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Religious discrimination in the US workplace: is it getting better or worse?

This article explores whether religious discrimination in the US workplace is getting better or worse, and what can be done to prevent religious discrimination.

It is unclear whether actual religious prejudice or bias in the workplace is lessening or worsening. However, it is clear that opportunities for, and incidents of, religious conflict among workers, and between workplace policies and individuals' religious beliefs, have been increasing as workplaces have become more diverse. Surveys of US workers and the rising number of religious discrimination claims suggest that US workers of all religions do not appear to be facing religious bias in the hiring process. Rather, they face obstacles in pursuing their religious beliefs in the workplace and obtaining accommodation of their religious beliefs from employers.

Although one-third of workers surveyed by the Tanenbaum Center for Interreligious Understanding in its study *What American Workers Really Think About Religion: Tanenbaum's 2013 Survey of American Workers and Religion*[1] reported that they had witnessed or experienced religious discrimination or non-accommodation of their religious beliefs, only five per cent reported that they felt excluded or treated differently because of their religious beliefs. These workers cited other forms of discrimination such as age, race, ethnicity or gender as being more prevalent forms of bias in the workplace.

Religious discrimination claims in context

Religious discrimination claims make up a fraction of the workplace discrimination claims filed in the US each year. The Equal Employment Opportunity Commission (EEOC) – the agency that administers federal discrimination laws – reported that only 3,721 of the 93,727 charges of workplace discrimination filed for 2013 alleged claims of religious discrimination. In contrast, there were 33,068 charges of racial discrimination, 27,687 charges of sexual discrimination (including sexual harassment and pregnancy discrimination) and 25,957 disability discrimination charges. In other words, workplace religious discrimination claims constitute approximately four per cent of all workplace discrimination claims filed.

Religious discrimination claims are increasing

However, religious discrimination complaints appear to be the fastest growing type of workplace discrimination claim. The EEOC has reported that workplace religious discrimination complaints have doubled from 1,709 in 1997 to 3,721 in 2013, peaking at 4,151 in 2011. Percentage-wise, claims jumped from two per cent to four per cent of all discrimination claims filed during this period. These claims are being filed by individuals of numerous religions, including adherents to mainstream Protestant Christian religions as well as Mormons, Jehovah's Witnesses, Seventh-Day Adventists, Jews, Muslims, Sikhs and less well-known religious groups. Experts believe the number of religious discrimination claims will continue to rise.

Reasons for increased religious conflict

The rising number of religious discrimination complaints does not necessarily mean that religious discrimination in the workplace is getting worse, nor that there is increasing bias against religion, religious practice or members of certain religions in the US workplace. Rather, experts attribute the increasing numbers of religious conflicts to the high level of diversity in the workplace, coupled with the greater willingness and assertiveness of workers in discussing and sharing their own religious beliefs in the workplace and in demanding accommodation of their personal religious practices. These religious conflicts and complaints thus tend

to arise more from clashes between employer work rules and employee religious practices, or amongst employees who wish to bring their religious practices into the workplace, rather than from employer bias.

US religious discrimination law

Religious-based disputes and complaints tend to be much more complex than other types of bias claims because of the legal requirement in the US that an employer accommodates an employee's religious belief. Thus, employers can face religious discrimination claims not because they made employment decisions based on religious bias, but because they did not change or provide an exception to a work requirement or schedule to accommodate an employee's personal religious belief.

Title VII of the Civil Rights Act of 1964 (Title VII), the major US federal anti-discrimination law, prohibits making an employment decision about a person because of that person's religion. Title VII also requires that, where a workplace policy or practice conflicts with an employee's sincerely held religious belief or practice, and the employee brings that conflict to the employer's attention, the employer must provide a 'reasonable accommodation' that eliminates the conflict. A 'reasonable accommodation' of a religious practice is one that does not impose an 'undue hardship' on an employer.

