

HANDBOOK ON RELIGIOUS DISCRIMINATION IN EMPLOYMENT



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APRIL 2009**

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I. INTRODUCTION

Religious discrimination and accommodation issues have taken a more prominent role in the workplace in the last decade. Yet, the legal requirements can be confusing and are often misunderstood. This Handbook provides information on these subjects and is intended to be a campus resource.

II. WHAT CONSTITUTES A RELIGIOUS BELIEF?

Both federal and state laws prohibit discrimination against employees on the basis of religion.¹ They also protect employees from harassment on the basis of religion.²

The California Fair Employment and Housing Act defines a religious belief as:

any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions.³

Personal philosophies or particular ways of life do not meet the definition of a religious belief entitled to protection under the law.

Federal law is broader. A religious belief under the federal standard includes "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."⁴ A strongly held moral or ethical view may qualify even if it is strictly political, sociological or economic, is not related to a "Supreme Being," and no other people adhere to it as a religion.⁵ Under the federal standard, veganism may constitute a religious belief, whereas in California it is considered a personal philosophy not covered by FEHA.

Either standard could apply to the CSU workplace depending upon which statute an employee chooses to sue under. Therefore, campuses should be familiar with the fact that there are two standards and apply the more liberal federal standard in the workplace.

¹ 42 U.S.C. § 2000e-2; Cal. Gov't. Code § 12940 subds (a) & (l).

² 42 U.S.C. § 2000e-2; Cal. Gov't. Code § 12940 subd. (j).

³ Cal. Gov't. Code, § 12940, subd. (l) . FEHA defines "religious creed," "religion," "religious observance," "religious belief," and "creed" interchangeably to include all aspects of religious beliefs, observances, and practices. Cal. Gov't. Code, § 12926, subd. (o).

⁴ 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.1.

⁵ Friedman v. Southern California Permanente Medical Group, 102 Cal. App. 4th 39, 68 (2002).

III. IDENTIFYING RELIGIOUS BELIEFS AND PRACTICES

As the United States Supreme Court has observed, "the determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task"⁶ Some religious practices that have been recognized by courts include: wearing beards,⁷ nonpayment of union dues,⁸ refusal to distribute draft registration materials,⁹ participation in a spouse's religious conversion ceremony,¹⁰ and attendance at a religious convention.¹¹

Employers may ask employees to provide supporting information if there is an objective basis for questioning an alleged religious practice. If an employee requests a reduced schedule, for example, to "attend church frequently," the request lacks sufficient detail to determine whether an accommodation is appropriate. The employer may ask for more information – e.g., what revised schedule is required, why it is needed, and how the current schedule conflicts with religious practices or beliefs. The employee is then obligated to provide sufficient information to permit the employer to make a reasonable assessment of whether the request was based on a sincerely held religious belief, the precise conflict between the work schedule and church schedule, and whether an accommodation would be appropriate.

The employee is not required to submit his/her response in any particular form. Written materials or the employee's verbal explanation are sufficient. Third party verification is not necessary and does not need to come from a church official or member. Others who are aware of the employee's religious practice or belief will suffice.

An employee who refuses to cooperate with a reasonable request for verification forfeits the right to claim that s/he was improperly denied a religious accommodation. Conversely, an employer attempting to verify the sincerity of a religious belief may subject itself to liability if it makes an unreasonable request for information to an employee. For example, an employer may not require that an employee demonstrate a history or pattern of engaging in a religious practice. Employers also may not require that employees verify their religious beliefs through membership in a particular congregation or pastor. Finally, an employer may not mandate that an employee document his/her religious beliefs using forms created by the employer.

⁶ Thomas v. Review Bd., Ind. Empl. Sec. Div., 450 U.S. 707 at p. 714 (1981).

⁷ Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1383 (9th Cir. 1984).

⁸ See Intern. Ass'n of Machinists v. Boeing Co., 833 F.2d 165, 168 (9th Cir. 1987).

