Religious Discrimination and Accommodation

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Discussion Points and Objectives

- Religious Discrimination
  - Understand the impact that fear, stereotypes and recent world events have on religious discrimination in the workplace.
  - Identify unlawful discriminatory employment actions that are based on “religion” and understand why they are considered discrimination.
  - Know what actions employers should take to avoid religious discrimination in the workplace.

Discussion Points and Objectives

- Religious Accommodation
  - Understand an employer's obligation to grant reasonable religious accommodations.
  - Understand the interactive process and undue burden.
  - Understand those actions employers should take to avoid failure to accommodate claims.

Title VII Of the CRA of 1964

- Prohibits employers, employment agencies and unions from discriminating against workers based on religion, including disparate treatment and harassment.

- Requires employers to reasonably accommodate employees' religious beliefs, observances and practices when employees request it, unless accommodation would impose a more than *de minimis* cost or burden on business operations.

- Over 35 Years as a Coal Miner
- Good Employee
- No Disciplinary History

Henry Johnson

Henry Johnson works for the Clean Energy Coal Company, as a general laborer. Henry has worked at one of the company's West Virginia mines for over 35 years and he has always been a hard and diligent worker. Recently, Clean Energy started requiring employees to use a newly installed biometric hand scanner to track employee time and attendance. Henry refused to participate, however, because he believed the scanner was imprinting the "Mark of the Beast," which is described in the New Testament Book of Revelation. Henry repeatedly informed company officials that submitting to biometric hand scanning violated his religious beliefs as an Evangelical Christian. After the company's continued refusal to accommodate Henry, he decided to retire rather than submit to the hand scanning. Henry now wants to sue Clean Energy under Title VII

Biometric Hand Scanner

What is Religion?

- All aspects of religious observance and practice, as well as belief.
- Includes theistic beliefs and non-theistic moral or ethical beliefs as to what is right and wrong, if held with the same level of conviction as traditional religious views.

Traditional & Common

"Religion" includes:

- Christianity
- Judaism
- Buddhism
- Islam
- Hinduism

Henry Becomes A Wiccan

Henry Adheres to the Religion of Body Modification

Aberrant & Eccentric

Does “Religion” Include:

- Beliefs that are unusual?
- Beliefs that are new?
- Beliefs that are not part of a formal church or sect?
- Beliefs that are subscribed to by a small number of individuals or seem illogical or unreasonable?

Title VII "Religion" Is Not . . .

In and of themselves, "religious beliefs" do not include:

- Social Beliefs
- Political Beliefs
- Economic Beliefs
- Personal Preferences

No Reasonable Accommodation Provided

Forced to Retire

Henry

What's Prohibited?
Disparate Treatment

- Employers may NOT take adverse employment actions based on religion or religious beliefs. Employment actions include recruitment and hiring, discipline and termination, promotions and pay raises, job training and any other term, condition, or privilege of employment.
- Employers also may NOT take action based on affiliation or stereotypes because of religion or religious belief.

Henry

Henry's shift leader tells him to watch out before he becomes like the crazy religious zealots seen in the news.

Henry receives the silent treatment most days.

Co-workers taunt him by writing "666" on their hands.

What's Prohibited?
Harassment

- It is illegal to harass a person because of his or her religion.
- Employers may NOT require employees to adopt or abandon religious practices as a condition of employment.
- Employers may NOT subject employees to unwelcome statements or conduct that are based on religion and are sufficiently severe and pervasive to cause employees' work environment to be hostile or abusive.
- Liability: Supervisor vs. Co-Worker Harassment

Henry's Conflict With the Biometric Hand Scanner

- Biometric scanner tracks employees' hours and attendance.
- Submitting to the scanner violates Henry's sincerely held religious beliefs.
- Repeatedly informed the company of his beliefs.
- Formally requested an exemption.

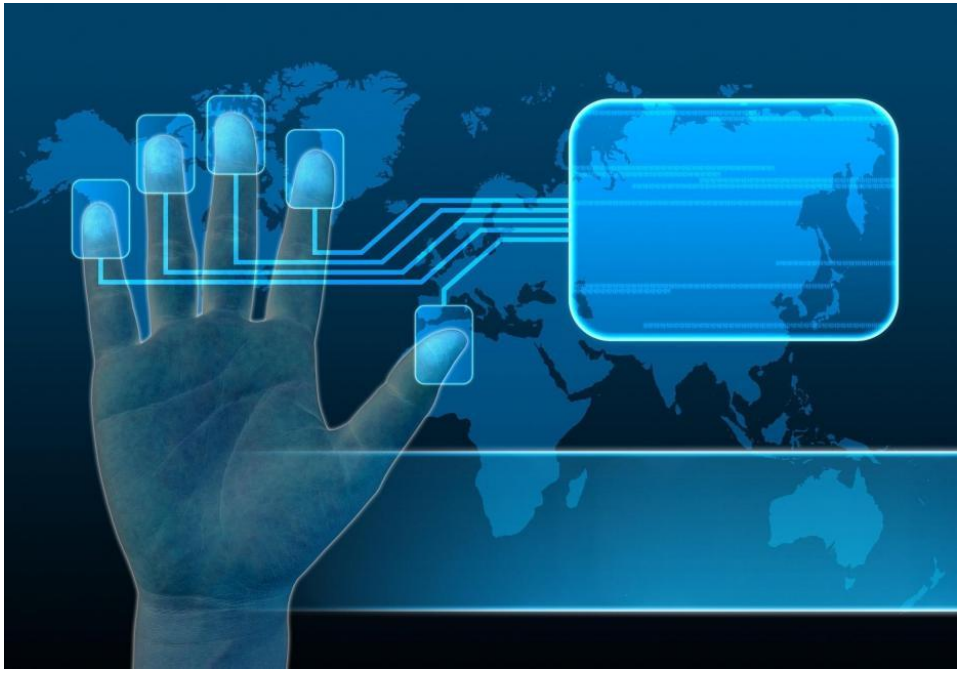
What's Required?

