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REPORT

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Recent 2d Circuit Decision Highlights Employer's Need To Give Due Consideration To Employees' Requests For Religious Accommodations

by Mark Goldberg and Michael Shortnacy

A recent ruling by a federal appeals court highlights the seriousness and sensitivity with which employers must consider an employee's request for religious accommodation. In *Baker v. Home Depot*, 445 F.3d 541 (2d Cir. 2006), the court found that Home Depot's offer of Sunday afternoon shifts, instead of Sunday morning shifts, to an Evangelical Christian employee claiming that his religious beliefs precluded him from working on Sundays entirely was not a reasonable accommodation under Title VII of the Civil Rights Act of 1964.

As employees increasingly assert their religious identities in the workplace, employee requests for religious accommodation are also on the rise. In addition to requests not to work at certain times in observance of religious Sabbaths, employees are requesting, among other accommodations, exceptions to employers' dress and personal appearance policies and for the time and place to pray during the workday. In responding to such employee requests, an employer must act consistently within the requirements of applicable federal, state, and local law.

In general, under Title VII, employers are required to make reasonable accommodations to their employees' and prospective employees' bona fide religious beliefs, unless to do so would cause an "undue hardship" to the conduct of the employer's business. What constitutes a "reasonable accommodation" to employees or an "undue hardship" for employers is an oft-litigated question, where there is no "bright-line" test.

For example, in *Baker v. Home Depot*, the court assessed the reasonableness of the accommodation offered by Home Depot in response to an employee's request not to work on Sundays so that he could attend religious services and because his religious beliefs prevented him from working at all on Sundays. Home Depot's response was to offer him Sunday afternoon shifts. The appellate court found that: the shift change offered to Baker was no accommodation at all because it would not permit him to observe his religious requirement to abstain completely from work on Sundays. "Simply put, '[t]he offered accommodation cannot be considered reasonable … because it does not eliminate the conflict between the employment requirement and religious practice.'"

As for what constitutes an undue hardship that will excuse an employer from making a reasonable accommodation, under Title VII, such a hardship generally will be found if the accommodation results in more than a *de minimis* cost to the employer. While the term "undue hardship" is undefined by Title VII, some federal courts have held that requested accommodations result in an undue hardship when the accommodations cause almost any added costs or burdens to employers, including running afoul of a bona fide seniority or merit system and having more than a *de minimis* impact on coworkers.

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For example, the issue of "undue hardship" has been addressed in cases where employees have requested variances from their employers' dress and appearance policies as a religious accommodation. In *E.E.O.C. v. Alamo Rent-a-Car LLC*, 2006 WL 1464472 (D. Ariz. 2006), an employee who was a practicing Muslim requested an exemption from Alamo's appearance policies so that she could wear a head covering during the holy week of Ramadan. The court rejected Alamo's argument that any deviation from its "carefully cultivated image" policies would cause an undue burden because Alamo would have to forgo enforcement of the policy against other employees. The court found such reasoning impermissibly hypothetical.

In another federal appellate case (*Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004)), the court affirmed the dismissal of an employee's claims that Costco failed to accommodate her religious practices as a member of the "Church of Body Modification" by not exempting her from its appearance policies and allowing her to wear facial piercings. The court found the employer demonstrated that such an accommodation would be an undue hardship because it would force Costco to lose control of its public image, a result the court held Title VII does not require.

Same Standard Under California Law

In California, both religious beliefs and religious "observances" are protected by California's Fair Employment and Housing Act. Cal. Gov. Code § 12940. Once an employee establishes that the employer is aware of the employee's "sincere religious belief" and that that belief or observance conflicts with an employment requirement as under Title VII, the employer must initiate good-faith efforts to accommodate the belief or observance. Alternatively, the employer must establish that no accommodation was reasonable without creating undue hardship. *California Fair Employment and Housing Commission v. Gemini Aluminum Corp.*, 122 Cal. App. 4th 1004, 18 Cal. Rptr. 3d 906 (2003). Certain accommodations are mandated by California law, including flexible scheduling of interviews, exams and events associated with the general hiring process, dress codes and even union membership. *See* 2 Cal. Code Regs. § 7293.3(c).

In determining what constitutes an undue hardship, California courts follow the federal standard, holding that "an accommodation causes 'undue hardship' whenever that accommodation results in 'more than a *de minimis* cost' to the employer." *Soldinger v. Northwest Airlines, Inc.*, 51 Cal. App. 4th 345, 371, 58 Cal. Rptr. 2d 747, 762 (1997). In making this determination, California courts generally balance the notice given by the employee, the costs and possibilities of an accommodation, the size of the employer or facility and the structure of the workforce. *See* 2 Cal. Code Regs. § 7293.3(b).

