RELIGIOUS DISCRIMINATION IN THE WORKPLACE

A SPECIAL REPORT FOR CORPORATE AMERICA
PREPARED BY THE RUTHERFORD INSTITUTE

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ABOUT THE RUTHERFORD INSTITUTE

Founded in 1982 by constitutional attorney and author John W. Whitehead, The Rutherford Institute is a civil liberties organization that provides legal services without charge to people whose constitutional and human rights have been threatened or violated. The Rutherford Institute is widely recognized as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide spectrum of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of religious and civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking about religion or defending the rights of individuals against illegal search and seizure, The Rutherford Institute offers assistance—and hope—to thousands.

The Rutherford Institute's dedication to educating the public stems from our understanding that the freedoms enshrined in the Bill of Rights and important legislation such as the Civil Rights Acts are potent only to the extent that the people whom they protect recognize when those sacred rights are infringed. Moreover, it has been our experience that many individuals charged with managing the governmental and corporate organizations that are restrained by these laws genuinely desire to comply with the restraints. Unfortunately, a lack of education or understanding frequently precludes them from doing so. It is in the spirit of assisting those who desire to respect individual liberties and civil rights that The Rutherford Institute presents the following report.

For more information about the Institute, please visit our website at www.rutherford.org.

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EXECUTIVE SUMMARY

The face of America is rapidly changing to reflect not only an increasing religious diversity, but also a deeper level of individual commitment to religious faith. People of faith are not only calling themselves religious, they are actually attempting to live out the tenets of their beliefs in all aspects of their lives. Because so many of Americans' waking hours are spent in the workplace, employers are regularly forced to grapple with conflicts between their employees' job requirements and these cherished, deeply personal beliefs. Employers who are committed to providing their employees with a workplace atmosphere of respect and tolerance and who take the proactive steps necessary to do so will probably find that their efforts were worthwhile, as they are likely to yield lower turnover, fewer lawsuits and, most importantly, a boosted level of employee morale.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace on the basis of race, color, religion, sex or national origin.[1] Following are some of the employers' specific duties toward religious employees or prospective employees:[2]

- Employers may not treat employees or applicants either more or less favorably because of their religious beliefs or practices.
- Employers may not force employees to participate or not participate in any religious activity as a condition of employment.
- Employers must reasonably accommodate employees' sincerely held religious beliefs or practices, unless doing so would impose an undue hardship on the employer.
- Employers must permit employees to engage in religious expression if employees are permitted to engage in other types of personal expression at work.
- Employers must take steps to prevent religious harassment of their employees.

It is not enough for employers to avoid discriminating against religious employees. Once an employee has notified his or her employer that the employee's religious beliefs or practices conflict with work requirements, an employer will only be justified in failing to provide a reasonable accommodation if it can show that any accommodation would impose an undue hardship.[3]

The Rutherford Institute offers employers the following recommendations:

1. Maintain professionalism at all levels in the workplace.
2. Make sure employees are encouraged to communicate problems directly to someone who knows what to do about them.
3. Never question the legitimacy of an employee's religious belief(s).
4. Always attempt to accommodate.
5. Encourage respectful religious expression.
6. Respect ALL religions.

FULL REPORT ON RELIGIOUS DISCRIMINATION IN THE WORKPLACE

I. INTRODUCTION

According to a 2001 study, more than eighty percent of American adults identify themselves with a religious worldview.[4] Moreover, those who identify with a religious worldview are increasingly exhibiting a desire to live out their religious beliefs in all aspects of life. In fact, the idea of keeping religious beliefs private or practicing them only on a given day of the week is repugnant to millions of Americans who would say that those beliefs are the very center of their lives.

Now consider that most of these people for whom religion is so fundamental enter some workplace on a daily basis. Combine this fact with the reality that our nation is becoming more and more diverse religiously, as well as racially and ethnically. In 1980, only two percent of Americans expressed a religious preference other than Christian or Jewish. By 1999, however, this number had tripled to six percent, according to the 2000 Statistical Abstract of the United States.[5] The United States State Department estimates that by 2010, Islam will have displaced Judaism as the second-largest religion practiced in America after Christianity.[6]

These demographics can truly be a recipe for disaster in the workplace. And, indeed, religion-based complaints to the Equal Employment Opportunity Commission have risen over fifty-seven percent in the past decade.[7] However, corporations that add a mixture of genuine concern for the well-being of their employees and commitment to educating and training employees in the area of religious tolerance and accommodation will likely find that their efforts instead yield a workplace with lower turnover, fewer lawsuits and, most importantly, a boosted level of employee morale. While it is relatively easy for corporate decision-makers to add these components, it is important to resist the urge to deny the gravity of potential problems.

II. UNDERSTANDING TITLE VII'S MANDATES AND PROHIBITIONS REGARDING RELIGION IN THE WORKPLACE

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace on the basis of race, color, religion, sex or national origin.[8] The inclusion of "religion" into the mix of protected categories delineated in the statute indicates that all of the legal principles developed under Title VII with respect to racial or gender discrimination apply equally in cases where religious discrimination is claimed. However, because religion, for truly devout people, is something that is "practiced" rather than simply a personal characteristic, there are some differences in the protection Title VII provides for religious employees. Most notably, Title VII goes a step further than forbidding employers to discriminate against religious employees by actually requiring employers to *accommodate* the religious practices of employees and prospective employees unless doing so would result in undue hardship.

