BRIEFS

Religious Posters, Pictures, and Articles in the Workplace

While it would be inappropriate for The Rutherford Institute to provide you with legal advice at this time or under these circumstances, we are pleased to provide you with the following information regarding your area of concern.

Applicable Law

Whether employees have a right to display religious posters, pictures, and other articles in the workplace has yet to be decided by the courts, as very few courts have had the opportunity to rule on the subject. However, a number of cases provide guidance on the issue by analogy.

Generally, Title VII of the Civil Rights Act of 1964[1] and state statutes apply to religious discrimination, accommodation, and hostile work environment matters in both public and private workplaces. While Title VII is binding on private and public employers with fifteen or more employees in an industry affecting commerce,[2] courts have also used the Free Speech Clause of the First Amendment to the United States Constitution when examining state and local government workplace expression. However, the Supreme Court held in Brown v. General Services Administration that it was Congress' intent in the 1972 amendments to the Civil Rights Act to create "an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination."[3] Thus, federal employees must rely on Title VII as their sole remedy for religious discrimination by a federal employer.

The Equal Employment Opportunity Commission (EEOC) receives and investigates charges of employment discrimination, failure to accommodate, and hostile work environments. If the EEOC investigates a charge and determines that there is reasonable cause to believe an employer has

violated Title VII, the EEOC will seek a remedy through the process of conciliation. If the conciliation process does not achieve a remedy, the EEOC is empowered to file suit in federal district court to insure the employer's compliance with Title VII. The EEOC also has the option of issuing a "right to sue" letter which gives the employee the ability to file suit. The

employee must then initiate legal action within ninety (90) days or he will waive his rights under Title VII.

Discrimination

Title VII forbids discrimination against religious employees with respect to conditions and privileges of their employment. Section 2000e-2(a) of Title VII makes it unlawful for an employer to discriminate against an employee or prospective employee because of that individual's religion. The exact wording reads:

> It shall be an unlawful employment practice for an employer
> (1) 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 race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

To seek redress for employment discrimination under Title VII, an employee must first show that an employment practice has an adverse, discriminatory impact on him. The burden of proof then shifts to the employer who must "demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity."[4] For instance, not allowing an employee to display religious signs or posters when other employees are allowed to post non-religious and non-work related signs and posters has a discriminatory impact on the terms and conditions of an employee's employment. However, prohibiting religious signs or posters could be said to be job-related when employees have frequent contact with the public since the employer's business could be adversely affected. In that instance, such a policy could be argued to be a "business necessity" due to the delicate nature of dealing with the varying likes and dislikes of the public that a business wishes to serve.

Accommodation

Under Title VII, employers also have a duty to accommodate the religious beliefs and practices of employees. In 1972, Congress amended Title VII to include ? 701(j) which defines the term religion as "including all aspects of religious observance and practice, as

well as beliefs." To use the accommodation argument, the employee must first prove that his belief is sincere. The EEOC follows United States v. Rasheed which states: "although the validity of religious beliefs cannot be questioned, the sincerity of the person claiming to hold such beliefs can be examined."[5] Proof of sincerity can include any one of the following categories: oral statements, affidavits, or other documentation from the charging party's minister or religious leader stating his knowledge of the party's religious beliefs; oral statements, affidavits, or other documentation from the party's friends, co-workers or others aware of the charging party's religious beliefs; documentation as to the activity prohibited by the charging party's religious practices or beliefs if available, i.e., text from the Bible or other scripture setting forth tenets of faith; or the charging party's own statements regarding the date he embraced his religion, the place he usually worships, and tenets of the faith he practices.

If an employee can substantiate that his faith requires him to display signs or posters containing religious sayings or pictures, (i.e., to be a "witness"), he will have shown that he has a sincerely held religious belief. The burden of proof then shifts to the employer who must show that he has taken some initial steps to reach a reasonable accommodation for the employee, or that accommodation would create an undue hardship on the employer's business. It is questionable whether allowing employees to display religious signs or posters could be held to be an "undue hardship" on an employer, especially if other employees already display their own personal items. Even if other employees are not currently posting signs, an employer's claim that religious signs create an undue hardship seems somewhat tenuous unless the employee's workplace is frequented by the public. Some courts, however, have found that undue hardship occurs when the accommodation would be more than a de minimis cost to the employer in terms of expenditure, loss of revenue, or loss of efficiency. When customers or clients would come in contact with the signs or posters, it might be argued that the content of the signs or posters may turn away present or potential customers, arguably creating more than a de minimis cost to the employer.

