Religious Accommodation at Work after Groff v. DeJoy

CLS National Conference 2024

Overview:

- **Employment Religious Accommodation Before *Groff v. DeJoy***
- ***Groff v. Dejoy*: What Changed?**
- **Religious Accommodation in the Pandemic and Post Pandemic Era**

I. Employment Religious Accommodation 101 (Before *Groff v. DeJoy*)

A. What types of scenarios are we talking about here?

-Messianic Jewish manager asks for Saturdays off so he can observe the Sabbath.

-Christian manager advocates to keep personal religious items on her desk at work.

-Jewish employee wants to wear yarmulke at work.

-Life affirming nurse objects to vaccine developed using cell lines from aborted fetuses.

-Christian public-school teacher objects to trans pronouns, names & deceiving parents.

-And many, many more.

B. An employee's religion is protected in the workplace by federal and state statutes.

1. Federal Title VII (Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq)

2. State Example: California's Fair Employment and Housing Act (FEHA, Ca. Gov. Code §§ 12900-12996).

C. Title VII of the Civil Rights Act of 1964: made it unlawful for covered employers "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." §2000e–2(a)(1). EEOC began to interpret "because of religion" to include an obligation of employers to accommodate religion.

1. 1972 Amendment: Congress amended Title VII to track the EEOC's regulatory language and to clarify that employers must "**reasonably accommodate**. . . an employee's or prospective employee's **religious observance or practice**" unless the employer is "unable" to do so "without **undue hardship** on the conduct of the employer's business." §2000e(j) (emphasis added).

2. Rule: Employers must reasonably accommodate employees' sincerely held religious beliefs, observances and practices that conflict with a bona fide work requirement unless the employer can demonstrate that accommodating the employee imposes an **undue hardship** on the employer after engaging in an **interactive process**

(to explore accommodation options) or unless the employer has **objective evidence** the religious belief is not sincerely held. Furthermore, the employer may neither harass nor retaliate against employees because they requested religious accommodation.

D. Title VII's Broad Definition of Religion:

"The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business" (42 USC § 2000e(j)).

Title VII of the Civil Rights Act of 1964 protects all aspects of religious observance and practice as well as belief and defines religion very broadly for purposes of determining what the law covers.

For purposes of Title VII, religion includes not only traditional, organized religions, such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.

An employee's belief or practice can be "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief or practice, or if few – or no – other people adhere to it.

E. Failure to Accommodate Elements:

To establish religious discrimination on the basis of a failure-to-accommodate theory, [a plaintiff] must first set forth a prima facie case that (1) he had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement. *Heller v. EBB Auto. Co.*, 8 F.3d 1433, 1438 (9th Cir.1993).

F. Causation: "Motivating Factor" is Enough (Not "But For"):

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a **motivating factor** for any employment practice, even though other factors also motivated the practice (42 U.S.C.A. § 2000e-2(m) (emphasis added).

G. *Abercrombie*: Religion Neutral Polices Are Not Sufficient (Employers Have Affirmative Accommodation Duty) & Unconfirmed Religious Practices May Suffice:

1. Facts: Company had "neutral" appearance policy banning head coverings and female applicant wore Muslim head scarf to interview, however, neither she nor interviewer discussed it. Interviewer downgraded her score because she wore headscarf and company didn't hire her.

2. Question: Can an employer be held liable under Title VII for refusing to hire an applicant based on a religious observance or practice if the employer did not have direct knowledge that a religious accommodation was required

3. Held: Title VII allows failure-to-accommodate challenges to be brought as **disparate-treatment** claims but gives ***favored treatment*** to religious practices, rather than demanding that religious practices be treated no worse than other practices. Title VII does not demand mere neutrality; instead it creates an affirmative duty to accommodate religious practices. See also, *Peterson v. Hewlett-Packard Co*., 358 F.3d 599, 606 (9th Cir. 2004).

