

Suing Bosses Over Beliefs

Bill proposed to accommodate workers' religious tenets

BY MARK HANSEN

When Cora Miller took a job as a waitress in 1993 at a Chi-Chi's restaurant near Washington, D.C., she says she had no idea that her duties would include singing "Happy Birthday."

Miller is a longtime Jehovah's Witness whose religious beliefs don't allow her to celebrate birthdays. So when she was told on her second day of work that she was expected to join the rest of the wait staff in singing "Happy Birthday" to a customer, Miller says she asked to be excused and offered to do something else.

But her boss turned her down flat, she says, telling her that if she couldn't sing the birthday song, she couldn't wait tables there, either.

"I felt hurt, wronged, dejected," says the 44-year-old mother of four, who is now in the process of opening up a day care business in her home. "Nobody should have to choose between their job and their religion."

Seeking Accommodation

That sentiment may be growing. At the same time that the U.S. Equal Employment Opportunity Commission is seeing an increase in complaints of religious bias at work, Congress is considering legislation that would require employers to do more to accommodate workers' religious beliefs.

The bill, known as the Workplace Religious Freedom Act, is backed by a broad-based coalition of religious groups.

"We're living in sort of a rights-asserting period in our history," says Lynn Mitchell, resident scholar of religion at the University of Houston. "People are starting to realize that we have a Bill of Rights in this country and that we don't have to check our rights at the door when we go off to work."

Miller's quest to assert her rights succeeded in December when Chi-Chi's agreed to pay her \$53,000



When Cora Miller refused to sing, she was shown the door.

and adopt a new religious accommodation policy under which employee disputes with management will be resolved on the corporate level, not left to the individual restaurants.

But lawyers for Chi-Chi's, which disputes the allegations, say the company settled the case only to avoid the costs of going to trial. They say Chi-Chi's has always tried to accommodate its employees' religious beliefs and did so with Miller, who they say also objected to carrying her own "bank"—used to hold money and dispense change—and who refused to consider taking another job, such as hostess.

"Chi-Chi's' business is selling quality food in a pleasant environment, not litigating cases," says Bruce Harrison, one of the company's lawyers.

Miller's is not the only unusual employment-related suit that has been filed as of late. "As society becomes more heterogeneous, there will be more situations cropping up in which a person's job respon-

sibilities will rub up against his or her religious practices," says Abba Cohen, Washington, D.C., counsel for an Orthodox Jewish group, Agudath Israel of America.

In one lawsuit, the American Center for Law and Justice, a conservative public interest law firm, claims that Connecticut violated the First Amendment rights of a public health nurse when it fired her for telling an AIDS patient her religious belief is that homosexuality is not an acceptable lifestyle.

In another suit, the center sued Missouri on behalf of a social worker who claims he was fired from his family services job for stating that his Christian beliefs prohibit him

from placing foster children with openly gay couples.

Miller had filed her complaint with the EEOC, which sued Chi-Chi's on her behalf in 1996 under Title VII of the Civil Rights Act. The commission investigates workplace discrimination claims, and has seen the number of complaints alleging religious bias rise more than 18 percent over the last five years, from 1,444 in fiscal year 1993 to 1,709 in fiscal year 1997.

More religion complaints may bear fruit if the Workplace Religious Freedom Act becomes law. Plaintiffs lawyers say that under current law, employers have little incentive to do anything to accommodate the religious beliefs of their workers.

As Title VII law exists today, employers are required to make reasonable accommodations for an employee's religious beliefs unless doing so would impose an undue hardship on the employer. In 1977, however, the U.S. Supreme Court defined the term "undue hardship" as anything more than a minimal

effort or expense. *TWA v. Hardison*, 432 U.S. 63.

Courts have cited a number of reasons why accommodating employees' requests for days off for religious observance would impose an undue hardship. Among them: It would lower morale and productivity, and would violate seniority rights of more experienced employees forced to work instead.

Other courts have held that a Sambo's restaurant need not relax its grooming standards to allow a Sikh Muslim to keep his beard, and that a public school could refuse to let a Muslim teacher wear religious garb.

"The law has never lived up to its original promise," says Agudath Israel's Cohen.

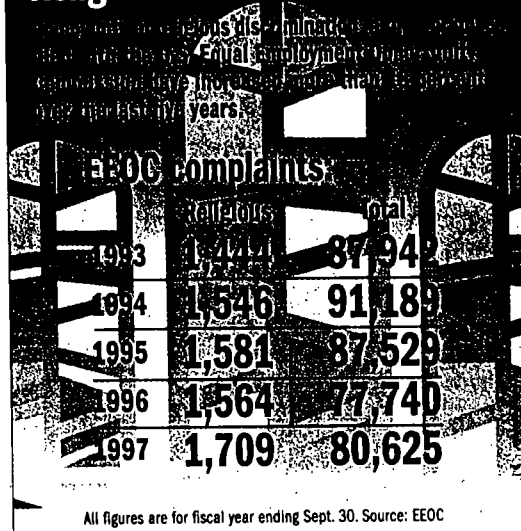
The pending legislation, sponsored by Indiana Sen. Dan Coats, a conservative Republican, and Massachusetts Sen. John F. Kerry, a liberal Democrat, would raise the standard for what constitutes an undue hardship to something that requires "significant difficulty or expense."

Opening the Litigation Floodgates?

Critics say the legislation, if passed, could create turmoil in the workplace and is unnecessary because the law already works.

"There's an old saying that, 'If it ain't broke, don't fix it,'" says Harrison, who notes that he is speaking only for himself, not Chi-Chi's. "I think that applies here."

Religious Bias at Work



Lawrence Lorber, a labor defense lawyer in Washington, D.C., says the proposed law would require an employer to honor every employee request for a religious accommodation regardless of the consequences.

"What happens if everybody wants to take Fridays off?" he says. "It would be absolutely unworkable."

But supporters of the legislation say it would not provide religious employees with absolute protection. What it would do, they say, is require that requests for an accommodation be subject to a balancing test between the employee's needs and the employer's requirements. It also would bring the law in line with the language of the Americans with Disabilities Act, which defines an undue hardship the same way.

Jay Sekulow, chief counsel of the American Center for Law and Justice, says the proposed legislation makes it clear that religious discrimination will not be tolerated in the workplace.

"It gives the law some teeth," he says. "There's too much wiggle room in it for the employer now."

And Richard Foltin, legislative director and counsel for the American Jewish Committee, who chairs the coalition of religious organizations supporting the act, says critics' fears that it would be abused are unfounded.

"In the real world, that's not going to be a problem," he says.

"Asking for a religious accommodation is not something employees do lightly. I can't say there would never be an employee who would abuse it, but as a general rule, I can assure you it's just not going to happen."

STATUS REPORT: Update on a previous story in the ABA Journal

■ Litigation

Plastic Pipes Lawyer Battles Clients Over Fees

A mass tort battle over faulty plastic pipes has spawned an angry fee fight with a group of homeowners trying to stop their lawyers from collecting \$108 million in fees and expenses.

Lead plaintiffs' lawyer George Fleming, of Houston and other attorneys want the fees for representing 38,000 homeowners against the makers of polybutylene pipes, which were installed in homes in the 1970s and '80s. (See "Lawsuit Pipeline," December 1995 ABA Journal, page 20).

After more than a decade of litigation, homeowners settled with manufacturers Hoechst Celanese Corp. of New Jersey and Shell Oil Co. of Texas in 1996. The companies agreed to pay \$170 million in cash, and perform free

plumbing work that Fleming values at an additional \$180 million.

In November 1996, state District Judge Russell Lloyd of Houston approved the settlement but turned down Fleming's request for \$108 million in fees and expenses, awarding \$13 million instead.

Fleming, however, stood by his original request, arguing that it was consistent with the homeowners' 40 percent retainer agreements and noting that the money would be split among about 200 lawyers from 49 firms. In July 1997, Fleming told the homeowners he would appeal Lloyd's order, tying up their money for years, if they didn't agree to a larger fee.

In February, at least 21 enraged homeowners filed a legal malpractice class action lawsuit against Fleming, accusing him of fraud, conflict of interest and breach of fiduciary duty.

The protesters' attorney, Larry

Doherty of Houston, says homeowners could have gotten the free replumbing without litigation. The rule is, Pipes get it and bobs get slaughtered, he says. Fleming spent for \$108 million out of \$170 million. No one's going to go for that.

Fleming argues that plaintiffs' lawyers had to fight the manufacturers for everything their clients got, including the replumbing. They spent \$22 million up front in expenses, tried the case to a jury seven times and fought 11 appeals. "I'd kind of like to know where the critics were when we were trying these cases," he says, adding that he could have used their help in 1989.

In February, about 21,000 of the homeowners agreed to settle for 15 percent of their share of the disputed fees, leaving plaintiffs attorneys with 85 percent—or about \$25 million. Lloyd approved that deal on Feb. 6.

—Michael Higgins



WRFA -
EW

2-5-98

ANALYSIS

S. 1124/H.R. 2948, the Workplace Religious Freedom Act (WRFA) by Sen. John Kerry (D-MA), Sen. Dan Coats (R-IN), and Rep. Bill Goodling (R-PA)

"[N]o worker in America should be forced to choose between a job and violating deeply held religious beliefs."—Senator Dan Coats (R-IN).

Legislation is pending that would amend Title VII of the 1964 Civil Rights Act to expand substantially—not "clarify" as some would argue—the already existing duty of employers to accommodate the religious beliefs and practices of their applicants and employees. S. 1124/H.R. 2948, the Workplace Religious Freedom Act (WRFA), raises the current accommodation threshold under Title VII by requiring employers to make adjustments for religious beliefs and practices of their employees unless these adjustments result in "significant difficulty or expense." Among other things, WRFA would override seniority rights, conflict with certain wage-hour requirements, let employees set their own work schedules, and exacerbate the already existing tension when trying to make a religious accommodation for one employee without generating a claim of harassment from another. The following analysis summarizes WRFA's provisions, reviews how current law strikes the appropriate balance in protecting employees' religious rights in the workplace, and analyzes in detail the serious practical problems that are almost certain to arise if WRFA is enacted as currently drafted.

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S. 1124/H.R. 2948, THE WORKPLACE RELIGIOUS FREEDOM ACT (WRFA)

Introduction

Legislation that would expand substantially the duty of most employers to accommodate the religious beliefs and practices of both their employees and job applicants has been introduced in Congress and is likely to receive serious consideration by federal legislators in 1998. The Workplace Religious Freedom Act (WRFA), S. 1124/H.R. 2948, is sponsored in the Senate by Senators John Kerry (D-MA) and Dan Coats (R-IN), and in the House by Education and Workforce Committee Chairman Bill Goodling (R-PA). The legislation's bipartisan cosponsorship, and its support by a broad-based coalition of liberal and conservative religious groups, gives it a running start as the second session of the 105th Congress gets underway.

Two points must be stressed at the outset. First, although the very title of the bill suggests that religious practices and observances lack protection in the workplace, the fact is that Title VII of the Civil Rights Act of 1964 (which applies to all employers with 15 or more employees) has provided protection against religious discrimination since 1964, and since 1972 has required covered employers to accommodate the religious beliefs and practices of their employees. In fact, religion—unlike sex, race, and national origin—is the *only* protected category under Title VII to enjoy this special status of requiring “reasonable accommodation.”

Second, WRFA would increase substantially the duty of employers to accommodate religious beliefs and practices of their applicants and employees. Last summer, the Clinton Administration issued “Guidelines on Religious Exercise and Religious Expression in the Federal Workplace” to all civilian branch agencies and officials. Those guidelines were issued to “clarify and reinforce the right of religious expression in the federal workplace,” so that federal law does not unduly restrict *appropriate* religious enjoyment—i.e., that which does not interfere with the rights of others or with the efficient and effective functioning of the workplace. The guidelines did not alter current law in any way. Though some proponents of WRFA argue that the bill is merely an extension to the private workplace of the Administration's guidelines, this clearly is not the case. WRFA is not a “clarification” of existing law.

According to Senator Coats, WRFA is intended to extend “constitutional protections to religious observers in the workplace” and if enacted, will ensure that “no worker in America should be forced to choose between a job and violating deeply held religious beliefs.” But, as discussed in more detail below, there is no absolute right to unbridled religious expression in the workplace. Indeed, there is a serious question as to whether the bill as drafted is constitutional.

LPA Analysis

As the following analysis documents, it is far from clear that the perceived problem that WRFA attempts to address is as serious as alleged, especially in light of the adequate protection afforded under current law, the small percentage of religious discrimination charges filed in comparison to other types of alleged discrimination, and, most importantly, the fact that the vast majority of employers do make reasonable accommodations to the religious needs of their employees.

In a nation of cultural and religious diversity such as ours, it is the absolute right of every person to *believe* according to individual conscience—however, how an individual's beliefs can be *practiced* must give due accord to balancing the equal rights of adherents of many different religions, and other competing nonreligious interests. In the workplace, this may require neutral conduct rules for the good of all (particularly where, as with religion, no clear viewpoint emerges as the one the employer could, or should, endorse or prohibit).

Title VII attempts to reach an accommodation of conflicting religious practices, without doing violence to the rights and nonreligious interests of employees. Unfortunately, it appears that WRFA as currently drafted could become a new tool for discrimination, by elevating the religious rights of some individuals above other compelling, and at times conflicting, federal antidiscrimination and labor policies.

LPA's analysis follows.

Overview and Section-by-Section Analysis

WRFA would amend Title VII of the 1964 Civil Rights Act to expand significantly the obligation of employers to accommodate the religious beliefs and practices of their employees and job applicants. An employer would not be required to make reasonable accommodation if the employer can show that the accommodation would result in an undue hardship, which is defined under WRFA to mean "significant difficulty or expense." Although WRFA purports to adopt the undue hardship standard contained in the Americans with Disabilities Act (ADA), the WRFA undue hardship standard is in fact different and would be more difficult to meet. WRFA also would expressly require employers to make exceptions to seniority systems and collective bargaining agreements where necessary to accommodate an employee's religious observance or practice and would impact current wage-hour law by providing that overtime would not be required even if otherwise payable if work performed is solely to accommodate the employee's religious requirements.

Definition of Religion

WRFA first amends Section 701(j) of Title VII (the definition of the term "religion") by adding the phrase "after engaging in an affirmative and bona fide effort" to define the effort an

LPA Analysis

employer must undertake in carrying out its existing duty to accommodate an applicant's or employee's religious beliefs or practices. Second, it strikes the phrase "or prospective employee" from the current definition of religion and redefines the term "employee" to include "prospective employee" (i.e., to include applicants). This is merely a technical change, as Title VII currently reads "employee's or prospective employee's religious observance or practice . . ." Third, and most significantly, WRFA adds a statutory definition of the term "undue hardship" to mean that an accommodation would require "significant difficulty or expense."

As discussed in more detail in the next section of this analysis, the Equal Employment Opportunity Commission (EEOC) — the federal agency that enforces Title VII — and the federal courts have interpreted religion broadly under current law to include much more than simply "established" faiths. For example, according to EEOC, any closely held moral or ethical belief qualifies for protection under Title VII. This broad interpretation of religion becomes highly problematical when applied in the context of WRFA's expansive duty to accommodate.

New Definition of Undue Hardship

Although WRFA's sponsors suggest that the definition of undue hardship is the same as the ADA's undue hardship standard, this simply is not the case. As we explain in detail later on this analysis, the WRFA undue hardship standard would be much more difficult for an employer to meet.

"Significant difficulty or expense" under WRFA is to be determined by considering several factors set out in the bill, e.g., whether the accommodation results in the employee's inability to "perform the essential functions" of his or her job¹; *and* other factors, including (i) the "cost" of the accommodation relative to the "size and operating cost" of the employer, including the costs of lost productivity, retraining or hiring employees, or transferring employees from one facility to another; (ii) the number of individuals who will need a particular accommodation for a religious observance or practice; and (iii) operational considerations when an employer has multiple facilities, such as the administrative, fiscal, or geographic relationship between/among facilities that will "make the accommodation more difficult or expensive."

It is unclear whether WRFA's sponsors intend that an accommodation that interferes with the essential functions of a job is a *per se* undue hardship.

¹ Under the ADA, the employee has to be able to show that he or she is able to perform the essential functions of the job, with or without reasonable accommodation. Indeed, if the employee cannot meet this threshold test, the employee is precluded from further pursuing a valid ADA claim. Under WRFA, the burden is shifted to the employer as part of proving undue hardship.

LPA Analysis

Prohibited Employment Practices

WRFA amends Section 703 (prohibited employment practices) of Title VII by adding a new subsection "o" to deal specifically with employment practices relating to religious accommodation.

First, it sets out the following three definitions: (1) reiterates that "employee" includes "a prospective employee," in other words includes applicants; (2) defines the term "leave of general usage" as leave provided under an employer's policy or program that allows employees to adjust work schedules or assignments according to rules set down by the employer for reasons of the employee's choosing; and (3) reiterates that "undue hardship" means significant difficulty or expense.

Second, it specifies that an accommodation is only reasonable if it actually *removes* the conflict between employment requirements and the applicant's/employee's religious observance or practice.

Third, WRFA specifies that an employer cannot deny an employee "leave of general usage" (see above) that the employee otherwise would be entitled to, if the only reason for the refusal is that the leave will be taken to accommodate a religious observance or practice.

Bona Fide Seniority Systems/Collective Bargaining Agreements

WRFA also would require employers to make exceptions to seniority systems and collective bargaining agreements where necessary to accommodate an employee's religious observance or practice under two specified circumstances: (1) where an adjustment to work hours, shift, or job assignment needs to be made, as an accommodation for a religious practice or observance, that the employee otherwise would not be entitled to because of seniority considerations among employees; or (2) where employees voluntarily exchange shifts or job assignments, or voluntarily make some other arrangement between themselves, to allow an employee to engage in a religious practice or observance.

In either of these two situations, an employer could not refuse to make the special assignment as a religious accommodation, even if to do so would violate the seniority provisions of a collective bargaining agreement.

