Religion in the Workplace

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Thanks to Lee Crawford

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- Lee of City of Austin wrote extensive paper, which we updated in April and September, covering the history of religious freedom in the US, beginning with the First Amendment's Free Exercise & Establishment Clauses
- This talk focuses on workplace issues

Free Exercise Clause – First Amendment

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- Unemployment awards – state action even though private employer
- 1963 – USSC established strict scrutiny/compelling state interest standard; granted unemployment to employee fired for not working Saturday Sabbath. *Sherbert v. Verner*, 374 U.S. 398 (1963)
- 1990 USSC denied unemployment for employee using peyote for religious purposes because unlawful, not because compelling government interest. *Emp't Div., Dep't of Human Res. of Oregon v. Smith,* 494 U.S. 872 (1990)

Peyote case led to 1993 RFRA

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- Public reaction strong
- Religious Freedom Restoration Act required compelling government interest and narrow tailoring to burden religious practices.
- 1993 USSC invalidated animal sacrifice ordinance because not neutral application, but enacted for purpose of constraining religious practice.
- "Sole reason" must be neutral, and not to oppress a religion. Looks at legislative intent.
  - *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, Florida*, 508 U.S. 520 (1993).

Title VII – Reasonable Accommodation of Religion

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- Accommodation not in original 1964 Title VII – regs amended in 1967 to include affirmative duty to accommodate religious practices
- Affirmed by Congress in 1972
- Reasonable accommodation not as strict as ADA
  - *de minimus* cost is undue hardship, including paying OT to other employees for days unable to work *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977)
- Permitting employee to use PTO for extra holidays reasonable accommodation. *Arizona Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986)

New era of Title VII cases

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- Dress codes and headscarves - USSC settled circuit dispute - failure to accommodate claim not separate action like in ADA. Employee bears burden to show discriminatory intent. *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015)
- Firefighter refused respirator accommodation after refusing vaccination for religious purposes. MSJ for City. *Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020)
- Force reassignment to cover shift undue hardship, but asking for volunteers is not. *Davis v. Ft. Bend Cty.*, 765 F.3d 480 (5th Cir. 2014)

Title VII laxer than RFRA

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- Tagore v. U.S. 5th Cir 2013
  - Sikh IRS employee fired for continuing to bring kirpan to work
  - She refused accommodations like dulled or shortened kirpan, or Lucite encased
  - Sued under Title VII and RFRA
  - MSJ on Title VII based on security law for federal building.
  - Remand on RFRA to determining "compelling government interest"

Accommodation guidelines from EEOC and lower court caselaw

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- Consider:
  - Voluntary shift swaps
  - Flexible scheduling
  - Transfers and duty changes
  - Don’t request availability on applications w/o business necessity
  - Dress codes – don’t rely only on “image” which relies on customer biases
  - Dress codes and uniforms – consider allowing religious garb in company colors
  - Safety is defense – e.g. beard under respirator, or loose scarves around machinery.
  - Praying – look at potential disruption and sensitivity to others’ religious beliefs or non-beliefs

Our Lady of Guadalupe v. Morrissey-Berru & Biel v. St. James School, USSC 7/8/2020 (7-2)

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The "Ministerial Exemption" in Title VII: teachers covered

- **Agnes Morrisey-Berru:** Elementary teacher moved to part-time, then contract not renewed. Alleges Age Discrimination.
- **Kristen Biel:** Elementary teacher contract not renewed after requested leave of absence for breast cancer. Alleges ADA disability discrimination.
- "**What matters, at bottom, is what an employee does**... educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."
- No minister title, but took religious courses requested by school, taught religion daily, led students in prayer daily, "taught Catholic values" and provided "faith based education"
- 2012 Hosanna-Tabor's test not rigid definition of purely lay/non-religious jobs, and each position must be individually assessed.

State law (Chapter 21)

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Jones v. Angelo State Univ. (Tex. App.—Austin 6/10/16)

- No requirement to allow evangelical Christian to proselytize
- Not possible to accommodate in public classroom under Establishment Clause

Collins v. Tarrant Appraisal Dist. (Tex. App.—Ft. Worth 6/14/07)

- Employer must know of religious tenet to consider accommodation – prima facie case
- Pentecostal employee refused hair sample drug screen, but didn't give the reason to employer

Religious Freedom Restoration Act of 1993 ("RFRA")

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- Broader than Establishment Clause – 2000 modification
- Burdens exercise of religion unless government shows compelling interest and least restrictive means
- Only for federal action- *City of Boerne, Texas v. Flores*, USSC 1997 Catholic church building permit denial
- But see Texas Religious Freedom Act 1999
  - Response to *Flores*
  - Applies regardless of whether public or private entity is party
- Hobby Lobby and ACA contraceptive mandate - 2014
  - Corporation is protected "person"
  - Less restrictive means

Little Sisters of the Poor v. Pennsylvania – USSC 7/8/20 (7–2)

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- USSC reversed 3rd Cir
- Affordable Care Act, and regs from HHS, DOL and Treasury
- Departments had authority to provide exemptions from contraceptive requirements for employers with religious and conscientious objections.
- Plain language of statute allowed exemptions

THANK YOU!

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