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Accommodation of Religion in the Workplace

by John Bowens

As a nation, the U.S. has always prided itself on its pluralistic society, where people of all backgrounds may succeed by dint of hard work irrespective of their ethnic origin. With that diversity comes a variety of issues, some large and some small. Two recent decisions have shown the spotlight on the issue of the accommodation of religion in the workplace.

In *Burwell v. Hobby Lobby Stores, Inc.*,[1] the Supreme Court resolved a conflict between the Third and 10th circuits[2] regarding whether closely held corporate employers are required to comply with the contraception requirements of the Patient Protection and Affordable Care Act of 2010[3] when they conflict with the employer's sincere religious beliefs. A divided Third Circuit panel found that the Religious Freedom Restoration Act of 1993 (RFRA)[4] did not offer protection to a closely held corporation, irrespective of the religious beliefs of the ownership. A less than unanimous *en banc* decision of the 10th Circuit reached a contrary conclusion. In a 5–4 decision, the Supreme Court held that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.

After failing to reach a pre-litigation settlement, the Equal Employment Opportunity Commission (EEOC) brought suit against Abercrombie & Fitch Stores, Inc. (A&B), challenging the firing of an employee for wearing a hijab as required by her Muslim religion. The employee was initially permitted to wear a hijab in A&B's approved colors. Subsequently, she was told that the hijab violated A&B's "Look Policy," and she would be fired if she did not refrain from wearing it.

The EEOC argued that Title VII of the Civil Rights Act of 1964 required employers to accommodate employees' sincere religious beliefs and practices unless doing so would create an undue hardship for the employer. The district court rejected A&B's argument that the employee's departure from the look policy placed an undue hardship on its business. A&B has faced similar cases, including one in Oklahoma where a ruling against A&B was reversed on appeal based upon the 10th Circuit's view that Title VII requires a potential employee to disclose her religious beliefs.[5] The Supreme Court has granted *certiorari* on that case.[6] The *Hobby Lobby* decision demonstrates the polar opposites that form on a national level when the exercise of religious beliefs conflicts with social legislation. While the Supreme Court may adopt the technical reasoning of the 10th Circuit, it seems unlikely that A&B's look policy will be given much traction.

The EEOC describes various practices it views as religious discrimination in the workplace. For example:

> [r]eligious discrimination involves treating a person (an applicant or employee) unfavorably because of his or her religious beliefs. The law protects not only people who belong to traditional, organized religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, but also others who have sincerely held religious, ethical or moral beliefs.
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> Religious discrimination can also involve treating someone differently because that person is married to (or associated with) an individual of a particular religion or because of his or her connection with a religious organization or group.
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> ...
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> The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.[7]

An obvious conflict arises, however, when the employee's religious beliefs conflict with a business priority of the employer. Tension may also exist among employees of differing religious views, giving rise to claims of a hostile working environment. In religious accommodation cases under New

Jersey Law Against Discrimination[8] (NJLAD), state courts will look to jurisprudence under Title VII for guidance.[9]

Hostile Work Environment

Absent direct evidence of a discriminatory motive, to make a *prima facie* case for a religiously hostile work environment under Title VII a plaintiff must demonstrate five elements:

1. the employee suffered intentional discrimination because of religion;
2. the discrimination was pervasive and regular;
3. the discrimination detrimentally affected the plaintiff;
4. the discrimination would detrimentally affect a reasonable person of the same religion in that position; and
5. the existence of *respondeat* superior liability.[10]

Under Title VII, the plaintiff must establish that the workplace was permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.[11] The mechanics of this analysis requires the court to determine if an environment is sufficiently hostile or abusive by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The Supreme Court has stated repeatedly that Title VII is not a general civility code and that ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing, do not give rise to liability under Title VII.[12]

Similarly, under the NJLAD a plaintiff states a claim for a religiously hostile work environment by showing that the complained-of conduct (1) would not have occurred but for the employee's [religion]; and it was (2) severe or pervasive enough to make a (3) reasonable [person of that particular religion] believe that (4) the conditions of employment were altered and the working environment was hostile or abusive.[13]

Under the NJLAD, when a hostile work environment claim is based on religious discrimination, the inquiry is whether a reasonable person of the plaintiff's religion or creed would consider the alleged comments made by or in the presence of the plaintiff's supervisors to be sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile or offensive working environment. A plaintiff must also show the complained-of conduct would not have occurred but for his or her religion.[14] The courts will evaluate the severity and pervasiveness by considering the conduct itself rather than the effect of the conduct on any particular plaintiff.[15] The court quantifies the alleged conduct by viewing it through the prism of whether it would make a reasonable person believe the conditions of employment are altered and that the working environment is hostile.[16]

