RELIGIOUS ACCOMMODATIONS AND PUBLIC SECTOR EMPLOYEES

California League of Cities

September 8, 2003

Jennifer Brown Shaw, Esq.
Michael J. Christian, Esq.
Sarah R.S. Thomas, Esq.

Jackson Lewis LLP
1215 K Street, Suite 1800
Sacramento, CA 95814
(916) 341-0404
www.jacksonlewis.com
I. INTRODUCTION

Consider the following factual scenarios and how a public sector employer should respond, if at all:

- The City has a mandatory examination that prospective employees must take and pass before being hired. The exam is scheduled for Saturday morning, which conflicts with an applicant’s Sabbath.

- A department supervisor hangs a large cross in his office and usually begins meetings with a moment of reflection.

- Employees complain about co-workers discussing the Bible in the workroom.

- The City Police Department requires all officers to be clean shaven.

- A religious group wishes to use the council chambers for a meeting.

Each of these situations raises issues regarding the place and presence of religion in the public sector workplace. None has an easy answer.

Guidelines and parameters for employers to address religious issues in the workplace are derived from several different sources. First, both state and federal law contain anti-discrimination provisions that specifically include religion as a protected category. Such laws generally provide that employers may not discriminate against individuals because of their religious beliefs or practices and must reasonably accommodate such beliefs and practices unless doing so would cause undue hardship to the employer. Two obvious questions arise. First, how does one define a religion? Second, what constitutes a reasonable accommodation?

With respect to public employees, the issues become even more complex when considering the applicability of the First Amendment of the United States Constitution. The First Amendment protects public employees’ religious expression and prevents the “government” (i.e., public employers) from preferring one religion over another. Thus, for public sector employers, the mandates of the general anti-discrimination laws must be tailored to avoid violations both of the free exercise and non-establishment prongs of the First Amendment.

While articulating the general principles of anti-discrimination laws and the First Amendment is not difficult, applying those principles to everyday situations frequently creates significant problems for employers. This article discusses the nuances of the principles that control religious issues in the workplace and provides case examples and practical suggestions to assist public sector employers in addressing these challenging situations.

II. ANTI-DISCRIMINATION LAWS

The primary federal law governing employment discrimination is Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e-2000e-17. Title VII prohibits covered employers from discriminating against an individual because of race, color, religion, sex, or national origin.
42 U.S.C. §§ 2000e-2(a)-(d). “Covered employers” include any persons engaged in an industry affecting commerce who have 15 or more employees for each working day in 20 or more weeks of the current or preceding year. 42 U.S.C. § 2000e(b). “Persons” explicitly includes governments or governmental agencies. 42 U.S.C. § 2000e(a).

In general, the employment practices prohibited by Title VII include the discriminatory failure or refusal to hire or refer for employment, discriminatory discharge, and other discriminatory acts with respect to compensation, terms, conditions, or privileges of employment. 42 U.S.C. § 2000e(a)-(c). Courts have interpreted this last clause to include situations in which an employee is subject to a hostile work environment due to harassing conduct based on a protected characteristic, such as religion. See, e.g., Venters v. City of Delphi, 123 F.3d 956, 972 (7th Cir. 1997). Title VII also imposes an affirmative duty on an employer to accommodate an individual’s religious beliefs or observances. 42 U.S.C. § 2000e(l). Furthermore, Title VII explicitly prohibits retaliation for opposition to employment discrimination. 42 U.S.C. § 2000e-3(a).

The foremost employment discrimination law in California is the Fair Employment and Housing Act (“FEHA”). Cal. Govt. Code §§ 12900 et seq. FEHA’s basic religious discrimination provisions are consistent with Title VII. In relevant part, FEHA provides it shall be an unlawful employment practice “for an employer, because of the . . . religious creed . . . of any person to refuse to hire or employ the person, to bar or discharge the person from employment . . . or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.” Cal. Govt. Code § 12940(a).

FEHA further provides that it is an unlawful employment practice for an employer “to refuse to hire or employ a person . . . or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person’s religious beliefs or observances and any employment requirement unless the employer . . . demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance . . ., but is unable to reasonably accommodate the religious belief or observance without undue hardship.” Cal. Govt. Code § 12940(l). As with Title VII, FEHA also prohibits harassment based on a religious belief and retaliation for opposing any unlawful employment practices. Cal. Govt. Code §§ 12940(h) and (j).

