11th Annual Employment & Labor Law Short Course

When Religion, Culture and Ethnicity Collide and Challenge the Corporate Culture

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I. Dress Codes and Grooming Standards

A. Private Employers

1. Pro-Employee

Brown v. F.L. Roberts & Co., 419 F. Supp.2d 7 (D. Mass. 2006)

Plaintiff was a practicing Rastafarian, and therefore could not shave. He worked as a lube technician. The company implemented a personal appearance policy mandating that employees in customer contact positions be clean-shaven. Because plaintiff refused to shave, he was assigned to work on vehicles only in an area where he did not have customer contact, which possibly resulted in a significant change in his job duties; thus, summary judgment in the employer's favor was inappropriate.

EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291JLR, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005)[1]

Red Robin's appearance policy required that body piercings and tattoos not be visible. An employee who practiced Kemetecism, a religion with roots in ancient Egypt, had two tattoos encircling his wrists. According to the employee, the tattoos represented his servitude to Ra, the Egyptian sun god, and it would be a sin to intentionally cover them. The court denied Red Robin's summary judgment motion, holding that the company failed to show either that it made a good faith effort to reasonably accommodate the employee or that accommodating the employee would result in undue hardship. "Hypothetical hardships based on unproven assumptions typically fail to constitute undue

[1] This case could also have been discussed in the section on "Accommodation" under *Religion*.

hardship." The court noted that the employee had worked for six months at Red Robin before being asked to cover his tattoos, and no evidence was presented to indicate that any customers complained about the tattoos.

The case was settled by consent decree. The company paid the employee $150,000 and agreed to educate managers.

2. Pro-Employer

Lorenz v. Wal-Mart Stores, 225 Fed.Appx. 302 *(*5th Cir. 2007)

The employee appealed the district court's order dismissing the case. The employee began wearing priestly garments, a court jester suit, and a Muslim headdress (a Kaffiyeh) to work as a cashier. He also occasionally wore multiple crosses, a crucifix and various anarchy and peace symbols. Customers complained. The manager informed him that the priestly attire did not comply with the store's dress code policy, but that he could wear the Muslim headdress. He continued to wear everything and after repeated warnings and disciplinary action, the employee was terminated. The court affirmed the district court's finding that no claim for religious harassment or failure to provide religious accommodation existed.

Jesperson v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006)

Harrah's appearance and grooming policy required female bartenders to wear face powder, blush, mascara and lip color. The policy specified that men were not permitted to wear any makeup. Jesperson did not wear makeup on or off the job and claimed that she found the makeup requirement offensive and felt uncomfortable wearing makeup. The court noted that grooming standards that appropriately differentiate between genders are not facially discriminatory. It was up to the employee to establish that the policy created an "unequal burden" for females. The court declined the employee's request to take judicial notice that it costs more money and takes more time for a woman to comply with the makeup requirement. After also finding no evidence that the grooming standards were adopted to make female bartenders conform to a stereotypical image of how women should look, the court affirmed the trial court's decision granting summary judgment to Harrah's. In the vigorous dissent, we learn that the female employees were required to meet with professional image consultants who created a facial template for each woman, dictating where and how the makeup was to be applied.

B. Public Employers

1. Pro Employee

Nothing…..

2. Pro Employer

Webb v. City of Philadelphia, No. 05-5238, 2007 WL 1866763 (E.D. Pa. June 27, 2007)

A Muslim female police officer's requests to wear a khimar while on duty were denied by her supervisors as a violation of the Philadelphia Police Department Directive 78, which describes in detail the approved uniform for police officers. Nothing in the Directive permits the wearing of religious symbols or clothing as part of the uniform.

While her EEOC Charge alleging religious discrimination was pending, Webb reported for duty a few days wearing a khimar. She refused orders to comply with Directive 78 and was sent home. Subsequently, she was disciplined for insubordination and neglect of duty for refusing to obey the directive to remove her khimar. After an evidentiary hearing before the Police Board of Inquiry, she was suspended for 13 days. Thereafter, Webb filed an amended Charge for retaliation.

The City conceded that it offered Webb no religious accommodation and raised the undue hardship defense. The uncontradicted testimony of the Police Commissioner was that the purposes of Directive 78 include promoting cooperation among officers, fostering esprit de corps, emphasizing the hierarchical nature of the police force and portraying a sense of authority to the public. The wearing of religious symbols or clothing undermines these purposes and has the potential for interfering with effective law enforcement and for causing harm to officers in a diverse community such as Philadelphia. The court found that the City had thus established compelling non-discriminatory reasons for Directive 78 and demonstrated as a matter of law that it would suffer an undue hardship if required to accommodate the wearing of a khimar by Webb while on duty.

With regard to her retaliation claims, it was clear that by wearing her khimar to work, Webb was protesting what she reasonably believed was discrimination. However, the court determined that by sending her home and disciplining her, the supervisors were merely enforcing Directive 78 as written, with no suggestion of a retaliatory motivation.

Francis v. Mineta, 505 F.3d 266 (3d Cir. 2007).

A Transportation Security Administration (TSA) employee appealed the district court's dismissal of his action alleging employment discrimination under the Religious Freedom Restoration Act (RFRA). The employee wore his hair in dreadlocks, which he declared to be an important religious expression. The Government told him that TSA screeners were part of a uniformed service and subject to a mandatory grooming policy requiring short hair. The Government moved to dismiss, arguing that Title VII provided the exclusive remedy for employment discrimination claims and that the employee had not exhausted his administrative remedies. The appellate court affirmed the district court, concluding that Title VII is the exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination, and that Congress did not intend

the RFRA to create a vehicle for allowing religious accommodation claims in the context of federal employment to do an end run around the legislative scheme of Title VII.

Dodd v. SEPTA, No. 06-4213, 2007 WL 1866754 (E.D. Pa. June 28, 2007)

Niles Dodd is a former police officer with the Southeastern Pennsylvania Transportation Authority. Dodd, a Rastafarian, wore his hair in dreadlocks for his religious purposes. After nearly four years of employment with SEPTA, Dodd began complaining of harassment because of the way he wore his hair. He also complained that female officers were treated more favorably with respect to the application of SEPTA's grooming policy—that females regularly wore their hair in ponytails and were not disciplined for doing so. He sued SEPTA and three officers of the SEPTA police department, claiming religion and gender discrimination and retaliation under Title VII and the state human relations act and retaliation under §1983. SEPTA moved to dismiss the gender discrimination and §1983 retaliation claims.

Citing Third Circuit precedent, the trial court noted that dress codes are permissible under Title VII as long as they, like other work rules, are enforced even-handedly between men and women, even though the specific requirements may differ. In fact, all of the federal courts of appeal that have addressed the issue of hair length have held that an employer's regulation of its male employees' hair length does not violate Title VII. So, the sex discrimination claims were dismissed.

The §1983 claims alleged that all three individual defendants, due to religious animus, personally made negative comments about Dodd's dreadlocks and/or instructed him to cut his hair. The motion to dismiss these claims against the individuals in both their individual and official capacities was denied.

Roberts v. Ward, 468 F.3d 963 (6th Cir. 2006)

General Burnside State Park implemented a professional appearance policy that applied to all employees. This included no uncovered tattoos and the requirement that shirts and blouses be tucked in. Three seasonal maintenance workers were fired for failing to tuck in their shirts. The workers' first amendment claims failed because there was no evidence that untucked shirts amount to speech on a matter of public concern. The workers also argued that their equal protection rights were violated because the dress code had a more onerous impact on the manual laborers who worked outside in the summer. In order to establish an equal protection violation, plaintiffs needed to show that the policy targeted a group that has historically been the victim of discrimination.

