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Trials&TRIBULATIONS

# Religious accommodations in the workplace

## *What is a "reasonable accommodation?"*

The Supreme Court's recent consideration of the boundaries of the Religious Freedom Restoration Act, as well as several high-profile terminations by religious-based employers, based on the employers' religious beliefs or affiliations have brought the issue of religion in the workplace to the forefront, see *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), cert. granted *Sebelius v. Hobby Lobby Stores, Inc*., 134 S. Ct. 678 (2013); The Associated Press, 'Excellent' teacher fired by Catholic school after becoming pregnant, The Washington Times (Feb. 4), http://bit.ly/1goFBth; Michael D. Clark, Catholic teacher contract specifies banned practices, Cincinnati.com, (March 7), http://cin.ci/1lnORmA.

**By MARY E. "MOLLY" SHEPARD**
Daily Record Columnist

The Equal Employment Opportunity Commission has also experienced a rise in religious discrimination claims over the last decade, see EEOC Charge Statistics FY 1997 through FY 2013, available at http://1.usa.gov/1efuu6w (last visited, April 1).

Leaving politics and policy aside, based on the recent publicity in this area and the uptick in religious discrimination claims, it behooves us to review recent case law with respect to religious discrimination in the workplace, particularly as it relates to Title VII of the Civil Rights Act of 1964, the most common avenue for employee complaints.

Significantly, Title VII's mandates regarding accommodations for religious beliefs are arguably the most difficult aspect of compliance with Title VII's requirements relating to religion. While these requirements may present a multitude of questions for employers, this article focuses on the issue of what constitutes a "reasonable" accommodation, an issue on which the Circuit Courts of Appeal are deeply divided.

Title VII prohibits a broad range of conduct under the general umbrella of religious discrimination and retaliation. In the discrimination and retaliation context, the employer is bound by the traditional anti-discrimination principals that apply to discrimination against other protected classes.

For example, an employer must not make employment determinations (hiring, promoting, firing) based on an employee's religion. Likewise, an employer must not tolerate, or worse, promote harassment based on an employee's religion. In these areas, employment attorneys are well equipped to counsel employers on the scope of their duties to prevent and/or ameliorate religious discrimination.

However, with respect to accommodations for an employee's religious practice or belief, the legal landscape is murkier and employers should be cautious in their response to any request for a religious accommodation. Title VII requires that an employer "reasonably accommodate" an employee's religious beliefs or practices, unless the employer can demonstrate that an accommodation would be an "undue hardship," 42 U.S.C. § 2000e(j).

What is "reasonable," however, is not always an easy question to answer in the context of religious accommodations, and the circuit courts are split on the appropriate test. Further, the issue of whether an accommodation is reasonable is separate from the issue of whether the accommodation poses an undue hardship, see *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986).

Accordingly, even if an accommodation does not pose an undue hardship, it may still be considered unreasonable, and an employer is not obligated to accept the employee's preferred accommodation if another reasonable accommodation exists, regardless of whether the preferred accommodation causes an

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undue hardship, *Id*. at 68-70.

The issue that has created the greatest dissension among the circuit courts is whether, to be reasonable, an accommodation must completely eliminate the conflict between work and religion. For example, must an employer allow an employee to take every Sunday off to reasonably accommodate his request to observe Sunday as a day of rest, as is required by some religions? Some circuit courts, including the Second Circuit, would answer in the affirmative; others may look at other factors to determine whether an offered accommodation is reasonable.

In *Ansonia*, the court held that the accommodation offered to an employee — unpaid leave to observe religious holidays — was reasonable because it "eliminate[d] the conflict between employment requirements and religious practices[.]" *Id*. at 70. Courts in several circuits have conflated this fact-specific finding with a broader requirement that reasonableness requires that the conflict between work and religion be completely eliminated, see e.g. *Cosme v. Henderson*, 287 F.3d 152, 159 (2d Cir. 2002) ("[T]o have been reasonable within the meaning of [Title VII], the proposed accommodation had to have eliminated the conflict between the employment requirement…and the employee's religious practice….") (citing *Ansonia* without discussion).

However, as the Eighth Circuit Court of Appeals points out in *Sturgill v. UPS*, 12 F.3d 1024 (8th Cir. 2008), the Supreme Court's "reference to 'eliminating the conflict' [in *Ansonia*] was not intended to pronounce a rule that all employees — absent an undue hardship — must receive accommodations that eliminate any conflict between religion and work," *Id*. at 1031.