⁹ See American Postal Workers Union v. Postmaster General, 781 F.2d 772, 776 (9th Cir. 1986).

¹⁰ Heller v. EBB Auto Co., 8 F.3d 1433, 1438-1439 (9th Cir. 1993).

¹¹ See Toledo v. Nobel-Sysco, Inc., 651 F.Supp.483, rev'd on other grounds, 892 F.2d 1481 (10th Cir. 1989).

IV. RELIGIOUS ACCOMMODATION

California and federal law require employers to accommodate employees' religious beliefs and practices.¹² Once an employee notifies an employer s/he has a bona fide religious belief that conflicts with an employment requirement, the employer must initiate a good faith effort to accommodate, unless an accommodation would impose an undue hardship.¹³ Employers are not required to engage in a formal interactive process, as in a disability situation, to determine whether there is a reasonable accommodation for an employee's religious belief.¹⁴

Any accommodation that is reasonable is sufficient to meet the employer's obligation to accommodate; it is not necessary to adopt the most reasonable accommodation or the remedy preferred by the employee.¹⁵ An accommodation is not reasonable if it lessens but does not eliminate the conflict between religion and work.¹⁶

Examples of reasonable religious accommodations include: (1) scheduling times for interviews, examinations, and other functions related to employment opportunities to avoid religious holidays; (2) dress standards or requirements for personal appearance that are flexible enough to take into account religious practices; (3) not requiring an employee to join a union if his or her religious creed prohibits such membership; (4) providing exceptions to union dues requirements; (5) voluntary substitutes and exchanging positions with co-workers; and (6) job transfers and assignment changes.¹⁷ When a religious observance is at issue, an accommodation must include time necessary for travel to and from the observance.¹⁸

An employer may not summarily deny an employee's request for scheduling accommodations, even if granting the request would violate labor contract provisions.¹⁹ For example, an employer may not refuse to consider employees' requests for Saturdays off to observe the Sabbath, irrespective of the language in a union contract, without first having considered alternatives. The employer must first make efforts to rearrange employees' schedules or ask whether any other employees are willing to work on Saturdays.

Employer dress standards and personal appearance requirements must be flexible enough to take into account religious practices.²⁰ However, employers may enforce reasonable rules regarding personal appearance and safety even where the rules collide with an employee's religious beliefs.²¹ An employer can, for example, enforce a no-beard policy if beards prevent employees from safely wearing protective masks.

¹² Cal. Gov't. Code, § 12940; 42 U.S.C. § 2000e(I).

¹³ Soldinger v. Northwest Airlines, 51 Cal. App. 4th 345, 370 (1996).

¹⁴ See Cal. Gov't. Code, § 12940 (n) (establishing a formal interactive process in disability cases).

¹⁵ Ansonia Board of Education v. Philbrook, 479 U.S. 60, 68 (1986).

¹⁶ Opuku Boateng v. State of California, 95 F.3d 1461, 1467 (9th Cir. 1996).

¹⁷ 2 Cal. Code Regs. § 7293.3; 29 C.F.R. § 1605.2.

¹⁸ Cal. Gov't. Code, § 12940 (I).

¹⁹ EEOC v. Hacienda Hotel, 881 F.2d 1504 (abrogated on other grounds by statute) (9th Cir. 1989).

²⁰ 2 Cal. Code Regs. § 7293.3(c).

²¹ See Bhatia v. Chevron U.S.A., 734 F.2d 1382 (9th Cir. 1984).

