

How Much Religious Freedom Must You Allow?

Congress is currently debating a bill called the Workplace Religious Freedom Act, whose sponsors say it is too easy for employers to refuse to accommodate workers' religious practices. Some employment lawyers would counter that employers have so few guidelines to follow in this arena that they are already overly vulnerable to liability. We recently asked two attorneys for their advice on this tricky topic.

Offering an accommodation is key. Ron Stolkin and Alec Hillbo, both of Arizona law firm Fennemore Craig, began by explaining the Supreme Court's ruling in the 1986 case of *Ansonia Board of Education v. Philbrook*. The core of the justices' opinion was that an employer need not accommodate an employee (in this case, Philbrook) in the particular way that he or she most wants, as long as other alternatives are explored and one is chosen.

The case involved a teacher whose membership in the Worldwide Church of God required him to miss approximately 6 school days a year. But the collective bargaining agreement in force with his teachers' union limited time off for religious observances to 3 school days a year. The teacher offered to pay for a substitute or use personal business leave, but the school board chose instead to grant him unpaid leave. Justices felt that was in line with the 1972 amendment to Title VII of the 1964 Civil Rights Act, writing, "By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation." And, once the employer has offered a reasonable accommodation, the question of undue hardship needn't be explored.

What is undue hardship? In answering this question, Stolkin and Hillbo refer us to another Supreme Court ruling that has guided employers and courts since it was issued in 1977. In *Trans World Airlines v. Hardison*, the airline offered several alternatives to an individual who could not work from sundown Friday until sundown Saturday because of his religious faith. Like *Philbrook*, he sued anyway, and also like *Philbrook*, he belonged to a union. The Court ruled not only that no accommodation in conflict with a union contract needs to be offered but also that the cost of the accommodation to the employer should be only minimal.

Proponents of the congressional bill feel that those two rulings give employers too much leeway. They want to specify that an employer cannot include its dress code or leave policy in defining the essential functions of any job and that the cost of an accommodation must be significant rather than minimal to relieve the obligation to grant it. Given the lack of agreement about

how to define "reasonable" accommodation and either "minimal" or "significant" costs, it's no wonder so many employers oppose the bill. Meanwhile, religious discrimination charges filed with the Equal Employment Opportunity Commission rose 82 percent between 1993 and 2003. That's probably not because more employers are ignoring workers' religious needs but because of the fast-growing diversity of religions to which employees adhere.

Here's advice for employers. Stolkin and Hillbo stressed that the best defense in court that an employer can offer is evidence that management explored possible accommodations with the employee early and thoroughly. Here's an example of a good effort: Hardison's employer offered him a 4-day week, or to staff his shift with other available employees, or to help him arrange a permanent shift swap with someone else. Other alternatives could be a lateral shift to another, reasonably equivalent, job; a series of meetings with the employee to explore alternatives, even if a satisfactory one isn't found; or helping the person identify other positions that wouldn't conflict with the religious practice. Many courts also require that the employer initiate the exploration of alternatives as soon as management becomes aware there's a conflict.

Employer issues with a large group of workers who all want the same accommodation can be especially troublesome. In 2004, for example, Muslim employees sued Whirlpool to get time off for sunset prayers at a Tennessee plant. Whirlpool told the jury that between 30 and 40 Muslims worked there. If all were permitted to break for prayers at sunset, production lines would need to shut down. Although juries generally sympathize with employees more than judges do, this one voted that line shutdowns would be an undue hardship for the company.

Stolkin and Hillbo warn employers never to offer hypothetical situations when trying to show a judge or jury that an accommodation creates undue hardship. If an organization hasn't actually tried out one or more accommodations, it had better not argue they were too expensive or difficult.

Looking for answers. Courts have not defined religious harassment as clearly as sexual harassment, or reasonable accommodations as in rulings on the Americans with Disabilities Act. And, say the attorneys, that's bad news for employers. Without such guidance, employers will find it harder to identify the elements of an effective defense. The right approach? Work with the employee promptly, and explore as many workable approaches as possible.