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Bible Studies and Religious Meetings in the Workplace

At this time, it would be inappropriate for The Rutherford Institute to provide you with legal advice. However, we have reviewed the current law relating to your inquiry and are pleased to provide you with the following comments and information:

Whether employees have a right to hold Bible studies or other religious meetings in the workplace has yet to be decided by the courts, as very few courts have had the opportunity to rule on the subject. However, a number of cases provide guidance on the issue by analogy.

Applicable Law

Generally, Title VII of the Civil Rights Act of 1964[1] and state statutes apply to religious discrimination, accommodation, and hostile work environment matters in both public and private workplaces. While Title VII is binding on private and public employers with fifteen or more employees in an industry affecting commerce,[2] courts have also used the Free Speech Clause of the First Amendment to the United States Constitution when examining state and local government workplace gatherings. However, the Supreme Court held in Brown v. General Services Administration that it was Congress' intent in the 1972 amendments to the Civil Rights Act to create "an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination."[3] Federal employees, therefore, typically pursue Title VII as their remedy for religious discrimination in the workplace.[4]

The Equal Employment Opportunity Commission (EEOC) receives and investigates charges of employment discrimination, failure to accommodate, and hostile work environments. If the EEOC investigates a charge and determines that there is reasonable cause to believe an employer has violated Title VII, the EEOC will seek a remedy through the process of conciliation. If the conciliation process does not achieve a remedy, the EEOC is empowered to file suit in federal district court to insure the employer's compliance with Title VII. The EEOC also has the option of issuing a "right to sue" letter which gives the employee the ability to file suit. The employee must then initiate legal action within ninety (90) days or he will waive his rights under Title VII.

Discrimination

Section 2000e-2(a) of Title VII makes it unlawful for an employer to discriminate against an employee or prospective employee because of that individual's religion. The exact wording reads:

It shall be an unlawful employment practice for an employer

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, *religion*, sex, or national origin.

To seek redress for employment discrimination under Title VII, an employee must first show that an employment practice has an adverse, discriminatory impact on him. The burden of proof then shifts to the employer who must "demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity."[5] For instance, an employer who allows employees to hold non-religious and non-work related meetings but does not allow employees to hold Bible studies or other religious meetings would be hard-pressed to justify its practice as either job-related or consistent with business necessity. Furthermore, the practice clearly has a discriminatory impact on an employee's benefits of employment since employers typically would not allow non-employees to use the facilities for meetings.

Religious discrimination claims will probably be more successful than accommodation or hostile work environment claims when the disparate treatment of religious employees is at issue. For example, the right to use a company meeting room for non-company meetings can be considered a "privilege" of employment. Title VII expressly prohibits an employer from denying employees "privileges of employment" based on religion. Therefore, an employer cannot deny employees access to meeting rooms simply because those employees wish to discuss religious issues. Once an employer allows non-business meetings of a non-religious nature, it cannot then prevent similar meetings of a religious nature.

Accommodation

Under Title VII, employers also have a duty to accommodate the religious beliefs and practices of employees. In 1972, Congress amended Title VII to include ? 701(j) which defines the term religion as "including all aspects of religious observance and practice, as well as beliefs." To use the accommodation argument, the employee must first prove that his belief is sincere. The EEOC follows United States v.

Rasheed which states: "although the validity of religious beliefs cannot be questioned, the sincerity of the person claiming to hold such beliefs can be examined."[6] Proof of sincerity can include any one of the following categories: oral statements, affidavits, or other documentation from the

charging party's minister or religious leader stating his knowledge of the party's religious beliefs; oral statements, affidavits, or other documentation from the party's friends, co-workers or others aware of the charging party's religious beliefs; documentation as to the activity prohibited by the charging party's religious practices or beliefs if available, i.e., text from the Bible or other scripture setting forth tenets of faith; or the charging party's own statements regarding the date he embraced his religion, the place he usually worships, and tenets of the faith he practices.