Employers may not prohibit employees from bringing ceremonial knives or swords (e.g. *kirpans*) to work without considering reasonable accommodations.²² Employers must determine whether such items, which sometimes have dull blades and are decorative in nature, create a genuine hazard in the workplace. Similarly, employers may not discipline employees for wearing religious headscarves, or *hijabs*, in violation of workplace dress policies without first considering reasonable accommodations.²³

V. UNDUE HARDSHIP

An accommodation that imposes more than a de minimis cost constitutes an undue hardship.²⁴ De minimis “cost” includes fiscal and non-fiscal components. It is defined by the total identifiable cost of the accommodation in relation to the size and operating costs of the employer, as well as the number of individuals who will need the accommodation. The administrative cost associated with rearranging schedules and recording substitutions for payroll purposes, or the temporary payment of overtime wages while a more permanent accommodation is sought, are generally de minimis. However, the hiring of additional employees to provide an accommodation will generally cause an undue hardship.²⁵

To rely on undue hardship as the basis for denying a religious accommodation, employers must be able to show the actual cost or disruption that the accommodation would involve. Hypothetical hardship or assumptions that others will also seek the same accommodation are irrelevant. Actual cost may include the burden on the business conducted. For example, there is undue hardship where an accommodation diminishes efficiency in other jobs, infringes on other employees’ job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee’s share of potentially hazardous or burdensome work. Conflicts with other laws may also be considered. It is also an undue hardship to require a variance from a bona fide seniority system or deny another employee his/her guaranteed job or shift preference.²⁶ The regular and ongoing payment of premium wages to substitute workers is an undue hardship. Removing a new employee from a rotating schedule to accommodate the Sabbath or a Jehovah’s Witness from an overnight truck driving shift is an undue hardship.²⁷

Employers are not required to accommodate an employee’s desire to impose religious beliefs on co-workers. Allowing an employee to post demeaning anti-gay messages is an undue hardship that does not have to be permitted.

²² EEOC Compliance Manual, Section 12: Religious Discrimination (July 22, 2008), Ex. 39 (stating that Sikhs may wear religious swords at work unless it would cause an undue hardship).

²³ EEOC v. Alamo Rent-A-Car LLC, 432 F.Supp.2d 1006 (D.Ariz., 2006) (upholding a jury verdict of more than \$285,000 against employer who terminated employee for wearing a hijab); But see Webb v. City of Philadelphia, 2007 WL 1866763 (E.D.Pa.) (police department could prohibit a police officer from wearing a hijab on duty because accommodating the officer would violate the department’s uniform policy and cause an undue hardship).

²⁴ TWA, Inc. v. Hardison, 432 U.S. 63, 84 (1977); see also 2 C.C.R. § 7293.3; Soldinger v. Northwest Airlines, 51 Cal. App. 4th 345, 370 (1996).

²⁵ 29 C.F.R. § 1605.2(e)(1).

²⁶ 29 C.F.R. § 1605.2(e)(2).

²⁷ See 29 C.F.R. § 1605.2(e)(1); Beadle v. City of Tampa, 42 F.3d 633 (11th Cir. 1995); Weber v. Roadway Express, Inc., 210 F.3d 365 (5th Cir. 2000).

VI. PROSELYTIZING AND PRAYER

Praying, proselytizing, or engaging in other forms of religious expression in the workplace that undermines the operation of the employer's business or subjects other employees to unwanted harassment on the basis of religion causes an undue hardship and does not need to be accommodated.

An employer is not required to grant an employee's request to conduct lunchtime Christmas and Easter parties with religious themes, or to send e-mails to co-workers with religious messages, when co-workers complain about the activity and the conduct violates the employer's anti-harassment policies.²⁸ An employer may prohibit employees from posting flyer's in the workplace expressing views regarding marriage and "family values" where such materials tend to target, exclude, or demean other employees.²⁹ Public universities may also prohibit faculty members from reading bible verses to students in class.³⁰

Employers may not prohibit prayer in the workplace, but may enforce reasonable restrictions. It would be permissible, for example, to prohibit the use of conference rooms for prayer meetings while allowing employees to pray in break rooms or outside during lunch.³¹ Employers can require employees to make up any work time missed for prayer or religious observance.