Wage-Hour Issues

WRFA specifies that an employer is not required to pay "premium wages" or give "premium benefits" for overtime hours worked if an employee is working during those hours only as an accommodation for religious practices or observances. The bill defines "premium benefit" to mean seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, an educational benefit, or a pension; that is *greater* than the benefit the employee

normally would receive for working the same number of hours on the employee's regular work schedule. "Premium wages" are defined to include overtime pay, compensatory time off, premium pay for night/weekend/holiday work, and premium pay for standby or irregular duty.

Effective Date

The amendments made by the bill would generally take effect on the date of enactment of WRFA, except that they would not apply to conduct occurring before the date of enactment.

Religion Broadly Defined Under Title VII

Title VII of the Civil Rights Act defines religion as "*all aspects of religious observance and practice, as well as belief*," although Congress did not attempt to actually define what a "religious observance [or] practice [or] belief" is under Title VII. In 1980, the Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcing Title VII, issued *Guidelines on Discrimination Because of Religion*, 29 C.F.R. § 1605.1. Although these "guidelines" do not have the same legal binding effect as regulations, the federal courts traditionally have treated EEOC guidelines as if they were mandatory regulations.

The EEOC's religious guidelines interpret the term religion to give it an expansive meaning, including "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." Indeed, the EEOC guidelines go on to state that "[t]he 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." As one example of what this can mean in practical terms in the Title VII context, an EEOC area office in 1996 determined that the Orange County CA Transit Authority committed *religious* discrimination when it fired a vegetarian employee for refusing to hand out free hamburger coupons. *Anderson v. Orange County Transit Authority*, No. 345960598 (Aug. 20, 1996).

And more recently, the EEOC's San Francisco District Office determined that the Teamsters Union committed religious discrimination by taking disciplinary action against two UPS employee union members who crossed a picket line because the employees held "religious convictions that preclude [her/him] from withholding [her/his] labor from [her/his] employer." *Hawkins & Christolear v. International Brotherhood of Teamsters, Charges Number 375-98-0014 & 375-98-0015*, (Jan. 12, 1998).

For purposes of Title VII enforcement, the EEOC adopts as a practical matter, the broad concept of "religion" as it has been interpreted by the U.S. Supreme Court in its constitutional decisions. For example, in *Thomas v. Review Board of Indiana Employment Security Division*, 101 S. Ct. 1425, 1430 (1981), the Court said that "religious beliefs need not be acceptable,

logical, consistent, or comprehensible to others in order to merit First Amendment protection." The Supreme Court considered the "officiality" of the belief to be irrelevant, observing that "the judicial process is singularly ill-equipped" to make such a determination.

The Court also has ruled that religion can be entirely personal to the individual who claims that he must do something or refrain from doing something because of "religion," and does not have to come from an organized church. *Frazee v. Illinois Department of Employment Security*, 109 S. Ct. 1514 (1989). "Religion" is more than the established, mainstream organizations and belief systems that the word religion typically conjures up, said the Court in *United States v. Seegar*, 85 S. Ct. 850, 863 (1965); e.g., a religious belief is "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God" The Supreme Court said:

The validity of what [the individual] believes cannot be questioned. . . . "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." . . . Local boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.

Even though the Court said in *Thomas* that some asserted beliefs might be "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause," it gave no hints what such a practice might be, and lower courts have not risked too readily labeling unconventional religious beliefs or practices as "bizarre."

For example, in *Callahan v. Woods*, 658 F.2d 679, 685 (9th Cir. 1981), a person's refusal to obtain a Social Security number because of a religious belief that such numbers were the "mark of the beast" described in the scriptural book of *Revelations* was entitled to protection as religion because "courts may not inquire into the truth, validity or reasonableness of a claimant's religious beliefs." In *Stevens v. Berger*, 428 F. Supp. 896, 899 (E.D.N.Y. 1977), a U.S. district court said that "a religious belief can appear to every other member of the human race preposterous, yet merit the protections of the Bill of Rights."

Since the substance of a person's belief cannot be questioned, the key consideration in determining protections for a religious belief or practice is whether or not the belief is *truly held* by the adherent. From an employer's perspective, given the fact that the courts are extremely reluctant to question the sincerity or nature of someone's claimed religion, how will the employer itself be able to make the determination when a request for an accommodation is made? It is important to understand that as the agency responsible for enforcing WRFA's expanded reasonable accommodation requirement, EEOC will be compelled to enforce WRFA's

increased accommodation duty for every conceivable "religious" practice under its broadly worded guidelines.

Title VII Already Prohibits Religious Discrimination, Requires Employers to Accommodate

Does the Alleged Problem Merit the Major Changes WRFA Would Make?

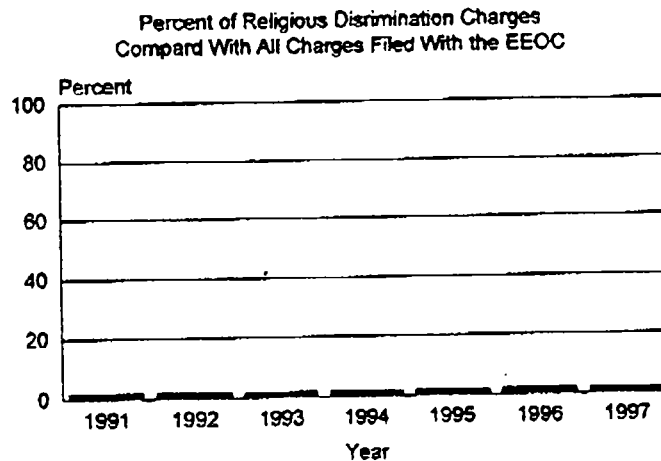
Even before explaining how current law provides adequate protection to those who seek workplace accommodations for their religious beliefs while at the same time preserving the legitimate rights of other employees, it is worth taking some time to put the alleged problem of workplace religious discrimination in its proper context.

A recent survey conducted by the Society for Human Resource Management (SHRM) shows that most employers already make reasonable accommodations to the religious needs of their employees of the nature and magnitude that should satisfy WRFA's proponents. SHRM represents more than 90,000 human resource managers working for corporate America. The SHRM survey (*1996 Religion in the Workplace Mini-Survey*) reports that the demand for religious accommodations in the workplace has remained unchanged in recent years and that 80 percent of employers responding said there is about the same demand for religious accommodation in the workplace today as five years ago. The rest of the respondents were about equally split between finding there were more accommodation requests than in the past and less requests than in the past. The SHRM survey also reports that flexible work schedules are the most common form of accommodation. We would note here that there is legislation pending in Congress to amend the Fair Labor Standards Act (H.R. 1/S. 4) that would give both employees and employers additional flexibility to be able to accommodate such requests.

Proponents of WRFA cite a rise in the number of charges of religious discrimination being filed with the Equal Employment Opportunity Commission (EEOC), the federal agency that enforces Title VII. While the absolute number of charges filed with the EEOC alleging religious discrimination rose slightly in the past year, a greater number than ever were resolved with a finding that there was "no reasonable cause" to believe the charge had merit. It also must be noted that charges filed with EEOC rose in virtually every other category in 1997 as well.

Further, the number of religious discrimination claims compared to other discrimination charges filed with EEOC has been and continues to be small as shown in the graph below. For example, the number of charges filed with the EEOC alleging religious discrimination in 1997 was 1,709 out of 80,680 total charges received by the EEOC, or just 2.1 percent of its charge intake. This compares to 2.0 percent of all charges in 1996, 1.8 percent of all charges in 1995,

1.7 percent of all charges in 1994, 1.6 percent of all charges in 1993, 1.8 percent of all charges in 1992, and 1.9 percent of all charges in 1991.²



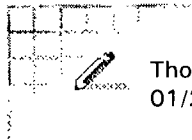
A closer look at the raw numbers shows that the basis of the alleged religious discrimination cited in the charges does not always support the proponents of the WRFA. While some individuals still do encounter unreasonable refusals by some employers to accommodate their religious practices, many other individuals file Title VII religious charges and bring court cases to curtail religious practices being forced on them by their employers, supervisors, and co-workers.

The raw numbers also include charges where individuals have been subjected to discriminatory treatment because of their religion ("hostile work environment" harassment against them or overt discriminatory treatment),³ discriminatory practices that are already prohibited under Title VII. For all anyone knows, the increase in EEOC charges may just as likely be due to the rise of religious conduct and proselytizing of unwilling targets in the workplace as to any failure to accommodate such. Ironically, WRFA actually could give rise to *more* such claims by these unwilling targets because it increases the likelihood that employees will claim harassment because of accommodations made to others wishing to express their religious beliefs.

² "Charge Statistics From the U.S. Equal Employment Opportunity Commission, FY 1991 Through FY 1997," Compiled by EEOC from the agency's Charges Data System - National Data Base.

³ *Turner v. Barr*, 806 F. Supp. 1025 (D.D.C. 1992)(hostile environment including jokes about the Holocaust); *Sattar v. Motorola, Inc., et al.*, 1996 WL 432403 (N.D. Ill. July 26, 1996)(employee alleged his supervisor harassed and unfairly evaluated him because he was a lapsed Muslim).

Workplace
Freedom — ew



Thomas L. Freedman
01/23/98 07:29:55 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP
cc: Laura Emmett/WHO/EOP, Mary L. Smith/OPD/EOP
Subject: Workplace religious freedom

We met today with representatives of the religious groups, AFL-CIO, Department of Labor, and Senator Kerry's office. The results were mixed: general agreement on principle but disagreement about a couple of specific aspects of the bill. Bill Marshall thinks we are close enough to say something general about it in the SOTU. Unless we really want it in, I think it would be better to save it and hopefully get an announcement (with everything more explicit) and we can do an event where the religious groups can, hopefully, stand with the President.

Tom —

Where are we on this?
Elena

Current Law Requires Reasonable Accommodation

To further underscore the fact that congress already has given religion special attention under Title VII, in 1972 it added a reasonable accommodation requirement to Title VII specifically for religion. While employers since then have been required by Section 701(j) of Title VII to provide reasonable accommodation for employees' religious beliefs and practices, the extent to which employers are required to accommodate particular religious observations to meet this obligation has been defined narrowly by federal courts. Two Supreme Court decisions—*Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), and *Ansonia School District v. Philbrook*, 479 U.S. 60 (1986)—set the parameters, using very careful reasoning.

The *Hardison* Court interpreted Title VII's reasonable accommodation standard narrowly to avoid reaching the constitutional issue of whether Title VII's accommodation provision violated the Establishment Clause of the Constitution; i.e., "Congress shall make no law respecting an establishment of religion . . ." In doing so, the Supreme Court implied that the religious accommodation requirement of Title VII could reach the unconstitutional level of "establishment of religion" if the accommodation demanded by the statute was sufficiently costly. Therefore, by holding that accommodation that exceeded *de minimis* cost is an undue hardship (therefore not required by Title VII), the Court avoided a decision on whether Title VII violated the Establishment Clause.

The Court explained its reasonable accommodation rationale as follows:

To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship . . . [T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.

The Court was sensitive to the issue that when an employer provides too much religious accommodation, particularly financial support, and burdens other employees in the process, it can face "reverse religious discrimination" cases from employees who are not being favored by the employer's accommodation policy. WRFA expands the duty to accommodate but does not adequately address the reverse religious discrimination issue.

Existing Law Provides Adequate Protection to Most Employees

Our research reveals that that in cases where a conflict arises between a religious practice or obligation and a work requirement, the employees almost without exception follow their religious conscience. Therefore, it is not the work requirement that is preventing them from engaging in a religious practice, but a religious practice that is preventing them from performing conflicting work duties. What the employer does in response is the real focus of the accommodation debate. In any event, even with the relatively narrow parameters laid out by the Supreme Court on the employer's duty to accommodate religious beliefs and practices, the court cases illustrate that Title VII as it currently exists is fully capable of vindicating *reasonable* requests for accommodation for religious observances.

Grooming/Dress Policies. For example, in *Carter v. Bruce Oakley, Inc.*, 849 F. Supp. 673 (E.D. Ark. 1993), the plaintiff won after suing his employer for failing to reasonably accommodate his religiously motivated practice of wearing a beard. The company could not establish any undue hardship, and the court rejected its reasons for a no-beard policy such as "unprofessional appearance."

Scheduling Conflicts. Witnesses who testified at a 1997 Senate Labor Committee hearing on WRFA expressed conflict between tending to a religious obligation and scheduling for work. These issues too are already covered under existing law. For example, a federal court in Nebraska recently ruled that an employer was required to reasonably accommodate an employee's request for *all* of Easter Sunday off. She had made the request sufficiently in advance, and there was sufficient staff to schedule around her request. In addition, she had been similarly accommodated in the past. The court reasoned that scheduling the employee for the evening shift on Easter interfered with her practice of attending evening as well as morning services. *Pedersen v. Casey's General Stores, Inc.*, 1997 U.S. Dist. LEXIS 15452 (D. Neb. 1997).

Similarly, in another case the court ruled that two employees who requested the Jewish high holy days off, weeks in advance, were unfairly disciplined when they did not report for work on Yom Kippur. The employer could easily have scheduled around them. *EEOC v. Ilona of Hungary, Inc.*, 97 F.3d 204 (7th Cir. 1996). Likewise, an employer could have and should have accommodated an employee who requested time off to attend the religious conversion ceremony of his wife. *Heller v. EEB Auto Co.*, 8 F.3d 1433 (9th Cir. 1993).

Religious Expression. Finally, employees have also established the ability under current law to engage in religious conduct that does not interfere with their official job duties or, in the case where the actor is a manager or supervisor, create an environment of religious favoritism. For example, in *Brown v. Polk County, Iowa*, 61 F.3d 650 (8th Cir. 1995), a supervisor's spontaneous prayers and Bible references did not create an undue hardship for the employer,

though the employer was justified in disciplining the employee for directing his secretary to type notes for his Bible study class on government time.

WRFA Likely to Provoke Harassment Charges

Under Title VII, an employer is liable for conduct by supervisors, co-workers, and even nonemployees with respect to workplace harassment if the employer knew or should have known about the conduct and failed to take corrective action. In cases involving supervisors, managers, and others employees acting as agents for the employer, the employer can be liable even if it did not know about the harassing conduct.

EEOC Attempted to Provide Guidance on Workplace Harassment

In 1993, the Equal Employment Opportunity Commission proposed guidelines on workplace harassment, including harassment on the basis of religion. The proposed guidelines went into a considerable amount of detail in broadly defining what constitutes harassing conduct. For example, the Commission identified the criteria for determining whether an action constitutes unlawful behavior:

Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her ...religion, ... or that of his/her relatives, friends, or associates, and that: (i) has the purpose or effect of creating an intimidating environment; (ii) has the purpose or effect of unreasonably interfering with an individual's work performance; or (iii) otherwise adversely effects an individual's employment opportunities.

The proposed guidelines also made clear that employers would be held liable under Title VII for failure to prevent harassment.

Ironically, EEOC was forced to withdraw the proposed guidelines in 1994 under intense pressure from Congress because of a concern that employers, in response to the guidelines, would attempt to protect themselves from religious harassment claims by virtually banning any form of religious expression in the workplace. But, as already described in detail, WRFA takes a 180 degree opposite tack. The bill would legally bind employers to make greater accommodation to religious beliefs and practices, and thereby exacerbate the problem of harassment that the proposed EEOC guidelines purported to address.

Even under present law, employers already are in a difficult situation because they cannot act to *prevent* religious harassment, they can only *respond* to it after it has occurred. As such, religion already enjoys a status unlike any other category protected by Title VII. WRFA's increased duty to accommodate will only make it more difficult for employers, putting them

between a rock and a hard place if an accommodation of one employee's religious beliefs, observances, or practices permits that employee to express himself or herself in the workplace in ways that harass or intimidate other employees.

WRFA offers no guidance as to how an employer can reasonably accommodate one employee's religious needs, without infringing on other employees' rights, when the two present an irreconcilable conflict.

Religious Conduct That Harasses Others

At its heart, the issue of accommodation vs. harassment centers on what is the best way to promote tolerance of diversity (including religion) in the workplace. At times, the way in which rights are exercised must yield to workplace policies that promote the common good above individual expression no matter how sincerely the beliefs behind the expression may be held (e.g., racial, sexual, and religious epithets are not tolerated in the workplace, because they erect arbitrary barriers to the achievement of equal opportunity, though they might conceivably be protected as free speech in other contexts).

Unfortunately, one employee's religious expression can result in another employee's harassment. Title VII already recognizes that certain individual "constitutional freedoms" in the private workplace must be balanced against collective needs. For example, a supervisor is not entitled to explicitly berate or single out a female or minority employee on the basis of gender, race, or national origin, simply as an exercise of "free speech" that the supervisor feels compelled to express in the workplace. Such expressions clearly could rise to the level of prohibited harassment. Yet, WRFA as drafted could permit what amounts to religious harassment under the emblem of free expression.

In one case, an evangelical Christian believed she should "share the gospel and look for opportunities to do so." She was "led by the Lord" to write a letter to her supervisor and send it to his home, telling him among other things that he needed to "get right with God." The supervisor's wife opened the letter and believed the reference was to an extramarital affair her husband was having. This caused much grief. The employee wrote another letter to one of her subordinates suggesting that recent health problems she was experiencing were due to her sinful state. The employee sued after she was disciplined, but the court ruled against her, noting that her conduct "is not the type that an employer can possibly accommodate." *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996). The court went on to say:

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. . . . The company would subject itself to possible suits from [the employees to whom Chalmers' letters were directed] claiming that

Chalmers' conduct violated *their* religious freedoms or constituted religious harassment.

How would this case be decided under WRFA's expansive duty to accommodate?

Reasonable Accommodation vs. Harassment

Clearly, employers risk violating Title VII if they cannot effectively deal with harassment in the workplace. If, as under WRFA, employers will be required to permit the religious conduct and religious expression of some employees that is offensive or intimidating to other employees, employers will run the risk of violating Title VII under a theory of hostile work environment actually *created by* WRFA's strict duty to accommodate.