Inturri v. City of Hartford, Connecticut, 365 F. Supp.2d 240 (D. Conn. 2005), *aff'd,* 165 Fed.Appx. 66 (2nd Cir. Jan. 31, 2006)

Pursuant to a regulation authorizing the police chief to order the covering of tattoos deemed offensive or unprofessional, the chief ordered five white police officers to cover their spider web tattoos. The officers denied that they knew it at the time they got

the tattoos, but there was evidence that the tattoo symbolized race hatred of non-whites and Jews. The officers complied with the order and filed a lawsuit claiming a §1983 violation by denying them their right to free expression under the first and fourteenth amendments and an equal protection violation. Because the officers not only denied that the tattoos expressed any racist meaning but also argued that they were merely decorative, they lost on their freedom of expression claim. The court applied the rational basis test to the Equal Protection clause claim and determined that there was a legitimate government interest. The police chief and command staff were concerned that the spider web tattoos would negatively affect relations between the officers in the department and the citizens of Hartford.

II. Religion

A. The Illinois Health Care Right of Conscience Act

Conscience laws allow health workers the right to refuse health treatment based on their moral or religious beliefs. Currently, forty-five states have some form of conscience law, as does the federal government.[2] Most of these laws were passed in response to *Roe v. Wade,* because states were worried that the decision would open the door to requiring that all physicians perform abortions. Some conscience laws were also passed in response to euthanasia, specifically in reaction to Oregon's Death with Dignity Act, where a physician can prescribe lethal amounts of pain killers with the intent to hasten death for some terminal patients who wish to voluntarily end their lives. Some Illinois pharmacists believe the laws permit their refusal to dispense religiously-objectionable medications. Now, four states in addition to Illinois are considering competing legislation which guarantees a patient's access to prescriptions.[3]

In Illinois, the governing conscience law statute is called the Health Care Right of Conscience Act, 745 ILCS 70/ et seq. The statute states that "no physician or health care personnel shall be civilly or criminally liable to any person…by reason of his or her refusal to perform, assist, counsel, suggest, recommend, refer, or participate any way in any particular form of health care service which is contrary to the conscience of such physician or health care personnel."[4] The purpose of the Act is to "respect and protect

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[2] Lora Cicconi, *Pharmacist Refusals and Third-Party Interests: A Proposed Judicial Approach to Pharmacist Conscience Clauses,* 54 U.C.L.A. L. REV. 709, 735 (2007).

[3] The four states are California, Montana, New Jersey and West Virginia. For example, in 2005, California enacted Senate Bill 644 into law, allowing pharmacists to refuse to dispense medications on ethical, religious, or moral grounds, but only in cases where the pharmacist has notified his employer in advance of the drugs to which he or she objects, and only if the employer can reasonably accommodate the objection without undue hardship. *See also* Cicconi, *supra*, at 710.

[4] 745 ILCS § 70/4. "Health care personnel" is defined as any nurse, nurses' aide, medical school student, professional, paraprofessional or any other person who furnishes, or assists in the furnishing of, health care services. 745 ILCS § 70/3.

the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care."[5]

B. Workplace Religious Freedom Act (WRFA)

The WRFA (S.B. 893) was introduced on March 17, 2005. If passed, it will require employers to make reasonable accommodation for an employee's religious practice or observance, such as holy days. This legislation is supported by diverse religious groups, such as the Union of Orthodox Jewish Congregations, the Southern Baptist Convention, the National Council of Churches, the North American Council for Muslim Women, the Seventh-Day Adventist Church, and the U.S. Conference of Catholic Bishops. The ACLU is opposed to the WRFA, claiming it is overly broad and could potentially erode civil rights by permitting workplace religious freedom claims that have been previously rejected by the courts.

The WRFA focuses on the *TWA v. Hardison*[6] definition of "undue hardship." The Supreme Court stated that an employer must show that accommodating an employee's religious beliefs puts more than a *de minimus* cost on the company. Employers can show undue burden if they cannot staff easily or efficiently, accommodating violates a collective bargaining agreement between a union and the employer, or loss of production would result due to accommodation. Instead of the 'not more than *de minimus*' standard set out in *Hardison*, the WRFA would describe "undue hardship" as 'an action requiring significant difficulty or expense.' It would require that, to be considered an undue hardship, the cost of accommodation must be quantified by the employer and considered in relationship to its size.

The WRFA is still in discussion by House and Senate Committees.

C. Accommodation

Menges v. Blagojevich, 451 F. Supp.2d 992 (C.D. Ill. 2006)

In April 2005, Governor Blagojevich introduced Emergency Rule 1330.91 ("Rule") in the Illinois General Assembly. It was later adopted into the State Health Code in August 2005.[7] Given that Illinois women were unable to get contraceptive prescriptions filled in various pharmacies across the State, the Rule required that all

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[5] 745 ILCS § 70/2.

[6] 432 U.S. 62 (1977).

[7] Jesse Vivian, *Intervention or Unwanted Intrusion?* US PHARMACIST, VOL. 8, 90-94, Aug. 25, 2006.

Division I pharmacies "dispense contraceptives…without delay."[8] "Contraceptives" are defined in the Rule to include all FDA-approved contraceptives, which include Emergency Contraceptives (EC).

Plaintiff John Menges is a fourth generation pharmacist in Collinsville, Illinois, who was employed by Walgreens.[9] When the Rule was instituted at the beginning of 2005, plaintiff broke down in tears at a public hearing, explaining that filling EC prescriptions violates his core Catholic beliefs against abortion. When the Rule became law, Walgreens fired Menges and four other pharmacists for refusing to comply with it. Plaintiffs filed suit against the Governor and two officials at the Illinois Department of Financial and Professional Regulation, alleging violations of their constitutional right to exercise freely their religious beliefs and Title VII. Walgreens intervened, alleging that it has been subjected to state administrative enforcement actions for not complying with the Rule and civil suits by former employees for complying with the Rule, and sought a declaratory judgment that the Rule violated Title VII and that its previous policies conformed to both the Rule and Title VII. The Governor and other state officials moved to dismiss all claims.

Plaintiffs claimed that on the day of the announcement of the Rule's enactment, all pharmacists received a letter informing them of its provisions. The Governor also sent a letter to every licensed Illinois physician, explaining that the Rule was promulgated in response to actions of individual pharmacists opposed to EC use, and requested that physicians report these pharmacists to the Illinois Department of Financial and Professional Regulation. Furthermore, plaintiffs alleged that the Governor sent a letter to a conservative organization, stating that the Rule was in response to pharmacists who disagreed with EC. The letter also advised that should individual pharmacists refuse to fill prescriptions or dispense EC, their employer would face significant penalties, and that defendants would aggressively enforce the law. Finally, plaintiffs alleged that the Governor publicly stated that pharmacists who oppose EC should "find another profession."

Like plaintiffs, Walgreens also claimed that prior to the Rule's enactment it accommodated plaintiffs' religious beliefs, but no longer could without violating the Rule. Prior to the Rule, Walgreens had a policy called the Referral Pharmacist Policy. Pursuant to this policy, Walgreens allowed its pharmacists nationwide to decline to fill any prescription based on moral or religious objections so long as the prescription could be filled by another pharmacist at that store or a nearby pharmacy. After the Rule's enactment, Walgreens changed its policy in Illinois, requiring every pharmacist to dispense any and all prescriptions regardless of their moral or religious beliefs. Before the Rule's enactment, Walgreens notified each of the pharmacists who objected to dispensing EC, and requested that each agree in writing to the new policy. The pharmacists who refused to sign the policy were placed on unpaid indefinite suspension

[8] 68 ILL. ADMIN. CODE §1330.91(J).

[9] Molly McDonough, *Rx for Controversy: Battle Over Dispensing Emergency Contraceptives Creates Competing Litigation,* 4 NO. 23 ABA J. E-REPORT 3, 2 (2005).

and later terminated. In a national television broadcast, the Governor lauded Walgreens for its actions in complying with the Rule by terminating plaintiffs, and reiterated defendants' interpretation that the Rule requires pharmacists to dispense all forms of contraception, including EC. Walgreens sought a declaratory judgment that the Rule conflicted with Title VII, and that its own Referral Pharmacist Policy complied with both the Rule and Title VII. Walgreens also sought a permanent injunction enjoining enforcement of the Rule to the extent that it prohibited Walgreens from implementing the Referral Pharmacist Policy in Illinois.