Religious accommodation requests

Typical, religious accommodation requests concern:

- different arrival and departure times or days off to attend religious services or to observe religious holidays or Sabbaths;
- requests for exceptions to dress codes or grooming policies to permit the wearing of religious garb; requests by employees for times and places to pray; and
- requests by employees to not perform certain functions of their position based on their religious beliefs.

In this last category, lawsuits have involved the denial of pharmacists' requests not to fill contraception prescriptions based on their own religious beliefs opposing contraception, and the denial of Muslim truckers' and taxi drivers' requests not to transport alcohol.

Protected religious beliefs

Under US law, sincerely held religious beliefs are entitled to accommodation, whether or not those beliefs are actually part of the belief system of the religion that the employee purports to observe or whether they are part of any established religion or religious group. The EEOC Commission Guidelines state:

'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 or prospective employee.'

Thus, under Title VII, a belief is '"religious" [if,] in the person's own scheme of things', it is 'a sincere and meaningful belief that occupies in the life of its possessor a place parallel to that filled by... God', according to *Redmond v GAF Corp*[2] and *United States v. Seeger*.[3] To be protected, the belief must be 'sincerely held'.

For obvious reasons of proof, employer challenges to the 'sincerity' of an employee's religious belief are rare. In some cases, employers have prevailed on a lack of sincerity of belief defence where:

- the employee behaved in a manner markedly inconsistent with the professed belief;
- the accommodation requested was a particularly desirable benefit that was likely to be sought for other reasons; and
- the timing of the request rendered it suspect (such as the request followed the denial of an earlier request for the same benefit made for other reasons).

What is a reasonable accommodation?

A 'reasonable accommodation' is one that eliminates the conflict between the workplace rule and the employee's religious belief. An employer can refuse to provide an accommodation that the employee requests, if the requested accommodation would pose an 'undue hardship' on the employer, or if the employer offers an alternative solution that resolves the conflict. For instance, in *Farah v A-1 Careers*,[4] a court held that an employer did not have to allow a Muslim employee a private prayer space since it offered to allow him to go off premises to pray.

An undue hardship means 'more than *de minimis* cost' to the operation of the employer's business. Undue hardship includes actual monetary costs to the

employer, but can also include non-monetary costs such as burdens on the conduct of the employer's business. Courts have held that an undue hardship on the employer occurs where the accommodation diminishes efficiency in other jobs, infringes on other employees' rights or benefits (such as seniority), impairs workplace safety, or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work. A few courts have found undue hardship where the exception to the policy would harm the public image of the employer.

A number of court cases have concerned employees' requests to be exempted from policies prohibiting beards, body piercings, head coverings, tattoos or wearing certain insignia. Often these policies are based on brand or public image, safety concerns or the need for visual uniformity.

In these cases, employers have argued that it would be an undue hardship to make an exception to the policy. While employers have generally prevailed on preventing exceptions to uniform and grooming policies based on health and safety concerns, and based on uniformity for certain public employers (such as police), the EEOC has continued to challenge application of such policies based on public or brand image. Most notably, the EEOC filed a series of lawsuits against Abercrombie & Fitch for refusing to hire Muslim women who wore hijabs (headscarves) as salespeople because the hijab was inconsistent with the company's preppy 'Look Policy'. Two of the cases settled; in the third, Abercrombie & Fitch prevailed because it did not receive notice from the individual that the hijab was being worn because of her religious beliefs.

American perceptions about religious discrimination in the workplace

In the Tanenbaum survey, 36 per cent of American workers surveyed said they had experienced or witnessed some form of religious discrimination or religious non-accommodation in the workplace. Tanenbaum purposely and perceptively used the word 'non-accommodation' for failure to accommodate a religious practice, reserving the word 'discrimination' for actual prejudice or bias.

Workers from both majority and minority US religious groups, including evangelical Christians, reported that they felt non-accommodated in their religious beliefs at work. In fact, 49 per cent of non-Christian workers and 48 per cent of Christian evangelical workers reported experiencing or witnessing religious non-accommodation at work. When asked whether companies offered the types of accommodations that employees most commonly want – such as time off for Sabbath observance, food that satisfied religious requirements (such as halal, kosher or vegetarian) at workplace gatherings and permission to wear religiously significant clothing – a full 24 per cent of employees reported that they were required to work on Sabbath observances or a religious holiday and 13 per cent said they attended work events that did not offer kosher, halal or vegetarian options.

