINST A PRIVATE SECTOR OR STATE OR LOCAL GOVERNMENT EMPLOYER

This appendix provides general information regarding the processing of a charge alleging discrimination by a private sector or state or local government employer under the EEO statutes. The information presented in this appendix applies to private sector and state and local

government employers only. For information on the processing of complaints against federal agencies, visit the EEOC's "Federal Sector Information" page on the Internet at http://www.eeoc.gov/federal/index.html.

Anyone who believes that a private sector or state or local government employer has violated his or her employment rights based on race, color, sex, religion, national origin, age (40 or over), disability, opposition to unlawful discrimination, or participation in an EEO proceeding, may file a charge of discrimination with the EEOC. A charge does not constitute a finding that your company did, in fact, discriminate. The EEOC has a responsibility to investigate and determine whether there is reasonable cause to believe discrimination occurred.

That process begins with the EEOC sending your company a copy of the charge, which will briefly identify the charging party, the basis (*e.g.*, race, religion, etc.) and issues (hiring, promotion, etc.), and the date(s) of the alleged discrimination. You also may be asked to provide a response to the charge and supporting documentation. The EEOC also may ask to visit your work site or to interview some employees. It is important that your company retain records relating to issues under investigation as a result of the charge until the charge or any lawsuit based on the charge is resolved.

In some cases, the EEOC notice may offer mediation as a method of resolving the charge before an investigation. EEOC's mediation program is a free service, and participation is voluntary. The process is confidential, and there is a firewall (*i.e.*, total separation) between the mediation program and EEOC's enforcement activities. Mediation provides employers and charging parties the opportunity to reach mutually agreeable solutions early in the process. The EEOC will notify your company if a charge is eligible for mediation. In the event that mediation does not succeed, the charge is referred for investigation.

If the EEOC finds reasonable cause to believe that your company discriminated against a charging party, it will invite you to conciliate the charge (*i.e.*, the EEOC will offer you a chance to resolve the matter informally). In some cases, where conciliation fails, the EEOC will file a civil court action. If the EEOC does not find discrimination, or if conciliation fails and the EEOC chooses not to file suit, it will issue a notice of a right to sue, which gives the charging party 90 days to file a civil court action. The EEOC also must issue a notice of right to sue to the charging party on request if its handling of the charge is still pending after 180 days, or earlier if the EEOC knows it will take more than 180 days to complete action on the charge.

In all cases, your company should remember that it is unlawful to retaliate against the charging party for filing the charge, even if you believe the charge is without merit. You should submit a response to the EEOC and provide the information requested, even if you believe the charge is frivolous. If the charge was not dismissed by the EEOC when it was received, that means there was some basis for proceeding with further investigation. There are many cases where it is unclear whether discrimination may have occurred and an investigation is necessary. You are encouraged to present any facts that you believe show the allegations are incorrect or do not amount to a violation of the law.

Religious Discrimination Regulation Text

CHAPTER XIV--EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 C.F.R. PART 1605 GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION

[Code of Federal Regulations]
[Title 29, Volume 4]
[Revised as of July 1, 2006]
From the U.S. Government Printing Office via GPO Access
[CITE: 29CFR1605.1]

Sec.

Authority: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.

Source: 45 FR 72612, Oct. 31, 1980, unless otherwise noted.

Sec. 1605.1 "Religious" nature of a practice or belief.

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions. \1\ The 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 phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in section 701(j), 42 U.S.C. 2000e(j).

\1\ See CD 76-104 (1976), CCH]6500; CD 71-2620 (1971), CCH]6283; CD 71-779 (1970), CCH]6180.

Sec. 1605.2 Reasonable accommodation without undue hardship as required by section 701(j) of title VII of the Civil Rights Act of 1964.

(a) Purpose of this section. This section clarifies the obligation imposed by title VII of the Civil Rights Act of 1964, as amended, (sections 701(j), 703 and 717) to accommodate the religious practices of employees and prospective employees. This section does not address other obligations under title VII not to discriminate on grounds of religion, nor other provisions of title VII. This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutional, or other statutory provisions; neither is it intended to provide guidance for statutes which require accommodation on bases other than religion such as section 503 of the Rehabilitation Act of 1973. The legal principles which have been developed with respect to discrimination prohibited by title VII on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) Duty to accommodate.

(1) Section 701(j) makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business. \2\

\2\ See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977).

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(2) Section 701(j) in conjunction with section 703(c), imposes an obligation on a labor organization to reasonably accommodate the religious practices of an employee or prospective employee, unless the labor organization demonstrates that accommodation would result in undue hardship.

(3) Section 1605.2 is primarily directed to obligations of employers or labor organizations, which are the entities covered by title VII that will most often be required to make an accommodation. However, the principles of Sec. 1605.2 also apply when an accommodation can be required of other entities covered by title VII, such as employment agencies (section 703(b)) or joint labor-management committees controlling apprenticeship or other training or retraining (section 703(d)). (See, for example, Sec. 1605.3(a) “Scheduling of Tests or Other Selection Procedures.”)

(c) Reasonable accommodation.

(1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and
(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation.

Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

(d) Alternatives for accommodating religious practices.

(1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation. See, for example, the Commission's finding number (3) from its Hearings on Religious Discrimination, in appendix A to Sec. Sec. 1605.2 and 1605.3. The principles expressed in these Guidelines apply as well to such requests for accommodation.

