Bloomberg BNA

BNA's
Health Law Reporter™

Religious Accommodation Issues for the Health Care Employer: Termination of Pregnancy and Related Issues

By Robert Wolff and Alex Frondorf

Introduction: The Employer's Duty

Health care employees who object to providing patient care for women seeking an abortion have long presented a thorny issue for health care employers. A recent settlement in the U.S. District Court for the District of New Jersey is a reminder that this issue continues to raise tricky questions. Nonetheless, a careful employer can successfully navigate the issue and avoid common pitfalls associated with walking the tightrope between accommodating an employee's religious beliefs without compromising the integrity of the health care employer's mission.

Hospitals that receive federal funds are prohibited from requiring employees to participate in abortions if it ''would be contrary to [their] religious beliefs or moral convictions.'' 42 U.S.C. § 300a-7. In *Danquah v. University of Medicine & Dentistry of New Jersey* (UMDNJ) (21 HLR 23, 1/5/12), a group of nurses sought to enforce this prohibition through an injunction after UMDNJ changed its policies in September 2011, requiring all nurses to assist in termination-of-pregnancy procedures. The parties entered into a settlement that allowed the objecting nurses to refrain from participating in nonemergency care of patients seeking or obtaining an abortion.

Robert Wolff is co-chair of the health care practice at Littler Mendelson PC, the nation's largest employment and labor law firm representing management, and a shareholder in the Cleveland office. Alex Frondorf is an associate in the Cleveland office of Littler Mendelson PC. The authors can be reached at rwolff@littler.com and afrondorf@littler.com, respectively.

While all hospitals and medical facilities that receive federal funds through the Public Health Service Act, the Community Mental Health Services Act, or the Developmental Disabilities Services and Facility Act should be mindful of this prohibition, medical providers that do not receive federal funds also should beware of potential pitfalls when an employee objects to participating in abortion-related medical care or otherwise seeks special accommodation based upon religious beliefs.

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., an employer may not discriminate on the basis of religion with regard to any aspect of employment, including recruitment, hiring, assignments, or discharge. This also means that an employee cannot be required to refrain from participating in a religious activity as a condition of employment. Title VII also requires an employer to reasonably accommodate the religious practices of an employee or prospective employee, unless doing so would create an undue hardship on the employer. A reasonable religious accommodation is any adjustment to the work environment that will allow an employee to practice his or her religion and eliminates the conflict. When a religious accommodation is requested, an employer is required to work in good faith to resolve the conflict between the employee's religious needs and the obligations of the job. An employer, however, is not required to provide the accommodation specifically requested by the employee, as long as the accommodation resolves the conflict between the religious need and the demands of the job.

The Equal Employment Opportunity Commission Compliance Manual, Section 12: Religious Discrimination (July 22, 2008) (EEOC manual)[1], provides a wealth of information in regard to the health care employer's obligations to reasonably accommodate religious beliefs that interfere with an employer's reasonable workplace expectations. As observed in the EEOC manual, ''religion'' is very broadly defined under Title VII. The statute defines religion to include ''all aspects of religious observance and practice as well as belief.'' 42 U.S.C. § 2000(e)(j). In addition to universally known re-

[1] The EEOC manual is available at http://www.eeoc.gov/policy/docs/religion.html.

 ISSN 1064-2137

ligions such as Islam, Christianity, and Hinduism, the Supreme Court has extended the definition of religion to beliefs that ''need not be acceptable, logical, consistent, or comprehensible to others in order to merit . . . protection.'' *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981). Accordingly, the EEOC manual (citing the Fourth Circuit decision in *Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986)) concludes that it would be an unlawful act for an employer, absent undue hardship, to deny a Wiccan (a person who practices witchcraft) time off on Halloween to attend the ''Samhain Sabbat.''

A belief is religious, for Title VII purposes, if it is ''religious in the person's own scheme of things.'' *Redmond v. GAF Corp.*, 574 F. 2d 897, 900-901, n.12 (7th Cir. 1978). It is ''religion'' if it is a ''sincere and meaningful belief that occupies in the life of its possessor a place parallel to that filled by . . . God.'' *United States v. Seger*, 380 U.S. 163, 176 (1969); 29 C.F.R. § 1605.1. Religion addresses ''fundamental questions about life, purpose and death.'' *See United States v. Meyers*, 906 F. Supp. 1494, 1502, *aff'd*, 95 F.3d 1475, 1483 (10th Cir. 1996). Whether a practice is religious does not turn on the nature of the activity, but instead, focuses on the motivation of the actor. The belief must be sincerely held in order for the employee to be entitled to accommodation. For example, an employee seeking time off for religious observance arguably does not sincerely hold that belief if he had previously asked for the same days off for unrelated reason such as a family vacation or school reunion. *See Hansard v. Johns-Manville Prods. Corp.* (E.D. Tex. Feb. 16, 1973). Social, political, or economic philosophies are not religious beliefs under Title VII. *Slater v. King Soopers Inc.*, 809 F. Supp. 809, 810 (D. Colo. 1992) (the Ku Klux Klan is not a religion for Title VII purposes).

