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ACCOMMODATING RELIGIOUS BELIEFS – WHAT EMPLOYERS SHOULD CONSIDER THIS HOLIDAY SEASON

by Claudia D. Orr

Most employers are aware of the prohibitions against discrimination based on the religious beliefs or practices (or the lack thereof) of their employees under both federal and state civil rights laws. See Title VII (42 U.S.C. § 2000e-2) and the Elliott-Larsen Civil Rights Act (M.C.L. § 37.2202). But, federal law (applicable to employers having 15 or more employees) also requires an employer to make a reasonable accommodation for its employees' religious observances and practices.

In the 10 years following the first Gulf War, religious discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) nearly doubled. With the upcoming season of religious holidays, employers should be prepared to respond to requests for accommodations.

First, only a "sincerely held" religious belief (and not simply a purely personal preference) needs to be accommodated. However, a sincerely held belief may be one that is debated among others of that sect and not necessarily a uniformly held belief of those practicing the specific religion. Thus, the employee needs not belong to a "sect" that forbids what is required of him by his job to invoke the protection of Title VII.

The EEOC, which is charged with enforcing Title VII, further defines religious beliefs to include moral or ethical beliefs as to what is right and wrong, regardless of whether any religious group (including the one to which the employee belongs) holds such beliefs, provided they are sincerely held with the same strength as religious views. But there are limits. For example, one court found that the Ku Klux Klan is not a religion, but rather a political/social organization.

Federal law will protect such things as an employee's participation in a regularly scheduled Bible class, observance of the Sabbath's restriction on work, and attendance in classes for conversion to a religion, but it would not protect an employee who refused to work because he wanted to attend a church play, which is more social in nature.

Federal law (applicable to employers having 15 or more employees) also requires an employer to make a reasonable accommodation for its employees' religious observances and practices.

Most requests for accommodation involve a conflict with the work schedule, but requests may also concern an opportunity to pray, the need for a quiet space to worship during the workday, or a variance from the dress code or grooming standards. Employees only need to provide enough information about their religious needs to permit the employer to understand the religious conflict (i.e., "I cannot work on Saturdays because of my

religious beliefs and practices as a Jew."). Further delving into the tenets of the faith by the employer is inappropriate. So what is required of an employer when such a request is made?

Title VII requires accommodation for current and prospective employees' religious observances or practices unless the employer can demonstrate that it cannot do so without causing an undue hardship on the employer's business. An accommodation will create an undue hardship if it results in more than a de minimus cost to the employer.

In determining whether more than a de minimus cost would result, the EEOC considers the cost in relation to the size and operating cost of the employer and the number of employees who require the accommodation. The administrative costs associated with changing work schedules is de minimus. However, the EEOC will not assume that the infrequent payment of overtime, or temporary overtime pay while a more permanent solution is sought, is more than a de minimus cost.

Title VII doesn't require an employer to allow the employee to select the accommodation of his or her choice, or require the employer to prove that the employee's preferred accommodation would have been more burdensome than the one granted. The employer is only required to provide some accommodation – not necessarily the one requested by the employee. However, one employer, which offered its employee a different job on the night shift so that he would not be required to work around sexually explicit pictures, may have violated federal law by offering an accommodation that the employee felt was punitive and prevented him from spending time with his family.

For scheduling conflicts, **the EEOC suggests that employers should consider flexible scheduling (for arrival, departure and break periods), permitting make up time, floating or optional holidays, voluntary substitution or swaps, job reassignments or bidding, and lateral transfers.** But, employers are not required to accommodate an employee in this manner where doing so would deny another employee an employment benefit, job assignment or shift preference to which they are entitled under a bona fide seniority system or collective bargaining agreement. Unions and management are free, of course, to negotiate arrangements for voluntary swaps as part of the collective bargaining agreement.

Employers, however, should not simply leave it up to their employees to find someone willing to swap shifts. Employers must do more. The EEOC suggests that employers should consider publishing a policy promoting an atmosphere where such substitutions are regarded favorably or, at a minimum, provide some mechanism to assist the employee in making such arrangements (i.e., a bulletin board for posting requests). One employer ran afoul when it took a survey of employees' views on accommodating a co-worker's scheduling needs after it had permitted voluntary swaps for a period of time. While swaps had been fairly easy to obtain for the employee pre-survey, they became virtually impossible afterward.

The EEOC suggests that employers should consider publishing a policy promoting an atmosphere where substitutions (shift swapping) are regarded favorably or, at a minimum, provide some mechanism to assist the employee in making such arrangements.

The court in the ensuing litigation reasoned that the employer's survey may have discouraged, or at least frustrated, the swapping process, thus impeding the employee's ability to be reasonably accommodated. Another employer who initially granted a day off for a religious ceremony, and then revoked the permission, violated Title VII because it did not provide the employee with a good faith explanation for its decision.

At a minimum, **an employer faced with a request for an accommodation is required to explore potential accommodations and make a determination as to whether each would cause an undue hardship.** An employer may not simply accommodate one of the employee's religious practices, while ignoring a request to accommodate his other religious practices. Requests for unpaid leave may be a reasonable accommodation except where such action results in a staffing shortage and undue hardship. While requiring an employee to utilize his or her vacation time for religious observances and practices may be a reasonable accommodation, doing so when the number of days needed off will exhaust or exceed the allotted vacation bank may violate Title VII.

Unfortunately, there is no hard and fast rule, except

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"reasonableness." As one court explained "[t]he term 'reasonable accommodation' is a relative term and cannot be given a hard and fast meaning. Each case involving such a determination 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."

Clearly, the courts struggle with providing clear guidance and the judicial approach appears ad hoc. However, it is clear that best practices include first discussing with the employee any ideas that the employee or you have concerning potential accommodations and then making a reasoned analysis of what can be done without incurring an undue hardship.

As always, document the discussions, analize the situation and make a determination. When in doubt, contact legal counsel before denying any request.

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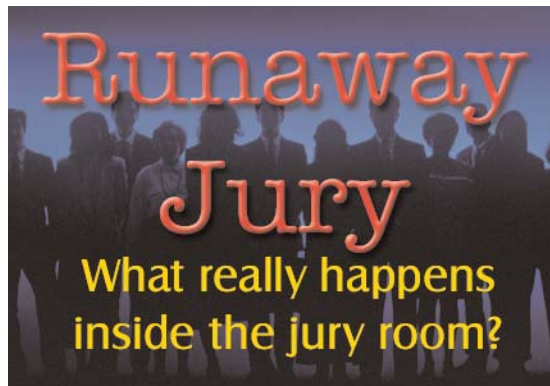

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