401 (Repeat of 102)

Religion in the Workplace - Duties to Accommodate and the Consequences of Not Doing So

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Religion in the Workplace—
Duties to Accommodate and the Consequences of Not Doing So

May 21, 2018 at 11:25 a.m. and 4:00 p.m.

I. What is religion or religious belief?

A. Under Title VII, "religion" is defined to include: "**all aspects** of religious observance and practice, as well as belief, **unless** an employer demonstrates that he is **unable to reasonably accommodate** to an employee's or prospective employee's religious observance or practice **without undue hardship** on the conduct of the employer's business." 42 U.S.C.A. § 2000e(j) (emphases added) (also referred to as Section 701(j)).

1. Includes not just "religion" but also religious practices.

B. The EEOC's regulations state that "[i]n most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include **moral or ethical beliefs as to what is right and wrong** which are **sincerely held** with the **strength of traditional religious views**." 29 C.F.R. § 1605.1 (emphases added).

1. Whether others observe or practice the same religious beliefs does not affect protection. "The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee." 29 C.F.R. § 1605.1

a. Evidence on whether the employee's beliefs are religious or reflect secular personal preferences may include the employee's own testimony. *See, e.g.*, *EEOC v. Red Robin Gourmet Burgers*, No. C04-1291-JLR, 2005 WL 2090677, at *3 (W.D. Wash. Aug. 29, 2005) (denying employer's summary judgment motion on accommodation claim relating to employee's refusal to cover tattoos to comply with employer's dress code based on his religious beliefs under an ancient Egyptian religion, Kemetecism, based on employee's deposition testimony)

2. Atheism is considered a religion or belief system for Title VII purposes. *See Reed v. Great Lakes Companies, Inc.*, 330 F.3d 931, 934 (7th Cir. 2003) ("[S]o an atheist . . . cannot be fired because his employer dislikes atheists."*); E.E.O.C. v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 621 (9th Cir. 1988) (referring to an atheist employee's desire not to attend mandatory worship sessions at work as "seek[ing] to pursue a religious practice").

C. Courts and the EEOC have refined religious belief to exclude philosophy or ethical preferences that are primarily political or that do not otherwise address theological concerns.

1. The separation between personal preference and religious belief is not always clear, and courts have suggested that religious beliefs are those that try to answer deeper questions about "man's nature or his place in the universe." *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 324 (5th Cir. 1977) (dissent).

2. Personal preferences, including those related to grooming, can enter a gray area. For example, dreadlocks may not require accommodation, but a beard may.

D. Recent guidance from the Attorney General indicates that for public employers, it is not for the employer to question the "reasonableness" of a religious belief: "[A] government agency may not second-guess the determination of a factory worker that, consistent with his religious precepts, he can work on a line producing steel that might someday make its way into armaments but cannot work on a line producing the armaments themselves." Atty. Gen'l Oct. 6, 2017 Mem. at 4, 82 Fed. Reg. 49668. However, the memorandum acknowledges that there is no violation if the employee doesn't believe that a restriction is important or consequential. *See id.*

E. The religious belief must be sincerely held.

1. While courts will not determine the truth of religious beliefs, they will inquire into whether the beliefs are genuinely held.

a. In rare circumstances, courts have required information from litigants to determine good faith belief, like whether parents' beliefs required students to opt-out of school uniforms. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001).

b. Evidence that individual had previously acted in a manner inconsistent with claimed religious beliefs is also relevant, though courts have recognized that beliefs can change over time. *Hussein v. Waldorf Astoria*, 134 F. Supp. 2d 591 (S.D.N.Y. 2001).

2. Ultimately, it's a question for the jury. *See, e.g.*, *Mial v. Foxhoven*, C17-4007-LTS, 2018 WL 1660081, at *6 (N.D. Iowa Apr. 4, 2018). The plaintiff bears the burden of proving his/her belief is sincere. *Vetter v. Farmland Indus., Inc.*, 120 F.3d 749, 751 (8th Cir. 1997).

II. The scope of the duty to accommodate

A. Title VII

1. The core provisions, 42 U.S.C. § 2000e-2(a), state:

"It shall be an unlawful employment practice for an employer—

(1) to **fail or refuse to hire or to discharge** any individual, **or otherwise to discriminate against** any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to **limit, segregate, or classify his employees or applicants** for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an

employee, because of such individual's race, color, religion, sex, or national origin."

2. Title VII duty applies to private employers with more than 15 employees

    a. *See* 42 U.S.C.A. § 2000e(a), (b), (g), (h):

        i. A person or organization engaged in an industry affecting interstate commerce

            (a) ("Industry affecting commerce" means that a labor dispute involving that employer would hinder or obstruct commerce or the free flow of commerce)

        ii. And who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year,

        iii. But not the U.S. government, a U.S. government agency or entity, or an Indian tribe.

3. Exemptions to Title VII duty:

    a. BFOQ Carveout: There is a carveout for employers that hire and employ employees "on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a **bona fide occupational qualification** reasonably necessary to the normal operation of that particular business or enterprise . . . ." *Id.* § 2000e-2(e) (also referred to as Section 703(e)).