It is worth noting that when the religious accommodation duty was added to Title VII in 1972, it was done to require employers to examine what may appear to be neutral workplace policies and to make room for employees' sincerely held religious beliefs, *where possible*. However, even as the amendment was being considered by the Senate, there was recognition that not every accommodation would be possible.

It will be of little comfort to employers under the WRFA standard to simply say that they should wait until someone claims harassment before examining the reasonableness of the accommodation.

WRFA's Expanded Reasonable Accommodation/Undue Hardship Standard

Just how far would employers be required to go in accommodating the religious beliefs and practices of their employees and job applicants if WRFA were to be enacted as drafted? As already mentioned, contrary to the claims of WRFA's sponsors, a direct comparison of WRFA and the Americans with Disabilities Act shows that the definition of undue hardship and the treatment of essential functions and direct threats to safety are key areas in which WRFA diverges from the ADA. Further, there is a fundamental policy question as to whether it is appropriate for WRFA to even adopt the ADA standards, since disability and religion are vastly different issues.

Definition of Undue Hardship

WRFA's accommodation duty is controlled by the definition of undue hardship. In other words, an accommodation must be made unless and until it becomes an undue hardship. Though both WRFA and the ADA define undue hardship as "requiring significant difficulty or expense," the factors that determine what constitute "significant difficulty or expense" differ.

The following side-by-side comparison of the two standards highlights the differences:

**ADA undue hardship: 42 U.S.C.A.
Sec. 12111(10)(B)**

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation on the operation of the facility;
- the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities;

and

- the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

WRFA undue hardship

proposed 42 U.S.C.A. Sec. 2000e(j)(3)

For purposes of determining whether an accommodation requires significant difficulty or expense—

(A) an accommodation shall be considered to require significant difficulty or expense if the accommodation will result in the inability of an employee to perform the essential functions of the employment position of the employee;

and

(B) other factors to be considered in making the determination shall include:

- *the identifiable cost of the accommodation including the costs of loss of productivity and of retraining or hiring employees or transferring employees from one facility to another in relation to the size and operating cost of the employer*
- *the number of individuals who will need the particular accommodation to a religious observance or practice*

and

- *for an employer with multiple facilities the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.*

Essential Functions

The first and most obvious distinction between the ADA and WRFA is in the treatment of "essential functions." WRFA would make the employee's ability to perform the essential functions of his or her position merely a subsidiary concern when it comes to determining whether the accommodation is an undue hardship for an employer. In contrast, the concept of "essential functions" is an integral element of defining the duty to reasonably accommodate under the ADA. Indeed, the burden is on the individual claiming the law's protection to show that he or she is a "qualified individual with a disability," that is, that he or she can perform the essential functions of the job with or without reasonable accommodation. If the person cannot establish this threshold requirement, he or she does not have a claim under the ADA.

Although WRFA contains an essential functions component, it is but one of the factors that the *employer must prove* in determining whether the accommodation would impose an "undue hardship." Under this approach, and further unlike the ADA, an employer still could be obligated to provide an accommodation even if the employer could show that the employee would not be able to perform the job's essential functions. Stated another way, the employer always would have to prove undue hardship in order to avoid the duty to accommodate.

This suggests that where an employee's religious observance prevents him from accomplishing the essential functions of his job, but the "cost" of shifting these essential functions to another employee is not significantly large, an employer can be required to accommodate the employee in such a way that the employee no longer performs the actual job he was hired to do, but continues to reap the same salary and benefits. Under the ADA, an individual first must be able to show that he or she can perform the job's essential functions (with or without an accommodation) in order to be protected as a "qualified individual with a disability." The problem with borrowing the concept of accommodation from the ADA is that an accommodation for an individual with a disability is designed to allow an employee to perform his job's essential functions, not excuse him from doing them.

WRFA Has No Provision for "Direct Threat" and Safety Considerations

The ADA also includes a provision that an employer's qualification standards may include a requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace. This allowance under the ADA recognizes that where an employee, by virtue of his disability, imposes a threat to his own safety, or the safety of others, it is a risk that cannot be tolerated in the workplace. This reinforces the notion that accommodation is not an absolute concept and at times the needs and rights of individuals other than the employee seeking accommodation are paramount. In the disabilities context, health and safety-related job requirements are recognized and upheld, even where they have a tendency to eliminate individuals with disabilities.

Likewise, current law appropriately recognizes that where an employee's religious practice poses a safety risk, it is not suitable for accommodation. For example, in *Bhatia v. Chevron USA*, 734 F.2d 1382 (9th Cir. 1982), the court recognized that unavoidable potential exposure to toxins in certain jobs required that employees be able to attain a gastight seal with a respirator, which is not yet technically achievable when an individual wears a beard. Where the employee would not shave his beard for religious reasons, the court of appeals ruled that the safety risk was not and acceptable, therefore the beard could not be accommodated in particular jobs.

Employers should not be asked to compromise safety when certain religious restrictions are incompatible with safety-sensitive jobs. For example, an employee's religious belief that she not wear "masculine clothing" could not be accommodated where, despite several meetings between the employer, the employee, and the employee's union representatives to discuss alternatives, it was determined that no skirt could be worn on the job without creating a safety risk to herself and others, because of the dangerous machinery involved. *Killebrew v. Local 1683 AFSCME*, 42 FEP Cas. (BNA) 165 (W.D. Ky. 1986).

WRFA's Override of Bona Fide Seniority Systems

Title VII, in its current form, does not require that an employer accommodate an employee's religious observance or practice if that cannot be done without violating some other employee's rights under a bona fide seniority system. *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). WRFA, however, would change Title VII to require accommodation even where it would violate legitimate seniority rights.

Title VII's new Section 703(o)(4) (as added by WRFA) provides that an employer charged with failing to make a reasonable accommodation to an employee's religious observance or practice could not defend itself against Title VII liability by showing "that such accommodation would be in violation of a bona fide seniority system," if the accommodation could be accomplished through either: (1) a change of work hours, shift, or job assignment that otherwise would not be available to an employee, or (2) a voluntary exchange of shifts or job assignments or some other voluntary arrangement between the employee and a co-worker.

WRFA thus appears to contemplate that an employer must breach existing seniority rights, if necessary, in order to provide a work schedule or job assignment that does not conflict with an employee's religious obligations. It is not clear, however, whether WRFA would afford employers any offsetting protection against legal liability to other employees whose seniority rights are violated in this process.

The bill does not expressly supersede existing employment contracts or collective bargaining agreements that spell out seniority rights. (Indeed, it is perhaps arguable that

Congress could not constitutionally impair seniority rights under existing contracts.) Nor does the bill expressly repeal or modify provisions of other statutes that require employers to comply with seniority agreements, *i.e.*, National Labor Relations Act (NLRA) Sections 8(a)(5) and 8(d), 29 U.S.C. §§ 158(a)(5) and 158(d), or that make such agreements judicially enforceable, *i.e.*, Labor Management Relations Act (LMRA) Section 301, 29 U.S.C. § 185.

By taking away a defense based on compliance with seniority requirements without providing any relief from liability for noncompliance with such requirements, this section of WRFA poses yet another serious dilemma for employers.

To illustrate, suppose an employer needs someone to work on a Sunday, but no employee is willing to do so voluntarily. The employer is bound by a typical collective bargaining agreement, which requires that when Sunday work is necessary, it must be assigned in reverse order of seniority. Thus, the unwanted Sunday assignment normally would go to the most junior employee. Suppose, however, that the most junior employee has asked to be excused from all Sunday work on religious grounds.

In the foregoing scenario, it seems clear that, under WRFA, the employer would face Title VII liability if it compelled the most junior employee to work Sunday. Yet, if the employer instead required some other, more senior employee to work Sunday, the employer might well find itself charged with a breach of the collective bargaining agreement. The more senior employee, forced to work in violation of an established seniority system, could either invoke a contractual grievance-and-arbitration procedure or sue to enforce the bargaining agreement under Section 301 of the LMRA.

An employer faced with this predicament might argue that its violation of the seniority system should be excused, since the employer was required to breach seniority in order to satisfy its Title VII/WRFA accommodation duty. It is far from certain, however, that a court would accept statutory compulsion as a defense to liability for violating contractual seniority rights. In an arguably analogous situation, the Supreme Court held that an employer was not relieved of its obligation to comply with the seniority provisions of a collective bargaining agreement simply because they conflicted with the terms of a Title VII conciliation agreement. *See W.R. Grace & Co. v. Local Union 759, Rubber Workers*, 461 U.S. 757, 768-80 (1983).

In sum, if WRFA is enacted in its present form, employers could find themselves in the untenable position of being unable to require *any* employee to work a needed time slot without incurring legal liability one way or another.

WRFA's Wage-Hour Law Conflicts

WRFA envisions that a reasonable accommodation could be made, at least in some instances, through a schedule adjustment that would require an employee to work overtime instead of at a time when work would conflict with the employee's religious obligations. In such cases, WRFA contemplates that the employer would not be required to provide premium pay or benefits—presumably such as the “time-and-a-half” pay ordinarily required for overtime work under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*

Thus, WRFA would add to Title VII a new subsection 703(o)(5)(A), stating:

An employer shall not be required to pay premium wages or confer premium benefits for work performed during hours to which such premium wages or benefits would ordinarily be applicable, if work is performed during such hours only to accommodate religious requirements of an employee.

The apparent intent of this provision is to assure that employers will not incur added costs solely because of schedule adjustments made to accommodate employees' religious needs. Whether the legislation would successfully accomplish that purpose is open to question, however. WRFA does not expressly amend the FLSA. Nor does WRFA expressly supersede any of the numerous, existing state and local laws and contractual provisions that require premium rates for overtime work.

Premium Wages and Benefits

It may be argued that Section 703(o)(5)(A) impliedly supersedes and/or preempts inconsistent requirements of other laws. Certainly that appears to be the intent of WRFA's drafters. That argument would be considerably stronger, however, if the section were preceded with a phrase such as “notwithstanding any other provision of federal, state, or local law.” The absence of such reinforcing language is likely to invite considerable litigation if WRFA is enacted in its present form.

A more difficult question, perhaps, is whether the addition of Section 703(o)(5)(A) to Title VII would relieve employers of premium pay obligations under private employment contracts or collective bargaining agreements. Although the section's “shall not be required” language seems categorical and unambiguous, some might argue that it does not refer to contractually imposed requirements, as opposed to legislatively imposed requirements. (Again, some also might question whether Congress has constitutional power to impair provisions of existing contracts.)

Thus, although WRFA's drafters arguably envision that employers will be free to adjust work schedules for religious accommodation purposes without having to worry about incurring

added overtime expense, it is far from certain that the legislation, as presently drafted, would actually accomplish that result.

Constitutional Issues

It is not merely the rights of the individual wishing to express a religious belief or follow a religious observance that govern whether or how the belief or observance should be accommodated in the employment context. As described in more detail below, WRFA raises a serious constitutional issue as to the extent to which a duty to accommodate can be imposed upon an employer without the government unconstitutionally sanctioning (in constitutional terms, "establishing") a religion.

Freedom of Expression vs. Workplace Rules Designed to Preserve Order, Efficiency, and Equal Opportunity

WRFA in part is designed to open the workplace to greater religious expression by employees. Proponents of the bill sometimes cite it as a measure that will restore/defend/extend the "constitutional right to free exercise of religion" in the workplace. However, an examination of cases interpreting the Free Exercise Clause of the First Amendment reveals that often religious conduct must yield to important secular interests. As the Supreme Court noted, 32 years before Congress first enacted a reasonable accommodation duty for religion in the workplace:

Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. . . . [T]he [First] Amendment embraces two concepts—*freedom to believe and freedom to act*. (Emphasis supplied.) The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.

Cantwell v. State of Connecticut, 60 S. Ct. 900, 903 (1940). See also *Estate of Thornton v. Caldor*, 105 S. Ct. 2914, 2918 (1985) ("The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.").

In a case brought under Title VII, a company's owners were born-again Christians who had made a covenant with God to operate their company as a "Christian, faith-operated business." Among other religiously oriented activities connected to the business, the owners held weekly devotional services during work time and made attendance mandatory for all employees. One employee, an atheist, asked to be excused from attending these services. He was told by his supervisor that attendance was mandatory. The owners felt they had a right to freely express their religious devotion and had to share it with all their employees as part of their

covenant with God. *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

After the atheist employee sued, the court ruled that the employer could not make attendance at a religious service mandatory for all employees and would have to conduct any business portion of the meetings separately. The court observed that protecting the atheist employee's right to be free from forced observance of his employer's religion is at the heart of Title VII's ban against religious discrimination, and a prohibition against mandatory attendance at services would not unduly burden business owners' free exercise rights. The court explained that the employer must make an accommodation to the atheist's freedom not to believe or observe religious practices, and to do so would not infringe on the owners' freedom to exercise their own religion, despite the owners' sincere belief that their covenant with God required them to share the Gospel with all their employees. The court also pointed out the Supreme Court's ruling that the right to religious practice (unlike the right to religious belief) may be limited by a statute if "it is essential to accomplish an overriding governmental interest." *United States v. Lee*, 455 U.S. 252, 257-58 (1982).

The *Townley* court also stated that "[t]he strength of the government's interest in eradicating discrimination through Title VII is also clear. We have stated that 'Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions.'"⁴

In another relevant case, a public school could not accommodate the religious beliefs of a teacher that prevented her from teaching any subject relating to love of country or patriotism, because "in seeking to conduct herself in accordance with her religious beliefs, [plaintiff] neglects to consider the impact on her students who are not members of her faith." *Palmer v. Chicago Board of Education*, 603 F.2d 1271, 1274 (7th Cir. 1979) (noting that the First Amendment is not a teacher license for uncontrolled expression, and that "[p]laintiff's right to her own religious views and practices remains unfettered, but she has no constitutional right to require others to submit to her views and to forego a portion of their education they would otherwise be entitled to enjoy.").

Another court pointed out in *Miller v. Drennon*, 56 FEP Cas. (BNA) 274, 281 (D.S.C. 1991), *aff'd*, 59 FEP Cas. (BNA) (4th Cir. 1992), that "[i]f an employee could pick and choose which of his fellow employees he is willing to work with based on those employees' willingness

⁴ Additionally, the Free Exercise Clause is only implicated where a *central tenet* of faith is *substantially burdened*. E.g., *Graham v. Commissioner*, 822 F.2d 844, 850-51 (9th Cir. 1987), *aff'd sub nom. Hernandez v. Commissioner*, 490 U.S. 680 (1980). Title VII's accommodation provision is relevant where *any* asserted religious belief or practice conflicts with any work requirement—i.e., the Free Exercise Clause is "not a guarantee against inconvenience." *Kelly v. Municipal Court*, 852 F. Supp. 724 (S.D. Ind. 1994), *aff'd*, 97 F.3d 902 (7th Cir. 1996).

to comply with *his* notion of moral or Christian behavior, the workplace would be chaotic” and “[t]he Free Exercise Clause does not extend this far.”

Courts have upheld Title VII as a compelling reason for curtailing First Amendment expression because of the paramount interest in preventing discrimination in the workplace. In cases such as, *Robinson v. Jacksonville Shipyards Inc.*, 760 F. Supp. 1486, 1534-36 (M.D. Fla. 1991), and *Jensen v. Eveleth Taconite Co.*, 824 F. Supp. 847, 884 n.89 (D. Min 1993), courts have rejected First Amendment arguments against liability under Title VII for sexual harassment. Likewise, in *Lambert v. Condor Mfg. Inc.*, 768 F. Supp. 600 (E.D. Mich. 1991), the court ruled that “a private employer, has the right to require that the pictures [of nude women that offended an employee’s religious beliefs] be taken down, and the exercise of that right would not implicate any First Amendment problems.”

Does WRFA Violate the Constitution’s “Establishment Clause”?

The Constitution’s First Amendment also contains the Establishment Clause stating that “Congress shall make no law respecting an establishment of religion...” When it added the reasonable accommodation provision to Title VII in 1972, Congress was not trying to make sure there was never a conflict between work and religious observance. Indeed, such a goal is impossible. In *Estate of Thornton v. Caldor*, 105 S. Ct. 2914 (1985), the Supreme Court overturned a Connecticut state statute that provided Sabbath observers with an absolute right not to work on Sabbath as violating the Establishment Clause.

In *Hardison* (discussed earlier), the Supreme Court chose the *de minimis* standard for reasonable accommodation of religion cases because a requirement that employers bear a greater cost might be invalid under the Establishment Clause—a ruling the court desired to avoid making. In a later decision, further interpreting Title VII’s religious accommodation obligation, the Supreme Court again explained:

In enacting Sec. 701(j), Congress was understandably motivated by a desire to assure the individual *additional* opportunity to observe religious practices, but it did not impose a duty on the employer to accommodate at all costs. . . . [P]rovision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work. . . . But unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones. . . . Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness.

Philbrook, 107 S. Ct. at 373 (citations omitted). See also *Miller v. Drennon*, 56 FEP Cas. (BNA) 274, 280 (D.S.C. 1991), *aff'd*, 59 FEP Cas. (BNA) 192 (4th Cir. 1992) "To permit plaintiff to be exempt from assignment at certain locations or to exempt him from assignment with a female partner solely because of his religious beliefs would single out his religious beliefs for preferable treatment. Such action would, when undertaken by Lexington County, constitute a violation of the Establishment Clause.").

