

## When Is Leave for Religious Reasons 'Undue Hardship'?

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In the year following the 9/11 attacks, the percentage of increase in the number of religious discrimination and harassment claims filed with the U.S. Equal Employment Opportunity Commission more than doubled. From 2000 to 2001, claims increased about 9.7 percentage points. From 2001 to 2002 the same claims increased nearly 21 percentage points.

Such claims became so prevalent that the EEOC named them "post-9/11" and/or "backlash" cases. While the frenetic rate of increase has slowed, related headlines are still prevalent. Here are just a few highlights from the EEOC's press releases and announcements for the month of June:

- [Company] agrees to pay \$50,000 for allegations that a store refused an employee's request to wear his yarmulke while at work.
- Hotel agrees to pay \$525,000 for alleged "post-9/11 backlash discrimination" against 12 Muslim, Arab and South Asian employees.
- A Mormon woman who alleges she was no longer permitted to have Sundays off from work to attend church receives a \$23,750 settlement.
- [Company] agrees to pay \$362,000 as a settlement for six Somali Muslim women who alleged their employer failed to provide them with an evening prayer break during Ramadan, the Muslim holy month.
- The EEOC pursues a lawsuit seeking \$50,000 in damages against a local restaurant chain that fired a manager for conducting a Bible-study group that included employees.

Title VII of the Civil Rights Act of 1964 prohibits covered employers from discriminating in employment on the basis of an individual's religious beliefs or practices. It also requires an employer to reasonably accommodate an employee's or prospective employee's religious observance or practice unless the employer "demonstrates that he is unable to without undue hardship on the conduct of the employer's business" (42 U.S.C. § 2000e(j)).

But the phrases "reasonable accommodation" and "undue hardship" are not defined within Title VII, so the definition has evolved through court interpretation, namely the U.S. Supreme Court, and the EEOC's regulations. The Supreme Court defined a reasonable accommodation as one that "eliminates the conflict between employment requirements and religious practices" (*Ansonia*

*Board of Educ. v. Philbrook* (1986)). The Court also held that an accommodation was unreasonable or created an "undue hardship" when it required anything more than a negligible expense (*Transworld Airlines v. Hardison* (1977)).

Following that guidance, the EEOC regulations provide that an employer "may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require more than a *de minimis* cost. The commission will determine what constitutes more than a *de minimis* cost with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation" (29 C.F.R. §1605.2).

## **Practical Implications**

**Scenario #1:** You have an employee that requests time off from work to attend to religious observance or practices. The request includes time to prepare for such activities. Such was the case in *Dachman v. Shalala* (2001), in which an employee requested two hours off from work in advance of the beginning of her Sabbath to run errands and conduct activities related to preparing for her Sabbath. The 4th U.S. Circuit Court of Appeals held that the employer was not obligated to grant the request for the two hours preparatory time, because such time was not a part of the religious obligation but was the employee's preference. That is, preparation could take place the day before the Sabbath.

**Scenario #2:** Take the same scenario as above and presume that the two hours requested for preparatory activities were, in fact, a religious obligation. Now the employee suggests that a co-worker could perform her duties for the two-hour period. Does a reasonable accommodation under Title VII include imposing additional duties on a co-worker? Courts have fairly consistently held that "requiring another employee to assume a disproportionate workload to accommodate a co-worker is an undue hardship as a matter of law" (*George v. Home Depot* (2001)).

**Scenario #3:** Take the same scenario as in #2 above and assume that there is more than one accommodation available. The employee could apply for a transfer to another shift that would not conflict with her work schedule or the employee could find a co-worker with whom to switch shifts. What if the employee states that she cannot find a buddy with whom to switch shifts, feels she should not have to change shifts and asks the employer to find someone with whom she can switch? Must the employer attempt to provide the employee's requested accommodation or may it stick with the original offer to transfer to a different shift that does not conflict with the employee's religion? The U.S. Supreme Court held that the employer's obligation is to offer at least one reasonable accommodation. While the employer certainly may consider multiple options, it is not required to provide the employee with a second or preferred accommodation or "to show that each of the employee's alternative accommodations will result in undue hardship" (*Ansonia*).

## **Same Words, Different Laws**

Do not confuse Title VII's reasonable accommodation standard as described here with the same phrase as it applies to the Americans With Disabilities Act. The definition of undue hardship under Title VII is at a lower threshold than the same term as it is defined under the ADA. Undue hardship under the ADA is defined as a "significant difficulty or expense," rather than anything more than a *de minimis* cost, as under Title VII.

To clarify the different definitions for the same phrase, the EEOC's interpretive guidance states that an employer must show substantially more difficulty or expense under the ADA's standard than would be needed to satisfy the undue hardship requirement for religious accommodation. The congressional record of the passage of the ADA also reveals Congress' intent for the ADA's undue hardship provision was to represent a "significantly higher standard" than Title VII's.

### **So What's An Employer To Do?**

Do not take shelter, solace or comfort in the *de minimis* standard or use it as a shield for defending your refusal to grant a request for religious accommodation leave. Engage in the same interactive dialogue you would for an employee's disability-related accommodation request. Listen to what the employee needs.

Objectively assess the cost or impact to business operations. Creatively consider alternate accommodations. And remember that courts have found in employees' favor in many of these cases such as when an employer was held liable for refusing to grant two employees' requests off from work on Saturdays to observe the Sabbath despite the employer's showing that the absences would result in a loss of money to the company (*EEOC v. Ilona of Hungary, Inc.* (1997)). So consider seeking guidance from your legal counsel before implementing any adverse employment decision.

### **For More Information**

For more on religious discrimination, visit <http://www.eeoc.gov/types/religion.html>.