The Inside Line

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Exec's Corner

Terry Metcalf, Executive Vice-President

Save the Date! On Tuesday, August 12, 2014 we will host Sandy Lynskey, the Chief of the Ohio Attorney General Mike DeWine's Consumer Protection Section and E.J. Early, the lead enforcement attorney in this Section, for a two hour Seminar to review Ohio's Motor Vehicle Advertising Guidelines. This year the Section has initiated an Advertising Review and Enforcement Project to ensure that businesses are complying with Ohio's consumer laws that govern advertising. This is your opportunity to meet with the lawyers from the Section that have the responsibility of enforcing the law. The Seminar will be held at the Cambria Suites, 1787 Thorn Drive, Uniontown, Ohio 44685. The Seminar is scheduled to begin at 10:00 a.m. through noon. Larry Bach from Roderick Linton Belfance, LLP will help to moderate the Seminar.

Inside This Issue

"Title VII protects all aspects of religious observance, practice, and belief, and defines religion very broadly to include not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, Buddhism, and Sikhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or may seem illogical or unreasonable to you."

Dealing with Religious Discrimination in the Workplace

By Larry Bach

Title VII of the Federal Civil Rights law imposes an obligation on an employer "to reasonably accommodate the religious practices of an employee or perspective employee, unless the employer demonstrates that the accommodation would result in undue hardship on the conduct of its business." For years this has been a fairly easy task for employers as the workforce was populated with employees following "mainstream" religious practices. That is no longer the case and, as America's population changes, employers are more and more likely to confront challenges to their established routines. How employers react the changes could lead to serious repercussions.

There are a number of factors contributing to this change, the first

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of which is the changing face of America. As a whole, the nation's minority population continues to rise. In 2012, it was noted that the statistical majority of births were to members of the minority races. Just a year later, the deaths of white Americans outpaced the rate of white births. This event came more than a decade before it was expected and the Census Bureau says that the ranks of white Americans will likely drop with every passing year. In large measure the increase in minorities stems from the increase Latino population. According to the Pew Research Center, Latinos are the nation's largest minority, and one of its fastest growing. It is reported that since 1970, the Latino population has increased sixfold, from 9.1 million to 53 million by 2012, although some recent reports shows the growth to be declining.

Another factor is the change in immigration to the United States. Over the past 20 years, the United States has granted permanent residency status to an average of about 1 million immigrants each year. In recent years the geographical origins of legal immigrants include people from nearly every country in the world. U.S. government statistics show that a smaller percentage come from Europe and the Americas and a growing share now come from Asia, sub-Saharan Africa and the Middle East-North Africa region.

While there are no government records identifying the religion, if any, of the immigrants, there are estimates based upon a match of the birthplaces of the immigrants and the country from which they came. From those estimates a discernible shift has been noted showing a decline in the number of Christians coming to America in relation to those of religious minorities including Muslims, Hindus, and Buddhists.

Employers must recognize that Title VII protects all aspects of religious observance, practice, and belief, and defines religion very broadly to include not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, Buddhism, and Sikhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or may seem illogical or unreasonable to you. Just because it is a practice which you are not familiar with does not mean it is unprotected. Religious practices may be based on theistic beliefs or non-theistic moral or ethical beliefs as to what is right or wrong that are sincerely held with the strength of traditional religious views. Religious observances or practices include, for example, attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, or refraining from certain activities. Moreover, an employee's belief or practice can be "religious" under Title VII even if it is not followed by others in the same religious sect, denomination, or congregation, or even if the employee is unaffiliated with a formal religious organization.

Three recent actions of the United States Equal Employment Opportunity Commission (the "EEOC") highlight the potential harm to employers that fail to follow the law.

Outright hostility to employees based upon their religion is illegal. On June 25, 2014 the Chicago office of the EEOC announced a consent decree requiring Rizza Buick GMC Cadillac to pay $100,000 to three Arab Muslim employees that were subjected to what the EEOC found to be a hostile work environment based upon the national origin and religion of the men. According to the EEOC, the managers allegedly used offensive slurs, such as 'terrorist,' 'sand n----r' and 'Hezbollah,' and made mocking and insulting references to the Qur'an and the manner in which Muslims pray." While most employers would immediately recognize that this type of behavior could not be tolerated or condoned, it is not a stretch to believe that uninformed employees may react negatively to others whose religious practices are foreign to them.

The law provides that religious harassment may occur when an employee is required or coerced to abandon, alter, or adopt a religious practice as a condition of employment. Religious harassment may also occur when an employee is subjected to unwelcome statements or conduct based on religion. Harassment may include offensive remarks about a person's religious beliefs or practices, or verbal or physical mistreatment that is motivated by the victim's religious beliefs or practices. Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, such conduct rises to the level of illegal harassment when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment action (such as the victim being fired or demoted). The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or even a third party who is not an employee of the employer, such as a client or customer.

An employer can liable for harassment by co-workers and third parties where it knew or should have known about the harassment and failed to take prompt and appropriate corrective action. An employer will almost always liable for harassment by a supervisor if it results in a tangible employment action, such as the harassment victim being fired or demoted.

Reasonable accommodations of religious practices are required. In August, 2010, the EEOC filed a lawsuit against a Colorado based meat packing company alleging that the company discriminated against its Somali and Muslim employees. While some of the allegations related to anti-Muslim graffiti in bathrooms, and the use of offensive names, another claim alleged that the employer engaged in a pattern or practice of religious discrimination when it failed to reasonably accommodate its Muslim employees by refusing to allow them to pray according to their religious tenets. In announcing the decision to sue the employer, EEOC General Counsel P. David Lopez stated that "The issue of national origin and religious discrimination in the workplace

has become more significant as more immigrants with different ethnic and religious backgrounds join our workforce."