The survey also found that those who worked in highly diverse workplaces were more likely to report religious discrimination, or that they had experienced or witnessed some form of religious-non-accommodation. These statistics suggest that, as US workplaces continue to become more diverse, more conflicts will arise between employment practices and religious beliefs and among employees as they share with each other, or try to proselytise, their religious beliefs. Thus, religion-based workplace complaints are expected to increase.

Solutions

Given that religious conflict and actual claims of discrimination in the workplace seem to stem more from non-accommodation of religious beliefs and practices rather than religious bias, solutions to these conflicts would seem to lie with employers' proactive adoption of religious discrimination and accommodation policies to minimise such potential conflicts. Such policies might include training staff and supervisors concerning:

- religious accommodation rules and the types of accommodation that can reasonably be expected;
- policies and structures for making religious accommodation requests;
- flexible work schedules to accommodate religious observance; and
- paid leave, such as personal days, for use for days of religious observance.

These solutions can also lead to a more stable workforce. According to the Tanenbaum study, workers at companies that do not provide flexible hours for religious observances are more than twice as likely to say they do not look forward to coming to

work as workers at companies that do (29 per cent versus 13 per cent). Additionally, employees of companies that have religious discrimination policies are less likely to be looking for a new job. Thus, proactive religious accommodation policies can both reduce religious discrimination claims and foster greater employee loyalty and workplace stability.

Notes

1 The Tanenbaum Center for Interreligious Understanding is a secular, non-sectarian not-for-profit organisation that studies the power of religion. The study is available at tanenbaum.org/publications/2013-survey
2 574 F.2d 897, 901 n 12 [7th Cir. 1978]
3 380 US 163 [1969].
4 2013 US Dist LEXIS 164930 [D Kan 2013]

Workforce reduction in South Korea

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At the start of 2015, multinational employers in South Korea faced a trend of worldwide economic decline. Even though the Korean economy remains in relatively good shape when compared to the US and Europe, many foreign-invested businesses must reduce their workforce in Korean in the local and global spirit of business reorganisation and 'shared sacrifice'.

However, Korea's employment laws make workforce reduction at the employer's discretion difficult. Even though Korean law recognises the possibility of involuntary redundancies, it is necessary to plan carefully and consider other options before proceeding to layoffs.

Job security defined as a general principle

The Labor Standards Act (LSA) generally governs Korean labour and employment law. This is a comprehensive statute applicable to all workplaces with five or more employees. Under LSA Article 23, paragraph 1, the employer may not terminate an employee unless there is 'just cause' for the action.

Similar statutory provisions exist in several European countries – particularly in France, Italy and Germany – and served as an inspiration for Korea's original job security act in the 1980s. However, employers from those countries are generally astonished by the strict protection of Korean employees' job security under the LSA today.

Korean court decisions interpreting the LSA and the notion of 'just cause' have established only two circumstances where 'just cause' is deemed to exist:

- 'fault attributable to the employee', which makes continued employment impossible; and
- 'urgent managerial necessity', such as saving a failing business from imminent bankruptcy.

Employee fault

Generally speaking, 'fault attributable to the employee' appears to mean that the employee has committed some form of sufficiently serious misconduct and breach of trust, making it impossible to continue the employment relationship.

Court cases involving disputes over construction of this term indicate that other potential interpretations include:

- continuous and persistent unsatisfactory performance; or
- criminal or deliberate harmful acts against the employer, including:
  - serious criminal acts outside the line of duty;
  - an improper relationship with another employee; and
  - material misrepresentation in the hiring process.

Ineptitude for work may also sometimes be a fault attributable to the employee not deemed to have occurred within the frame of the employee's duties, such as disease or illness. A complete lack of aptitude may also justify a termination (although the court is traditionally quite generous to employees in making these determinations).