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LET US PRAY: THE CHALLENGES OF ACCOMMODATING MUSLIM PRAYER IN THE WORKPLACE

By Matt Malone

Some prayers go unheard; others go to the Equal Employment and Opportunity Commission. Recently, employers in three states have faced actions from Muslim employees demanding increased accommodation for prayer in the workplace. In May, an employer in Minnesota refused to schedule prayer breaks requested by employees, and subsequently fired some workers who refused to comply with the work schedule. In response, the Council on American-Islamic Relations (CAIR) filed a complaint with the Equal Employment and Opportunity Commission (EEOC).¹ Similar situations have recently arisen with employers in Wisconsin and Colorado.²

While Muslims account for only 1% of the population in the United States,³ they now represent one-quarter of religious discrimination complaints to the EEOC.⁴ Requested accommodations for prayer are at the top of the reasons why such complaints are submitted.⁵ These trends show that many employers have little knowledge of the religious tenets of their Muslim employees and may lack any acquaintance with the entailments of daily prayer for Muslims. Perhaps

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continued on page 2

not coincidentally, the three recent cases all occurred in states with fast-growing Muslim populations.⁶ As workforces become more diverse, employers should not only become aware of these practices, but also understand their legal obligations to accommodate such practices.

ACCOMMODATING MUSLIM PRAYER AT WORK

Harmonizing *salah*, or Muslim prayer, with the workday presents cultural and logistic challenges to employers unfamiliar with Islam. Salah is one of the Five Pillars of Islam. Different schools of Islamic jurisprudence in Sunni, Shi'a, and other traditions require different etiquette and even frequency of prayer, but Sunni Islam, the most popular strain, requires five daily prayers. Two of the daily prayers—the *Dhuhr* and *Asr* prayers—usually overlap with a nine-to-five workday. The *Maghrib* prayer, which occurs just after sunset, also often overlaps with normal working hours. All five prayers are preceded by ritual ablutions of the hands, mouth, nose, face, ears, and feet.

Accommodating prayer in the workplace can be intricate for several reasons. First, the time of prayer synchronizes with the movement of the sun, not clock time, so an employer may have difficulty scheduling prayer times that are constantly shifting. For example, the *Dhuhr* prayer occurs shortly after the sun reaches its zenith, a moment that shifts in clock time throughout the year. Second, Muslims pray facing in the direction of the *Ka'aba* in Mecca; ideally, prayer space should also face in this direction. Some employers can be hard-pressed to provide space meeting that requirement. Finally, doing ablutions on the feet can result in damage to sinks, as they gradually pull away from the wall. Excess water splashing on the floor can also pose a safety hazard.

These intricacies are compounded by variation of belief and practice among Muslims themselves. Muslim employees may differ over things such as the exact time of the prayers, the length of particular prayers, the permissibility of skipping some prayers (or praying later or combining prayers), the necessity of praying in gender-segregated spaces, and the extent of ablution required before praying. Many Muslim employees may only wish to attend the *Jumu'ah*, the noon Friday congregational prayer, which is traditionally longer. Employers should be cognizant of these differences. But in light of such complex issues, what are the legal obligations and how should an employer proceed?

APPLICABLE LAW

Title VII of the 1964 Civil Rights Act prohibits religious discrimination in the workplace in the private sector.⁷ It imposes a burden on employers with 15 or more employees to reasonably accommodate the religious practices of their

employees (individuals cannot be held liable under a Title VII claim).⁸ The only exception is if the accommodation puts undue hardship on the employer, that is, if the accommodation is too expensive or disruptive for the employer. Title VII also created the EEOC, the federal agency that enforces these anti-discrimination provisions.

Lodging a religious discrimination complaint with the EEOC is relatively simple. The employee files his or her complaint with the EEOC within 180 days of the act of discrimination (or 300 days in California and other states with agencies enforcing anti-discrimination provisions in the workplace).⁹ This time window commences from the date of the latest act of discrimination, whether it was a single instance or part of an ongoing range of behaviors.¹⁰ Title VII also protects employees who have filed a complaint against retaliation during this process.¹¹ Some states, like California, have separate fair employment practices agencies that provide an additional avenue of redress for religious discrimination but have a different statute of limitations, e.g., in California under the Fair Employment and Housing Act (FEHA), complaints must be filed within one year.

Once it receives the complaint, the EEOC notifies the employer in question and asks for a statement of position, the employer's version of what happened. The EEOC also usually recommends mediation between the employer and the employee. If the employer does not respond and refuses mediation, the EEOC conducts an investigation, which averages about 10 months. At the end of the investigation, if it finds a violation, the EEOC may file a lawsuit against the employer on the employee's behalf; alternatively, the EEOC may send the employee a Notice-of-Right-to-Sue.¹²

Once a case is litigated, courts have established a two-part test for addressing Title VII claims. First, the plaintiff must demonstrate a *prima facie* case of religious discrimination. In order to establish the *prima facie* case, the plaintiff must: (1) hold a sincere religious belief; (2) take steps to inform the employer about the conflict; and (3) be disciplined by the employer for failing to comply with some conflicting requirement.¹³

Upon successfully proving a *prima facie* case, courts apply a burden-shifting approach. The court moves the burden to the employer to show either that (1) there are factual errors in the allegation of the employee; (2) the employer offered reasonable accommodation to the employee; or (3) the provision of religious accommodation in this context would, in fact, create undue hardship.¹⁴ The notion of undue hardship is defined on a case-by-case basis, considering “the particular factual context of

each case.”¹⁵ However, the Supreme Court has ruled that any accommodations creating “more than *de minimis* cost” for the employer may amount to undue hardship.¹⁶

UNDUE HARDSHIP: A GATEKEEPING FUNCTION?