A fundamental and founding principle of this nation is the separation of church and state. As the opponents of a Constitutional amendment to "restore religious freedom" point out, the reason that religious institutions are not eligible for public funds is to protect the integrity of the would-be beneficiary religious groups from government interference and to protect taxpayers from funding religious viewpoints with which they disagree (and also to avoid running the risk of establishing government religions).⁵ WRFA's increased financial obligation on employers to accommodate religious practices shifts the cost of accommodations to employers, who consequently are being asked to fund religious viewpoints with which they may disagree. No compelling reason has been cited by WRFA's proponents for why employers should be asked to do in the private arena what taxpayers are not asked to do in the public arena. *E.g.*, *International Assn. of Machinists v. Boeing Co.*, 833 F.2d 165, 169 (9th Cir. 1987) (pointing out that a religious accommodation cannot result in financial support for a particular religious group), *citing Wisconsin v. Yoder*, 92 S. Ct. 1526, 1542 n.22; *Sherbert v. Verner*, 83 S. Ct. 1790, 1997.

Some Additional Practical Considerations

In an attempt to further illustrate in practical terms the kind of difficulty that employers could experience in attempting to meet WRFA's new reasonable accommodation threshold, we pose below a series of (and by no means exhaustive) hypotheticals. The legislation does not provide a clear answer to any of them.

How will the number of individuals who will need the same or similar accommodation affect the duty to accommodate?

At what point is an employer obligated to start the accommodation discussion?

Who decides what the accommodation will be?

What would be the employer's right under WRFA to deny a religious accommodation request that would interfere with safety?

⁵ See testimony from the House of Representatives Committee on the Judiciary, Subcommittee Hearing on H.J. Res. 78, "Proposing an Amendment to the Constitution Restoring Religious Freedom," July 22, 1997.

How does an employer referee competing religious expressions among employees? Where can the employer draw the line on religious expression in the workplace?

Would an employer be required to establish a Kosher (other?) cafeteria if enough employees wanted it as a religious accommodation?

What if an employee's request is unusual by commonly accepted standards but is cloaked with religion? (The employer has no real right to question the "religion" of an employee, but clearly has under WRFA a financial obligation to support accommodations—no matter how unusual—until the point of undue hardship.)

What about religious observances or practices that do not involve time off to attend to religious requirements (Sabbath, holy days) but instead involve daily religious routines on the employer's premises?

Conclusion

In the final analysis, WRFA as currently drafted is a religious preference amendment. By increasing the obligation of employers to accommodate to the demands of applicants and employees to practice their religious convictions or observe religious Sabbaths, WRFA raises serious constitutional questions under the Establishment Clause. WRFA elevates the rights of the "faithful" over more secular but equally strong and legitimate interests of other employees, and impermissibly promotes or encourages religious adherence because it carries special benefits to those claiming religious protection for their behavior. Moreover, WRFA creates serious conflict by pitting the rights of religious employees to express themselves in the workplace against the rights of nonreligious employees (or employees of different religious beliefs), and against the ability of employers to maintain rules to preserve equal employment opportunity for all employees.

The following is a brief summary of the key outstanding issues regarding potential Administration support of the Workplace Religious Freedom Act.

1. Statutory Model. The Senate Bill is modeled after the Americans with Disabilities Act. The Administration proposal is based upon Title VII. Both approaches would accomplish essentially the same goal -- the ratcheting up of the protection currently afforded religious exercise under Title VII. There is a significant dispute, however, as to which approach would best accomplish that result. The religious groups' argument in favor of the ADA model is political. Although the ADA approach initially raised concerns within the small business community (because of compliance issues), the religious groups now represent that business supports the ADA model because it offers a familiar regulatory scheme. Similarly, the groups contend that business would oppose legislation that introduces a set of unfamiliar standards.

Administration objections to the ADA model are based upon a number of separate considerations. First, there is concern that the use of ADA language would lead to the watering down of ADA standards because courts would be reluctant to enforce religious accommodations to the same degree that they enforce accommodations for the disabled. Second, DOJ argues that ADA language may raise issues under the establishment clause because its emphasis on special accommodation suggests that it would create a preference for religion rather than merely redress discrimination against religion. Third, DOJ believes that, because the Administration's proposal is more clearly based on anti-discrimination concerns, it could more easily be enacted pursuant to Congress' Section V powers which would allow plaintiffs to collect damages from the states.

2. Premium Pay. Under the Senate Bill, private sector employers would be excused from their obligation under the FLSA to pay overtime to an employee for work in excess of 40 hours when that employee works those overtime hours to make up for time taken off for religious observance. The Department of Labor opposes this provision because it is inconsistent with the Administration's opposition to current Congressional proposals that would allow employees to opt for compensatory time in lieu of premium pay. The religious groups have countered that an existing federal statute (5 U.S.C § 5550a) requires that federal employees who take time off for religious observances are not entitled to overtime pay and that it would therefore not harm Administration policy to allow a similar rule to apply to the private sector for the limited purpose of accommodating religious observance. DOL argues, however, that the analogy is inappropriate because the regulation of federal overtime and private sector overtime raise distinct considerations. For example, other than that provided in section 5550a, the rights of federal employees to overtime pay are far greater than that allowed employees in the private sector.

3. Effect on Seniority Rights. The Senate Bill would allow for the accommodation of religious employees to supersede other employees' seniority rights in certain limited circumstances (i.e. when an employee with seniority rights voluntarily agrees to exchange shifts or jobs with the religious employee who would not otherwise be entitled to accede to the senior employees' shift or job.) The religious groups strongly support this provision believing that employers have consistently hidden behind collective bargaining agreements in denying religious accommodations. Labor objects on policy grounds and DOJ is concerned that to accommodate only religious employees in this context would raise establishment concerns.

Summary impacts religion / ADA

ADA
vs.
Title
VII

For
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Fed's
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FLSA
Title
VII

Collective
bargaining

Agenda
RELIGION IN THE WORKPLACE

I. LEGISLATION

- * Status: DPC, WH Counsel, OPL, DOJ, EEOC, SBA, Labor, Commerce have met many times. DOJ/EEOC has produced draft legislation.
- * Draft bill does not currently satisfy constituency group. (Marshall memo on outstanding issues.)

II. EXTERNAL VETTING

- * Have met with religious groups led by Folton. If we can work out issues with them, should vet with other non-coalition member groups. Including:
- * Labor (some vetting required-- premium pay issue remains).
- * Business (Chamber Commerce etc. have been alerted but complete vetting needed).
- * Legislative (Leg. Affairs has waited to contact Coates/Kerry-- thinks they will be very interested if groups sign on.)

III. OPTIONS

- * Get everyone to agree to Administration bill. (Best choice)
- * Get close enough to endorse common principles with Senators and constituency groups.

IV. DISCUSS NEXT STEPS AND TIMING

Agenda
RELIGION IN THE WORKPLACE

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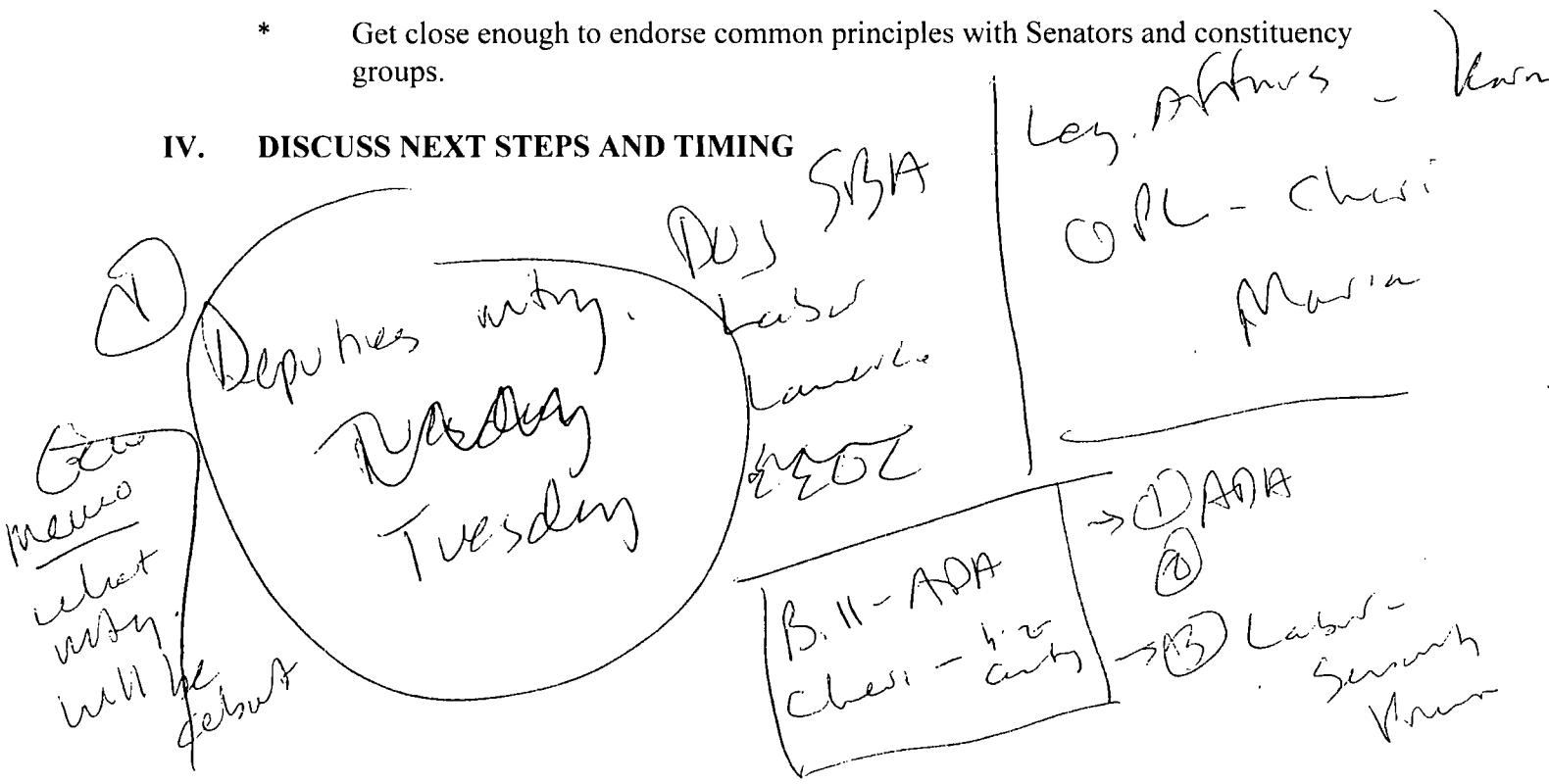
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IV. DISCUSS NEXT STEPS AND TIMING



62874

Clean Copy of Proposed Mark-up of S.1124

SECTION 1. SHORT TITLE.

This Act may be cited as the "Workplace Religious Anti-Discrimination Act of 1997"

SECTION 2. FINDINGS AND PURPOSE

(a) FINDINGS. The Congress finds that --

[Insert congressional findings of existence of religious discrimination in the workplace and its effect on interstate commerce]

(b) PURPOSE. It is the purpose of this Act --

- (1) to provide clear and comprehensive national standards to prevent and remedy discrimination in employment against individuals whose religious observances and practices conflict with work requirements;
- (2) to remove artificial, arbitrary, and unnecessary barriers to employment when such barriers operate invidiously to discriminate on the basis of religion or religious observance;
- (3) to provide for greater protection from discrimination to individuals whose religious observances and practices conflict with work requirements than that previously accorded pursuant to the Supreme Court's construction of Title VII in TWA v. Hardison, 432 U.S. 63 (1977);
- (4) to ensure that employer action that targets religious conduct for discriminatory treatment cannot be shielded by mere compliance with facially neutral work rules; and
- (5) [??] to invoke the sweep of congressional authority, including the power to enforce section 1 of the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by employees whose religious obligations and commitments conflict with their employment requirements. [??]

SEC. 3. AMENDMENTS

(a) DEFINITIONS. -- Section 701(j) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(j)) is amended --

- (1) by inserting "(1)" after "(j)";

- (2) by inserting "after engaging in an affirmative and bona fide effort," after "unable";
- (3) by striking "or prospective employee's";
- (4) by inserting "or on other employees" after "employer's business"; and
- (5) by adding at the end the following:

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“(2) As used in this subsection, the term ‘employee’ includes a prospective employee.

“(3) As used in this subsection, the term ‘employer’ includes a labor organization and an employment agency.

“(4) An accommodation by the employer shall be deemed to be ‘reasonable’ if such accommodation removes the conflict between employment requirements and the religious observance or practice of the employee.

“(5) As used in this subsection, the term ‘undue hardship’ means a material interference with the conduct of the employer's business or a material burden on other employees.

“(A) An accommodation can require more than de minimis cost to the employer without constituting material interference. Among the factors to be considered in determining whether an accommodation materially interferes with the conduct of the employer's business are --

“(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retraining or hiring employees or transferring employees from one facility to another; ordinary administrative costs generally will not constitute a material interference with the conduct of the employer's business;

“(ii) the number of individuals who will need the particular accommodation; and

“(iii) the size and operating cost of the employer and, for an employer with multiple facilities, the geographic separateness or administrative or fiscal relationship of the facilities.

“(B) An accommodation shall be considered to materially burden another employee if it adversely affects such employee's terms, conditions, or privileges of employment, such as by depriving such an employee of a shift or job preference that she or he otherwise would enjoy. Provided, however, that if an adversely affected employee

note for summary

voluntarily agrees to the accommodation, the burden on such employee shall not be deemed material.

- (b) EMPLOYMENT PRACTICES. -- Section 703 of such Act (42 U.S.C. 2000e-2) is amended by adding at the end the following:

“(o) An employer shall not be required to pay premium wages to or confer premium benefits on an employee for work performed during hours to which such premium wages or premium benefits would ordinarily be applicable, if work is performed during such hours only to accommodate religious requirements of that employee.

“(1) As used in this paragraph--

“(A) the term "premium benefit" means an employment benefit, such as seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, an educational benefit, or a pension, that is greater than the employment benefit due the employee for an equivalent period of work performed during the regular work schedule of the employee; and

“(B) the term "premium wages" includes overtime pay and compensatory time off (except such overtime pay and compensatory time off required by Section 7 of the Fair Labor Standards Act, 29 U.S.C. § 207, or otherwise required by Federal law), premium pay for night, weekend, or holiday work, and premium pay for standby or irregular duty.

SEC. 4. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

- (a) EFFECTIVE DATE. -- Except as provided in subsection (b), this Act and the amendments made by section 3 take effect on the date of enactment of the Act.
- (b) APPLICATION OF AMENDMENTS. -- The amendments made by section 3 do not apply with respect to conduct occurring before the date of enactment of this Act.

SEC. 5. STATUTORY CONSTRUCTION AND SEVERABILITY.

- (a) Administrative and judicial construction of terms contained within this Act shall not control the administrative or judicial construction of such terms in the Americans with Disabilities Act;

- (b) If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Proposed Mark-up of S.1124

SECTION 1. SHORT TITLE.

This Act may be cited as the "Workplace Religious ~~Anti-Discrimination Freedom~~ Act of 1997"

SECTION 2. FINDINGS AND PURPOSE

(a) FINDINGS. The Congress finds that --

[Insert congressional findings of existence of religious discrimination in the workplace and its effect on interstate commerce]

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- (4) to ensure that employer action that targets religious conduct for discriminatory treatment cannot be shielded by mere compliance with facially neutral work rules; and
- (5) [??] to invoke the sweep of congressional authority, including the power to enforce section 1 of the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by employees whose religious obligations and commitments conflict with their employment requirements. [??]

SEC. 2-3. AMENDMENTS

- (a) DEFINITIONS. -- Section 701(j) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(j))

is amended --

- (1) by inserting "(1)" after "(j)";
- (2) by inserting ", after ~~initiating and~~ engaging in an affirmative and bona fide effort," after "unable";
- (3) by striking "an employee's" and all that follows through "religious" and insert "an employee's religious" "or prospective employee's"; and
- (4) by inserting "or on other employees" after "employer's business"; and
- (4 5) by adding at the end the following:

"(2) As used in this subsection, the term 'employee' includes a prospective employee.

"(3) As used in this subsection, the term 'employer' includes a labor organization and an employment agency.

"(4) An accommodation by the employer shall be deemed to be 'reasonable' if such accommodation removes the conflict between employment requirements and the religious observance or practice of the employee.

"(3 5) As used in this subsection, the term 'undue hardship' means ~~a material interference with the conduct of the employer's business or a material burden on other employees, requiring significant difficulty or expense. For purposes of determining whether an accommodation requires significant difficulty or expense~~

~~"(A) an accommodation shall be considered to require significant difficulty or expense if the accommodation will result in the inability of an employee to perform the essential functions of the employment position of the employee; and~~

"(B) (A) An accommodation can require more than de minimis cost to the employer without constituting material interference. ~~other~~ Among the factors to be considered in determining whether an accommodation materially interferes with the conduct of the employer's business are -- ~~making the determination shall include~~

"(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retraining or hiring employees or transferring employees from one facility to another, ~~in relation to the size and operating cost of the employer; ordinary administrative costs generally will not constitute a material~~

~~interference with the conduct of the employer's business;~~

~~"(ii) the number of individuals who will need the particular accommodation to a religious observance or practice; and~~

~~"(iii) the size and operating cost of the employer and, for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.~~

~~"(B) An accommodation shall be considered to materially burden another employee if it adversely affects such employee's terms, conditions, or privileges of employment, such as by depriving such an employee of a shift or job preference that she or he otherwise would enjoy. Provided, however, that if an adversely affected employee voluntarily agrees to the accommodation, the burden on such employee shall not be deemed material.~~

(b) EMPLOYMENT PRACTICES. -- Section 703 of such Act (42 U.S.C. 2000e-2) is amended by adding at the end the following:

~~"(a)(1) As used in this subsection:~~

~~"(A) The term "employee" includes a prospective employee.~~

~~"(B) The term "leave of general usage" means leave provided under the policy or program of an employer, under which--~~

~~"(i) an employee may take leave by adjusting or altering the work schedule or assignment of the employee according to criteria determined by the employer; and~~

~~"(ii) the employee may determine the purpose for which the leave is to be utilized.~~

~~"(C) The term "undue hardship" has the meaning given the term in section 701(j)(3).~~

~~"(2) For purposes of determining whether an employer has committed an unlawful employment practice under this title by failing to provide a reasonable accommodation to the religious observance or practice of an employee, an accommodation by the employer shall not be deemed to be reasonable if such accommodation does not remove the conflict between employment requirements and the religious observance or practice of the employee.~~

~~“(3) An employer shall be considered to commit such a practice by failing to provide such a reasonable accommodation for an employee if the employer refuses to permit the employee to utilize leave of general usage to remove such a conflict solely because the leave will be used to accommodate the religious observance or practice of the employee.”~~

~~“(4) It shall not be a defense to a claim of unlawful employment practice under this title for failure to provide a reasonable accommodation to a religious observance or practice of an employee that such accommodation would be in violation of a bona fide seniority system if, in order for the employer to reasonably accommodate such observance or practice—~~

~~“(A) An adjustment would be made in the employee's work hours (including an adjustment that requires the employee to work overtime in order to avoid working at a time that abstention from work is necessary to satisfy religious requirements), shift, or job assignment, that would not be available to any employee but for such accommodation; or~~

~~“(B) the employee and any other employee would voluntarily exchange shifts or job assignments, or voluntarily make some other arrangement between the employees.”~~

~~(5)(A)~~ “(o) An employer shall not be required to pay premium wages to or confer premium benefits on an employee for work performed during hours to which such premium wages or premium benefits would ordinarily be applicable, if work is performed during such hours only to accommodate religious requirements of that an employee.

