Addressing Religious Discrimination and Accommodation in Today's Workplace

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Key Issues in Religious Accommodation: Questioning Sincerity of Belief

Groff v. DeJoy has reduced the viability of "undue hardship" claims, and rightly so. The focus appears to be shifting to employer attacks on sincerity of belief, especially in the COVID context.

I. What Inquiry is an Employer Permitted to Make with Respect to Sincerity of Belief?

In *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 135 S. Ct. 2028, 192 L. Ed.2d 35 (2015), the Supreme Court clarified Title VII does not contain a notice requirement. Instead, the employer's duty to accommodate is triggered when it understands an employee needs an accommodation. In that case, the retailer refused to hire an otherwise qualified applicant because she wore a head scarf, believing she wore it as a Muslim woman. During her interview, she had never been asked about her head scarf, nor did she inform the employer she was Muslim.

Decades earlier, the Ninth Circuit came to essentially the same conclusion, that it was sufficient for an employee to simply explain the need for an accommodation due to religion, without having to explain one's religion:

> *A sensible approach would require only enough information about an employee's*

> *religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements. See Redmond, 574 F.2d at 902 (informing employer that "I [am] not able to work on Saturday because of my religious obligation" is sufficient); Chrysler Corp. v. Mann, 561 F.2d 1282, 1286 (8th Cir.1977) (employee must, at least, "inform[ ] his employer of his religious needs"), cert. denied, 434 U.S. 1039, 98 S.Ct. 778, 54 L.Ed.2d 788 (1978). Under such a standard, Heller's notice to EBB was satisfactory. Young and Bowman knew that Heller was Jewish. Young knew that Heller's wife was studying for conversion. And, when Heller requested the time off, he informed Young why he needed to miss work.*
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> *Any greater notice requirement would permit an employer to delve into the religious practices of an employee in order to determine whether religion mandates the employee's adherence. If courts may not make such an inquiry, see Fowler, 345 U.S. at 70, 73 S.Ct. at 527; Redmond, 574 F.2d at 900, then neither should employers. Heller v. EBB Auto Co., 8 F.3d 1433 (9th Cir. 1993)*

Moreover, it is settled law not just with respect to Title VII, but FEHA, as well. California courts follow *Heller*, and also place a minimal "information" burden on the employee in FEHA cases.

In *California Fair Emp. & Hous. Com. v. Gemini Aluminum Corp.*, 122 Cal. App. 4th 1004, 1015 (2004), an appellate court, citing *Heller*, rejected the employer's claim that the employee had to explain his beliefs more completely in order to be eligible for an accommodation:

> *Gemini also contends that it was not required to accommodate Young's request until he explained his religious beliefs to his employer and provided enough information about his religious needs for Gemini to understand the significance of the convention and how his attendance was tied to his religious beliefs. We disagree. Notice to the employer does not require a complex explanation. (See Heller v. EBB Auto Co., supra, 8 F.3d at p. 1439.) The employee needs only to cite a religious connection. (See Redmond v. GAF Corp. (7th Cir.1978) 574 F.2d 897, 899–902, hereafter Redmond.)*
> Gemini, supra at 913.

Employees are not required to give a "complex explanation," but only need to "cite a religious

connection" between their religious belief and their objection to the vaccine. See also *Rolovich v. Wash. State Univ.*, No. 22-CV- 0319, 2023 WL 3733894, slip op. at *3 (E.D. Wash. May 30, 2023) (The plaintiff did not need to explain in detail how the vaccine conflicted with his Catholic faith.); *Kather v. Asante Health System* (D. Or., July 28, 2023, No. 1:22-CV-01842-MC) 2023 WL 4865533, at *5 (Despite not articulating her religious conflict with great clarity and precision, plaintiff pled enough facts that, favorably construed, allege a conflict with receiving a COVID-19 vaccine motivated by her bona fide religious beliefs); *Caspersen v. Western Union, LLC*, No. 23-CV-00923-NYW-SBP, 2023 3 WL 6602123, at *9 (D. Colo. Oct. 10, 2023) (holding that while his religious objection was not scrupulously detailed, the Court concludes that these statements, taken together, are sufficient at the pleading stage to survive a motion to dismiss); *Collins v. Tyson Foods, Inc.*, No. 22-CV-00076, 2023 WL 2731047, at *7 (W.D. Ky. Mar. 30, 2023) (ruling that a plaintiff established a prima facie case by simply identifying as a Christian who opposed the COVID-19 vaccine due to the use of fetal cell tissue).