If an employee, using the above elements of proof, can substantiate that his faith requires him to meet or pray at a specific time or on a specific day, he will have shown that he has a sincerely held religious belief. The burden of proof then shifts to the employer who must show that it has taken some initial steps to reach a reasonable accommodation for the employee, or that accommodation would create an undue hardship on the employer's business. It is questionable whether allowing an employee or employees to meet to pray or to hold religious meetings could be held to be an "undue hardship" on an employer, especially where other employees already hold non-religious, non-work related meetings on company property. Some courts, however, have found that undue hardship occurs when the accommodation would be more than a minimal cost to the employer in terms of expenditure, loss of revenue, or loss of efficiency. When customers or clients would be exposed to the religious meetings, it might be argued that the religious nature of the meetings may turn away or offend present or potential customers, arguably creating more than a minimal cost to the employer.

On the topic of undue hardship, an employer may not discriminate on the basis of its speculation that an undue hardship "might occur" at some future time if an accommodation is made at the present time. This is demonstrated in the Eighth Circuit Court of Appeals case of Brown v. General Motors Corporation[7] where the plaintiff was fired when he failed to show up for work on Saturday due to religious beliefs. The employer argued that it could not make an accommodation in this instance because the company feared that if it hired other members of this denomination, it might eventually suffer an undue hardship.[8] According to the court, the employer did not prove that accommodation of the plaintiff's needs would give rise to any immediate additional costs or burden.[9] Speculation about such costs or burden, the court held, "is clearly not sufficient to discharge [the employer]'s burden of proving undue hardship."[10] Thus, theoretical future hardship, unsupported by hard evidence, is not enough to establish an undue burden.

Hostile Work Environment

Lately, however, employers have been concerned about religious expression in the workplace giving rise to claims of religious harassment and the creation or toleration of a hostile work environment. While Title VII does not officially discuss harassment, it does bar an employer from allowing discriminatory

treatment in the "terms, conditions, or privileges of employment."[11] The United States Supreme Court first set down the "hostile work environment" standard in Meritor Savings Bank v. Vinson

where the court stated that "Title VII grants employees the right to work in an environment free from discrimination, intimidation, derision, and insults."[12] In Harris v. Forklift Systems, Inc.,[13] the Supreme Court affirmed its approval of the standard set down in Meritor. Although Harris and Meritor involved sexual harassment, courts are increasingly using the same legal reasoning in deciding religious harassment cases as well as other Title VII cases. One of the keys to employer liability for harassment lies in the doctrine of respondeat superior. Under this doctrine, if the conduct in question meets the harassment standard, an employer is liable for the conduct of supervisors even if the employer does not know about it. However, an employer is only liable for the conduct of non-supervisory employees and third parties when he is aware of the conduct and chooses to do nothing about it.

The Supreme Court also listed several factors that should be considered in determining whether a hostile environment has been created, including the frequency of the conduct, the severity of the conduct, if the conduct physically threatens or humiliates the employee or if it consists merely of offensive words, and if the conduct unreasonably interferes with an employee's work performance. The conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive."[14] The court in Harris held that the mere utterance of an epithet would not be enough to create a hostile work environment under Title VII. Many believe the EEOC's Proposed Guidelines failed to pass because they would have penalized more behavior than warranted under the Harris standard. If deliberately using words designed to insult and offend an employee is not enough on its own to constitute harassment, then simply *allowing* religious meetings which are not designed to insult or offend, should not be considered harassment. Furthermore, where employees are not coerced to attend the religious meeting(s), it is unlikely that a court will find harassment to be present. If a Bible study or religious meeting merely communicates religious beliefs, it would clearly meet the current standard.

Additionally, courts have generally interpreted state anti-discrimination statutes to include a bar on harassment both by speech or non-speech conduct. Most of the speech found to be harassment has consisted of sexual propositions, sexually explicit comments, demeaning words to address women, and pornography in the workplace.[15] These same principles could potentially be applied to religious harassment cases. Harassment law typically suppresses conduct and speech by threatening employers with liability if they do not punish such behavior by their employees. This indirect restriction on expression requires companies which fear liability to implement policies prohibiting particular kinds of conduct and speech to insulate themselves from liability, thus placing employers in a "Catch 22" situation.