(B 1) As used in this paragraph--

(i A) the term "premium benefit" means an employment benefit, such as seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, an educational benefit, or a pension, that is greater than the employment benefit due the employee for an equivalent period of work performed during the regular work schedule of the employee; and

(ii B) the term "premium wages" includes overtime pay and compensatory time off (except such overtime pay and compensatory time off required by Section 7 of the Fair Labor Standards Act, 29 U.S.C. § 207, or otherwise required by Federal law), premium pay for night, weekend, or holiday work, and premium pay for standby or irregular duty.

SEC. 3 4. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

- (a) EFFECTIVE DATE. -- Except as provided in subsection (b), this Act and the amendments made by section 2 3 take effect on the date of enactment of the Act.
- (b) APPLICATION OF AMENDMENTS. -- The amendments made by section 2 3 do not apply with respect to conduct occurring before the date of enactment of this Act.

SEC. 5. STATUTORY CONSTRUCTION AND SEVERABILITY.

- (a) Administrative and judicial construction of terms contained within this Act shall not control the administrative or judicial construction of such terms in the Americans with Disabilities Act.
- (b) If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

and
Religion & Workplace
105TH CONGRESS
1ST SESSION

Confusion
pros & cons
S. 1124

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II

To amend title VII of the Civil Rights Act of 1964 to establish provisions with respect to religious accommodation in employment, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 31, 1997

Mr. KERRY (for himself and Mr. COATS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

SEPTEMBER 10, 1997

Committee discharged; referred to the Committee on Labor and Human Resources

A BILL

To amend title VII of the Civil Rights Act of 1964 to establish provisions with respect to religious accommodation in employment, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Workplace Religious
5 Freedom Act of 1997".

1 SEC. 2. AMENDMENTS.

2 (a) DEFINITIONS.—Section 701(j) of the Civil Rights
3 Act of 1964 (42 U.S.C. 2000e(j)) is amended—

4 (1) by inserting “(1)” after “(j)”;

5 (2) by inserting “, after initiating and engaging
6 in an affirmative and bona fide effort,” after “un-
7 able”;

8 (3) by striking “an employee’s” and all that fol-
9 lows through “religious” and insert “an employee’s
10 religious”; and

11 (4) by adding at the end the following:

12 “(2) As used in this subsection, the term ‘employee’
13 includes a prospective employee.

14 “(3) As used in this subsection, the term ‘undue
15 hardship’ means an accommodation requiring significant
16 difficulty or expense. For purposes of determining whether
17 an accommodation requires significant difficulty or ex-
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19 “(A) an accommodation shall be considered to
20 require significant difficulty or expense if the accom-
21 modation will result in the inability of an employee
22 to perform the essential functions of the employment
23 position of the employee; and

24 “(B) other factors to be considered in making
25 the determination shall include—

1 “(i) the identifiable cost of the accommo-
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13 of the facilities will make the accommodation
14 more difficult or expensive.”.

15 (b) EMPLOYMENT PRACTICES.—Section 703 of such
16 Act (42 U.S.C. 2000e-2) is amended by adding at the end
17 the following:

18 “(o)(1) As used in this subsection:

19 “(A) The term ‘employee’ includes a prospective
20 employee.

21 “(B) The term ‘leave of general usage’ means
22 leave provided under the policy or program of an
23 employer, under which—

24 “(i) an employee may take leave by adjust-
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1 of the employee according to criteria deter-
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5 “(C) The term ‘undue hardship’ has the mean-
6 ing given the term in section 701(j)(3).

7 “(2) For purposes of determining whether an em-
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9 under this title by failing to provide a reasonable accom-
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13 remove the conflict between employment requirements and
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8 pay for standby or irregular duty.”.

9 **SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.**

10 (a) **EFFECTIVE DATE.**—Except as provided in sub-
11 section (b), this Act and the amendments made by section
12 2 take effect on the date of enactment of this Act.

13 (b) **APPLICATION OF AMENDMENTS.**—The amend-
14 ments made by section 2 do not apply with respect to con-
15 duct occurring before the date of enactment of this Act.

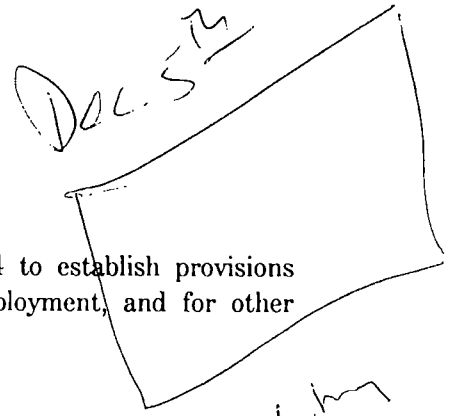
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Religious Freedom → ECW

II

105TH CONGRESS
1ST SESSION

S. 1124



To amend title VII of the Civil Rights Act of 1964 to establish provisions with respect to religious accommodation in employment, and for other purposes.

- ① 11/20
- ② discovery
- ③ summary
- ④ broken on 3rd phy employees
- ⑤ speech

IN THE SENATE OF THE UNITED STATES

JULY 31, 1997

Mr. KERRY (for himself and Mr. COATS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

SEPTEMBER 10, 1997

Committee discharged; referred to the Committee on Labor and Human Resources

- discriminate / accommodations

committee

need
properly
device
point
dispute

- Amendment

A BILL

To amend title VII of the Civil Rights Act of 1964 to establish provisions with respect to religious accommodation in employment, and for other purposes.

- Labor Policy

- Topic
- ①
- ②
- ③

1 *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

2 **SECTION 1. SHORT TITLE.**

3 This Act may be cited as the "Workplace Religious Freedom Act of 1997".

Amendment vs. freedom
handwriting

Sec. 5 - State employees
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State employees
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7 for night, weekend, or holiday work, and premium
8 pay for standby or irregular duty.”.

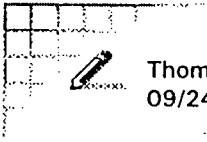
9 **SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.**

10 (a) **EFFECTIVE DATE.**—Except as provided in sub-
11 section (b), this Act and the amendments made by section
12 2 take effect on the date of enactment of this Act.

13 (b) **APPLICATION OF AMENDMENTS.**—The amend-
14 ments made by section 2 do not apply with respect to con-
15 duct occurring before the date of enactment of this Act.

○

To



Thomas L. Freedman
09/24/97 07:54:14 PM

EW

Received
9-30-97

Record Type: Record

To: Elena Kagan/OPD/EOP
cc: Laura Emmett/WHO/EOP
Subject: Religious Freedom

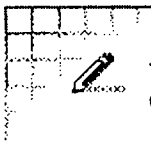
You sent Mary and I a memo from Bill Marshall about a bill to guarantee religious freedom in the workplace. It needs to get vetted.

We suggest a meeting calling in: DOJ, Commerce, EEC, Labor, SBA, Education, (Treasury?) plus OPL, and Marshall from counsel's office. We'd tell them we need to know their concerns in two weeks (three weeks if the Hill says this is moving quickly).

The bill itself has diverse religious support, and is sponsored by Coats (R-IN) and Kerry (D-MA). I like the idea even though a good lawyer probably wouldn't...

Do the meeting, but don't give them two weeks. If at all possible, they should come to the first meeting with their views. That gives you a couple of weeks to try to develop a consensus.

Elena



Thomas L. Freedman
09/26/97 05:50:08 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:

Subject: food safety

Have you heard the critique that guidance can't be enforced against foreign countries because it is too amorphous? The science question is if voluntary guidance represents a standard of protection that you could require foreign countries to meet?

Tom -

I believe this was my critique, expressed numerous times in our second meeting. (Weren't you listening??) There is an answer - actually a fairly decent one. But who is taking this line?

Elena

Bonnie/Tam -
FYI.
SANFORD D. BISHOP, JR.

SECOND DISTRICT, GEORGIA
DEMOCRATIC WHIP AT-LARGE

COMMITTEE ON AGRICULTURE

SUBCOMMITTEES:
RISK MANAGEMENT AND SPECIALTY CROPS
DEPARTMENT OPERATIONS, NUTRITION AND
FOREIGN AGRICULTURE

COMMITTEE ON VETERANS' AFFAIRS*

SUBCOMMITTEES:
BENEFITS
OVERSIGHT AND INVESTIGATIONS

PERMANENT SELECT COMMITTEE
ON INTELLIGENCE



Congress of the United States

House of Representatives

Washington, DC 20515-1002

September 10, 1997

WASHINGTON OFFICE:
1433 LONGWORTH BUILDING
WASHINGTON, DC 20515-1002
PHONE: (202) 225-3631
FAX: (202) 225-2203

DISTRICT OFFICES:
235 ROOSEVELT AVE., ALBANY TOWERS STE. 216
ALBANY, GA 31701
PHONE: (912) 439-8067

CITY HALL
DAWSON, GA 31742
PHONE: (912) 995-3991

230 FEDERAL COURTHOUSE
VALDOSTA, GA 31601
PHONE: (912) 247-9705

William J. Clinton
President
United States of America
1600 Pennsylvania Avenue
Washington, D.C. 20500

*Counsel
Linsay
copy to
V. Tate*

SEP 15 1997

Dear Mr. President:

In response to your request on input from Members of Congress regarding the Tobacco Agreement, I am attaching a bill which I have introduced in the 105th Congress. To date, this bill, H.R. 2034, the Tobacco Use by Minors Deterrence Act, has twenty bipartisan cosponsors.

While my bill does not address the larger liability and advertising issues which the Agreement speaks to, H.R. 2034 will effectively get at the problem of underage children having access to tobacco, while at the same time allowing tobacco use to remain an adult decision.

My approach in this bill is to honestly address the problem of youth access to tobacco, and to do so in a manner which involves entire communities in the process. My bill spreads the responsibility for the problem to underage users themselves, retailers, law enforcement and parents.

I believe my bill balances tobacco-related health and minor access concerns, and the concerns of those who have an economic stake in the continued sale of a legal product to adults. In sum, I hope you will agree that a review of my bill in the context of an official White House position on the Agreement is warranted.

Thank you for your consideration.

Sincerely yours,

Sanford
Sanford D. Bishop, Jr.
Member of Congress

REPUBLICANS

BOB STUMP, ARIZONA, CHAIRMAN
 CHRISTOPHER N. SMITH, NEW JERSEY
 MICHAEL BLUMADE, FLORIDA
 FLOYD SPENCE, SOUTH CAROLINA
 EVERETT, ALABAMA
 E. BUYER, INDIANA
 JARA QUINN, NEW YORK
 SPENCER BACHUS, ALABAMA
 CLIFF STEARNS, FLORIDA
 SAM SCHAEFER, COLORADO
 MORAN, KANSAS
 JIMMY CROKLEY, LOUISIANA
 ASA HUTCHINSON, ARKANSAS
 J.D. HAYWORTH, ARIZONA
 HELEN CHENOWETH, IDAHO
 RAY LAHOOD, ILLINOIS

CARL D. COMBENATOR
 CHIEF COUNSEL AND STAFF DIRECTOR

ONE HUNDRED FIFTH CONGRESS

BOB STUMP

CHAIRMAN

U.S. House of Representatives

COMMITTEE ON VETERANS' AFFAIRS

335 CANNON HOUSE OFFICE BUILDING

Washington, DC 20515

September 16, 1997

DEMOCRATS

LARRY EVANS, ILLINOIS
 JOSEPH P. KENNEDY II, MASSACHUSETTS
 BOB FILNER, CALIFORNIA
 LARRY V. GUTTERREZ, ILLINOIS
 JAMES E. CLYBURN, SOUTH CAROLINA
 CONNOR BROWN, FLORIDA
 MICHAEL F. DOYLE, PENNSYLVANIA
 FRANK MASCARA, PENNSYLVANIA
 COLLIN C. PETERSON, MINNESOTA
 JULIA CARSON, INDIANA
 SYLVESTRE REYES, TEXAS
 VIC SNYDER, ARKANSAS

Honorable William J. Clinton
 President
 The White House
 Washington, DC 20500

Dear Mr. President:

According to recent press accounts, you ~~members~~ members of your staff are about to make a decision concerning the proposed settlement agreed to by tobacco companies and Attorneys General representing various states. I strongly urge you to reject this proposed settlement.

The proposal is unacceptable because it provides no financial resources for the Department of Veterans Affairs to meet the costs of the benefits it provides veterans suffering from tobacco-related illnesses. The Department of Veterans Affairs must be provided sufficient resources under any settlement to pay for costs borne by VA because of tobacco-related illnesses. These costs include the medical care already being provided by the Veterans Health Administration for tobacco related illnesses, and the costs to be borne by the Veterans Benefits Administration for payment of compensation to veterans for service-connected conditions attributable to smoking. Informal VA estimates indicate that these latter costs alone are currently expected to be from \$5 billion to \$10 billion per year.

Mr. President, the Federal government for decades directly and indirectly encouraged the men and women serving our nation in uniform to smoke cigarettes. Many of these servicemembers became addicted to nicotine while in the service,

Linda

COPY TATS



Honorable William J. Clinton
September 16, 1997
Page 2

and smoked throughout the remainder of their life. From free cigarettes in C-rations and smoke breaks to dramatic discounts at the local PX, the military gave every reason for our military personnel to smoke. The all-too-frequent result has been premature death or the development of chronic and disabling medical conditions related to smoking. The Federal government must meet its clear, moral responsibility to provide benefits to these men and women for conditions arising as a result of tobacco use fostered by our Federal government.

Again, Mr. President, I strongly believe the Department of Veterans Affairs must be provided sufficient resources under any settlement to pay for costs borne by VA because of tobacco-related illness. I am hopeful you will carefully consider these views and look forward to receiving your response. If I can be of assistance to you in developing settlement legislation which adequately addresses this issue, I would welcome the opportunity to work with the Administration toward this goal.

Sincerely,



LANE EVANS

Ranking Democratic Member

Bruce / Tom -

FYI.

[Handwritten signature]



SE 11 PM 5:21

HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20615

ZOE LOFGREN
16TH DISTRICT
CALIFORNIA

September 5, 1997

*Canceled
Lyndsey
Copied Tate*

Dear Mr. President:

I recently had a chance to talk to representatives from urban California counties about the proposed tobacco settlement. They pointed out that local governments bear many of the financial costs imposed by tobacco. This is particularly true in California where counties have functioned as medical providers of last resort for the indigent and underinsured, and thus have incurred significant expenses caring for individuals with tobacco related diseases. It is estimated that California's 57 counties spend over \$ 200 million annually to treat tobacco-related diseases of indigents and county employees.

As you proceed with your review of the tobacco settlement, I would encourage you to make sure that any final agreement is fair to counties and local governments and recognizes the financial burden they incur.

Sincerely,

[Handwritten signature of Zoe Lofgren]
Zoe Lofgren
Member of Congress

The Honorable William J. Clinton
President of the United States
The White House
Washington, D.C. 20500

CUNNING
LINDSEY

COPY
✓
TATE

United States Senate

WASHINGTON, DC 20510

September 3, 1997

The President
The White House
Washington, DC 20500

SEP 9 AM 11:32

Dear Mr. President:

We are writing to you concerning your pending recommendations for the proposed national tobacco settlement. As the first President to take a strong stand for the public health on tobacco issues, we look forward to your recommendations for strengthening the tentative settlement reached between state attorneys general and the tobacco industry. In addition to the earlier concerns expressed about the weaknesses of the public health portions of the settlement, there is another issue that has not received the attention it deserves -- the release of hidden tobacco industry documents. The complete disclosure of these documents is critical to formulating an effective tobacco control policy for the future.

The tobacco industry has historically hid sensitive health information under the cloak of attorney-client privilege. As you know, a Florida appellate court recently removed the privilege for eight tobacco industry documents that it found either evidenced fraud or criminal activity. We believe this is just the tip of the iceberg.

It is essential that Congress understand the volumes of health information and full depths of the tobacco industry's misconduct before granting any immunity from liability. Taking such a step without fully reviewing these documents would be analogous to a prosecutor agreeing to a plea bargain without knowing the full extent of a criminal's misconduct.

Therefore, we encourage you, in your considerations, to require that all tobacco industry documents -- including those that the industry have claimed as privileged -- be released to Congress for review. If not, these documents may never see the light of day. We should guard against a settlement that hides critical health information from the American people.

We believe that full disclosure of the facts by the tobacco industry is essential for a full evaluation of this agreement. For far too long, a campaign of deceit has been launched against the health of our loved ones. Before we strike any deal with the tobacco industry, it must first come clean by disclosing information that could save millions of American lives.