On the topic of undue hardship, an employer may not discriminate on the basis of its speculation that an undue hardship "might occur" at some future time if an accommodation is made at the present time. This is demonstrated by the Eighth Circuit Court of Appeals case of Brown v. General Motors Corporation[6] where the plaintiff was an employee on General Motors' assembly line in Kansas City. The plaintiff became a member of the Worldwide Church of God and came to

believe it necessary to follow the church's teaching of Sabbath observance from sunset Friday to sunset Saturday.[7] When a shift change occurred, the plaintiff was told that he had to work at a certain time on Saturday or face termination. The plaintiff was fired when he failed to show up for work on Saturday. General Motors (GM) argued that it could not

make an accommodation in this instance because the company feared that if it hired other members of this denomination, it might eventually suffer an undue hardship.[8] According to the court, GM did not prove that accommodation of the plaintiff's needs would give rise to any immediate additional costs or burden.[9] Speculation about such costs or burden, the court held, "is clearly not sufficient to discharge GM's burden of proving undue hardship."[10] Thus, theoretical future hardship, unsupported by hard evidence, is not enough to establish an undue burden.

The Eighth Circuit Court of Appeals also recently examined a private employee?s religious expression in the workplace using a Title VII accommodation analysis. In Wilson v. U.S. West Communications,[11] an employer told one of its employees not to come to work if she was wearing an anti-abortion button which depicted a fetus. The employee subsequently missed three days of work and was fired for that reason. Even though the employee had made a claim of religious discrimination, the court examined whether the employer had accommodated the employee's expression of her religious beliefs. The court scrutinized the employer's three "offers" of accommodation and found that asking the employee to leave the button in her cubicle or to replace the button were not true accommodations because the employee had vowed to wear that particular button at all times.[12] However, the court determined that the employer's accommodation of asking the employee to cover a particularly offensive portion of the button while at work was reasonable.[13] Thus, if an employee's faith requires expression of that faith in the form of signs, posters, or other articles, an employer may be required to accommodate that expression if it does not create an undue hardship such as more than a de minimis cost to the employer.

Hostile Work Environment

Another aspect of religious expression in the workplace involves claims of religious harassment through the creation or toleration of a hostile work environment. One of the keys to employer liability lies in the doctrine of respondeat superior. If the conduct in question meets the harassment standard, an employer is liable for the conduct of supervisors, even if the employer does not know about it. However, an employer is only liable for the conduct of non-supervisory employees and third parties when he is aware of the conduct and chooses to do nothing about it. While Title VII does not officially discuss harassment, it does bar an employer from allowing discriminatory treatment in the "terms, conditions, or privileges of employment."[14] The United States Supreme Court first set down the "hostile work environment" standard in Meritor Savings

Bank v. Vinson where the court stated that "Title VII grants employees the right to work in an environment free from discrimination, intimidation, derision, and insults."[15] In Harris v.

Forklift Systems, Inc.,[16] the Supreme Court affirmed its approval of the standard set down in Meritor. Although Harris and Meritor involved sexual harassment, courts are increasingly using the same legal reasoning in deciding religious harassment cases as well as other Title VII cases.

The Supreme Court also listed several factors that should be considered in determining whether a hostile environment has been created, including the frequency of the conduct, the severity of the conduct, if the conduct physically threatens or humiliates the employee or if it consists merely of offensive words, and if the conduct unreasonably interferes with an employee's work performance. The conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive."[17] The court in Harris held that the mere utterance of an epithet would not be enough to create a hostile work environment under Title VII. Many believe the EEOC's Proposed Guidelines failed to pass because they would have penalized more behavior than warranted under the Harris standard. If deliberately using words designed to insult and offend an employee is not enough on its own to constitute harassment, then simply displaying religious items which are not designed to insult or offend should not be considered harassment. If a sign or poster merely states a religious belief or depicts a religious figure, it would clearly meet the current standard.

Courts have generally interpreted anti-discrimination statutes to include a bar on harassment both by speech or non-speech conduct. Most of the speech found to be harassment has consisted of sexual propositions, sexually explicit comments, demeaning words to address women, and pornography in the workplace.[18] These same principles could potentially be applied to religious harassment cases. Harassment law typically suppresses conduct and speech by threatening employers with liability if they do not punish such behavior by their employees. This indirect restriction on expression requires companies which fear liability to implement policies prohibiting particular kinds of conduct and speech to insulate themselves from liability, thus placing employers in a "Catch 22" situation. In other words, an employer can be liable for his employees' harassing conduct or speech, but he must also take care not to infringe on the free speech rights of his employees.