This section of the report will focus on the aspects of Title VII that pertain specifically to religious employees, as well as the guidance that the Equal Employment Opportunity Commission (EEOC) has provided regarding employers' duties toward religious employees.

Summary of the Employer's Title VII Obligations to Religious Employees

Following are some of the employers' specific duties toward religious employees or prospective employees:[9]

- Employers may not treat employees or applicants either more or less favorably because of their religious beliefs or practices.
- Employers may not force employees to participate or not participate in any religious activity as a condition of employment.
- Employers must reasonably accommodate employees' sincerely held religious beliefs or practices unless doing so would impose an undue hardship on the employer.
- Employers must permit employees to engage in religious expression if employees are permitted to engage in other types of personal expression at work.
- Employers must take steps to prevent religious harassment of their employees.

Fulfilling the Title VII Duty of Making Reasonable Accommodations

It is not enough for employers to avoid discriminating against religious employees. In 1967, the Equal Employment Opportunity Commission (EEOC) adopted the "reasonable accommodation rule." This rule requires employers to "make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business."[10] In 1972, Congress codified this rule, making the reasonable accommodation standard statutory.[11]

Once an employee or prospective employee notifies the employer of her need for a religious accommodation, the employer must reasonably accommodate the individual's religious practices.[12] A refusal to accommodate will be justified only when the employer can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation.[13]

"Religious" Beliefs/Practices

When Congress amended Title VII in 1972, it added the following definition of 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...religious observance or practice without undue hardship on the conduct of the employer's business.[14]

The EEOC has provided considerably greater assistance in defining religious practices "to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[15] Employers are explicitly cautioned that:

> [T]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such

belief will not determine whether the belief is a religious belief of the employee or prospective employee.[16]

Thus, generally speaking, when an employee notifies the employer that his or her religious beliefs conflict with a job duty and requests a reasonable accommodation, it is unwise for the employer to question the legitimacy of the employee's beliefs.

Alternatives for Accommodating Religious Practices

"[A]t a minimum, the employer [must] negotiate with the employee in an effort reasonably to accommodate the employee's religious beliefs."[17] To be considered reasonable, an accommodation must actually resolve the conflict between the requirements of employment and the employee's religious obligations.[18]

In most circumstances, Title VII does not require an employer to give the employee the accommodation of his choice or to adopt the accommodation proposed by the employee.[19] However, if the employer does not propose an accommodation, the employer must accept the employee's proposal or show that the proposal would cause undue hardship.[20]

According to the EEOC, employees most commonly request accommodations because their religious practices conflict with their work schedules.[21] The EEOC urges employers to consider three alternative ways of responding to this type of request for accommodation.

1. Voluntary Substitutions and "Swaps"

The EEOC believes that reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available.[22] Moreover, the EEOC maintains that, where this type of accommodation is appropriate, employers are obligated to facilitate the securing of a voluntary substitute.[23] Some means of doing this include publicizing policies regarding accommodation and voluntary substitution; promoting an atmosphere in which such substitutions are favorably regarded; and providing a central bulletin board for matching voluntary substitutes with positions for which substitutes are needed.[24]

2. Flexible Scheduling

The EEOC has stated that another means of providing reasonable accommodation for employees' religious practices that conflict with work schedules is to create a flexible work schedule for these employees.[25] This might include flexibility in arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting employees to make up time lost due to the observance of religious practices.[26]

3. Lateral Transfer and/or Change of Job Assignments

Finally, the EEOC directs that if an employee cannot be accommodated either

as to his or her entire job or an assignment within the job, employers should consider changing the job assignment or transferring the employee laterally in an effort to accommodate his or her religious practices.[27]

A second commonly requested accommodation, according to the EEOC, involves certain religious employees' practices that do not permit them to pay a labor organization a sum equivalent to dues.[28] Under such circumstances, the employee should be allowed to donate a sum equivalent to the dues to a charitable organization.[29]

"Undue Hardship"

Once an employee has notified his employer that the employee's religious beliefs or practices conflict with work requirements, an employer will only be justified in failing to provide a reasonable accommodation if it can show that any accommodation would impose an undue hardship.[30] Because "undue hardship" is not defined within the language of Title VII, the precise reach of the employer's obligation to its employee must be determined on a case-by-case basis.[31]

"To require [an employer] to bear more than a de minimis cost... is an undue hardship."[32] The EEOC maintains that administrative costs, such as rearranging schedules and recording substitutions for payroll purposes, do not constitute undue hardship.[33] Further, while the *regular* payment of premium wages of substitutes is considered to be more than a de minimis cost and would thus constitute an undue hardship, the EEOC indicates that infrequent or temporary payment of premium wages for a substitute does not constitute an undue hardship.[34]