The Eighth Circuit relied, in part, on the dissenting opinion of Justice Marshall, who acknowledged the difference between the court's majority opinion — that the employer had fully complied with its duty to accommodate the employee where it offered an accommodation that eliminated the conflict and the employer was therefore not statutorily required to considered the employee's preferred accommodation — and a situation in which the conflict was not "completely resolve[d]," *Id.* (citing Ansonia, 476 U.S. at 72-73 (Marshall, J., dissenting). In Justice Marshall's opinion, the employer in that case should be required to consider the employee's preferred accommodation, *Ansonia*, 476 U.S. at 72-73 (Marshall, J., dissenting).

Whether a conflict must be completely eliminated is a crucial component of an employer's determination of whether an offered accommodation is reasonable and whether an employee's preferred accommodation should be considered. But, as the Eighth Circuit pointed out in *Sturgill*, the circuit courts that have required elimination of the conflict have not discussed the Supreme Court's opinion in *Ansonia* at any length, and have done little more than cite Ansonia to support the rule that an accommodation must eliminate the conflict, *Sturgill*, 12 F.3d at 1032-1033.

The Second, Sixth, Seventh, Ninth and Eleventh circuits have all held, with little analysis, that an accommodation that does not eliminate the conflict is not reasonable, *Cosme v. Henderson*, 287 F.3d 152, 159 (2d Cir. 2002); *Baker v. Home Depot*, 445 F.3d 541, 547-548 (2d Cir. 2006); *Walden v. CDC & Prevention*, 669 F.3d 1277, 1293 (11th Cir. 2012); *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610, 615 (9th Cir. 1988); *Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir. 1996); *EEOC v. Ilona of Hung.*, 108 F.3d 1569, 1576 (7th Cir. 1997); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1379 (6th Cir. 1994).

For example, in *Baker*, the Second Circuit held that the District Court improperly granted summary judgment for the employer, where the employer offered to accommodate an employee's request to have Sundays off by allowing the employee to work only in the afternoon or the evening on Sundays, which would allow him to attend religious services, *Baker*, 445 F.3d at 547-548.

The court, quoting the Sixth Circuit in *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1379 (6th Cir. 1994) and the Seventh Circuit in *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1576 (7th Cir. 1996), stated:

The shift trade offer accommodated only one of [Baker's] concerns, that of missing church service on [Sunday], but failed to address [Baker's] principal objection to working on [Sunday]. … Simply put, the offered accommodation cannot be considered reasonable … because it does not eliminate the conflict between the employment requirement and the religious practice, *Id*. (internal quotations omitted).

In contrast, the *Sturgill* court and courts in the Fourth and First circuits have analyzed the Supreme Court's decision in *Ansonia* and the statutory language at issue, to conclude that an accommodation need not eliminate the conflict between work and religion, rather it must only be reasonable. In *EEOC v. Firestone Fibers & Textiles Co.,* 515 F.3d 307 (4th Cir. 2008), the court reasoned that requiring a "total accommodation … ignores the plain text of the statute, namely the inclusion of the word 'reasonably' as a modifier of accommodate, *Id*. at 313. If Congress had wanted to require employers to provide a complete accommodation absent undue hardship, it could easily have

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done so."

Similarly, the First Circuit, in *Sanchez-Rodriguez v. AT&T Mobility P.R., Inc.*, 673 F.3d 1 (1st Cir. 2012), cited *Sturgill* in finding that the court must look at the "totality of the circumstances" to determine whether elimination of the conflict is required, *Id*. at 12. So, for example, in *Sanchez-Rodriguez,* the First Circuit held that a series of accommodations offered to an employee who requested Saturdays off, including offering him two new positions, allowing him to "swap" shifts, and offering to ignore his prior unapproved absences on Saturdays, was reasonable, despite the fact that the new positions were offered at a decreased salary and plaintiff was unable to find co-workers to swap shifts, *Id*. at 12-13.

Rather than view any one offered accommodation in the abstract, the court looked at all of the efforts of the defendant and determined that they were reasonable in combination, regardless of whether any or all of the accommodations completely eliminated the conflict, *Id*. at 12-13.

Because the Supreme Court has not addressed this particular question, and the circuit courts are deeply divided, it is likely that the Supreme Court will address this issue in the near future. For now, employers in New York should be aware that the Second Circuit requires complete elimination of the conflict, in the absence of undue hardship, for the accommodation to meet the reasonableness standard under Title VII.

Accordingly, employers should carefully consider any request for a religious accommodation and consider implementing standard policies and procedures for handling such requests. For more information, see The U.S. Equal Employment Opportunity Commission, Best Practices for Eradicating Religious Discrimination in the Workplace, Jan. 31, 2011, available at, www.eeoc.gov/policy/docs/best_practices_religion.html.

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