Sincerely,

Patrick Leahy

Frank R. Lautenberg

tobacco

President Clinton
September 3, 1997
Page 2

Ron Wyden

Tom Harkin

Dick Durbin

Paul D. Wellstone

Jack Reed

Ted Kennedy

J. Bill

Barbara Boxer



GENERAL COUNSEL

*Tobacco - settlement -
federal costs*

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

22 SEP 1997

Bruce/Tam -

FYI

Elena

Received 9-20-97

Ms. Elena Kagan
Deputy Assistant to the President for Domestic Policy
White House, Second Floor West Wing
Washington, DC 20502

Dear Ms. Kagan:

I am writing to reiterate the Department of Defense's interest in potential recovery of expenditures for health care costs attributable to the use of tobacco products. Our interest arises in the context of the on-going negotiations with the tobacco industry representatives and various state Attorneys General.

I understand that the White House Domestic Policy Council is participating in these settlement discussions with a view towards negotiating an appropriate settlement document that will, among other things, address the recovery of federal agency health care expenditures which stem from tobacco-induced death, illness or disease. The Department of Defense has estimated its expenditures in this area to be approximately \$584 million annually (out of a total annual DoD health care budget of \$15 billion). This is not only a substantial expenditure, it attests to a significant impact upon precious health care resources.

I offer whatever assistance the Department can provide you in your efforts. Please do not hesitate to contact Commander Doug Newman, my point of contact for this matter, at (703) 697-9343.

Sincerely,

Judith A. Miller

cc:

Honorable Frank Hunger, Assistant Attorney General, Civil Division, Department of Justice
Honorable Rudy de Leon, Under Secretary of Defense (Personnel and Readiness)
Honorable Fred Pang, Assistant Secretary of Defense (Force Management Policy)
Dr. Edward Martin, M.D., Acting Assistant Secretary of Defense (Health Affairs)



Tobacco - correspondence

Bruce/Tom -

FYI.

Elenc

Received 9-2-97

THE WHITE HOUSE
WASHINGTON

September 24, 1997

MEMORANDUM FOR BRUCE LINDSEY

FROM: SUSAN BROPHY *SB*
SUBJECT: Congressional Correspondence

Attached are copies of letters sent to the President from Members of Congress. We would appreciate your assistance in drafting the responses.

Thank you very much for your assistance. If you have any questions, please feel free to call Chris Walker at x67500.

The following is a description of the letters:

- 1) Senators Connie Mack (R-FL) and Tom Harkin (R-IA), received 9-19-97.

Attachments

United States Senate

WASHINGTON, DC 20510

September 15, 1997

The Honorable William J. Clinton
President of the United States
The White House
Washington, D.C.

Dear Mr. President,

SEP 19 PM2:08

As you finalize your report to Congress and the American people on the proposed national tobacco settlement, we urge you to examine the agreement with this question in mind: who pays the price?

As the agreement now stands, the tobacco industry will benefit by its ability to claim a tax deduction on the \$368 billion settlement that could return more than \$100 billion to its collective pocket. It's even more disturbing that this settlement makes no effort to address the issue of how to relieve the pain and suffering of those who are afflicted by tobacco use.

That is why we have proposed ensuring that no tax deduction may be taken by the tobacco companies for settlement sums. Forcing the tobacco companies to pay \$368 billion over 25 years and then allowing them to receive about one-third of it back from the IRS is simply wrong.

Businesses can often deduct lawsuit settlements or fines. Penalties are not deductible. We believe tobacco settlements or judgements should be viewed as penalties.

Instead of allowing the deduction, we propose using the difference to fund more research at the National Institutes of Health.

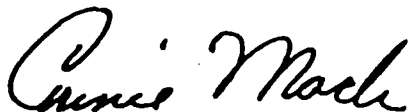
Tobacco companies, not taxpayers, should pay the price for the settlement and medical research, not tobacco companies, should benefit.

Think what \$100 billion could mean for medical science. Researchers all across this country are on the verge of amazing new medical discoveries to unlock the mysteries of medicine to find cures for diseases such as cancer, Alzheimer's or juvenile diabetes.

It's better to spend \$100 billion on a healthier America than allow the tobacco companies to perpetuate sickness and death.

We hope you will join us in this effort to end tobacco's subsidized tax break and fund more medical research. Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in cursive script, reading "Connie Mack".

Connie Mack

A handwritten signature in cursive script, reading "Tom Harkin".

Tom Harkin



U. S. Department of Housing and Urban Development
Washington, D.C. 20410-0500

DEPUTY GENERAL COUNSEL

SEP 16 1997

Tom/Tose -

FYI. See p. 3
especially for
ideas that could
be used in hate
crimes conference
or civil rights initiative

Elena

MEMORANDUM FOR: Elena Kagan, Deputy Assistant to the President
for Domestic Policy

FROM: Mercedes M. Márquez, Deputy General Counsel for Civil
Rights and Fair Housing

RE: Race Policy Report - Update

Attached please find an updated version of the Department's race policy proposals. I also have included statistics on the number of cases received by the Department in recent years. I apologize for the delay in transmitting this update to you. Many of our staff members, from whom we were awaiting data, have been on leave. Please feel free to contact me at (202) 708-2467 with any questions regarding this piece.

Attachment



U. S. Department of Housing and Urban Development
Washington, D.C. 20410-0500

DEPUTY GENERAL COUNSEL

HUD ENFORCEMENT IN THE 21ST CENTURY

○ **ENFORCEMENT POLICY INITIATIVES:**

In 1996, the Department took action on 12,037 cases of alleged housing discrimination in violation of the Fair Housing Act (Act). In 3,271 of those cases, the Department concluded that there was no reasonable cause to believe that discrimination in violation of the Act had occurred. In 330 cases, the Department concluded that there was reasonable cause to believe that discrimination had occurred. The Department conciliated 2,846 cases. The statistics for the three previous years are as follows:

Total cases:

1995 - 8,206
1994 - 9,672
1993 - 10,190

Cases Taken Action On:

1995 - 7,407
1994 - 8,402
1993 - 9,225

Cases no-caused:

1995 - 2,095
1994 - 2,151
1993 - 1,738

Cases caused:

1995 - 414
1994 - 514
1993 - 432

Cases conciliated:

1995 - 3,126
1994 - 3,303
1993 - 3,061

This policy piece sets forth initiatives designed to double - in the next four years - the number of housing discrimination actions taken by the Department.

Combatting covert discrimination in the '90s

Housing discrimination in the 1990's is no longer limited to overt acts such as a landlord's bold assertion that he will not rent to persons of color. Today, housing discrimination is often so subtle that an individual buyer or renter cannot recognize that they have been discriminated against. In order to root out today's more covert discriminator, the Department must broaden its working definition of discrimination, it must assess discrimination within the marketplace, and it must consequently expand the parameters of fair housing compliance and enforcement. The Department has begun this process by focusing on discrimination in the following areas:

- Lending
- Insurance
- Zoning Decisions

Current fair housing law encompasses even these novel forms of discrimination. As the discriminator becomes more sophisticated in his acts, however, the Department must look beyond these fair housing laws and make full and creative use of its statutory and regulatory enforcement arsenal. When appropriate, RESPA, the Truth in Lending Act and other non-civil rights vehicles must be used in lieu of, or at times, in conjunction with customary civil rights enforcement laws. When current statutory and regulatory mechanisms do not adequately address the new discrimination, the Department will be prepared to propose new legislation on the issue.

Hate Crimes: Make 'Em Pay

While acts of housing discrimination have expanded to more sophisticated forms, acts of violence taken against people or their property, or threats of violence made to people, because of their race or ethnic background are on the rise. Such hate crimes constitute a major barrier to the ability of people to live where they want and otherwise could. Currently, HUD investigates hate crimes in the housing context and refers appropriate cases to the Department of Justice for criminal prosecution. When hate crime perpetrators are prosecuted for their acts, the judicial system may profess that justice has been served and that society at large may now rest assured that a barrier to housing choice has been eradicated. For the individual victim, however, the acute pain of being targeted because of race or ethnicity lingers and may not be assuaged by a remedy that does not change that reality and the ever-present possibility of its reoccurrence.

HUD's Make 'Em Pay initiative, through use of the Fair Housing Act, affords the victim a civil remedy whereby he can take from the wrongdoer to compensate for what was stripped from him. Thus, when a group of teenagers speed by in their prized possession hotrod and fire shots into the bedroom of a sleeping African-American family because of their race, those teenagers relinquish their car to that couple because of their crime.

The Department can significantly increase the number of Make 'Em Pay complaints by:

- Proactively monitoring newspaper and other media reports,
- Establishing close contact with local fair housing groups who agree to inform HUD of all such acts that become known to them,
- Requiring FHIPs to report to HUD all such acts that become known to them,
- Setting up a Hotline for the report of such actions.

HUD Testing Program

Fair housing testing is a widely accepted, powerful weapon used to establish the existence of discrimination in housing. A tester assumes the role of a verifiable profile and purports to be a home-seeker for the specific purpose of gathering information concerning the manner in which a housing provider does business. The Department of Justice currently runs its own fair housing testing program out of main Justice. Over 350 non-attorney DOJ employees have participated in the program.

With regional offices nationwide, HUD proposes to create its own program to train and utilize testers throughout the country. The Department can thereby more closely direct and control its own fair housing investigations. Furthermore, a testing program presents an ideal opportunity to galvanize the Department's employees and expose them to civil rights enforcement in a wholly hands-on manner.

○ AGENCY REFERRAL OF FAIR HOUSING ACT MATTERS TO HUD:

In a January, 1994 Executive Order (Executive Order 12892), President Clinton declared that it is the responsibility of Executive Agencies to forward, upon receipt of a complaint or other information alleging facts that may constitute a violation of the Fair Housing Act or suggesting a violation of the Act, to the Secretary such facts or information for processing under the Act. The Secretary can remind federal agencies of the Executive Order directive and require that the agencies submit information to the Department pursuant to it.

○ THE PRESIDENT'S FAIR HOUSING TASK FORCE:

In the January, 1994 Executive Order, President Clinton also established the "President's Fair Housing Council" and named the Secretary of HUD as chair of that Council. The President directed the Secretary to work closely with the Secretary of Health and Human Services, the Secretary of Transportation, the Secretary of Education, the Secretary of Labor, the Secretary of Defense, the Secretary of Agriculture, the Secretary of Veterans Affairs, the Secretary of the Treasury, the Attorney General, the Secretary of the Interior, the Chair of the Federal Reserve, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Chair of the Federal Deposit Insurance Corporation and such other officials of executive departments and agencies as the President may, from time to time, designate. The Secretary can develop memoranda of understanding with these executive agencies and in July, 1997, did so with the Department of Agriculture. The unprecedented memorandum of understanding grants HUD the jurisdiction to handle all future Fair Housing Act complaints received in connection with Agriculture's housing financing and rental assistance programs. HUD also intends to convene, for the first time, the Council so that it can fulfill its mandate to review the design and delivery of Federal programs and activities to ensure that they support a coordinated strategy to affirmatively further fair housing.

○ PUBLIC EDUCATION CAMPAIGN:

Coinciding with the 30th anniversary of the Fair Housing Act - to be celebrated in the spring of 1998 - the Department proposes to launch a three pronged public education campaign. Educating the public about their right to fair housing will enable them to recognize when discriminators violate their rights and allow them to take aggressive action with HUD to combat that discrimination.

Media Drive

The Department will commence an extensive media drive designed to educate the public about their rights under the Fair Housing Act and the resources available from HUD to vindicate their rights if violated. The Department intends to use print ads and other media forms to convey its pertinent message. It will solicit the help of major entertainers and public figures committed to the principle of fair housing.

Fair Housing Fora

The Department will host a series of local, regional, and then a national forum celebrating the accomplishments and promise of the Fair Housing Act and reaffirming HUD's commitment and duty

to enforce the Act and other related civil rights laws.

Performance Awards

The Department proposes creating an award which recognizes communities' outstanding work in the area of fair housing and in formulating good partnership programs which foster integration. Not unlike the Blue Ribbon Practices awards given by the Secretary last month at the meeting of the Conference of Mayors, the Civil Rights Excellence award would recognize a community's outstanding performance. We must encourage civil rights best practices and recognize those practices when they succeed, just as we must enforce them when they fail.

Bonus / Tim -

JACK REED
RHODE ISLAND

FYI

Elena

COMMITTEES:
BANKING
LABOR AND HUMAN RESOURCES
AGING

United States Senate

WASHINGTON, DC 20510-3903

September 15, 1997

PLEASE RESPOND TO:

WASHINGTON:

☐ WASHINGTON, DC 20510-3903
(202) 224-4642

RHODE ISLAND:

☐ 201 HILLSIDE ROAD
SUITE 200
GARDEN CITY
CRANSTON, RI 02920-5602
(401) 943-3100

☐ FEDERAL BUILDING
ROOM 418
PROVIDENCE, RI 02903-1773
(401) 528-5200

TDD RELAY RHODE ISLAND
1-(800) 745-5555

The Honorable William J. Clinton
Office of the President
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

SEP 17 PM 9:31

Dear Mr. President:

I write to share my concerns regarding the proposed tobacco settlement. While the settlement may present an opportunity to establish appropriate incentives to significantly reduce teenage smoking in this country, any move to translate the settlement into law should be made only after careful review of the issues as well as significant strengthening of many of its provisions. In sum, I urge you to continue your strong leadership on this issue, and I would caution that a cosmetic overhaul of the deal for the sake of expedience would not be acceptable.

I applaud the parties who reached this agreement. The Attorneys General deserve great credit for engineering the negotiations and producing the settlement. Attorney General Mike Moore and his colleagues have been tenacious and effective representatives of their states.

The parties to the agreement have asked Congress to act, and Congress is now at a juncture where it must attempt to translate the outline of this agreement into legislative language. This effort should incorporate the positive spirit of the agreement as well as establish stronger incentives to reduce teen smoking. Tobacco use is clearly a problem that starts with children: almost 90 percent of adult smokers started using tobacco at or before age 18. The average youth smoker begins at age 13 and becomes a daily smoker by age 14 1/2.

While the settlement aims to reduce teen smoking, I have many concerns about the settlement as currently written. First, I am pleased that the agreement affirms the Food and Drug Administration's (FDA) authority to regulate tobacco products and incorporates most of the provisions of the FDA's tobacco regulation. However, some provisions of the proposal place undue restrictions on the FDA's authority to regulate nicotine, and I applaud your administration's call for strengthening the FDA's authority under any agreement.

Second, the settlement includes a "look-back" provision that couples specific targets for reductions in underage tobacco use with fines on the industry if these targets are not met. The "look-back" has been the subject of much deserved criticism, and I agree with your assertions that the "look-back" needs to be strengthened. Any efforts to strengthen this provision should include a thorough examination of the agreement's dubious allowance of a rebate to the tobacco companies after companies pay required fines for not meeting the targets. I question the reasonableness of such a rebate and believe it should not be part of any implementing legislation.

September 15, 1997

Page 2

Third, the settlement's marketing and advertising restrictions have been promoted as having the potential to significantly reduce the number of teens who smoke. However, a huge disparity exists between the estimated \$5 billion spent each year on advertising by the tobacco industry and the \$500 million in the settlement's funding for a public education campaign geared toward decreasing tobacco use. Plainly, the settlement's efforts are underfunded. Indeed, we might consider a closer ratio in terms of money spent on tobacco advertising and anti-smoking efforts. Financial support for such activities is crucial to improving the public health of our nation. In addition, the funding mechanism for these and other public health activities must be designed so that funds cannot be diverted and that other FDA functions are not shortchanged.

If advertising restrictions are written into law, First Amendment challenges could negate their impact. Any legislation must include a mechanism that will bind the tobacco companies, if, even through no action of their own, the advertising bans are struck down by the courts on the basis of a First Amendment case.

Finally, the tobacco settlement contains a number of other issues that necessitate thorough consideration by the Administration and Congress. For example, any legislation must ensure that contraband tobacco products do not become a larger problem than they already are. We need to ensure that lower requirements for "reduced risk" products do not provide a gaping loophole in the settlement. In addition, a number of parties not included in the settlement have significant concerns that should be considered. These parties include the Medicare program and other federal programs that have sustained significant costs due to smoking, tobacco farmers, asbestos workers, and others.

I continue to follow these issues closely, and, as a member of the Labor and Human Resources Committee and the Senate Democratic Task Force appointed to work on the settlement, I plan to take an active role in the development of any legislation to implement the agreement. As more details emerge and as the legislative process progresses, I look forward to working with you on this and other efforts to improve our public health and reduce teen smoking. Again, I urge your continued strong leadership on these issues to produce the kind of agreement that is worthy of support.

Sincerely,

A large, stylized handwritten signature in dark ink, appearing to read "Jack Reed". The signature is written over a light, textured background.

Jack Reed
United States Senator

FORTNEY PETE STARK
THIRTEENTH DISTRICT, CALIFORNIA

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

COMMITTEES:
WAYS AND MEANS
JOINT ECONOMIC

Brue/Tam -

FYI. (New 9

There were five
to us to answer.)

Elia

September 17, 1997

The Honorable William J. Clinton
The White House
Washington, DC 20500

SEP 18 AM 11:33

Dear Mr. President:

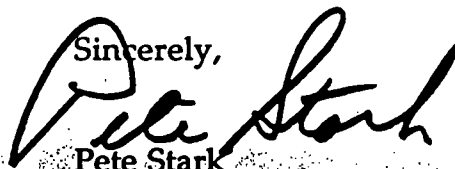
Congratulations on today's reports that you will seek stronger penalties and fines on the tobacco industry. Your proposals are an important improvement in the future health of the Nation.

I urge that you support dedicating any additional tobacco revenues--whether from fines or taxes--to the Medicare Part A Trust Fund. Treating smoking-related diseases costs Medicare tens of billions of dollars a year. It is only fitting that tobacco revenues help replenish the Trust Fund for the damage tobacco has caused.