It must be emphasized that employers may not simply refuse to offer any accommodations for a religious employee's religious practices and claim that their refusal to do so is justified by some hypothetical hardship. Any hardship asserted must be "real" rather than "speculative," "merely conceivable" or "hypothetical."[35] This is why the EEOC has specified that "a refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship *would in fact result from each available alternative method of accommodation.*"[36] An employer "stands on weak ground when advancing hypothetical hardships in a factual vacuum."[37] "Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts."[38] Moreover, a mere assumption that other religious individuals might need the same accommodation and that the employer will thus be inundated with requests for such accommodations is not evidence of undue hardship.[39]

Selection Practices

The duty to accommodate pertains to prospective employees as well as current ones.[40] Employers often unwittingly entangle themselves in Title VII violations by failing to understand the law's requirements with respect to employee selection practices. Employers must realize that they may not permit an applicant's need for a religious accommodation to affect in any way their decision whether to hire the applicant unless they can demonstrate that an undue hardship would result from any accommodation.[41]

The EEOC has concluded that the use of pre-selection inquiries that determine an applicant's availability has an exclusionary effect on the employment opportunities of certain religious persons.[42] Therefore, the EEOC generally considers the use of these inquiries to violate Title VII.[43] The EEOC suggests that employers who believe they have a legitimate interest in knowing the availability of their applicants use procedures that would minimize the exclusionary effect. For example, the employer could state the normal work hours for the job and, after making it clear to the applicant that she is not required to indicate the need for any absences for religious practices, ask her whether she is otherwise available to work those hours.[44] Then, after a position is offered, but before the applicant is hired, the employer could inquire into the need for a religious accommodation and determine at that point whether an accommodation is possible.[45] According to the EEOC, this type of inquiry would provide the employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of the usually small number of applicants who require accommodation.

Employers are cautioned that the EEOC will *infer* that the need for an accommodation discriminatorily influenced a decision to reject an applicant when the employer inquires into an applicant's availability without having a business necessity for doing so and then rejects a qualified applicant after determining his need for accommodation.[46]

III. COMMON TYPES OF TITLE VII CLAIMS BY RELIGIOUS EMPLOYEES AND EMERGING TRENDS

Common Types of Title VII Claims by Religious Employees

The following is a list of four common types of religion-based Title VII claims, along with examples of actual cases that have been litigated in the federal court system within the past few years.

1. Failure to Accommodate Need for Time Off Work for Religious Observances

According to the EEOC, this is the most common type of religion-based Title VII claim. The EEOC has provided very specific suggestions for ways in which employers may accommodate requests for time off for religious observances. Those suggestions are discussed on pages 3-4 of this report.

- *Abramson v. William Patterson College*, 260 F.3d 265 (3rd Cir. 2001).

The employer treated the employee, an Orthodox Jew, with hostility after she repeatedly requested accommodation to observe Jewish holidays. The court found that the employee presented sufficient evidence to survive summary judgment.

2. Failure to Accommodate Other Religious Practices

This group of claims encompasses those raised when an employer fails to accommodate one of any number of religious practices that might conflict with job requirements, including, but not limited to: requirement of wearing certain clothing; requirement to perform ablutions; and requirement of praying during work hours.

- *Rivera v. Choice Courier Sys.*, 2004 U.S. Dist. LEXIS 11758 (SDNY 2004).

The plaintiff, an evangelical Christian, was employed as a courier. The employer terminated him when he insisted that his religious beliefs required him to wear lettering on his jackets that proclaimed "Jesus is Lord." The court held that it remained to be decided what, if any, reasonable accommodations of this belief the employer might be able to offer.

- *Tyson v. Clarian Health Partners, Inc.*, 2004 U.S. Dist. LEXIS 13973 (S.D. Ind. 2004).

The employee, a Muslim, was fired in part for using the shower in an empty patient room to perform ablution (ceremonial washing of the feet, hands and forehead) in conformity with her religious beliefs. The court held that while the employer had adequately accommodated the employee's need to pray several times each day by offering her several spaces in the hospital for prayer and allowing her to do so while on duty, the employer had not accommodated her ablutions. The court therefore denied the employer's motion for summary judgment.

3. Religiously Hostile Work Environment

As previously explained, the same legal principles that apply to hostile work environment claims based on gender or race apply to religiously hostile work environments. Usually, the events giving rise to these claims indicate that the employer has allowed an unprofessional environment to persist in the workplace.

- *Feingold v. New York*, 366 F.3d 138 (2d Cir. 2004).

The plaintiff, an administrative law judge, claimed that he was subjected to a religiously hostile work environment because his co-workers regularly made anti-Semitic remarks, singled him out because of his Jewish faith and made continual references to his religion. The court found that evidence of this type of environment was sufficient to survive the employer's motion for summary judgment.

- *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368 (1st Cir. 2004).

The plaintiff resigned from his position after the employer failed to take action in response to the plaintiff's complaints about frequent lewd and inappropriate comments made to him by his supervisor after the supervisor learned that the employee was Catholic. The court upheld the jury's conclusion that this constituted a hostile work environment.

- *Idrees v. Beth Israel Hospital*, 2004 U.S. Dist. LEXIS 20898 (SDNY 2004).