Judge Scott denied defendants' motion to dismiss. The court first examined plaintiffs' Free Exercise challenge. It noted that State laws designed to discriminate against individuals because of their religious practices are subject to strict scrutiny. The State must therefore demonstrate that its law serves a compelling state interest and is narrowly tailored to advance that interest. However, because the Rule in question is religiously neutral, plaintiffs must go beyond the face of the Rule to show that it targets certain religions or religious beliefs disparately. Here, the court found that the public statements by the Governor, his letter to the conservative organization, and commendations to Walgreens for terminating plaintiffs, constituted sufficient facts to allow the Rule to be judged with strict scrutiny. Additionally, the Rule was written to only pertain to Division I pharmacies that carry EC, not to hospitals, emergency rooms, or other non-commercial pharmacies. Furthermore, a delay caused by being out of stock of EC does not violate the Rule, but a delay while another pharmacist dispenses the prescription pursuant to Walgreens policy *does* appear to violate the Rule. Therefore, the court reasoned, plaintiffs alleged sufficient facts that the Rule does target these specific plaintiffs, allowing a strict scrutiny review.

The court also pointed out that while the Rule's alleged purpose is to meet a critical need to make EC available, it does not do so because it is underinclusive and only covers specific pharmacies and specific situations – where the pharmacist has religious or moral objections to EC. Plaintiffs' allegations, the court held, at least created a genuine issue of fact regarding whether the Rule is generally applicable and violates the Free Exercise Clause.

In examining whether plaintiffs alleged a Title VII violation, the court first examined the preemption issue. Title VII provides that: "Nothing in this subchapter shall be deemed to exempt or relieve any person from liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." Furthermore, the Civil Rights Act also provides that: "Nothing contained in any Title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such Title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with of the purposes of this Act, or any provision thereof." Therefore, Title VII specifically permits states to enact laws that might affect the Civil Rights Act, so long as they do not expressly frustrate its purpose.

The court stated that plaintiffs alleged the Rule conflicted with Title VII's prohibition of religious discrimination in employment because the Rule required Walgreens to fire them due to their religious beliefs concerning EC. A Rule that mandates religious discrimination by employers would conflict with Title VII and be preempted, and plaintiffs' allegations state a claim. Because plaintiffs allege their religion prohibits the dispensing of EC, Walgreen's Referral Pharmacist Policy reasonably accommodated their beliefs without undue hardship. An undue hardship is anything other than a *de minimus* hardship, which Walgreens contended its policy was not. In the light of these allegations, plaintiffs stated a claim for preemption. Additionally, the Rule created a religiously hostile work environment for plaintiffs because they had to compromise their religious beliefs or be terminated.

Despite defendants' argument that there is a strong presumption against preemption of health and safety regulations, plaintiffs provided facts to show that the Rule is not a health and safety regulation, but rather a regulation targeting pharmacists who religiously oppose EC. Furthermore, plaintiffs showed that the Rule may not comply with Title VII because the Governor rejected Walgreens' accommodation. Because whether Walgreen's accommodation was an undue burden constitutes a question of fact, the complaint survived.

1. Private Employers

Morrissette-Brown v. Mobile Infirmary Medical Center, 2007 U.S. App. LEXIS 25870 (11th Cir. 2007)

The employee appealed from the district court's entry of final judgment after a bench trial. The district court found the employer did not terminate her from her position and reasonably accommodated her religious beliefs that she not work on Fridays or Saturdays. The employer offered the employee a different position which would not require her to work on Fridays or Saturdays.

EEOC v. United Parcel Service, Case No. 06-1453 (filed in federal district court in Newark, New Jersey in 2006)

The EEOC filed a lawsuit alleging that UPS required Ronnis Mason to shave his beard if he were hired for a position helping with customer deliveries and requiring customer contact. Mason wears his beard as part of his observance of Rastafarianism. Mason explained to UPS that he could not shave his beard, and UPS told him that he could then only apply for an "inside," lower paying position that would not have contact with the public. The EEOC advised us in December that discovery was proceeding.

a. Accommodation Proper/Case Should Go to Jury

EEOC v. Southwestern Bell Telephone, LLP, No. 3:06CV00176 JLH, 2007 WL 2891379 (E.D. Ark. Oct. 3, 2007)

The EEOC brought this lawsuit on behalf of Jose Gonzalez and Glenn Owen, members of the Jehovah's Witness faith who worked as customer service technicians for AT&T. Both (brothers-in-law) requested vacation time for a religious convention that was scheduled from Friday, July 15 to Sunday, July 17, 2005. Both had attended the convention every previous year during their employment with the company. Both submitted their vacation requests in January 2005; but, as of the Thursday morning prior, AT& T still had not made a decision. Later in the day, the two were informed that the workload would not permit them to take the day off. Both missed work and were terminated.

AT&T contended that accommodating the two employee's religious beliefs caused undue hardship because other employees were required to work overtime and the company had to pay premium wages for that work. Also, in the absence of Gonzalez and Owen, the company was unable to meet the service needs of all of its customers. The court found that such hardship was *de minimus* and denied AT&T's summary judgment motion.

Subsequently, a jury awarded $756,000--$296,000 in back pay and $460,000 in compensatory damages under Title VII.

Krop v. Nicholson, 506 F.Supp.2d 1170 (M.D. Fla. 2007).

Plaintiff, an observant Jewish female, was a pharmacist employed by a Veterans Hospital. She alleged several discrimination claims based on sex and religion. The court granted the Hospital's summary judgment motion in part and denied it in part. The court found no evidence of disparate treatment or disparate impact based on sex when the Hospital denied her request to work flex time in order to care for her children because she could not identify other employees that were granted such schedules, or that the denial of a flex time schedule disproportionately affected women at the Hospital. Both parties agreed that the employee had made out a *prima facie* religious discrimination case. What is disputed is whether the Hospital took reasonable steps to accommodate the employee's religious beliefs. The court determined that a genuine issue of fact for the jury existed as to whether the Hospital's denial of the employee's use of Leave Without Pay to prepare for Jewish holidays was due to undue hardship, or whether the denial which she claims caused her to resign was sufficient to constitute constructive discharge.

Baker v. Home Depot, 445 F.3d 541 (2d Cir. 2006)

The employee appealed from a summary judgment ruling in Home Depot's favor. The employee requested a schedule with Sundays off, due to his religious beliefs of not working on the Sabbath. The district court found that Home Depot's offer to allow the

employee a schedule with Sunday mornings off constituted a reasonable accommodation, despite the employee's repeated statements to several supervisors that he did not want to work at all on Sundays. The appellate court vacated the lower court's decision and remanded the case because the offered accommodation could not be considered reasonable as it did not eliminate the conflict between the employment requirement and the religious practice.

Kenner v. Domtar Industries, Inc., 97 Fair Empl. Prac. Cas. (BNA) 1354 (W.D. Ark. 2006)

Plaintiff Kenner became a preacher, and swapped shifts with a co-worker to handle his Sunday shifts as he needed to attend church; the shift-swap was allowed under a collective bargaining agreement. However, plaintiff was penalized under the employer's attendance policies for missing his shifts, and filed a Title VII claim. The employer's summary judgment motion was denied as it made absolutely no attempt to accommodate plaintiff's needs within its attendance system.