FEHA discrimination provisions apply to employers with five (5) or more employees, and its harassment provisions apply to any employer, regardless of size. Cal. Govt. Code 12926(d), 12940(j)(4)(A). FEHA explicitly covers the “state or any political or civil subdivision of the state and cities.” Cal. Govt. Code § 2926(d).

California public sector employers must comply with both Title VII and FEHA, and employees may pursue discrimination claims under either or both Title VII or FEHA. In California, more lawsuits generally are filed pursuant to FEHA because: (1) the monetary remedies for Title VII violations are capped, and (2) as to most protected characteristics, FEHA protections are broader. Interestingly, however, some of the relevant definitions regarding religion in Title VII are broader than similar definitions in FEHA.
Whether Title VII or FEHA is at issue, the first question is what constitutes a protected religious belief. As outlined below, this is not necessarily an easy question, and federal and state law differs in this respect.

A. **What is a Protected Religious Belief?**

What constitutes a protected religious belief? Consider the following:

- A nurse at a state hospital refuses to obtain a mumps vaccine that is grown from chicken embryos, citing her veganism.
- A member of the National Guard refuses to go to war on the basis that confrontation is against her spiritual beliefs.
- A state employee claims Rastafarianism requires he wear dreadlocks, which is prohibited by department policy.

Are protected “religious beliefs” implicated in these situations? California and federal law provide guidance in this difficult area.

1. **California’s Definition of Protected Religious Belief**

Guidance as to what constitutes a protected religious belief under California law can be found in statutory, regulatory, and decisional law. FEHA defines “religious belief or observance” to include observance of Sabbath or other religious holy days, and reasonable time necessary for travel prior and subsequent to a religious observance. Cal. Govt. Code § 12940(i).

The Fair Employment and Housing Commission, the administrative agency charged with enforcing FEHA, also has enacted regulations to define a protected “religious creed.” The regulations provide FEHA’s protections extend beyond traditionally recognized religions to include “any traditionally recognized religion as well as beliefs, observations, 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.” Cal. Code Regs., tit. 2, § 7293.

As noted by the California Court of Appeal in *Friedman v. Southern California Permanente Medical Group*, 102 Cal.App.4th 39 (2002), the determination of what is a religious belief or practice is “more often than not a difficult and delicate task.” In *Friedman*, the Court provided guidance to employers on how to determine whether an employee’s beliefs, observances, or practices are protected under state law.

Jerold Friedman was a strict vegan. As a condition of his employment, Friedman was required to obtain a mumps vaccination that was grown in chicken embryos. Friedman refused to be vaccinated claiming the vaccination would violate his system of vegan beliefs, including the belief that it is immoral and unethical for human beings to kill and exploit animals, even for food, clothing, and the testing of product safety. Because of his refusal, Friedman was terminated, and he filed suit alleging religious discrimination.
In upholding the lower court’s decision that Friedman’s beliefs were not a protected religious creed under FEHA, the California Court of Appeal adopted the test used by the Federal Court of Appeals for the Third, Eighth, Ninth and Tenth Circuits with regard to Title VII. The test examines whether the individual’s religious belief: (1) addresses fundamental and ultimate questions having to do with deep imponderable matters; (2) is part of a religion that is comprehensive in nature and consists of a belief system as opposed to an isolated teaching; and (3) can be recognized by the presences of certain formal and external signs. The Court of Appeal found that Friedman’s beliefs met none of these criteria.

First, even though the Court believed Friedman’s beliefs were based upon sincerely held moral and ethical considerations, Friedman’s belief system (as described by him) made no reference to issues addressing the meaning of human existence, the purpose of life, theories of humankind’s existence, or matters of life or death.

Second, while Friedman’s belief system governed his day-to-day behavior, including what he ate and the clothing he wore, it did not derive from a power, being, or faith to which all else was subordinate and, thus, was not sufficiently comprehensive to fall within the California definition of “religious creed.”

Finally, the Court of Appeal found that vegans had no formal or external signs of a religion: no teachers or leaders; services or ceremonies; orders of worship or articles of faith; and no holidays. A quite different result might have attained if Friedman were not a vegan, but a Jane, a member of an Eastern religious group that holds any injury to an animal – including insects – is to be avoided. It is not the particular belief which drives the result, but the relationship of that belief to a wider belief system and the relation of that belief system to the regulatory language.