The court held that the Muslim employee's Title VII claim survived summary judgment where he demonstrated an anti-Muslim bias existed in his workplace. The employee was frequently the target of comments such as, "Muslims don't need jobs—they're rich."

4. Interference with Matters of Religion-Based Conscience

This appears to be a growing area of religion-based Title VII cases involving conflicts that arise with job requirements that interfere with an employee's religious belief by requiring the employee to do something that is forbidden by the employee's faith.

- *Buonanno v. AT&T Broadband,* 313 F.Supp. 2d 1069 (2004).

The plaintiff, a Christian, was fired upon notifying his supervisors that his religious beliefs precluded him from complying with the requirement that he sign his name to the company's "Diversity Policy," which included a statement that the employee agreed to "value" all differences among employees, presumably including differences in sexual orientation that were discussed in the employee handbook. The federal district court held that "AT&T violated Title VII by failing to engage in the required dialogue with Buonanno upon notice of his concerns and by failing to clarify the challenged language to reasonably accommodate Buonanno's religious beliefs."

- *Altman v. Minnesota Dep't of Corrections*, 251 F.3d 1199 (8th Cir. 2001).

The plaintiff employees, Christians, received formal reprimands after silently reading their Bibles during a mandatory training program entitled "Gays and Lesbians in the Workplace." The court held that the employees' claim that they were impermissibly disciplined on the basis of their religious beliefs was sufficient to survive summary judgment.

- *Velez-Sotomayor v. Progresso Cash & Carry, Inc.*, 279 F.Supp.2d 65 (D. Puerto Rico 2003).

The plaintiff employee, a Jehovah's Witness, was fired because of her refusal to wear a Santa Claus cap during the Christmas season. She refused to do so because of her religious beliefs against celebrating Christmas. The court found that the employee's claim survived summary judgment.

- *O'Brien v. City of Springfield*, 319 F.Supp.2d 90 (D. Mass. 2003).

A Catholic teacher was denied his request to make a charitable contribution in lieu of paying a fee to a union that was affiliated with pro-choice organizations. The court found that the union had failed to offer the teacher a reasonable accommodation or to show undue hardship.

Trends

Post-September 11th Anti-Muslim Bias

David Grinberg, an EEOC spokesman, reports that a 2002 spike in religious discrimination reports was, in fact, driven by complaints from Muslim employees.[47] The EEOC attributes the jump to "backlash discrimination" related to the terrorist attacks on September 11, 2001.[48] Unfortunately, the same trend was observed in 2003 as well.[49]

Employers must be cognizant of any signs of anti-Muslim bias in the workplace. As with all complaints of religious discrimination or hostility, employers must take very seriously any reports of such behaviors and act immediately to correct them.

Corporate Infringement Upon Matters of Religion-Based Conscience

A second trend that is beginning to emerge involves Title VII claims, which ironically arise from conflicts between requirements imposed by employers in an effort to bring harmony into the workplace and individual employees' religion-based consciences. Employers should absolutely avoid imposing upon any employees' religious beliefs in their attempts to create an atmosphere of tolerance.

Examples of this trend are provided by two of the cases referenced above. In *Buonanno v. AT&T Broadband,* the plaintiff, a Christian, was fired because he refused to sign his name to the company's "Diversity Policy." His refusal was based on his religious objection to the practice of homosexuality. Because AT&T's Diversity Policy included a statement that the employee agreed to "value" all differences among employees, which presumably included differences in sexual orientation that were discussed in the employee handbook, Buonanno believed he would be violating his religious faith by signing the statement. He informed the appropriate corporate representatives that while he could not sign the statement as written, he would not discriminate against individuals based on any of the differences discussed in the handbook. While this should have been sufficient to alleviate any concerns of the employer, AT&T stubbornly refused to accommodate Buonanno's religious beliefs. The federal district court held that "AT&T violated Title VII by failing to engage in the required dialogue with Buonanno upon notice of his concerns and by failing to clarify the challenged language to reasonably accommodate Buonanno's religious beliefs."

In the other case, *Altman v. Minnesota Dep't of Corrections*, the plaintiff employees, also Christians, received formal reprimands after silently reading their Bibles during a mandatory training program entitled "Gays and Lesbians in the Workplace." Again, the employer would have been wise to be sensitive to religious objections to attending this type of training. The court held that the employees' claim that they were impermissibly disciplined on the basis of their religious beliefs was sufficient to survive summary judgment.

The bottom line is that employers invite conflict by advocating "diversity" to the point where it infringes upon matters of conscience. While it is extremely important that employers preclude employees from discriminating against or harassing other workers, employers must

themselves be careful to avoid any attempts at requiring employees to change or violate their beliefs. The employer's only legitimate concern regards employees' actual *behaviors* toward co-workers; not their beliefs about them.

IV. DISCUSSION OF PROPOSED NEW LEGISLATION

On March 17, 2005, Senators Rick Santorum, R-Pa., and John Kerry, D-Mass., with Hillary Clinton (D-N.Y.) as a co-sponsor, introduced into both houses of Congress a bill entitled, "Workplace Religious Freedom Act of 2005 (WRFA)." The bill would amend Title VII to provide even greater protection for religious employees. As such, it would make four major substantive changes to Title VII.