EEOC v. Alamo Rent-A-Car, 432 F. Supp.2d 1006 (D. Az. 2006)

The EEOC moved for partial summary judgment, which was granted. The employee had been employed by Alamo since 1999. The company had a "Dress Smart Policy" which prohibited employees from wearing certain clothing and accessories, including the wearing of any "garment or item of outer clothing not specifically mentioned in the policy." The employee was a Muslim woman who wore a head covering during the Ramadan holiday. Apparently, the employee had been permitted to wear a head covering in 1999 and in 2000; but, in 2001, she was verbally warned and then terminated for violation of company rules. The decision is remarkable in that there is absolutely no mention of 9/11. The court determined that Alamo's proposal--that the employee be allowed to wear her head covering while in the back office but that when she went to the rental counter to assist customers, she would have to remove it--was not a reasonable accommodation. And, because the company's concern that permitting the employee to wear a scarf while at the rental counter would affect its customer image was merely a "hypothetical hardship," Alamo failed to meet its burden to establish that it could not reasonably accommodate the employee without undue hardship.

***June 2007: A Phoenix jury awarded plaintiff more than $287,000. Alamo will pay $21,640 in back pay, $16,000 in compensatory damages, and $250,000 in punitive damages.

EEOC v. Blockbuster, Inc., No. CIV 04 2007 PHX FJM (D. Ariz. June 8, 2005)

The EEOC alleged Blockbuster, a video rental chain, failed to provide a reasonable accommodation for a 17-year-old part-time Jewish customer service representative who wore a yarmulke. He was told that wearing his yarmulke violated the dress code. He was forced to compromise his religious beliefs by working without his

yarmulke for approximately 2 months. Upon receiving the EEOC charge, defendant told him he could resume wearing his yarmulke. The case settled for $50,000.

b. No Accommodation Required

Stolley v. Lockheed Aeronautics Co., 100 Fair Empl. Prac. Cas. (BNA) 642 (5th Cir. 2007)

When plaintiff applied for work as an aircraft assembler at a union shop, he stated falsely that he was able to perform shift work and could work any day of the week. When he learned that he was scheduled to work from 3:45 p.m. to 12:15 a.m. on Fridays, he asked to be assigned to a different shift because his religion required him to observe the Sabbath from sundown on Friday until sundown on Saturday. The collective bargaining agreement did not permit shift transfers not based on seniority. The employer asked the Union to waive the provision, but the Union refused. Plaintiff was fired for leaving work prior to the end of a Friday shift. The employer's summary judgment motion was granted, and affirmed on appeal. The court held that where seniority-bidding provisions in collective-bargaining agreements conflicted with an employee's religious beliefs so that no accommodation was possible, an employer would not be liable for its failure to accommodate.

Bush v. Regis Corp., 2007 U.S. App. LEXIS 28210 (11th Cir. Dec. 2, 2007)

Plaintiff, a Jehovah's Witness, worked at a hair salon. The employer gave her time off to attend services. However, she was not given time off to perform "field service" work with her family, which she preferred to do on Sunday afternoons. Since she was not required to do the work on Sunday afternoons, there was no accommodation required.

Noesen v. Medical Staffing Network, Inc., 2006 U.S. Dist. LEXIS 36918 (W.D. Wis. June 1, 2006), *aff'd,* 232 Fed.Appx. 581 (7th Cir. May 2, 2007)

A pharmacist refused to dispense contraception. Initially, he was given the exact accommodation he sought, and he was merely to signal to the other pharmacist on duty that he was unable to assist the customer. However, later, the pharmacist sought the additional accommodation that he completely avoid situations where he might briefly interact with a customer who requested birth control. The pharmacist would actually walk away from customers or leave them on hold on the telephone indefinitely without alerting any pharmacy staff. The court held that Title VII only requires an employer to "provide one reasonable option that will eliminate the conflict between the employee's job and religious beliefs." Thus, the pharmacist was not entitled to an additional accommodation.

The Seventh Circuit affirmed, focusing on the undue hardship that the accommodation that Noesen attempted to impose on the employer would have caused. Accommodations that would require other employees to assume a disproportionate

workload or divert them from their regular work are an undue hardship as a matter of law.

Ng v. Jacobs Engineering Group, No. B185838, 2006 WL 2942739 (Cal. App. 2 Dist. Oct. 16, 2006)

Ng, an evangelical Christian whose religious beliefs compel her to share her religious beliefs with her co-workers in an effort to bring them "to a saving faith in Jesus Christ," was terminated when she repeatedly sent religious e-mails containing biblical quotations over the office system and held unauthorized weekly prayer meetings in company conference rooms after being repeatedly counseled not to. The court held that accommodation of Ng's proselytizing would have worked an undue hardship. Co-workers complained about her proselytizing. Thus, her conduct impacted other employees. In this situation, if the employer had condoned Ng's conduct, it would be subject to possible suits by her co-workers on the grounds of their religious freedom or religious harassment.

2. Public Employers

a. Accommodation Proper/Case should go to Jury

Hill v. Cook County, No. 05 C 588, 2007 WL 844556 (N.D. Ill. Mar. 19, 2007)

Yolanda Hill is a member of the Children of Light Church, which practices Orthodox Judaism. She told her supervisor that she could not work during the Sabbath, sundown Friday through sundown Saturday. The collective bargaining agreement required that all employees under his supervision work some weekends. Her supervisor told her that he could not schedule her differently from other employees.

As a result of the failure to accommodate, Hill called in sick seventeen times between May and September 2003, all Fridays and Saturdays. A disciplinary hearing was held, at which time Hill testified that she had informed her supervisor of her need for religious accommodation and that her request had been denied. Nonetheless, Hill was given a five-day suspension. She sued. Her failure to accommodate claims were brought alleging violation of her first amendment right to freedom of religion under 42 U.S.C. § 1983 and Title VII.

In order to establish employer liability under §1983, an employee must prove that her rights were violated in one of three ways: (1) an injury caused by the existence of an express policy, (2) an injury caused by a widespread practice or custom, or (3) an injury caused by a person in the municipality "with final policymaking authority." In this case, the trial court held that the record did not support a causal link between the adverse action by the supervisor or the hearing officer and a policy of the County.

However, the summary judgment motion as to the Title VII claim was denied. Here, Hill established a *prima facie* case of religious discrimination: (1) the practice

conflicting with employment is religious, (2) she called the practice to her employer's attention, and (3) the religious practice is the basis for her discriminatory treatment. Cook County argued that the reason for the discipline was strictly absenteeism. However, the court noted that Hill established that her absenteeism was limited to Fridays and Saturdays as a result of the failure to accommodate her religious beliefs.

Once the *prima facie* case is established, the employer must present evidence that accommodating a religious practice would create an undue burden. The only collective bargaining agreement requirement raised by the County as presenting an undue hardship was that each employee was to work some weekends. Hill offered to work Sunday through Thursdays, Saturday after sundown and Christian holiday shifts in exchange for accommodation of her Sabbath requirement. Thus, she raised a genuine issue as to the employer's undue burden defense, and the court found that a reasonable jury could find that the County could accommodate her request without undue hardship.

b. No Accommodation Required

Tepper v. Potter, 505 F.3d 508 (6th Cir. 2007)

A full time postal carrier and Messianic Jew worked for ten years with the agreement that he need not work Saturdays in conformity with his religious beliefs regarding the Sabbath. After budgeting cuts, when the employee was told that the Post Office could not accommodate this schedule, the employee filed a claim of religious discrimination. The district court granted summary judgment in the Post Office's favor and the Sixth Circuit affirmed. The district court found that the employee could not make out a *prima facie* discrimination case. Both sides agreed that the employee held a sincere religious belief and had informed the employer about the conflicts with his employment. However, the district court found that the employee could not demonstrate that he had been discharged or disciplined for failing to comply with the conflicting employment requirement. The Post Office allowed the employee to take as many Saturdays off using leave without pay or vacation and although this did impact the employee's annual pay and pension, more than a mere loss of income is required to demonstrate discipline.