- Religion is the protected category under Title VII that requires us to do more than simply prohibit discrimination.

- Employers must allow adjustments in the workplace that will resolve the conflict between an employee's "sincerely held" religious belief and the employer's policies, unless doing so will cause an "undue burden."

Henry Identifies a Conflict

- Biometric hand scanner



Step One: The Request

- The employee has the obligation to notify the employer of a conflict between a company policy and the employee's sincerely held religious belief.
  - Important to note: Employer may have a duty to start the accommodation discussion even without an explicit request
- But, what constitutes a "sincerely held belief"?

Sincerely Held Religious Belief

- Per the EEOC, the following factors may be considered to determine whether a religious belief is sincerely held:
  - Whether an employee behaves in a manner markedly inconsistent with professed beliefs;
  - Whether the timing of the request renders it suspect; and
  - Whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

Henry a Wiccan, then an Evangelical Christian

- His second religious conversion in 24 months
- He had been complaining a year before his second conversion about working Saturdays.
- He told a co-worker that he wants to make it hard for his shift leader, because he's an idiot.

Sincerely-held religious belief?

Sincerely Held Religious Belief

- Can we assume religious belief is not sincerely held because:
  - Employee's beliefs or degree of adherence changed over time?
  - Employee's beliefs or practices deviate from commonly followed tenets of the religion?

Sincerely Held Religious Belief

- If an employer has an objective basis to question the sincerity of an employee's religious belief, the employer may seek limited, supporting information.
- Proof of sincerity can include:
  - The employee's own written explanation;
  - Written explanation from someone aware of the employee's practices; or
  - Verification from an official of the religion or church.

Religious Observance or Practice

- Types of religious observances or practices that might conflict with company policies:
  - Attending worship service
  - Praying
  - Wearing religious garb or symbols
  - Displaying religious objects
  - Adhering to certain dietary rules
  - Proselytizing or other forms of religious expression
  - Refraining from certain activities

Interactive Process

Step Two: Interactive Process

- Notice of Conflict = Initiation of Interactive Process
  - Act promptly to obtain information necessary to determine whether an accommodation is available:
    - Speak with employee
    - Speak with management
    - Review policies
    - Analyze impact of any possible accommodations on the workplace

Step Two: Interactive Process

- Listen to the employee's ideas about possible accommodations.
- Determine with the employee how much of the policy or procedure s/he must avoid in order to eliminate the conflict.
- Discuss other positions or shifts available that the employee would be willing to work (if no possible accommodation in current role).

Step Two: Interactive Process

- Has the company allowed other accommodations (religious or not) with respect to the same policy or practice?
- Business justifications to deny the accommodation request?
- How will the accommodation impact the business?
- How will the accommodation impact other employees?
- ***If you had to testify about why the accommodation was denied, what would you say?***

Now, we need to decide whether Clean Energy Coal can accommodate Henry…

Clean Energy Coal Workplace

- Clean Energy now requires all employees to submit to biometric hand scanning in order to track attendance and hours.
- Henry repeatedly informs the company that submitting to the hand scanner would violate his religious beliefs – requests exemption.
- Henry provided written explanation of his religious beliefs and offered some non-biometric ways for the company to monitor his comings and goings.
- Clean Energy has already accommodated two employees who have missing fingers – thus proving that accommodation is possible.

Step Three: Accommodate or Not?

- An accommodation is “reasonable” if it ELIMINATES the conflict, not merely lessens the conflict.
- The accommodation cannot unnecessarily disadvantage the employee’s terms, conditions, or privileges of employment.
- When there is more than one reasonable accommodation, the employer does not have to choose the one preferred by the employee, but the one chosen should not be less favorable than what is permitted for non-religious purposes or have negative consequences.