4. Held: In a disparate-treatment claim, an applicant need only show that the need for accommodation **was a motivating factor** in the employer's decision, not that the employer had actual knowledge of said need. If the applicant can show that the employer's decision not to hire an applicant was based on a desire (motive) to avoid having to accommodate a religious practice, then the employer has violated Title VII.

E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 773, 135 S. Ct. 2028, 2033, 192 L. Ed. 2d 35 (2015)

H. Meaningful Interactive Process Has Become the Standard:

This court has recognized that "Title VII is premised on bilateral cooperation." *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 777 (9th Cir.1986); see also *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1440-41 (9th Cir.1993). An employee, therefore, has a "concomitant duty ... to cooperate in reaching an accommodation [under Title VII]." American Postal Workers, 781 F.2d at 777. An employee's "correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer" arises after the employer takes the " 'initial step' towards accommodating [the employee's] conflicting religious practice" by suggesting a possible accommodation. *Heller*, 8 F.3d at 1441-1442.

E.E.O.C. v. AutoNation USA Corp., 52 F. App'x 327, 329 (9th Cir. 2002)

I. Reasonable Accommodation Eliminates the Conflict:

Where the negotiations do not produce a proposal by the employer that would eliminate the religious conflict, the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do so. *Opuku-Boateng v. State of Cal.*, 95 F.3d 1461, 1467 (9th Cir. 1996), as amended (Nov. 19, 1996)

J. Under Title VII, What Constitutes and Undue hardship (before *Groff v. DeJoy*)?

I agree … that we should reconsider … *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977), [holding] that Title VII does not require an employer to make any accommodation for an employee's practice of religion if doing so would impose more than a ***de minimis burden***. … As the Solicitor General observes, Hardison's reading does not represent the most likely interpretation of the statutory term "undue hardship"… and the Court

did not explain the basis for this interpretation. I thus agree with the Solicitor General that we should grant review in an appropriate case to consider whether Hardison's interpretation should be overruled.

Patterson v. Walgreen Co., 140 S. Ct. 685, (Mem)–686, 206 L. Ed. 2d 230 (2020)(Alito concurring, joined by Thomas and Gorsuch)

1. **"More than a de minimis burden"**: Resulted in a lot of meritorious religious accommodation cases being dismissed where employers had to merely demonstrate a small to moderate impact on business to defense on undue burden standard.
2. **California Undue Hardship Comparison**: "Undue hardship" means an action requiring **significant difficulty or expense**, when considered in light of the following factors (including nature and cost of accommodation, financial resources, size of operations, type of operations) (Cal.Govt.Code 12926 (u)).

II. *Groff v. Dejoy*, 600 U.S. 447 (2023): What Changed?

Is a unanimous (9-0) watershed victory for religious accommodation in the workplace.

A. Facts: Gerald Groff is an Evangelical Christian who believes that Sunday should be devoted to worship and rest. Groff worked for the United States Postal Service and he was not scheduled for Sunday work. However, after the USPS started making Sunday deliveries for Amazon, Groff received progressive discipline from the USPS because he would not work Sundays on a rotating basis. After he resigned under pressure, he sued the USPS under Title VII. The Third Circuit found the de minimis cost standard (*Trans World Airlines, Inc. v. Hardison*, 432 U. S. 63 (1977)) was met here, concluding that exempting Groff from Sunday work had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale."

B. Held: Lower Standard Rejected: The *Groff* opinion clarified that "showing 'more than a *de minimis* cost'…does not suffice to establish undue hardship under Title VII." Instead, the Supreme Court held that "**undue hardship** is shown when a **burden is substantial** in the overall context of an employer's business," "tak[ing] into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer (emphasis added)."

C. Held: Hostility Towards Religion is Not an Undue Burden: A hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice, cannot be considered "undue." Bias or hostility to a religious practice or accommodation cannot supply a defense.

D. Held: Reasonable Accommodation Requires Consideration of all Options: The goal is to try and accommodate the employee whenever possible (this may require creativity and flexibility).

