# PUBLICATION

## Religious Discrimination In 2015

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Title VII of the Civil Rights Act prohibits employers with fifteen or more employees from discrimination on the basis of religion in hiring, firing, and other terms and conditions of employment.[1] This Act defines religion as "all aspects of religious observance and practice, as well as beliefs."[2] As such, almost any sincerely held belief system could reasonably be considered a religion and thereby entitled to Title VII protections.

In general, courts recognize four kinds of religious discrimination claims: direct evidence of religious discrimination, disparate treatment because of religion, hostile work environment, and failure to accommodate.[3]

"Direct evidence of discrimination is evidence which shows a fact (i.e. unlawful discrimination) *without any inferences or presumptions*."[4] This is a very exacting standard and the rarest of the claims; however, these can often be the most dangerous of these type claims. Consider a supervisor telling an employee "you were not promoted because I do not want to work with people that are or are not Catholic." This sort of statement would be direct evidence of discrimination.

In *Venters v. City of Delphi*,[5] the police chief regularly "interjected religious observations and quotations from the Bible, and spoke to [the plaintiff] about her salvation in a manner that led her to conclude that [the chief] considered her immoral."[6] When the plaintiff admitted that she had not attended church services, the police chief told her that she had a choice to follow God's way or Satan's way, and she was subsequently terminated.[7] The Court held that "remarks and other evidence that reflect a propensity by the decisionmaker to evaluate employees based on illegal criteria will suffice as direct evidence of discrimination even if the evidence stops short of a virtual admission of illegality."[8]

Absent direct evidence of discrimination, a plaintiff may claim disparate treatment because of religion, by showing that she was a member of an identifiable religion, was qualified for the position, suffered an adverse employment decision, and that the adverse employment decision was differentially applied.[9] If these things are demonstrated, the employer must show a legitimate, non-discriminatory reason for the adverse action.[10] If the employer can do that, the plaintiff may prevail only if she establishes that the non-discriminatory reason given by the employer was only a pretext for prohibited discrimination.[11]

To maintain a religious discrimination Hostile Work Environment ("HWE") claim, the plaintiff's burden is similar to that in a sexual harassment HWE claim. Moreover, "[t]he Supreme Court has explained that in order to be actionable under [Title VII], a [religiously] objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive so."[12] The Court must look at all of the circumstances of the case including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance,"[13] and the harassing conduct "must be extreme to amount to a change in the terms and conditions of employment."[14]

Title VII also requires employers to make "reasonable accommodation" for religious "observances and practices." However, no accommodation is required if the accommodation would place an "undue hardship" on the employer's business. An undue hardship exists if the employer is required to bear more than a *de minimus*

cost. So, if an employer refuses to provide any accommodation claiming undue hardship, the employer must show that all conceivable accommodations would have imposed more than *de minimus* cost. Some examples of accommodations that typically do not provide an undue hardship might be flexible scheduling, unpaid leave, allowing lunch or other breaks for religious prayer, modifications of grooming requirements, or of other workplace practices, policies and/or procedures. However, an accommodation may cause an undue hardship if that accommodation requires more than ordinary administrative costs, reduces efficiency, infringes on other employees' job rights or benefits impairs workplace safety, shifts burdensome work to co-workers, conflicts with other laws or regulations, or changes a bona fide seniority system to accommodate one employee's religious practices by denying other employees the job or shift preference guaranteed by the seniority system.[15]

When faced with a request for religious accommodation, an employer should engage the employee in an open and respectful dialogue. If a particular accommodation cannot be provided, consider alternative accommodations, and remain mindful that while the employee is entitled to reasonable accommodation, she is not necessarily entitled to her preferred accommodation.

With the courts recognizing a broad spectrum of religious discrimination claims, it is important for employers to take proactive measures to prevent these claims. First, adopt and enforce a zero-tolerance anti-harassment policy, which also provides a clear reporting procedure, making it the employee's responsibility to report any allegedly discriminatory conduct. The policy should also include an anti-retaliation provision, protecting those who might report discriminatory conduct as well as those who participate in any resulting investigation. Once the policy is adopted, the employer must then disseminate the policy to all of its workforce as well as post the reporting procedures for easy access by its employees. Next, the employer should conduct mandatory training for all of its personnel, supervisors, and managers on the company's commitment to preventing religious discrimination.

Finally, when a request for religious accommodation is made, consider the totality of the circumstances, dialog with the employee, and document everything!

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[1] 42 U.S.C. § 2000e-2(a)(1).

[2] 42 U.S.C. § 2000e(j).

[3] *See*, *Venters v. City of Delphi*, 123 F.3d 956, 962 (7th Cir. 1997); *Thomas v. Pillow Kingdom, Inc.*, No. 07-cv-824-EWN-MJW, 2008 WL 1924977 (D. Colo. Apr. 30, 2008); *Prowel v. Wise Business Forms, Inc.*, No. 2:06-cv-259, 2007 WL 2702664 (W.D. Pa. Sept. 13, 2007); *Sturgill v. United Parcel '>Service, Inc.*, 512 F.3d 1024 (8th Cir. 2008). *See also*, EEOC Compliance Manual, § 12 (2008).

[4] *Lynch v. Baylor Univ. Med. Ctr.*, No. 3:05cv-0931-P, 2006 WL 2456493, *3 (N.D. Tex. Aug. 23, 2006), quoting *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 40 (5th Cir. 1996)(emphasis in original).

[5] *Venters v. City of Delphi*, 123 F.3d 956, 962 (7th Cir. 1997).

[6] *Venters*, 123 F.3d at 962.

[7] *Id*.

[8] *Id*. at 973.

[9] *Lynch v. Baylor Univ. Med. Ctr*., No. 3:05cv-0931-P, 2006 WL 2456493, *3 (N.D. Tex. Aug. 23, 2006), *citing Rubinstein v. Adm'rs. of Tulane Educ. Fund*., 218 F.3d 392, 399 (5th Cir. 2000). *See also*, *McDonnell Douglas Corp*. 411 U.S. at 802; *Okoye v. Univ. of Tex. Houston '>Health Sci. Ctr.*, 245 F.3d 507, 512-13 (5th Cir. 2001).

[10] *Galbreath v. Northern Telecom, Inc*., 944 F.2d 275, 279 (6th Cir. 1991) (*citing Burdine*, 450 U.S. at 253), *cert. denied*, 503 U.S. 945 (1992).

[11] *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

[12] *May v. Autozone Stores, Inc.*, 179 F. Supp. 2d 682, 687 (N.D. Miss. 2001) (emphasis added).

[13] *Id*. (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 810 (1998)).

[14] *Faragher*, 524 U.S. at 788; *see also*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

[15] EEOC Compliance Manual, §12-IV (2008).