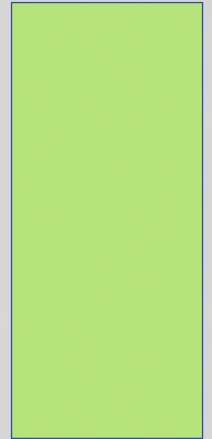


ACCOMMODATING RELIGIOUS  
PRACTICES & BELIEFS  
IN THE WORKPLACE

JULY 2017



# TRAINING GOALS

- What laws require the employer to accommodate?
- What “religion” means under the law?
- How to handle reasonable accommodation requests for sincere and meaningful beliefs?
- How do employers determine if an accommodation imposes an undue hardship?

# POTENTIAL CAUSES OF ACTION

- Failure to Accommodate
- Discrimination because of “religion”
- First Amendment Violations under the U.S. Constitution:
  - Free Exercise Clause
  - Establishment Clause
  - Freedom of Association
- Violation of the Washington Constitution
- Violation of State Collective Bargaining Agreements

**BUT TODAY WE WILL FOCUS ON  
FAILURE TO ACCOMMODATE.**

# FAILURE TO ACCOMMODATE “ELEMENTS”

- A bona fide religious belief that conflicts with job duties
- Employee has informed employer of the conflict
- Responding to the employee’s request by subjecting the employee to threatened or actual discriminatory treatment

# WHAT REQUIRES THE EMPLOYER TO ACCOMMODATE?

## Federal Law

- Title VII of the 1964 Civil Rights Act prohibits agencies from discriminating against individuals, because of their religion in hiring, firing, and the other terms and conditions of employment

## State Law

- Washington Law Against Discrimination (RCW 49.60) is the state version of Title VII that prohibits agencies from discriminating against people because of their creed.

# STATE LAW NOW REFLECTS FEDERAL LAW

- Although the WLAD does not explicitly requires employers to make reasonable accommodations for creed or religious belief, after *Kumar*, employers now have an obligation to accommodate employees for religious beliefs. *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481 (2014)
- This is unlike the employers obligation not to discriminate against a disabled employee by refusing to provide a reasonable accommodation. *See RCW 49.60.222(2)(b).*
- **Significance:** WLAD now mirrors federal law.
- Separate cause of action exists under WLAD

# IS THERE A DEFENSE TO THE EMPLOYER'S TITLE VII OBLIGATION?

- Yes → Undue Hardship Defense.
- An accommodation is an “undue hardship” if it imposes more than a *de minimis* cost on the employer, 29 C.F.R. 1605.2(e)
  - This is a lower standard than under the ADA, i.e. “undue hardship” means “an action requiring significant difficulty or expense”
- Employer carries the burden of proof



# HOW TO DETERMINE UNDUE HARDSHIP?

- Ask
  - Does this request accommodation impose  $>$  than a *de minimis* cost on us?
  - If yes, then know that the employer carries the burden of proof.
- Remember
  - This *de minimis* cost is  $<$  standard under the ADA
  - ADA  $\rightarrow$  “undue hardship” = “significant difficulty or expense”
- The factors later...

# THE TAKEAWAY

- Title VII → Reasonable Accommodation
- Undue hardship → No Reasonable Accommodation
- An employee can bring two causes of action:
  - WLAD = RCW 49.60
  - Title VII of the Civil Rights Act of 1964

**WAIT. WHAT DOES “RELIGION” EVEN  
MEAN?**

# FEDERAL LAW

- Federal Law
  - Title VII Provisions
    - Section 701 (42 U.S.C. § 2000e(j)) → Definition of “Religion”
      - The term “religion” includes all aspects of religious observance and practice, as well as belief

# FEDERAL LAW CONT'D

- EEOC says
  - “Religious” includes more or ethical belief
  - That is sincerely held with traditional religious views
  - Need not believe everything others in same religious group believe

# THE SUPREME COURT OF THE UNITED STATES SAYS

- A “religion” is “[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.” *Welsh v. U.S.*, 398 U.S. 333, 339 (1970).