In the context of disputes about daily prayers, the gatekeeping function of undue hardship currently tends to favor employers. For example, a judgment in 2013 favored a Nebraska meat producer whose policies allowed employees to request informal breaks and to pray in company facilities. However, a group of employees requested further accommodation for the *Maghrib*, or sunset prayer. Management calculated the cost of the requested accommodation—including assessing the possibility of coinciding meal breaks with prayer times and incurring costs by disrupting production—but determined that the costs would be too significant and so refused to accommodate the group. Shortly after Ramadan, the employees submitted a complaint to the EEOC.¹⁷

At trial, the district court found persuasive the meat manufacturer’s argument that the requested accommodation would constitute undue hardship. The manufacturer pointed to safety issues resulting from disruption to the line, negative impacts on operational efficiency, and associated costs.¹⁸ All of these exceeded the *de minimis* requirement. Notably, the *de minimis* requirement not merely is financial, but also takes into consideration the general burden of an employer.¹⁹

Commentators aver that generally courts are not sympathetic to religious plaintiffs, given the incredibly demanding requirements of the *de minimis* rule.²⁰ Nonetheless, undue hardship is not a clear-cut threshold. In a document on best practices, the EEOC recommended that an organization of 30 employees should make all the efforts it can to accommodate three Muslim employees who seek prayer accommodations.²¹ Some organizations have thus acted proactively to avoid religious discrimination claims. For example, this past May a security contractor for Amazon quickly provided prayer rooms for Muslim employees after a string of articles flooded newswires about the issue.²² Such acts sometimes attract media attention, such as when the University of Michigan-Dearborn installed footbaths for its 10% Muslim student population.²³

CASES ON THE RISE

The number of religious discrimination cases under Title VII has risen dramatically, from 1,709 in 1997 to 3,825 in 2016.²⁴ Even though the Equal Employment Opportunity Commission found no reasonable cause to believe that discrimination occurred in approximately 70% of cases filed in 2017, monetary benefits obtained by employees rose from \$2.2 million in 1997 to \$10.1 million in 2017.²⁵

The recent and growing body of case law speaks for itself. In 2007, 80 to 100 Somalis walked off their job at a beef processing plant that did not provide them with an extra break for prayer. The EEOC litigated on their behalf.²⁶ In 2008, an employee whose time card was persistently hidden on Fridays during the noon congregational prayer succeeded in establishing the claim of a hostile work environment.²⁷ Also in 2008, the EEOC won a case on behalf of Muslim employees that required employers to add a paid break during the second half of each shift to accommodate prayer.²⁸

Finally, employers should be aware of the issues involved in potentially discriminating against non-Muslim employees if employers schedule prayer breaks into the day for Muslim employees only. In an interesting case, non-Muslims in Georgia filed a complaint that their employer discriminated against them by providing the Muslim coworkers with one to three paid 15-minute breaks while the non-Muslim employees did not receive these entitlements.²⁹ The case was ultimately settled.³⁰

WHAT SHOULD AN EMPLOYER DO?

As the phenomenon of religious discrimination cases involving prayer grows, employers should first check their internal policies. One key step in avoiding these incidents is having a clear anti-discrimination policy that sets out the values of the organization. This policy should be widely disseminated to personnel, reflected in training, and implemented in good faith. Before an employee even makes a request for religious accommodation in the workplace, employers may want to set up policies on how an employee can do so in order to pray. Particular emphasis should go to the *Jumu’ah*, or Friday noon congregational prayer. In drafting these policies, the employer can look to the Council on American-Islamic Relations best practices guidelines, which advise that the time it takes for prayer and ritual ablutions is about 15 minutes.³¹ Additionally, the policy should address space.

While it may be wise to have a policy in place, given the *prima facie* test, it is incumbent upon an employee to take steps to inform the employer about the issue.³² Therefore, as soon as a Muslim employee notifies the employer about the need for a religious accommodation regarding prayer, the employer must make efforts to reasonably accommodate this request. Title VII prohibits retaliation by an employer against an employee who either makes a request for religious accommodation or files a charge with the EEOC.³³

Employers should take requests for accommodation seriously from the outset. The employer should not assume outright that the accommodation would create undue hardship simply if “many more people, with the same

religious practices as the person being accommodated, may also need accommodation.”³⁴ Failing to properly assess whether the accommodation would result in undue hardship is a dangerous oversight. Employers must investigate the extent of the hardship that the request will create. As some of the cases previously discussed show, engaging in an initial interactive accommodation process with employees bodes favorably for employers.

Ultimately, Muslim prayer in the workplace is a delicate—and potentially costly—issue. Employers are wise to be proactive in setting out policies that accommodate the

religious practices of their employees. Once notified of a request for accommodation, employers should undertake good faith efforts to assess the difficulties of accommodation and proceed accordingly

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