2. **Federal Definition of Protected Religious Belief**

Compared to FEHA, Title VII and its applicable regulations, 29 C.F.R. section 1605.1 et seq., interpret the term “religion” more broadly to include “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”

Federal courts have concluded that Title VII leaves little room for an employer to challenge the religious nature of an employee’s professed beliefs and that purely moral and ethical beliefs can be religious so long as they are held with the strength of religious convictions. Under federal interpretations, the fact that no religious group espouses such a belief, or the religious group to which the individual professes to belong may not accept such a belief, is not a deciding factor in whether the belief meets the statutory definition. Indeed, under 29 C.F.R. section 1605.1, a strongly-held moral or ethical view may qualify as a religious belief even though the view is essentially political, sociological, or economic. That clearly is not the case in California after the Friedman decision.

The scope of Title VII in this regard is broad. For instance, Satanism has been recognized as a religion such that prisoners were entitled to a three-inch metal bell as an
instrument of their faith; the Five Percent Nation of Islam received protection as a religious group; and Rastafarianism has been adjudged to be a religious ideology entitled to protection.

B. What is a Reasonable Accommodation?

Consider the following:

- Because of Sabbath, an employee requests not to be placed on the schedule to work on Saturdays.
- Based on his religious beliefs, a truck driver requests he not be required to make overnight runs with female truck drivers.
- Because of his religious beliefs, a Native American employee requests he be able to keep his hair long and tuck it into his collar despite a policy requiring men to wear shorter hair.

Under state and federal laws, once an employee has requested an accommodation of his or her religious beliefs or practices, the employer must grant the accommodation unless the employer can demonstrate the accommodation would cause an undue hardship. Pursuant to the California Code of Regulations, reasonable accommodations may include job restructuring, job reassignment, modification of work practices, or allowing time off to avoid a conflict with the employee’s religious observations. Cal. Code Reg., tit. 2 § 7293.3. Examples under federal regulations include voluntary substitutes and shift swaps, flexible scheduling, and lateral transfers or change of job assignments. 29 U.S.C. § 1605.2.

As an initial matter, an employer generally should not question an individual’s alleged religious beliefs. Rather, the employer should begin by determining if a reasonable accommodation is possible. The duty to accommodate is triggered only when an employee or applicant makes a request for an accommodation or the employer is aware of facts demonstrating the need for the accommodation. Once the duty is triggered, the employer must consider the possible alternative accommodations and make suggestions to the employee.

In determining the appropriate accommodation, the employer is not required to select the employee’s preferred accommodation. Rather, the employer may select any reasonable means of accommodation so long as the accommodation eliminates the conflict between the individual’s religious beliefs and the employment requirement. Accommodations that do not eliminate the conflict are not considered “reasonable” accommodations. For example, one court has held that an employee whose religious beliefs require her to be home on Sabbath and not do any work from sundown on Friday through sundown on Saturday was not reasonably accommodated by her employer’s suggestion that she only receive a 2½ hour break on Saturday to attend religious services. See Graves v. Nordstrom, 1964 U.S. Lexis 2 1615 at 2-3 (N.D. Cal. 1994) (not officially published).

As a general rule, there must be more than an ancillary connection between the requested accommodation and the religion. For example, one court determined that an employee’s reasons for requested leave—to decorate her church hall and to prepare students for a
Christmas play—did not constitute protected religious observances. **Heller v. EBB Auto Co.,** 8 F.3d 1433 (9th Cir. 1993). Similarly, another court found that the U.S. Food and Drug Administration (FDA) was not required to grant an Orthodox Jewish doctor time off from work to prepare for the observations of the Friday Sabbath. The doctor was granted two hours of leave every Friday so she could be home before sundown; however, the FDA refused the doctor’s request for additional time to cook food, bathe her children, lay out clothes, and prepare her home for the Sabbath. **Dachman v. Shalala,** 2001 U.S.App. Lexis 9888 (4th Cir. 2001) (not officially published).

In another case, the court ruled that the timing of an employee’s religious pilgrimage was a matter of personal preference rather than religious belief and therefore no Title VII violation occurred when the employee was terminated for leaving work to participate in the pilgrimage. **Tiano v. Dillard Dept. Stores, Inc.,** 139 F.3d 674, 682 (9th Cir. 1988). Each of these rulings was based on the courts’ determination that the acts at issue were essentially social and family obligations and not religious in nature.