First, employees or prospective employees would be considered "qualified" for a job position as long as they were able to perform the *essential* functions of the position. "Perform[ing] the essential functions" is explicitly defined to include carrying out the core requirements of the position but to *exclude* carrying out practices relating to clothing, taking time off, or other practices that may have "a temporary or tangential impact on the ability to perform job functions."[50] The purpose of this amendment is to preclude employers from classifying otherwise qualified employees as "unqualified" solely because their religious beliefs require them to wear certain clothing, take time off for religious observances, etc.

Second, "undue hardship" would be explicitly defined as "requiring significant difficulty or expense."[51] The statute would then list factors to be considered in determining whether or not an accommodation would result in undue hardship, including:

- the identifiable cost of the accommodation;
- the overall financial resources and size of the employer involved, relative to the number of its employees; and
- for an employer with multiple facilities, the geographic separateness or administrative or fiscal relationship of the facilities.[52]

This amendment raises the bar for employers who attempt to justify a failure to accommodate an employee's religious practices.

Third, the WRFA would amend Title VII to provide that for purposes of determining whether an employer has provided an accommodation will only be considered "reasonable" if it actually removes the conflict between employment requirements and the religious observance or practice in order to be considered "reasonable."[53]

Finally, the bill specifies that an employer "shall be considered" to violate Title VII by failing to provide a reasonable accommodation if the employer refuses to permit an employee to use general leave time to remove a conflict between the employment and her religious practices solely because the leave would be used to accommodate a religious practice or observance.[54] In other words, if employees are provided leave time or are allowed to adjust their work schedules for any purpose they choose, religious employees must be given the opportunity to take advantage of these policies for purposes of conforming with their religious beliefs.

According to Senator Kerry's website, WRFA is "bipartisan legislation [that] is supported by Christian, Jewish, Muslim, and Sikh groups..."[55] "Since the courts have interpreted Title VII of the 1964 Civil Rights Act so narrowly as to provide little restraint on an employer's ability to refuse accommodation for employees' religious practices," the website states, "the WRFA is necessary in order to restore the law as Congress originally intended it."[56] Senator Kerry believes that the legislation "asks only that employers make reasonable accommodations for an employee's religious observance – and that we protect the best of America's spiritual life even as we leave employers the flexibility they need to run their businesses."[57]

The WRFA, however, is not without its critics. In fact, the American Civil Liberties Union, Planned Parenthood and the Human Rights Campaign have raised concerns about this legislation. The ACLU is concerned that WRFA might protect workers who proselytize in the workplace in ways that co-workers or customers experience as harassment. Supporters of the WRFA respond that this is a misplaced concern. Since courts now regard harassment as an undue hardship, employers could raise this as a defense in such situations.

The ACLU and other groups are also concerned that WRFA would make it possible for workers to opt out of the essential functions of their jobs on grounds of conscience. A police officer, for example, might be permitted to refuse to guard an abortion clinic. WRFA supporters, however, contend that the police officer could request reassignment. This would mean that the employer could accommodate the employee's religious beliefs, but only if by doing so it did not incur an undue hardship. WRFA, it must be noted, requires employees to do "essential functions" of a job. Thus, the policeman referred to above would have to perform the basic tasks of his or her employment. If not, the employer could contend that this would constitute undue hardship.

The state of New York has had a WRFA-like law since 2002 without the dire consequences predicted by the ACLU and other organizations. Indeed, according to New York Attorney General Eliot Spitzer, "New York's law has not resulted in the infringement of the rights of others.... Nor has it been burdensome on business. Rather, it strikes a correct balance between accommodating individual liberty and the needs of businesses and the delivery of services. So does WRFA."[58]

V. RECOMMENDATIONS FOR EMPLOYERS

Because Title VII claims must be evaluated on a case-by-case basis, there is no way that this report can address every scenario in which an employer might encounter a potential Title VII problem; certainly, it cannot give employers actual legal advice. However, The Rutherford Institute offers the following recommendations in the spirit of assisting the many employers that, the Institute believes, genuinely desire to encourage true religious tolerance and diversity in the workplace and to respectfully accommodate their employees' needs for religious accommodations.

1. Maintain Professionalism at All Levels In the Workplace.

Most, if not all, of the Title VII claims based on religiously hostile work environments could have been avoided if personnel had simply maintained a professional working environment. Many cases involve supervisors or co-workers making lewd comments, rude religious "jokes" or insults that are out of place in any environment. All employees, but especially those who manage or supervise others, must be encouraged and *required* to maintain at all times a courteous, polite, professional working environment.

2. Make Sure Employees are Encouraged to Communicate Problems Directly to Someone Who Knows What to Do About Them.

An effective method for employers to avoid Title VII problems and promote a workplace atmosphere of respect toward all employees is to ensure that all employees know what to do when they encounter problems due to their religious beliefs. This is true whether those problems are based on schedules that conflict with religious observances or co-workers who use inappropriate religious slurs. It is essential that a specific person or persons be designated to listen to these concerns and that every employee knows the identity of such individual(s). Moreover, make sure that the designated individuals are knowledgeable about the ideologies of religious persons and are *trained* to properly understand and deal with these problems, including, if necessary, how to bring the problems to the attention of upper-level management.

