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# Workplace Religious Accommodations under the Supreme Court's New "Substantial Increased Costs" Standard

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# WORKPLACE RELIGIOUS ACCOMMODATIONS IN 2023

- On June 29, 2023, the U.S. Supreme Court issued its decision in *Groff v. DeJoy*, 143 S. Ct. 2279 (2023), which ***clarified*** that an employer establishes "***undue hardship***" under Title VII when "***the burden of granting an accommodation would result in <u>substantial increased costs</u> in relation to the conduct of its particular business.***"
- Under the old standard (from 1978), the employer needed to show only "***more than a de minimis cost***" in order to establish an "undue hardship."

# “Common” Types of Religious Accommodation Requests

- A Catholic employee needs a schedule change to attend church on Good Friday;
- A Muslim woman who wears a hijab (headscarf);
- A Jewish man who wears a yarmulke (skullcap);
- A Seventh Day Adventist needs a schedule change to not be scheduled on the Sabbath, which is from Friday at sunset to Saturday at sunset; and
- A Muslim employee needs a break schedule that will permit daily prayers at prescribed times.

# Overview: What Does the Law Provide?

- Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on religion.
  - This includes refusing to ***reasonably accommodate*** an employee or applicant's ***sincerely held religious beliefs or practices*** unless the accommodation would impose an ***undue hardship***.
  - State anti-discrimination laws may include accommodation requirement.

# STATUTORY TEXT

- Under Title VII, it unlawful for covered employers “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 . . . religion.” 29 U.S.C. § 2000e–2(a)(1).
- In 1972, Congress amended Title VII to clarify that employers must “reasonably accommodate . . . an employee's or prospective employee's ***religious observance or practice***” ***unless*** the employer is “unable” to do so “***without undue hardship on the conduct of the employer's business***.” 29 U.S.C. § 2000e(j).

# STATUTORY TEXT (CONT.)

- Section 703(h) of Title VII states that "[n]otwithstanding any other provision of this subchapter, it shall ***not*** be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a ***bona fide seniority or merit system***." 42 U.S.C. § 2000e–2(h).
- "[A]bsent a discriminatory purpose, the ***operation of a seniority system*** cannot be an unlawful employment practice even if the system has some discriminatory practices." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)

# Key Terms to Define

- “**Religion**”
- “**Sincerely Held**”
- “**Accommodation**”
  - Reasonable
  - Notice
  - Discussion of Request (Interactive Process)
- “**Undue Hardship**” (*modified by *Groff v. DeJoy**)
  - “De Minimis Costs” standard (old standard)
  - “Substantial Increased Costs” standard (new standard)

# DEFINING "RELIGION"

- "Religion" includes not only traditional, organized religion, 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 those that may seem illogical or unreasonable.
- An employee's belief/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."

# DEFINING "RELIGION" (CONT.)

- Social, political, or economic philosophies, or personal preferences, are not "religious" beliefs under Title VII.
- Some practices are religious for one person, but not religious for another person.
- **Example:** One person may not work on Saturday for religious reasons; another person may not work on Saturday for family reasons.
  - Under Title VII, a practice is only religious if the employee's reason for the practice is religious

# Example: *Coutier v. Costco Wholesale*

- Costco's policy prohibited employees from wearing "facial jewelry" (piercings) at work.
- A cashier with an eyebrow piercing belonged to the **Church of Body Modification**, which encourages extensive body piercings and tattoos.
- The employer offered an accommodation of allowing her to wear either a Band-Aid or a plastic retainer in the pierced site. She refused and was terminated.
- The court held that Costco's proposed accommodations reasonably respected her expressed religious beliefs while protecting the employer's legitimate interest in maintaining  workforce that is professional in appearance.

# Defining “Sincerely Held”

- Employers must accommodate only “sincerely held” beliefs.
- Factors that might undermine an employee’s assertion that he/she sincerely holds the religious belief at issue include:
    - If the employee has behaved in a manner markedly inconsistent with the professed belief;
    - If the accommodation is a particularly desirable benefit for secular reasons;
    - If 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).