In Brown v. Polk County, Iowa, the county-employer claimed that a supervisory-employee?s "spontaneous prayers, occasional affirmations of Christianity, and isolated references to Bible passages would amount to an undue hardship on the conduct of county business."[19] The Eighth Circuit Court of Appeals found, however, that the employer was unable to show an "'actual imposition on co-workers or [a] disruption of the work routine,' . . . generated by occasional

spontaneous prayers and isolated references to Christian belief."[20] The Brown decision therefore stands for the proposition that as long as an employee's religious expression in the workplace does not cause a disruption in the work routine or create an imposition on co-workers, the employer must permit the expression since it does not rise to the level of creating a hostile work environment.

Free Speech

When dealing with a state employee?s right to free expression in the form of posters, signs, buttons, and other articles in the workplace, the issue is largely one of free speech and therefore necessitates an analysis of the type of forum involved. The forum analysis found in Perry Education Association v. Perry Local Educator?s Association[21] is appropriate due to the state's involvement. In Perry, the United States Supreme Court held that public property falls into one of three forum categories for analysis of control over freedom of speech: the "open public forum," the "designated public forum," and the "non-public forum."

A government building, whether owned or leased by the government, is most properly classified as a "non-public forum" since such a building is not typically a public forum by tradition nor designation. The United States Supreme Court has held that while a government may discriminate on the basis of context in a non-public forum, it may not allow discrimination based on viewpoint.[22] In Lamb?s Chapel v. Center Moriches Union Free School District, the Court found that religion was not a category, but a viewpoint.[23] Therefore, an employer may constitutionally ban an entire topic; however, once employees have been allowed to use the forum to speak on a subject, religious employees must be allowed to speak on the same subject from a religious point of view. Banning only religious employees? expression would discriminate on the basis of viewpoint, thus violating these well-established constitutional principles.

While the Supreme Court has been conspicuously silent on the issue of religious expression in the workplace, lower courts have applied principles enumerated by the Supreme Court in other free speech and expression contexts. In Brown v. Polk County, Iowa,[24] for example, the court walked through an analysis of what is and is not permissible expression in a public workplace. The court found at the outset that "where a government is the employer, [a court] must consider both the first amendment and Title VII in determining the legitimacy of the [employer?s] action."[25] While acknowledging Title VII as applicable law, the court focused on the free expression rights of the employee, rather than on Title VII discrimination.

Brown?s employer ordered him to "remove from his office all items with a religious connotation, including a Bible that was in his desk."[26] The court found that "[t]here was no showing

of disruption of work or any interference with the efficient performance of governmental functions."[27] Without such a showing, the court refused to find that Brown?s expression could be so rigorously curtailed by his employer. Furthermore, the court stated that "even if employees found Mr. Brown?s displays offensive, '[the employer] could not legally remove them if their offensiveness' was based on the content of their message."[28] Thus, according to Brown, a county employee, even one employed in a supervisory capacity, may not be prohibited from expressing his religious views, so long as this expression does not rise to the level of coercing other employees to believe as he does.

A similar ruling by the Ninth Circuit Court of Appeals clearly delineates the rights of non-supervisory employees to express their views, even if those views are religious. In Tucker v. State of California Department of Education,[29] a case handled by The Rutherford Institute, a county employer issued a policy forbidding storage or display of any religious artifacts except in closed offices. The court, in striking down the policy, recognized that "important distinctions [exist] between restricting employees? speech at the workplace and prohibiting employees from using the state?s walls, tables or other space to post messages or place materials."[30] The court concluded that "the walls of the offices" at Tucker?s place of employment were "neither a public forum, nor a limited purpose public forum."[31] Instead, the court found that the walls were a "non-public forum" meaning that "[c]ontrol over access to [the] forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purposes served by the forum and are viewpoint neutral."[32] Furthermore, the Tucker court found that it was "not reasonable to allow employees to post materials around the office on all sorts of subjects, and forbid only the posting of religious information and materials."[33] Since the policy at issue in Tucker regulated only religious expression, the policy was not content-neutral, and therefore violated free speech principles.

