

The 2016 Upper Midwest Employment Law Institute

The Changing Nature of Accommodation – Pregnancy, Disability, and Religion

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Pregnancy, Disability, and Religion – the Duty to Accommodate

Below is a brief overview of discrimination in the areas of pregnancy, disability and religion, and the duty to accommodate in each of these areas.

Pregnancy Discrimination Act

The Pregnancy Discrimination Act (“PDA”) of 1978 amended Title VII of the Civil Rights Act of 1964.

- ◆ Purpose was to amend Title VII to prohibit sex discrimination on the basis of pregnancy.
- ◆ The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.
- ◆ Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

What are protected classes under the PDA?

- ◆ Current pregnancy
- ◆ Past pregnancy
- ◆ Potential or intended pregnancy:
 - Reproductive risk
 - Intention to become pregnant
 - Infertility treatment
 - Use of contraception
- ◆ Medical condition related to pregnancy or childbirth
 - Lactation and breastfeeding
 - Abortion

What does the EEOC have to say about enforcement of the PDA?

- ◆ On July 14, 2014, the EEOC issued Enforcement Guidance on Pregnancy Discrimination and Related Issues, as well as a “Q&A” document and a “Fact Sheet for Small Businesses.”

- ◆ The Guidance was the first comprehensive update of the EEOC's position on discrimination against pregnant workers since 1983.
- ◆ The Guidance supersedes earlier guidance and addresses the application to pregnant employees of laws passed in the past 30 years, such as the ADA, the FMLA, and the ADAAA.

Is there a reasonable accommodation obligation under the PDA?

- ◆ No, not expressly **BUT as a practical matter yes...**
- ◆ According to the EEOC, employers are obligated to treat pregnant employees temporarily unable to perform their jobs the same as it treats other employee who are similar in their ability or inability to work.
- ◆ How the employee became unable to perform the job does not matter.
- ◆ Making distinctions based on the source of the inability to perform the job (source discrimination) is the same as pregnancy discrimination.
- ◆ According to the EEOC, a pregnant employee with a need for accommodation may compare herself to the following employees similar in their ability to work for purposes of showing disparate treatment:
 - Disabled employees receiving accommodations under the ADAAA.
 - Employees receiving accommodations because they were injured on the job.

What about light duty for pregnant employees?

- ◆ According to the EEOC, light duty policies reserving light duty to employees injured on the job or disabled under the law would violate the PDA.
- ◆ Light duty policies providing caps on the number of light duty jobs available, or on the length of availability of light duty work, are permissible provided they are consistently applied without exception **AND** provided the caps and duration limits do not impose a disparate impact on pregnant employees.
- ◆ Employers can require all employees to complete prerequisites such as submitting a written request for light duty.
 - However – must comply with state laws.

Pregnancy-related leave vs. parental leave – is there a difference?

- ◆ Pregnancy-related medical leave is only available to women, but parental leave must be made available to men and women on the same terms.
- ◆ Employers need to distinguish between leave related to physical limitations imposed by pregnancy or child birth (pregnancy-related medical leave) and leave for purposes of bonding with a child or providing care for a child (parental leave).

- ◆ If an employer grants a female employee more time off than required to recuperate from childbirth, then that additional period of time off work may be considered parental leave and must be made available to men.

Pregnancy leave and accommodation under Minnesota law.

- ◆ In 2014, Minnesota passed the Women’s Economic Security Act (“WESA”), which took effect on May 12, 2014.
- ◆ Applies to employers with 21 or more employees.
- ◆ The law requires employers to provide female employees up to 12 weeks of unpaid leave during or following pregnancy.
- ◆ To be eligible, the employee must have worked at least half time for the past twelve months and been with the company at least 12 months.
- ◆ Leave may be taken for prenatal care, pregnancy, childbirth or “related health conditions.”
- ◆ Also – a pregnant employee may request and her employer **must provide**:
 - More frequent restroom, food, and water breaks;
 - Seating; and
 - Limits on lifting more than 20 pounds.
 - A reasonable unpaid break time to express breast milk, and when possible, a private area to express milk that is not bathroom, is shielded from view, is free from intrusion from coworkers and the public, and has access to an electrical outlet.
- ◆ Employers are not required to provide break time if doing so would seriously disrupt operations. Breaks already provided may fulfill this requirement.
- ◆ Finally, a pregnant employee may request other reasonable workplace accommodations when:
 - She has been given advice from a health care provider or doula; and
 - The accommodation would not impose an undue hardship on the employer’s business.
- ◆ Per the Minnesota Department of Labor and Industry, other accommodations may include the temporary transfer to a less strenuous or hazardous job.
- ◆ An employer cannot retaliate against an employee for requesting or taking an accommodation.
- ◆ An employer cannot require an employee to take an accommodation.

