Elimination of Bias Related to Religion

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Notes:

ELIMINATION OF RELIGIOUS BIAS IN THE PRACTICE OF LAW

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I.

Introduction

Religion is a deeply personal, often sensitive and sometimes controversial topic that engenders strong feelings. Attorneys may share these feelings, but California Rule of Professional Conduct 2-400 prohibits a member from unlawfully discriminating or knowingly permitting unlawful discrimination on the basis of religion in the management or operation of a law practice. This paper introduces California attorneys to the laws prohibiting religious discrimination, explores how these laws and duties impact management of a law practice, and discusses strategies a law office can implement to comply with its legal and professional duties.

II.

Religious Bias in the United States

Allegations of religious bias are abundant in the United States. According to the Federal Bureau of Investigation, one in five hate crimes reported in 2012 were due to religious bias, stemming mostly from anti-Semitic (59.7%) and anti-Islamic (12.8%) prejudice.[1] Immediately

[1] Federal Bur. of Investigation Crim. Justice Information Services Div. (2013) 2012 Hate Crime Statistics, Incidents and Offenses < http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/topic-pages/incidents-and-offenses/incidentsandoffenses_final> (as of July 21, 2014) & Table 1: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/tables-and-

following the 9-11 attacks, the number of religion-based discrimination claims involving Muslims reported to the Equal Employment Opportunity Commission ("EEOC") increased by 250% percent, and the total number of reported religion-based discrimination claims has steadily increased since.[2] Indeed, the agency itself filed nearly 90 lawsuits in the past decade predicated on religious discrimination against Muslim, Sikh, Arab, Middle Eastern, and South Asian communities."[3]

The legal community is not immune from allegations of religious bias. Some fear the religious beliefs of judges impair their ability to impartially adjudicate certain cases. For example, when five out of the six Roman Catholic justices on the Supreme Court upheld a closely-held corporation's challenge to the contraception requirement of the Affordable Care Act in *Burwell v. Hobby Lobby*, some in the media decried the decision as religiously motivated. The New York Times published an article questioning the influence of the justices' religion on their decision and suggested that the Roman Catholic justices were less impartial than their Jewish colleagues.[4] Even federal judge Richard George Kopf weighed in on the effect he believes the decision would have on perceptions of the justice system: "The decision looks religiously motivated because each member of the majority belongs to the Catholic Church, and

datadeclarations/1tabledatadecpdf/table_1_incidents_offenses_victims_and_known_offenders_by_bias_motivation_2012.xls> (as of July 21, 2014).

[2] Equal Employment Opportunity Com., *What You Should Know about the EEOC and Religious and National Origin Discrimination Involving the Muslim, Sikh, Arab, Middle Eastern and South Asian Communities* <http://www.eeoc.gov/eeoc/newsroom/wysk/religion_national_origin_9-11.cfm> (as of July 21, 2014); Equal Employment Opportunity Commission, Charge Statistics FY 1997 Through FY 2013 <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (as of July 21, 2014).

[3] Bean, *Rise in religious bias claims forces analysis of a multitude of sins* (April 20, 2014) HR Hero <http://blogs.hrhero.com/diversity/2014/04/20/rise-in-religious-bias-claims-forces-analysis-of-a-multitude-of-sins/> (as of July 21, 2014).

[4] Freedman, *Among Justices, Considering a Divide Not of Gender or Politics, but of Belief*s, The New York Times (July 12, 2014) p. A13.

that religious organization is opposed to contraception."[5]

Religious bias may also impact the participation of religious minorities in the legal profession. In 2011, when Governor Christie appointed Sohail Mohammed, an Indian-American of Islamic faith, to a Superior Court judgeship in New Jersey, a contentious confirmation hearing ensued, with New Jersey Senators inquiring into Mr. Mohammed's opinions about Hamas, the Muslim community's perceived ambivalence to terrorism, and Sharia law.[6] Similarly, when the first Muslim American judge was appointed to the bench in California in 2012, at least one critic unreasonably wondered if he would "lock up jihadis, honor killers, and those who assault non-believers as quickly as he does gang bangers."[7]

III.

Laws Prohibiting Religious Bias

Laws aimed at eradicating religious bias and discrimination exist at both the state and federal level. Specifically, Title VII of the 1964 Civil Rights Act and the California Fair

[5] Kopf, *Remembering Alexander Bickel's Passive Virtues and the Hobby Lobby cases* (July 5, 2014) <http://herculesandtheumpire.com/?s=hobby+lobby> (as of July 21, 2014).