III. Religious Accommodation in the Pandemic and Post Pandemic Era

A. Religious Discrimination at an All-time High: The pandemic multiplied the number of workplace employee mandates. Particularly as a result of the COVID-19 and booster

mandates, there was an enormous increase in workplace religious accommodation requests submitted to employers, a big percentage of which were denied, therefore resulting in a large number of employees being placed on unpaid administrative leave and losing their jobs. Many faithful suffered greatly as a result—losing homes and devastating families.

B. Big Numbers: EEOC data shows a total of **2,111** religious discrimination complaints filed in 2021. In 2022, that number rose to an astounding **13,814**, an increase of more than 650%! Religious discrimination complains comprised 18.8% of all workplace complaints filed. What caused the sharp rise in 2022? The EEOC explained that "there was a significant increase in vaccine-related charges filed on the basis of religion.

C. Litigation Spike: This rise in administrative complaints was followed by a deluge of lawsuits (NLCP: Three cases in last 30 years to twelve cases in the past two years).

D. Big Question: Does the emergency nature of a virus pandemic suspend civil rights at work?

1. Answer: No, workplace civil rights are not suspended by a virus.

E. How the employment religious accommodation process is supposed to work.

1. First, employee informs the employer (in writing) that a work requirement is in conflict with a sincerely held religious belief or practice.

2. Second, employer accepts employee's religious accommodation request at face value & enters a dialogue/meaningful interactive process by which it determines whether the employee can be reasonably accommodated.

3. Third, if the employer faces a legitimate "undue burden" in accommodating employee, accommodation may be denied.

Bias towards religious accommodation (i.e. employee prevails)

E. Aggressive Employer Religious Scrutiny Not Permitted: Employer must ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance/accept at face value (employers & courts are not theological experts—don't have to understand, agree with, or like). See EEOC Guid. K.12.; L.2. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981); Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 452 (7th Cir. 2013).

F. "**Objective Basis" Exception**: The only exception is if the employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, observance or practice. But this is only a limited factual inquiry. See EEOC Guide. K.12.; L.2.; 29 CFR 1605. Conduct of an employee inconsistent with the stated religious beliefs underlying the employee's religious objection to the COVID-19 vaccines may undermine the employee's accommodation request. Kansas HB 2001 outlawed inquiring into religious sincerity.

1. **Examples**: Pam claims a pro-life objection to the Pfizer jab, but got an abortion last year and volunteers at Planned Parenthood. Sarah took another

vaccine last year she knew was developed using fetal cell lines from aborted fetuses.

2. **Consistency is Better, but…:** Although failing to act consistently on a religious belief may be considered evidence that the belief is not sincerely held, *EEOC v. Union Independiente De La Autoridad De La Acueductos Y Alcantarillados De P.R.*, 279 F.3d 49, 56 (1st Cir. 2002), the fact that a religious belief was only recently acquired does not necessarily render the belief an insincere one, EEOC v. *Ilona of Hungary*, Inc., 108 F.3d 1569, 1575 (7th Cir. 1997).
    a. Therefore, Sarah may respond that either she did not know that prior vaccines she took were developed using fetal cell lines (as she now knows with COVID-19 vaccines) and/or that she has only recently been personally convicted in her faith about pro-life issues.

G. How employers have been ignoring the law & abusing employees regarding vaccine and booster mandates:

1. **Pre-empting Religious Claims/Running the gauntlet**: Employers have not been accepting religious beliefs & practice claims at face value, but have been launching blanket pre-textual /preemptive assaults on employee religious objections, attempting to attack the consistency thereof without first having any objective basis for doing so. Example: Defense contractor issues all employees requesting religious accommodation initial set of 10 very aggressive & invasive questions—basically bullying & cross-examining employees about their medical & religious history, followed by 14 additional questions (even worse than the first set), followed by requiring employees to sign document swearing they will never (again) take medicines or vaccines developed using fetal cell lines developed from abortions.

