

EEOC Issues New Guidance on Reasonable Accommodation for Employee Religious Attire and Grooming Practices

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On March 6, 2014, the Equal Employment Opportunity Commission published new guidance on workplace accommodations for employees who have sincerely held religious beliefs that require them to dress or groom themselves in a particular manner. The guidance, entitled "Religious Garb and Grooming in the Workplace: Rights and Responsibilities," purports to be consistent with existing case law. In some of its examples, however, the EEOC advances a view of the balance between an employer's legitimate business interests and an individual's rights to religious expression that appears to be at odds with the balance established by some courts. The guidance comes at a time when there has been a significant rise in the number of claims in this area.

Reasonable Accommodation Required for Religious Practices

Title VII of the Civil Rights Act of 1964 prohibits discrimination against employees and job applicants based on their religion, but it also affirmatively requires reasonable accommodation of religious beliefs and practices. Absent proof of "undue hardship," an employer is required to offer an accommodation for an employee or applicant's religious beliefs once the employer becomes aware of the conflict between those beliefs and a requirement of the job, regardless of whether the employee actually asks for one. It need not be the individual's preferred or suggested accommodation but only a reasonable accommodation. An employer who makes such an accommodation for one employee is not required to alter its policy with respect to employees who do not share those religious beliefs.

The EEOC's new guidance focuses primarily on the obligation to reasonably accommodate an employee or applicant's religion-based dress or grooming practices when those practices conflict with a job requirement. Some of the more common examples of religious dress and grooming practices identified by the EEOC include wearing religious clothing or articles (such as a Muslim headscarf, a Sikh turban, or a Christian cross); observing a religious prohibition against wearing certain garments (such as a religious practice of not wearing pants or short skirts); or adhering to shaving or hair length observances (including Sikh uncut hair and beard, Rastafarian dreadlocks, or Jewish sidelocks). For such a practice to be protected by Title VII, it must be motivated by a sincerely held religious belief; hence someone who wears a cross or keeps his or her hair in dreadlocks for non-religious reasons is not entitled to an accommodation under Title VII. "[I]f an employer has a legitimate reason for questioning the sincerity or even the religious nature of a particular belief or practice for which accommodation has been requested," the guidance suggests, "[the employer] may ask an applicant or

employee for information reasonably needed to evaluate the request.” The EEOC correctly cautions, however, that employers should not automatically assume that a belief or observance is insincere simply because it may change over time or may only manifest itself at certain times.

What Is Sufficient Proof of an “Undue Hardship” on an Employer?

Employers are not required to offer an accommodation, even for a sincerely held religious belief, if doing so would present an “undue hardship” to the employer’s business operations. This is often the central issue in litigation because a religious accommodation claim typically arises directly from a conflict between the individual’s exercise of religion and a job requirement. The EEOC explains correctly that an “undue hardship” has been defined by the courts as one that presents “more than de minimis” cost or burden on the operation of the employer’s business, including higher-than-ordinary administrative costs or safety or security concerns. Moreover, the EEOC acknowledges that in this context, “undue hardship” is not the same as the higher “undue burden” standard associated with an employer refusing a reasonable accommodation under the Americans with Disabilities Act. Though not cited in the guidance, one court has explained that “the undue hardship test is not a difficult threshold to pass.”¹

Typically, the accommodation sought by an employee in a religious dress or grooming practice case is for the employer simply to lift or relax the job requirement for the impacted employee. The employer’s grooming or dress requirements frequently exist for business reasons, and sometimes for safety, security, or health-related reasons, but in other instances those requirements are designed to maintain and promote professionalism or a particular corporate image.

Some of the examples contained in the guidance reflect a balancing between the employer’s business interests and the individual’s interest in religious expression that is generally consistent with the courts’ application of the “undue hardship” test:

- In a restaurant, an employer normally requires employees to have short hair. According to the EEOC, the employer may be required to exempt from that requirement an employee who for religious reasons maintains long hair, so long as the employee keeps his hair “in a ponytail or held up neatly with a clip” or under a hairnet.
- A surgical instrument manufacturer with a hygiene rule for employees involved in the process of sterilizing instruments requires employees to be clean shaven. A Sikh employee refuses to shave his beard, but the employer offers to allow him to wear two face masks instead of shaving his beard; he refuses the offer and files an EEOC charge. According to the EEOC, the employer would prevail because it offered a reasonable accommodation.