[6] Sohrabji, *New Jersey Gets Its First Muslim American Judge* (August 4, 2011) The Muslim Observer <http://muslimmedianetwork.com/mmn/?p=8958> (as of July 21, 2014); Lowery, *Not exactly New Jersey at its best*, Herald News (July 1, 2014) <http://www.northjersey.com/news/crime-and-courts/not-exactly-new-jersey-at-its-best-1.320393> (as of July 21, 2014); Martel , *Christie Defends Appointing Muslim Judge: 'This Sharia Law Business is Crap'* (August 3, 2011) Mediaite, LLC <http://www.mediaite.com/tv/gov-chris-christie-defends-appointing-muslim-judge-this-sharia-law-business-is-crap/> (as of July 21, 2014).

[7] Sohrabji, *Brown Appoints California's First Muslim Superior Court Judge*, IndiaWest (June 26, 2014) <http://www.indiawest.com/news/global_indian/brown-appoints-california-s-first-muslim-superior-court-judge/article_9e025585-b872-5e2a-be05-1af7b156f04a.html?mode=jqm> (as of July 21, 2014); *California's first Muslim Superior Court Judge Led Muslim Brotherhood-founded Student Group* (July 11, 2012) <http://creepingsharia.wordpress.com/2012/07/11/californias-first-muslim-superior-court-judge-led-muslim-brotherhood-founded-student-group/> (as of July 21, 2014).

Employment and Housing Act prohibit discrimination against individuals based upon protected classes, including religion.[8] The Unruh Civil Rights Act also prohibits businesses of all types from discriminating against, refusing services or facilities to, and otherwise declining to do business with individuals based on protected characteristics, including religion.[9]

Public law offices operating within a state or federal government must also comply with the additional constitutional protections conferred by the First Amendment's Free Speech Clause, which prohibits the government's undue restriction of religious speech,[10] Free Exercise Clause, which prohibits state action that substantially burdens religion,[11] and Establishment Clause, which prohibits state action that unduly entangles government and religion or endorses or inhibits a religion.[12]

A.

Defining Religion

"Religion," as defined by Title VII, FEHA, and the Unruh Civil Rights Act broadly encompasses all aspects of religious belief, observance and practice which an individual sincerely holds, including religious dress and grooming practices.[13] Religious beliefs warranting protection need not be "acceptable, logical, consistent, or comprehensible to others," nor widely

[8] 42 U.S.C.A. § 2000e-2 ; Gov. Code, § 12940.
[9] Civ. Code, § 51.
[10] *Widmar v. Vincent* (1981) 454 U.S. 263; *DiLoreto v. Downey Unified School District* (1999) 196 F.3d 958.
[11] *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 699; *Smith v. Fair Employment & Housing Com.*, 12 Cal.4th 1143, 1166–67, 51 Cal.Rptr.2d 700, 913 P.2d 909 (1996).
[12] *DiLoreto v. Board of Education of the Downey Unified School District* (1999) 74 Cal.App.4th 267, 275; *Lemon v. Kurtzman* (1971) 403 U.S. 602, 612; *Edwards v. Aguillard* (1987) 482 U.S. 578, 616.
[13] 42 U.S.C. § 2000(e)(j); Gov. Code, § 12969, subd. (q); Civ. Code § 51, subd. (e)(4)

followed.[14] These laws protect traditional, organized religions, as well as "religious beliefs that are new, uncommon, not part of a formal church or sect" or "only subscribed to by a small number of people."[15] Indeed, not even the belief in a Supreme Being or power is a necessary prerequisite, and non-theistic beliefs such as atheism are as equally deserving of protection under these laws as traditional religions whose tenets mandate belief in a higher power.[16]

Under Title VII, an individual's beliefs qualify as "religion" if they are sincerely held and religious in his or her own scheme of things.[17] EEOC guidelines further define religious practices to include any "set of moral or ethical beliefs as to what is right and wrong where such beliefs are sincerely held with the strength of traditional religious views." This capacious definition "leaves little room to challenge the religious nature of an employee's professed beliefs."[18]

