

E*Alert

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Workplace Proselytizing: What's an employer to do?

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The duty of an employer to maintain a work environment free of harassment and discrimination is increasingly coming in conflict with the employer's parallel duty to accommodate the religious rights of its employees. Consider an employee who reports that she was subjected to workplace harassment because a co-worker was preaching to her about his evangelical Christian beliefs and posting religious sayings or scripture excerpts in his cubicle. Should you discipline the co-worker and instruct him to refrain from any religious discussions in the workplace and to promptly remove the postings from his cubicle? Or, does the law against religious discrimination protect the proselytizing co-worker and require the employer to accommodate these religious activities? The answers to these questions are not necessarily easy and require an understanding of the conflicting duties and obligations under the federal anti-discrimination law.

Title VII of the Civil Rights Act of 1964 makes it unlawful to "discriminate against any individual with respect to [his or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, *religion*, sex or national origin." The term "religion" includes all aspects of religious observance and practice, as well as beliefs. In determining whether a specific practice is indeed a religious practice, courts have broadly interpreted the term "religion" and have generally held that a belief or practice that is religious in the individual's "own scheme of things" is adequate to obtain protection under Title VII. An employer generally has a duty to reasonably accommodate an employee's religious practices unless it can demonstrate that it would be unable to provide such an accommodation without an undue hardship on the employer's business.

In addition to the duty to accommodate an employee's religious practices, an employer has a parallel duty to maintain a work environment that is free of religious harassment. The definition of religious harassment parallels that of sexual harassment. A hostile work environment can be created by offensive conduct directed at an employee because of that employee's religion if the conduct is so severe and pervasive that it affects a term or condition of employment and the employer fails to take reasonable steps to stop the conduct. The duty of providing a work environment free of harassment is particularly challenging when it involves curbing the religious rights of other employees.

A few recent court decisions demonstrate this dichotomy. In the case of *Petersen v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004), the plaintiff, a self-described "devout Christian," felt religiously compelled to post at his work station biblical passages denouncing homosexuality in response to diversity posters hung by his employer which covered employees, including employees labeled as "gay." After determining that the biblical passages could be offensive to certain employees, management asked Peterson to remove the posting. When he repeatedly refused (even after a paid leave of absence to reconsider his position), his employment was terminated. In addressing his religious discrimination case, the court held that he was not terminated for his religious beliefs, but because he was refusing to comply with the employer's anti-harassment policy. The court also rejected his religious accommodation claim, noting that an employer is not required to accommodate an employee's religious beliefs if doing so would result in discrimination or in the deprivation of contractual or statutory rights of other employees.

Similar facts, which gave rise to a claim for a hostile work environment, were presented in *Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074 (8th Cir. 2006). There, a newly-converted evangelical Christian felt obligated to expound her newfound religious beliefs to co-workers and to post religious sayings in her workstation. After a co-worker complained, she stopped talking to that employee about her religious beliefs, but continued posting religious matters in her cubicle. After the employee continued to complain, the employer moved that employee to a cubicle farther away. In rejecting the employee's hostile work environment claim, the court noted that the communications did not rise to the requisite level of being severe and pervasive. It also found that the employer's response to the complaints of harassment were both prompt and reasonable and that an employer was not required to suppress any and all religious expression merely because it annoyed a single employee.

While persistent or blatant proselytizing at work can be prohibited, where the conduct is less prevalent, the employer may need to accommodate or tolerate the employee's religious beliefs, even if it runs counter to the culture that the employer is otherwise attempting to cultivate. One such example was presented in *Banks v. Service America Corp.*, 952 F.Supp. 703 (D. Kan. 1996),

where a district court upheld the right of two cafeteria employees in a factory to greet customers with phrases such as “God bless you” and “praise the Lord.” Yet, employers who consider themselves “faith-friendly” can also invite claims. In a recent case, comments by a company’s owner and president encouraging an employee to “talk with God” were found to establish a discriminatory hostile environment. *Tillery v. ATSI, Inc.*, 242 F. Supp. 2d 1051, (N.D. Ala. 2003), aff’d, (11th Cir. 2004).

In light of the ever-expanding global economy and the continuing clash of cultures and religions in the post 9/11 workplace, employers need to tread cautiously in dealing with employees’ requests for religious accommodations and co-workers’ complaints about religious practices creating a hostile work environment. These issues are even more acute in the public sector where employees’ free speech rights under the First Amendment are also implicated. While implementing diversity initiatives and setting standards of mutual respect for all employees may alleviate some of these conflicts, the prevalence of these issues appear to be on the rise.

If you have any questions about the issues raised by this e-alert, please feel free to contact Oyvind Wistrom at (414) 273-3910 or by e-mail at owistrom@lindner-marsack.com.

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