How should an employer address pregnancy in the workplace under the PDA?

- ◆ Treat pregnant employees the same as you treat disabled employees, or others similar in ability or inability to perform essential job functions.
 - The Guidance requires reasonable accommodation (or “workplace adjustments”) without saying it requires reasonable accommodation.

- If you do something for someone else (because you have an obligation to provide a reasonable accommodation under the ADAAA), you may have to do it for the pregnant employee.
- According to the EEOC, if a pregnant employee can show someone else was treated better or given an accommodation or benefit, and that person is similar in ability/inability to work, she has established a violation of the PDA.

Americans with Disabilities Act Amendments Act of 2008 ("ADAAA")

◆ Purpose of ADAAA

- Prohibits discrimination against qualified individuals with disabilities who, with or without reasonable accommodation, can perform the essential functions of the job.

What does it mean to reasonably accommodate?

- ◆ The ADAAA requires employers to reasonably accommodate an otherwise qualified individual with a disability.
- ◆ Reasonable accommodation is defined as a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity.
- ◆ A modification or adjustment is "reasonable" if it "seems reasonable on its face," i.e., ordinarily or in the run of cases.
- ◆ It is "reasonable" if it appears to be "feasible" or "plausible."
- ◆ An accommodation also must be effective in meeting the needs of the individual. This means it enables the individual to perform the essential functions of the position.
- ◆ A disabled employee is not entitled to the exact accommodation requested.
- ◆ Employers are entitled to medical documentation if the need for a reasonable accommodation is not obvious or known ... but the request for medical information must be narrowly tailored.
- ◆ Reassignment is the accommodation of last resort.
- ◆ Reassignment can be temporary or permanent.

What are some examples of reasonable accommodations?

- ◆ Making existing facilities accessible;
- ◆ Job restructuring;

- ◆ Part-time or modified work schedules;
- ◆ Acquiring or modifying equipment;
- ◆ Changing tests, training materials, or policies;
- ◆ Providing qualified readers or interpreters;
- ◆ A leave of absence; and
- ◆ Reassignment to a vacant position.

What are some examples of things that are not reasonable?

- ◆ Removing essential job functions.
- ◆ Diluting uniformly enforced productivity standards.
- ◆ Excusing or forgiving past misconduct or poor performance.
- ◆ Promotion.
- ◆ Bumping an employee from a job.
- ◆ Creating another position or job.
- ◆ Changing an employee's supervisor (as compared to changing supervisory techniques, which is required absent a showing of undue hardship).

What is an undue hardship and why does that matter?

- ◆ There is no obligation to provide "reasonable accommodation" if it would cause an "undue hardship".
- ◆ What is an undue hardship?
 - Significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation.
 - Assess on case-by-case basis.
 - Factors to consider:
 - Cost;
 - Financial resources of agency;
 - Type of business; and
 - Impact on operation.

What is the interactive process?

- ◆ ADAAA requires good faith, individualized interactive process.
- ◆ Employer and employee clarify individual needs of employee and the business and reasonable accommodations.
- ◆ Employer must investigate employee's request for accommodation and determine feasibility.

What are the general steps in the interactive process?

1. **Analyze** job involved to determine purpose and essential functions;
2. **Consult** with the individual (and/or doctor) to ascertain the precise job-related limitations imposed by the disability and how those limitations could be overcome with a reasonable accommodation;
3. **Identify** potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
4. **Consider** the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both employee and employer.

Religious Discrimination and the Duty to Accommodate

- ◆ Under Title VII, employees are protected from discrimination for the exercise of religious beliefs, observances, and practices:

“It shall be an unlawful employment practice for an employer... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s... religion.” 42 U.S.C. § 2000e-2(a)(1).

What is considered “religion” for Title VII purposes?