California courts, however, have not adopted such an expansive construction and arguably employ a more restrictive definition of what constitutes religion and religious practices. California courts employ a three part test which examines: (1) whether the belief addresses fundamental and ultimate questions having to do with deep and imponderable matters, such as the meaning and purpose of life and theories of humans' place in the universe (2) whether the belief is comprehensive in nature, consisting of a belief system as opposed to an isolated

[14] *Freidman v. Southern Cal. Permanente Medical Group* (2002) 102 Cal.App.4th 39, 57-58; 29 C.F.R. § 1605.1.
[15] Equal Employment Opportunity Commission, Religious Garb and Grooming in the Workplace: Rights and Responsibilities (March 6, 2014) <http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm> (as of July 21, 2014); 29 C.F.R. § 1605.1; *Equal Employment Opportunity Com. v. Abercrombie & Fitch Stores, Inc.* (10th Cir. 2013) 731 F.3d 1106, 1117; *Friedman*, 102 Cal.App.4th at 58.
[16] *Young v. Southwestern Sav. & Loan Ass'n* (5th Cir. 1975) 509 F.2d 140.
[17] *Friedman*, 102 Cal.App.4th at 57-58;*Eatman v. United Parcel Service* (S.D.N.Y. 2002) 194 F.Supp.2d 256, 268; *Telfair v. Federal Exp. Corp*. (S.D. Fla. 2013) 934 F.Supp.2d 1368, 1382; *Brown v. F.L. Roberts & Co.* (D. Mass. 2006) 419 F.Supp.2d 7, 12.
[18] *Brown*, 419 F.Supp.2d at 12.

teaching, and (3) whether the belief can be recognized by certain formal and external signs, although the absence of such signs will not necessary preclude a finding of "religion."[19]

An instructive example of the difference in "religion" under Title VII compared to FEHA can be found in cases deciding whether veganism constitutes a religion. Utilizing the three part test described above, the court in *Friedman v. Southern Cal. Permanente Medical Group* found that, "while veganism compels an individual to live in accord with strict dictates of behavior," it does not fall within the provisions of FEHA because (1) "it reflects a moral and secular, rather than religious, philosophy" (2) "it is not sufficiently comprehensive" in that it "the belief system does not derive[] from a power or being or faith to which all else is subordinate or upon which all else depends" and (3) "though not determinative, no formal or external signs of a religion are present," such as "teachers or leaders; services or ceremonies; structure or organization; orders of workshop or articles of faith; or holidays."[20] By contrast, federal courts have permitted lawsuits based on an employer's failure to accommodate veganism because an individual could practice veganism "with a sincerity equaling that of traditional religious views."[21]

B.

The Duty to Accommodate Religious Exercise

An employer must reasonably accommodate an employee's religious beliefs unless the

[19] *Friedman*, 102 Cal.App.4th at 69.
[20] *Friedman*, 102 Cal.App.4th at 70.
[21] *Chenzira v. Cincinnati Children's Hospital Medical Center* (S.D. Ohio December 7, 2012, 1:11-CV-00917) __ F.Supp.2d __ (2012 WL 6721098) at 4; 29 C.F.R. 1605.1.

accommodation would impose an undue hardship on the employer.[22] A reasonable accommodation generally eliminates the conflict between an employee's religious belief and the job requirement, although some circuits have held that a reasonable accommodation need not eliminate all possible conflicts and the employee may have to compromise a religious practice or accept a less desirable job.[23]

C.

When Religious Accommodations Impose an Undue Hardship

Under Title VII, an undue hardship exists where accommodating the employee's religious beliefs imposes more than a *de minimis* cost on the employer, either in the sense of economic costs such as the loss of efficiency or higher wages or non-economic costs such as the violation of a neutral seniority system.[24] These costs must be actual and not hypothetical or speculative.[25]

An employer also has no obligation under Title VII to implement an accommodation that would cause the employer to violate any statute prohibiting discrimination or would impact the

[22] 42 U.S.C. § 2000(e)(j); Gov. Code, § 12940, subd. (l)(1).
[23] *Equal Employment Opportunity Com. v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 313 (total accommodation not required); *Sturgil v. United Parcel Service, Inc.* (8th Cir. 2008) 512 F.3d 1024, 1033 (court upheld termination of UPS driver who refused to deliver packages after sundown on Sabbath on religious grounds.).
[24] *Cloutier v. Costco Wholesale Corp.* (1st Cir. 2004) 390 F.3d 126, 134.
[25] *Equal Employment Opportunity Com. v. Red Robin Gourmet Burgers, Inc.* (Aug. 29, 2005, C04-1291JLR) __ F.Supp.2d __ (2005 WL 2090677) at 4-5.