Employers may also prohibit employees from wearing buttons or pins with religious messages that become the subject of employee complaints. For example, an employer may prohibit an employee from wearing a button with disturbing abortion-related images that offend co-workers.³² In addition, a police department would not be required to accommodate a peace officer's request to wear a gold cross pin symbolizing evangelical Christianity. The employer has a right to ensure that the officer's personal religious beliefs were not viewed by members of the public as an endorsement by the police of that message.³³

An employee's proselytizing to clients could subject a public employer to First Amendment Establishment Clause claims, particularly when it appears that the employee is speaking on behalf of the institution. Avoiding Establishment Clause violations constitutes a compelling interest for an employer and provides justification to restrict employees' discussion of religion with clients.³⁴

²⁸ See Ng v. Jacobs Engineering Group, 2006 WL 2942739 (unpublished).

²⁹ See Good News Assn. v. Hicks, 2005 WL 35173, *affirmed* 2007 WL 651452 (unpublished).

³⁰ Lynch v. Indiana State, 378 N.E.2d 900 (1978).

³¹ See Berry v. Department of Social Services, 447 F.3d 642, 653-654 (9th Cir. 2006).

³² See Wilson v. U.S. West Communications, 58 F.3d 1337 (8th Cir. 1995).

³³ See Daniels v. City of Arlington, 246 F.3d 500, 504 (5th Cir. 2001).

³⁴ Berry, *supra*, 447 F.3d at 650.

VII. ELEMENTS OF A CLAIM OF RELIGIOUS DISCRIMINATION

The prohibition against religious discrimination in employment protects all job applicants and employees. The standard to prove a claim is very similar to what is necessary to establish other forms of illegal discrimination. The claimant must show that s/he: (1) has a sincerely held religious belief of which the employer was aware; (2) was qualified for the position or was performing his/her job satisfactorily; (3) experienced an adverse employment action; and (4) that other similarly situated employees not of the same religious belief or practice were treated more favorably.³⁵ Unlike many types of discrimination claims where membership in a protected class may be more obvious, a claimant alleging religious discrimination will generally be required to show the employer's awareness of the employee's sincerely held religious belief.

If an employee, for example, resigns from training as a police cadet because of his objection to the oath and flag salute requirements, but does not tell the employer until after he resigns that these practices violated his religious beliefs, the employer cannot be held liable for constructive discharge based on religious discrimination.³⁶ If an employer suspends an employee for repeatedly arriving back at the workplace late after lunch, and has no idea that the reason was because the employee was attending Friday prayers, there is no valid claim of religious discrimination.³⁷

There must be a causal connection between a sincerely held religious belief or practice and the adverse employment action. Where a supervisor tells an employee that "your religion is a scam," repeatedly quizzes the employee about his religious beliefs while simultaneously demoting him, and refuses reasonable leave requests, the connection is clear.³⁸ In other situations where the connection is less clear, the employee must establish that connection based on the totality of circumstances surrounding the adverse employment action.³⁹ In a recent case, a court upheld an employee's right to proceed with a religious discrimination claim where she alleged that she was not promoted because she did not share the same religious beliefs as her employer.⁴⁰

If an employee satisfies the minimum requirements of a religious discrimination claim, the employer must then demonstrate a legitimate nondiscriminatory reason for the adverse employment action taken. To ease this burden, employers are well advised to document the reasons for significant employment actions -- e.g., tardiness or poor performance is the basis for discipline.

A university, for example, was able to defeat a religious discrimination claim in the denial of tenure when it demonstrated that the decision was not based on an Anti-Semitic comment from a fellow professor or the professor's failure to attend a retreat on the Jewish high holidays,⁴¹ but

³⁵ See Peterson v. Hewlett-Packard Co., 358 F.3d 599, 603 (9th Cir. 2004).

³⁶ See Lawson v. Washington, 296 F.3d 799, 805-806 (9th Cir. 2002).

³⁷ See Elmenayer v. ABF Freight Systems, No. 98-CV-4061(JG), 2001 WL 1152815 (E.D. N.Y. 2001), *aff'd*, 318 F.3d 130 (2nd Cir. 2003).

³⁸ See Reed v. Mineta, 93 Fed. Appx 195, 199-200 (10th Cir. 2004).

