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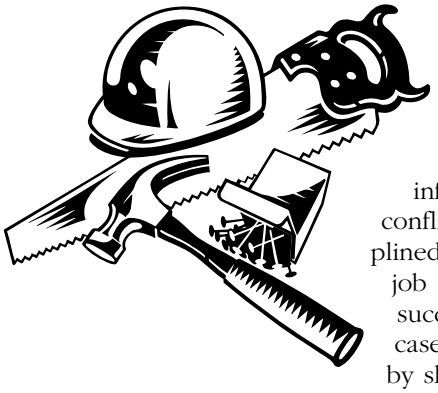
Use Your Head! Title VII Provides for Reasonable Accomodation for Religious Headwear

Over the last few decades, the field of labor and employment law has become increasingly centered on the requirements imposed by various antidiscrimination laws that have been—and continue to be—passed by the U.S. Congress. Although the bulk of employment discrimination lawsuits pertains to more traditional protected characteristics such as age, race, gender, and disability, statutes such as Title VII of the Civil Rights Act of 1964 have a considerably broader scope.[1]

One of the less talked about, but no less important, areas of discrimination law addresses employers' responsibility to accommodate the religious practices of their employees. In fact, federal courts have recently analyzed the propriety of facially neutral dress codes and other policies that have a potential impact on an employee's right to wear clothing and other accoutrements that are required by his or her religion. For example, courts have issued decisions with respect to whether the enforcement of policies restricting employees from wearing religious headwear—such as headscarves, turbans, and yarmulkes—are unlawful violations of Title VII.

As an initial matter, Title VII broadly prohibits employers from discharging or disciplining an employee based on the employee's religion. To establish a prima facie case when an employee claims lack of religious accommodation, the employee must show specifically that he or she (1) holds a religious belief that conflicts with an existing job requirement, (2) informed the employer of this conflicting belief, and (3) was disciplined for failing to comply with the job requirement.[2] If the employee successfully proves the prima facie case, the employer must respond by showing either that the employee's religious belief was reasonably accommodated in the workplace,[3] that no such reasonable accommodation existed, or that an accommodation would impose an undue hardship on the employer.[4] An accommodation constitutes 'undue hardship' if it would impose more than a de minimis [economic or uneconomic] cost on the employer."[5]



In a recent case, *Webb v. Philadelphia*,[6] the U.S. Court of Appeals for the Third Circuit held that the city of Philadelphia did not violate Title VII when the city refused to accommodate a police officer's request to wear a religious headscarf with her uniform. The plaintiff, Webb was a practicing Muslim who was hired by the city in 1995 as a police officer. In 2003, consistent with her religious beliefs, she requested permission to wear her headscarf while in uniform and on duty. Her request was denied pursuant to the police department's uniform policy that prohibited officers from wearing religious symbols or garb as part of their uniform. Despite the denial of her request, Webb wore her headscarf to work on three occasions; each time the department sent her home when she refused to remove it and threatened her with further disciplinary action. Ultimately, Webb stopped wearing the headscarf to work, but she still received a 13-day suspension for her repeated violation of the department's established uniform policy.

As a result, Webb brought an action against the city in federal district court under Title VII, claiming that the city had failed to accommodate her religious practice, but the city prevailed on summary judgment with respect to all of her claims. Reasoning that the police force needed uniformity, cooperation, and cohesiveness in order to operate effectively, the district court held that forcing the city to permit Webb and/or other officers to wear religious clothing or ornamentation along with their uniforms would cause the city to suffer undue hardship under Title VII. Webb appealed the ruling, and the Third Circuit Court of Appeals affirmed the district court's decision in favor of the city and its policy.

The Third Circuit began its analysis by reiterating the established standard for Title VII religious discrimination claims,[7] that is, once the employee proves the initial prima facie case of religious discrimination, demonstrating that he or she was disciplined for violating a policy that conflicted with an honestly held religious belief, the burden shifts to the employer to prove either that the employee was accommodated or that the requested accommodation would have caused undue hardship. As a practical matter, the court's application of this standard demonstrates that employers should not have to face tremendous difficulty establishing the existence of undue hardship.

In this case, the court found that Webb had es-

tablished her prima facie case of religious discrimination against the city and therefore shifted the burden to the city on the issue of accommodation of an employee's religious practices. Because the city did not accommodate Webb's request for an exception to its uniform policy that would allow her to wear a headscarf, the city was forced to claim that being required to do so would have caused an undue hardship because of the police department's need to maintain "impartiality, religious neutrality, uniformity, and the subordination of personal preference"—all of which could be severely damaged by accommodating Webb's request. The Third Circuit found this rationale sufficient to meet the 'more than de minimis cost' test. Thus, the city had demonstrated undue hardship, and the court affirmed the district court's decision granting the city summary judgment on all of Webb's claims.