rights of other employees in a significant and discriminatory way.[26] Thus, while an employer may have a duty to reorganize employees' shifts or implement split shifts in order to accommodate an employee's religious beliefs, an employer has no obligation to implement shift changes that would impose undesirable shifts on other employees of different religions, thus resulting in a discriminatory impact on the rights of other employees.[27]

Unlike Title VII, FEHA does not utilize a *di minimis* standard to determine when an undue hardship exists. Rather, in 2013, California promulgated amendments to FEHA which clarified that FEHA imposes a heightened undue hardship standard, requiring an employer to provide an accommodation unless it imposes a "significant difficulty or expense" in light of: "(1) the nature and cost of the accommodation needed; (2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility; (3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities; (4) the type of operations, including the composition, structure, and functions of the workforce of the entity; (5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities."[28] These amendments also clarified that FEHA prohibits accommodations which segregate an individual from the public or other employees.[29]

[26] Gov. Code, § 12940, subd. (l)(3); *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 80-84.
[27] *Trans World Airlines, Inc.*, 432 U.S.at 80-84.
[28] Gov. Code, § 12926, subd. (u).
[29] Gov. Code, § 12940, subd. (l)(2).

Importantly, an employer cannot establish an undue hardship simply because a client expresses displeasure for an employee's religion and/or religious practices.[30] An employer must still articulate a legitimate, neutral, and non-discriminatory reason for the lack of accommodation.[31]

IV.

Regulating Appearance in a Law Office in Light of the Prohibition on Religious Discrimination and the Duty to Accommodate Religious Practices

Law offices often strive to promote a professional image by regulating the appearance of its attorneys with dress codes that mandate business attire and a clean, professional appearance. A law office's dress code may impinge upon an attorney's religious practices if it has the effect of prohibiting the attorney from donning religious garb, displaying religious symbols, or observing religious grooming practices at the workplace. Yet, law offices also have a legitimate interest in presenting a professional appearance to clients, and Title VII does not require a law office to exempt an attorney from a dress code in order to accommodate the attorney's religious beliefs if the exemption would compromise the professional appearance the law office strives to present.[32] So long as the dress code is neutrally applied and not directed at religious practices, a law office may be able to enforce the dress code even when it conflicts with an attorney's religious practices, although careful consideration should be given on a case by case basis to

[30] Equal Employment Opportunity Com. Compliance Manual (July 22, 2008) 2008 WL 3862095, §12-II(B); *see also Kern v. Dynaletron Corp.* (1983) 577 F.Supp. 1196, 1201; *Fernandez v. Wynn Oil Co.* (9th Cir. 1981) 653 F.2d 1273, 1276-1277.
[31] Equal Employment Opportunity Com. Compliance Manual (July 22, 2008) 2008 WL 3862095, §12-II(B) & (D); *see also Kern*, 577 F.Supp. at 1201 *Fernandez*, 653 F.2d at 1276-1277.
[32] *Cloutier v. Costco Wholesale Corp.* (1st Cir. 2004) 390 F.3d 126, 136.

whether a duty to accommodate exists.[33]

In *Brown v. F.L. Roberts*, an employee who refused cut his hair because of his Rastafarian religion sued his employer under Title VII when the employer transferred him to a position with the same rate of pay but with no customer contact.[34] The court rejected the employee's claim of religious discrimination because exempting the employee from the grooming requirements would undermine its neutral public image policy.[35] The court also found that the employee's transfer to a lateral position without public contact was a reasonable accommodation under Title VII.[36]

Since almost 50% of Americans between 21 and 32 have at least one tattoo or a non-ear piercing, and since some of these are religious in nature, it is also worthwhile examining cases that have dealt with the issue of employer regulation of body art.