        (a) This is to be construed narrowly. *Int'l Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991).

    b. Religious Institution Carveout: And there's a carveout for religious educational institutions. *Id.* (allowing an educational institution to "hire and employ employees of a particular religion" if the school/institution is wholly or substantially "owned, supported, controlled, or managed by a particular religion" or religious "corporation, association, or society," or if the school's curriculum "is directed toward the propagation of a particular religion").

    c. Various other carveouts are also included.

        i. One that may affect Minnesotan or other Midwest employers allows a business "on or near an Indian reservation" to apply a "publicly announced employment practice . . . under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation." *Id.* § 2000e-2(i).

ii. Note that Title VII also has particular subsections applicable to employment agencies, labor organizations, and organizations that run training programs. *See id.* § 2000e-2(b)-(c). These are beyond our scope.

4. EEOC regulations/guidance

a. *See* 29 C.F.R. Part 1605.

B. Minnesota Human Rights Act (MHRA)

1. Minn. Stat. § 363A.08, subd. 2, states:

> Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer, because of . . . religion . . . to:
>
> (1) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or
>
> (2) discharge an employee; or
>
> (3) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

2. MHRA does not define what constitutes a religiously "hostile work environment."

3. MHRA also doesn't specifically require accommodation, and appellate courts have not yet made it clear whether the duty to not discriminate based on religion includes the duty to accommodate religious practices.

a. In a newsletter, the MDHR has interpreted the statute to require reasonable accommodation.

4. Litigants frequently treat MHRA claims as identical to Title VII. *See, e.g.*, *Haliye v. Celestica Corp.*, 717 F.Supp.2d 873, 876 n.1 (D. Minn. 2010).

C. For a public employer: The First Amendment also applies.

a. Free exercise of religion clause

> *Brown v. Polk Cty.*, 61 F.3d 650, 654 (8th Cir. 1995) (holding that "any religious activities of employees that can be accommodated without undue hardship to the governmental employer, *see* 42 U.S.C. § 2000e(j), are also protected by the first amendment").

b. Freedom of speech clause

III. Notice by employee of a duty to accommodate

A. Employee must provide notice to employer of *bona fide* religious belief that conflicts with employment requirement

1. 29 C.F.R. § 1605.2(c): “After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices.”

2. *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 959 (8th Cir. 1979);[1] *Reed v. Great Lakes Companies, Inc.*, 330 F.3d 931, 935 (7th Cir. 2003) (“Title VII imposes a duty on the employer but also a reciprocal duty on the employee to give fair warning of the employment practices that will interfere with his religion and that he therefore wants waived or adjusted.”).

3. MDHA Example: In *Credit Service Settles Charge of Religious Discrimination by Buddhist Woman*, Case 46733, 2006 WL 6187950 (MDHR 2006), the employee wore a “tika” (colored powdered dot placed near the hairline) because of her Buddhist religion. She was asked to stop wearing it but informed the employer that she wore it “as a symbol of her religion.” When she was nonetheless told to “to remove it or lose her job,” she later sued for religious discrimination, and MDHR found probable cause to believe the employer had violated the MHRA. The defendant settled.

B. Employee does not necessarily need to expressly request a reasonable accommodation or expressly identify that the accommodation they request is for a religious belief.

1. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028, 2033, (2015) (“an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed”)

2. *Brown v. Polk County*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc) (“[W]e reject the defendants’ argument that because Mr. Brown never explicitly asked for accommodation for his religious activities, he may not claim the protections of Title VII. An employer need have ‘only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee’s religious practices and the employer’s job requirements.’” (citation omitted))

    a. Because Brown’s supervisor had reprimanded him for his religious activities at work—which included asking his assistant to type up Bible study materials, allowing employees to pray in his office and at department meetings, citing Bible passages in a meeting, and keeping a Bible on his desk—it was apparent that the employer was “well aware

[1] “In order to establish a prima facie case of religious discrimination under §§ 2000e-2(a)(1) & (j), a plaintiff must plead and prove that (1) he has a bona fide belief that compliance with an employment requirement is contrary to his religious faith; (2) he informed his employer about the conflict; and (3) he was discharged because of his refusal to comply with the employment requirement.”

of the potential for conflict between their expectations and Mr. Brown's religious activities." *Id.* at 354.

3. *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444 (7th Cir. 2013) ("The employee must make the request reasonably clear so as to alert the employer to the fact that the request is motivated by a religious belief. The employer, in turn, must be alert enough to grasp that the request is religious in nature. If the employer is not certain, managers are entitled to ask the employee to clarify the nature of this request.")

    a. The plaintiff asked for several weeks' leave to attend his father's funeral. He did not expressly state he was requesting a religious accommodation but did mention the request was so he could participate in "funeral ceremony," a "funeral rite," and animal sacrifice, with certain spiritual consequences if he failed to participate. *Id.* at 450-51. This was enough to put the employer on notice.