Richardson v. Dougherty County, 185 Fed.Appx. 785 (11th Cir. 2007)

A Seventh-Day Adventist was permitted to take annual leave or swap shifts whenever he was assigned to work on the Sabbath, and the employee never worked on the Sabbath while employed. The employee was terminated due to allegations that he sexually harassed another employee while on duty. He then filed EEOC discrimination charges. The district court granted summary judgment in the Sheriff's Office's favor. The concluding that there was no direct evidence of discrimination sufficient to survive summary judgment and no evidence that his work schedule was not accommodated, as the employee never worked on the Sabbath. Furthermore, the employee could not establish a *prima facie* retaliation case because he failed to rebut the legitimate nondiscriminatory reason for his termination, which was sexual misconduct. The

employee could not causally link his religion to his eventual termination. The appellate court affirmed.

Glass v. IDOT, 2007 U.S. Dist. LEXIS 10498 (S.D. Ill. 2007)

The employee informed IDOT upon hire that based on her religious beliefs, she could not wear pants. Due to safety and occupational concerns, IDOT transferred her to another position where she could wear a skirt or dress. IDOT alleged that the employee received several negative performance reviews. After two other employees received promotions, the employee resigned. The Illinois Department of Transportation moved for summary judgment on the employee's claims of religious, race, and sex discrimination. The court granted its motion on the grounds that the employee could not make out a *prima facie* discrimination case, and that she has not shown that IDOT's proffered reasons for employment decisions were pretextual. The court found that the employee could not show that she was performing her job satisfactorily, or that at least one similarly-situated employee, not in her protected class, was treated more favorably. The court also found that the employee produced no evidence that the reason she did not receive a promotion was due to her religious beliefs.

D. Other Religion Issues

1. Private Employers

Sidelinger v. Harbor Creek School District, 2006 U.S. Dist. LEXIS 86703 (W.D. Pa. Nov. 27, 2006)

Plaintiff alleged his religious beliefs prohibited him from having his picture taken for an identification badge all school employees were required to wear. He failed to provide further information despite multiple opportunities, other than he had a steadfast belief against adornment, and failed to show up for work or call in absent. He later said he was a very old-fashioned Latin Roman Catholic. He was eventually terminated.

The court granted the employer's motion for judgment as a matter of law. The court found that plaintiff failed to prove a *prima facie* case. First, he could not prove a sincerely held religious belief and that he provided his employer with notice of same. Plaintiff provided no evidence that his belief was at all related to his Catholicism. It was appropriate for the employer to make further inquiry given that identification badges are worn frequently at different facilities and events; if it was improper for an employer in inquire further, an employee could freely claim any imaginable religious belief as ostensibly conflicting with a work requirement. Further, the fact that plaintiff posted a picture of himself on the internet made it unlikely that his belief that being photographed was sinful was sincere.

Ollis v. HearthStone Homes, 495 F.3d 570 (8th Cir. 2007)

Defendant home-builder HearthStone appealed the district court's denial of its motion for judgment as a matter of law; a jury found for the employee on his claims of religious discrimination and retaliatory discharge.

HearthStone's owner and president believed in reincarnation and that a person's traumas in the past explain behaviors in the present life. HearthStone required Mind Body Energy (MBE) sessions to motivate and cleanse the employees and monitored the employees' attendance at these sessions. The sessions focused on reincarnation and required the reading of Hindu and Buddhist literature.

A Protestant employee objected to attending these sessions. The employee was later fired after allegedly sexually harassing a fellow employee, though his termination was written up as "poor leadership and lack of judgment." The employee claimed the termination was pretextual and was actually due to his religious beliefs which conflicted with MBE. The court found reasonable evidence to conclude a jury could find in the employee's favor. The record indicated that the employee had made out a *prima facie* case, and that a reasonable jury could determine that HearthStone's proffered reasons for termination were pretextual, as his termination notice did not list sexual misconduct.

Powell v. Yellow Book USA, Inc., 445 F.3d 1074 (8th Cir. 2006)

Powell brought claims of sexual and religious harassment and retaliation against Yellow Book after she was terminated when she failed to return from FMLA leave. A co-worker spoke to Powell about her religious beliefs and posted religious sayings in her (the co-worker's) cubicle. Yellow Book met with the co-worker and explained that she was not to raise religious matters with Powell, either in person or via e-mail. The company reviewed the posted sayings, determined that they did not violate company policy, and did not require their removal. Powell, however, continued to complain that the posted religious messages were inappropriate and distracting. So, Yellow Book moved Powell away from her co-worker's cubicle. Even then, Powell continued to insist that the sayings be removed. The trial court granted Yellow Book's summary judgment motion and the Eighth Circuit affirmed, finding that the company's response to Powell's complaint was prompt and reasonable. The court also noted that employers are not obligated to "suppress any and all religious expression merely because it annoys a single employee."

West v. Shands Hospitals & Clinics, Inc., 97 Fair Emp. Prac. Cas. (BNA) 1544 (N.D. Fla. 2006)

West had a rocky relationship with her supervisor. She was given poor performance reviews and reprimanded on several occasions. The supervisor underwent surgery and, due to complications, suffered a stroke and became gravely ill. When West learned about her supervisor's turn for the worse, she immediately e-mailed a co-worker, claiming that G-d had told her that He was going to put His "wrath" on the supervisor.

Throughout the day, West communicated to friends and acquaintances her view that her supervisor's illness was a sign of a divine judgment about her supervisor's treatment of her. Once West learned that her supervisor had passed away, she essentially celebrated and shared that celebration with her co-workers, who were very upset by her actions. One employee contacted Employee Relations, and West was terminated two days later, after an investigation revealed that her actions had caused a major disruption in the clinic's activities. She sued, alleging religious discrimination. The court found that the termination was based on a legitimate, nondiscriminatory reason, for outrageous conduct that caused a disruption in the workplace among her co-workers and staff. It was not the religious nature of the statements that prompted the termination; it was the fact that West openly celebrated the death of a woman she did not get along with in front of other employees who were emotionally grappling with the supervisor's sudden death. Summary judgment was granted in defendant's favor.

EEOC v. Bombardier Aerospace Inc., No. 3-CV-1904-M (N.D. Tex – settled in 2005)

Kolman was a Mormon, and as such, he abstained from drinking alcohol. He contended that his manager told him that potential customers would be highly offended if he didn't imbibe. He was fired after complaining to Human Resources. The case was settled for $159,000.

2. Public Employers

Grossman v. South Shore Public School District, 507 F.3d 1097 (7th Cir. 2007)

Plaintiff was a guidance counselor in a k-8 public school in a small town. She alleged that her contract was not renewed in violation of Title VII and the 1st Amendment. This was because she refused to distribute literature to students concerning the use of condoms and instead ordered and distributed literature advocating abstinence. Also, on two occasions, she had distraught students pray with her. The entry of summary judgment in the school district's favor was affirmed, based on the determination that Grossman had been terminated for her conduct, not for her religious beliefs.

This case also illustrates the tension between the establishment clause and the Free Exercise Clause of the First Amendment. The court cited to guidelines issued by the federal Department of Education providing that "when acting in their official capacities as representatives of the state, teachers, school administrators, and other school employees are prohibited by the Establishment Clause from encouraging or discouraging prayer, and from actively participating in such activity with students."

Amekudzi v. Board of City of Richmond Public Schools, 2007 U.S. Dist. LEXIS 92275 (E.D. Va. Dec. 7, 2007)

Plaintiff, a substitute teacher, complained that he was not allowed to discuss his Christianity with students although, according to his complaint, the school allowed "magic and witchcraft" to be taught. The complaint was dismissed, with reliance on *Grossman*, as plaintiff's conduct was inappropriate for a school setting.

III. Employee Activities on Personal Time

A. Illinois Right to Privacy in the Workplace Law

Illinois law provides, among other matters,

> 5. Discrimination for use of lawful products prohibited.
>
> (a) Except as otherwise specifically provided by law and except as provided in subsections (b) and (c) of this Section, it shall be unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual uses lawful products off the premises of the employer during nonworking hours.
>
> (b) This Section does not apply to any employer that is a non-profit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public. This Section does not apply to the use of those lawful products which impairs an employee's ability to perform the employee's assigned duties.