In *Cloutier v. Costco*, Cloutier wore facial piercings to work in violation of Costco's dress code. [37] After informing Costco that she belonged to the Church of Body Modification and that her piercings were a religious practice, Costco proposed two accommodations -- wear undetectable plastic retainers in lieu of the metal jewelry or cover the jewelry with a band-aid.[38] Cloutier rejected the accommodations proposed by Costco, maintaining that her religion precluded her from removing or covering her piercings and demanded total exemption from the

[33] *Hussein v. The Waldorf-Astoria* (SD.N.Y. 2001) 134 F.Supp.2d 519, 599; *Cloutier*, 390 F.3d at 136.
[34] *Brown v. F.L. Roberts & Co.* (D.Mass. 2006) 419 F.Supp.2d 7, 10-11.
[35] *Brown,* 419 F.Supp.2d at 16-17.
[36] *Brown*, 419 F.Supp.2d at 14-15.
[37] *Cloutier*, 390 F.3d at 129-130.
[38] *Id.* at pp. 129-130.

policy.[39] The court upheld Costco's termination of Cloutier for violation of the dress code, finding that the accommodation she demanded worked an undue hardship on Costco by detracting from Costco's professional public image.[40]

By contrast, in *Equal Employment Opportunity Commission v. Red Robin*, a server named Rangel had two small religious tattoos on his wrist that he received "during a religious ceremony after undergoing a rite of passage involving communal prayer, meditation, and ritual."[41] The tattoos represented Rangel's servitude to the Egyptian god of the sun, and his commitment to his faith.[42] Red Robin allowed Rangel to work for six months without covering his tattoos before demanding that he cover the tattoos to comply with the Red Robin's dress code.[43] Rangel's religious beliefs dictated that intentionally covering the tattoos was a sin so, when Rangel refused, Red Robin terminated his employment.[44] The court rejected as speculative Red Robin's claim that permitting Rangel to work without covering his tattoos created an undue hardship.[45] Not only did Rangel work six months without any customer complaints or measurable adverse impact on Red Robin's business, Red Robin failed to present any evidence that "visible tattoos are inconsistent with [Red Robin's family-oriented and kid-friendly image] generally or that or that its customers specially shared this perception."[46]

All three cases discussed above involved the application of the undue hardship analysis

[39] *Id.* at pp. 129-130.
[40] *Id.* at pp. 135.
[41] *Equal Employment Opportunity Com. v. Red Robin Gourmet Burgers, Inc.* (Aug. 29, 2005, No. C04-129JLR) __F.Supp.2d __ (2005 WL 2090677) at 1.
[42] *Id.* at 1.
[43] *Id.* at 1.
[44] *Id.* at 1.
[45] *Id.* at 4-5.
[46] *Id.* at 4-5.

under Title VII's di minimis standard. Accordingly, these cases probably do not provide persuasive authority for a law office's duty to accommodate religious tattoos and piercings under FEHA. Indeed, no California case has yet to determine when an exception to a neutrally-applied dress code or grooming policy imposes "significant difficulty or expense" on an employer pursuant to California's newly adopted statutory framework, described above.

V.

The Display of Religious Symbols or Religious Speech in a Law Office

A law office may also have a duty to accommodate an employee's religious speech, including proselytization, or an employee's display of religious materials at work if permitting such conduct does not work an undue hardship on the law practice.[47] However, if an employee's religious expression is disruptive or demeaning, discriminating, or harassing towards other employees, the law practice not only can but should refuse to accommodate the practice.[48] Thus, in *Peterson v. Hewlett-Packard, Co.*, the court upheld the termination of an employee who refused to take down the Biblical scriptures he posted in his workspace which were admittedly intended to hurt and offend his homosexual co-workers.[49] The court confirmed that an employer has no duty to accommodate demeaning and harassing conduct even when predicated upon religious beliefs. [50]

[47] Equal Employment Opportunity Com. Compliance Manual (July 22, 2008) §§ 12-I and 12-IV.
[48] Gov. Code, § 12940, subd. (l)(3); *Peterson v. Hewlett-Packard Co.* (2004) 358 F.3d 599, 607-608; *Trans World Airlines, Inc.*, 432 U.S. at 80-84; Equal Employment Opportunity Com. Compliance Manual (July 22, 2008), 2008 WL 3862095 §§ 12-I and 12-IV.
[49] *Peterson*, 358 F.3d at 602.
[50] *Id.* at 607-608.

