

 ALASKA SHRM STATE COUNCIL 



Complimentary Webinar Series


Download copy of slides

<http://alaska.shrm.org/slides>

To Troubleshoot webinar, go to
<http://alaska.shrm.org/webinarhelp>

 /AKSHRMStateCouncil  @akstatecouncil  <http://tiny.cc/AKLinkedIn> 

 ALASKA SHRM STATE COUNCIL 




1 General Credit


The link to the certificate will be provided at the end

Religious Discrimination,
Harassment & Accommodation
in the Workplace

Presented by:
Douglas S. Parker
Littler Mendelson, P.C.



Presented by:



Douglas S. Parker
Littler Mendelson, P.C.
Anchorage Office
(907) 561-1214
dparker@littler.com

Background

- US religious landscape: US Religion Census released May 2012 identify following among faster growing groups: Evangelical Protestantism, Muslims, Mormons, Assemblies of God, and Seventh Day Adventists as fastest
- At least half of all Americans self-identify as having religious beliefs
- 2010 Pew Forum on Religion and Public Life study: Americans know very little about religious beliefs and practices other than their own
- Religion charges filed with the EEOC more than doubled between 2000 and 2012

Religious Discrimination Problem Areas

- Applicants
 - Disparate treatment: refusal to hire
 - Disparate impact – policy, requirement, etc.
- Employees – adverse employment action
- Failure to accommodate
 - Time off
 - Job assignments
 - Dress code
- Harassment

Prima Facie Case

To establish a claim of religious discrimination under Federal and Alaska law, a plaintiff must demonstrate:

- (1) he or she has a bona fide religious belief that conflicts with an employment requirement;
- (2) he or she informed the employer of this belief; and
- (3) he or she suffered an adverse consequence for failing to comply with the conflicting employment requirement

Miller v. Safeway, 102 P.3d 282 (Alaska 2004)

What Does Title VII Say About Religion?

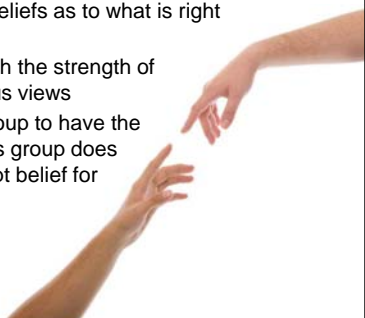
"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business"

- 42 U.S.C. § 2000e(j)

Bona Fide Belief

- Moral or ethical beliefs as to what is right and wrong
- Sincerely held with the strength of traditional religious views
- Do not need a group to have the belief; employee's group does not need to accept belief for it to be religious

- 29 C.F.R. § 1605.1



INQUIRY INTO SINCERITY?

“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.”

EEOC Compliance Manual

SINCERE BELIEF?

- 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.
- http://eoc.gov/policy/docs/qanda_religion.html

Miller v. Safeway (Alaska 2004)

Miller was terminated for violating Safeway’s grooming standard. He sued, claiming his long hair should have been accommodated on religious grounds, and that Safeway’s policy disparately impacted Alaska Natives.

- The court accepted that he had a bona fide religious belief based on his affidavit which said:

“I personally like to have my hair long and feel it is an expression of my natural personality, my spirituality and my ties with Alaska Native tradition.”

Miller v. Safeway (Alaska 2004)

The failure to accommodate claim was rejected:

Miller's claim falters in the second part of the test which requires Miller to have informed his employer about his spiritual beliefs. * * * Miller did not give notice to Safeway regarding his religious beliefs or the fact that his hairstyle was tied to his spiritual beliefs . . .

The disparate impact claim was also rejected

"Miller has not presented any studies, research, or testimony to prove that Alaska Native males are disparately impacted by Safeway's hair length requirement."

SINCERE RELIGIOUS BELIEF PROVED

"The appellant presented impressive evidence concerning the religion of the Central Alaskan Athabascan people. Several Athabascans and expert anthropologists testified and anthropological works were received in evidence. The evidence was unrefuted . . ."

"Athabascans believe that the funeral potlatch is the last meal shared by the living with the deceased. It is a communion meal. The deceased is discussed and songs of eulogy are sung. The deceased is thought to partake of the meal and this helps his spirit on its journey. From the foregoing it is clear, and consistent with the findings of the courts below, that the funeral potlatch is a religious ceremony."