- ◆ If the asserted belief stems from a person’s “moral, ethical, or religious beliefs about what is right and wrong” and is “held with the strengths of traditional religious convictions,” then it constitutes a religion that warrants protection by the law. *Welsh v. United States*, 398 U.S. 333, 340 (1970).
- ◆ A “religious belief” refers to a “sincere and meaningful belief that occupies in the life of its possessor a place parallel to that filled by [] God...” *U.S. v. Seeger*, 380 U.S. 163, 176 (1965).
- ◆ A “religious practice” includes moral and ethical beliefs about what is right and wrong that are sincerely held with the strength of a traditional religious view. 29 C.F.R. § 1605.1.
- ◆ Employee’s religious belief need not be acceptable logical, consistent, or comprehensible to others.

Examples of religions under Title VII.

- ◆ Church of Body Modification (body piercing)
- ◆ Church of the World Creator (white supremacy)
- ◆ Veganism

- ◆ Pana Wave Religion
- ◆ Happy Science Religion
- ◆ Church of All Worlds
- ◆ Satanism
- ◆ Uniting of the Moorish Science Temple of America

What is religious discrimination under Title VII?

Employees alleging religious discrimination can bring the same types of claims available to other protected categories:

- ◆ **Disparate Treatment** (“I was treated differently because of my religion”)
- ◆ **Harassment:**
 - Quid Pro Quo (“My raise was contingent upon abandoning my religious beliefs”)
 - Hostile Work Environment (“My supervisor made comments regarding my faith”)
- ◆ **Retaliation** (“I was terminated for complaining about religious discrimination”)
- ◆ **Failure to Provide a Reasonable Accommodation!**

How does the duty to accommodate apply to religious beliefs?

- ◆ Employee must come forward and advise the employer he/she has a bona fide religious belief that conflicts with a duty owed to the employer.
- ◆ Employer must engage in an interactive dialogue with the employee in an attempt to remove the conflict unless doing so would result in an undue hardship to the employer.
- ◆ Employer can only refuse to accommodate a religious employee when “each available alternative” has been explored and cannot be done.
- ◆ Employer need not provide the employee with the accommodation favored by the employee.
- ◆ However, an employer must offer the alternative that least disadvantages the employee in terms of his/her employment opportunities.

What are some examples of reasonable accommodation of religion?

- ◆ Rescheduling shift.
- ◆ Accommodating religious clothing requirements.
- ◆ Accommodating religious hair styles and facial hair requirements.
- ◆ Modification of duties.
- ◆ Creating spaces within workplace for worship/prayer.
- ◆ Voluntary Substitutions and “Swaps”

◆ Flexible Scheduling

- Arrival
- Departure
- Floating or Optional Holidays
- Flexible Work Breaks
- Use of Lunch Time in Exchange for Early Departure
- Staggered Work Hours
- Permitting Employee to Make Up Time Lost due to Observance of Religious Practices
- Lateral Transfer and Change of Job Assignments

What is an undue hardship with respect to religious accommodations?

◆ Under Title VII: The *De Minimis Standard*

- *Trans World Airlines v. Hardison*, 432 U.S. 63, 67 (1977)
- The Supreme Court provided a definition of “undue hardship” and determined that under Title VII, requiring an employer to bear any cost greater than *de minimis* would constitute an undue hardship.”

Hypothetical One: The Wedding Cake

Part 1.

Janet owns Happy Occasions Cakes. She is the sole owner of the cake company. She has 20 employees, most of whom are part-time. She advertises in all of the local newspapers and church bulletins.

Recently, Happy Occasions contracted with a gay couple who wanted it to make a wedding cake for their upcoming nuptials. The wedding was going to be the social event of the season, and Southern Living was going to do a feature on it.

Janet assigned the cake order to her top designer, Wendy True. While the other cake decorators at Happy Occasions were good, no other matched Wendy's technique and skill with fondant. These skills made Wendy the most highly compensated employee at Happy Occasions.

When Janet approached Wendy about the job, however, Wendy refused to work on the order. She stated that she thought gay weddings were disgusting.

This is the first time that any employee had refused to work on a cake because of the subject matter of the cake. There were procedures in place for employees who were unable to work on certain cakes because of allergies.

What should Janet do?