When regulating employee speech, law offices within state, city or county government agencies must also consider an employee's rights under the First Amendment Free Speech and Free Exercise clauses as well as its duties under the First Amendment's Establishment Clause.[51] These constitutional authorities do not require complete sanitization of religious speech from the workplace, nor do they compel or permit unbridled religious expression in the workplace.[52] Rather, an employer's duty or ability to regulate religious expression, and the degree to which such regulation must or can occur, requires a balancing of the employee's free speech rights against the government's interest justifying regulation of that expression.[53] If the balance of interests weighs in favor of curtailing an employee's free speech due to the government employer's interest in efficiency in the workplace, avoiding disruption, or protecting the legal rights of other employee's, then the government can regulate the speech.[54] Indeed, if permitting the speech would run afoul of the Establishment Clause by conveying a misperception that the government is endorsing a particular religion, the law practice may have a duty to prohibit the religious expression.[55] Moreover, if an employee's religious expression would cause the employer to violate the Establishment Clause, then neither Title VII nor FEHA compels the employer to accommodate that expression in violation of the Establishment Clause.

For example, in *Barry v. Department of Social Services*, the state, professing an interest in avoiding an Establishment Clause violation, banned Barry, a welfare worker who had regular contact with the public, from discussing religion and praying with the Department's clients as

[51] *Berry v. Dept. of Social Services* (2006) 447 F.3d 642, 650; *Tucker v. State of Cal. Dept. of Education* (1996) 97 F.3d 1204, 1210-1213.
[52] *Berry*, 447 F.3d at 648-652; *Tucker*, 97 F.3d at 1210-1213.
[53] *Berry*, 447 F.3d at 649-652; *Tucker*, 97 F.3d at 1210-1216.
[54] *Berry*, 447 F.3d at 649-652; *Tucker*, 97 F.3d at 1210-1216.
[55] *Berry*, 447 F.3d at 650-652.

well as from displaying a Bible and sign which stated "Happy Birthday Jesus" in his cubicle.[56] The ban only applied to religious discussions with the Department's clients and religious displays in his cubicle, which was open to the public. The court upheld this regulation as reasonable because Barry's conduct created a real risk of entangling the Department in religion or conveying the Department's endorsement of a particular religion to the public.[57]

By contrast, in *Tucker v. State of California Department of Education*, Tucker's employer issued a total ban on written or oral advocacy as well as on the display of any religious materials outside Tucker's cubicles.[58] The state asserted several different interests for its regulation, including: (1) efficiency, (2) protecting the liberty interests of other employees (3) meeting the expectations of the taxpayers that their tax dollars not be used to promote religion and (4) complying with the Establishment Clause.[59] The Court rejected the first three interests because the state failed to adduce any evidence that Tucker's religious advocacy actually impacted those interests.[60]

The Court also found the state's interest in avoiding violation of the Establishment clause unpersuasive.[61] As to the religious advocacy ban, the Court held that what Tucker discussed in his cubical or in the hallway with other employees would not appear to any reasonable person to

[56] *Berry*, 447 F.3d at 645-647.
[56] *Id.* at pp. 645-647.
[57] *Id.* at pp. 650-652.
[58] *Tucker*, 97 F.3d at 1208-1209.
[59] *Id.* at p. 1211.
[60] *Id.* at p. 1211-1212.
[61] *Id.* at pp. 1212-1213.

represent the views of the state.[62] Moreover, since Tucker had no contact with the public, his proselytizing could not possibly convey an endorsement to the public.[63] As to the display of religious materials outside Tucker's cubicle, the Court recognized that the state had a greater interest in regulating the materials posted on state walls because there is a greater likelihood that materials posted on state walls would be interpreted as endorsement of the views contained in the those materials.[64] Nonetheless, the Court concluded that, because the ban only applied to religious postings and not secular postings, it was not reasonable to allow employees to post materials around the office on any secular subject, no matter how controversial, and only forbid the posting of religious materials, even when the materials were non-controversial informational announcements that did not proselytize.[65] Moreover, because the area outside Tucker's cubicle was not open to the public, the court reasoned there was no risk that the public would perceive religious postings as government endorsement of that religion.[66] The Court further reasoned that, even if the area was open to the public, a sweeping ban on religious postings would be unreasonable because reasonable persons are not likely to consider all of the information posted on bulletin boards or walls in government buildings to be government-endorsed.[67]

While the propriety of an employer's regulation of religious expression necessitates a case-by-case review of the specific circumstances surrounding the religious expression,[68] a few general principles can be gleaned from the case law which has tackled these issues:

[62] *Id.* at pp. 1212-1213.
[63] *Id.* at pp. 1212-1213.
[64] *Id.* at p. 1214.
[65] *Id.* at p. 1215.
[66] *Id.* at p. 1215.
[67] *Id.* at p. 1215.
[68] *Id.* at p. 1209.

