

# Religion and the U.S. Workplace

By Samuel Estreicher and Michael J. Gray

**B**enjamin Franklin expressed well the tension that often arises in balancing the demands of one's employment and one's faith when he advised his readers to work as though they would live a hundred years and pray as though they would die tomorrow.

In Franklin's time, and for much of the next 200 years, the average American was able to engage in this balancing act with relatively little difficulty. Most Americans worked in fairly homogenous communities and shared with employers similar expectations about religious observance. Today, however, with increasingly diverse workforces and employees often working days of varying lengths, some workers may find Franklin's advice difficult to follow.

Drawn from many different ethnic and religious groups, the modern American workforce reflects a rich variety of forms of religious practice and observance, and many employers understandably have sought to minimize accommodation burdens and potential for friction by keeping religion out of the workplace.

This often salutary effort of firms to keep separate the work and worship domains raises difficulties for workers for whom religious observance requires time off from work or exceptions to generally applied rules of dress. These workers are often put to a tough choice: whether to be true to one's religious requirements and lose one's job or to work and sacrifice a closely held religious tenet. Not surprisingly, this struggle finds its way into the courts, most often in the form of discrimination lawsuits filed under Title VII of the Civil Rights Act of 1964 and related state laws. Employees ranging from doughnut makers to submarine builders recently have filed suits challenging

discipline or termination occurring as a result of their refusal to accede to the demand of their employers. Indeed, an analysis of the current landscape reveals (1) the challenges confronting employers who must both prevent religion-based discrimination and accommodate workers' religious beliefs and (2) the dearth of assistance provided by Title VII in offering workable ground rules.

## Religious Diversity in the United States

The problem of reconciling the religious convictions of an employee with the demands of a job has acquired particular salience in the United States. Aside from arguably valuing religion more highly than most other industrialized Western nations, the United States enjoys a diversity of religion that is unparalleled in any other developed country. The Pew Research Center reports that the United States stands alone in being the richest nation on the planet while being one of the most religiously devout. Indeed, almost six in ten people in the United States report that religion plays a very important role in their lives. That figure contrasts dramatically with those for Canada and the United Kingdom, with half that number, or France and Japan, with less than one-fifth that number attaching similar weight to religion. Even in heavily Catholic Italy, fewer than three in ten people say religion is very important. THE PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *AMONG WEALTHY NATIONS . . . U.S. STANDS ALONE IN ITS EMBRACE OF RELIGION* (Dec. 19, 2002).

Despite a long history of religious diversity within the United States, the question of whether employers need to make accommodation to employee religious observance and, if so, what they

must do to meet such obligation has become salient only in the last decade. Although undoubtedly many forces are at work, at least three recent trends have brought religious accommodation to the fore in the national debate.

First, immigration has led to a steady increase in religious diversity. Although the predominant religious affiliation of immigrant groups continues to be Christian, the number of non-Christian immigrants is rising dramatically. In 2001 the American Religious Identification Survey concluded that the number of people within the United States who characterize themselves as Christian dropped from 86 percent in 1990 to 77 percent in 2001. The Center for Immigration Studies estimates that the number of immigrants to the United States from the Middle East—73 percent of whom were Muslim—grew nearly eightfold from 1970 to 2000 and will double again before 2010. The rising Muslim population is highly educated; nearly half possess bachelor's degrees, compared with 28 percent of the native-born U.S. population. As a result, American employers increasingly are hiring new workers whose religious practices and customs may not fit neatly within companies' existing practices, the traditional Judeo-Christian framework, or the assumptions underlying companies' existing policies on dress and work time—and who increasingly seek accommodation for their own religious practices.

Recent cases reflect the difficulty some companies have had in integrating Muslim workers and others into their workplace or business. For example, in August 2002, Walid Elkhatib opened a letter from the general counsel of Dunkin' Donuts informing him that the company would not be renewing

his franchise agreement. Elkhatib, whose Muslim faith forbids him from handling pork, had refused to sell the company's new line of breakfast sandwiches at any of his three restaurants. When the time came for Elkhatib to renew his franchise, the company declined his application, citing his refusal to sell the full line of products. Not fitting the template for an employment discrimination case reachable under Title VII, Elkhatib invoked 42 U.S.C. § 1981, which bars racial and certain forms of ancestry discrimination in the making of contracts. The federal court ultimately rejected Elkhatib's claim, finding that it was a religious rather than a racial claim (hence not reachable under section 1981), and that the Dunkin' Donuts rule affected religions such as Islam and Judaism equally. *Elkhatib v. Dunkin' Donuts, Inc.*, No. 02 C 8131, 2004 WL 2600119 (N.D. Ill. Nov. 15, 2004).