IV. "Reasonable accommodation" without "undue hardship"

A. Reasonable accommodation

1. "Title VII entitles employees only to a reasonable accommodation, not an absolute one." *E.E.O.C. v. Univ. of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990)

    a. But, an accommodation suggested by the employer is not "reasonable" if it still requires the employee to violate religious beliefs.

    b. That said, accommodation doesn't necessarily need to eliminate a work-related conflict entirely. *Sturgill v. UPS, Inc.*, 512 F.3d 1024, 1033 (8th Cir. 2008).

2. The law does not require the accommodation preferred by the employee

    a. No requirement to consider or agree to every suggestion made by employee, particularly if suggestion would result in undue hardship to employer. *See, e.g.*, *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149 (10th Cir. 2000).

    b. Nor any requirement to offer the employee's preferred accommodation. *See Cosme v. Henderson*, 287 F.3d 152 (2d Cir. 2002).

    c. However, "when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities" (compensation, terms of employment, etc). 29 C.F.R. § 1605.2(e)(ii).

B. Undue hardship

1. Whether an accommodation would impose an undue hardship is a case-by-case determination. *Brown v. Polk Cty.*, 61 F.3d 650, 655 (8th Cir. 1995).

2. Under Title VII, it only takes "more than a *de minimis* cost" to impose an undue burden on the employer. *See* 29 C.F.R. § 1605.2(e)(1) (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977)).

   a. The EEOC says it "will determine what constitutes 'more than a *de minimis* cost' with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation." 29 C.F.R. § 1605.2.

   b. What is more than *de minimis* cost? *E.g.*:

      i. "[C]osts similar to the regular payment of premium wages of substitutes" (29 C.F.R. § 1605.2)

      ii. "[W]here a variance from a bona fide seniority system is necessary" and the variance "would deny another employee his or her job or shift preference guaranteed by that system" (29 C.F.R. § 1605.2)

      iii. Costs that "materially compromis[e] operations" (Atty. Gen'l Oct. 6, 2017 Mem. at 5)

      iv. "The cost of hiring an additional worker or the loss of production that results from not replacing a worker who is unavailable due to a religious conflict can amount to undue hardship." *Brown v. Polk Cty.*, 61 F.3d 650, 655 (8th Cir. 1995).

         (a) Thus, Brown's asking his assistant to type up Bible study materials caused more than a *de minimis* burden because the assistant couldn't do other work, meaning that the work was either "postponed, done by another employee, or not done at all." *Id.*

      v. Requiring the employer to open its doors early so the employee can pray in his office. *Polk Cty.*, 61 F.3d at 656.

      vi. Requiring other employees "to assume a disproportionate workload." *Bruff v. N. Mississippi Health Servs., Inc.*, 244 F.3d 495, 501 (5th Cir. 2001).

   c. What isn't *de minimis* cost? *E.g.*:

i. "[I]nfrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought" (29 C.F.R. § 1605.2)

ii. "[T]he payment of administrative costs necessary for providing the accommodation"—for example, "costs involved in rearranging schedules and recording substitutions for payroll purposes" (29 C.F.R. § 1605.2)

iii. Merely "speculative," "conceivable," or "hypothetical" burdens. *Brown v. Polk Cty.*, 61 F.3d 650, 655 (8th Cir. 1995) (citations omitted).

iv. "Grumbling" by coworkers. *Polk Cty.*, 61 F.3d at 655 (citation omitted).

(a) Thus, speculation and concern by employees that Brown's religious leanings might affect his personnel decisions were too hypothetical, where there was no evidence that Brown showed favoritism or discriminated on the basis of religion. *See id.* at 656-57.

d. Customer preference can impose an undue burden

i. The EEOC maintains that "[i]f an employer takes an action based on the discriminatory preferences of others, including co-workers or clients" or customers, "the employer is unlawfully discriminating." EEOC Compliance Manual § 12-II.B.

ii. Some courts appear to have taken a different view.

(a) *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004) (holding it would have been an undue burden to allow an employee to expose facial piercings because it would "detract from [the] professionalism" of the store).

(b) *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 477 (7th Cir. 2001) (affirmed reasonable accommodation of employee's belief where the company was that the employee's practice of concluding emails with "Have a blessed day" was imposing her beliefs on others and "could damage" the company's relationship with its customers).

e. Employer must be prepared to prove actual hardship, not theoretical hardship. *See, e.g.*, *Banks v. Serv. Am. Corp.*, 952 F. Supp. 703 (D. Kan. 1996) (declining to find hardship where customers complained about

"blessings" issued by employee because employer failed to show actual harm to business in reduced sales or other disruption).

3. Denying accommodation can give rise to Title VII discrimination claim.

a. *See, e.g.*, *EEOC v. JBS USA, LLC*, 8:10CV318, 2013 WL 6621026, at *15 (D. Neb. Oct. 11, 2013) ("The EEOC claims the alleged unlawful discrimination in this case is that JBS had a pattern or practice of failing to provide reasonable religious accommodation to Somali Muslim employees.").

b. But there are other bases for a discrimination claim, too (*e.g.*, denying a promotion on the basis of religious prejudice). *See Sturgill v. UPS, Inc.*, 512 F.3d 1024, 1029 (8th Cir. 2008) (noting that termination because of religion and "termination caused by a failure to reasonably accommodate [] religious beliefs" are "alternative theories of Title VII liability").