A similar case is currently pending in another district court within the Third Circuit. Earlier this year, the Department of Justice filed a Title VII religious discrimination lawsuit in the District of New Jersey[8]—*United States v. Essex County*—in which the Justice Department alleges that Essex County, N.J., unlawfully failed to accommodate the religious practice of one of its correction officers. As in *Webb*, the county's uniform policy prohibited the officer from wearing a headscarf while in uniform, and the officer was discharged as a result of her failure to comply with the policy. The court has not yet issued any decision in this case. However, assuming that Essex County puts forth similar arguments with respect to undue hardship as the city of Philadelphia articulated in *Webb* and barring other distinguishing facts, it would be hard to envision the district court disregarding the Third Circuit's recent pronouncement on this issue.

In fact, *Webb* is not the only Third Circuit case to deal with this issue. In *United States v. Board of Education for the School District of Philadelphia*,[9] the Third Circuit similarly found that an employer demonstrated undue hardship and therefore the school district's refusal to provide a reasonable accommodation to one of its employees was not unlawful. In that case, the plaintiff was a teacher who, during her tenure with the school district, began wearing a traditional religious headscarf covering her head and neck and a long dress covering the rest of her body. The school district asserted that, in wearing that attire, the plaintiff had violated a Pennsylvania statute making it a crime for a teacher to wear any religious clothing, marks, emblems, or insignia while in school. The plaintiff refused to change her attire to comply with the statute, and the school district subsequently prohibited the plaintiff from teaching in the school. As a result, the Justice Department filed a Title VII religious accommodation claim against the school district, and the court considered whether the plaintiff's desire to wear religious clothing when she was teaching could have been accommodated without imposing an undue hardship on the school district. The court indeed found that undue hardship would result from mandating any such accommodation, because allowing the plaintiff to violate a criminal statute could expose the school district to criminal prosecution.

This particular issue is not specific to the Third Circuit, as demonstrated by the New York case of *Kalsi v. New York City Transit Authority*.[10] In *Kalsi*, the U.S. District Court for the Eastern District of New York dismissed the plaintiff's accommodation claim because the court found that the defendant-employer had established that undue hardship existed. In this case, the plaintiff's religion—Sikhism—required him to wear a turban at virtually all times and prohibited him from covering his turban with other items of clothing. The plaintiff worked for New York City's Transit Authority as a subway car inspector, a job that required him to wear a hard hat. The plaintiff refused to wear the protective headgear because of the restrictions imposed by his religion, and the Transit Authority eventually fired him for failing to comply with the requirement.

After the plaintiff brought a Title VII accommodation claim against the Transit Authority, the district court accepted both the legitimacy and propriety of the plaintiff's religious belief and found

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judgeships bill attracted bipartisan support, including the support of six Republicans. That bill, introduced in March 2008, well before the presidential election in November, would have taken effect on Jan. 21, 2009, the day after the new President's inauguration. The bill introduced in September 2009 would become law immediately after passage, giving President Barack Obama more opportunities to influence the next generation of the judiciary. Sen. Orrin Hatch (R-Utah), one of the co-sponsors of the 2008 bill, indicated that he would consider co-sponsoring the bill again if the effective date were changed to Jan. 21, 2013.

The last comprehensive judgeships bill was passed in 1990, after a Democratic Congress and a Republican President agreed on an immediate increase. Other bills since then also would have been effective immediately. Another hurdle to the establishment of more judgeships is the fact that there currently are 96 vacancies, and opponents of added judgeships have insisted that these vacancies be filled before new judgeships are added.

The number of judicial vacancies in the federal courts is once again reaching levels of concern. In late October, there were 96 vacancies, with the nominations of 19 judicial nominees pending in Congress. The high number of vacancies is attributable to the time the new administration needs to staff up both within the White House and the Justice Department as well as the time required for the nominees to be recruited through home-state senators and for the White House to vet the nominees.

On a different front, the Judicial Conference in June recommended to Congress the establishment of 13 additional permanent bankruptcy judgeships in 10 judicial districts, the conversion of 22 existing temporary bankruptcy judgeships to permanent positions in 15 judicial districts, and the extension of two existing temporary bankruptcy judgeships for five years. A House judiciary panel held a hearing in June on the bankruptcy judgeships request in June and legislation advancing that request is expected to be introduced in the House soon. **TFL**

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that he had established a prima facie case. The court then considered whether the Transit Authority had demonstrated that accommodating his religious practice would result in undue hardship. The court noted the relatively low burden that employers face under that inquiry: "[s]afety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer's business"[11] And concluded that accommodating the plaintiff would have imposed undue hardship upon the Transit Authority because of the potential costs of serious injury to the plaintiff and others. Moreover, the court found that undue hardship existed because the accommodation would have required the Transit Authority to violate its collective bargaining agreement with the union. Because the Transit Authority demonstrated undue hardship, the court dismissed the plaintiff's accommodation claim.