Islamic dietary restrictions, dress and grooming requirements, and the salat, the five-time-daily prayer vigil, can be a significant source of tension between Muslim employees and their employers. Companies often accommodate these practices on their own by, for example, removing pork from their company cafeterias or providing breaks for prayer. At other times, disputes boil over into litigation, with mixed results. For example, a recent federal district court decision in Arizona held that Alamo Rent-A-Car was liable under Title VII for refusing to permit a female Muslim employee to wear her headscarf during the holy month of Ramadan. *EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006). Similarly, Washington, D.C., Muslim firefighters successfully challenged a fire department policy that required them to shave their beards. *Potter v. District of Columbia*, 382 F. Supp. 2d 35 (D.D.C. 2005). Although an injunction against the policy has been in place for four years, litigation continues over efforts to balance the safety of firefighters and individual religious convictions.

Second, the events of September 11,

2001, and their aftermath have led to some tensions, workplace conflict, and lawsuits between Muslims and non-Muslims, as well as between advocates and opponents of the Afghan and Iraq military operations. For example, a jury in Maine concluded, and the U.S. Court of Appeals in Boston recently affirmed, that a Muslim immigrant from Afghanistan suffered religious and racial discrimination when his employer failed to protect him from racial epithets and physical and verbal abuse. *Azimi v. Jordan's Meats, Inc.*, 456 F.3d 228 (1st Cir. 2006). In December 2002, Dresser-Rand, a manufacturer of turbines and compressors, terminated a skilled laborer who had refused to help build a submarine for the U.S. Navy because, as a Jehovah's Witness, he would not work on any project that would serve as an "implemen[t] of war." *EEOC v. Dresser-Rand Co.*, No. 04-CV-6300T, 2006 WL 1994792 (W.D.N.Y. 2006). The U.S. Equal Employment Opportunity Commission (EEOC), which is responsible for enforcing Title VII, has reported a jump of more than 20 percent in claims of religious discrimination since September 11.

Third and finally, the discussion and practice of religion have become more acceptable throughout the country, both in politics and within the workplace. As a cultural matter, people appear more comfortable expressing their religious views in public and some actively seek new opportunities to do so. To that end, so-called affinity groups in larger companies—consisting of employee groups organized around some shared characteristic such as race, sex, or sexual orientation—have become increasingly popular. Even though Title VII does not require establishing such groups, several large multinational companies voluntarily provide assistance to them. Such voluntary initiatives, however, are not required by Title VII. In fact, the U.S. Court of Appeals in Chicago recently held that an employer does not violate Title VII when it chooses to support affinity groups for matters of race or gender, but declines to support religious affinity

groups. *Moranski v. General Motors Corp.*, 433 F.3d 537 (7th Cir. 2005).

## **Title VII and the Vagueness of Religious Accommodation**

Because of these recent shifts in the religious landscape, employers need guidance regarding both their legal obligations to accommodate employees' religious beliefs and their potential legal exposure should they fail to do so. Unfortunately, Title VII, by its terms, provides little guidance. The statute states that it is unlawful for an employer to "discriminate because of . . . religion." Originally, the measure left silent what the term "religion" encompassed, but in 1972 Congress amended the act to offer a definition that purportedly balanced the need for both religious tolerance and workable obligations for employers.

The first part of the statutory provision defines what is meant by a religious belief or practice. The statute says religion includes "all aspects of religious observance and practice, as well as belief." The EEOC interpretive regulations are no less sweeping: a religious practice "include[s] moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." Because of the breadth of these provisions, in many cases it is quite difficult for employers to determine whether an asserted practice is, in fact, religiously based.

