The Latest On Religious Accommodations In The Workplace

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In the past few months, we have seen three different cases of religious accommodation claims, with three very different results.

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- In case one, the U.S. Court of Appeals for the Eighth Circuit affirmed dismissal of a U.S. Equal Employment Opportunity Commission failure-to-hire case, on very narrow grounds.

- In case two, a Florida jury awarded a hotel kitchen employee $21.5 million, after she was terminated for refusing to work on her Sabbath.

- In case three, a federal judge in New York approved a $4.9 million settlement of a class action brought by the EEOC against United Parcel Service Inc., which involved claims that the company had not properly handled employee requests for religious accommodation, relaxing dress and uniform rules.

What do these cases tell us?

The obligation to accommodate employees' religious beliefs and practices remains a critical concept for employers to understand, and a concept which the EEOC and the plaintiffs bar plainly take very seriously.

Employers must be careful in drafting and enforcing policies, and managers and human resources executives must be especially cautious when they say "no" to a request for a religious accommodation, and make sure that their denial is on solid legal footing.

The Revoked Job Offer — EEOC v. North Memorial

In EEOC v. North Memorial[1], a Minnesota hospital eked out a narrow victory when the

Eighth Circuit affirmed dismissal of an EEOC lawsuit, which challenged the hospital's decision to revoke a job offer to a nurse, Emily Sure-Ondara, a Seventh-day Adventist, when she requested an accommodation not to work on her Sabbath (Friday night to Saturday).

The plaintiff had applied for an "Advanced Beginner" residency program at North Memorial, designed to provide training to registered nurses who previously worked in nonhospital settings. The plaintiff was told during interviews that the job would require working night shifts, every other weekend, and did not disclose that her religion would prevent her from working from sundown Fridays to sundown on Saturdays. After she was accepted for the program and went to the hospital to complete pre-employment paperwork, she disclosed, for the first time, that she would need this shift accommodation.

North Memorial explained (again) that the residency program required nurses — covered by a collective bargaining agreement — to work every other weekend, which included Friday nights. Initially, Sure-Ondara offered to trade the Friday shifts with co-workers, but the request was denied. Sure-Ondara was invited to apply for other positions for which she was qualified. Such efforts were unsuccessful.

The job offer was revoked.

The EEOC filed suit against North Memorial, claiming that North Memorial engaged in unlawful retaliation under Title VII when it revoked the job offer — in retaliation for Sure-Ondara's request. The district court held, and the Eighth Circuit affirmed, that the EEOC failed to establish a prima facie case of opposition-clause unlawful retaliation because "merely requesting a religious accommodation is not the same as opposing the allegedly unlawful denial of a religious accommodation." Specifically, the request for an accommodation "did not reflect, much less communicate, *opposition or resistance* to any North Memorial employment practice." (italics added).

The court also held that it would not resolve "categorically" the question of whether requests for religious activity are "protected activity" under Title VII's anti-retaliation provisions.

Fatally, the EEOC did *not* allege that North Memorial engaged in disparate treatment discrimination. In fact, the court suggested that the plaintiff might have possibly succeeded on this theory, if North Memorial had been unable to show that it would have caused an

undue hardship for the hospital to accommodate her Sabbath observance.

Thus, it is far from certain that the hospital would have succeeded if the claim was examined from that standpoint.

The public has not responded to this decision favorably: Along with the EEOC's request for a rehearing, on Jan. 8, 2019, an amicus brief was filed by the Mid-America Union Conference of Seventh-Day Adventists, the Minnesota Catholic Conference, American Jewish Committee, the Union of Orthodox Jewish Congregations of America, the Christian Legal Society, the American Civil Liberties Union, and the American Civil Liberties Union of Minnesota, urging an en banc rehearing of the case.

These groups, along with the EEOC, claim together that the Eighth Circuit's decision undercuts fundamental religious bias protections under Title VII and makes it harder for job seekers to seek and obtain religious accommodations for their observance.

Stay tuned.

The Sunday Showdown — Pierre v. Park Hotels & Resort

In stark contrast and echoing a familiar fact pattern, in Pierre v. Park Hotels & Resort Inc.,[2] a jury in Florida handed down a $21.5 million retaliation verdict in a suit brought by a dishwasher alleging failure to accommodate, religious discrimination and retaliation, after she was fired from a hotel for refusing to work on a Sunday.

Of the $21.5 million, only $36,000 were for lost wages; the remainder consisted of $500,000 for emotional pain and mental anguish, and $21 million in punitive damages.

The Jury Wanted to Send a Message

The facts here were not good. According to the complaint, the plaintiff, Marie L. Jean Pierre, had worked for the hotel without incident for approximately 10 years, and had always been given Sundays off, based on her religious needs as a Christian. In fact, when she was asked to work on a Sunday in 2009, she initially resigned, citing religious beliefs, but the hotel, in an effort to persuade Pierre not to quit, offered to accommodate her and she retracted her resignation. According to the new accommodation, the hotel agreed to assign

Pierre a fixed Monday to Thursday schedule. This allowed the plaintiff to fulfill her religious beliefs and not work on Sundays.

Things changed for the worse in 2015, when a new kitchen manager changed Pierre's schedule and demanded that she work on Sundays. She wrote a letter and had her pastor do the same. The letters were discarded. Pierre then arranged to swap shifts with other workers, which the kitchen manager demanded stop. Once, when a co-worker of Pierre was working Pierre's shift, the kitchen manager reprimanded the co-worker home and told her "he wanted [the plaintiff] there."