Job Discrimination

When an employee claims religion-based job discrimination, the court's focus changes. If a Title VII plaintiff shows that discrimination was a 'motivating' or a 'substantial' factor in the employer's action, the burden of persuasion shifts to the employer to show that it would have taken the same action regardless of the impermissible consideration.[17] Absent direct evidence supporting such motivation, the courts will rely upon the burden-shifting methodology of *McDonnell Douglas Corp. v. Green*[18] to analyze both Title VII and NJLAD claims.[19]

The Third Circuit holds[20] that under *McDonnell Douglas*, a plaintiff bears the burden of establishing a *prima facie* case of discrimination.[21] If the plaintiff satisfies that burden, the burden shifts to the employer at the second step "to articulate some legitimate, nondiscriminatory reason" for the adverse employment action.[22] If the employer satisfies that burden, the court moves to the final step of the *McDonnell Douglas* analysis, where the plaintiff bears the burden of showing "[the employer's] stated reason...was in fact pretext."[23]

To show an employer's stated reason was a pretext for discrimination, a plaintiff generally must submit evidence that: 1) casts sufficient doubt upon the stated reason so a fact finder could reasonably conclude it was a fabrication; or 2) allows the fact finder to infer discrimination was more likely than not a motivating or determinative cause of the adverse employment action.[24] To discredit the employer's proffered reason, however, the plaintiff cannot simply show the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory *animus* motivated the employer, not whether the employer is wise, shrewd, prudent or competent. Rather, the nonmoving plaintiff must demonstrate weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find "unworthy of credence," and hence infer "that the employer did not act for [the asserted] non-discriminatory reasons."[25]

Conclusion

It seems clear the disputes in this arena will increase with society's continued diversification. The Supreme Court decision in the Abercrombie & Fitch case will likely set some parameters for

religious accommodation in the workplace, but it is unlikely to provide finality to the issue. The conflict between religious expression and workplace priorities will undoubtedly spawn another generation of litigation as the courts grapple with the type of balances to be struck.

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ENDNOTES

1. *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751 (2014).
2. *Conestoga Wood Specialties Corp. v. Sec'y of the United States HHS*, 724 F.3d 377, 2013 U.S. App. LEXIS 15238 (3d Cir. Pa., 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 2013 U.S. App. LEXIS 13316 (2013).
3. 42 U.S.C.S. § 300gg-13(a)(4).
4. 42 U.S.C.S. § 2000bb *et seq.*
5. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013).
6. Supreme Court Case #14-86.
7. www.EEOC.gov.
8. N.J.S.A. 10:5-1, *et seq.*
9. *Carmona v. Resorts Int'l Hotel, Inc.*, 189 N.J. 354 (2007); *Andes v. New Jersey City Univ.*, 419 Fed. Appx. 230 (3d Cir. 2011).
10. *Abramson v. William Paterson College*, 260 F.3d 265, 276-277 (3d Cir. N.J. 2001)(citation omitted).
11. *Spence v. Lahood*, 2013 U.S. Dist. LEXIS 11409, *8-10 (D.N.J. Jan. 28, 2013).
12. *McKinnon v. Gonzales*, 642 F. Supp. 2d 410, 421 (D.N.J. 2009) (*quoting, Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)).
13. *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 114 (3d Cir. 1999) *cert. denied*, 528 U.S. 1074, 145 L. Ed. 2d 663, 120 S. Ct. 786 (2000) (*quoting Lehmann v. Toys R Us, Inc.*, 132 N.J. 587, 626 A.2d 445, 453 (N.J. 1993).
14. *El-Sioufi v. St. Peter's University Hosp.*, 382 N.J. Super. 145, 178-179 (App. Div. 2005)(Internal citations and quotations omitted).
15. *Ibid, citing Lehmann* 132 N.J 587, 603-604 (1993).
16. *Cutler v. Dorn*, 196 N.J. 419, 431 (2008) (citation omitted).
17. *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 183 (3d Cir. 2009).
18. 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).
19. *Saunders v. Apothaker & Assocs.*, 556 Fed. Appx. 98, 101-102 (3d Cir. 2014).
20. *Ibid.*
21. *Citing, McDonnell Douglas*, 411 U.S. at 802.
22. *Id.*
23. *Id.* at 804.
24. *Saunders, supra*, 556 Fed. Appx. at 101. (Citation omitted).
25. *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) (Citations omitted).