The reasonable accommodation obligation for religious beliefs is a significantly different standard than the obligation to reasonably accommodate an individual with a disability imposed under the Americans with Disabilities Act (ADA). The distinction arises from the very different definitions of undue hardship under Title VII and the ADA. Compare *Transworld Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (defining undue hardship under Title VII), with 42 U.S.C. § 12111 (10)(A) (definition of undue hardship under the ADA). Proving undue hardship under the ADA is a stringent and exacting standard. However, an undue hardship—as a defense to providing a specific accommodation to religious belief under Title VII—is anything more than a *de minimis* cost or burden. Like the ADA, however, there are no magic words that need to be spoken to put the employer on notice of the need for an accommodation. The obligation is to provide ''enough information'' to make the employer aware of the tension between the individual's religious practices or beliefs and the job requirements. *See Hellinger v. Eckard Corp.*, 67 F. Supp. 2d 1359 (S.D. Fla. 1999).

Also, similar to reasonable accommodation under the ADA, the employer must engage in the interactive process in responding to an employee's request for reasonable accommodation. *See Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 n.5 (10th Cir. 2000). However, the employer needs some advance notice of the need for accommodation. In its manual, Example 29, the EEOC posits the situation of an employee who refuses to sign the consent form for a drug test, and after his termination, alleges that his religious beliefs precluded him from ''swearing an oath.'' Because the employee did not notify the employer of his religious beliefs prior to this refusal, the termination did not violate Title VII. *See Cary v. Carmichael*, 908 F. Supp. 1334 (E.D. Va. 1995), *aff'd*, 116 F.3d 472 (4th Cir. 1997).

Where the request for accommodation does not provide sufficient information for the employer to determine the bona fides of the request, it can make a limited inquiry into the underlying circumstances of the employee's assertion that the belief or practice at issue is religious and sincerely held (and results in a need for accommodation). The sincerity of the belief does not need to be accepted without question. Indeed, in the EEOC manual, Example 30, a dues-paying member of a union, following a work-related dispute with his union, alleged that the union activities were contrary to his religious beliefs. In this instance, it is reasonable to ask the employee to provide additional information supporting the assertion that his religious convictions preclude him from supporting the union. Moreover, when more than one reasonable accommodation is available, the employee is not necessarily entitled to his or her preferred accommodation. For example, an employee who observes the Sabbath on Saturday may prefer not to work on weekends at all, but the duty to accommodate is satisfied if he or she is offered Sunday work hours instead. *Wilshin v. Allstate Ins. Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002).

The Employer's Obligation Toward Applicants

At the pre-hire stage, it is unlawful to ask an applicant about his or her religious affiliation or beliefs. 29 C.F.R. § 1605.3(b). However, it is not unlawful to inquire whether an applicant can perform the essential functions of the position. Thus, it should not be problematic to ask an applicant whether he or she could assist with performing medical procedures that result in the termination of a pregnancy, as long as the question is not phrased in such a way as to inquire whether there are religious reasons why the applicant could not assist with these procedures. Employees, however, are obligated to tell the employer about the need for a religious accommodation at the time the job is accepted or upon becoming aware of the need for the accommodation. The request also should be clear that the need is based upon a bona fide, or ''sincerely held'' religious belief, observance, or practice.

While there is some risk that refusing to hire candidates who refuse to perform these procedures could lead to a charge of religious discrimination, there are steps employers can take to reduce the risk. On this point, the EEOC offers employers the following guidance on best practices (Best Practices for Eradicating Religious Discrimination in the Workplace, available at http://www.eeoc.gov/policy/docs/best_practices_religion.html):

- Establish written objective criteria for evaluating candidates for hire or promotion and apply those criteria consistently to all candidates.
- Ask the same questions of all applicants for a particular job or category of jobs and inquire about matters directly related to the position in question.

Employers also should consider revising written job descriptions to reflect that a medical employee may be

   ISSN 1064-2137

required to perform medical procedures involving the termination of pregnancy, when applicable. Moreover, when applicable, applicants for medical positions should be advised that they will be required to assist with these procedures, and asked whether they can do so.

The Duty to Accommodate: Case Studies

The EEOC manual provides an example directly applicable to health care employers dealing with employees who refuse to participate in any pregnancy termination procedure. Example 34 states:

> 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.

This accommodation was lawful, even though it was not the nurse's preferred accommodation. This example was based on the facts of *Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220, 226 (3d Cir. 2000). In *Shelton*, the court held that under Title VII, an inability to ''participate in ending a life'' through an abortion procedure is a legitimate religious belief that must—if possible—be accommodated. Thus, if an applicant or employee states he or she cannot perform an abortion-related procedure based on religious grounds, the employer may have a duty to accommodate those religious objections, unless it would cause an undue burden. If there are no alternate positions or shifts that would eliminate the need for the applicant or employee to participate in abortion-related procedures and if there is insufficient staff to cover for applicants or employees who refuse to participate in these procedures, then a court could find that providing an accommodation to applicants or employees would place an undue burden on the employer. Alternatively, if other, nonobjecting employees could perform these procedures and there is ample work for the objecting employee or applicant to perform during his or her shift, then a court may find that a reasonable accommodation is feasible.