a. **Critique**: There are at least 6 major problems / employer violations: (1) employer not accepting sincerely religious beliefs/practices at face value; (2) employer blanket cross-examination of religion w/o first having a specific objective factual basis to do so (no known inconsistency); (3) not a "limited inquiry" but is a fishing expedition (transparent attempt at gathering "self-incriminating" negative information to pre-empt & circumvent religious accommodation process & scare employees into submission—either taking the vaccine or quitting their job (i.e. constructive termination?); (4) avoids/forestalls interactive process/undue burden analysis; (5) retaliation/harassment for lawful accommodation request, creates hostile work environment, &; (6) questions probably invade medical privacy (HIPPA).

b. **But Caution**: Employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief/practice risks losing any subsequent claim that the employer improperly denied an accommodation (it's a fine line).

2. **Personal Religious Beliefs/Practices Suffice—an employee's personal religious beliefs or practices need not agree or align with their pastor, church, or denomination (can be idiosyncratic).** EEOC: "The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee . . . ." Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1. (See *Heller v. EBB*

Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993). Therefore, employer can't demand clergy letters—or point out inconsistencies as a basis for denial.

3. **Falsely claiming that the accommodation request places an "undue burden" on the company, when it does not (i.e. no objective evidence):** An employer must demonstrate that it has attempted to accommodate an employee's religious beliefs before claiming it cannot do so without imposing an undue hardship on the employer. *Redmond v. GAF Corp*., 574 F.2d 897, 901–02 (7th Cir. 1978). In addition, the employer has the burden of demonstrating undue hardship. And evidence of undue hardship must be more than hypothetical and speculative. *Smith v. Pyro Mining Co*., 827 F.2d 1081, 1085–86 (6th Cir. 1987).

   a. **Note**: Interestingly, this is the most common defense we normally see in non-COVID-19 cases, but we are not seeing a lot of employers trying to argue "undue burden" now. Example: Employee is immediately denied reasonable accommodation request with no explanation and terminated (w/o the employer making any attempt to accommodate employee & with only a hypothetical/speculative claim of undue burden).

4. **Failing to Engage in Interactive Process and Explore all Accommodation Options:** Rather than there being any good faith attempt to accommodate the employee who submits vaccine exemption request (i.e. engaging in interactive process/evaluating objective undue burdens), the employer claims undue burden and/or refuses to take employees religious beliefs at face value (but looks for specious "inconsistencies" and the employee is immediately placed on unpaid administrative leave.

H. Good News, the EEOC has defined COVID-19 reasonable accommodation in our favor!: EEOC has explicitly instructed employers that COVID-19 vaccine alternatives, including wearing masks, social distancing, regular testing, modifying shifts, teleworking, & reassignment constitute reasonable accommodations (i.e. are not an "undue burden" on the employer). See EEOC Guidance, K.2. This makes it much more difficult for employers to successfully deny religious accommodations with weak claims of undue hardship.

III. Concluding Thoughts:

Historically, the majority of employment religious accommodation cases have involved the Sabbath. However, as the culture becomes more post-Christian and companies become more hostile towards religion, in addition to the vaccine mandates, we are seeing many more conscience conflicts arising at work:

A. **Abortion Participation**: Life-affirming medical care professionals objecting to participating in abortions or dispensing abortion prescriptions.

B. **Gender Affirmation**: Employers imposing LGBTQ+ affirming training and mandates on employees who believe that is gender binary (male and female).

1. Example: Religious Accommodation for Public School Teacher Win-*Garcia v. EUSD*: The NCLP was recently able to successfully advocate for religious

accommodation for Christian teacher who, in regards to minor student children struggling with gender dysphoria, refused to use (1) non-biological pronouns, (2) non-biological names, or (3) keep secrets from parents about their child's struggle with gender.

The Christian legal community needs to be well prepared to effectively advocate for faithful employees who are not willing to compromise their sincerely held religious beliefs and practices at work.