In Brown v. Polk County, Iowa, the county-employer claimed that a supervisory-employee?s "spontaneous prayers, occasional affirmations of Christianity, and isolated references to Bible passages would amount to an undue hardship on the conduct of county business."[16] The Eighth Circuit Court of Appeals found, however, that the employer was unable to show an "'actual imposition on co-workers or [a] disruption of the work routine,' . . . generated by occasional spontaneous prayers and isolated references to

Christian belief."[17] Brown, while limited to state employees, stands for the proposition that as long as a state employee's religious expression in the workplace does not cause a disruption in the work routine or create an imposition on co-workers, the employer must permit the expression since it does not rise to the level of creating a hostile work environment. The applicability of this proposition to a private employment setting has yet to be determined by the courts and thus is unclear.

Free Speech

When dealing with a state employee?s right to free expression in the form of Bible studies or other religious meetings in the workplace, the issue is largely one of free speech and therefore necessitates an analysis of the type of forum involved. The forum analysis found in Perry Education Association v. Perry Local Educator?s Association[18] is appropriate due to the state's involvement. In Perry, the United States Supreme Court held that public property falls into one of three forum categories for analysis of control over freedom of speech: the "open public forum," the "designated public forum," and the "non-public forum."

A government building, whether owned or leased by the government, is most properly classified as a "non-public forum" since such a building is not typically a public forum by tradition nor designation. The United States Supreme Court has held that while a government may discriminate on the basis of context in a non-public forum, it may not allow discrimination based on viewpoint.[19] In Lamb?s Chapel v. Center Moriches Union Free School District, the Court found that religion was not a category, but a viewpoint.[20] Therefore, an employer may constitutionally ban an entire topic; however, once employees have been allowed to use the forum to speak on a subject, religious employees must be allowed to speak on the same subject from a religious point of view. Banning only religious employees? expression would discriminate on the basis of viewpoint, thus violating these well-established constitutional principles.

While the Supreme Court has been conspicuously silent on the issue of religious expression in the workplace, lower courts have applied principles enumerated by the Supreme Court in other free speech and expression contexts. In Brown v. Polk County, Iowa,[21] for example, the court walked through an analysis of what is and is not permissible expression in a public workplace. The court found at the outset that "where a government is the employer, [a court] must consider both the first amendment and Title VII in determining the legitimacy of the [employer?s] action."[22] While acknowledging Title VII as applicable law, the court focused on the free expression rights of the employee under the First Amendment. Unfortunately, Brown appears to apply only to *state* employees, not federal or private sector employees.

Brown's employer claimed that as a supervisor-employee he should not have allowed subordinate employees to pray in his office prior to the beginning of the workday.[23] The court found that neither Title VII nor the First Amendment requires "an employer [to] open its premises for use before the start of the workday."[24] Additionally, "no proof was offered that . . . Brown's office was a public forum or a limited public forum or that the [county-employer] allowed employees to use their offices for personal purposes

before the start of the workday."[25] Thus, the court found that if Polk County had permitted other employees to meet prior to the start of the workday to discuss non-religious, non-work related matters, the employer could not then prohibit employees from meeting to pray or to discuss religious matters.

A Seventh Circuit case involving free expression of public school teachers provides additional insight into how a court might examine free speech issues in the public workplace. In May v. Evansville-Vanderburgh School Corp.,[26] teachers had conducted a prayer meeting before school started for several years without student knowledge. The court, in upholding a school board rule that prohibited the teachers from meeting, distinguished between an organized prayer meeting, which the school could constitutionally prohibit under "closed forum" (non-public) analysis, and informal conversations that the school could not prevent. Furthermore, the court said that a school board may prohibit teachers from holding organized meetings on campus for religious purposes if the school's general policy does not allow teachers to meet except for school business. However, if the school permits other teacher groups to meet, then it must also permit teachers to meet and discuss religious matters.

Similarly, if a state employer permits groups of employees to hold non-religious, non-work related meetings at the workplace, the employer must also permit employees to meet to discuss religious matters. State and federal government employers, however, often claim that they have an interest in prohibiting Bible studies or other religious meetings in the public workplace to avoid Establishment Clause problems. However, Title VII clearly prohibits religious discrimination in the private and federal workplace and First Amendment law clearly prohibits hostility toward religion by state government entities.