### 1. **Undue Hardship**

A refusal to accommodate an employee’s religious beliefs is only justified when the employer can demonstrate an undue hardship would result from granting the request. Under California regulations, in determining whether an accommodation would impose an undue hardship, the following factors must be considered: (1) the size of the employer (including the number of employees, number and type of facilities, and size of budget); (2) the type of the employer’s operation, including the composition and structure of the workforce; (3) the nature and cost of the accommodation involved; (4) the reasonable notice to the employer of the need for any accommodation; and (5) any available reasonable alternative means of accommodation. With respect to the cost factor, the cost must be “more than de minimis” to justify denying a reasonable accommodation request. Cal. Code Reg., tit. 2 § 7293.3.

The United States Supreme Court’s decision in **Transworld Airlines, Inc. v. Hardison,** 432 U.S. 63 (1977) (“TWA”), is one of the leading cases regarding reasonable accommodations. Hardison requested an accommodation so he would not have to work on Saturday, his Sabbath day. The Court held that the accommodation was not “reasonable” because it would violate the seniority system established in Hardison’s union contract. In addition, the Court found that such an accommodation would not be reasonable if the employer had to pay a substitute for Hardison at premium rate of pay.

The Ninth Circuit Court of Appeals has added a gloss on this issue. In **Opoku Boateng v. California,** 95 F.3d 1461 (9th Cir. 1996), the Ninth Circuit found the employer failed to establish an undue hardship when the employee had proposed accommodations, including excluding him from Sabbath work and scheduling for other equally-undesirable shifts, adopting a system of voluntary or mandatory shift trades, employing a combination of the above procedures, and arranging a transfer to another department that could provide such an accommodation.

Finally, even though **TWA** was interpreted by some courts to mean that the existence of a seniority system obviated the need to provide an employee a reasonable
accommodation, the Ninth Circuit in Balint v. Carson City, 180 F.3d 1047 (9th Cir. 1999) ruled otherwise. According to the Ninth Circuit, if an accommodation can be achieved short of interfering with the seniority system with no more than a de minimis cost to the City, it must be considered.

2. Employees’ Responsibilities with Respect to Reasonable Accommodation

An employee must make a good-faith attempt to meet his or her religious needs through the accommodation offered by the employer. For example, in Vargas v. Sears, Roebuck & Co., 1998 U.S. Dist. LEXIS 21148 (E.D. Mich. 1998) (not officially published), when a Native-American employee refused to cut his hair as required by the employer’s grooming policy, the employer suggested the accommodation of tucking his hair into the collar of his shirt. The employee refused, and was terminated. In dismissing the employee’s case, the court found the employer made a good-faith effort to accommodate the employee’s religious beliefs through the suggested accommodation.

III. CONSTITUTIONAL PROTECTIONS AND THE FIRST AMENDMENT

Consider the following:

- An employee complains other employees are holding Bible studies in the lunch room.
- A supervisor only promotes employees who attend his church.
- A city council says a prayer before every council meeting.

Public sector employees’ religious freedoms are protected by the First Amendment, which is applicable to state and local governments by virtue of the Fourteenth Amendment. These freedoms include the right to speak about religious subjects. The Free Speech Clause of the First Amendment also prohibits the government from singling out religious expression for disfavored treatment.

Section 4 of Article 1 of the California Constitution similarly protects a public employee’s religious freedoms and guarantees “free exercise and enjoyment of religion without discrimination or preference.” Section 4 also provides that “the legislature shall make no laws respecting the establishment of religion.” See, e.g., Vernon v. City of Los Angeles, 27 F.3d 1385 (9th Cir. 1994) (California Constitution provides greater protection to religious liberty than does the United States Constitution).

A. Constitutionally-Protected Religious Expression

The scope of public employees’ religious expression not only encompasses the right to speak freely about their religion, but also the right to wear symbols of their faith, hang religious posters or artifacts within their personal workspace, and hang religious materials in the office, subject to certain limitations.
Although the First Amendment strictly protects freedom of expression, when the government acts as an employer, it has certain latitude to protect its operations and policies from being subverted by its own personnel. “First Amendment rights are implicated only when a public employee’s speech relates to matters of public concern.” Sanguini v. Pittsburgh Bd. of Educ., 968 F.2d 393, 397 (3rd Cir. 1992). Once public concern is determined, to resolve conflicts between the First Amendment rights of public employees and the interests of their government employers, courts engage in a test that balances the interest of the employee as a citizen against the interest of the “state” as an employer in promoting the efficiency of the public services it promotes. See, e.g., Pickering v. Board of Education, 391 U.S. 563 (1968).