# “RELIGION” UNDER WASHINGTON LAW

- RCW 49.60.030(1)—Freedom from discrimination—Declaration of civil rights
  - “The right to be free from discrimination because of . . . creed . . .”
- RCW 49.60.030(1)(a)
  - This includes the right to obtain and hold employment without discrimination.
- RCW 49.60.180—Unfair practices of employers
  - Prohibits an employer from discriminating against an employee because of the employee’s religious practices or beliefs.

# NOT DEFINED UNDER WASHINGTON LAW

- Religion or Creed =
  - Sincere and meaningful belief that parallel God in a traditional religion
- Sound familiar?



## A LITTLE BROAD?

- The definition of “religion” is a little broad as it can include:
  - Sincerely held moral and ethical beliefs as to what is right and wrong
  - Beliefs that address ultimate ideas
    - Questions about life, purpose, and death

**“RELIGION” AND “CREED” SOUND LIKE  
MISNOMERS. WHY?**

# BECAUSE...

- Includes many practices
  - **Membership** in an organization or church is not a requirement
- Does not include ideologies
  - It is **okay** for someone ascribing to a **particular religion** may **adhere to different** practices and beliefs than someone in the **same religion**
- Key question: **Does the employee have a sincere and meaningful belief?**

# BUT WHAT COUNTS AS A “SINCERE AND MEANINGFUL BELIEF”?

- HRC examples –
  - Wiccan = sincerely held belief
  - Membership in Ku Klux Klan ≠ a religion

# THE TAKEAWAY

- “A sincere and meaningful belief” is a broad definition that can encompass many belief systems

Belief System	“Sincere and meaningful” belief under the law	Probably not a “sincere and meaningful” belief under the law	Maybe a “sincere and meaningful” belief under the law
Catholicism	<input checked="" type="radio"/>		
Atheism	<input checked="" type="radio"/>		
Islam	<input checked="" type="radio"/>		
Creativity	<input checked="" type="radio"/>		
Pentecostalism	<input checked="" type="radio"/>		
Native American spiritual beliefs	<input checked="" type="radio"/>		
Pastafarianism			<input checked="" type="radio"/>
Dudeism		<input checked="" type="radio"/>	
Bandidoism		<input checked="" type="radio"/>	

# WHAT IS A “REASONABLE ACCOMMODATION”?

- Title VII of the Civil Rights Act does not define “reasonable accommodation”
- This suggests a case-by-case approach
- Meaning that the process should be interactive
  - Both sides must cooperate

## WHAT DOES THAT MEAN?

- Engage in a good faith, interactive process with the employee
- Avoid being indirect when inquiring about more information
- Let the employee know you want to understand their situation and assist

## MORE ON ACCOMMODATION...

- The requested accommodation is not required *unless* it eliminates the conflict
- Meaning that the accommodation must eliminate the conflict without undue hardship
  - [https://www.eeoc.gov/policy/docs/religion.html#\\_ftnref127](https://www.eeoc.gov/policy/docs/religion.html#_ftnref127)
- If more than one possible accommodation exists, the employer must offer one that “least disadvantages the individual’s employment opportunities.” 29 C.F.R. § 1605.2(c)(2)(ii)



# SO WHAT ARE SOME COMMON RELIGIOUS ACCOMMODATIONS SOUGHT?

- Flexible scheduling
  - Arrival, departure, breaks
- Voluntary shift substitutions or swaps
- Job reassignments (lateral transfers)
  - No adverse employment actions! (e.g. firing or reductions in pay)
- Modifications to workplace policies or practices

# A COMMON CATEGORIZATION?

- Accommodations for **appearance**:
  - Religious garb (e.g., turban, modest clothing, headscarf)
  - Religious symbols (e.g., crucifix)
  - Body Adornments (e.g., tattoos, piercings)
- Accommodations for **prayer/worship**:
  - Breaks for praying at work
  - Shift changes for attending services
  - Time off for religious holidays
  - Rescheduling
- Accommodations for **activity restrictions**:
  - Allowing special foods (e.g., kosher, no pork)
  - Schedule certain days/hours (e.g., Sabbath)
  - Use a substitute employee for certain activities (e.g., avoiding filling a customer's morning-after pill)

## IMAGINE THIS

- An employee approaches you, his supervisor, asking to leave work early Friday for an event at his church. The supervisor has some concern about approving the request because, as it turns out, the employee has attendance issues for which the employee has been progressively disciplined. Concerned that under these circumstances a denial might suggest that the agency is discriminating against the employee's religious freedoms, the supervisor reaches out to you, Human Resources (HR).
  - What should you do?