# Defining “Sincerely Held” (cont.)

- None of those factors is dispositive in determining sincerity.
- A religious practice may be sincerely held even if the person just adopted it, does not consistently observe it, or it is different from the commonly followed tenets of the religion.
- **EEOC:** Because the definition of religion is broad and protects beliefs and practices with which the employer may be unfamiliar, you should ordinarily assume that an employee’s request for a religious accommodation is based on a sincerely held religious belief.
- But, If the employer has objective basis for questioning the sincerity of a particular belief, the employer is justified in seeking additional supporting information.

# EXAMPLE: *EEOC V. ALDI*

- Aldi employee described herself as “a Christian, Protestant, and a Born Again Christian,” who claimed that the store failed to accommodate her belief that it is a sin to work on the Sabbath or to ask another to work on the Sabbath, which, in accordance with her beliefs, falls on a Sunday.
- Aldi questioned the sincerity of her religious beliefs because (1) prior to Aldi being open on Sundays, she wanted Saturdays off to spend time with family; and (2) because she “does not attend church on Sundays, but spends time with her family, reads the Bible, and watches a preacher on television.”
- Court found that her beliefs were religious in nature and sincere enough to create a jury question and denied summary judgment to employer.

# Defining “Accommodation”

- An accommodation means making reasonable adjustments to the work environment that will allow an employee to practice her/his religion and comply with her/his beliefs.
- The term “reasonable” is not defined in Title VII.  What is reasonable is “relative” and “fact specific.”
- **EEOC:** An accommodation is not “reasonable” if it merely lessens—rather than eliminates—the conflict between religion and work.
  - Eliminating the conflict between a work rule and an employee’s religious belief means accommodating the employee without unnecessarily disadvantaging the employee’s terms, conditions, or privileges of employment.

# Defining “Accommodation” (cont.)

- Examples of (usually) reasonable accommodations:
  - Allowing voluntary shift swaps
  - Providing time off for religious holidays
  - Providing flexible break times for prayer
  - Relaxing dress codes
- Is it an “accommodation” if the employer already allows the practice?

# Defining “Accommodation” (cont.)

- Employer *may* choose the accommodation.
  - Where there is more than one accommodation that would not pose an undue hardship, the employer is not obligated to provide the employee’s preferred accommodation.
  - 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
    - If it requires the employee to accept a reduction in pay rate or other loss of a benefit/privilege and the alternative accommodation does not do so.

# EXAMPLE: *WILSHIN V. ALLSTATE INS. CO.*

- 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.

# Defining “Notice”

- No magic words are needed to place an employer on notice, but typically an applicant or employee who seeks a 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.
- Likewise, the employer should not assume that a request is invalid simply because it is based on unfamiliar religious beliefs or practices.

# Defining “Interactive Process”

- Title VII does not require that an employer engage in the interactive process (as with the ADA).
- However, case law has made it clear that the employer and employee must engage in discussions about the religious accommodation request before denying an accommodation.
- Courts have found that employers who fail to engage in the interactive process subsequently lack the evidence needed to meet their burden of proof to establish that a proposed accommodation would actually have posed an undue hardship.

# Old "Undue Hardship" Standard (pre-*Groff*)

- In *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), the Supreme Court held that that requiring an employer to bear more than a "***de minimis cost***" is an "undue hardship" justifying denial of a religious accommodation.
- In *Hardison*, the plaintiff was a Seventh Day Adventist who needed to be off from sunset on Friday to sunset on Saturday.
- The conflict went away when the plaintiff switched to the night shift, but it resurfaced when he sought a transfer to the day shift and he did not have enough seniority to avoid work during his Sabbath.

# Old "Undue Hardship" Standard (pre-*Groff*)

- The Court identified no way in which TWA, without violating seniority rights, could have feasibly accommodated Hardison's request for an exemption from work on his Sabbath.
- The parties had not focused on determining when increased costs amount to "undue hardship" under Title VII separately from the seniority issue.
- But the Court's opinion in *Hardison* contained this oft-quoted sentence: "***To require TWA to bear <u>more than a de minimis cost</u> in order to give Hardison Saturdays off is an undue hardship***."