V. Types of accommodation

A. Changing working conditions (*i.e.*, special exemption)

1. An example could be allowing an employee requesting accommodation to have a more flexible schedule. 29 C.F.R. § 1605.2(d)(ii). Some recognized examples are:

a. flexible arrival and departure times;

b. floating or optional holidays;

c. flexible work breaks;

d. use of lunch time in exchange for early departure;

e. staggered work hours; and

f. permitting an employee to make up time lost due to the observance of religious practices.

B. Transfer employee to comparable position where conflicts are less likely, or change the job assignment. 29 C.F.R. § 1605.2(d)(iii).

1. Allow the employee to "swap" shifts if other employees will volunteer to do so.

a. The EEOC takes the position that the employer has an obligation to affirmatively "facilitate the securing of a voluntary substitute with substantially similar qualifications," not just leaving it "entirely up to the individual seeking the accommodation." 29 C.F.R. § 1605.2(d)(i).

i. How? The EEOC suggests publicizing policies about voluntary substitutions, promoting an atmosphere in which substitutions

are welcomed, and providing "a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed." *Id.*

b. Some courts have been less imposing.

i. *E.g.*, *Sturgill v. UPS, Inc.*, 512 F.3d 1024, 1032 (8th Cir. 2008) (discussing favorably a case holding that "it was reasonable to require the employee to arrange swaps with other employees to avoid working on the Sabbath and to fire the employee for refusing to work after failing to arrange a swap").

ii. *Morrisette Brown v. Mobile Infirmary Medical Ctr.*, 506 F.3d 1317, 1323 (11th Cir. 2007) (posting a master shift schedule and approving all of an employee's requested shift swaps "likely constitut[ed] reasonable accommodations," even without actively coordinating swaps).

VI. Public employers

A. First Amendment: free exercise clause

1. "[I]n the governmental employment context, the first amendment protects at least as much religious activity as Title VII does." *Brown v. Polk Cty.*, 61 F.3d 650, 654 (8th Cir. 1995)

2. Failure to accommodate, or treating religiously-motivated conduct adversely compared to secular conduct, can only be justified by demonstrating a narrow and compelling interest.

a. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (citing *Lukumi* and applying heightened scrutiny to police department's allowance of exceptions for medical reasons to its rule that no police officer may wear a beard, but not allowing an exemption for religious reasons).

3. A defense to alleged violation of the First Amendment is thus subject to a much higher standard than the "undue burden" defense under Title VII.

B. First Amendment: free speech clause

1. If an employee is expressing his/herself outside his/her official duties and can demonstrate that:

a. his/her expression is a matter of legitimate public concern and

b. that the employee's interest in commenting on a matter outweighs the employer's interests in operating efficiently and effectively,

c. Then the public employee's speech may be protected.

d. *See Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006); *see also id.* at 428 (Souter, J., dissenting) (not involving religious speech)

C. Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000bb-1(b))—Applies to federal government

1. 42 U.S.C.A. § 2000bb-1: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," except that it may do so where "it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest."

a. "Religious exercise" means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C.A. § 2000cc-5 (definition incorporated by reference into RFRA)

D. Minn. Stat. § 15A.22: By state law, most public employees must be allowed a day off if their religion's holy day does not fall on Sunday. But the day can be charged against the employee's accumulated annual leave, or made up by working an extra day during the year.

VII. Common Requests for Religious Accommodation

A. Dress and grooming

1. One of the most common requests for accommodation.

2. EEOC has issued recent guidance to address growing number of charges

a. Warned that customer preference is not a defense

b. Job segregation is unacceptable

3. Employer may bar religious dress or grooming practice based on workplace safety, security, or healthy concerns if there is evidence of actual undue hardship. Examples include:

a. *EEOC v. GEO Grp., Inc.*, 616 F.3d 265 (3d Cir. 2010) (finding employer could ban religious head coverings in prison setting because of risks presented to employees and possibility of smuggling).

b. *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984) (holding employer not required to accommodate beard because job safety required employees to wear respirators that could not fit over beard).

c. *But see Mohamed Sheik v. Golden Foods/Golden Brands*, No. 3:03CV-737-H, 2006 WL 709573 (W.D. Ky. Mar. 16, 2006) (rejecting employer's

undue hardship claim when evidence suggested that banning head coverings for safety reasons was pretextual, shortly after Sept. 11, 2001).