3. Never Question the Legitimacy of an Employee's Religious Belief(s).

Provided the employer has no reason to question the *sincerity* of an employee's religious belief, employers potentially create conflict when they refuse to accommodate the belief because they are unfamiliar with it or do not believe that the belief is shared by a mainstream religion. Even courts refuse to engage in this type of analysis; certainly an employer should not.

4. Always Attempt to Accommodate.

Employers are on an uncertain foundation when they are quick to claim an undue hardship before even making a real attempt at accommodating an employee's religious practices. The employer should always engage in a meaningful and thoughtful dialogue with any employee who notifies the employer of a conflict between a job requirement and the employee's religious practices. Many times, the employee herself will have very reasonable ideas as to how the employer might accommodate the religious practices. Remember, if an employer cannot create a reasonable accommodation of its own choosing, it is required to adopt the employee's suggestion unless it can demonstrate that an actual undue hardship would result.

5. Encourage Respectful Religious Expression.

Employers can encourage religious tolerance and greatly enhance the climate of the workplace and employee morale by allowing employees to freely engage in expression of their own religious beliefs, provided they are not disparaging other faiths. The marketplace of ideas (including religious ideas) makes our nation strong and keeps its citizenry mentally and emotionally healthy; it can have the same benefits for the workplace, provided harassment is not tolerated. At the very least, the EEOC *requires* employers to permit employees to engage in

religious expression to the extent that employees are permitted to engage in other types of personal expression at work.[59]

6. Respect ALL Religions.

Although it may seem counterintuitive, some employers tend to be less tolerant of popular "mainstream" religions, such as Christianity, than other faiths. This is likely due to the growing number of highly-publicized legal challenges based on the so-called "separation of church and state." Under no circumstances should employers be less tolerant or accommodating of Christian expression or beliefs than of other faiths.

VI. CONCLUSION

The face of America is rapidly changing to reflect not only increasing religious diversity, but also a deeper level of individual commitment to religious faith. People of faith are not only calling themselves religious, they are actually attempting to live out the tenets of their beliefs in all aspects of their lives. Because so many of Americans' waking hours are spent in the workplace, employers are regularly forced to grapple with conflicts between employees' religious beliefs and job requirements. Employers who are committed to providing their employees with a workplace atmosphere of respect and tolerance and who take the proactive steps necessary to do so will probably find that their efforts were worthwhile, as they are likely to produce a workplace with lower turnover, less conflict, fewer lawsuits and, most importantly, a boosted level of employee morale.

ENDNOTES

[1] 42 U.S.C. § 2000e-1 et seq. (1995).
[2] List is paraphrased from EEOC website at http://www.eeoc.gov/types/religion.html.
[3] *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1435 (9th Cir. 1993); *EEOC v. Townley Eng'g. & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).
[4] http://www.teachingaboutreligion.org/Demographics/map_demographics.htm.
[5] http://www.veritude.com, "Religious Demographics Drive Workplace Changes."
[6] Id.
[7] http://www.eoc.gov/types/religion.html.
[8] 42 U.S.C. § 2000e-1 et seq. (1995).
[9] List is paraphrased from EEOC website at http://www.eeoc.gov/types/religion.html.
[10] 29 C.F.R. § 1605.1, 32 Fed. Reg. 10298, July 13, 1967. Several courts concluded that the Commission exceeded its authority under the statute because while Title VII prohibited discrimination, it did not mandate reasonable accommodation. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971)("The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted."); *Kettell v. Johnson & Johnson*, 337 F.Supp 892 (D.C. Ark. 1972)("The EEOC regulation imposing a duty to...accommodate... goes beyond the Congressional mandate..."). But *see Jackson v. Veri Fresh Poultry, Inc.*, 304 F.Supp. 1276 (D.C. La. 1969)(EEOC had authority to adopt reasonable accommodation regulations). The passage of 42 U.S.C. § 2000e(j) and 2000e2(a)(1) (1995) settled the debate regarding the whether the EEOC had exceeded the scope

of Title VII by adopting the "reasonable accommodation" guidelines. *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972); *Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972), *later op.*, 369 F.Supp. 684 (D.C. Tenn. 1973).

[11] 42 U.S.C. § 2000e(j) (1995).

[12] 29 C.F.R. § 1605.2(c)(1).

[13] Id.