Generally, a public employee receives greater speech protection when expressing views on matters of public concern than when commenting on employment matters of personal or internal interest. See, e.g., Tucker v. Cal. Dep’t of Ed., 97 F.3d 1204 (9th Cir. 2002). Public employers possess substantial discretion to impose content-neutral and viewpoint-neutral time, place, and manner rules regulating employee expression in the workplace. Further, employee speech can be regulated or discouraged if it impairs discipline by superiors, has a detrimental impact on the close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the employee’s duties or interferes with the regular operation of the enterprise, or demonstrates that the employee holds views that could lead his employer or the public reasonably to question whether he can perform his duties adequately. See, e.g., Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (White House, 1997).

B. The Establishment Clause

The First Amendment’s Establishment Clause may become an issue in various situations. For example, the Establishment Clause may be implicated when religious organizations wish to use public meeting areas to congregate, when public employees seek to proselytize regarding their religion in public areas, or when an employer permits certain items of worship to adorn public buildings.

Government neutrality toward religion is the hallmark of the First Amendment religion clauses. See, e.g., Bd. of Educ. v. Grumet, 512 U.S. 687, 696 (1994). When determining whether a public employer has engaged in conduct that violates the Establishment Clause, courts have determined the clause is not violated if the regulation or action engaged in by the employer does not have the purpose or effect of advancing or inhibiting religion. See Zelman v. Simmon-Harris, 536 U.S. 639, 648-49 (2000).

Numerous court decisions involve the scope of a public employer’s right to display religious items in the workplace, such as during religious holiday displays. For example, in Spohn v. West, 2000 U.S. Dist. Lexis 14290 (S.D. N.Y. 2000) (not officially published), the plaintiff filed suit against his employer, the Department of Veterans Affairs Medical Center, challenging the legality of holiday displays the employer exhibited during the December holiday season. Specifically, Spohn, who is a Catholic, challenged the employer’s display of Jewish holiday items, but no Christian items, in public areas of the hospital. Spohn claimed this violated the Establishment Clause. The court stated that whether the employer violated the Establishment Clause depended on whether a “reasonable observer” of the display in its particular context
perceived a message of governmental endorsement or sponsorship of religion. Thus, public employers may acknowledge Christmas, Chanukah, and other similar days from a cultural perspective, but under the First Amendment, the employer may not observe such holidays as religious holy days or in any manner that endorses any specific religious doctrine.

In Cammack v. Waihee 1991 U.S. App. Lexis 18115 (9th Cir. 1998) (not officially published), the Ninth Circuit found that there was no Establishment Clause violation by the state of Hawaii when it made Good Friday a state holiday. The court held that because the statute had a legitimate, sincere, secular purpose of providing an additional holiday and was not motivated by an impermissible purpose. Furthermore, the court held so because the effect was secular and there was no entanglement with religion in the closure of state offices on Good Friday.

IV. COMMON WORKPLACE SITUATIONS

A. Dress and Grooming Standards

California regulations provide that “dress standards or requirements for personal appearance shall be flexible enough to take into account religious practices.” Cal. Code Reg., tit. 2, § 7293.3. In Bhatia v. Chevron USA, Inc., 734 F.2d 1382 (9th Cir. 1984), the court required the employer to offer reasonable accommodations (including different positions in the company) to a Sikh employee because his religious beliefs prohibited the cutting or shaving of body hair. The employee worked in a position that required the wearing of a respirator. As a means of improving the seal between the respirator mask and the employees’ faces, the employer enacted a requirement that employees shave all facial hair. The employee objected on the basis of his religious belief and the employer refused to accommodate him. The court ruled the employer had not reasonably accommodated the employee.