# New “Undue Hardship” Standard

- Gerald Groff is an evangelical Christian whose religious beliefs prohibit him from working on Sundays in observation of the Sabbath.
- In 2013, USPS entered into an agreement with Amazon to facilitate Sunday deliveries.
- As a result, Groff was instructed that he would have to work on Sundays. Groff requested a transfer to a smaller USPS station that at the time did not make Sunday deliveries.
- But shortly thereafter, his new station began making deliveries on Sundays.

# New “Undue Hardship” Standard (cont.)

- In an effort to accommodate Groff’s religious beliefs, USPS offered to find other postal carriers to cover Groff’s Sunday shifts, but on numerous occasions, no co-workers were available.
- USPS also offered to allow Groff to come in late on Sundays after church, to allow Groff to take another day off to observe the Sabbath, and to excuse Groff if he could find his own Sunday coverage.
- When no co-workers were available to cover his Sunday shifts, Groff was progressively disciplined for failure to report to work, and he ultimately resigned.

# New “Undue Hardship” Standard (cont.)

- Writing for a unanimous Court, Justice Alito rejected the lower courts’ application of the *Hardison* “de minimis” standard.
- The Supreme Court ultimately declined to overrule *Hardison* and instead clarified the meaning of “undue hardship” under Title VII.
- The Court held that the correct reading of Hardison is that to deny a religious accommodation, “***an employer must show that the burden of granting an accommodation would result in <u>substantial increased costs</u> in relation to the conduct of its particular business***” – mere “additional costs” are not sufficient.

# "Substantial Increased Costs" Standard

- This is a fact-specific inquiry, and the Court directed lower courts to consider "all relevant factors in the case at hand, including ***the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of the employer***."
- The Court also suggested that its clarification may prompt little, "if any," change in the EEOC's existing guidance that no undue hardship would be imposed by "***temporary costs, voluntary shift swapping, occasional shift swapping or administrative costs***."

# “Substantial Increased Costs” (cont.)

- The following are **NOT** an “Undue Hardship”
  - A coworker's dislike of “religious practice and expression in the workplace”
  - “[E]mployee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice”
- “Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations.”

# EEOC Examples (cited by *Groff*)

- EEOC Dec. No. 71–779 (Dec. 21, 1970) (no undue hardship in permitting nurse to wear religious headscarf)
- EEOC Dec. No. 71–463 (Nov. 13, 1970) (no "undue hardship" or "unreasonable burde[n]" for employer to train co-worker to cover two-week religious absence)
- EEOC Dec. No. 70–580 (Mar. 2, 1970) (manufacturing employer asked to accommodate sundown-to-sundown Sabbath observance did not carry "burden ... to demonstrate undue hardship" where it did not address "whether another employee could be trained to substitute for the Charging Party during Sabbath days, or whether already qualified personnel ha[d] been invited to work a double shift")

# EEOC Examples (cont.)

- EEOC Dec. No. 70–670 (Mar. 30, 1970) (no “undue ‘hardship’ ” in having other employees take on a few more on-call Saturdays per year)
- EEOC Dec. No. 70–110 (Aug. 27, 1969) (employer could not deny employee all Sunday “overtime opportunities” on basis of employee's religious inability to work Saturday, where others not working the full weekend had been accommodated, notwithstanding employer’s claim of “considerable expense”);
- EEOC Dec. No. 70–99, (Aug. 27, 1969) (no obligation to accommodate seasonal employee unavailable for Saturday work, where employer showed both “no available pool of qualified employees” to substitute and a “practical impossibility of obtaining and training an employee” to cover one day a week for six weeks).

# Health and Safety

- The *Groff* decision was silent as to whether health and safety impacts can be an undue hardship.
- Court left in place EEOC guidance providing that health and safety impacts can be an undue hardship.
- Examples
  - Mandatory vaccination policies
  - Breaks on manufacturing lines
  - Religious garb on manufacturing lines.