The analysis of what constitutes an undue hardship is made on a case-by-case factual basis. The EEOC guidelines [2] (set forth in the Code of Federal Regulations) define the relevant factors as: the ''type of workplace,'' the ''nature of the employee's duties,'' the ''identifiable cost of the accommodation in relation to the size and operating cost of the employer,'' and the ''number of employees who will in fact need a particular accommodation.'' 29 C.F.R. § 1605.2(e). The EEOC has opined that a reassignment or transfer that will result in regular payment of overtime to another employee is an undue hardship while the infrequent or sporadic payment of overtime is not. *See* EEOC Guidelines, 29 C.F.R. § 1605.2(e)(1). However, any proposed religious accommodation that would deprive another employee of bona fide seniority or collective bargaining rights is an undue hardship. *See Transworld Airlines Inc. v. Hardison*, 432 U.S. 63, 80 (1977). As explained in the EEOC manual, Example 37, however, it is not an undue hardship if other employees are willing to voluntarily swap shifts.

The EEOC manual also discusses two examples of a pharmacist who refuses to distribute contraceptives. In Example 43, the pharmacist, based on sincere religious beliefs, informs the employer that he will not participate in distributing contraceptives or answering patient inquiries. The employer's offer to allow the pharmacist to signal another employee to take over servicing any patient who needs help regarding filling a prescription for contraceptives clearly is a reasonable accommodation. However, as shown in Example 44, the pharmacist who puts such patients on hold indefinitely, or walks away from the patient rather than engaging, may lawfully be terminated because a patient has the legitimate expectation that he or she will be provided with adequate information regarding the prescription and will not be ignored. To allow inappropriate treatment of a patient is not a reasonable accommodation. *See Noesen v. Med. Staffing Network Inc.*, 2007 WL 1302118 (7th Cir. May 2, 2007) (unpublished).

Other areas in which requests for religious accommodation frequently occur concern dress codes and attire. For example, wearing a hijab, or headscarf, is a visible expression of faith for many Muslim women. Accommodating this attire typically is reasonable and does not present undue hardships. If the employee requests an accommodation for a full headpiece, however, with only the eyes showing, some issues have arisen, especially in the health care field. In *EEOC v. Regency Health Associates*, No. 1:05-cv-2519 (N.D. Ga. *filed* Aug. 2, 2007) a medical assistant in a pediatric health clinic wore a hijab, but informed her employer of her intent to begin wearing a full headpiece. The clinic objected because it was important for patients—especially children—to see the face of the medical providers. Management informed her that it would consider potential accommodations; however, before a final decision could be made the medical assistant resigned and filed suit. The clinic argued that it had not made a final decision in the matter and the jury agreed, and found for the clinic. While the case was not decided on the reasonableness of the accommodation, it raises (but does not fully resolve) a tricky question of the extent to which a medical provider must make an accommodation for patient caregivers.

A particularly difficult balance is needed when the rights of an individual to express or share his or her religious views conflict with another employee's wish to be free from religious proselytizing or harassment. Both of these rights are protected under Title VII. As stated in the EEOC manual, 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. However, an employee's religious expression can create an undue hardship if it disrupts the work of other employees or threatens to constitute unlawful harassment. For example, it has been held that an employee has the right to tell patients ''have a blessed day.'' *See Anderson v. U.S.F. Logistics Inc.*, 274 F.3d 470, 476 (7th Cir. 2001). However, it

[2] The EEOC guidelines are available at http://op.bna.com/pl.nsf/r?Open=byul-8tdvuk.

would pose an undue hardship on the employer to permit the employee to send communications ''in the name of Jesus Christ of Nazareth.'' *Johnson v. Halls Merch.*, 1989 WL 23201 (W.D. Mo. Jan. 17, 1989).

In another case involving religious expression, the court concluded that it was a reasonable accommodation to excuse an ultrasound technician from performing ultrasounds for women contemplating abortions, but the hospital did not have to allow the technician to provide pastoral counseling as that accommodation would have resulted in an undue hardship. *Grant v. Fairview Hospital & Healthcare Serv.*, 2004 WL 326694 (D. Minn. Feb. 18, 2004). Likewise, an employee may have deeply held religious beliefs regarding homosexuality. That does not, however, entitle him or her to be excused from training on the company's diversity policy that ''reinforces the employer's conduct rule regarding employees not to discriminate against or harass other employees and to treat one another professionally.'' *See* EEOC manual, Example 54.

In sum, health care providers, regardless of their source of funding, should exercise caution when employees object or refuse to provide care for patients in connection with the termination of a pregnancy or otherwise seek accommodation of religious beliefs. A careful analysis of the request and its impact upon the hospital's mission is required, with due deference to all competing interests.

  HLR ISSN 1064-2137