Other examples in the guidance, however, suggest that the EEOC considers the undue hardship test to be a higher threshold than some courts have applied, which is likely an indication that the agency will continue to take an aggressive stance in these types of cases.

- The EEOC describes a hypothetical staffing company that provides employees at state and local correctional facilities and prohibits the wearing of headgear, citing security concerns about interference with identification and the potential for smuggling contraband into and out of the facilities. According to the EEOC, if the individual’s religious headgear can be worn in a manner that does not interfere with visual identification, and the headgear is or can be removed for security screenings to address smuggling concerns without undue hardship to the employer, such a reasonable accommodation would be required. In *EEOC v. The Geo*

Group,² however, the Third Circuit Court of Appeals affirmed summary judgment for the employer on a similar set of facts, rejecting the EEOC's arguments that the employer's evidence concerning undue hardship was "utterly speculative and conclusory." Thus, the outcome the EEOC says would be required in this instance is precisely the outcome rejected by the Third Circuit.

- The EEOC describes a hypothetical retailer that requires sales personnel to wear only clothing sold in its stores and no headgear, so they will look like the clothing models in the company's catalogues. The retailer does not hire an applicant who it understands wears a headscarf for religious reasons. According to the EEOC, the retailer must make an exception for the applicant "in the absence of employer evidence of undue hardship." In *Cloutier v. Costco Wholesale Corp.*,³ however, the First Circuit Court of Appeals affirmed summary judgment for a retail employer who refused to permit an employee to wear piercings required by her religious beliefs, finding that the employer had demonstrated undue hardship: "Even if Cloutier did not personally receive any complaints about her appearance, her facial jewelry influenced Costco's public image and, in Costco's calculation, detracted from its professionalism."⁴ Again, the EEOC's guidance appears to be at odds with appellate decisions on point.

The EEOC also explains that discriminatory customer preferences and fear of customer reaction to a particular religion or religious practice is not an undue hardship, even if customers or clients are made uncomfortable to the point of no longer patronizing the business. The EEOC guidance also makes clear that the practice of "back rooming" employees—that is, permitting them to dress as they wish, but requiring that they keep out of sight of customers—constitutes workplace segregation, which is also a violation of Title VII. How the EEOC's position on these issues is received by the courts will vary widely depending upon the facts and circumstances presented in any given case.

The Challenge of Employee Proselytizing

While the EEOC's guidance is focused on religious attire and grooming practices, the EEOC explains as well that "proselytizing or other forms of religious expression" are also religious practices that employers may be obligated to reasonably accommodate. Employers, however, have a separate obligation under Title VII to prevent religious harassment—including offensive remarks or mistreatment motivated by an employee's religious dress or grooming—if the employer is aware of such conduct or should have been aware of it. Sometimes these two obligations place an employer in a difficult situation. In one recent case, an employer successfully defended against a claim that it failed to reasonably accommodate the plaintiff's religious practices when it prevented her from distributing religious pamphlets to other employees. The employer, the court observed, "was not required to accommodate [the plaintiff's] religion by permitting her to distribute pamphlets offensive to other employees."⁵ In an earlier case, however, an employer's motion for summary judgment was denied in a case where it had terminated employees for repeatedly greeting customers with "God bless you" and "praise the Lord."⁶ The court there concluded that a jury needed to resolve the undue hardship question.

Mitigating the Risk of Religious Accommodation Claims

The need for an accommodation will generally be determined by fact-specific circumstances with a focus on the nature of the accommodation, the employee's job duties, and the sincerity of the employee's beliefs. Therefore, employers should evaluate religious accommodations on a case-by-case basis and carefully consider the facts demonstrating undue hardship and the controlling case law in

the relevant jurisdiction. From a compliance perspective, proper training of managers and supervisors who will be responsible for identifying and responding to requests for accommodation is critical to minimizing the risk of Title VII violations in this area.

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¹ *Webb v. City of Phila.*, 562 F.3d 256, 260 (3d Cir. 2009) (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)).

² 616 F.3d 265 (3rd Cir. 2010).

³ 390 F. 3d 126 (1st Cir. 2004).

⁴ 390 F.3d at 135.

⁵ *Ervington v. LTD Commodities, LLC*, 2014 WL 554534, at *3 (7th Cir. Feb. 13, 2014).

⁶ *Banks v. Service America Corp.*, 952 F. Supp. 703 (D. Kan. 1996).