[14] 42 U.S.C. § 2000e(j) (1995). Although a few district courts have held that this provision violates the Establishment Clause, *Isaac v. Butler's Shoe Corp.*, 511 F.Supp. (N.D.Ga. 1980); *Yott v. North American Rockwell Corp.*, 428 F.Supp. 763 (D.C.Cal. 1977), *aff'd. on other grounds*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *Anderson v. General Dynamics Convair Aerospace Div.*, 489 F.Supp. 782 (S.D.Cal. 1980), *rev'd.*, 648 F.2d 1247 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982), all the circuit courts that have addressed the issue have held that the statute does not violate the Establishment Clause. *EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 119 (4th Cir. 1988), *cert. denied*, 488 U.S. 924 (1988); *Protos v. Volkswagen*, 797 F.2d 129, 137 (3d Cir. 1986), *cert. denied*, 479 U.S. 972 (1986); *McDaniel v. Essex Int'l. Inc.*, 696 F.2d 34, 37 (6th Cir. 1982); *Tooley v. Martin Marietta Corp.*, 648 F.2d 1239, 1244-46 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981); *Nottelson v. Smith Steel Workers D.A.L.U. 198806, AFL-CIO*, 643 F.2d 445, 453-55 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046 (1981); *Trans World Airlines, Inc. v. Hardison*, 527 F.2d 33 (8th Cir. 1975), *rev'd. on other grounds*, 432 U.S. 63 (1977).

[15] 29 C.F.R. § 1605.1.

[16] Id.

[17] *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513 (9th Cir. 1989); *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, at 75, n.11 (1977).

[18] *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, at 70 (1986) (A reasonable accommodation is one that "eliminates the conflict between employment requirements and religious practices."); *Wilson v. U.S. West Communications, Inc.*, 860 F.Supp. 665 (D.Neb. 1994).

[19] *See Ansonia Bd. of Educ.*, 479 U.S. at 70; *see also Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390 (10th Cir. 1984).

[20] *Hacienda Hotel*, 881 F.2d at 1512.

[21] Id.

[22] 29 C.F.R. § 1605.2(d)(1).

[23] Id.

[24] Id.

[25] Id.

[26] Id.

[27] Id.

[28] 29 C.F.R. § 1605.2(d)(2).

[29] Id.

[30] *Heller*, 8 F.3d at 1435; *Townley Eng'g. & Mfg. Co.*, 859 F.2d at 615.

[31] *Beadle v. City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995), *cert. denied*, 63 U.S.L.W. 3891 (U.S. 1995); *Beadle v. Hillsborough County Sheriff's Dep't.*, 29 F.3d 589, 592 (11th Cir. 1994), *cert denied.*, 115 S.Ct. 2001 (1995); *see also Hacienda Hotel*, 881 F.2d at 1512, n. 5.; *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1083 (6th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988);

Redmond v. GAF Corp., 574 F.2d 897, 902 (7th Cir. 1978); *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976), *cert. denied*, 443 U.S. 909 (1977).

[32] *Hardison*, 432 U.S. at 84.

[33] Id.

[34] 29 C.F.R. §1605.2(e).

[35] *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2963 (1993); *Tooley*, 648 F.2d at 1243. *See also Toledo v. Nobel-Sysco Inc.*, 892 F.2d 1481 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990); *Smith*, 827 F.2d at 1086; and *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979). It is important to note that, after public hearings held in 1978, the EEOC reported that little evidence was submitted by employers which showed actual attempts to accommodate religious practices had resulted in unfavorable consequences to the employer's business. The EEOC report noted that while employers "appeared to have substantial anticipatory concerns," they had "no, or very little, actual experience with the problems" they feared would result from their reasonable accommodation of religious practices. 29 C.F.R. §§ 1605.2, 1605.3 - Appendix A (1995).

[36] 29 C.F.R. § 1605.2(c)(1).

[37] *Brown*, 601 F.2d at 960.

[38] Anderson, 589 F.2d at 402; see also Draper v. United States Pipe and Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975).

[39] Id.

[40] 29 C.F.R. § 1605.3(b).

[41] Id.

[42] Id.

[43] Id.

[44] Id.

[45] Id.

[46] Id.

[47] Pepi Sappal, "Workplace Intolerance Rises for Muslims After Sept. 11," http://www.vault.com.

[48] Id.

[49] Id.

[50] Workplace Religious Freedom Act, § 2(a)(4).

[51] Id.

[52] Id.

[53] Id., at § 2(b).

[54] Id.

[55] http://kerry.senate.gov/text/cfm/record.cfm?id=184182.

[56] Id.

[57] Id.

[58] As quoted by Charles C. Haynes, "For Advocates of Workplace Religious Liberty, Hope Springs Eternal," April 3, 2005, http://www.firstamendmentcenter.org/commentary.aspx?id=15059. *Also see* Kristen Lombardi, "Time for a Prayer Circle: Clinton and Kerry Launch An Unlikely Crusade for Religious Freedom at Work," *Village Voice*, April 1, 2005.

[59] http://www.eeoc.gov/types/religion.html.

APPENDIX A

SELECTED TEXT FROM TITLE VII OF THE CIVIL RIGHTS ACT OF 1964
42 USCS § 2000e-2

§ 2000e-2. Unlawful employment practices.

(a) Employer practices. 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.

(b) Employment agency practices. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices. It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religions. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], (1) it shall not be an

unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], 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, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title [42 USCS §§ 2000e et seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS §§ 2000e et seq.] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or

percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases.