Part 2.

Despite the fact that Wendy was her top designer, Janet agreed to have someone else do the work. The next day, Janet is shocked to see Wendy on the front page of the Star Tribune and the Pioneer Press in her chef's coat and hat, clearly showing where she worked, protesting against gay marriage. The paper quoted Wendy as saying that she would never make a cake for a gay wedding.

Customers start calling to cancel their orders, brutal and ugly remarks are posted on Happy Occasions' Facebook page, and its website is attacked.

What should Janet do?

Part 3.

Janet decides to terminate Wendy based on a policy prohibiting employees from representing themselves as Happy Occasions workers when engaged in their own personal activities. At the termination meeting, Wendy states for the first time that her objections were based on her religious beliefs. Wendy says that she is going to sue Happy Occasions for retaliating against her for exercising her rights under Title VII—namely, requesting that she not work on cakes for gay weddings.

What do you think will happen next?

Relevant authority:

Trans World Airlines v. Hardison, 432 U.S. 63 (1977)

EEOC v Abercrombie & Fitch Stores, 575 U.S. ___, 135 S. Ct. 2028, 127 FEP Cas. 157 (2015)

Peterson v. Wilmur Comm., 205 F.Supp.2d 1014 (E.D. Wis. 2002)

Hypothetical Two: The Hijab and Prayers

Part 1.

Aabidah applied for a position as a greeter in a local chain retail store. As a greeter, she would be the first person welcoming customers into the store. Aabidah was Muslim. She wore a hijab and said daily prayers. The interviewing manager told Aabidah that it could not hire her in the greeter position if she continued to wear the hijab, but that it could hire her in a stockroom position.

Aabidah initially agrees to remove her hijab, but after a week, she tells her manager that she just cannot continue. She says that it violates her sincerely held religious beliefs to go without the hijab at work.

The next day, the manager tells Aabidah that she cannot wear her hijab. He gives the following reasons: (1) the retail store has a neutral uniform policy, and she cannot violate it, particularly in the greeter position; (2) the greeter position is required to round shopping carts up, occasionally using a powered machine to corral the carts; the manager says that Aabidah would be at risk for physical harm if she continued to wear the hijab; and (3) the manager had looked at Aabidah's Facebook page, and saw a picture of her without a hijab, so he questions whether Aabidah has a sincerely held religious belief.

What do you think about the manager's decision? Were any of his reasons strong enough?

Part 2.

Aabidah decides to transfer to the stockroom position, where she is allowed to continue to wear her hijab. She works with about eight other employees. One day, she is instructed to stock the liquor shelves. She objects that handling liquor violates her faith. Her supervisor refuses to reassign her, but Aabidah talks to a co-worker who is stocking produce. The coworker is willing to trade jobs. The supervisor reluctantly goes along with the trade, but tells Aabidah that she will be disciplined in the future if she drags co-workers into resolving her problems.

What are the potential violations here from the management's perspective? Do we now also have a NLRA issue?

Part 3.

Work goes along fine until issues arise regarding Aabidah praying during working hours. Initially, Aabidah prays during unscheduled breaks at work, but her supervisor objects. Although Aabidah points out that her prayers don't take any longer than the workers who take unscheduled smoking breaks, which were permitted, her supervisor says that she can only pray during the regularly scheduled break times. Aabidah requests that she be allowed to move her break time until later in the shift during Ramadan, so that she can perform her night prayers during the obligatory time period. Her supervisor refuses, saying that Aabidah must take her break at the same time as the other employees because it would be unsafe if she continued to work alone in the stockroom while everyone else was on break.

There are also issues relating to where Aabidah prays. Initially, she tried to pray unobtrusively in the break room, but other employees objected. She then tried to pray in the stock room, but her supervisor concluded that this was potentially unsafe because forklifts occasionally were used and the drivers might not see her. The supervisor suggested that Aabidah pray in a bathroom stall.

Aabidah takes her concerns to human resources. What should HR do?

Relevant authority:

Trans World Airlines v. Hardison, 432 U.S. 63 (1977)

EEOC v. Abercrombie & Fitch Stores, 575 U.S. ___, 135 S. Ct. 2028, 127 FEP Cas. 157 (2015)

Hypothetical Three: Treading Lightly With Pregnancy

Part 1.