As you know, the Balanced Budget Act established the National Bipartisan Commission on the Future of Medicare. In seeking to extend the life of Medicare past 2007, that Commission is almost certain to need to recommend a combination of provider and beneficiary cuts and increased revenues. Combining changes from all three of these possible sources--providers, beneficiaries, and taxpayers--makes saving Medicare relatively easy. And the easiest, most popular form of tax change would be dedicating increases in tax from tobacco to the Medicare Trust Fund.

I hope this idea will have your support in the months to come.

Sincerely,



Pete Stark

Ranking Democratic Member
Subcommittee on Health

cc: Chairman Bill Archer
Rep. Charles B. Rangel

9/20/97 - seal - or x

MEMORANDUM

EW

TO: BRUCE REED, ELENA KAGAN

FROM: TOM FREEDMAN, MARY L. SMITH

RE: WORKPLACE RELIGIOUS FREEDOM ACT OF 1997

DATE: SEPTEMBER 23, 1997

1. Where it's at
2. What people think
3. Process
- any contacts
- press a log
Call Andy
Kalis

SUMMARY

The Workplace Religious Freedom Act of 1997, sponsored by Senators Kerry (D-MA) and Coats (R-IN), prohibits discrimination of religious practices by private employers unless the employer can demonstrate that to reasonably accommodate the religious practice would be an undue hardship. The key provision of the legislation is to create a new definition of "undue hardship" to mean actions requiring significant difficulty or expense. Given the President's past record of promoting religious freedom, most recently his August 13, 1997 announcement of guidelines to permit religious observance by federal workers, it would seem that this legislation would be in keeping with the President's agenda. However, we still should hold a meeting to discuss the legislation and the political ramifications with the appropriate persons.

KEY ASPECTS OF THE LEGISLATION

- S. 1124 entitled the "Workplace Religious Freedom Act of 1997" is sponsored Senators John F. Kerry (D-MA) and Dan Coats (R-IN). There are no other cosponsors.
- The bill amends the Civil Rights Act of 1964 to modify the definition of "religion" to include all aspects of religious observance, practice, and belief.
- The bill creates a new standard of requiring an employer to reasonably accommodate religious observance of its employees unless to do so would amount to "undue hardship," or an action requiring significant difficulty or expense on the conduct of the employer's business.
- The bill would prohibit deeming an accommodation as "reasonable" if the accommodation does not remove the conflict between employment requirements and the religious observance or practice.

REASONS BEHIND THE LEGISLATION AND SUPPORT FOR IT

- The bill is supported by a diverse group of Christian, Jewish, Muslim, and Sikh organizations.

- The courts have construed narrowly the current language in the Civil Rights Act which provides that an employer must reasonably accommodate an employee's religious observance.
- The bill establishes the same standard of "undue hardship" to religious cases as are already applied in other federal civil rights actions, such as those under the Americans with Disabilities Act.

CLINTON'S RECORD ON RELIGIOUS FREEDOM

- In 1993, the President signed into law the Religious Freedom Restoration Act, which although partially struck down by the Supreme Court this June, still protects religious worship from being inappropriately restricted by the federal government.
- In 1994, the President signed the American Indian religious freedom, peyote-as-sacrament amendment into law.
- In 1995, the President issued guidelines explaining the extent of permissible prayer and religious speech allowed in public schools.
- In 1996, the President signed an executive order to protect and preserve American Indian sacred sites.
- On August 14, 1997, the President announced a set of guidelines for protecting the religious expression of federal employees in the workplace.

44TH DOCUMENT of Level 1 printed in FULL format.

FULL TEXT OF BILLS

105TH CONGRESS; 1ST SESSION
IN THE SENATE OF THE UNITED STATES
AS INTRODUCED IN THE SENATE

S. 92

1997 S. 92; 105 S. 92

<=1> Retrieve Bill Tracking Report

SYNOPSIS:

A BILL To amend title VII of the Civil Rights Act of 1964 to establish provisions with respect to religious accommodation in employment, and for other purposes.

DATE OF INTRODUCTION: JANUARY 21, 1997

DATE OF VERSION: JANUARY 28, 1997 -- VERSION: 1

SPONSOR(S):

Mr. KERRY introduced the following bill: which was read twice and referred to the Committee on Labor and Human Resources

TEXT:

* Be it enacted by the Senate and House of Representatives of the United*
*States of America in Congress assembled. *

SECTION 1. SHORT TITLE.

This Act may be cited as the "Workplace Religious Freedom Act of 1997".

SEC. 2. AMENDMENT.

(a) DEFINITIONS.-Section 701(j) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(j)) is amended-

(1) by inserting "(1)" after "(j)";

(2) by inserting ", after initiating and engaging in an affirmative and bona fide effort," after "unable"; and

(3) by adding at the end the following:

"(2) As used in this subsection, the term 'undue hardship' means an accommodation requiring significant difficulty or expense. For purposes of determining whether an accommodation requires significant difficulty or expense, the factors to be considered shall include-

"(A) the identifiable cost of the accommodation in relation to the size and operating cost of the employer; and

"(B) the number of individuals who will need a particular accommodation to a religious observance or practice."

(b) EMPLOYMENT PRACTICES.-Section 703 of such Act (42 U.S.C. 2000e-2) is amended by adding at the end the following:

"(c)(1) As used in this subsection:

"(A) The term 'employee' includes a prospective employee.

"(B) The term 'undue hardship' has the meaning given the term in section 701(j)(2).

"(2) For purposes of determining whether an employer has committed an unlawful employment practice under this title by failing to provide a reasonable accommodation to the religious observance or practice of an

S. 92 JANUARY 28, 1997 -- VERSION: 1

employee, an accommodation by the employer shall not be deemed to be reasonable if-

"(A) such accommodation does not remove the conflict between employment requirements and the religious observance or practice of the employee; or

"(B)(i) the employee demonstrates to the employer the availability of an alternative accommodation less onerous to the employee that may be made by the employer without undue hardship on the conduct of the employer's business; and

"(ii) the employer refuses to make such accommodation.

"(3) It shall not be a defense to a claim of unlawful employment practice under this title for failure to provide a reasonable accommodation to a religious observance or practice of an employee that such accommodation would be in violation of a bona fide seniority system if, in order for the employer to reasonably accommodate to such observance or practice-

"(A) an adjustment would be made in the employee's work hours (including an adjustment that requires the employee to work overtime in order to avoid working at a time that abstention from work is necessary to satisfy religious requirements), shift, or job assignment, that would not be available to any employee but for such accommodation; or

"(B) the employee and any other employee would voluntarily exchange shifts or job assignments, or voluntarily make some other arrangement between the employees.

"(4)(A) An employer shall not be required to pay premium wages for work performed during hours to which such premium wages would ordinarily be applicable, if work is performed during such hours only to accommodate religious requirements of an employee.

"(B) As used in this paragraph, the term 'premium wages' includes overtime pay and compensatory time off, pay for night, weekend, or holiday work, and pay for standby or irregular duty."

SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.-Except as provided in subsection (b), this Act and the amendments made by section 2 take effect on the date of enactment of this Act.

(b) APPLICATION OF AMENDMENTS.-The amendments made by section 2 do not apply with respect to conduct occurring before the date of enactment of this Act.

What does this mean?

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person should it be common

Label - no overtime

For Immediate Release

August 14, 1997

**GUIDELINES ON RELIGIOUS EXERCISE AND
RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE**

The following Guidelines, addressing religious exercise and religious expression, shall apply to all civilian executive branch agencies, officials, and employees in the Federal workplace.

These Guidelines principally address employees' religious exercise and religious expression when the employees are acting in their personal capacity within the Federal workplace and the public does not have regular exposure to the workplace. The Guidelines do not comprehensively address whether and when the government and its employees may engage in religious speech directed at the public. They also do not address religious exercise and religious expression by uniformed military personnel, or the conduct of business by chaplains employed by the Federal Government. Nor do the Guidelines define the rights and responsibilities of non-governmental employers -- including religious employers -- and their employees. Although these Guidelines, including the examples cited in them, should answer the most frequently encountered questions in the Federal workplace, actual cases sometimes will be complicated by additional facts and circumstances that may require a different result from the one the Guidelines indicate.

Section 1. Guidelines for Religious Exercise and Religious Expression in the Federal Workplace. Executive departments and agencies ("agencies") shall permit personal religious expression by Federal employees to the greatest extent possible, consistent with requirements of law and interests in workplace efficiency as described in this set of Guidelines. Agencies shall not discriminate against employees on the basis of religion, require religious participation or non-participation as a condition of employment, or permit religious harassment. And agencies shall accommodate employees' exercise of their religion in the circumstances specified in these Guidelines. These requirements are but applications of the general principle that agencies shall treat all employees with the same respect and consideration, regardless of their religion (or lack thereof).

A. Religious Expression. As a matter of law, agencies shall not restrict personal religious expression by employees in the Federal workplace except where the employee's interest in the expression is outweighed by the government's interest in the efficient provision of public services or where the expression intrudes upon the legitimate rights of other employees or creates the appearance, to a reasonable observer, of an official endorsement of religion. The examples cited in these Guidelines as permissible forms of religious expression will rarely, if ever, fall within these exceptions.

As a general rule, agencies may not regulate employees' personal religious expression on the basis of its content or viewpoint. In other words, agencies generally may not suppress employees' private religious speech in the workplace while leaving unregulated other private employee speech that has a comparable effect on the efficiency of the workplace -- including ideological

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speech on politics and other topics -- because to do so would be to engage in presumptively unlawful content or viewpoint discrimination. Agencies, however, may, in their discretion, reasonably regulate the time, place and manner of all employee speech, provided such regulations do not discriminate on the basis of content or viewpoint.

The Federal Government generally has the authority to regulate an employee's private speech, including religious speech, where the employee's interest in that speech is outweighed by the government's interest in promoting the efficiency of the public services it performs. Agencies should exercise this authority evenhandedly and with restraint, and with regard for the fact that Americans are used to expressions of disagreement on controversial subjects, including religious ones. Agencies are not required, however, to permit employees to use work time to pursue religious or ideological agendas. Federal employees are paid to perform official work, not to engage in personal religious or ideological campaigns during work hours.

(1) **Expression in Private Work Areas.** Employees should be permitted to engage in private religious expression in personal work areas not regularly open to the public to the same extent that they may engage in nonreligious private expression, subject to reasonable content- and viewpoint-neutral standards and restrictions: such religious expression must be permitted so long as it does not interfere with the agency's carrying out of its official responsibilities.

Examples

- (a) An employee may keep a Bible or Koran on her private desk and read it during breaks.
- (b) An agency may restrict all posters, or posters of a certain size, in private work areas, or require that such posters be displayed facing the employee, and not on common walls; but the employer typically cannot single out religious or anti-religious posters for harsher or preferential treatment.

(2) **Expression Among Fellow Employees.** Employees should be permitted to engage in religious expression with fellow employees, to the same extent that they may engage in comparable nonreligious private expression, subject to reasonable and content-neutral standards and restrictions: such expression should not be restricted so long as it does not interfere with workplace efficiency. Though agencies are entitled to regulate such employee speech based on reasonable predictions of disruption, they should not restrict speech based on merely hypothetical concerns, having little basis in fact, that the speech will have a deleterious effect on workplace efficiency.

Examples

- (a) In informal settings, such as cafeterias and hallways, employees are entitled to discuss their religious views with one another, subject only to the same rules of order as apply to other employee expression. If an agency permits unrestricted nonreligious expression of a controversial nature, it must likewise permit equally controversial religious expression.

- (b) Employees are entitled to display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. So long as they do not convey any governmental endorsement of religion, religious messages may not typically be singled out for suppression.
- (c) Employees generally may wear religious medallions over their clothes or so that they are otherwise visible. Typically, this alone will not affect workplace efficiency, and therefore is protected.

(3) **Expression Directed at Fellow Employees.** Employees are permitted to engage in religious expression directed at fellow employees, and may even attempt to persuade fellow employees of the correctness of their religious views, to the same extent as those employees may engage in comparable speech not involving religion. Some religions encourage adherents to spread the faith at every opportunity, a duty that can encompass the adherent's workplace. As a general matter, proselytizing is as entitled to constitutional protection as any other form of speech -- as long as a reasonable observer would not interpret the expression as government endorsement of religion. Employees may urge a colleague to participate or not to participate in religious activities to the same extent that, consistent with concerns of workplace efficiency, they may urge their colleagues to engage in or refrain from other personal endeavors. But employees must refrain from such expression when a fellow employee asks that it stop or otherwise demonstrates that it is unwelcome. (Such expression by supervisors is subject to special consideration as discussed in Section B(2) of these guidelines.)

Examples

- (a) During a coffee break, one employee engages another in a polite discussion of why his faith should be embraced. The other employee disagrees with the first employee's religious exhortations, but does not ask that the conversation stop. Under these circumstances, agencies should not restrict or interfere with such speech.
- (b) One employee invites another employee to attend worship services at her church, though she knows that the invitee is a devout adherent of another faith. The invitee is shocked, and asks that the invitation not be repeated. The original invitation is protected, but the employee should honor the request that no further invitations be issued.

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- (c) In a parking lot, a non-supervisory employee hands another employee a religious tract urging that she convert to another religion lest she be condemned to eternal damnation. The proselytizing employee says nothing further and does not inquire of his colleague whether she followed the pamphlet's urging. This speech typically should not be restricted.

Though personal religious expression such as that described in these examples, standing alone, is protected in the same way, and to the same extent, as other constitutionally valued speech in the Federal workplace, such expression should not be permitted if it is part of a larger pattern of verbal attacks on fellow employees (or a specific employee) not sharing the faith of the speaker. Such speech, by virtue of its excessive or harassing nature, may constitute religious harassment or create a hostile work environment, as described in Part B(3) of these Guidelines, and an agency should not tolerate it.

(4) **Expression in Areas Accessible to the Public.** Where the public has access to the Federal workplace, all Federal employers must be sensitive to the Establishment Clause's requirement that expression not create the reasonable impression that the government is sponsoring, endorsing, or inhibiting religion generally, or favoring or disfavoring a particular religion. This is particularly important in agencies with adjudicatory functions.

However, even in workplaces open to the public, not all private employee religious expression is forbidden. For example, Federal employees may wear personal religious jewelry absent special circumstances (such as safety concerns) that might require a ban on all similar nonreligious jewelry. Employees may also display religious art and literature in their personal work areas to the same extent that they may display other art and literature, so long as the viewing public would reasonably understand the religious expression to be that of the employee acting in her personal capacity, and not that of the government itself. Similarly, in their private time employees may discuss religion with willing coworkers in public spaces to the same extent as they may discuss other subjects, so long as the public would reasonably understand the religious expression to be that of the employees acting in their personal capacities.

B. Religious Discrimination. Federal agencies may not discriminate against employees on the basis of their religion, religious beliefs, or views concerning religion.

(1) **Discrimination in Terms and Conditions.** No agency within the executive branch may promote, refuse to promote, hire, refuse to hire, or otherwise favor or disfavor, an employee or potential employee because of his or her religion, religious beliefs, or views concerning religion.

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Examples

- (a) A Federal agency may not refuse to hire Buddhists, or impose more onerous requirements on applicants for employment who are Buddhists.
- (b) An agency may not impose, explicitly or implicitly, stricter promotion requirements for Christians, or impose stricter discipline on Jews than on other employees, based on their religion. Nor may Federal agencies give advantages to Christians in promotions, or impose lesser discipline on Jews than on other employees, based on their religion.
- (c) A supervisor may not impose more onerous work requirements on an employee who is an atheist because that employee does not share the supervisor's religious beliefs.

(2) **Coercion of Employee's Participation or Nonparticipation in Religious Activities.** A person holding supervisory authority over an employee may not, explicitly or implicitly, insist that the employee participate in religious activities as a condition of continued employment, promotion, salary increases, preferred job assignments, or any other incidents of employment. Nor may a supervisor insist that an employee refrain from participating in religious activities outside the workplace except pursuant to otherwise legal, neutral restrictions that apply to employees' off-duty conduct and expression in general (e.g., restrictions on political activities prohibited by the Hatch Act).

This prohibition leaves supervisors free to engage in some kinds of speech about religion. Where a supervisor's religious expression is not coercive and is understood as his or her personal view, that expression is protected in the Federal workplace in the same way and to the same extent as other constitutionally valued speech. For example, if surrounding circumstances indicate that the expression is merely the personal view of the supervisor and that employees are free to reject or ignore the supervisor's point of view or invitation without any harm to their careers or professional lives, such expression is so protected.

Because supervisors have the power to hire, fire, or promote, employees may reasonably perceive their supervisors' religious expression as coercive, even if it was not intended as such. Therefore, supervisors should be careful to ensure that their statements and actions are such that employees do not perceive any coercion of religious or non-religious behavior (or respond as if such coercion is occurring), and should, where necessary, take appropriate steps to dispel such misperceptions.

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Examples

- (a) A supervisor may invite co-workers to a son's confirmation in a church, a daughter's bat mitzvah in a synagogue, or to his own wedding at a temple.
but—A supervisor should not say to an employee: "I didn't see you in church this week. I expect to see you there this Sunday."
- (b) On a bulletin board on which personal notices unrelated to work regularly are permitted, a supervisor may post a flyer announcing an Easter musical service at her church, with a handwritten notice inviting co-workers to attend.
but—A supervisor should not circulate a memo announcing that he will be leading a lunch-hour Talmud class that employees should attend in order to participate in a discussion of career advancement that will convene at the conclusion of the class.
- (c) During a wide-ranging discussion in the cafeteria about various non-work related matters, a supervisor states to an employee her belief that religion is important in one's life. Without more, this is not coercive, and the statement is protected in the Federal workplace in the same way, and to the same extent, as other constitutionally valued speech.
- (d) A supervisor who is an atheist has made it known that he thinks that anyone who attends church regularly should not be trusted with the public weal. Over a period of years, the supervisor regularly awards merit increases to employees who do not attend church routinely, but not to employees of equal merit who do attend church. This course of conduct would reasonably be perceived as coercive and should be prohibited.
- (e) At a lunch-table discussion about abortion, during which a wide range of views are vigorously expressed, a supervisor shares with those he supervises his belief that God demands full respect for unborn life, and that he believes it is appropriate for all persons to pray for the unborn. Another supervisor expresses the view that abortion should be kept legal because God teaches that women must have control over their own bodies. Without more, neither of these comments coerces employees' religious conformity or conduct. Therefore, unless the supervisors take further steps to coerce agreement with their view or act in ways that could reasonably be perceived as coercive, their expressions are protected in the Federal workplace in the same way and to the same extent as other constitutionally valued speech.