Notably, the complaint alleged the kitchen manager allowed other non-Christian employees to swap schedules. Shortly thereafter, Pierre was fired for misconduct, negligence and "unexcused absences", the suit alleged.

The jury, after deliberating for almost a week, told the hotel what it thought of that decision.

Interestingly, although the jury deliberated on three separate causes of action — failure to accommodate, religious discrimination and retaliation — it appeared the verdict was based solely on the retaliation claim. The jury did not find religious discrimination, but held that she was retaliated against for requesting the accommodation.

The Result

The $21.5 million verdict, which the hotel is now undoubtedly challenging.

Clearly, unlike the Eighth Circuit court in North Memorial, this jury *would* hold categorically that requests for religious accommodations are "protected activity" sufficient to support a retaliation claim.

A "Hairy" Controversy — EEOC v. United Parcel Service

On the eve of the government shutdown, in EEOC v. United Parcel Service,[3] the **EEOC settled a class religious discrimination lawsuit** with the UPS, the world's largest package delivery company. The settlement — a consent decree — calls for the package delivery giant to pay $4.9 million and provide other relief over a five-year period. The EEOC reported on this development on Friday, Dec. 21, 2018, when the EEOC reopened after the

shutdown.

The lawsuit, which was first brought in 2015, alleged that UPS discriminated against applicants and employees whose religion conflicted with the company's uniform and appearance policy, which prohibited male employees in supervisory or customer contact positions, including delivery drivers, from wearing beards or growing their hair below collar length. The complaint alleged that for more than a decade, UPS had refused to hire or promote individuals whose religious practices conflicted with the policy, and failed or refused to provide religious accommodations to employees requesting accommodation from the policy. The EEOC further alleged that UPS segregated employees with beards and long hair into nonsupervisory, back-of-the-facility positions without customer contact.

The complaint alleged that this discrimination and segregation prevented employees from being hired for certain positions, or from being promoted within the company to customer-facing roles. The complaint alleged that UPS' refusal to accommodate their employees' requests for a reasonable accommodation was impermissible, since the requested accommodations would not pose an undue hardship on UPS. These practices were alleged to violate Title VII.

UPS denied these allegations, and did not admit any violation of the law in the consent decree.

Under the terms of the decree, UPS will pay $4.9 million to a class of current and former applicants and other potential claimants identified by the EEOC. In addition, UPS will amend its religious accommodation process for applicants and employees, provide nationwide training to managers, supervisors and human resources personnel, and publicize the availability of religious accommodations on its internal and external websites. UPS also agreed to provide the EEOC with periodic reports of requests for religious accommodation related to the appearance policy to enable the EEOC to monitor the effectiveness of the decree's provisions.

Conclusion

It is curious how the North Memorial and Pierre cases resulted in such contrasting outcomes, with such similar facts. And it is also not clear how these cases would have been resolved in other jurisdictions. But, these cases, together with the recent UPS settlement,

offer several common lessons for employers.

Key Takeaways Regarding Religious Accommodations

- Requests for religious accommodations must be taken seriously and a “no” must be carefully considered. Indeed, consider as the judge warned in the North Memorial case whether your business can prove that denying that request will cause an undue hardship? Can you prove that employees who do not have religious obligations were not accommodated?

- In addition, remember to be careful about possible retaliation. As illustrated in North Memorial and in the Pierre case, an employee who is denied an accommodation may sue for discrimination or may claim that they were punished in some way for making the request. Despite the North Memorial decision, requests for accommodation may still be protected activity — so an adverse action that postdates the request could be challenged as retaliatory.

- Remember that the denial of a request for a religious accommodation may be challenged as disparate-treatment discrimination. Thus, before you deny, ask yourself: Have we said yes to any similar requests? Are we sure that other employees have not been given that day off, or exempted from that rule?

- Make sure to engage the employee in some dialogue and document the process. In some jurisdictions, failure to engage in the interactive process — even if no accommodation would have been possible — may give rise to a stand-alone cause of action.

- Policies that impact employees’ religious observances should be carefully drafted and applied, and supported by valid business considerations.

Recommendations for Employers

- Provide manager training to ensure that employee requests for reasonable accommodations are identified and sent to the appropriate decision-makers (usually HR).

- Review your policies and procedures — if inflexibly followed, are they likely to exclude applicants or employees from hiring consideration or advancement opportunities? Do your policies inform employees how to request an accommodation?

- Exercise discretion and proceed carefully. Employers need not grant all requests for reasonable accommodations, or may grant a different accommodation from the one requested; but employers should ensure that HR performs the interactive process consistently and reliably for all similarly situated employees, and that denials are based on valid considerations of undue hardship (which standard may vary by jurisdiction).

- Carefully consider changes to accommodations previously granted, as well as neutral policies that are applied unevenly by managers, or which disproportionately affect members of a protected group.

- Understand the damages available in your jurisdiction; never assume low wages — or a single cause of action going to trial — means a high jury award is not possible.

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[1] EEOC v. North Memorial, Civ No. 17-2926, 908 F.3d 1098 (8th Cir. 2018).

[2] Pierre v. Park Hotels & Resort, Inc., 1:17 cv 21955 (S.D. Fl. Jan. 14, 2019).

[3] EEOC v. United Parcel Service Inc., Civil Action No. 1:15-cv-04141 (E.D.N.Y. Dec. 21, 2018).