

Law Report

LEGAL NEWSLETTER

VOLUME 5, ISSUE 4

RELIGION IN THE WORKPLACE

Growing Phenomenon of Workday Evangelism Requires Employers to Understand and Comply with Discrimination Laws

Where do the majority of people spend the majority of their time, interacting with the majority of unsaved people? Where did 39 of the 40 miracles done in the book of Acts occur? Where was Jesus in 122 of 132 public appearances in the New Testament? ... the Answer: The Workplace." So begins the website of the International Coalition of Workplace Ministries (www.icwm.net). The organization heralds the active expansion of religion, in this instance Christianity, into the American workplace.

Religion is one of the original classifications of workers covered by the federal Civil Rights Act of 1964 (also known as "Title VII"). With the widening effort to mix religion and business, the U.S. Equal Employment Opportunity Commission (EEOC) has report-

The EEOC reports an 84 percent increase in religious discrimination complaints since 1992 and a 30 percent increase since 2000

edly seen an 84 percent increase in Title VII religious discrimination complaints since 1992 and a 30 percent increase since 2000. (Source: "Faith at Work" by Russell Shorto, *The New York Times Magazine*, October 31, 2004.)

Religious discrimination can occur at any point in the employ-

ment process, from hiring, training, promotion, compensation and other benefits to termination. Unwelcome and unlawful religious harassment occurs when an employer presides over a working environment so severely or pervasively hostile to non-believers that the conditions of employment are fundamentally altered.

Religious discrimination can occur at any point in the employment process, from hiring, training, promotion, compensation and other benefits, to termination

While religious proselytizing among a workforce is lawful, employers must take care to ensure the practice does not cross the line into a violation of applicable employment discrimination and harassment laws.

A. The Basic Principles of Discrimination Law: The bedrock principle of American workplace law is "at-will" employment. To enable greater worker mobility and business flexibility since the Industrial Revolution, "at-will" status allows either employee or employer to terminate their relationship for any reason or no reason at all, at any time, with or without notice. As businesses thus need not justify their basis for letting a staff member go, they may rightfully ask why the number of government complaints and lawsuits

arising out of employment terminations is apparently increasing. Companies must note while they in theory need no reason to fire a worker, the proportion of employment-related litigation has grown over the past three decades because the number of recognized *illegal* reasons for termination – or other employment-related decisions – has been steadily expanding.

There are now no less than seven "protected classifications" of workers under federal Title VII, including race/color, national origin/ancestry, sex/gender, religion, age (40 and over), and mental or physical disability. There are commonly additional protected classifications under state law. For example, California counts 11 such classifications including marital status, medical condition, pregnancy and sexual orientation.

The complaining employee must show a good faith conflict over a religious belief or practice in the workplace

It is generally unlawful for an employer to make an employment decision based on any one or more of the protected classifications. The only exception is a position where excluding a protected class member is a good faith occupational requirement.

Please see "RELIGION," page 2

EMPLOYER-IMPOSED RELIGIOUS PRACTICES, A CASE STUDY

Equal Employment Opportunity Commission v. Townley Illustrates the Balance on Employer Religious Practices

A religious discrimination claim can arise upon any conflict over a religious belief or practice in the workplace. Such cases commonly stem from friction between an employee's religious belief or practice – e.g., inability to work on Saturdays or mandatory religious attire – and the employer's policy or protocol. However, a disagreement can also arise between an employer's religious practice and an employee that declines to participate in that practice. In that instance, the decision of the U.S. Court of Appeals for the Ninth Circuit in *EEOC v. Townley Engineering* (9th Cir. 1988) 859 F.2d 610 is instructive.

Please see "CASE STUDY" page 3

The Law Offices of Timothy Bowles work primarily in employment and health care fraud law; mediation; arbitration; and civil litigation. While published articles convey the firm's views on topics it has found concern many of its clients, the articles are not intended and should not be considered legal advice. Such professional advice requires full disclosure to an attorney of a client's circumstances and that attorney's opportunity to analyze those circumstances against applicable law.

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"RELIGION"

Continued from page 1

(e.g., male candidates can be excluded from jobs as attendants in a women's locker room). Federal and state anti-discrimination laws are intended to ensure qualified workers have equal opportunity in employment regardless of their respective races, genders, religions, etc.