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(3) Hostile Work Environment and Harassment.

The law against workplace discrimination protects Federal employees from being subjected to a hostile environment, or religious harassment, in the form of religiously discriminatory intimidation, or pervasive or severe religious ridicule or insult, whether by supervisors or fellow workers. Whether particular conduct gives rise to a hostile environment, or constitutes impermissible religious harassment, will usually depend upon its frequency or repetitiveness, as well as its severity. The use of derogatory language in an assaultive manner can constitute statutory religious harassment if it is severe or invoked repeatedly. A single incident, if sufficiently abusive, might also constitute statutory harassment. However, although employees should always be guided by general principles of civility and workplace efficiency, a hostile environment is not created by the bare expression of speech with which some employees might disagree. In a country where freedom of speech and religion are guaranteed, citizens should expect to be exposed to ideas with which they disagree.

The examples below are intended to provide guidance on when conduct or words constitute religious harassment that should not be tolerated in the Federal workplace. In a particular case, the question of employer liability would require consideration of additional factors, including the extent to which the agency was aware of the harassment and the actions the agency took to address it.

Examples

- (a) An employee repeatedly makes derogatory remarks to other employees with whom she is assigned to work about their faith or lack of faith. This typically will constitute religious harassment. An agency should not tolerate such conduct.
- (b) A group of employees subjects a fellow employee to a barrage of comments about his sex life, knowing that the targeted employee would be discomforted and offended by such comments because of his religious beliefs. This typically will constitute harassment, and an agency should not tolerate it.
- (c) A group of employees that share a common faith decides that they want to work exclusively with people who share their views. They engage in a pattern of verbal attacks on other employees who do not share their views, calling them heathens, sinners, and the like. This conduct should not be tolerated.
- (d) Two employees have an angry exchange of words. In the heat of the moment, one makes a derogatory comment about the other's religion. When tempers cool, no more is said. Unless the words are sufficiently severe or pervasive to alter the conditions of the insulted employee's employment or create an abusive working environment, this is not statutory religious harassment.

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- (e) Employees wear religious jewelry and medallions over their clothes or so that they are otherwise visible. Others wear buttons with a generalized religious or anti-religious message. Typically, these expressions are personal and do not alone constitute religious harassment.
- (f) In her private work area, a Federal worker keeps a Bible or Koran on her private desk and reads it during breaks. Another employee displays a picture of Jesus and the text of the Lord's Prayer in her private work area. This conduct, without more, is not religious harassment, and does not create an impermissible hostile environment with respect to employees who do not share those religious views, even if they are upset or offended by the conduct.
- (g) During lunch, certain employees gather on their own time for prayer and Bible study in an empty conference room that employees are generally free to use on a first-come, first-served basis. Such a gathering does not constitute religious harassment even if other employees with different views on how to pray might feel excluded or ask that the group be disbanded.

C. Accommodation of Religious Exercise. Federal law requires an agency to accommodate employees' exercise of their religion unless such accommodation would impose an undue hardship on the conduct of the agency's operations. Though an agency need not make an accommodation that will result in more than a *de minimis* cost to the agency, that cost or hardship nevertheless must be real rather than speculative or hypothetical; the accommodation should be made unless it would cause an actual cost to the agency or to other employees or an actual disruption of work, or unless it is otherwise barred by law.

In addition, religious accommodation cannot be disfavored vis-a-vis other, nonreligious accommodations. Therefore, a religious accommodation cannot be denied if the agency regularly permits similar accommodations for nonreligious purposes.

Examples

- (a) An agency must adjust work schedules to accommodate an employee's religious observance -- for example, Sabbath or religious holiday observance -- if an adequate substitute is available, or if the employee's absence would not otherwise impose an undue burden on the agency.
- (b) An employee must be permitted to wear religious garb, such as a crucifix, a yarmulke, or a head scarf or hijab, if wearing such attire during the work day is part of the employee's religious practice or expression, so long as the wearing of such garb does not unduly interfere with the functioning of the workplace.

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- (c) An employee should be excused from a particular assignment if performance of that assignment would contravene the employee's religious beliefs and the agency would not suffer undue hardship in reassigning the employee to another detail.
 - (d) During lunch, certain employees gather on their own time for prayer and Bible study in an empty conference room that employees are generally free to use on a first-come, first-served basis. Such a gathering may not be subject to discriminatory restrictions because of its religious content.

In those cases where an agency's work rule imposes a substantial burden on a particular employee's exercise of religion, the agency must go further: an agency should grant the employee an exemption from that rule, unless the agency has a compelling interest in denying the exemption and there is no less restrictive means of furthering that interest.

Examples

- (a) A corrections officer whose religion compels him or her to wear long hair should be granted an exemption from an otherwise generally applicable hair-length policy unless denial of an exemption is the least restrictive means of preserving safety, security, discipline or other compelling interests.
- (b) An applicant for employment in a governmental agency who is a Jehovah's Witness should not be compelled, contrary to her religious beliefs, to take a loyalty oath whose form is religiously objectionable.

D. **Establishment of Religion.** Supervisors and employees must not engage in activities or expression that a reasonable observer would interpret as Government endorsement or denigration of religion or a particular religion. Activities of employees need not be officially sanctioned in order to violate this principle; if, in all the circumstances, the activities would leave a reasonable observer with the impression that Government was endorsing, sponsoring, or inhibiting religion generally or favoring or disfavoring a particular religion, they are not permissible. Diverse factors, such as the context of the expression or whether official channels of communication are used, are relevant to what a reasonable observer would conclude.

Examples

- (a) At the conclusion of each weekly staff meeting and before anyone leaves the room, an employee leads a prayer in which nearly all employees participate. All employees are required to attend the weekly meeting. The supervisor neither explicitly recognizes the prayer as an official function nor explicitly states that no one need participate in the prayer. This course of conduct is not permitted unless under all the circumstances a reasonable observer would conclude that the prayer was not officially endorsed.

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- (b) At Christmas time, a supervisor places a wreath over the entrance to the office's main reception area. This course of conduct is permitted.

Section 2. Guiding Legal Principles. In applying the guidance set forth in section 1 of this order, executive branch departments and agencies should consider the following legal principles.

A. Religious Expression. It is well-established that the Free Speech Clause of the First Amendment protects Government employees in the workplace. This right encompasses a right to speak about religious subjects. The Free Speech Clause also prohibits the Government from singling out religious expression for disfavored treatment: "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression," *Capitol Sq. Review Bd. v. Pinette*, 115 S.Ct. 2448 (1995). Accordingly, in the Government workplace, employee religious expression cannot be regulated because of its religious character, and such religious speech typically cannot be singled out for harsher treatment than other comparable expression.

Many religions strongly encourage their adherents to spread the faith by persuasion and example at every opportunity, a duty that can extend to the adherents' workplace. As a general matter, proselytizing is entitled to the same constitutional protection as any other form of speech. Therefore, in the governmental workplace, proselytizing should not be singled out because of its content for harsher treatment than nonreligious expression.

However, it is also well-established that the Government in its role as employer has broader discretion to regulate its employees' speech in the workplace than it does to regulate speech among the public at large. Employees' expression on matters of public concern can be regulated if the employees' interest in the speech is outweighed by the interest of the Government, as an employer, in promoting the efficiency of the public services it performs through its employees. Governmental employers also possess substantial discretion to impose content-neutral and viewpoint-neutral time, place, and manner rules regulating private employee expression in the workplace (though they may not structure or administer such rules to discriminate against particular viewpoints). Furthermore, employee speech can be regulated or discouraged if it impairs discipline by superiors, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise, or demonstrates that the employee holds views that could lead his employer or the public reasonably to question whether he can perform his duties adequately.

Consistent with its fully protected character, employee religious speech should be treated, within the Federal workplace, like other expression on issues of public concern: in a particular case, an employer can discipline an employee for engaging in speech if the value of the speech is outweighed by the employer's interest in promoting the efficiency of the public services it performs

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through its employee. Typically, however, the religious speech cited as permissible in the various examples included in these Guidelines will not unduly impede these interests and should not be regulated. And rules regulating employee speech, like other rules regulating speech, must be carefully drawn to avoid any unnecessary limiting or chilling of protected speech.

B. Discrimination in Terms and Conditions. Title VII of the Civil Rights Act of 1964 makes it unlawful for employers, both private and public, to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). The Federal Government also is bound by the equal protection component of the Due Process Clause of the Fifth Amendment, which bars intentional discrimination on the basis of religion. Moreover, the prohibition on religious discrimination in employment applies with particular force to the Federal Government, for Article VI, clause 3 of the Constitution bars the Government from enforcing any religious test as a requirement for qualification to any Office. In addition, if a Government law, regulation or practice facially discriminates against employees' private exercise of religion or is intended to infringe upon or restrict private religious exercise, then that law, regulation, or practice implicates the Free Exercise Clause of the First Amendment. Last, under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, Federal governmental action that substantially burdens a private party's exercise of religion can be enforced only if it is justified by a compelling interest and is narrowly tailored to advance that interest.

C. Coercion of Employees' Participation or Nonparticipation in Religious Activities. The ban on religious discrimination is broader than simply guaranteeing nondiscriminatory treatment in formal employment decisions such as hiring and promotion. It applies to all terms and conditions of employment. It follows that the Federal Government may not require or coerce its employees to engage in religious activities or to refrain from engaging in religious activity. For example, a supervisor may not demand attendance at (or a refusal to attend) religious services as a condition of continued employment or promotion, or as a criterion affecting assignment of job duties. Quid pro quo discrimination of this sort is illegal. Indeed, wholly apart from the legal prohibitions against coercion, supervisors may not insist upon employees' conformity to religious behavior in their private lives any more than they can insist on conformity to any other private conduct unrelated to employees' ability to carry out their duties.

D. Hostile Work Environment and Harassment. Employers violate Title VII's ban on discrimination by creating or tolerating a "hostile environment" in which an employee is subject to discriminatory intimidation, ridicule, or insult sufficiently severe or pervasive to alter the conditions of the victim's employment. This statutory standard can be triggered (at the very least) when an employee, because of her or his religion or lack thereof, is exposed to intimidation, ridicule, and insult. The hostile conduct -- which may take the form of speech -- need not come from supervisors or from the employer. Fellow employees can create a hostile environment through their own words and actions.

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The existence of some offensive workplace conduct does not necessarily constitute harassment under Title VII. Occasional and isolated utterances of an epithet that engenders offensive feelings in an employee typically would not affect conditions of employment, and therefore would not in and of itself constitute harassment. A hostile environment, for Title VII purposes, is not created by the bare expression of speech with which one disagrees. For religious harassment to be illegal under Title VII, it must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Whether conduct can be the predicate for a finding of religious harassment under Title VII depends on the totality of the circumstances, such as the nature of the verbal or physical conduct at issue and the context in which the alleged incidents occurred. As the Supreme Court has said in an analogous context:

[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include 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 effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

The use of derogatory language directed at an employee can rise to the level of religious harassment if it is severe or invoked repeatedly. In particular, repeated religious slurs and negative religious stereotypes, or continued disparagement of an employee's religion or ritual practices, or lack thereof, can constitute harassment. It is not necessary that the harassment be explicitly religious in character or that the slurs reference religion: it is sufficient that the harassment is directed at an employee because of the employee's religion or lack thereof. That is to say, Title VII can be violated by employer tolerance of repeated slurs, insults and/or abuse not explicitly religious in nature if that conduct would not have occurred but for the targeted employee's religious belief or lack of religious belief. Finally, although proselytization directed at fellow employees is generally permissible (subject to the special considerations relating to supervisor expression discussed elsewhere in these Guidelines), such activity must stop if the listener asks that it stop or otherwise demonstrates that it is unwelcome.

E. Accommodation of Religious Exercise. Title VII requires employers "to reasonably accommodate . . . an employee's or prospective employee's religious observance or practice" unless such accommodation would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). For example, by statute, if an employee's religious beliefs require her to be absent from work, the Federal Government must grant that employee compensation time for overtime work, to be applied against the time lost, unless to do so would harm the ability of the agency to carry out its mission efficiently. 5 U.S.C. § 5550a.

more

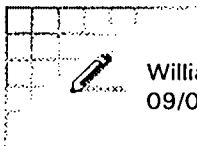
Though an employer need not incur more than de minimis costs in providing an accommodation, the employer hardship nevertheless must be real rather than speculative or hypothetical. Religious accommodation cannot be disfavored relative to other, nonreligious, accommodations. If an employer regularly permits accommodation for nonreligious purposes, it cannot deny comparable religious accommodation: "Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986).

In the Federal Government workplace, if neutral workplace rules -- that is, rules that do not single out religious or religiously motivated conduct for disparate treatment -- impose a substantial burden on a particular employee's exercise of religion, the Religious Freedom Restoration Act requires the employer to grant the employee an exemption from that neutral rule, unless the employer has a compelling interest in denying an exemption and there is no less restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1.

F. Establishment of Religion. The Establishment Clause of the First Amendment prohibits the Government -- including its employees -- from acting in a manner that would lead a reasonable observer to conclude that the Government is sponsoring, endorsing or inhibiting religion generally or favoring or disfavoring a particular religion. For example, where the public has access to the Federal workplace, employee religious expression should be prohibited where the public reasonably would perceive that the employee is acting in an official, rather than a private, capacity, or under circumstances that would lead a reasonable observer to conclude that the Government is endorsing or disparaging religion. The Establishment Clause also forbids Federal employees from using Government funds or resources (other than those facilities generally available to government employees) for private religious uses.

Section 3. General. These Guidelines shall govern the internal management of the civilian executive branch. They are not intended to create any new right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. Questions regarding interpretations of these Guidelines should be brought to the Office of the General Counsel or Legal Counsel in each department and agency.

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William P. Marshall
09/09/97 11:41:40 AM

Record Type: Record

To: Elena Kagan/OPD/EOP
cc:
Subject: Workplace Freedom Meeting

We should ask:

Andy Pincus (Commerce)
Ellen Vargyas (EEOC)
Marvin Krislov (Labor)
DOJ-OLC
SBA
Public Liason (Deborah Mohile)
Other agencies?

cc: Bruce

Tom -

Could you handle this issue? I take it that this might be coming up soon in the House, and we need to have a position. There are the people Bill Marshall thinks will have views on the issue. But you should talk with him and pick his brain before you convene a meeting. Many thanks.

Elena

PS - All that I know about this bill is that it somehow concerns religion in the workplace.

Religion
Process
Muswell
B.H. Marshall

MEMORANDUM

TO: BRUCE REED, ELENA KAGAN

FROM: TOM FREEDMAN, MARY L. SMITH

RE: WORKPLACE RELIGIOUS FREEDOM ACT OF 1997

DATE: SEPTEMBER 23, 1997

DOJ - Penn Johnson
Commerce - Baker
EEOC - Janygas
Civil Rights - Kristow
SBA -
OSL - McIntire
Education - Doyle
Ag. Affairs

SUMMARY

The Workplace Religious Freedom Act of 1997, sponsored by Senators Kerry (D-MA) and Coats (R-IN), prohibits discrimination of religious practices by private employers unless the employer can demonstrate that to reasonably accommodate the religious practice would be an undue hardship. The key provision of the legislation is to create a new definition of "undue hardship" to mean actions requiring significant difficulty or expense. Given the President's past record of promoting religious freedom, most recently his August 13, 1997 announcement of guidelines to permit religious observance by federal workers, it would seem that this legislation would be in keeping with the President's agenda. However, we still should hold a meeting to discuss the legislation and the political ramifications with the appropriate persons.

KEY ASPECTS OF THE LEGISLATION

- S. 1124 entitled the "Workplace Religious Freedom Act of 1997" is sponsored Senators John F. Kerry (D-MA) and Dan Coats (R-IN). There are no other cosponsors.
- The bill amends the Civil Rights Act of 1964 to modify the definition of "religion" to include all aspects of religious observance, practice, and belief.
- The bill creates a new standard of requiring an employer to reasonably accommodate religious observance of its employees unless to do so would amount to "undue hardship," or an action requiring significant difficulty or expense on the conduct of the employer's business.
- The bill would prohibit deeming an accommodation as "reasonable" if the accommodation does not remove the conflict between employment requirements and the religious observance or practice.

REASONS BEHIND THE LEGISLATION AND SUPPORT FOR IT

- The bill is supported by a diverse group of Christian, Jewish, Muslim, and Sikh organizations.

- The courts have construed narrowly the current language in the Civil Rights Act which provides that an employer must reasonably accommodate an employee's religious observance.
- The bill establishes the same standard of "undue hardship" to religious cases as are already applied in other federal civil rights actions, such as those under the Americans with Disabilities Act.

CLINTON'S RECORD ON RELIGIOUS FREEDOM

- In 1993, the President signed into law the Religious Freedom Restoration Act, which although partially struck down by the Supreme Court this June, still protects religious worship from being inappropriately restricted by the federal government.
- In 1994, the President signed the American Indian religious freedom, peyote-as-sacrament amendment into law.
- In 1995, the President issued guidelines explaining the extent of permissible prayer and religious speech allowed in public schools.
- In 1996, the President signed an executive order to protect and preserve American Indian sacred sites.
- On August 14, 1997, the President announced a set of guidelines for protecting the religious expression of federal employees in the workplace.