Frank v. State (Alaska 1979)

Prima Facie Case of Failure to Accommodate

- Employee has a belief or wants to engage in an observance or practice that conflicts with job duties
- Asks employer for accommodation to eliminate the conflict
- Employer refuses to hire an applicant or subjects an employee to an adverse action because of the belief or practice

Employer Response:

- Provide a reasonable accommodation or
- An accommodation would impose an undue hardship on the employer that is more than de minimis.

More than *De Minimis*?

- Contrary to seniority systems or other collectively bargained rights
- Contrary to the legal or contractual rights of other employees
- Require regular payment of premium wages
- Require hiring additional employees
- Impairing workplace safety
- Contrary to other laws
- Not crystal clear beyond this list

“Cases involving reasonable accommodation turn heavily on their facts and an appraisal of the reasonableness of the parties’ behavior.”

– *Sanchez-Rodriguez v. AT&T Mobility Puerto Rico, Inc.* (1st Cir. March 8, 2012)

Who Is Likely to Ask for Time Off?

- Sabbath observance
 - Those with Sabbath from Friday sundown to Saturday sundown
 - Sunday Sabbath
- Those wanting time to attend prayers on Friday at noon
- Those wanting to attend holiday observances, classes, prayer/study groups, pilgrimages



Undue Hardship

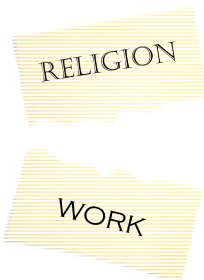
Trans World Airlines, Inc. v. Hardison (U.S. 1977)

- Sabbath was Friday sundown to Saturday sundown
- Employee transferred and lost seniority under CBA
- Employee requested: (1) 4-day workweek; (2) substitute other workers with premium wages; or (3) forced violation of seniority provisions of CBA
- Discussion of alternatives; settled on union steward seeking shift swaps, but no one interested
- Court: cannot ignore CBA seniority system
- "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."

Reasonable Accommodation

Ansonia Bd. Of Educ. v. Philbrook (U.S. 1986)

- Some reasonable accommodation
- Not what the employee requests or prefers
- Must eliminate the conflict between religion and work
- "Bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business"




EEOC v. Firestone Fibers (4th Cir. 2008)
 Enough to be "Reasonable"

- Seven year employee joined a new faith with strict religious holidays
- CBA w/ seniority based scheduling system and attendance cap
- Employee and management reviewed CBA options
- Provided "reasonable, though not total accommodation"; supervisor informally accommodated when could
- Employee terminated after exhausted leave cap
- Court: total accommodation would have been an undue hardship

Sturgill v. UPS (8th Cir. 2008)
 Engaging All Stakeholders

- Friday sundown work limitation
- Employer denies formal accommodation because proposals "inconsistent" with operations and CBA
- But first line supervisor "informally" accommodates by load splits with other employees
- Dec. 17th: can't finish by sundown, but no available mid-shift split
- Driver refused to continue working and is terminated
- Court: employee should have been accommodated



Evaluating Time-Off Requests

- It is one-time, sporadic, or regular?
- Exactly what is being sought?
- Do you need more information about the religious context?
- Is there another way for the individual to achieve the same goal? (personal preference)
- What does the employee suggest?
- What is the cost to the business of providing accommodation: monetary, safety, efficiency, impact on other employees?
- What will be your evidence of "undue hardship?"

Who is likely to have dress and grooming needs?

- Those who need to cover their heads or wear particular hair styles
 - Muslim women
 - Sikh men
 - Jewish men
- Men who wear beards
 - Muslims
 - Sikhs
 - Orthodox Jews
 - Amish
- Those who wear modest clothing
 - Pentecostal women
 - Muslim women
- Those who wear religious jewelry/symbols

EEOC v. GEO Group, Inc. (3rd Cir. 2010)

- Prison medication nurse, intake specialist, and a correctional officer wanted to wear khimars
- Prison argued security and safety in great detail
 - Could be used to smuggle contraband
 - Could conceal identity
 - Could be used against an employee in attack
- Court said "close case," but would be undue hardship to make exception to policy