820 ILCS 55/1-20. Note that this law only extends to the use of products (i.e., tobacco and alcohol) and not activities (i.e., sexual proclivities, moonlighting). A number of other states, as well as municipalities, have "lifestyle discrimination" laws which prohibit employers from taking into account certain off-duty activities when making employment-related decisions.

B. Blogging

Here is a sampling of what has been happening when employees blog during their personal time[10] –

1. Blogging outside of work, about work

Many employees have been discharged for somehow implicating their workplaces on their private, personal blogs. And the conduct extends to photographs, not simply words. Perhaps the best known of these incidents involves Ellen Simonetti, known as the "Queen of the Sky." Simonetti is the former Delta flight attendant who posted suggestive pictures of herself in her Delta uniform on her personal blog, and was then fired.[11] Her

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[10] This has been updated from a section of a paper drafted by Ms. Arnoff for the American Bar Association. The entire papered, co-authored with two Washington attorneys, discusses possible claims related to these matters. The paper can be accessed at http://www.bnabooks.com/ababna/eeo/2006/arnoff.pdf.

[11] http://queenofsky.journalspace.com.

lawsuit alleging gender discrimination, based on Delta's alleged failure to discipline men who engaged in similar conduct (i.e., the posting of photographs with women in various stages of undress with Delta logos on the site) is pending in Atlanta, Georgia.[12]

Michael Hanscom, a former Microsoft contractor, also posted a photograph – of rival Apple's computers being unloaded at Microsoft's Washington headquarters. He, too, was fired, for violating his duty of loyalty.[13] A web designer was fired for violating the company's zero-tolerance policy for "negativity" after she posted photographs from a company party on her website, dooce.com; this resulted in the phrase, "getting dooced," meaning to be fired.[14]

Google, Inc. fired employee Mark Jens after he criticized the company on his personal blog.[15] A Friendster web developer was discharged after she posted critical comments about her employer on her personal blog. The company admits to not having a policy in place addressing such issues.[16] Wells Fargo dismissed mail handler Peter Whitney after he complained on his personal blog about contributing to a gift for a manager.[17] Starbucks terminated an employee who complained on his personal blog after a manager refused to let him go home sick.[18]

Journalists seem particularly drawn to blogging in their free time. Blogging under the name "Sarcastic Journalist," Rachel Mosteller was fired by *The Herald-Sun Newspaper* in Durham, North Carolina after complaining about favoritism shown towards co-workers on her private blog. Matt Donegan was fired by the *Dover Post* (Delaware) after posting raunchy and racially inappropriate material on his personal blog. The *Hartford Courant* required travel editor Denis Horgan to discontinue posting his opinions on topics covered by the newspaper on his personal blog, citing the paper's conflict of interest policy.[19] The *Houston Chronicle* fired a reporter who maintained a personal blog using a pseudonym, covering the same topics he was paid by the paper to cover as part of his job.[20] A *St. Louis Post-Dispatch* reporter resigned following being

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[12] *See* "Delta Employee Fired Over Blog Sues Airlines," Associated Press (Sept. 8, 2005); *Simonetti v. Delta Airlines, Inc.*, U.S. District Court No. 1:05-cv-2321 (N.D. Ga. 2005). Unfortunately for Ms. Simonetti, before an answer was filed, Delta filed for bankruptcy, so the case is currently stayed.

[13] Lee, "Anti-Employer Blogging: Employee Breach of the Duty of Loyalty and the Procedure for Allowing Discovery of a Blogger's Identity Before Service of Process is Effected," 2006 Duke L. & Tech. Rev. 2.

[14] http://www.dooce.com.

[15] http://99zeros.blogspot.com.

[16] Wallace, "Beware if Your Blog is Related to Work," San Francisco Chronicle (Jan. 24, 2005).

[17] http://gravityspike.blogspot.com.

[18] Lee, *supra.*

[19] Glaser, "Will Denis Horgan Blog Again?," Online Journalism Review (May 9, 2003).

[20] Gutman, "Say What? Blogging and Employment Law in Conflict." 27 Colum. J.L. &

suspended for making unkind remarks about his employer and the stories it covered in his personal blog.

A Pennsylvania congressman blogged during his personal time. His site contained what he considered to be comedic musings on current political issues. After the blog appeared to threaten his political career, the congressman removed the site.[21]

2. Blogging outside of work, not about work

Even an employee's purely personal musings can cost him his job. It makes no difference that the employee posted on his own time, from his own computer. For example, Cameron Barrett was terminated from his marketing job after co-workers discovered his experimental short stories, written for a creative writing class he was taking, on his personal website.[22] Another employer took a softer approach, asking an employee to refrain from posting certain personal opinions on his personal log; the employee complied.[23]

The perils of blogging have even reached the hallowed halls of government in Washington, D.C. Jessica Cutler, a staff assistant for U.S. Senator Mark DeWine, was terminated after posting information about her sexual activities with powerful Washington figures.[24] Her postings came to public light after they were reprinted in a popular Internet gossip column.[25] And, returning to journalists, a Los Angeles radio reporter was fired after posting an e-mail from an employee from another station which was critical of her, *not* the blogger's, workplace.[26]

A special education teacher is challenging a denial of reappointment under 42 U.S.C. §1983.[27] She posted information about special education topics on her blog.

Arts 145 (Fall 2003).

[21] DiBiase, "To Blog or Not to Blog?," 24 American Bankruptcy Institute Journal 32 (Nov. 2005).

[22] http://www.camworld.com/archives/001172.html.

[23] Zeller, Jr. "When the Blogger Blogs, Can the Employer Intervene?," New York Times (Apr. 18, 2005).

[24] *Steinbuch v. Cutler*, 463 F. Supp.2d 4 (D.D.C. 2006).

[25] Sills, Cummis, Epstein & Gross, "Blogs Present New Pitfalls for Employers," Client Alert-Employment & Labor (Feb. 2005).

[26] Gutman, *supra.*

[27] *Stengle v. Office of Dispute Resolution*, 479 F. Supp.2d 472 (M.D. Pa. 2007).

C. Private Employers

Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, Inc., 450 F.3d 130 (3rd Cir. 2006)

Curay-Cramer, an English teacher at a Catholic school, signed her name to a pro-choice advertisement celebrating the 30th anniversary of *Roe v. Wade* that was published in the Wilmington *News-Journal*. When she subsequently refused to immediately publicly recant her support of the ad and state unequivocally that she was pro-life, Curay-Cramer was terminated. She filed Title VII claims alleging that she was fired for opposing the school's illegal employment practice of firing anyone who has or contemplates an abortion, because the ad advocated for persons protected by Title VII, and because she is a female and that male employees were treated less harshly for substantially similar conduct. The appellate court held that Curay-Cramer failed to state a cause of action with respect to the first two counts of her complaint because the ad did not mention employment, employers, pregnancy discrimination or even gender discrimination. With regard to the third count, the court determined that applying Title VII raised substantial constitutional question under the first amendment's religion clauses because in order to assess Curay-Cramer's claim of the relative harshness of penalties for "similar" conduct, the court would be required to measure the degree of severity of various violations of Church doctrine.

Patrick Cudahy Incorporated v. Labor and Industry Review Comm'n, 723 N.W.2d 756 (Wis. App. 2006)

The employer appealed the state unemployment compensation commission's finding that the ex-employee's violation of a last chance agreement not to use alcohol or illegal drugs on or off the job was not misconduct and thus the ex-employee was eligible for unemployment benefits. The circuit court affirmed, but the appellate court reversed, finding that the last chance agreement was reasonably related to the employer's business interest of workplace safety. Here, the ex-employee, who operated a material handling truck, hit one of his co-workers with his truck, injuring the co-worker. A drug test was positive for cocaine metabolites. The ex-employee signed a last chance agreement in order to remain employed. Within six weeks of signing the last chance agreement, he admittedly used alcohol on two occasions.