Notably, California courts apply a stricter standard for "undue hardship" when determining whether they are required to make an accommodation for an employee's or a prospective employee's disability. Under this stricter standard, an accommodation must require "significant difficulty or expense" to constitute an "undue hardship." 2 Cal. Code Regs. § 7293.9(b). Because an employer has a competing duty to avoid religious preferences, the duty to accommodate an employee's religious beliefs in California presents a lesser burden than the duty to accommodate an employee's disability.

Stricter Standard Under New York Law

In contrast to the "*de minimis* standard" applied under Title VII and California law, New York law imposes a heavier burden on employers seeking to establish that a religious accommodation would result in an "undue hardship." Specifically, the New York State Human Rights Law, which was amended in 2002, now explicitly defines undue hardship as "an accommodation requiring s*ignificant expense* or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system)" or where an employee would not be able to perform the essential functions for the position in which the employee works. (Emphasis supplied.) The New York Human Rights Law also specifies several factors through which to analyze whether an accommodation results in an undue hardship, including the size and operating costs of the employer and the number of employees who require the accommodation. Until this 2002 amendment, New York employers asserting that a religious accommodation caused an undue burden were only

required to show a "palpable increase in costs or risk to industrial peace," which was much closer to the *de minimis* standard which continues to prevail under Title VII and California law.

It is also noteworthy that the 2002 amendments to the New York Human Rights Law were modeled after federal legislation first introduced in Congress in 1997 and reintroduced in a recent session of Congress by Senator Rick Santorum of Pennsylvania. The Workplace Religious Freedom Act of 2005 (H.R. 1445/S.677), which is cosponsored by Senators Charles Schumer and Hillary Clinton, among others, enjoys broad bipartisan support. If passed, the WRFA would expand the religious accommodations that employers would be required to give under federal law and redefine "undue hardship" under Title VII consistent with the "significant expense" language under the NYHRL.

Employees are increasingly asserting their religious identities and are increasingly requesting accommodations from their employers. These requests can pose difficult questions for employers. The lengths to which employers are required to go to comply with federal, state and local law are not always clear. Moreover, damages under the various statutory schemes that are available to successful plaintiffs include compensatory damages (such as for lost wages or emotional injuries), punitive damages and attorneys' fees. Before making decisions regarding requests for religious accommodation that potentially expose them to liability, employers are well advised to consider the ramifications.

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Mark's primary area of practice is employment law in connection with which he represents clients in proceedings before administrative, arbitral, local, state, and federal forums and counsels management on all aspects of employment relations.

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Increase In California's Minimum Wage Effective January 1, 2007

by Jon Daryanani

On September 12, 2006, Governor Arnold Schwarzenegger signed Assembly Bill 1835 into law, which will increase California's minimum wage to $7.50 effective January 1, 2007, and $8.00 effective January 1, 2008. California's minimum wage is currently $6.75 an hour. The $1.25 increase in the minimum wage will be phased in over a twelve-month period, with the first increase of 75 cents taking effect on January 1, 2007, and the additional increase of 50 cents taking effect on January 1, 2008. The last time the minimum wage was raised in California was more than four years ago in January 2002. Employers that employ exempt employees are required, in addition to meeting the requirements of the exemption (*e.g.,* administrative, professional, executive), to pay such exempt employees a salary of at least two times the minimum wage. Therefore, employers should ensure that exempt employees are being paid at least $31,200 as of January 1, 2007, and $33,280 as of January 1, 2008. Additionally, employers in the city of San Francisco are still required to abide by the San Francisco Minimum Wage Ordinance, which currently requires a minimum wage of $8.82 effective January 1, 2006, and which applies to all employers, including small businesses and nonprofits and to adult and minor employees who work two (2) or more hours per week. The San Francisco Minimum Wage Ordinance, which took effect on January 1, 2005, is increased each year by an amount equivalent to the increase in the regional consumer price index and will therefore increase on January 1, 2007, by an amount yet to be announced by the city. Additionally, effective January 1, 2007, California employers must update their current workplace posters to accurately reflect the new minimum wage.

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Jon Daryanani actively represents clients in virtually all aspects of labor and employment, including the defense of wage/hour, discrimination, harassment, retaliation, and wrongful termination claims. Mr. Daryanani also routinely advises clients with respect to various employment matters, including employee discipline and termination, personnel policies, employment and severance agreements, and wage and commission structures.

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