Of course, such an accommodation might not be reasonable in a fire department that requires all employees to be capable of responding to fires under OSHA standards (which require the use of self-contained breathing apparatus). Whether a particular accommodation is reasonable, and thus required, turns on the specific facts regarding the employer’s need and the employee’s religious beliefs

B. Proselytizing

A particularly interesting issue with respect to religious accommodation is religious proselytizing in the workplace. While employees have certain First Amendment rights of expression, a balance must be achieved between employees’ protected speech and employers’ legitimate business interests.

The Ninth Circuit Court of Appeals specifically has held the First Amendment does not require public employers to tolerate policy-level officials who engage in conduct that is inconsistent with the policies they carry out. For example, in Lumpkin v. City of San Francisco, 109 F.3d 1498 (9th Cir. 1997), the City removed Reverend Lumpkin from the San Francisco Human Rights Commission when, based upon his religion, he made public statements condemning homosexuality.
In deciding whether the City’s removal of Lumpkin was lawful, the court employed a balancing test, “[when weighing] the City’s interest in eliminating prejudice and discrimination against Reverend Lumpkin’s First Amendment interest in condemning homosexuality as sin while serving as a voting member of the Human Rights Commission, the conclusion is inescapable that the City’s interest prevails.” See also Tucker v. Cal. Dep’t of Ed., 97 F.3d 1204 (9th Cir. 1996) (general ban on employees’ engaging in oral religious advocacy violated the employees’ freedom of speech as guaranteed by the First Amendment because the employer was unable to identify any interest in such a restriction that outweighed the employees’ interest in the speech.)

Similarly, in Knight v. Connecticut Dept. of Public Health, 275 F.3d 156 (2nd Cir. 2001), the court found that a public employer’s interest in avoiding disruption stemming from employees’ religious proselytizing outweighed the employees’ right to engage in religious expression. In Knight, a nurse consultant and a sign language interpreter who described themselves as born-again Christians felt called to proselytize while working with clients. Both were reprimanded and filed suit, claiming numerous constitutional violations. The court held the state may reasonably place restrictions on the employees’ ability to speak about religion with clients without infringing on the employees’ constitutional rights.

The employer’s interest does not always prevail, however. In Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995), an employee was terminated in large part because: (1) he directed his secretary to type Bible study notes for him; (2) he opened the main office early in the morning to allow several employees to join in a prayer session; and (3) he and several other employees recited prayers together and made references to Biblical passages during department meetings.

In evaluating the employee’s claim that his termination constituted religious discrimination, the Eighth Circuit ruled it would have imposed an undue burden on the County to allow the employee to direct his secretary to type the Bible study notes or to open the main office prior to the workday for prayers as such activities. However, the court took a different approach with respect to the conduct in the employee’s office during the workday. In that regard, the court found the prayers, affirmations of Christianity, and references to Bible passages related to slothfulness and “work ethics” during department meetings were protected by the First Amendment. In the court’s view, permitting such expression did not place an undue hardship on the County so long as the employee’s personal decisions were not affected by his religious beliefs.

C. Religious Items in the Workplace

The First Amendment protects the right of public sector employees to maintain items with religious messages in their personal workplaces, subject to certain limitations. In Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995), the court held the County violated the First Amendment when it demanded an employee remove a Bible and plaques containing the serenity prayer, the Lord’s prayer, and one that contained the phrase, “God be in my life and in my commitment,” because such items could be “offensive” to other employees. In the court’s view, the County failed to demonstrate any disruption of work or any interference with the efficient performance of government functions sufficient to justify the removal of the items from the
workplace. Even if employees found the displays offensive, the County could not remove the items if the offensiveness was based on the content of the items’ message.

D. **Symbolic Religious Dress**

Generally, employees’ symbolic speech, including, for example, wearing rosary beads, a cross, or the Star of David, is protected by the First Amendment, and employers are required to provide such employees reasonable accommodation. See, e.g., Chalifoux v. New Caney Ind. School Dist., 976 F. Supp. 659, 665-666 (S.D. Tex. 1997).

However, such protections are limited. For example, in Daniels v. City of Arlington, 254 F.3d 72 (5th Cir. 2001), a police officer wore a gold cross pin to symbolize his Christianity. The police department allowed him to wear the pin when he was in “plain clothes,” but refused to allow him to wear the pin with his uniform, pursuant to a policy prohibiting any adornments to uniforms. When the officer requested an accommodation with respect to the policy, the department suggested he wear the pin under his uniform shirt, or on a ring or a bracelet, and refused to grant the accommodation. The officer sued, and the court ruled in the department’s favor, finding that police, military, and similar employers have a heightened interest in maintaining an unadorned uniform as “a symbol of neutral government authority, free from expressions of personal bent or bias.”

