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Religious Expression in the Workplace

How employers should respond to the growing phenomenon

According to one survey, 61 percent of American workers believe that their workplace would benefit from increased religious awareness. See Heather Johnson, "Taboo No More," 2004 WLNR 1377221, VNU Business Media (April 1, 2004). Of course, it is well settled that religious *beliefs* are protected under Title VII of the 1964 Civil Rights Act (Title VII) and the New Jersey Law Against Discrimination (LAD). But is religious *expression* protected in the workplace? Must employers allow employees to express their religious beliefs, e.g., prayer, dress, in the workplace? Do employers run a risk by allowing affinity groups based on gender and race, but not on a particular religion? Where is the line drawn? This article examines these questions in the context of three growing forms of religious expression: religious affinity groups; practice of faith at work; and the display of religious objects.

Many corporations foster diversity by supporting affinity groups. These groups are typically formed based upon employees' sexual orientation, gender, race or national origin. Religious affinity groups are growing in popularity as well. For

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example, Ford Motor Company formed an interfaith network in 2001, composed of employees of various faiths. See "Faith at Work," *Los Angeles Times*, May 27, 2005. The network has provided foot-washing and prayer for Muslim employees, allowed evangelical Christians to punctuate e-mails with a Bible verse, and ensured that the proper cake is served to Jewish employees during Passover. Similarly, Intel and Texas Instruments support religious affinity groups. See www.intel.com/jobs/diversity/people and www.ti.com/corp/docs/company/citizen/diversity/initiatives.shtml.

However, employers face certain inherent risks in permitting religious affinity groups. First, some employees may oppose groups that have beliefs that are at odds with their own personal religious beliefs. Second, religious affinity group members may do more than just meet; they may actually worship at work by praying or conducting Bible study. Employees who practice their faith at the office may attempt to proselytize other employees, thereby violating an employer's nondiscrimination or even nonsolicitation policies. Further, employees could feel pressured to join a religious affinity group because a member of management formed the group or extended an invitation to participate in prayer or worship. See *Robinson v. Healthnetworks Int'l*, 837 So. 2d 714, 717 (La. App. 2003) (plaintiff prevailed upon her religious discrimina-

tion claim where she was expected to attend prayer meetings conducted by her manager).

Accordingly, there are legitimate reasons why an employer may want to exclude religious affinity groups, while allowing the formation of affinity groups based upon other legally protected characteristics in order to promote diversity. At least one federal appellate court has confirmed an employer's right to do so. See *Moranski v. General Motors Corp.*, 433 F.3d 537 (7th Cir. 2005). In *Moranski*, General Motors allowed the formation of affinity groups based upon protected characteristics, such as sexual orientation, disability and national origin, but explicitly excluded religion. As a result, GM rejected the plaintiff John Moranski's proposed affinity group, the "Christian Employee Network." Moranski claimed that GM's rejection of his affinity group violated Title VII because GM treated "nonreligious" employees more favorably than religious employees. The court disagreed, stating that GM did not discriminate on the basis of religion because it "treats all religious positions alike — it excludes them all from serving as the basis of a company-recognized Affinity group." The court further held that Title VII does not stretch so far as to require an employer to recognize religious affinity groups, simply because they allow affinity groups based upon legally protected characteristics. *Moranski*, the only case of its kind to date, is helpful precedent for employers who seek to limit religious affinity

groups. Of course, there is no guarantee that other courts, including the Third Circuit or New Jersey state courts, will follow suit.

New Jersey employers should note that Governor Jon Corzine signed into law on July 26, 2006, the "Worker Freedom from Employer Intimidation Act." The law prohibits an employer from requiring employees to attend an employer-sponsored meeting or participate in any communication with the employer about "religious or political matters."

Short of establishing affinity groups, employees may ask to use company property for religious activities. An employer's obligation to allow an employee to use its facilities for religious purposes may turn on whether the employee's religious faith requires him or her to worship during working hours, or if the employee simply desires or prefers to pray at work.

In *Berry v. Dep't of Social Servs.*, 447 F.3d 642 (9th Cir. May 1, 2006), the United States Court of Appeals for the Ninth Circuit upheld a public employer's ability under the First Amendment of the U.S. Constitution and Title VII to reject an evangelical Christian's request to use a conference room for prayer. There was no indication that the plaintiff's religious faith mandated that he pray during working hours, or that he needed the privacy of a conference room for prayer. Under these facts, the court found that the employer did not violate Title VII because it similarly had denied other employees' request to use a conference room to organize a walk to raise money for cancer research. The employer's evenhanded application of its policy prohibiting the use of its facilities for any nonbusiness reason trumped the plaintiff's religious expression.