(1) (A) An unlawful employment practice based on disparate impact is established under this title only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

(3) Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores. It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 USCS §§ 2000e et

seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

APPENDIX B

SELECTED TEXT FROM THE CODE OF FEDERAL REGULATIONS
29 C.F.R. §§1605.1-1605.3

§ 1605.1 "Religious" nature of a practice or belief.

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions. n1 The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in section 701(j), 42 U.S.C. 2000e(j).

§ 1605.2 Reasonable accommodation without undue hardship as required by Section 701(j) of title VII of the Civil Rights Act of 1964.

(a) Purpose of this section. This section clarifies the obligation imposed by title VII of the Civil Rights Act of 1964, as amended, (sections 701(j), 703 and 717) to accommodate the religious practices of employees and prospective employees. This section does not address other obligations under title VII not to discriminate on grounds of religion, nor other provisions of title VII. This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutional, or other statutory provisions; neither is it intended to provide guidance for statutes which require accommodation on bases other than religion such as section 503 of the Rehabilitation Act of 1973. The legal principles which have been developed with respect to discrimination prohibited by title VII on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) Duty to accommodate. (1) Section 701(j) makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business. ...

(c) Reasonable accommodation. (1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that

many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

(d) Alternatives for accommodating religious practices. (1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation.

(i) Voluntary Substitutes and "Swaps."

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(ii) Flexible Scheduling.

One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should consider is the creation of a flexible work schedule for individuals requesting accommodation.

The following list is an example of areas in which flexibility might be introduced: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.

(iii) Lateral Transfer and Change of Job Assignments.

When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer.

(2) Payment of Dues to a Labor Organization.

Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices to not permit compliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.

(e) Undue hardship. (1) Cost. An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require "more than a de minimis cost." The Commission will determine what constitutes "more than a de minimis cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the Hardison decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in Hardison, would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a de minimis cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(2) Seniority Rights. 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.

§ 1605.3 Selection practices.

(a) Scheduling of tests or other selection procedures. When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the user of the test should be aware that the principles enunciated in these guidelines apply and that it has an obligation to accommodate such employee or prospective employee unless undue hardship would result.

(b) Inquiries which determine an applicant's availability to work during an employer's scheduled working hours. (1) The duty to accommodate pertains to prospective employees as well as current employees. Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

(2) As a result of the oral and written testimony submitted at the Commission's Hearings on Religious Discrimination, discussions with representatives of organizations interested in the issue of religious discrimination, and the comments received from the public on these Guidelines as proposed, the Commission has concluded that the use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on the employment opportunities of persons with certain religious practices. The use of such inquiries will, therefore, be considered to violate title VII unless the employer can show that it:

(i) Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for the same religious practices; or

(ii) Was otherwise justified by business necessity.

Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest and which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these Guidelines, whether an accommodation is possible. This type of

inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of the usually small number of applicants who require an accommodation.

(3) The Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when: (i) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification; and (ii) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.

APPENDIX C

CASE STUDIES/TRAINING EXERCISES

CASE I

A Muslim employee from Sudan comes to you and relates to you the following facts:

- His supervisor frequently makes comments such as "You foreigners need to go back to your own country" and "You foreigners need to leave my country."

- His manager refused his request to leave work for two hours of weekly Friday prayer, despite the employee's offer to make up those two hours at a time of the manager's choosing.

- A co-worker asked the employee why he could not eat pork. When the employee responded that he did not eat pork for religious reasons, another co-worker responded, "Your freakin' religion[?]"

- A co-worker made fun of the holy month of Ramadan.

- On September 11, 2001, after Muslim terrorists crashed planes into the World Trade Center towers and the Pentagon, a co-worker told the employee that cops were coming to get the employee, so he better run.

What, if anything, should be done?

The employee should be assured that steps will be taken immediately to put an end to this religious harassment. These events, as related by the employee, are creating a hostile work environment with respect to the employee's religion, and possibly national origin as well. It appears that in this situation it will be necessary, at a minimum, to inform all employees that harassment will not be tolerated in the workplace. In addition, it may be appropriate to formally reprimand some employees for extremely unprofessional behavior. Finally, management should immediately begin to accommodate the complaining employee's need for time off on Fridays. It appears that the employee has already suggested a reasonable accommodation.

The facts of this case study have been taken from *Hammad v. Bombardier Learjet, Inc.*, 192 F.Supp.2d 1222 (D. Kan. 2002).

CASE II

One of your employees, a Muslim Pakistani woman, took a compassionate leave to attend her grandmother's funeral. The employee did not return to work when scheduled and, due to a pattern of absences around weekends and holidays, was issued a memorandum stating that further absenteeism could result in termination of employment. Shortly thereafter, the employee complained that she felt ill at work. Her supervisor advised her that she would need a doctor's note if she left work and that she would be terminated if she left work and did not bring in a doctor's note. The employee left work and failed to submit a doctor's note as instructed. Can she be terminated?

Yes. Assuming there are no additional facts indicating that the employee was denied a requested accommodation or that her religious faith was a motivating factor in the decision, there is no basis for a Title VII claim. Like any other employee, a religious employee may properly be fired for insubordination or other misconduct.

The facts of this case study have been taken from *Habib v. NationsBank*, 279 F.3d 563 (8th Cir. 2001).