

Religious Expression in the Public Workplace

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FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



Free Exercise/Speech Clauses



- Protects citizens' right to practice their religion as they please, so long as the practice does not run afoul of a "public morals" or a "compelling" governmental interest.
- Protects citizens' right to express oneself without government interference, including religious expression.
- *Berry v. Dept. of Social Serv.*, 447 F.3d 642 (9th Cir. 2006), the Ninth Circuit held that a state could prevent an employee from prayer and religious displays with or in view of clients.

Establishment Clause

- Prohibits the government from "establishing" a religion.
- Traditionally has been interpreted to prohibit government action that compels religious conduct, favors one religion over another, or endorses religion over non-religion.
- Recently, the Supreme Court has counseled that the Establishment Clause must be interpreted by "reference to historical practices and understandings."



“

...successfully navigate[] between the Scylla of not respecting its employee's right to the free exercise of his religion and the Charybdis of violating the Establishment Clause of the First Amendment by appearing to endorse religion.

”

Reconciling the Establishment and Free Exercise Clauses

The *Pickering-Garcetti* test applies to religious speech and expression and involves a three-step analysis:

Whether the public employee is speaking out as a citizen or pursuant to the employee's official duties.

Whether the employee's speech is a matter of public or personal concern.

Balancing the employee's First Amendment interests and the government employer's legitimate interests.

Key Issues

- Religious expression is often considered to be a matter of public concern.
 - For example: *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996), “This circuit and other courts have defined public concern speech broadly to include almost any matter other than speech that relates to internal power struggles within the workplace.”
- Religious expression claims may turn on whether the expression was part of the employee’s official job duties.
 - For example: *Sprague v. Spokane Valley Fire Dep't*, 189 Wn.2d 858, 880 (2018), the Washington State Supreme Court held that “The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.”
- Balancing test is fact-specific, but likely excludes unlawful harassment, hate speech, and bona fide establishment clause concerns.



Kennedy: Establishment Revisited

- High school football coach knelt at midfield after games to offer “quiet” personal prayer.
- Bremerton School District terminated employment.
- Shifts the Establishment Clause standard. Acceptance of open expression in a workplace.

Kennedy vs. Bremerton School District, 597
U.S. 507 (2022)

Title VII

- Applies to private and public employers that employ 15 or more employees.
- Unlawful to discriminate against any individual with respect to their compensation, terms, conditions, or privileges of employment, because of such individual's religion.
- Reasonably accommodate sincerely held religious belief, the practice of which conflicts with an employment duty, unless doing so would be an undue hardship on the conduct of the employer's business.



Religious Harassment

- Religious **discrimination**, includes **harassment**, which occurs when the employee is:
 - Required or coerced to abandon, alter or adopt a religious practice as a condition of employment; or
 - Subjected to unwelcome statements or conduct based on religion and is so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive, and there is a basis for holding the employer liable.
- Harassment based on any protected class may be unlawful, even if the harasser or harassing conduct is acting based on religious belief or involves religious expression

Washington Law Against Discrimination



- Applies to private and public sector employers that employ 8 or more employees.
- Prohibits discrimination based on creed. The inclusion of “creed” provides Washington employees with broader protections.
- Also requires employers to accommodate employees' religious beliefs.

Common Issues under Title VII and WLAD

Congress did not define:



Religion



Reasonable
Accommodation



Undue
Hardship

What is “Religion”?

- Religion includes all aspects of religious observance and practice as well as belief, not just practices that are mandated or prohibited by a tenet of the individual’s faith.
- Religion includes not only traditional, organized religion such as Christianity, Judaism, Islam, Hinduism, Sikhism, 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 or unreasonable to others.
- A belief is “religious” under Title VII purposes if it is “religious” in the person’s “own scheme of things,” i.e., it is a “sincere and meaningful” belief that “occupies a place in the life of its possessor parallel to that filled by . . . God.”
- The Supreme Court has made clear that it is not a court’s role to determine the reasonableness of an individual’s religious beliefs, and that “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others . . .”

What is a “Reasonable Accommodation”?

Reasonableness of the employer’s action is determined on a case-by-case basis. Examples may include:



Scheduling changes or shift changes



Exception to dress code or grooming rules



Remote work



Accommodating prayer, proselytizing, and other forms of religious expression

What is “Undue Hardship”?

- Employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.
- An employer may not dismiss an employee’s request for religious accommodation simply by pointing to a minimal cost to the business.
- Burden on coworkers, such as working overtime or a coworker's dislike of religious expression in the workplace, does not constitute undue hardship.

Groff v. DeJoy, 600 U.S. 447 (2023)



Employer Policy

- For example: non-solicitation, distribution of literature, technology/electronic communications, use of workspaces and equipment
- If neutral and consistently enforced, may be used as non-discriminatory basis for restricting religious expression to the same extent as non-religious speech
- Inconsistently enforced policies raise risk of discrimination, may support reasonableness of accommodation, or undermine interests in restricting protected religious speech.

Electronic Communications

- Public employee was a captain in a fire department.
- Fire department prohibited any personal use of department email accounts.
- After a firefighter committed suicide, the captain weighed in on the issue from a Christian perspective and included scripture quotations in his emails.
- After the captain refused to comply with a directive not to discuss religious issues over District email, he was terminated.

Sprague v. Spokane Valley Fire District, 189.
Wn.2d 858 (2018)



A Framework for Analysis

Expression Promoters

- 1st Amendment - Free Exercise/Free Speech
 - Citizen expression
 - Public concern
 - Non-disruptive/low employer interest
- Title VII - Religious Accommodation
 - Low bar to belief
 - Higher bar to hardship & addressing conflict
- Title VII - Non-Discrimination
 - Different treatment as secular speech
 - Expression as motivating factor
- Policy – Inconsistent Enforcement

Expression Inhibitors

- 1st Amendment - Free Exercise/Free Speech
 - Public duty expression
 - Disruptive/high employer interest
- 1st Amendment – Non-Establishment
 - Shifting standard
 - Expression attributable to employer
- Title VII – Non-Harassment
 - Unwanted expression
 - Adverse to religion, non-religion, or protected class
 - Severe or pervasive
- Policy – Neutral/Consistent

Questions?

Thank you.



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