4. Contrary to EEOC guidance, courts have recognized undue hardship when requested accommodation would otherwise violate grooming or uniform policies in a way that harms business reputation

   a. *Webb v. Philadelphia*, 562 F.3d 256 (3d Cir. 2009) (police department was not required to allow officer to wear headscarf, as doing so might suggest police were not impartial all citizens, regardless of religion).

   b. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004) (holding it would have been an undue burden to allow an employee to expose facial piercings because it would "detract from [the] professionalism" of the store) (also cited above).

   c. *But see EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006) (finding that employer's claimed undue hardship from allowing headscarf was unsupported, and that proposed accommodations did not facilitate religious practice at issue).

   d. *Cf. EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) (involving a Muslim candidate whom an Abercrombie store declined to hire because she was wearing a headscarf, and the store management thought that it would violate the no-"caps" dress code to allow her to wear a headscarf, but not actually reaching the accommodation question)

B. Holidays/Break times

1. Holidays or religious days

   a. Reasonable accommodations:

      i. Transfer to position with a different schedule

(a) Might be reasonable even if the other job is "less desirable" or requires the employee to take a pay cut. *See Sturgill v. UPS, Inc.*, 512 F.3d 1024, 1033 (8th Cir.2008) ("it may well have been reasonable for UPS's district and regional managers to conclude, with the union's concurrence, (i) that the accommodations proposed by Sturgill were costly or inconsistent with the C[ollective] B[argaining] A[greement] and therefore (ii) all that could be offered Sturgill was the prospect of bidding on a less desirable, but conflict-eliminating combination job in 2005").

ii. Offer a different schedule

(a) *Porter v. City of Chicago*, 700 F.3d 944 (7th Cir. 2012)

iii. Allow voluntary swap

(a) *See Antoine v. First Student, Inc.*, 713 F.3d 824 (5th Cir. 2013) (finding there was a genuine dispute as to whether the employer actually offered a voluntary swap, and not reaching its reasonableness)

(b) Not required to force other employees to swap*. See Siddiqi v. New York City Health & Hosps. Corp.*, 572 F. Supp. 2d 353, 363, 371 (S.D.N.Y. 2008) (granting summary judgment against plaintiff's claim where employer explained it could not find any employees to swap with him)

iv. Allow employee to use floating holidays or take unpaid time off

(a) *EEOC v. Firestone Fibers & Textiles Co.*, 3:04-CV-00467, 2006 WL 2620314, at *4 (W.D.N.C. Sept. 13, 2006), *aff'd*, 515 F.3d 307 (4th Cir.2008)

b. In *Sturgill v. UPS, Inc.,* 512 F.3d 1024, 1032 (8th Cir. 2008), the court discussed several "claims that an employer failed to reasonably accommodate an employee's religious desire not to work on the Sabbath" to support its conclusion that a reasonable accommodation need only be "significant," not a total cure:

i. In *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 145 (5th Cir. 1982), the court affirmed judgment for an employer, concluding it was reasonable to require the employee to arrange swaps with other employees to avoid working on the Sabbath and to fire the employee for refusing to work after failing to arrange a swap.

ii. In *Wren v. T.I.M.E.-D.C., Inc.*, 595 F.2d 441, 444-45 (8th Cir. 1979), a truck driver joined the Worldwide Church of God but continued to work some Sabbath days. When the employer's demands increased, the driver insisted he would only work on the Sabbath in an emergency, "resorted to using his ingenuity to avoid working on the Sabbath," and was terminated after refusing to accept work many Sabbath days. Held that the employer did not have to bear more than a de minimis cost, as would be required by plaintiff's suggested accommodations, such as hiring more expensive drivers to cover him or using complicated procedures to find substitute drivers.

iii. In *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992), a Seventh Day Adventist ended a layoff by accepting a new position. Lacking seniority, he was placed on a shift requiring Friday night work, denied a shift change, and eventually terminated for multiple unexcused absences. The Eighth Circuit affirmed a judgment for the employer and the union, concluding that the seniority system for bidding on more favorable shifts, combined with a first-come-first-serve procedure for requesting Fridays off in advance, was a significant accommodation and any further accommodation would be either impractical, too costly, or contrary to the collective bargaining agreement.

iv. In *Mann v. Frank*, 7 F.3d 1365, 1367-69 (8th Cir. 1993), the court affirmed a judgment rejecting the religious accommodation claim of a Seventh Day Adventist because, while the employer did not completely eliminate the conflict between her work and her religious desire not to work on Friday nights and Saturdays, the employer's seniority system and the voluntary nature of its overtime procedure were significant accommodations that justified suspending the employee when she disobeyed instructions to work a Friday night-Saturday morning shift.

2. Time to pray

a. Transfer to position with a different schedule

b. Allowing an employee to use a scheduled break as a time for prayer was a reasonable accommodation. *See* 29 C.F.R. § 1605.2(d)(ii).

c. But it would impose an undue hardship on an employer operating a meat processing plant to have to "(1) "allow Muslim employees to take unscheduled breaks to pray; and/or" (2) "move the meal break during the remainder of Ramadan 2008 (from September 18 through September 30, 2008) to a time that coincided closely with such

employees' sunset prayer time." *EEOC v. JBS USA, LLC*, 8:10CV318, 2013 WL 6621026, at *17 (D. Neb. Oct. 11, 2013).

i. Factors supporting this ruling included: number of employees who would have to be accommodated (200) during the same short time period (10-minute); possible effect of the extra breaks on food safety and on personnel safety (as other employees might rush to complete work during that time window); similarly, possible effects on "operational efficiency" (i.e., rushed employees would complete less quality work); calculations of actual direct financial impact that the break would have on the employer based on plant downtime; negative impact on employee morale; and facilities' inability to handle so many employees on break at once. *Id.* at *18-20.