Finally, in *Riback v. Las Vegas Metropolitan Police Department*, the U.S. District Court for the District of Nevada considered whether it would be an undue hardship for a police department to accommodate the request of the plaintiff, an Orthodox Jewish police officer, to wear a yarmulke while at work.[12] The plaintiff established his prima facie claim and the court analyzed the only remaining issue—whether the police department could establish undue hardship. The police department claimed that it was unable to accommodate the plaintiff's request, because of the need for its officers to retain a religiously neutral appearance in order to appear free of personal bias. Unlike the cases discussed above, the Nevada court denied summary judgment on this issue, because material factual issues remained with respect to whether the police department had truly demonstrated that allowing the police officer to wear a yarmulke while on duty would impose an undue hardship on the department.

These cases reveal that employers will often—but not always—have a strong defense against claims of failure to accommodate an employee's religious practices even when the employee can demonstrate that being disciplined and/or terminated was a result of a policy that conflicted with an honestly held religious belief. Employers with rational policies that are supported by logical and facially neutral justifications should be able to seek refuge in the "undue burden" defense to a claim of discrimination. Accordingly, employers should do their best to ensure that, to the extent that policies conflict with employees' religious requirements, those policies are well-reasoned, based on legitimate justifications, and consistently applied to all employees. **TFL**

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on a dictionary, which is consistent with its decision in *Phillips*, but was careful to instruct district courts that dictionaries cannot be used to contradict the patent. And, in many of the cases in which the Federal Circuit affirmed the district court's claim construction, the Federal Circuit noted with approval that the district court had considered dictionaries.

Even though it is clear that, in a post-*Phillips* world, the use of dictionaries is appropriate at any time during the claim construction process, district courts should be careful that the use of any dictionary definition does not contradict the intrinsic evidence. Courts will be unlikely to err in their use of dictionaries if they first review the claims, then the specification, and then the prosecution history before turning to dictionaries. One can only hope that, after courts have reviewed the intrinsic evidence, they will find that the dictionary definition simply supports the claims construction that was arrived at after reviewing the intrinsic evidence.

Preference for Broader Claim Constructions

It appears that the *Phillips* decision provided guidance to the district courts that brought about greater consistency in their decisions involving claim construction. This consistency and lower rate of reversal since the *Phillips* case should give litigants more certainty about the outcomes of their patent cases. But even with a clear legal standard, reversals of district court claim constructions continue to be high—probably because claim construction is inherently indeterminate. The fact that claim construction is an issue of law that the Federal Circuit reviews de novo also contributes to the high reversal rate, because no deference is given to the district court's decision. From a review of the recent post-*Phillips* cases, district courts can avoid claim construction errors by following the methodology used in the *Phillips* decision and by avoiding importing unnecessary limitations from the specification while applying any specific definitions in the specification.

And, when in doubt, rather than flipping a coin, the district court should adopt the broader of two potential claim constructions, bearing in mind that the Federal Circuit has been more likely to alter a claim to make it more broad than less broad. Finally, the district courts can still use dictionaries—provided the definitions they offer do not contradict the intrinsic evidence. **TFL**

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Endnotes

[1]415 F.3d 1303 (Fed. Cir. 2005) (en banc).

[2]This sample does not take into account any decisions that are summarily affirmed pursuant to Rule 36 (increasing the percentage of decisions that were affirmed) or unpublished decisions (which should have a similar affirmance rate as published decisions).

[3]540 F.3d 1337 (Fed. Cir. 2008).

[4]543 F.3d 1306 (Fed. Cir. 2008).

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Endnotes

[1]*See* 42 U.S.C. § 2000-2(a)(1).

[2]*Webb v. Philadelphia*, No. 07-3081, 2009 U.S. App. LEXIS 7169, at *6 (3d. Cir. Apr. 7, 2009), citing *Shelton v. Univ. of Med. and Dentistry of N.J.*, 223 F.3d 220, 224 (3d Cir. 2000).

[3]*See Sheikh v. Indep. Sch. Dist.* 535, No. 00-1896, 2001 U.S. Dist. LEXIS 17452 (D. Minn. Oct. 18, 2001) (granting summary judgment to defendant-employer because it granted each of plaintiff-employee's requested religious accommodations related to wearing religious headwear).

[4]*Webb*, 2009 U.S. App. LEXIS 7169, at *6.

[5]*Id.* at *7, citing *Trans World Airlines Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

[6]*Id.* at *1–2.

[7]*See* 42 U.S.C. § 2000-2(a)(1).

[8]*United States v. Essex County*, No. 2:09-cv-02772-KSH-MAS (D.N.J.), *complaint filed* June 8, 2009.

[9]*United States v. Bd. of Educ. for the Sch. Dist. of Philadelphia*, Nos. 89-1694, 89-1740, 1990 U.S. App. LEXIS 13629 (3d Cir. 1990).

[10]*Kalsi v. New York City Transit Authority*, No. 94-cv-5757, 1998 U.S. Dist. LEXIS 20062, at *43 (E.D.N.Y. Dec. 22, 1998).

[11]*Id.* at *35, quoting *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 519 (6th Cir. 1975).

[12]*Riback v. Las Vegas Metro. Police Dept.*, No. 2:07-cv-1152-RLH-LRL, 2008 U.S. Dist. LEXIS 62491 (D. Nev. Aug. 6, 2008).