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Religious Discrimination: It's Even More Complicated than You Thought

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Of the five original protected classes under Title VII, religion has always been (with color) by far the smallest in terms of number claims filed. Still, compared to 1997, the number of charges of religious discrimination filed with the EEOC in 2014 has doubled both in absolute numbers and as a percentage of all charges filed.[1]

Linus had it right in 1961 when he said, "There are three things I have learned never to discuss with people ... religion, politics, and the Great Pumpkin." Certainly raising religion in the workplace can and frequently does lead to conflict.

As with most areas of workplace conflict there are areas where the law of religious discrimination is well developed but other areas where at this point the impact is mostly one of conjecture.

I. WHAT IS A SINCERELY HELD RELIGIOUS BELIEF OR PRACTICE?

A. Courts do not relish making religious decisions.

The logical starting point in the examination of any issue of potential religious discrimination is does it involve religion. Although basic, it also is an area where courts have shown significant hesitancy in addressing the issue.

More than a decade ago, an employee challenged an employer's policy prohibiting her from wearing her eyebrow piercing claiming it was required by her religious beliefs as a member of the Church of Body Modification (CBM). Cloutier v. Costco, 390 F. 3d 126 (1st Cir. 2004). According to the Court's opinion:

> The CBM was established in 1999 and counts approximately 1000 members who participate in such practices as piercing, tattooing, branding, cutting, and body manipulation. Among the goals espoused in the CBM's mission statement are for its members to "grow as individuals through body modification and its teachings," to "promote growth in mind, body and spirit," and to be "confident role models in learning, teaching, and displaying body modification."

The Court also found that the CBM's website was its primary mode of attracting adherents. Included is an application to become a minister of the CBM. When Cloutier was terminated for refusing to remove her eyebrow piercing while working, she filed a charge of religious discrimination with the EEOC which found the her belief in the CBM creed to be "religiously based as defined by the EEOC."

Given that background one might think the central question to be addressed by the Court is the first element of a prima facie case of religious discrimination, did a bona fide religious practice conflict with an employment requirement? However, that question was decided by neither the district nor the appeals court. In the latter's words:

> Determining whether a belief is religious is "more often than not a difficult and delicate task," one to which the courts are ill-suited. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981). Fortunately, as the district court noted, there is no need for us to delve into this thorny question in the present case. Even assuming, arguendo, that Cloutier established her prima facie case, the facts here do not support a finding of impermissible religious discrimination.

Cloutier's only accepted accommodation was a complete exemption from Costco's ban on facial jewelry. Why would that be an undue hardship? The Court's answer:

> Granting such an exemption would be an undue hardship because it would adversely affect the employer's public image. Costco has made a determination that facial piercings, aside from earrings, detract from the "neat, clean and professional image" that it aims to cultivate. Such a business determination is within its discretion. As another court has explained, "Even assuming that the defendants' justification for the grooming standards amounted to nothing more than an appeal to customer preference, . . . it is not the law that customer preference is an insufficient justification as a matter of law." *Sambo's of Georgia, Inc.*, 530 F. Supp. at 91.

In other words, although customer preference clearly no longer works as a defense for other types of discrimination, see *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908 (7th Cir. 2010)[2], the First Circuit was willing to find it here rather than take on the "thorny question" of whether the Church of Body Modification could qualify as a religion.

Courts have also stumbled when trying to decide whether or not individual acts qualify as religious actions. Just last summer, In a 2-1 decision, written by Judge Prado, the Fifth Circuit overturned summary judgment where the district court had found that an employee's absence on a Sunday to attend a ground breaking ceremony for her church was not a religious practice.

The district court found, and her employer, Fort Bend County had argued: "being an avid and active member of church does not elevate every activity associated with that church into a legally protectable religious practice."

But instead, the majority opinion focused on what it called a historical reluctance of court's to delve too deeply into an individual's professed religious belief:

> This court has cautioned that judicial inquiry into the sincerity of a person's religious belief "must be handled with a light touch, or judicial shyness." *Tagore*, 735 F.3d at 328 .... "[E]xamin[ing] religious convictions any more deeply would stray into the realm of religious inquiry, an area into which we are forbidden to tread." Id. .... Indeed, "the sincerity of a plaintiff's engagement in a particular religious practice is rarely challenged," and "claims of sincere religious belief in a particular practice have been accepted on little more than the plaintiff's credible assertions." Id.

Judge Jerry Smith, politely, but vigorously disagreed with the Court's limited view:

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