Josie is a warehouse clerk who began working for Big Box shortly before becoming pregnant six months ago. The pregnancy has exacerbated her sciatica, causing her doctor to issue 20-pound lifting restrictions. While most of the items Josie handles as a clerk weigh less than 20 pounds, some of the packages she must lift weigh as much as 25 or even 30 pounds. Josh, Josie's manager, therefore tells her she must go on leave.

Josie asks why she can't be placed on light duty, just like other employees. Josh tells Josie to talk to HR. Manuel, the HR Manager, explains to Josie that light duty is only available for employees who incur work-related injuries. Manuel also explains that because she is not FMLA-eligible, she is only entitled to four weeks of leave under company policy, after which she will be terminated and provided with COBRA election forms.

Does the Big Box light duty policy pass muster?

Does the Big Box leave policy pass muster?

Part 2.

Same facts, but Josie is in human resources. In her fourth month of pregnancy, Josie begins experiencing high blood pressure as well as an exacerbation of her sciatica. Josie requests the following accommodations:

1. That she be allowed to telecommute until her blood pressure gets under control. She says that if she could telecommute, she could work from her bed.
2. A reserved parking spot close to the office.
3. The ability to eat and drink around her work station.
4. The ability to wear slippers, which contravenes her employer's dress code.

Part 3.

Same facts as Part 2, but Josie wants to work from her hospital bed.

Relevant authority:

Young v. United Parcel Service, Inc., 575 U.S. ___, 135 S. Ct. 1338, 126 FEP Cas. 765 (2015)

EEOC v. Ford Motor Co., 752 F.3d 634 (6th Cir. 2015) (*en banc*)

Women's Economic Security Act, Minn. Stat. §181.941, 181.9414

Minnesota Human Rights Act, Minn. Stat. §363A.08, Subd. 5-6

EEOC's Enforcement Guidance on Pregnancy Discrimination,
http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

Hypothetical Four: Expressing Oneself

Part 1.

Elizabeth, who works on a line for ABC Widget doing light assembly in a work cell with two other employees, recently returned to work from maternity leave. Because she is breastfeeding her child, she requests time to express milk while at work. Myra, her supervisor, reminds Elizabeth that ABC provides all hourly employees with two paid ten-minute breaks as well as an unpaid 30-minute lunch break and tells Elizabeth she is welcome to use a bathroom stall during those breaks. Has Myra done enough?

Part 2.

Breaks take place during scheduled times, during which the assembly line is shut down. The times during which Elizabeth needs to express milk don't necessarily correlate with the times during which employee breaks are scheduled. Elizabeth asks whether she might take allotted breaks during different-than-scheduled times. Myra expresses sympathy, but notes that if Elizabeth takes breaks during unscheduled times, it will compromise her work cell and slow down the line. Can Myra, on this basis, turn down Elizabeth's request?

Part 3.

It usually takes Elizabeth between 12-15 minutes to express milk, plus an additional 1-2 minutes for both the walk to and the walk from the site used for expressing milk.

Can ABC deny Elizabeth the right to take more than 10 minutes when she is expressing milk during a paid break? If ABC agrees to allow Elizabeth to take more than 10 minutes, must it also pay Elizabeth for this additional break time, even though it's longer than the 10 minutes allotted for a break by ABC?

Part 4.

Two weeks after returning to work, Elizabeth asks Myra for a new venue, indicating that she doesn't feel comfortable expressing milk in a bathroom stall, while adding that she's also worried about hygiene. Myra again expresses sympathy, but she reminds Elizabeth that this is a factory, not an office suite -- while noting that there really isn't any other room that's available. Unwilling to accept

this answer, Elizabeth asks why she can't use Myra's office, since Myra is often on the shop floor and isn't required to be in her office.

Myra indicates she can't grant Elizabeth a special perk like this, since no employees are allowed to spend time in her office, which is filled with her files and other confidential data relating to employees. But she does suddenly remember that there's an infrequently used closet where Elizabeth might go if she isn't happy using the bathroom. Is Myra's proposed solution good enough?

Part 5.

Do ABC's actions (or refusals) raise issues under either Title VII or the Pregnancy Discrimination Act?