3. Place to pray

a. *Nichols v. Illinois Dep't of Transp.*, 152 F.Supp.3d 1106, 1123 (N.D. Ill. 2016) (denying summary judgment on religious accommodation claim regarding request by on-the-road supervisor to be able to return to "the yard" to pray twice a day "in a quiet place").

b. *See Tyson v. Methodist Health Grp., Inc.*, 1:02-CV-01888-DFH-TA, 2004 WL 1629538, at *5 (S.D. Ind. June 17, 2004) (holding as a matter of law that the employer had reasonably accommodated the employee's request to pray during the workday by offering several locations where she could pray and only requiring that she inform her supervisor when she went to pray, but finding a material question of disputed fact regarding whether the employer offered a reasonable accommodation for the employee's need to perform "ablution" before praying—washing hands, feet, and forehead—because "the record also contains evidence indicating that these venues were ill-suited for her needs," citing deposition testimony that "the sinks in public restrooms were too high for her to be able to wash her feet" and declining to decide on the record whether "Tyson's faith would permit her to perform ablution regularly in one of the places that Clarian made available to her for prayer").

c. *Cf. Haliye v. Celestica Corp.*, 06-CV-4769(PJS/JJG), 2009 WL 1653528, at *3 (D. Minn. June 10, 2009) (in an order denying a motion to certify a class of Muslim plaintiffs alleging failure to accommodate their prayer schedules, noting twice that the employer did offer a prayer room and "added a second prayer room . . . to accommodate the growing number of Muslim employees").

C. Religious expression

1. Proselytizing

a. *Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156, 168 (2d Cir. 2001) ("Permitting appellants to evangelize while providing services to clients would jeopardize the state's ability to provide services in a religion-neutral matter.")

b. *Ervington v. LTD Commodities, LLC*, 555 Fed. Appx. 615, 618 (7th Cir. 2014) (where plaintiff alleged that" the company wrongfully discharged her for distributing [religious] tracts because proselytizing is a part of her religious practice," the court rejected it "on a failure-to-accommodate theory . . . because LTD Commodities was not required to accommodate Ervington's religion by permitting her to distribute pamphlets offensive to other employees").

i. In accordance with her Christian beliefs, Plaintiff had, at a work Halloween event, "handed out bags that contained candy and pamphlets known as 'gospel tracts.' Some of the tracts negatively depicted Muslims and Catholics, and stated that they would go to hell." Coworkers were offended.

c. The current Attorney General recommends that public and private employers alike consult President Clinton's "Guidelines on Religious Exercise and Religious Expression in the Federal Workplace," which "explain[] that federal employees may keep religious materials on their private desks and read them during breaks; discuss their religious views with other employees, subject to the same limitations as other forms of employee expression; display religious messages on clothing or wear religious medallions; and invite others to attend worship services at their churches, except to the extent that such speech becomes excessive or harassing." Atty. Gen'l Oct. 6, 2017 Mem. at 6.

2. Espousing beliefs motivated by religion (e.g., anti-GLBTQ or anti-abortion)

a. In *Wilson v. U.S. West Communications*, 58 F.3d 1337, 1341 (8th Cir. 1995), the Eighth Circuit rejected the claim that the employer was unreasonable as a matter of law in requiring an employee to cover up a graphic, religiously-motivated anti-abortion button at work. Without discussing undue hardship, the court observed that requiring the employer to instruct co-workers they must tolerate the plaintiff's offensive button "is antithetical to the concept of reasonable accommodation."

b. In *Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220, 226 (3d Cir. 2000), the court affirmed dismissal of the claim of a nurse who objected to participating in any medical procedure that

would terminate a pregnancy, despite the nurse's contention that the accommodation offered—transfer to a newborn intensive care unit—might not have eliminated the religious conflict (cited approvingly in *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1031 (8th Cir.2008))

c. *Walden v. Ctrs. For Disease Control & Prevention*, 669 F.3d 1277 (11th Cir. 2012) (counselor who would not counsel patients in same-sex relationships and handled one such patient in an insensitive manner was removed from that particular work; held that qualified immunity defense protected employers)

d. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (employer not required to accommodate plaintiff's anti-gay and lesbian views in the workplace by allowing employee to post discriminatory posters or removing its own anti-discrimination posters)

e. *Schwingel v. Elite Prot. & Sec., Ltd.*, 11 C 8712, 2015 WL 7753064, at *6 (N.D. Ill. Dec. 2, 2015) (rejecting accommodation claim based on the employee's desire to use a "makeshift chair" marked with the sign "men only" and claims about women's impurities, based on his Messianic Jewish faith).

i. "A claim for failure to accommodate with respect to the seating issue would fail. Elite was not required to accommodate Schwingel's religion by permitting him to use a special chair and sign offensive to other employees. *See Ervington*, 555 F. App'x at 618 (failure to accommodate religion claim failed because company was not required to accommodate plaintiff's religion by allowing her to proselytize and distribute pamphlets that other employees found offensive); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1021 (4th Cir. 1996) (employer not required to accommodate employee's request to proselytize, noting that 'where an employee contends that she has a religious need to impose personally and directly on fellow employees, invading their privacy and criticizing their personal lives, the employer is placed between a rock and a hard place')."