B. The Elements of a Religious Discrimination Claim: A federal or California court will impose employer liability for religious discrimination by a series of steps that alternately require the employee and employer to shoulder the burden of proof. First, an employee claiming religious discrimination

The employee must show that he/she put the company on notice of that religiously based conflict

must establish the three basic (*prima facie*) elements to qualify for relief. Then, in order to fend off liability, the employer must prove that it sought to reasonably accommodate an employee's claimed religious conflict and that it took any adverse action against the employee for a legitimate non-discriminatory reason. Presuming the employer can articulate its actions were reasonable, an employee can still collect damages if he/she can show the claimed business-based reason for adverse action to have been a pretext.

1. An Employee's Three Initial Steps to Prove Religious Discrimination: A current or former employee must initially show three "*prima facie*" elements to build a case for religious discrimination. See, e.g., *Balint v. Carson City, Nevada* (Ninth Circuit Court of Appeals [9th Cir] 1998) 180 Federal Reporter, Third Series (F.3d) 1047, 1050, note 3; *California Fair Employment and Housing Commission v. Gemini Aluminum Corp.* (Sept. 24, 2004) 122 California Appellate Reports, Fourth Series (Cal.App.4th) 1004, 18 Cal.Rptr.3d 906, 910.

(a) **Employee Element One, Good Faith Religiously Based Conflict in the Workplace:** First, the complaining employee must show the existence of a good faith conflict over a religious belief or practice in the workplace.

The EEOC recognizes that "good faith" religiously based conflict has an expansive meaning. It can include conflict over "moral or ethical beliefs as to right and wrong that are sincerely held with the strength of traditional religious views. This broad coverage ensures that individuals are protected against religious discrimination regardless of how widespread their particular religious beliefs or practices are. It also ensures [the EEOC] will not have to determine what is or is not a religion, something which it would be inappropriate for the government to do. Religious discrimination also includes discrimination against someone because he/she is an atheist." EEOC Compliance Manual at section 605:0003. See also, e.g., *Shapola v. Los Alamos National Laboratory* (U.S. District Court, Dist. New Mexico 1991) 773 Federal Supplement 304, 305 (Title VII is a neutral provision which entitles every employee, believer or atheist, to a reasonable accommodation of his religious beliefs and practices). In other words, as long as the employee is making a sincere claim and not asserting, say, that he must take three-day weekends in the fall due to his supposed membership in the Church of Monday Night Football, the alleged conflict is probably in good faith.

The employee must show he/she was then "penalized," including threat of adverse action, denial of benefits or training, failure to promote, or actual termination

Conflict "over a religious belief or practice in the workplace" could be seen as a coin with two sides. It might be a

conflict between an employee's religious belief or practice and the employer's policy or protocol. For example, a Seventh Day Adventist might carry a strong religious belief and practice to not work on Saturdays which directly conflicts with an employer's scheduled workweek requiring Saturday labor. On the other hand, the conflict could be between an employer/proprietor's religious practice and an employee that declines to participate in that practice. For example, a born again business owner might run his/her company as a "Christian, faith-operated business," including mandatory devotional services during work hours, a practice conflicting with the preferences of an atheist employee. See, accompanying article and case study on *EEOC v. Townley Engineering* (9th Cir. 1988) 859 F.2d 610.

(b) **Employee Element Two, Employee Must Place Employer on Notice of the Conflict:** Next, the current or former employee must show that he/she put the company on notice that he or she had a religiously based conflict over a workplace policy or practice. This element is of course necessary to establish any possibility that the employer took some action based on knowledge that the worker had some sort of religious issue.

(c) **Employee Element Three, Employer Later "Penalized" in Some Manner:** If a worker can show he/she notified the company of the conflict, that employee must show the employer then "penalized" him/her in some way, including threat of adverse action, denial of benefits or training, failure to promote, or actual termination.

2. An Employer's Required Showings Once the Employee Has Demonstrated the Above "Prima Facie" Case: Assuming an employee can show the above three *prima facie* elements, including placing the company on notice of the conflict, the burden then falls to the employer to make showings that it dealt with that employee fairly.

The employer initially must prove either that it attempted to

reasonably accommodate the employee's expressed religiously based conflict or that any accommodation of the employee's needs would result in the company's undue, substantial economic hardship.