D. Public Employers

Gouveia v. Sears, No. 05-1102-HO, 2006 LEXIS 73253 (D. Or. Oct. 6, 2006)

Plaintiff was terminated shortly after she and a co-worker, who were both communications technicians for Marion County, Oregon, announced that they were getting married and asked for time off for a honeymoon. The County had a nepotism policy prohibiting married couples from working in positions where the duties of one of the employees included supervision or review of the other. Plaintiff filed a summary judgment motion on her privacy and association rights claims. The court determined that

there was a fact issue as to whether plaintiff's work was directed by her boyfriend. Further, there was evidence that the County's nepotism policy was designed to avoid the appearance of impropriety and favoritism and to minimize the risk of violations of state law prohibitions of supervisor-subordinate relationships and statutory ethics requirements for public employees, so the court was not prepared to find as a matter of law that the interests are not legitimate or that as applied to plaintiff were not rationally calculated to advance those interests.

Hubbard v. State, 849 N.E.2d 1165 (Ind. App. 2006)

Hubbard was a civilian employee at the Goshen Work Release Center who had consensual sexual relations with a work release detainee on two occasions when the detainee was away from the facility on an eight-hour pass. Unfortunately for Hubbard, Indiana law forbids employees employed by an entity that provides services to a person who is subject to lawful detention to knowingly or intentionally engage in sexual intercourse with a person who is subject to lawful detention. She was convicted and sentenced to eighteen months' imprisonment, with twelve months suspended to probation. She appealed, claiming that her conduct did not violate the law and also that the statute as applied to her violated her right of privacy under the Due Process Clause. Hubbard's liberty interest in engaging in consensual relations was trumped by the legitimate governmental interest in regulating the sexual activity between detainees and the service providers, who were authorized to coerce compliance or authorize privileges.

IV. Domestic Partners, Same Sex Relationships, Transgender Concerns, Cross Dressing

A. Private Employers

1. For Employee

Creed v. Family Express Corp., No. 3:06-CV-465RM, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007)

Plaintiff applied for a sales associate position with the company as Christopher Creed. During the next several months of her employment, plaintiff, now known as Amber Creed, became more feminine in appearance. Ten months into her employment, Creed was called into Human Resources and was told that they had received a complaint about her feminine appearance and that she could no longer present herself in a feminine manner at work. Creed informed the Director of Operations and the Director of Human Resources that she was transgender and going through the process of gender transition. Because she refused to present herself in a more masculine way at work, she was terminated.

The company's motion to dismiss counts I and III was denied. Those claims alleged that plaintiff was discriminated against because the company perceived her "to be a man who did not conform to gender stereotypes associated with men in our society or

because it perceived Plaintiff to be a woman who did not conform to gender stereotypes associated with women in our society." While recognizing that not all gender stereotyping is discriminatory, the court found that the facts plead in the complaint supported a "plausible" claim that she suffered discrimination because of her sex.

The motion to dismiss counts II and IV was granted. These counts alleged that Creed was discriminated against "on the basis of her transgender status" under Title VII and the Indiana state fair employment practices statute, which is construed consistent with Title VII. As the complaint did not suggest that stereotypical notions regarding gender played a role in the discharge, dismissal was proper.

Mitchell v. Axcan Scandipharm, Inc., 97 Fair Emp. Prac. Cas. (BNA) 960 (W.D. Pa. 2006)

Plaintiff alleged that he was a pre-operative transsexual who had been approved for hormones and a candidate for sex reassignment surgery. He was terminated less than two months after he began presenting in public as a female. Defendant's motion to dismiss arguing that Title VII provides no protection from discrimination based on transgender status was denied with leave to file an amended complaint to state more clearly his discrimination claims based on sex stereotyping. While the magistrate judge had recommended a dismissal based on several decisions that have declined to extend Title VII's protection to transsexuals, the court noted that neither the United States Supreme Court nor the Third Circuit has made that distinction. "Having included facts showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions, plaintiff has sufficiently pleaded claims of gender discrimination."

2. For Employer

Lynch v. Baylor University Medical Center, No. 3:05-CV-0931-P, 2006 WL 2456493 (N.D. Tex. Aug. 23, 2006)

Lynch is a lesbian who claimed that her beliefs about gender and religion conflicted with those of a subordinate and that her beliefs caused her termination as a weekend nurse supervisor. Plaintiff brought Title VII claims for gender and religious discrimination.

The court rejected Lynch's attempt to proceed on the theory that she was discriminated against because of gender stereotypes. Plaintiff made no showing that her non-conforming appearance or behavior impacted the termination decision. The court saw this claim as one for discrimination based on sexual orientation, which is not protected under Title VII.

This is another case where the employer defended the religious discrimination claim on the ground that it was the employee's conduct, rather than her religious beliefs, that formed the basis of the termination. And, plaintiff was unsuccessful in her attempt to

establish differential treatment. The Medical Center presented evidence that Lynch had "poor personal boundaries" with subordinates, engaged in inappropriate sexual discussions in the workplace, abused her position of authority by making jokes about a subordinate, and generally failed to perform her job duties.

B. Public Employers

1. For Employee

Schroer v. Billington, 424 F. Supp.2d 203 (D. D.C. 2006) and also ___ F.Supp.2d ___, 2007 WL 4225667 (D.D.C. Nov. 28, 2007)

Plaintiff, a male-to-female transsexual, sued the Library of Congress for sex discrimination under Title VII. Before she began the stages of sex-reassignment, she applied for a position as a terrorism research analyst with the Congressional Research Service (CRS), an arm of the Library of Congress. She was extraordinary qualified for the position. Not surprisingly, Schroer was invited to interview for the position. Since Schroer had applied as David J. Schroer and had not yet begun presenting as a woman, she attended the interview dressed in traditionally masculine clothing. After being offered the position, Schroer was invited to the CRS to go over the administrative details of her hiring and to meet some of her future colleagues. Schroer decided to take that opportunity to explain that she was under a doctor's care for gender dysphoria and that she would be presenting herself as a woman when she started to work as a terrorism research analyst. The next day, Schroer received a call indicating that "given (Schroer's) circumstances" and "for the good of the service," Schroer would not be a "good fit" at CRS.

The court went through a detailed analysis, noting that Title VII prohibits discrimination in employment "because of …sex," and that applying those "three simple words in the context of transsexuals is decidedly 'complex.'" Looking back at the initial decisions addressing the issue, all federal courts held that Title VII does not prohibit discrimination on the basis of transsexualism or gender identity. Then, *Price Waterhouse* held that Title VII reaches claims of discrimination based on "sex stereotyping." After *Price Waterhouse*, courts recognized a cause of action in transsexualism cases for failure to conform to gender stereotypes. The district court, however, identified two lines of cases that "are in tension with the post-*Price Waterhouse* approach to sex stereotyping." The first is that courts continue to consistently hold that Title VII does not prohibit discrimination based on sexual orientation or sexual preference. The rationale, equally applicable in transsexual cases, is that such discrimination is based on sexual orientation, not on sex—that sexual orientation is gender-neutral: it impacts homosexual men and women alike. The second is that courts have found no Title VII violation in gender-specific dress and grooming codes, so long as the policies do not impose an unequal burden.

Next, the court noted that while some district courts have continued to reject discrimination claims of transsexuals, a "larger number of district and appellate courts

have treated discrimination against transsexuals as sex discrimination based on gender non-conforming behavior." But the court disagreed that discrimination against transsexuals is sexual stereotyping. Here, according to the court, Schroer was not seeking acceptance as a man with feminine traits. But, rather, was seeking to express her female identity, not as an effeminate male, but as a woman. "The problem she faces is not because she does not conform to the Library's stereotypes about how men and women should look and behave, her problems stem from the Library's intolerance toward a person like her, whose gender identity does not match her anatomical sex."