(i) Voluntary Substitutes and “Swaps”.

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(ii) Flexible Scheduling.

One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should

consider is the creation of a flexible work schedule for individuals requesting accommodation.

The following list is an example of areas in which flexibility might be introduced: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices. \3\

\3\ On September 29, 1978, Congress enacted such a provision for the accommodation of Federal employees' religious practices. See Pub. L. 95-390, 5 U.S.C. 5550a “Compensatory Time Off for Religious Observances.”

(iii) Lateral Transfer and Change of Job Assignments.

When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer.

(2) Payment of Dues to a Labor Organization.

Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices to not permit compliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.

(e) Undue hardship.

(1) Cost. An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require “more than a de minimis cost". \4\ The Commission will determine what constitutes “more than a de minimis cost” with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the Hardison decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in Hardison, would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a de minimis cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

\4\ Hardison, supra, 432 U.S. at 84.

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(2) Seniority Rights. Undue hardship would also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. Hardison, supra, 432 U.S. at 80. Arrangements for voluntary substitutes and swaps (see paragraph (d)(1)(i) of this section) do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Statute or these Guidelines precludes an employer and a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.

Sec. 1605.3 Selection practices.

(a) Scheduling of tests or other selection procedures. When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the user of the test should be aware that the principles enunciated in these guidelines apply and that it has an obligation to accommodate such employee or prospective employee unless undue hardship would result.

(b) Inquiries which determine an applicant's availability to work during an employer's scheduled working hours.

(1) The duty to accommodate pertains to prospective employees as well as current employees. Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

(2) As a result of the oral and written testimony submitted at the Commission's Hearings on Religious Discrimination, discussions with representatives of organizations interested in the issue of religious discrimination, and the comments received from the public on these Guidelines as proposed, the Commission has concluded that the use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on the employment opportunities of persons with certain religious practices. The use of such inquiries will, therefore, be considered to violate title VII unless the employer can show that it:

(i) Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for the same religious practices; or
(ii) Was otherwise justified by business necessity.

Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest and which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these Guidelines, whether an accommodation is possible. This type of inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of the usually small number of applicants who require an accommodation.

(3) The Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when:

(i) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification; and

(ii) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.

Appendix A to Sections 1605.2 and 1605.3--Background Information

In 1966, the Commission adopted guidelines on religious discrimination which stated that an employer had an obligation to accommodate the religious practices of its employees or prospective employees unless to do so would create a "`serious inconvenience to the conduct of the business". 29 CFR 1605.1(a)(2), 31 FR 3870 (1966).

In 1967, the Commission revised these guidelines to state that an employer had an obligation to reasonably accommodate the religious practices of its employees or prospective employees, unless the employer could prove that to do so would create an "undue hardship". 29 CFR 1605.1(b)(c), 32 FR 10298.

In 1972, Congress amended title VII to incorporate the obligation to accommodate expressed in the Commission's 1967 Guidelines by adding section 701(j).

In 1977, the United States Supreme Court issued its decision in the case of Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977). Hardison was brought under section 703(a)(1) because it involved facts occurring before the enactment of section 701(j). The Court applied the Commission's 1967 Guidelines, but indicated that the result would be the same under section 701(j). It stated that Trans World Airlines had made reasonable efforts to accommodate the religious needs of its employee, Hardison. The Court held that to require Trans World Airlines to make further attempts at accommodations by unilaterally violating a seniority provision of the collective bargaining agreement, paying premium wages on a regular basis to another employee to replace Hardison, or creating a serious shortage of necessary employees in another department in order to replace Hardison--would create an undue hardship on the conduct of Trans World Airlines' business, and would therefore, exceed the duty to accommodate Hardison.

In 1978, the Commission conducted public hearings on religious discrimination in New York City, Milwaukee, and Los Angeles in order to respond to the concerns raised by Hardison. Approximately 150 witnesses testified or submitted written statements. \5\ The witnesses included employers, employees, representatives of religious and labor organizations and representatives of Federal, State and local governments.

\5\ The transcript of the Commission's Hearings on Religious Discrimination can be examined by the public at: The Equal Employment Opportunity Commission, 2401 E Street NW., Washington, DC 20506.

The Commission found from the hearings that:

(1) There is widespread confusion concerning the extent of accommodation under the Hardison decision.
(2) The religious practices of some individuals and some groups of individuals are not being accommodated.
(3) Some of those practices which are not being accommodated are:
--Observance of a Sabbath or religious holidays;
--Need for prayer break during working hours;
--Practice of following certain dietary requirements;

--Practice of not working during a mourning period for a deceased relative;
--Prohibition against medical examinations;
--Prohibition against membership in labor and other organizations; and
--Practices concerning dress and other personal grooming habits.

(4) Many of the employers who testified had developed alternative employment practices which accommodate the religious practices of employees and prospective employees and which meet the employer's business needs.

(5) Little evidence was submitted by employers which showed actual attempts to accommodate religious practices with resultant unfavorable consequences to the employer's business. Employers appeared to have substantial anticipatory concerns but no, or very little, actual experience with the problems they theorized would emerge by providing reasonable accommodation for religious practices.

Based on these findings, the Commission is revising its Guidelines to clarify the obligation imposed by section 701(j) to accommodate the religious practices of employees and prospective employees.