E. **Use of Bulletin Boards**

The definition of “workplace” with respect to religious accommodations is an interesting element of the accommodation analysis. For instance, in Tucker v. Cal. Dep’t of Ed., 97 F.3d 1204 (9th Cir. 1996), the court recognized an important distinction between restricting employees’ speech at the workplace and “prohibiting employees from using the state’s walls, tables, or other space to post messages or place materials.” In the court’s view, while the government has “a greater interest in controlling what materials are posted on its property,” religious speech must be given the same protections as secular speech. Therefore, if an employer allows employees to post non-religious materials around the office, it cannot prohibit the posting of religious materials. The court found that allowing secular speech while prohibiting advertising for religious events is “unreasonable. . . because its sole target is religious speech.”

V. **PRACTICAL SUGGESTIONS**

As the guidelines and examples addressed in this article illustrate, employers who are faced with religious accommodation requests must take such requests seriously and understand the legal implications of their decisions in this area. Employers who receive a request should immediately begin a process of analyzing if an accommodation is required, what accommodations are available, and the consequences of implementing the accommodations that involve dialogue with the employee. The ultimate decision as to the appropriate accommodation obviously depends on the facts surrounding each request. However, employers should keep the following general guidelines in mind when considering accommodation requests:

1. Immediately acknowledge the conflict or request and inform the employee the issue is being examined;
(2) keep the employee informed throughout the process and work with the employer to identify possible accommodations;

(3) respect the employee’s privacy rights and keep the conflict, request, and accommodation process as confidential as possible;

(4) be creative in terms of possible accommodations;

(5) disregard whether others in the workplace agree or disagree with the alleged religious belief;

(6) be consistent; and

(7) document the reason for the ultimate decision and the evidence supporting it.

More specifically, the following principles should guide employers’ decisions regarding the accommodation of employees’ religious beliefs and practices in the workplace.

**Religious expression.** Employees should be permitted to engage in private religious expression in their personal work areas (those areas not accessible to the general public) to the same extent they may engage in nonreligious private expression, subject to reasonable viewpoint-neutral time, place, and manner restrictions. For example, an employee should be permitted to keep a Bible or Koran at her desk to read during breaks. However, an employer may restrict all posters in work areas, even religious-based posters, so long as the same standard applies to all posters in the work area.

Similarly, employees should be permitted to engage in religious expression with co-workers to the same extent they may engage in non-religious expression, so long as the expression does not interfere with workplace efficiency. For instance, employers may not adopt rules prohibiting certain religious speech in work areas unless the same rules are applied to non-religious speech. Also, employees are entitled to wear religious buttons and jewelry so long as workplace efficiency is not adversely affected.

The same rules generally apply to expression directed toward fellow employees. Employees (other than supervisors) should be permitted to engage in religious expression with one another, including discussions of personal religious beliefs and practices and even proselytizing, unless the expression becomes harassing in nature and may create a hostile work environment if allowed to continue. At that point, the employer must become involved and reasonably regulate the offensive behavior.

Employee religious expression in work areas that are accessible to the public creates establishment clause concerns. Employers may regulate such expression to ensure the public reasonably understands the expression is personal and does not create the impression the government is sponsoring or endorsing any particular religion. However, even in workplaces

---

1 These principles are based on the “Guidelines on Religious Exercise and Religious Expression in the Federal Workplace” issued on August 14, 1997, by the White House.
open to the public, not all private employee religious expression is forbidden. For example, employees should be able to wear personal religious jewelry absent special safety circumstances. Employees should also be able to display art and literature in their private workplace to the same extent they may display other art and literature so long as the viewing public reasonably understands the religious expression to be that of the employee and not the government.

**Religious discrimination.** As discussed throughout this article, there are various issues employers must consider with respect to religious discrimination. First no public employer may discriminate against an employee or potential employee because of her religion, religious beliefs, or views concerning religion. So, for example, a public employer may not refuse to hire individuals because of their religious beliefs, or impose stricter performance or discipline standards on certain employees because of their religious beliefs.