1. An employer likely may not prohibit an employee from engaging in religious expression when the expression is not viewed or heard by others, or members of the public, and does not interfere with workplace efficiency.[69]

2. A government employer must restrict religious speech that creates impression that the employer is endorsing or making a particular statement that favors or disfavors religion.[70]

3. An employer should have solid evidence of interference with workplace efficiency if it decides to regulate employees' religious practices that are not communicated to the public.[71]

4. An employer has a greater interest in controlling what materials are posted on its property than it does in controlling the speech of its employees because there is a greater likelihood that materials posted on the walls or the corridors of government offices would be interpreted as representing the views of the government. [72]

VI.

The Prohibition on Religious Bias in Providing Client Services

The Unruh Civil Rights Act provides that all persons in California are "free and equal" no matter what their religion and specifically confers upon persons of all religions a right to "full and equal accommodations, advantages, facilities, privileges, or services in all business

[69] *Tucker*, 97 F.3d at 1213-1216; *Berry*, 447 F.3d at 649-652.
[70] *Berry*, 447 F.3d at 650-652.
[71] *Tucker*, 97 F.3d at 1211-1212.
[72] *Tucker*, 97 F.3d at 1215.

establishes of every kind whatsoever."[73] Law offices, therefore, cannot refuse legal representation to potential or existing clients based upon their perceived religion and doing so could subject the law office to civil rights litigation and liability for damages. The denial of a law office's services must be based upon a reasonable interest not directed at a client's religion which bears a rational relation to the commercial objectives of the law practice, such as maintaining order, complying with ethical and legal requirements, or protecting a business reputation or investment.[74]

VII.

Strategies for Eliminating Religious Bias in Law Offices

Bias can be more subtle than unlawful discrimination or harassment and frequently may not rise to the level of legally actionable conduct. Rather, bias involves subtle actions and attitudes borne out of stereotypes and revealed in the way an individual deals with persons who belong to a protected class. This can make bias hard to detect and eliminate.

Education and training aimed at developing a greater awareness of and sensitivity to religious differences are key to eliminating religious bias within a law practice. Indeed, California mandates that employers with more than 50 employees provide at least two hours of interactive harassment training to supervisors within six months of being appointed to a supervisory position, and at least every two years thereafter.[75] Beyond this mandated supervisor

[73] Civ. Code, § 51.
[74] *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1162-63 (collecting cases where a legitimate business interest justifying the denial of business services was found).
[75] Gov. Code, § 12950.1.

training, though, law offices should take steps to ensure all employees and associates are sensitive to religious bias and understand that the practice's culture does not tolerate bias or discriminatory conduct of any kind.

Creating a diverse and inclusive work environment is also an essential component of preventing religious bias in a law practice. The greater number of protected classes represented in a workplace, the greater the perception of fairness is among employees. An environment in which individuals are unencumbered by traditional barriers and stereotypes will enrich a law practice and enable it to fully utilize the perspectives and talents of all employees. Conversely, lack of diversity and sensitivity to differences breeds a restrictive environment where ideas and solutions go unexpressed, morale suffers, disgruntled feelings flourish, productivity diminishes, and turnover is high.

Law offices should also establish and regularly update harassment and discrimination policies at least every one to two years and ensure these policies protect religious expression to the same extent they protect other classes such as race and gender. A law practice should adopt a comprehensive complaint procedure as part of this policy and ensure it provides a meaningful mechanism through which employees may report religious bias or discrimination without fear of retaliation. Moreover, proactively assessing the success of its harassment and discrimination policies will allow the law office to maximize efficiency and quickly identify problems. Law offices can do this by anonymously collecting information regarding the experiences of protected groups within the practice and conducting exit interviews, preferably with a third party, to learn if bias was a factor in the decision to leave.

IX.

CONCLUSION

Working to eliminate bias in a law practice is a fluid and evolving process, but remaining mindful of the legal prohibitions against religious bias and proactively adopting strategies designed to eliminate such conduct will help a law office comply with its professional duty to prevent religious bias in its practice.

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