D. Job duties

1. Handling pork

a. *See EEOC v. Work Connection*, CIV. 08-5137 DSD/JJG, 2008 WL 8954713, at *1 (D. Minn. Dec. 1, 2008) (consent decree settling allegations by Muslim employees that that the defendant—an employment agency—failed to provide reasonable accommodation "for their sincerely held religious beliefs in refusing to place them with an employer "unless the employee agreed to sign a form acknowledging that he or she agreed to

handle pork pursuant to [the employer's] direction that all persons placed by The Work Connection at its facilities must be able to handle products containing pork").

b. *But see Al-Jabery v. Conagra Foods, Inc.*, 4:06CV3157, 2007 WL 3124628, at *4 (D. Neb. Oct. 24, 2007) (granting summary judgment against plaintiff, a Muslim hired at a ham processing plant who sought a religious accommodation not to have to touch pork, on the basis that he "failed to present competent evidence that he informed ConAgra that he could not touch pork" and, in the alternative, the accommodation he sought was an undue hardship as a matter of law).

2. Handling alcohol

a. *EEOC v. Star Transp., Inc.*, 13-1240, 2015 WL 13597802, at *1 (C.D. Ill. Mar. 16, 2015) (denying employer's motion for summary judgment on punitive damages where plaintiffs, two Muslim employees, claimed that the trucking company failed to accommodate their religious belief that they could not transport alcohol, when there was evidence the company frequently "swapped loads," and the company had not provided any anti-discrimination law training).

3. Issuing birth control

a. *See Menges v. Blagojevich*, 451 F. Supp. 2d 992, 998 (C.D. Ill.2006) (former pharmacists who were fired by employer Walgreens after Illinois passed a law that required immediate fulfillment of prescriptions for emergency contraceptives, i.e. Plan B, and the pharmacists refused to issue the prescriptions on religious bases, sued the State for promulgating the rule in violation of the free exercise clause and Title VII; they alleged that previously Walgreens accommodated their beliefs by allowing them to refer the prescriptions to another pharmacist; the court found the plaintiffs stated a claim for relief).

b. *Cf. Grossman v. South Shore Public School Dist.*, 507 F.3d 1097 (7th Cir. 2007) (affirming judgment in favor of public school administrators who did not renew a contract with a guidance counselor who refused to counsel students on birth control and instead counseled abstinence and prayed with students).

4. An October 2017 memorandum issued by the U.S. Attorney General reiterated that the law (including the First Amendment's Free Exercise Clause and federal statutes "including the Religious Freedom Restoration Act of 1993" protect "the right to perform or *abstain from performing*" in accordance with one's beliefs.

5. Other

a. *Reed v. The Great Lakes Cos.*, 330 F.3d 931 (7th Cir. 2003) (affirming judgment for employer, in part based on the unique record, where employee of a hotel claimed his religious preferences were offended when he was asked to attend a meeting with the Gideons, but he never gave any indication, even in discovery, of what his religion was or what other conflicts it would present with his job)/

b. *EEOC v. CONSOL Energy, Inc.*, 1:13CV215, 2016 WL 538478, at *1 (N.D.W. Va. Feb. 9, 2016), *aff'd*, 860 F.3d 131 (4th Cir. 2017): A coal miner won a jury verdict against his employer for religious discrimination for failure to reasonably accommodate his religious request to clock-in and clock-out of work using a method other than the required biometric hand scanner. He asserted a moral belief that using the scanner would be pledging allegiance to the Christian Antichrist. *See id.* at *2.

E. Other job requirements

1. Vaccines

a. *Cf. Friedman v. Clarkstown Cent. Sch. Dist.*, 75 F. App'x 815 (2d Cir. 2003) (not employment-related; case involving parent who sought exception on religious grounds to state law requiring that her school-aged child be immunized).

b. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2802 (2014) (Ginsburg, J., dissenting) (querying whether the majority's approach would require the government to pay for an employee's vaccines if "an employer's sincerely held religious belief is offended by health coverage of vaccines").

VIII. Recap and Best Practices

A. Employee (or Prospective Employee) Checklist

1. Sincerely held religious belief

2. Told the employer about the belief and about the perceived conflict (or otherwise provided notice)

3. Was not offered reasonable accommodation

4. Can demonstrate that employer's assertion of "undue hardship" is pretextual or wrong

B. Employer Checklist

1. Awareness of religious belief

a. Remember, if the employer **is** aware of the belief, the employee does **not** need to explicitly ask for an accommodation.

