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A Primer on Religious Discrimination

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On April 26, 2018, the Equal Employment Opportunity Commission (EEOC) issued a press release in which it announced that it obtained a \$5.1 million verdict on behalf of 10 employees for whom the EEOC was seeking relief in a religious discrimination claim. According to the EEOC, the employees in question "were forced to engage in a variety of religious practices at work, including prayer, religious workshops, and spiritual cleansing rituals." These practices were part of a belief system called "Harnessing Happiness" or "Onion head," which was created by the aunt of the employer's CEO. Courts had previously ruled that such practices constituted a religious practice for purposes of Title VII of the Civil Rights Act of 1964 (Title VII).

Title VII makes it "unlawful [...] for an employer [...] 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...religion." Further, "religion" includes all aspects of religious observance and practice, as well as belief. The prohibitions against religious discrimination protect not only those that belong to traditional or mainstream religions, but also to those who have sincerely held religious, ethical, or moral beliefs. Title VII also requires that "an employer, short of undue hardship, make 'reasonable accommodations' to the religious needs of its employees." *Trans World Airlines, Inc. v. Hardis* (1977). To "accommodate" "means [...] allowing the [employee] to engage in [the employee's] religious practice despite the employer's normal rules to the contrary." Accommodations may mean making modifications to dress and grooming standards, shift swaps or schedule changes, accommodating prayer during breaks, allowing religious speech at work, and many other forms of accommodation.

A recent decision of the U.S. Court of Appeals for the 10th Circuit (which covers Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming), *Tabura v. Kellogg USA* (10th Cir. 2018), highlights the importance of taking a case-by-case approach when engaging in an interactive dialogue with an employee regarding a reasonable accommodation for a religious belief or practice. In *Tabura*, an employer (i.e., Kellogg) changed its production schedule in 2011, which required some workers to begin working every other Saturday. Two Seventh-Day Adventist production workers observed their Sabbath (i.e., day of rest) from Friday at sundown to Saturday evening. The new schedule required the employees to work 26 Saturdays per year. Under Kellogg's absence policy, employees could use vacation and other accrued time off to modify their schedules or they could swap shifts with other employees. However, in this case, the pool of employees who could switch with these production workers was very limited. The plaintiffs did not have enough accrued vacation to cover all the Sabbaths in a year, and both struggled to find coworkers with whom to swap. The two employees then requested further accommodations without success. Both employees were eventually terminated for absences.

The EEOC filed an amicus brief, asserting that the employer's suggested accommodations were not reasonable. The EEOC also proposed a new standard that proposed religious accommodations should not be considered reasonable unless the accommodations actually work to eliminate the conflict between the employee's religious practice and the employer's work requirements. The court rejected the EEOC's proposed standard, stating that "to be reasonable, an accommodation need not provide a 'total' accommodation; that is, Kellogg is not required to guarantee Plaintiffs will never be scheduled for a Saturday shift, nor is Kellogg required to provide an accommodation that spares the employee any cost whatsoever[.]" The 10th Circuit further held that while "an employee is not required to modify his religious beliefs," "[a] reasonable accommodation need not be on the employee's terms, only." In rejecting the EEOC's standard, the Court stated that the [EEOC's] rule would read 'reasonably' out of the statute." Instead, an employer's decision about whether an accommodation is reasonable "must be made on a case-by-case basis, grounded on the specific facts presented by a particular situation."

Kellogg sought to accommodate the employee's Sabbath observance through a combination of allowing them to use their vacation and other paid time off, as well as permitting the employees to swap shifts with other employees. In this case, however, even if the employees used all of their vacation and other paid time off, such substitutions would still have been insufficient to avoid working some scheduled Saturdays. Additionally, the universe of employees with whom the plaintiffs could swap shifts was limited. Therefore, the 10th Circuit remanded this case back to the district court, determining that "on the record here, we think a jury could find that, in light of the difficulties on plaintiffs had in arranging shift swaps, Kellogg had to take a more active role in helping arrange swaps in order for that to be a reasonable accommodation."

If you have questions about accommodating religious beliefs or practices, Employers Council is available to assist you.