A federal court has observed that "at a minimum, the employer was required to negotiate with the employee in an effort reasonably to accommodate the employee's religious beliefs." However, an employer is not required to attempt or negotiate an accommodation when the employer "can show that any accommodation would impose hardship" and that "[i]f an employer can show that no accommodation was possible without undue hardship, it makes no sense to require that he engage in a futile act." *Balint v. Carson City*, cited above, 180 F.3d at 1051, note 4.

To fend off liability, the employer then must prove that it sought to reasonably accommodate an employee's claimed religious conflict

The "Saturday work" cases are good illustrations. In the event of an employee's religiously based claim that he/she cannot work on that day, an employer open for business Saturdays must undertake to move its employee scheduling to accommodate that conflict. Resolving the issue is a case-by-case proposition. In a smaller company, where no employee can be spared from working Saturdays, the business might be unable to grant such without incurring substantial economic hardship. A larger business might well be able to accommodate and resolve such a conflict by adjusting the schedules of various employees.

Second, an employer must show that once on notice of the religiously based conflict, it had a legitimate, non-discriminatory

Please see "RELIGION," page 3

"RELIGION"

Continued from page 2

reason for later taking any action adverse to the employee. Thus, thorough company documentation of the bases for discipline, denying promotions and/or benefits, and terminations is essential. For example, if an employee was a regular non-producer or discipline problem well before he/she raised a religious conflict over work conditions, it is important that the employer has documented those problems throughout the work relationship.

The employer must also show it took any adverse action against the employee for a legitimate non-discriminatory reason

3. The Last Step, an Employee's Showing of Pretext: Once an employer has demonstrated its reasonable attempts at accommodation, its significant economic hardship at accommodation, and its legitimate business reason for any adverse employment action against the complaining worker, that employee may still establish the company's liability for religious discrimination if he/she can prove the company's claimed reasons for the adverse action were pretext for the real discriminatory reason.

This element is very rarely confirmed by *direct* evidence, e.g., a manager's statement that a termination was based on the employee's religious beliefs or practices. Rather, an employee commonly must prove pretext by circumstantial means. For example, if the company only started noting, warning or correcting a worker for chronic misconduct *after* that person lodged a complaint over religion, then that belated discipline might well be used against the employer as indirect "proof" it was only acting out of religious prejudice. An employer's failure to attempt an obvious accom-

modation of the religious conflict would also help the complaining employee to indirectly establish the company's later denial of benefits, failure to promote, or termination of that employee was not a fully business-based decision.

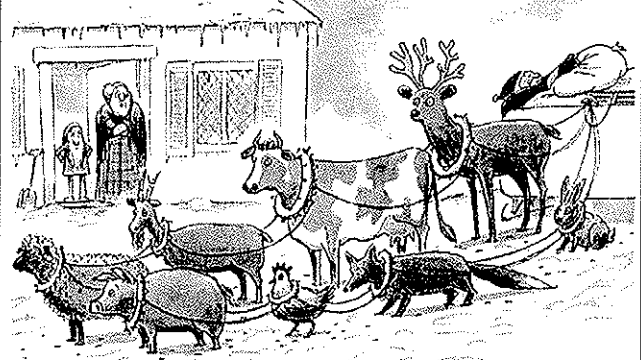
The contest of whether an employer's adverse action against an employee was a legitimate non-discriminatory decision or merely a pretext for religious intolerance thus largely depends on the thoroughness of the employer's documentation of that worker's production (or lack of it) and of the legitimate, credible bases for taking adverse action. Without such documentation, an employer will almost certainly be fighting an uphill, defensive battle against a complaining employee no matter how honorably that employer acted during the employment relationship.

C. Conclusion: Citing a November, 1999 Business Week magazine issue, the International Coalition of Workplace Ministries website notes "Today, a spiritual revival is sweeping across Corporate America as people of all stripes are ... importing into office corridors the lessons usu-

An employee can still collect damages if he/she can show the claimed legitimate reason for adverse action was a pretext

ally doled out in churches, temples and mosques ..." While courts recognize the right of employers, managers and co-workers to engage in such activity (see accompanying article on the *Townley* case), management must also comply with the laws prohibiting and preventing religious discrimination and harassment in the workplace. These important protections include making employment decisions solely on the basis of demonstrated competence and ability and elimination of religion as a criterion for any management decision in the workplace. ■

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Mitch Lyberg

"I think I preferred it before he became an equal-opportunity employer."