# IMPACT ON COWORKERS

- "Impacts on coworkers are relevant, but only 'coworker impacts' that go on to 'affec[t] the conduct of the business.'"
  - A coworker's dislike of "religious practice and expression in the workplace" or "the mere fact [of] an accommodation" is not "cognizable to factor into the undue hardship inquiry."
- Two Questions
  - (1) Does the requested accommodation negatively impact coworkers?
  - (2) Does that negative coworker impact affect the conduct of the business.

# What About Seniority Rights?

**EEOC Guidance [29 C.F.R. § 1605.2]**

- "***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***."

# SENIORITY RIGHTS (CONT.)

**EEOC FAQ re: Religious Discrimination in the Workplace**

- *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.

# PRE-*GOFF* EXAMPLE: *HARRELL V. DONAHUE*

- Postal Service employee requested a religious accommodation to have every Saturday off because working at any time between sundown Friday to sundown Saturday conflicted with his religious beliefs as a Seventh Day Adventist.
- This request would have violated the bidding schedule of the CBA and would have violated the post-office's long-standing seniority system for scheduling.
- "By seeking every Saturday as a scheduled day off, Harrell effectively asked for the USPS to make a unilateral change to his bid position so that he would operate under a fixed schedule rather than a rotating one. However, the CBA prohibited the USPS from making this accommodation, and doing so would have therefore imposed an undue hardship."

# HARRELL V. DONAHUE (CONT.)

- Harrell also argued that USPS could have accommodated him through annual leave and approved leave without pay.
- Court noted that USPS utilized a seniority system to schedule work for full-time letter carriers.
  - Under this system, the most senior full-time letter carrier had a fixed schedule with every Saturday and Sunday off while the other six full-time letter carriers and the full-time letter carrier technician had a rotating schedule with Sunday and one other rotating day off each week.
  - Court noted that “relieving Harrell, the most junior full-time letter carrier, of his responsibility for Saturday work would have violated the seniority system and required the USPS to assign another letter carrier in Harrell's place.”

# PRE-*GOFF* EXAMPLE: *EEOC V. MESABA AIRLINES*

- Mesaba Airlines (a subsidiary of Delta) agreed to reinstate and pay several customer-service employees who were denied schedule accommodations for either Christian or Jewish Sabbath observations.
- The company policy prohibited voluntary swapping of shifts during the probationary period — preventing the new employees from trading shifts in order to attend church or not work during their Sabbath observation.
- A federal judge in Minnesota approved a $130,000 settlement for the employees.

# PRE-*GOFF* EXAMPLE: *STURGILL V. UPS*

- UPS delivery driver was awarded more than $100,000 in back pay and $207,000 in punitive damages after he was terminated for refusing to work after sundown on Fridays because it violated his religious beliefs as a Seventh Day Adventist.
- The driver had suggested possible accommodations including starting early on Fridays, working Sundays through Thursdays, longer shifts on Mondays through Thursdays and shorter shifts on Fridays, using vacation time to cover a shorter Friday workday.
- UPS refused them all and unlawfully terminated him.
- On appeal, 8th Circuit affirmed decision (although not punitive dames), but said a reasonable accommodation need not “eliminate the religious conflict altogether.”

# PRE-*GOFF* EXAMPLE: *WILSON V. U.S. W. COMMUNICATIONS*

- An employee made a religious vow to wear an anti-abortion button that depicted a graphic color photograph of a fetus.
- Many co-workers found the button offensive, and the button caused work disruptions. The employer offered three accommodations, including covering the button up while wearing it at work.
- The employee was ultimately fired when she continued to wear the uncovered button, and she sued for religious discrimination.
- The Eighth Circuit affirmed summary judgement. The employer's accommodation proposal would have allowed the employee to comply with her vow while respecting the desire of her co-workers not to look at the button.

# Religious Accommodation: Checklist

- ✓ Ask employee to identify the conflict between religion and work.
- ✓ Ask employee to specify the desired accommodation.
- ✓ Calculate financial and other costs to the workplace, including impact on coworkers
- ✓ Analyze any conflict with the CBA or practices
- ✓ Consider reasonable alternative accommodations.
- ✓ Have an interactive discussion with employee.
- ✓ Consider benefits of providing the accommodation and the risks of refusing it altogether.

# THANK YOU!