³⁹ See Feingold v. New York, 366 F.3d 138, 153-54 (2nd Cir.2004).

⁴⁰ Noyes v. Kelly Servs. Inc., 488 F.3d 1163 (9th Cir. 2007).

⁴¹ Slatkin v. University of Redlands, 88 Cal. App. 4th 1147, 1159 (2001).

rather was because the professor's colleagues found her uninspiring as a teacher, uncooperative as a colleague, unable to accept criticism, and unlikely to improve her performance.⁴² (The court also found that the comment came from someone not involved in the employment decision and the claimant had not been disadvantaged by not attending the retreat.)

Employers should follow established written objective criteria in making hiring or promotion decisions. Job applicants should be asked the same questions that relate directly to the requirements of the position for which they are applying.

California law prohibits pre-employment inquiries into an employee's availability to work on weekends, as they are a pretext for ascertaining religious beliefs,⁴³ except where they are reasonably related to the normal business requirements of the job (e.g. a police dispatcher who is needed for work on weekends).

After the employer has explained the reasons for its action, the applicant or employee will have an opportunity to establish that those reasons are pre-textual (i.e., not the true reasons) and that the action was really motivated by discrimination.⁴⁴ To reduce the risk of discrimination claims, the employer should encourage managers and supervisors to consult with Human Resources when making difficult personnel decisions.

VIII. ELEMENTS OF A CLAIM OF RELIGIOUS HARASSMENT

Religious harassment occurs when an employee is subjected to unwelcome statements or conduct based on his/her religion that is so severe or pervasive that the work environment becomes hostile or abusive.⁴⁵

Generally these claims arise from remarks and/or conduct with religious content that are intimidating, ridiculing, or insulting -- e.g., when fellow employees called a Muslim who wore a kufi to work as part of his religious observance "towel head," "Taliban," a terrorist, or made comments associating all Muslims with senseless violence.⁴⁶

Religious harassment claims may also result from another's expression of religious beliefs in the workplace, and/or inviting employees to participate in religious discussions or activities in the workplace.

Finally, courts have also found religious harassment even without an explicit mention of religion. A university professor who refused to work on her Sabbath, and whose dean and department chair scheduled meetings on Jewish holidays and charged her leave on those holidays despite their awareness of her religious beliefs, stated a claim for religious harassment even though her religion was never explicitly mentioned.⁴⁷

⁴² Slatkin, supra, 88 Cal. App. 4th at 1156.

⁴³ See Cal. Code Regs. Tit. 2 § 7293.4.

⁴⁴ Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 143 (2000).

⁴⁵ EEOC Compliance Manual, Section 12: Religious Discrimination (July 22, 2008), at 18; Cal. Gov't. Code § 12940(j).

⁴⁶ See EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306 (4th Cir. 2008).

⁴⁷ See Abramson v. William Paterson Coll. Of N.J., 260 F.3d 265, 281 (3d Cir. 2001).

A. Unwelcome Invitations to Participate in Religious Activities

Employees have a right to engage in general religious talk at work and may invite a fellow employee to attend a religious activity without violating the law.⁴⁸ However, once the employee informs his supervisor that s/he does not wish to discuss religious issues, and the conduct persists, it becomes actionable because it is unwelcome.⁴⁹ Employers should allow religious expression among employees just as they allow other forms of expression that are not harassing or disruptive. But employers must also balance one group of employees' rights to engage in religious discussion against the rights of another group of employees to be free from unwelcome solicitation or proselytizing. Once there is a complaint about any unwanted religious discussion, the employer should require that the conduct stop to prevent a harassment claim. (See Proselytizing and Prayer section, supra, for further discussion of this topic.)