Complications arise when an employer requires or strongly recommends attendance at a Bible study or religious meeting. The situation is most difficult when government employers "encourage" attendance at such meetings, because doing so comes perilously close to violating the Establishment Clause of the First Amendment. Arguably, a private employer could require attendance at such a meeting, so long as the employer accommodates employees who have sincere religious objections to the meeting and does not discipline non-attending employees in any way. The regulations of the federal EEOC emphasize that "[a] refusal to accommodate is justified only when an employer . . . can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation."[27] This information should not be interpreted to mean that an employer, public or private, may not allow religious meetings or Bible studies in the workplace.

It would be difficult for an employer to show that excusing an employee from an employment seminar based on religious principles would result in excessive cost to the employer or require the employer to interfere with the seniority rights of other employees. As to cost, it may in fact be less expensive for the employer to have fewer employees attend an employment seminar.

The issue becomes more difficult if the organization conducting the seminar offers substantial discounts for larger groups of employees. As to seniority rights, it is difficult to imagine how excusing one employee from attending a seminar could

interfere with the seniority rights of other employees. This would appear to be possible only if excusal from employment seminars was itself one of the benefits of seniority, which seems very unlikely.

An employer may contend, however, that it has a bona fide interest in having all employees attend a religious employment seminar in order to improve the productivity or efficiency of its employees. If this is the case, the employee could be excused from only those parts of the seminar which he finds religiously objectionable. If the employee finds the entire seminar objectionable, then the employer could meet individually with the employee to discuss the neutral, non-objectionable methods of improving employment productivity and efficiency. In any event, the employer is under a duty to reasonably accommodate the religious beliefs or non-beliefs of its employees unless the employer can demonstrate that such accommodation would create excessive cost or result in interference with the seniority rights of other employees.

A decision of the Ninth Circuit Court of Appeals clearly supports the idea that an employee should not be required to attend a seminar if he has religious objections to it. In EEOC v. Townley Engineering and Manufacturing Co.,[28] the employer was a manufacturing company which was owned and operated by two conservative Christians. The employer required all employees to attend weekly devotional services which included "prayer, thanksgiving to God, singing, testimony, and [S]cripture reading, as well as a discussion of business-related matters."[29] An atheist employee objected to attending the weekly services, but was told that attendance was mandatory. The employee filed a complaint with the EEOC which, in turn, filed suit against the employer in federal court. The Ninth Circuit held that the employer was not permitted to require the objecting employee to attend the weekly devotional services.[30] Applying the federal statutes and regulations discussed above, the court declared that excusing the employee from the devotional services was a reasonable accommodation of the employee's non-religious beliefs. The court also concluded that this accommodation would not result in undue hardship to the employer, notwithstanding the fact that some items of business were communicated to the employees at the weekly services.[31] Townley could easily be applied to allow a conservative Christian to be excused from attending a New Age seminar which he finds religiously objectionable.

Conclusion

Private employees must rely on Title VII and any state anti-discrimination provisions, while state and local government employees enjoy the protection of the First Amendment and Title VII. However, unless covered under state anti-discrimination statutes, federal employees must rely exclusively on Title VII remedies for religious discrimination due to the Supreme Court's holding in Brown v. General Service Administration.[32] For all employees, though, the core issue is

discrimination. Disparate treatment of employees based on religious expression in the workplace is forbidden and employers should seek to accommodate such expression where it does not cause undue hardship. Simply stated, religious and non-religious employees must be treated equally.

Additionally, it seems clear that since Title VII was based on free speech principles found in the First Amendment[33], private employees should have the same right of expression as public employees and that discrimination based on viewpoint should not be permitted, even in the private sector. For instance, if an employer allows employees to use a conference room during breaks or lunch periods for non-company meetings, that employer has arguably lost or diminished his private owner?s rights of dominion over his property. As Justice Black once stated, "Ownership does not always mean absolute dominion. The more an owner . . . opens up his property for use by the public in general, the more his rights become circumscribed by the statutory and constitutional rights of those who use it."[34] Thus, in many cases, if an employer allows employees to hold non-work related meetings or events on company grounds, it may not then prohibit the holding of Bible studies or religious meetings.

The Rutherford Institute hopes that this information has been helpful to you in your fight for religious freedom. If you desire additional information on this or other issues of religious liberty, or if you need personal legal assistance in any area regarding religious freedoms, please feel free to write to us at:

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NOTES

1. 42 U.S.C. ? 2000e, et seq. (1982).

2. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964).

3. 425 U.S. 820, 828 (1976).

4. Based on Brown, some courts assert that Title VII precludes federal employees from pursuing First Amendment claims for damages from the government. See, e.g., Kizas v. Webster, 707 F.2d 524, 542-43 (D.C. Cir. 1983), cert. denied, 464 U.S. 1042 (1984); White v. General Services Administration, 652 F.2d 913, 916-17 (9th Cir. 1981); Porter v. Adams, 639 F.2d 273, 278 (5th Cir. 1981); Gissen v. Tackman, 537 F.2d 784 (3d Cir. 1976); Sugrue v. Derwinski, 26 F.3d 8, 11-12 (2nd Cir. 1994); Hines v. The Irvington Counseling Center, 933 F. Supp. 382, 385 (D.C. N.J. 1996); Assar v. Crescent Counties Foundations for Medical Care, 13 F.3d 215, 218-19 (7th Cir. 1993). Furthermore, the Supreme Court has held that federal employees must rely on the administrative remedial scheme established by Congress to seek damages for constitutional violations, rather than pursuing a constitutional action in federal court. Schweiker v. Chilicky, 487 U.S. 412, 425 (1988); Bush v. Lucas, 462 U.S. 367, 389 (1983). A few courts, however, suggest that federal employees who allege that the government has violated their constitutional rights may be able to pursue a constitutionally-based action for damages against their supervisors on a personal basis. Neely v. Blumenthal, 458 F.Supp. 945, 952-54 (D.D.C. 1978); Langster v. Schweiker, 565 F.Supp. 407, 410 (N.D. Ill. 1983). Finally, the courts are divided over whether a federal employee may pursue an action for equitable relief in federal court. *Compare* Spagnola v. Mathis, 859 F.2d 223, 227 (D.C. Cir. 1988) (en banc) ("Spagnola II") (permitting action for civil servants' constitutional claims for equitable cause of action); Perry v. Thomas, 849 F.2d 484, 484-85 (11th Cir. 1988) (same); *with* Saul v. United States, 928 F.2d 829, 843 (9th Cir. 1991) (denying equitable cause of action); Roth v. United States, 952 F.2d 611, 614 (1st Cir. 1991) (same); Lombardi v. Small Business Administration, 889 F.2d 959, 961-62 (10th Cir. 1989) (same); Paige v. Cisneros, 91 F.3d 40, 44 (7th Cir. 1996) (same); Pinar v. Dole, 747 F.2d 899, 909-12 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985) (same).

5. 42 U.S.C. ? 2000e-2(k)(1)(A)(l).

6. 663 F.2d 843, 847 (9th Cir. 1981).

7. 601 F.2d 956 (8th Cir. 1979).

8. Id. at 960.

9. Id. at 961.

10. Id.

11. 42 U.S.C. 2000e-2(a).

12. 477 U.S. 57, 65 (1986).

13. 114 S.Ct. 367 (1993).

14. Id. at 370.

15. Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 U.C.L.A. L. REV. 1791, 1800 (1992).

16. 61 F.3d 650, 656 (8th Cir. 1995).

17. Id. (quoting Burns v. Southern Pacific Transportation Co., 589 F.2d 403, 407 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979)).

18. 460 U.S. 37 (1983).

19. 508 U.S. 384 (1993) (emphasis added).

20. Id. at 393-94.

21. 61 F.3d 650 (8th Cir. 1995).

22. Id. at 654.

23. Id. at 656.

24. Id.

25. Id.

26. 787 F.2d 1105 (7th Cir. 1986).

27. 29 C.F.R. ? 1605.2(c)(1) (1981).

28. 859 F.2d 610 (9th Cir.), cert. denied, 109 S.Ct. 1527 (1988).

29. Id. at 612.

30. Id. at 615-16.

31. Id.

32. 425 U.S. 820 (1976).

33. 118 Cong. Rec. 1,705 (1972), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 713 (1972) (statements of Senator Randolph, made during the introduction of Section 701(j) of the Act).

34. Marsh v. Alabama, 326 U.S. 501 (1946).