In contrast, the United States Equal Employment Opportunity Commission (EEOC), in its Guidance related to the employment of Muslim employees, stated that an employer should accommodate Muslim employees who wish to use a conference room for prayer. See Equal Employment Opportunity Commission, "Questions and Answers About Employer Responsibilities Concerning the Employment of Muslims, Arabs, South Asians, and Sikhs," www.eeoc.gov/facts/backlash-employer.html (last modified on March 21, 2005). Under this scenario, the accommodation may be necessary because Muslims'

religious obligations may require prayer at times that coincide with working hours. Accordingly, rather than considering an employee's request to use the conference room for his or her personal use, an employer needs to analyze how to accommodate an employee's tenet of faith.

An employer has an obligation under both Title VII and the LAD to reasonably accommodate an employee's religious practice, including the display of religious objects and artifacts, absent an undue hardship. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977). The EEOC has held that an employer cannot place any more restrictions on religious expression than other forms of expression that have a comparable effect on workplace efficiency. See Equal Employment Opportunity Commission, *Religious Discrimination*, <http://www.eeoc.gov/types/religion.html> (last modified on March 13, 2006). This generally means that if an employer permits the display of personal items, such as pictures, calendars, etc., the employer cannot preclude the display of Bibles and crosses.

The problem occurs, however, when other employees or individuals are offended by the religious symbol, and demand that the symbol be removed. Critically, "[a]n employer...has no legal obligation to suppress any and all religious expression merely because it annoys a single employee." See *Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074, 1078 (8th Cir. Apr. 25, 2006). In *Powell*, the Eighth Circuit found that an employer had no legal obligation to remedy an employee's complaint regarding a coworker's display of religious sayings in her cubicle. The court held that the display of religious sayings did not create a hostile work environment under Title VII.

Indeed, an employer potentially faces liability if it demands that an employee take down a religious symbol without sound business justification. In *EEOC v. Univ. of Chi. Hosps.*, 276 F.3d 326, 328 (7th Cir. 2002), the Seventh Circuit remanded for trial a religious discrimination claim, in part because a supervisor required the plaintiff to remove a religious calendar and clock because they were "too religious and too denominational."

Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004), presents the case of whether an employer can enforce its policies even at the expense of an employ-

ee's religious expression. Richard Peterson, in response to Hewlett-Packard's diversity posters which addressed homosexuality, posted Biblical scriptures in his cubicle. One scripture read:

If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be put upon them.

When Peterson, "a devout Christian," refused to take down the scriptures because he wanted to condemn "gay behavior," Hewlett-Packard terminated Peterson's employment for violating the company's antiharassment policy.

Thereafter, Peterson sued the employer for religious discrimination under Title VII and the Idaho Human Rights Act. The Ninth Circuit Court of Appeals, affirming the grant of summary judgment for Hewlett-Packard, held that Peterson's first proposed accommodation (i.e., being allowed to post the scriptures) created an undue hardship because it compelled the employer to post messages intended to "demean and harass his co-workers." Peterson's second proposed accommodation (i.e., removing both the scriptures and the diversity poster) created an undue hardship because he was essentially asking the company to exclude sexual orientation from its diversity initiative. "Either choice would have created an undue hardship for Hewlett-Packard because it would have inhibited its efforts to attract and retain a qualified, diverse workforce, which the company reasonably views as vital to its commercial success; thus, neither provides a reasonable accommodation."

The case law makes clear that an employer must have a legitimate business justification for prohibiting religious items in the workplace. Mere concern that the religious object is "too religious" generally will not suffice. Instead, an employer must show that the religious object violates an established company policy and/or intentionally disparages other individuals.

In addition, employers often implement "nonsolicitation policies," which are intended to prohibit employees from soliciting other individuals for personal causes during working hours. An employee who uses a religious display as a means for proselytizing could be in violation of a

nonsolicitation policy.

Employers must give careful consideration as to how to respond to the growth of religious expression in the workplace. For example, while permitting religious affinity groups may improve employee morale and job satisfaction for the employees seeking such recognition, the creation of such groups may increase the number of

complaints from employees subject to actual or perceived religious proselytization. The key to effectively managing religious expression in the workplace is the consistent and uniform implementation and enforcement of antiharassment and antidiscrimination policies. Employees must feel free to report to management evidence of religious expression that has turned into harass-

ment or discrimination, as was the case in *Peterson*, and also report undue pressure or attempts to convert. Similarly, employers must maintain a workplace that allows employees to express their religious beliefs (absent a showing of undue hardship) within the confines of federal and state antidiscrimination laws, and in compliance with an employer's policies and practices. ■