B. When is Conduct Severe or Pervasive?

Only conduct that is severe or pervasive is prohibited. What constitutes severe or pervasive conduct will depend on whether a reasonable person would consider it such, based on the totality of circumstances in which the conduct occurs. Courts will consider factors such as the frequency of the conduct, whether the conduct was humiliating or physically threatening, and whether the conduct had derogatory, offensive or abusive elements.⁵⁰

An isolated incident, offhand comment, or simple teasing are not likely to rise to the level of severe or pervasive conduct. But a single incident involving physical harassment or a threat of physical harm might. Conduct directed at an individual employee⁵¹ -- e.g. the silent treatment or other shunning activities -- may constitute severe or pervasive forms of religious discrimination.⁵²

C. Defenses to Harassment Claims

An employer's defense to a religious harassment claim will vary depending on whether the alleged harasser is a supervisor, co-employee, or third party such as a customer, independent contractor, or student. Employers are automatically liable for supervisory harassment resulting in tangible loss such as denial of promotion, demotion or discharge.⁵³ For this reason, supervisors and managers engaged in outside religious activities should refrain from promoting

⁴⁸ See DFEH v. Kathleens's Merle Norman Cosmetics Studio, (1998) FEHC Dec. No. 98-05 *8.

⁴⁹ See Venters v. City of Delphi, 123 F.3d 956 (7th Cir. 1997).

⁵⁰ See e.g., Bains LLC v. Arco Prods. Co., 405 F.3d 764, 773, 74 (9th Cir. 2005); Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999); Jones v. United Space Alliance, No. 05-13001, 2006 WL 250761 (11th Cir. Feb. 3, 2006) (unpublished).

⁵¹ See Peters v. Renaissance Hotel Operating Co., 307 F.3d 535, 552 (7th Cir. 2002)(the impact of actions not directed at a complaining employee is not as great as the impact of harassment directed at him).

⁵² See e.g., Bains LLC v. Arco Prods. Co., 405 F.3d 764 (9th Cir. 2005); Feingold v. New York, 366 F.3d 138, 150 (2nd Cir. 2004); Shanoff v. Illinois Dep't of Human Servs., 258 F.3d 696, 705 (7th Cir.2001); Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1130-31 (4th Cir. 1995).

⁵³ See Faragher v. Boca Raton, 524 U.S. 775, 789 (1998).

such events at the workplace to avoid any possibility that employees under their supervision might construe attendance as a condition of their employment.

If there is no tangible loss, an employer may defend against a supervisor or a co-worker's harassment by establishing that: (1) the employer exercised reasonable care to prevent and promptly correct the harassing behavior, (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm, and (3) reasonable use of the employer's procedure would have prevented at least some of the harm that the employee suffered.⁵⁴ The employer must have a formal policy against harassment with a reasonable complaint procedure. CSU Executive Order 928 satisfies this requirement. The employer must also be able to demonstrate that it took prompt action – e.g., confronting the co-worker allegedly responsible, conducting an investigation, separating employees, transferring the offending employee, obtaining an apology, reprimanding or taking other disciplinary action, or otherwise achieving a discontinuation of the alleged misconduct.⁵⁵

Employers are only responsible for harassment by non-employees when the employer knew or should have known of the harassment, had some control over the harasser's conduct, and could have taken steps to protect the employee. A university may in some situations be deemed to have sufficient control over students who are harassing employees. Similarly, a university may have sufficient control over its independent contractors and the employees working for them to require prompt and appropriate corrective measures.⁵⁶

IX. CONCLUSION

This Handbook provides basic information about what is prohibited and permitted behavior. The facts of each situation vary. Campuses are encouraged to consult University Counsel when issues arise in this complex area.

⁵⁴ See e.g., Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); State Dept. of Health Serv. v. Superior Court, 31 Cal. 4th 1026, 1044 (2003).

⁵⁵ See, e.g., Star v. West, 237 F.3d 1036, 1038 (9th Cir. 2001); Sheikh v. Indep. Sch. Dist. 535, No. Civ. 00-1896D WFSRN, 2001 WL 1636504 (D. Min. Oct. 18, 2001) *5.

⁵⁶ See Berry v. Delta Airlines, Inc., 260 F.3d 803, 812 (7th Cir. 2001).