For example, in one case, after FedEx terminated a group of employees who refused to cut their dreadlocks to conform to the company's dress code, the employees sued on the ground that they wore their dreadlocks as a matter of religious conviction. FedEx ultimately settled. *EEOC v. Federal Express Corp.*, 268 F. Supp. 2d 192 (E.D.N.Y. 2003). Similarly, a national burger chain paid \$150,000 to settle a claim by an ex-employee who had been terminated for refusing to cover his tattoos. The tattoos, which contained religious verse, were the result of a ritual performed as part of the employee's Kemetic Orthodox religion. *EEOC v. Red Robin Gourmet Burgers, Inc.*, No. C04-1291, 2005

WL 2090677 (W.D. Wash. Aug. 29, 2005). However, another federal court in Wisconsin recently rejected a grocery store employee's claim that his employer had failed to accommodate his religion when it had required him to wear a gingerbread man necklace as part of a sales promotion. *Kreilkamp v. Roundy's Inc.*, 428 F. Supp. 2d 903 (W.D. Wis. 2006). Because the employee could not point to any conflicting religious belief—aside from perhaps an understandable aversion to wearing gingerbread men necklaces—that conflicted with the requirement, he had no claim. In none of these cases was it obvious to the employer that its requirements impinged on religion. While in some cases an employer may be alerted to or aware of the religious nature of a practice, in other circumstances it can be difficult to know whether an employee's claim relates to an actual, if obscure, religious practice or whether it reflects a creative effort by employees to circumvent company policy. As new religions become more prevalent in America's social network, the uncertainties created by the ambiguities in the definitions of religion and religious practice are bound to increase.

The second part of Title VII's definition of religion does place some limits on the employer's statutory duty to accommodate religion by exempting an employer from accommodating those aspects of an employee's religious observance or practice that an employer would be "unable to reasonably accommodate . . . without undue hardship on the conduct of the employer's business." Generally, an accommodation is reasonable if it removes the conflict with religious practices or beliefs alleged

by the employee. However, when an employer fails to accommodate a sincerely held religious belief that would not impose an undue hardship on the employer, it has "discriminate[d] because of . . . religion" in violation of the law.

Whether an accommodation would create undue hardship for an employer is a particularly difficult question. The Supreme Court provided some guidance in 1977 when it held in *TWA v. Hardison*, 432 U.S. 63, that any accommodation that imposes more than a "de minimis cost" is an undue hardship. But it is hardly clear which costs are to be included in the accommodation calculus. In *Hardison*, the Court seemed particularly concerned with the costs imposed on coworkers asked to give up weekend days off in order to accommodate another employee's religious beliefs.

But the courts have recognized that a company may incur costs as well. For example, in *Farah v. Whirlpool Corp.*, No. 3:02-0424 (M.D. Tenn. Oct. 16, 2004), a jury upheld Whirlpool's refusal to permit forty Muslim workers to leave the production line at the same time for evening prayers because doing so would create an undue hardship. Similarly, the U.S. Court of Appeals in Philadelphia recently found that a clinical testing company did not discriminate against an Orthodox-observant Jew when it refused to accommodate his religious prohibition against working on Saturdays because, although the plaintiff had made out a prima facie case of religious discrimination, the cost of revamping work assignments would have posed an undue hardship for the employer. *Aron v. Quest Diagnostics*

*Inc.*, 174 Fed. App. 82 (3d Cir. 2006).

The Workplace Religious Freedom Act (WRFA) is a recently proposed federal bill that would increase employer obligations under Title VII. The proposed legislation would reverse the presumption announced by the Supreme Court in *Hardison*. Rather than finding an undue hardship wherever a de minimis cost arose, the WRFA would permit employers to decline to make requested accommodations only if they showed that they would incur identifiable increased costs, either in the form of lost productivity or in the cost of retaining, hiring, or transferring employees. In addition, the WRFA would ratchet up an employer's obligations in accommodating an employee by requiring the employer to modify any job requirement that did not affect the "essential functions" of the job.

At the moment, however, neither the case law nor the statute provides sufficient guidance to employers regarding the scope of accommodation obligations. Given the proliferation of religions within the United States, and until further guidance is available, the safe bet for an employer is to treat each reasonable request for religious accommodation as presumptively legitimate and make an earnest effort to address the employee's requested accommodation.

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