In addition, public employees may not be “coerced” to participate in religious activities by management. For instance, a supervisor may not directly or indirectly insist another employee participate or not participate in religious activities, whether those activities are inside or outside the workplace. So, while a supervisor may casually invite an employee to attend his son’s bar mitzvah or express his religious views regarding abortion, the supervisor may not comment, “I didn’t see you at temple this week. I expect you will be there next week.” Similarly, while a supervisor may post an announcement on the office bulletin board regarding an Easter service at her church (if that bulletin board is otherwise open to non-workplace-related postings), the supervisor should not circulate a memorandum encouraging employees to attend so they will have the opportunity to “bond” with the supervisor.

**Hostile work environment and harassment.** Employees are protected under both federal and state laws from being subjected to a hostile work environment on the basis of their religious beliefs or practices. Conduct such as religious intimidation or pervasive or severe religious ridicule or insult, whether by supervisors or fellow employees, must not be tolerated. Mere expression of speech with which some employees may disagree, however, will not by itself create a hostile work environment and employees’ right to engage in such expression must be reasonably regulated so that the complaints of non-religious employees are not a pretest for anti-religious discrimination.

For example, if an employee makes derogatory comments to co-workers about their faith (or lack thereof), or repeatedly brags about his sex life (knowing such comments likely will cause discomfort to religious co-workers), the employee is violating the employer’s harassment prevention policy and the behavior must be corrected. However, such behavior must be distinguished from situations in which employees wear religious jewelry, medallions, or buttons, for instance, which typically are personal expressions and do not by themselves violate employer policies or the law. Similarly, if an employee displays a picture of Jesus and the text of the Lord’s Prayer in her private work area, such conduct, without more, does not create a hostile work environment for employees who do not share such views, even if those employees are upset or offended by the conduct.

**Accommodation of religious exercise.** All employers must reasonably accommodate employees’ exercise of their religious beliefs and practices unless doing so would impose an undue hardship on the employer. In considering a request for accommodation,
employers must consider the actual cost or disruption to the employer’s operations, and may not deny such a request based on the hypothetical impact of the accommodation. Employers also must ensure their policies and procedures in this regard are applied consistently throughout their organization, and do not favor one religion over another, or religion over non-religion or vice versa.

For example, upon a request by an employee, an employer must adjust work schedules to accommodate the employee’s religious observance if the employee’s absence will not cause an undue hardship. In other words, so long as another employee can work in the employee’s place, or the employer can do without the employee for the specified period of time, the accommodation should be granted. Similarly, employees should be permitted to wear religious dress and other garb unless doing so would interfere with workplace operations (public safety officers required to wear uniforms, as discussed above, are an exception to this rule). Also, employees who ask to be excused from particular assignments because of their beliefs, or who want to meet as a group on their breaks to discuss religious matters, should be accommodated unless the employer can show doing so would result in an undue hardship.

One particularly difficult issue involves workplace employer rules that impose a substantial burden on an employee’s exercise of religion. For instance, if a County requires all correctional officers to wear short hair (or hair pulled back), and an employee requests an accommodation to wear his hair long, the County must consider whether denying the request is the least restrictive means of preserving safety, security, discipline, or other compelling interests. Similarly, Jehovah’s Witness should not be compelled to take a loyalty oath if doing so is contrary to her religious beliefs.

Establishment of religion. All public sector employers must reasonably regulate the expression and activities of employees that an observer likely would interpret as a government endorsement or denigration of a particular religion. Various factors, including the context of the expression and whether official channels of communication are used, are relevant to determining what a reasonable observer would conclude.

For instance, if an individual supervisor places a wreath on the door to her office during the Christmas holiday, such conduct is not likely to be considered government endorsement of Christianity. However, if the same wreath were placed on the door to City Hall, a reasonable observer could conclude otherwise.

VI. CONCLUSION

Reasonably accommodating an employee’s religious beliefs and practices can pose a significant challenge. Striking the appropriate balance between rights of free expression and free exercise of religion, on the one hand, and an employer’s ability to reasonably and fairly regulate conduct in the workplace and the obligations of a public employer under the establishment clause, on the other, can be difficult at best. To achieve this balance, employers should familiarize themselves with both the relevant laws and their own internal policies and procedures regarding religious accommodations in the workplace. In addition, management should work with staff counsel, personnel directors, and others, to ensure employees are treated fairly and appropriately in all areas of religious accommodation.