Potential Accommodations Per the EEOC

- Schedule changes, voluntary substitutes, and shift swaps.
- Modified workplace practices, policies, and procedures.
  - E.g. A Christian pharmacy employee may request to be excused from filling birth control prescriptions, or a Jehovah's Witness may seek to change job tasks at a factory so that he will not have to work on weapon production.

Potential Accommodations Per the EEOC

- Change of Job Tasks and Lateral Transfers
- Test and Other Selection Procedures
- Excusing Union Dues/Agency Fees or Participation in Training
- Use of work facility for religious observance, e.g. quiet place for prayer
- Prayer, proselytizing, and other forms of religious expression, e.g. religious icons or messages at work

Henry as Body Modification Follower

Step Three: Accommodate or Not?

- Employers can refuse to accommodate if the possible accommodations:
  - Are more than a de minimis cost (in relation to size and operating costs to the employer).
  - Infringe on co-workers' ability to perform their duties, although general disgruntlement, resentment or jealousy of co-workers does not constitute undue hardship.
  - Will cause an undue burden because of the number of individuals who will in fact need the particular accommodation.

Undue Burden

More Than *De Minimis* Cost

- Employers may be able to refuse possible accommodations if they:
  - Diminish efficiency in other jobs
  - Infringe on other employees' job rights or benefits
  - Impair workplace safety
  - Cause co-employees to carry burden of accommodated employee's work

Outcome?

- *U.S. EEOC v. Consol Energy, Inc. and Consolidation Coal Company*

5 Steps to Avoid/Prepare For Liability

1. Don't Assume or Ask: When it comes to religion, don't assume that an employee or job applicant believes in a particular faith based on what you see, hear, or infer. You should not ask about an applicant or employee's religion at any time.
2. State Job Requirements. Detail job requirements, especially any dress code, so that the applicant can make company aware of potential conflicts.
3. Stick to Job Requirements: Keep the discussion specific to the job requirements, rather than asking if their religion will affect their ability to perform the job in any way.

5 Steps to Avoid/Prepare For Liability

4. Engage in the Interactive Process: If an applicant or employee raises the need for an accommodation on religious grounds, engage in an interactive discussion to determine the range of possible accommodations.
5. Prepared to Reasonably Accommodate: Although you are not required to implement the specific accommodation requested by the individual, you are obligated to offer reasonable accommodations that do not impose an undue hardship on your organization.

Case Update

- Consol Energy recently moved for judgment as a matter of law or for a new trial
  - Arguing that the employee had admitted that he did not actually believe the scanner would give him the mark of the beast (or any mark at all), but instead believed that future versions of the devise would be capable of doing so.
- EEOC responded to Consol's motion and stated:
  - Although the employee admitted that the current scanner left no mark, he testified that the scanners "will be used to serve the antichrist."

Case Update

- EEOC further stated:
  - It is unconstitutional for Consol to demand theological accuracy or consistency.
  - "As the Court instructed the jury, religious beliefs need not be seen as rational, doctrinally consistent, or accurate in order to be protected under Title VII."

- <u>Key Takeaway</u>: If an employee seeks an accommodation based on religion, an employer should not subjectively evaluate the logic or wisdom of the employee's beliefs, but instead should only consider whether the employee sincerely believes.

Best Practices that Employers Should Adopt and EEO Officers Should Promote

Let's Make the Clean Energy Coal Company Better

Best Practices

Policies & Protocols

- Interviewing and Hiring Protocol
  - Job Qualifications
  - Uniform evaluating criteria
- Investigation Protocol
- Request for Accommodation Protocol
- Discipline & Termination Protocol
  - Detailed Documentation
- Exit Interviews Protocol

Best Practices

Policies & Protocols

- Discrimination & Retaliation Policy
  - Distributed &Acknowledged
- Accommodation Policy
  - Including details on how to accommodate
- Complaint Procedure
  - Multi-layered
  - Anti-Retaliation Provision
  - Distributed & Acknowledged

Best Practices

Policies & Protocols

- Audit/Review All Company Policies
  - Make sure they have the desired results.
  - Make sure they are being followed.
  - Determine whether those policies relating directly to employment actions have a disparate impact.

Best Practices

Training

- Who?
  - Everyone, especially management and HR
- When?
  - At Hire
  - Annually, especially HR

Best Practices

Training

- What?
  - Management and HR: All Protocols from Prior Slides
  - Employees: Discrimination and Complaint Policies
- How?
  - Open Discussions
  - Role Plays

Best Practices

Diversity Awareness

- Diversity Department (or HR Professionals who dedicate some of their time to diversity awareness).
- Programming designed to create sensitivity around religion.

Best Practices

Documentation

- Document attendees at training and diversity events.
- Interactive process and reasons for undue hardship and accommodations made.
- Discipline; termination; reasons for hiring/not hiring; and other critical employment decisions.

Credit

Portions of today's presentation come from EEOC Guidance on religious discrimination and accommodation. The EEOC is the administrative body responsible for regulations around and enforce Title VII of the Civil Rights Act of 1964.