The state employer in Tucker attempted to defend its policy by claiming that it could prohibit the posting of religious materials in order to avoid the "appearance of government endorsement of religious messages."[34] The court rejected this claim, finding that "the sweeping ban on the posting of all religious information would clearly be unreasonable. Reasonable persons are not likely to consider all the information posted on bulletin boards or walls in government buildings to be government sponsored or endorsed."[35] The court did, however, suggest that "[t]he state has a legitimate interest . . . in preventing the posting of Crosses or Stars of David in the main hallways, by the elevators, or in the lobbies, and in other locations throughout its buildings . . . [since s]uch a symbol could give the impression of impermissible government support of religion."[36] The court went on to say that the state, in order to avoid the appearance of endorsement, may likewise have an "interest in regulating, or perhaps banning displays of religious artifacts and symbols in various

parts of its office buildings. . . . However, banning the posting of all religious materials and information in all areas of an office building except in employees? private cubicles simply goes too far."[37]

Conclusion

In conclusion, private employees must rely on Title VII and any state anti-discrimination provisions, while state and local government employees enjoy the protection of the First Amendment and Title VII. Federal employees, however, must rely exclusively on Title VII remedies for religious discrimination due to the Supreme Court's holding in Brown v. General Service Administration.[38] For all employees, though, the core issues are accommodation and fair treatment. Disparate treatment of employees based on religious expression in the workplace is forbidden and employers should seek to accommodate such expression where it does not cause undue hardship. Simply stated, religious and non-religious employees must be treated equally.

Additionally, it seems clear that since Title VII was based on free speech principles found in the First Amendment[39], private employees should have the same right of expression as public employees and that discrimination based on viewpoint should not be permitted, even in the private sector. For instance, if an employer allows a bulletin board to be used by employees to post notices of non-company events and meetings, that employer has arguably lost or diminished his private owner?s rights of dominion over his property. As Justice Black once stated, "Ownership does not always mean absolute dominion. The more an owner . . . opens up his property for use by the public in general, the more his rights become circumscribed by the statutory and constitutional rights of those who use it."[40] Thus, in many cases, if an employer allows employees to have pictures, posters, books, and other non-work related items in their work area, it may not then prohibit the display of religious items of the same type.

The Rutherford Institute hopes that this information has been helpful to you in your fight for religious freedom. If you desire additional information on this or other issues of religious liberty, or if you need personal legal assistance in any area regarding religious freedoms, please feel free to write to us at:

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NOTES

1. 42 U.S.C. ? 2000e, et seq. (1982).

2. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964).

3. 425 U.S. 820, 828 (1976).

4. 42 U.S.C. ? 2000e-2(k)(1)(A)(i).

5. 663 F.2d 843, 847 (9th Cir. 1981).

6. 601 F.2d 956 (8th Cir. 1979).

7. Id. at 958.

8. Id. at 960.

9. Id. at 961.

10. Id.

11. 58 F.3d 1337 (8th Cir. 1995).

12. Id. at 1340.

13. Id.

14. 42 U.S.C. 2000e-2(a).

15. 477 U.S. 57, 65 (1986).

16. 114 S.Ct. 367 (1993).

17. Id. at 370.

18. Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 U.C.L.A. L. REV. 1791, 1800 (1992).

19. 61 F.3d 650, 656 (8th Cir. 1995).

20. Id. (quoting Burns v. Southern Pacific Transportation Co., 589 F.2d 403, 407 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979)).

21. 460 U.S. 37 (1983).

22. 508 U.S. 384 (1993) (emphasis added).

23. Id. at 393-94.

24. 61 F.3d 650 (8th Cir. 1995).

25. Id. at 654.

26. Id. (emphasis added).

27. Id.

28. Id. (emphasis added).

29. 97 F.3d 1204 (9th Cir. 1996).

30. Id. at 1214.

31. Id. at 1214-15 (citing Cornelius v. NAACP Legal Defense Fund, 473 U.S. 788 (1985); and Perry Educational Association v. Perry Local Educator?s Association, 460 U.S. 37 (1983)).

32. Id.

33. Id. at 1215.

34. Id.

35. Id.

36. Id. at 1216.

37. Id. (emphasis added).

38. 425 U.S. 820 (1976).

39. 118 Cong. Rec. 1,705 (1972), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972,* at 713 (1972) (statements of Senator Randolph, made during the introduction of Section 701(j) of the Act).

40. Marsh v. Alabama, 326 U.S. 501 (1946).