The Seventh Circuit held in 1984 that Title VII did not prohibit discrimination against transsexuals, reversing the decision of Judge Grady.[28] The trial judge in this case looked favorably on Judge Grady's decision, in which he determined that "sex is not a cut-and-dried matter of chromosomes…. Rather, it encompasses 'sexual identity,' which is in part a psychological question—a question of self-perception; and in part a social matter—a question of how society perceives the individual." Judge Grady distinguished "sexual identity" from "sexual preference," holding that "sex" under Title VII comprehends the former but not the latter. Accordingly, Judge Grady held that the term "sex" "literally and…scientifically" applies to transsexuals, but not to homosexuals or transvestites."

The *Schroer* court adopted Judge Grady's conclusion that "discrimination against transsexuals because they are transsexuals is 'literally' discrimination "because of…sex." The motion to dismiss for failure to state a claim was denied.

Defendant filed a second motion to dismiss after both parties compiled a record reflecting the scientific basis of sexual identity in general and gender dysphoria in particular. The court initially appeared prepared to rule that discrimination against transsexuals because they are transsexuals is literally discrimination because of sex and therefore prohibited by Title VII. In this subsequent decision, the court seems to step back from the earlier opinion, but makes no definitive ruling. The Title VII claim proceeded in any event on the sex stereotyping theory.

Plaintiff's amended complaint also contained a claim under the Equal Protection Clause of the fifth amendment, in which she contended she had a constitutionally protected liberty interest in making medical decisions without penalty by the government in the absence of a constitutionally sufficient justification. The court, however, determined that the decision to undergo gender reassignment did not implicate a fundamental liberty interest and that Schroer failed to assert that she had a property interest in the position. Therefore, the Due Process claim was dismissed.

DePiano v. Atlantic County, No. 02-5441, 2005 U.S. Dist. LEXIS 20250 (D. N.J. Sept. 2, 2005)

[28] *Ulane v. Eastern Airlines, Inc*., 742 F.2d 1081 (1984).

DePiano worked as a corrections officer at the Atlantic County Justice Facility. After a series of disciplinary actions, DePiano was demoted. DePiano admitted that he committed the infractions for which he was disciplined, but, claimed that he received overly harsh discipline. After an acquaintance of DePiano was arrested, photos of DePiano dressed in women's clothing were placed in his Internal Affairs file. DePiano contended that he was submitted to excessive disciplinary action because of his cross-dressing, in violation of the state law against discrimination. DePiano was unable to establish that the reasons given for the discipline were pretextual. However, the court denied the summary judgment motion on the claim that DePiano was subjected to severe and pervasive harassment based on gender role stereotyping under New Jersey law.

Additionally, DePiano brought §1983 claims for invasion of privacy. The record established that the warden showed the photos to DePiano's co-workers and that the details of the pictures were the subject of general knowledge among the staff and inmates. DePiano was able to establish that the privacy right to sexuality or even his sexual proclivities was a fundamental one. Prevailing Third Circuit law is clear that such information falls within a "zone of privacy" that is protected from disclosure by the state absent an "overriding interest in the disclosure."

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005)

Barnes was living as a pre-operative male-to-female transsexual when she failed the probationary period required to become a police sergeant. During the probationary period, Barnes was living off-duty as a female, had a French manicure, arched eyebrows, and reported for work with makeup on her face on some occasions. Barnes was told by one of her reviewing officers that she did not appear to be "masculine" and that she needed to stop wearing makeup and act more masculine. Barnes' scores on the sergeant evaluation were higher than at least one other probationary sergeant, and Barnes was the only person to be put in a Sergeant Field Training Program and the only one to fail probation in a seven-year period.

She sued after being demoted, alleging a Title VII violation. A jury awarded Barnes over $300,000 in compensatory damages, back and front pay, and the judge awarded over $550,000 in attorney's fees and costs. The City appealed. The appellate court rejected the City's argument that Barnes did not have standing to bring her claims against the City. Without going into any detail, the Sixth Circuit found that Barnes was a member of a protected class under Title VII as either a male or a female.

2. For Employer

Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10th Cir. 2007)

Plaintiff was born male, although she believed herself to be a female. She identified herself as a woman on her job application. She began to prepare for sex reassignment surgery, and decided to live full-time as a woman although she had not yet had the surgery.

Etsitty was an extra board bus operator. This meant that she was not assigned to a permanent route or shift. During training, plaintiff presented herself as a male. Shortly thereafter, she informed her supervisor that she was a transsexual and had not had the surgery yet as she could not afford it. She drove many of the 115-plus routes in the Salt Lake City area. She was discharged.

While on their routes, UTA employees use public restrooms. UTA's claimed reason for the termination was that Etsitty, who still had male genitalia, could subject UTA to liability should a member of the public object to Etsitty's using a female restroom. Plaintiff sued under Title VII, alleging that she was fired because she was a transsexual and did not conform to the company's expectations of stereotypical male behavior.

The district court granted the employer's summary judgment motion, and the appellate court affirmed. The appellate court expressly held that an employer's requirement that employees use restrooms matching their biological sex does not discriminate against employees who fail to conform to gender stereotypes. And, the court found that since there was no evidence in the record of any "weaknesses, implausibilities, inconsistencies, incoherence, or contradictions" in UTA's asserted legitimate, nondiscriminatory reason for Etsitty's termination, the trial court properly granted UTA's summary judgment motion. Likewise, since the §1983 claim did not assert a violation of the Equal Protection clause separate from discrimination based on sex, that claim failed as well.

The appellate court found that Title VII did not protect transsexuals, as "sex" meant only "male" or "female." While a transsexual might be able to bring a Title VII sex discrimination claim, the employee could not do so on the basis of being a transsexual alone; it must be because of status as a male or female. The stereotyping argument failed because a requirement that employees use restrooms matching their biological sex is not disadvantageous or discriminatory.

Myers v. Cuyahoga County, Ohio, 98 Fair Emp. Prac. Cas. (BNA) 959 (6th Cir. 2006)

Myers transitioned to being a female about eight years before she began her employment with the Department of Health and Human Services. After over sixteen years without any disciplinary problems or incidents, Myers began reporting to a new supervisor who Myers claimed began to systematically work to constructively discharge her by pretextually finding fault with her work and creating a stressful work environment. Myers brought claims under the ADA, Title VII, §1983 and Ohio law, which were dismissed on the County's summary judgment motion.

On review of the district court's decision, the Sixth Circuit observed that Myers failed to address whether her Adjustment Disorder substantially limited one or more major life activity and therefore determined that she did not prove that she was disabled under the ADA. With regard to her sex discrimination claim, the court noted that sex-

stereotyping based on a person's gender non-conforming behavior is impermissible discrimination. Although there was evidence that Myers' supervisor's supervisor referred to her as a "he/she," the court held that because the isolated remark was remote in time from the termination and that there was significant and unrebutted evidence of disciplinary problems, the remark, without more, was not sufficient to create a jury question as to pretext.

Sturchio v. Ridge, 86 Emp. Prac. Dec. (CCH) P42,067 (E.D. Wa. 2005)

Tracy Sturchio claimed that in the two years before she announced that she was changing her gender and in the two months thereafter, she was harassed, discriminated and retaliated against by the U.S. Border Patrol. She continued to be employed during the litigation. After a bench trial, the district court found for defendants. While the court acknowledged that plaintiff felt isolated and unfairly treated by the Border Patrol and that this was due in part by the difficulty her coworkers had in dealing with the manifestations of plaintiff's gender conflict, defendants presented legitimate, nondiscriminatory reasons for the adverse actions which Sturchio was unable to rebut. So, although working during this time frame for the Border Patrol was clearly very difficult for Sturchio, she was unsuccessful in establishing discriminatory motive.