Relevant authority:

EEOC v. Houston Funding II, 717 F.3d 425 (5th Cir. 2013)

Fair Labor Standards Act, as amended by ACA, 29 U.S.C. §207(r) (1)-(4)

WESA, Minn. Stat. §181.939

EEOC's Enforcement Guidance on Pregnancy Discrimination,
http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

Hypothetical Five: The Quandary Over the Bathroom

Part 1.

J.C. Collins is a transgender male. He informed his coworkers at Big Bart's Warehouse and Manufacturing around July 1, 2014, that he was undergoing gender transition from female to male, and intended to start dressing as a male.

After Collins began the transition process, he sought to use the men's bathroom. His male coworkers vehemently protested. They said that they didn't want some lesbian staring at their private parts. The director of personnel told Collins to use the family restroom – which was a single stall restroom on the main floor of the facility. Collins protested, saying his work location was too far from the family restroom and that he was being singled out for differential treatment because of sex stereotyping. He also said that his co-workers were harassing him.

What should the Director of Personnel do?

Part 2.

The Director of Personnel decided to defer the decision about the bathroom until after Collins' transition process was complete. He told Collins that Collins could either use the women's room or the family stall, but not the men's room.

In response to Collins' complaints of harassment, the Director arranged for a "sensitivity" trainer to talk to the workers about LBGT issues. The training barely addressed issues relating to transgender, however. Moreover, about ten employees brought their bibles, and read them during the training, rather than participating in the mandatory training.

Collins complains that Big Bart's response to his complaints of harassment were inadequate. He also says that the employees who were reading their bibles should be disciplined. He renews his objections to being restricted from using the men's bathroom.

What should the Director of Personnel do?

Relevant authority:

Goins v. West Group, 635 N.W.2d 717 (Minn. 2001)

EEOC Fact Sheet summarizing recent litigation,

http://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm

EEOC – Examples of federal court decisions supporting coverage for transgender individuals as sex discrimination,

http://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm

OSHA Guidance on transgender bathroom use,

<https://www.osha.gov/Publications/OSHA3795.pdf>

Hypothetical Six: The Body is the Message

Part 1.

Farouk is an associate at Cookie Cutter, LLC, a major Minneapolis law firm which has a dress code policy prohibiting visible tattoos or body piercings. Farouk is a member of the Kemetic religion, an ancient Egyptian faith involving a rite of passage in which he is tattooed on his wrists.

Farouk seeks an exemption from the Cookie Cutter policy, because he believes that his faith does not allow him to intentionally cover his tattoos or remove his eyebrow piercings. Cookie Cutter's managing partner tells Farouk that while he respects his right to do whatever he wants outside of work, he has an obligation while at work to generate business rather than scaring clients away. The managing partner also notes that when in court representing clients, Farouk will need to wear long-sleeve shirts and a suit jacket.

When Farouk refuses to back down, he is fired. Farouk sues. Does he have a case?

Part 2.

Not wanting to lose an up-and-coming lawyer of Farouk's talent, Cookie Cutter proposes a compromise: Farouk only needs to cover his wrist tattoos when in court, as long as he agrees to cover the eyebrow piercings while at work with flesh-colored band-aids. Farouk refuses to back down, is fired, and sues. What if any role should Cookie Cutter's proposed compromise have on the outcome?

Part 3.

Even though it's sure it would win, Cookie Cutter doesn't want the potentially negative publicity associated with a lawsuit; it therefore accommodates Farouk.

Meanwhile, the managing partner receives complaints about Frank, who works in the mail room at Cookie Cutter and sports a forearm tattoo of a hooded figure standing before a burning cross. When told he must cover the tattoo both because it offends the mail room's African American employees and because it violates Cookie Cutter policy, Frank notes that he's entitled to the same protections as Farouk. He adds that his tattoo is a sacred symbol of the Church of the American Knights of the Ku Klux Klan. When he still refuses to cover the tattoo he is

terminated and sues, alleging reverse discrimination and a failure to accommodate his religious beliefs. Does Frank have a case?

Relevant authority:

Swartzentruber v. Gunitite Corp., 99 F.Supp.2d 976 (N.D. Ind. 2000)

Riggs v. City of Fort Worth, 229 F.Supp.2d 572 (N.D. Tex. 2002)

Cloutier v. Costco, 390 F.3d 126 (1st Cir. 2004)

EEOC press release, September 16, 2005,

<http://www.eeoc.gov/eeoc/newsroom/release/9-16-05.cfm>

Hypothetical Seven: Shooing the Flu at the Hospital

Part 1.