It is not an employer's job or prerogative to police the consistency of employees' religious beliefs. All *Heller* and *Gemini* required a plaintiff to do was to inform an employer they had a sincere religious belief in conflict with a vaccine requirement. Employees are not required to prove or justify their beliefs, as shown above.

Employers may also not use consistency of practice or rationality of beliefs as tests. As the Ninth Circuit held in a COVID-19 vaccine objector case:

> *Beyond the district court's factual error, its decision reflects a misunderstanding of Title VII law. A religious belief need not be consistent or rational to be protected under Title VII, and an assertion of a sincere religious belief is generally accepted. Thomas v. Review Bd., 450 U.S. 707, 714 (1981) ("[T]he resolution of [whether a belief is religious] is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); Doe v. San Diego Unified Sch. Dist., 19 F.4th 1173, 1176 n.3 (9th Cir. 2021) ("We may not . . . question the legitimacy of [Appellants'] religious beliefs regarding COVID-19 vaccinations." (citing Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S.Ct. 1719, 1731 (2018))), recons. en banc denied, 22 F.4th 1099 (9th Cir. 2022); EEOC Guidance, § 12-I(A)(2) ("[T]he sincerity of an employee's stated religious belief is*

usually not in dispute and is generally presumed or easily established." (cleaned up)). Keene v. City of San Francisco, 22-16567 (9th Cir. May 15, 2023)

Employers are required to "presume" when its employees certified they have a sincere religious belief in conflict with the vaccine, that it is so, in the absence of an "objective" basis to doubt. *EEOC Guidance, § 12–I(A)(2)2.*

II. When Employers ask Intrusive Questions, they Violate Employees' Rights under the California Constitution, Article I, Section 1, and Government Code § 12940(f)

In the absence of objective evidence that employees lack a sincere religious belief in conflict with a vaccine mandate, employers violate employees' rights to informational and medical privacy by asking intrusive questions. FEHA makes it unlawful for an employer to make any medical inquiry of an employee unless job-related and consistent with business necessity. *CA GOVT § 12940(f)* Follow up questions about medical history are often overbroad; for instance, when asking whether an applicant had ever used medications or taken vaccines, or questions about whether someone had knowingly used products developed with fetal tissues. Improper questions are those which are not based on objective doubts, but are merely fishing efforts to find something.

The California Constitution vigorously protects employee interests in informational privacy. See, *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 35, 865 P.2d 633 (1994) ("Informational privacy is the core value furthered by the Privacy Initiative. (White v. Davis, supra, 13 Cal.3d at p. 774.)")

III. "Sincerity of Belief" Questions Should Survive Both 12(b)6 and MS motions – At most, these questions may be a credibility issue for the jury.

Moreover, the Ninth Circuit has been consistently reversing district courts which dismiss COVID-19 claims on 12(b)6 motions. See, *Beuca v. Washington State University*, 2024 WL 3450989 (C.A.9 (Wash.), 2024); *Health Freedom Defense Fund, Inc. v. Carvalho*, 104 F.4th 715, 722 (C.A.9 (Cal.), 2024); *Bacon v. Woodward*, 104 F.4th 744 (C.A.9 (Wash.), 2024).

Other circuits have done so as well. See, *Bazinet v. Beth Israel Lahey Health, Inc.*, 2024 WL 3770708 (1st Cir. 2024); *Lucky v. Landmark Medical of Michigan, P.C.*, 103 F.4th 1241 (6th Cir. 2024); *Passarella v. Aspirus, Inc.*, 108 F.4th 1005 (7th Cir., 2024); *Ringhofer v. Mayo*

Clinic, Ambulance, 102 F.4th 894 (8th Cir. 2024); *Davis v. Orange Cnty*., 2024 WL 3507722 (11th Cir. 2024).

The Circuit Courts are clear; a light touch is required when analyzing sincerely held religious beliefs, and "it is generally presumed or easily established." *Keene v. City & Cnty. of San Francisco*, 2023 WL 3451687, at *2 (9th Cir. May 15, 2023).