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"CASE STUDY"

Continued from page 1

J.O. (Jake) and Helen Townley founded Townley Engineering in 1963. Mr. and Mrs. Townley made a covenant with God that the company "would be a Christian, faith-operated business." The Townleys were "born again believers in the Lord Jesus Christ" who "are unable to separate God from any portion of their daily lives, including their activities at the Townley company."

In December, 1982, Townley gave its workforce a policy handbook. The handbook stated: "All employees are required to attend the non-denominational devotional services each Tuesday. Employees are paid for their time while attending these services."

Louis Pelvas attended the services without complaint until June, 1984, when he asked to be excused from the services because he was an atheist. His supervisor told him that attendance was mandatory. The supervisor also stated that Pelvas could sleep or read the newspaper during the services. Pelvas continued to attend the services, but in October, 1984 filed a religious discrimination charge with the Equal Employment Opportunity Commission. In December, 1984, Pelvas left the company, claiming he was constructively discharged. Townley contended Pelvas refused to accept an offer of transfer to another plant.

In July, 1986, the EEOC filed suit against Townley, alleging the

company violated the Civil Rights Act of 1964 (Title VII) by (1) requiring its employees to attend devotional services, (2) by failing to accommodate Pelvas' objection to attending the services, and (3) by constructively discharging Pelvas. Townley argued that Title VII was not intended to apply to its mandatory devotional services policy and that the proposed application of Title VII would violate the Free Exercise of Religion Clause of the First Amendment to the U.S. Constitution.

A religious discrimination claim can arise from an employee's declining to participate in an employer's religious practice

The U.S. Ninth Circuit appeals court concluded that Congress did intend for Title VII to cover Townley's mandatory devotional services. That law makes clear that requiring employees over their objections to attend devotional services cannot be reconciled with Title VII's prohibition against religious discrimination.

Townley admitted that it made no effort to accommodate Pelvas' objections to the services. Pelvas had proposed that Townley accommodate his religious objections to the devo-

Please see "CASE STUDY" page 4

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IN THIS ISSUE

*Religion in the
Workplace*

*Employer-Imposed
Religious Practices*

“CASE STUDY”

Continued from page 3
tional services by excusing him from attendance. The trial court and the Ninth Circuit found that this accommodation would have caused Townley no undue economic hardship.

When Louis Pelvas asked to be excused from mandatory religious services because he was an atheist, his supervisor told him attendance was mandatory

Townley also argued that it did not have to accommodate Pelvas' objections to the services because Pelvas waived his rights to accommodation by signing a page of the employee handbook which committed him to com-

plying with Townley's policies. However, the Ninth Court reiterated the Supreme Court's finding in another case that "there can be no prospective waiver of an employee's rights under Title VII."

The Ninth Circuit found that Title VII's requirement of religious accommodation did not unduly burden Jake and Helen Townleys' free exercise of religion rights save in one important respect. The trial court had enjoined all mandatory services at Townley's Eloy plant. Observing that Title VII "does not, and could not, require individual employers to abandon their religion," the Ninth Circuit Court of Appeals concluded the district court's decree was too broad. The goal of Title VII is served by protecting *only those* who have religious objections to the services. To protect those who do not have such objections is not necessary.

Thus, the Ninth Circuit directed the trial court to permit the Townleys to continue mandatory devotional services in their company's workplace. "[N]or do we think to require that the service be voluntary as to all employees, whether that is their wish or not, is necessary to further the purposes of Title VII. Following this decision, it is not likely that fear of intimidation will suppress requests to be excused on religious grounds. Obviously such requests must be honored by both Townley and the Townleys." 859 F.2d at 627.

This case – applicable to Title VII claims brought in the western states encompassing the Ninth Circuit – permits a business owner to include religious services into the workplace routine and to require employee attendance. However, that business owner must reasonably accommodate any employee

request not to participate in such services. Refusal of an employee to participate cannot be utilized as a factor in making any subse-

The Court directed that while a business owner may include mandatory religious services into the workplace, that owner must reasonably accommodate any employee request not to participate in such services

quent management decision on that worker's status (e.g., advancement, benefits, discipline or termination). It is thus in the interests of both employer and employee to confirm in writing their agreement – or lack of it – on such participation. ■