EEOC Issues New Compliance Assistance on Religious Discrimination

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Introduction

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

• attempts to articulate what religion is and when an employer may inquire into the religious nature or sincerity of an employee’s beliefs;
• adds meaningful discussion of two exceptions to Title VII: the statutory “religious organization” exception and the First Amendment-based “ministerial” exception;
• radically expands the prior version’s disparate treatment analysis by discussing discipline, compensation, religious expression, customer preferences, bona fide occupational qualifications, and conflict with security requirements;
• delves deeply into an employer’s obligation to provide reasonable accommodation for religious beliefs and practices by commenting on modification of dressing and grooming standards, use of employer facilities for religious purposes, use of tests and other selection procedures, religious-based refusal to provide social security numbers, and other religious expression in the workplace;
• analyzes the undue hardship defense, including how coworker complaints and security concerns factor in;
• adds a completely new, comprehensive discussion of religious harassment from managers, supervisors, coworkers, and third parties; and
• addresses special considerations for employers when balancing anti-harassment and accommodation obligations with respect to religious expression.

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

Questions and Answers: Religious Discrimination in the Workplace

Questions and Answers: Religious Discrimination in the Workplace (the “Q&A”) is a quick resource guide, providing plain language answers to common questions. It begins with: “[w]hat is religion?” According to the Q&A, “religion typically concerns ultimate ideas about life, purpose, and death.” While there is case law supporting this position, in some jurisdictions, courts continue to apply a much
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The Q&A states that Title VII prohibits “subjecting employees to harassment because of ... the religious practices or beliefs of people with whom they associate (e.g., relatives, friends, etc.).” This is a holdover from the EEOC’s failed attempt in 1994 to publish seriously flawed religious harassment guidelines. The most glaring concern was the “association” language (as above). How can an employer be expected to properly identify an employee’s friends, relatives and associates; learn about their religious beliefs and practices; and ensure that nothing derogatory is said about such beliefs or practices in the workplace that might offend the employee and lead to a harassment claim? Indeed, Congress thought so little of these flawed guidelines that, although the comment period had expired, Congress passed a nearly unanimous resolution that if the EEOC did not withdraw the guidelines, Congress would withdraw the agency’s funding. The EEOC withdrew the guidelines to receive its funding, and the proposed 1994 guidelines never saw the light of day. The resurrection of this concept in this recent guidance is troubling and remains problematic. Apart from this point, the Q&A can be helpful to employers in working through religious issues in the workplace.

The Q&A provides useful guidance regarding the scope of religious disparate treatment and harassment. The answers describe a wide range of situations in which disparate treatment may occur, including hiring, discharge, and all other terms and conditions of employment. The answers also specifically advise that treating the religious expression of persons of different faiths differently is illegal. In other words, if one employee is allowed to display a Bible in his cubicle, the similarly situated employee in the next cubicle must not be prevented from displaying her Koran.

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

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

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

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

Finally, the Q&A poses the question, “[w]hat are common methods of religious accommodation in the workplace?” The multi-page answer exploresthe implications of religious accommodations, voluntary substitutes, and shift swaps. The answer also advises that it may be necessary to remove tasks from employees or move them to other positions, but it notes that there may be many factors (i.e., lack of replacement workers, lack of other available positions, and the application of a collective bargaining agreement or seniority system) that could contribute to a finding that removing tasks or changing positions would present an undue hardship. See, e.g., Aron v. Quest Diagnostics Inc., 174 Fed. Appx. 82 (3d Cir.), cert. denied, 127 S.Ct. 393 (2006); George v. Home Depot, 2001 U.S. Dist. LEXIS 20627 (E.D. La. Dec. 6, 2001), aff’d, 2002 U.S. App. Lexis 21824 (5th Cir. 2002).

Dress and grooming standards are an area in which the EEOC expects employers to be liberal in their provision of accommodations. For example, in EEOC v. Alamo Rent-A-Car, LLC, a jury awarded a Muslim woman more than $287,000 in damages after her employer refused to allow her to wear a headscarf; at work and failed to demonstrate what steps it took to attempt to accommodate her. EEOC v. Alamo Rent-A-Car LLC, No. CIV 02-01908-PHX-ROS (D. Ariz. June 2007) (jury verdict); see also EEOC v. Alamo Rent-A-Car LLC, 432 F. Supp. 2d 1006 (D. Ariz. 2006) (summary judgment for plaintiff on liability).

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

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

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

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

The check on religious expression comes
when an undue hardship is created. The Q&A
advises that if a coworker complains about
“proselytizing,” the employer may require that
the “proselytizing to the complaining employee
cease.” (emphasis added). An employer may
also limit an employee’s religious expression
when the expression could be mistaken for the
employer’s message rather than the private sen-
timents of the communicator. Finally, religious
expression may be limited where the expres-
sion is “harassing or otherwise disruptive.”
Exactly what “ otherwise disruptive” means is
left for a case-by-case analysis. Without ques-
tion, this is still the area in which lines are the
least clearly drawn. Employers should inves-
tigate thoroughly, seek counsel, and make
informed decisions about how and when to
limit religious expression in the workplace.

Best Practices for Eradicating
Religious Discrimination in the
Workplace

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

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

The EEOC’s recommended best practices in
the area of reasonable accommodation/undue
hardship include the following proactive steps
that many employers may consider taking:

• inform employees (perhaps as part of
general non-discrimination policies) that
the employer will make reasonable efforts
to accommodate religious practices;

• train management to recognize religious
accommodation requests;

• develop internal procedures for process-
ing religious accommodation requests
(many employers have such forms for dis-
ability accommodation requests, but they
have not yet developed them for religious
accommodation requests);

• if an employee who wants to wear reli-
gious garb has regular interaction with
customers, consider whether it might be
possible for the employee to wear the
garb in the company’s uniform colors;

• train management not to engage in ste-
reotyping based on religious dress and
grooming practices;

• train management “to gauge the actual
disruption posed by religious expression
in the workplace, rather than merely
speculating that disruption may result;”

• be sensitive to the risk of pressuring
employees to attend social gatherings
after they make a religion-based objection
to attending; and

• incorporate a discussion of religious
expression into anti-harassment training for
both managers and employees.

Summary

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