# ENGAGE IN AN INTERACTIVE PROCESS

- Employers may request some type of information to ensure that the employee is sincere
  - Examples
    - A letter from a religious leader
    - Time and duration of daily prayers
    - Written materials
    - Employee's own first-hand explanation
    - Third-party verification from non-church officials or members

# NOTES ON THE INTERACTIVE PROCESS

- **Note:** From a legal perspective, challenging a person's sincerity is difficult. So →
  - Engage in a good faith, interactive process with the employee
  - Avoid being indirect when requesting more information
  - Let the employee know you want to understand their situation and assist
  - The employee must cooperate by attempting to meet his/her religious need through the accommodation if an alternative is presented

# APPLY THE UNDUE HARDSHIP FACTORS

- Type of Workplace
- Nature of employee's duties
- Relevance of the accommodation
- Size and operating costs of the business
  - A manager should look to impact of the accommodation on the agency as a whole—not just the impact on a satellite office
- # of employees impacted by permitting the requested accommodation
- Safety concerns

# WHAT'S THE BEST PRACTICE?

- Do not make assumptions about a belief or practice
- Do not make assumptions about the “best” accommodation

## AND...

- Inform employees that the employer will make a good faith, reasonable effort to accommodate employees' reason of faith or conscience
- Train managers on accommodation needs and responding to requests
- Develop internal policies and procedures for addressing accommodations requests
- Develop a monitoring system
- Treat each request individually
- Once on notice, initiate good faith efforts to accommodate



# DON'T FORGET!

- **Article 18.15 of WA Federation of State Employees Collective Bargaining Agreement (CBA)**
  - **Holidays for a Reason of Faith or Conscience –**
    - **Covered employees are granted up to two (2) workdays per calendar year of leave without pay for a reason of faith or conscience**

## AND...

- **WAC 357-31-052 Holidays and Leave** → Is an employee entitled to any unpaid holidays?
  - Yes.
- **Employees are entitled to two unpaid holidays per calendar year for a reason of faith or conscience or an organized activity conducted**
- **Unless the employee's absence would impose an undue hardship on the employer or the employee is necessary to maintain public safety**
  - “Undue hardship” defined under WAC 82-56-010

# RESOURCES SLIDE

- **EEOC Enforcement Guidance**
  - Section 12: Religious Discrimination <https://www.eeoc.gov/policy/docs/religion.html>
  - What You Should Know About Workplace Religious Accommodation [https://www.eeoc.gov/eeoc/newsroom/wysk/workplace\\_religious\\_accommodation.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/workplace_religious_accommodation.cfm)
- **HRC Enforcement Guidance**
  - Discrimination on basis of creed or religion <http://www.hum.wa.gov/employment/creed-in-employment>
- **Title VII of the Civil Rights Act**
  - <https://www.eeoc.gov/laws/statutes/titlevii.cfm>
- **WLAD**
  - RCW 49.60 <http://app.leg.wa.gov/RCW/default.aspx?cite=49.60>
- **WAC**
  - WAC 162 – Human Rights Commission <http://app.leg.wa.gov/wac/default.aspx?cite=162>
- **Bar Journal Article**
  - Bernard E. Jacques, *Discrimination on the Basis of Religion is Prohibited! But what is Religion?* 82 Conn. B.J. 365 (Dec. 2008).
- **ABA Annual Meeting Section of Labor & Employment Law**
  - Religious Discrimination Law [https://webcache.googleusercontent.com/search?q=cache:HIj4C9yQ0QAJ:https://www.americanbar.org/content/dam/aba/events/labor\\_law/am/2014/8b\\_religious\\_diversity.authcheckdam.pdf+&cd=9&hl=en&ct=clnk&gl=us](https://webcache.googleusercontent.com/search?q=cache:HIj4C9yQ0QAJ:https://www.americanbar.org/content/dam/aba/events/labor_law/am/2014/8b_religious_diversity.authcheckdam.pdf+&cd=9&hl=en&ct=clnk&gl=us)