Abercrombie & Fitch Cases

Collision between Religious Garb and "Look" Policies

- EEOC v. Abercrombie & Fitch Stores (N.D. Cal 9/13/13)
 - Found for employee who was fired for wearing a hijab; employer failed to establish a hardship by allowing her to wear her head scarf contrary to the company employee grooming requirements.
 - Last month EEOC settled this and another case in California against Abercrombie for \$71,000 *Wall Street Journal*, 10/28/13
- EEOC v. Abercrombie & Fitch Stores (10th Cir. 10/1/13)
 - Reversed decision in favor of unsuccessful job applicant because she failed to inform Employer of need for accommodation to allow wearing of her hijab



Evaluating Religious Garb Requests

- What is the cost to the business of accommodating: monetary, safety, efficiency, impact on other employees?
- How will this really impact your customers or other employees?
- What's the creative solution?
- What is your evidence of "undue hardship?"

Accommodation Keys

- Create a receptive culture
- Engage/inform supervisors
- Seek first to understand the religious context
- Respectful/repeated interaction
- No safety/customer preference assumptions
- Be creative
- Offer something reasonable
- Consider a policy – dparker@littler.com

Religious Harassment

Follows same proof requirements as other kinds of harassment

- Unwelcome conduct or coercion
- Because of religion
- Conduct is severe or pervasive
- Employer liability depending on
 - Supervisor
 - Coworker
 - Tangible employment action

Supervisors and Faith

“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.”



EEOC Compliance Manual, 12-III (C), p. 45.

CONDUCT MUST BE SUFFICIENTLY SEVERE

“To determine whether conduct is sufficiently severe or pervasive to create an objectively hostile or abusive work environment, the [Alaska Human Rights] Commission should consider all of the circumstances including:

The frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”

ASCHR ex rel Dowler v. Paul Kopf dba Goldstream Store, ASCHR Case No. J-09-138 (April 8, 2011)

SEVERE CONDUCT

Khan v. United Recovery Sys., Inc., (S.D. Tex. 2005): Pakistani Muslim subjected to anti-Muslim harassment beginning shortly after 9/11.

- Co-worker stated:
 - “all Muslims should be killed” and “wiped off the face of the earth.”
 - he was “racist and proud of it.”
- Supervisor ignored her complaints and implied that her mosque was teaching terrorism
- Employee not allowed to leave work early to attend prayer services

Court: sufficiently pervasive and severe conduct

Mackmuhammad v. Cagle’s Inc., (11th Cir. 2010): employee claimed anti-Muslim harassment

- Coworkers called him “Bin Laden”
- teased by coworkers about his refusal to eat pork

Court: the comments while “rude, insulting, and insensitive,” were not severe or pervasive so as to be “intimidating or threatening in any way.”

Dowler v. Kopf dba Goldstream Store

- Dowler, a Catholic, was a 27 year employee who ultimately became the store manager
- Kopf, a fundamentalist Christian, purchased the store in 2008
- Kopf almost immediately began talking daily about religious issues, allegedly including
 - Dowler’s daughter would go to hell due to her sexual orientation
 - Catholics are the “root of all evil”
 - Hitler was his friend and the Holocaust never happened

Dowler v. Kopf dba Goldstream Store

- Kopf issued a new set of work rules which included the following:
 - The OWNER of this BUSINESS is a very active CHRISTIAN who by nature of personality strives with lifetime goals to the benefit of humanity. The OWNER is by nature prone to religious and philosophic conversations.
- Dowler and the rest of the staff quit after receiving the new work rules.

Dowler v. Kopf dba Goldstream Store

- The ASCHR affirmed the ALJ ruling:
 - Kopf was strictly liable as a supervisor for hostile environment harassment
 - A hostile environment existed because Dowler was forced to listen to Kopf’s religious beliefs almost daily
 - The new work rules made it clear that any request that Kopf desist would likely result in termination
- However, the comments about Dowler’s daughter and Hitler and the Holocaust were not relevant to the decision:
 - The sexual orientation comments were not religious
 - No evidence Dowler offended by Hitler/Holocaust comment

Takeaways

- Ensure that religion is included in the anti-harassment policy
- Take complaints seriously and investigate
- Actions by supervisors must especially be scrutinized

 ALASKA SHRM STATE COUNCIL 

Thank You!

To download a copy of your certificate go to
<http://alaska.shrm.org/certificate>