

ORANGE COUNTY BUSINESS JOURNAL

The Ten Commandments of Religious Discrimination

by Brian Mills, Partner, and Erin Denniston, Associate, Snell & Wilmer L.L.P.

How can employers balance the competing interests of conducting their business when they need to take an employee's religion into account to make workplace decisions? We bring you the top Ten Commandments...

1. Thou shalt not assume a religion unknown to you is not a religion.

Simply because the name of a religion is not known to you or the religion claimed is not a traditional religion does not mean it is not protected under Title VII of the Civil Rights Act of 1964 ("Title VII") and the California Fair Employment and Housing Act ("FEHA"). Religion includes not only traditional, organized religions like Christianity, Judaism, Islam and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical, unacceptable or incomprehensible to others. For example, Wiccan is recognized by courts as a religious belief system. Being an atheist is even protected as a religious belief.

2. Thou shalt not discriminate on the basis of religion.

Both Title VII and FEHA prohibit discrimination based on religion. Examples include: not hiring a qualified applicant because he is Jewish, denying a promotion to a qualified non-Christian or terminating an employee after he discloses he is Buddhist. Specifically, employers may not refuse to recruit, hire, or promote individuals of a certain religion. Employers also may not make adverse decisions regarding an employee's compensation or other terms and conditions of employment based on the employee's religious beliefs.

3. Thou shalt not harass employees based on their religion.

Religious harassment occurs when (1) employees are required or coerced to abandon, alter or adopt a religious practice as a condition of employment or (2) employees are subjected to unwelcome statements or conduct that is based on religion and is so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive. While a consensual conversation about religious views, even if it gets heated, may not constitute harassment, repeated derogatory terms or comments about religious beliefs would likely be considered a form of harassment. Also remember, in California, an employer is strictly liable for religious harassment by a supervisor.

4. Thou shalt make reasonable accommodations for an employee's religious beliefs.

Employers must accommodate employee requests based on genuinely held religious beliefs unless accommodation would be an undue burden. Often these requests include modifications to work policies and schedules, job restructuring, reassignments and/or voluntary work substitutions. In analyzing whether a request is an undue burden, courts may consider the nature and type of accommodation requested, reasonableness of the

notice, cost of the accommodation, the company's financial condition, impact on the company and other employees, type and size of company, effects on workplace safety, conflicts with other laws, effects on any union agreements and the existence of other reasonable accommodations. Accordingly, employers should treat these requests seriously and engage in a timely interactive process to determine if a religious accommodation is reasonable or they may otherwise risk potential legal action.

5. Thou shalt be careful enforcing dressing standards.

Sometimes the employer dress code comes into conflict with employee religious beliefs (e.g. employee wearing Jewish yarmulke,

Muslim headscarf or Christian cross). Employers then need to balance the rights of their employees to practice their religion with the employer's right to manage their business. Courts have found, however, where the impact on the employer's business is minimal, the religious rights of the employee must be respected. Abercrombie & Fitch was found in violation of a Muslim applicant's right to wear a head scarf when it refused to hire her stating that the head scarf was in violation of their "look policy." Similarly, when a Subway sandwich-maker refused to remove her nose ring claiming that her practice of Nuwaubianism prohibited covering or removing the ring, a court found that it was not an undue burden to accommodate her request.

6. Thou shalt be careful enforcing appearance and grooming standards.

Employer appearance and grooming standards often include requiring employees to have their hair cut, face shaved and tattoos covered. Employees, however, may have certain religious beliefs in conflict with these standards (e.g. Rastafarian dreadlocks or Sikh uncut hair and beard). Courts must then decide whether the accommodation of the employee's religious beliefs is an undue burden for the employer. When a Red Robin employee refused to cover his wrist tattoos because he practiced Kemetecism, a court found no undue burden to allow him to show the tattoos. But, when a petroleum company machinist refused to cut his beard because he is Sikh, a court found it was an undue burden because he was unable to use a respirator safely. Employers should therefore be prepared to engage in the interactive process to discuss modifications to their standards when faced with an employee's request for a religious accommodation as well as be prepared to discuss reasonable alternatives (e.g. hair or beard net for employee who works with food).

7. Thou shalt allow employees to participate in religious observances.

Both Title VII and FEHA require employers to accommodate all aspects of religious observance (e.g. time off for religious holidays). FEHA also allows employees to observe a Sabbath or other

Snell & Wilmer
L.L.P.
LAW OFFICES
www.swlaw.com



Brian Mills and Erin Denniston
Brian Mills is a partner and Erin Denniston is an associate in the Employment Group at Snell & Wilmer L.L.P. Mills can be reached at 714.427.7484 or bmills@swlaw.com. Denniston can be reached at 714.427.7008 or edenniston@swlaw.com.



ORANGE COUNTY BUSINESS JOURNAL

religious holy days and reasonable time for travel. This accommodation includes allowing employees to substitute for one another. However, an employer does not have to permit a substitute or swap if it would pose more than de minimis cost or burden to business operations.

8. Thou shalt provide a time and place for employees to pray.

Employees may request time and a place to pray. Often all that is needed is a quiet room for a few minutes each day or a particular day during the week. In most circumstances, an employer can require that this prayer time be done during the employee's established rest breaks or meal periods. Recently, the EEOC (U.S. Equal Employment Opportunity Commission) obtained a consent decree from a chicken processor, which added another break to each workday to accommodate the religious beliefs of Muslim employees who requested to pray at work.

9. Thou shalt treat religious displays in the workplace equally

among religions.

Some employees may want to display religious items or posters at their work stations and the employer is faced with the issue of whether to allow such displays. If an employer allows an employee to display a Bible on her desk but tells another employee to put the Koran on his desk out of view, that may constitute discrimination. They must be treated equally. An employer, however, is not obligated to allow displays of religious items or posters that demean or offend (e.g. graphic anti-abortion button or anti-gay scriptural poster).

10. Thou may have an exception if thou art a religious organization.

As with many things in life there are exceptions to these laws, namely for religious corporations and associations which, under the California Fair Employment and Housing Act, are not considered "employers."