Three years of litigation, including a trial that spanned ten days, followed. In December, 2013, the district court judge determined that the EEOC had demonstrated a prima facie case of discrimination, but the employer proved that the accommodations being requested would have resulted in undue hardship. The court's decision explained the Muslim prayer practices as requiring one to three extra breaks per day in addition to regular restroom breaks. The court noted that there are different sects within Islam, with the two major groups being Sunni and Shiite. Additionally, the Sunnis and Shiites have varying practices, including varied prayer practices. Since majority of the Somali employees were Sunni, the court determined that Sunni Muslims could combine prayers only if there is something extraordinary to prevent prayer, like illness, travel, or sleeping through morning prayer time, but missing prayer as a regular practice was prohibited. Next, the court examined the timing of the five daily prayers required by Islam. In a 45 page decision the court ruled in favor of the employer after concluding that the cost to the employer of making the change was more than de minimis, and that it would have caused an imposition on the employer's other workers. In May of this year, the EEOC finally decided to drop its appeal of the decision. While the employer ultimately prevailed, it did so only after a lengthy lawsuit.

Accommodation can include allowing an employee to wear religious garb. If you have children, particularly teenagers, you've likely seen an Abercrombie & Fitch store. The EEOC took Abercrombie to court after it refused to hire a young woman that wore a hijab because the veil conflicted with the company's "Look Policy" which, according to the company, was intended to promote and showcase the Abercrombie brand. Initially, the EEOC prevailed. The initial decision in its favor was granted through a summary judgment. Late last year, however, the Tenth Circuit Court of Appeals reversed the decision, holding that Abercrombie did not fail to accommodate the request, because no request was made. Essentially, the court concluded that because the complaining party did not tell anyone at Abercrombie that her practice of wearing a veil stemmed from her religious beliefs and for that she would need an accommodation, Abercrombie did not violate the law. Ultimately, while Abercrombie prevailed in this action, it settled with other woman and instituted a policy change that would allow the headwear.

As these cases demonstrate, dealing with discrimination based upon religion is just as serious as any other protected class (race, sex, national origin, and possibly sexual preference). There are measures that an employer can take to protect itself. Some of the practices for employers that the EEOC suggests follow:

- Employers can reduce the risk of discriminatory employment decisions by establishing written objective criteria for evaluating candidates for hire or promotion and applying those criteria consistently to all candidates.

- Employers should have a well-publicized and consistently applied anti-harassment policy that: (1) covers religious harassment; (2) clearly explains what is prohibited; (3) describes procedures for bringing harassment to management's attention; and, (4) contains an assurance that complainants will be protected against retaliation. The procedures should include a complaint mechanism that includes multiple avenues for complaint; prompt, thorough, and impartial investigations; and prompt and appropriate corrective action.

- When faced with a request for a religious accommodation which cannot be promptly implemented, an employer should consider offering alternative methods of accommodation on a temporary basis, while a permanent accommodation is being explored. In this situation, an employer should also keep the employee apprised of the status of the employer's efforts to implement a permanent accommodation.

Unfortunately, most situations turn on the particular facts presented to the employer. Even when an employer acts in what it believes is in accord with the law, that belief will not stop a lawsuit from being filed or a complaint being made. Competent legal advice to guide your decision making process is recommended.

The *Hobby Lobby* Case: What Happens Next?

By Larry Bach

In *HOBBY LOBBY STORES, INC., ET AL., v. KATHLEEN SEBELIUS* the Supreme Court ruled 5-4 on June 30, 2014 that family-run companies and other "closely held" corporations can exercise religious beliefs. Under this ruling the Affordable Care Act cannot force those companies to violate the owners sincerely held religious beliefs by compelling the health plans they sponsor to provide all forms of Food and Drug Administration-approved contraceptives with no out-of-pocket costs for members. What this ruling bodes for the future is uncertain. It is known that the Obama administration seeks to limit the impact of the ruling.

The U.S. Department of Labor announced that in the wake of the decision employers must formally notify workers if they remove birth-control methods from their lists of covered prescriptions or procedures:

> For plans subject to the Employee Retirement Income Security Act (ERISA), ERISA requires disclosure of information relevant to coverage of preventive services, including contraceptive coverage. Specifically, the Department of Labor's longstanding regulations at 29 CFR 2520.102-3(j)(3) provide that, the summary plan

> description (SPD) shall include a description of the extent to which preventive services (which includes contraceptive services) are covered under the plan. Accordingly, if an ERISA plan excludes all or a subset of contraceptive services from coverage under its group health plan, the plan's SPD must describe the extent of the limitation or exclusion of coverage. For plans that reduce or eliminate coverage of contraceptive services after having provided such coverage, expedited disclosure requirements for material reductions in covered services or benefits apply. *See* ERISA section 104(b)(1) and 29 CFR 2520.104b-3(d)(1), which generally require disclosure not later than 60 days after the date of adoption of a modification or change to the plan that is a material reduction in covered services or benefits. Other disclosure requirements may apply, for example, under State insurance law applicable to health insurance issuers.

In other words, if you intend to limit contraceptive coverage, you must notify your employees 60 days before you do so.

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