Following CDC Guidelines recommending that hospital employees receive the flu vaccine, City General Hospital has implemented a mandatory flu vaccine policy, with medically driven and religiously based exemptions for employees who qualify.

Saleha, a Muslim who works for the hospital as a custodian, requests an exemption because the flu vaccine contains porcine gelatin, which is formed in part from the bones, skins and tendons of a judicially impure animal. Is Saleha entitled to an exemption?

Does it matter, in this context, that a 1995 decision of the Islamic Organization for Medical Sciences held that taking such gelatin into one's body is permissible and that Muslim clerics have supported this decision?

City General's policy requires employees who receive either a medical or religious exemption to wear a face mask at all times -- even when they are on break. Saleha is granted an exemption but refuses to wear a mask, noting that she doesn't work in a patient care area and insisting that even if she did, the hospital cannot make her wear a mask when she is on break and eating lunch in the City General cafeteria. City General tells Saleha that if she fails to wear a mask, she will be disciplined for insubordination. She claims she is being picked on for practicing her religion and threatens to sue. If she is disciplined, would she have a case?

Part 2.

Joseph, an atheist who has been a strict vegan for the last three years, requests an exemption because of the egg (animal) proteins within the flu vaccine. He indicates that because of his respect for the autonomy of all living beings, he believes that it is morally wrong to cause them to suffer. He does not consume any animal-based foods, ingredients or derivatives and does not own any animal-based products (e.g., silk, wool, or leather). Is Joseph entitled to an exemption?

While attending a Twins game, Joseph's supervisor sees him drinking copious amounts of beer that he's using to wash down the brats he is eating. Convinced that Joseph is lying about his supposed veganism, the supervisor wants to terminate him. Can she?

Part 3.

Jamilla requests an exemption, noting on the request form that her body is a temple and that she doesn't unnecessarily ingest foreign bodies into it. She adds that taking the vaccine would, in her eyes, reflect a lack of faith in God and his plan.

City General would like to meet with Jamilla and seek clarification regarding her request. Can it legally do so? And, if so, what questions can it or should it ask in assessing Jamilla's request?

Relevant authority:

EEOC v. Abercrombie & Fitch Stores, 575 U.S. ___, 135 S. Ct. 2028, 127 FEP Cas. 157 (2015)

U.S. v. Seeger, 380 U.S. 163 (1965)

EEOC v. Union Independiente De La Autoridad De Acueductos y Alcantarillados De Puerto Rico, 279 F.3d 49 (1st Cir. 2002)

Bushouse v. Local Union 2209, UAW, 164 F.Supp.2d 1066 (N.D. Ind. 2001)

Hussein v. Waldorf-Astoria, 134 F.Supp.2d 591 (S.D.N.Y. 2001)

Burns v. Warwick Valley Cent. Sch. Dist., 166 F.Supp.2d 881 (S.D.N.Y. 2001)

EEOC, EEOC Compliance Manual Section 12: Religious Discrimination 56-65 (2008), <http://www.eeoc.gov/policy/docs/religion.pdf>.

EEOC guidance on pandemic preparedness, http://www.eeoc.gov/facts/pandemic_flu.html#36

Hypothetical Eight: The Affinity Groups Dilemma

Part 1.

Amalgamated Batteries Company was experiencing terrible turnover in its positions, and there was talk of union organizing. In order to head this off at the pass, ABC decided to take several steps to try to improve poor employee morale. Among other things, ABC began approving and encouraging the formation of affinity groups. Ultimately, it approved about a dozen affinity groups, ranging from six representing specific causes (Parents Against Bullying, Employees for Social Justice, etc.) to six representing identity-based groups (Association of Black Professionals, Hispanics in Motion, Supporting Women in the Workplace, etc).

The Director of Human Resources has received inquiries from five new affinity groups that would like to start meeting:

1. A bible reading group;
2. The Christian Knights of the Ku Klux Klan;
3. Educate America: False Flags Today;
4. Wellness America: Promoting Physical Fitness for All; and
5. The Independent Party.

Who can the Director reject and why?

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