2. Employee did not demonstrate sincerity of belief

3. Offered reasonable accommodation **or** any accommodation would have imposed an undue hardship

    a. No requirement that the employee suggest accommodations, but it may be a good practice to ask what he/she suggests.

    b. If possible, it's a best practice to have facts and figures to support an assertion of undue hardship. *E.g.*, *EEOC v. JBS USA, LLC*, 8:10CV318, 2013 WL 6621026, at *17-20 (D. Neb. Oct. 11, 2013). "Speculative evidence of the future impact of an accommodation is not sufficient to show undue hardship; the costs must be present and real rather than hypothetical." *Haliye v. Celestica Corp.*, 06-CV-4769(PJS/JJG), 2009 WL 1653528, at *7 (D. Minn. June 10, 2009) (citing *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992)).

4. Practice pointer: Do **not** try to head off any anticipated issues by asking a potential hire about his/her religion.

    a. Minn. Stat. § 363A.08, subd. 4 ("[e]xcept when based on a bona fide occupational qualification, it is an unfair employment practice for an employer" to ask a potential hire "to furnish information that pertains to . . . religion").

    b. And use caution in deciding to ask potential hires about their availability. The EEOC recommends the following procedure if knowing the applicant's availability is important:

        i. "[S]tate the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours." 29 C.F.R. § 1605.3(b)(2)(ii).

Free, Publicly Available Resources

The U.S. Equal Employment Opportunity Commission's regulations are available at https://www.govinfo.gov/content/pkg/CFR-2017-title29-vol4/pdf/CFR-2017-title29-vol4-part1605.pdf.

The U.S. Equal Employment Opportunity Commission's website has a wealth of guidance, including:

> "What You Should Know About Workplace Religious Accommodation," https://www.eeoc.gov/eeoc/newsroom/wysk/workplace_religious_accommodation.cfm.
>
> A helpful overview of basic questions; links to the EEOC Compliance Manual, which contains fuller discussion and footnotes to case law.
>
> The Compliance Manual's chapter on religious discrimination (2008) can be found in full at https://www.eeoc.gov/laws/guidance/compliance.cfm.
>
> "Religious Garb and Grooming in the Workplace: Rights and Responsibilities," https://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm.
>
> An "FAQ"-style reference on the question of appearances and religion in the workplace, with numerous hypotheticals to illustrate the principles.
>
> "Questions and Answers: Religious Discrimination in the Workplace," https://www.eeoc.gov//policy/docs/qanda_religion.html.
>
> > Adapted from the EEOC Compliance Manual, these Q&As address the specific question of accommodation but also cover broader ground.

"Leave as a Religious Accommodation" (2008), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2008/ac2008/048.authcheckdam.pdf

Office of the Attorney General, "Memorandum for All Executive Departments and Agencies" (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download.

The White House Office of the Press Secretary, "Guidelines on Religious Exercise and Religious Expression in the Federal Workplace" (Aug. 14, 1997), https://clintonwhitehouse2.archives.gov/WH/New/html/19970819-3275.html.

> Note that the current Attorney General recommends that both public and private employers consult these guidelines from the Office of President Clinton.

Eighth Circuit Civil Jury Instructions, http://www.juryinstructions.ca8.uscourts.gov/8th%20Circuit%20Manual%20of%20Model%20Civil%20Jury%20Instructions.pdf.

> The section on Title VII begins on p. 80. It does not specifically address accommodation.

Department of Labor, "Religious Discrimination and Accommodation in the Federal Workplace," https://www.dol.gov/oasam/programs/crc/2011-Religious-Discrimination-and-Accommodation.pdf.

> High-level overview of questions and recommended best practices.

Anti-Defamation League, "Religious Accommodation in the Workplace: Your Rights and Obligations," https://www.adl.org/sites/default/files/documents/assets/pdf/civil-rights/religiousfreedom/religiousaccomodworkplace/religiousaccommodwkplacerevised07-29-15.pdf.

ABA Handouts

> "Religious Discrimination Law" (2014), https://www.americanbar.org/content/dam/aba/events/labor_law/am/2014/8b_religious_diversity.authcheckdam.pdf.
>
> "Advanced Religious Discrimination Issues" (April 1, 2017), https://www.americanbar.org/content/dam/aba/events/labor_law/2017/03/eeo/papers/issues_paper_eeo.authcheckdam.pdf.
>
> These handouts provide a useful starting-out point for legal research and contain lengthy lists of cases with brief summaries of the decisions. All citations should, of course, be cite-checked.

Minnesota Department of Employment and Economic Development, "An Employer's Guide to Employment Law Issues in Minnesota," https://mn.gov/deed/assets/an-employers-guide-to-employment-law-issues-in-minnesota-13th-ed-2016_tcm1045-133700.pdf.

> Provides a brief discussion of the topic at p. 82.
>
> *See also* https://mn.gov/mdhr/employers/resources/faq.jsp.

Minnesota Department of Human Rights, "Enforcement Case Summaries" (2011-2015), https://mn.gov/mdhr/assets/Case_Summaries_Report_tcm1061-229708.pdf, at p. 21 (summarizing 3 enforcement actions).

University of Minnesota, https://diversity.umn.edu/eoaa/religiousaccommodationresources.

> A collection of online resources, including a link to a calendar of religious observances.