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EMPLOYMENT & IMMIGRATION LAW

Accommodating Religious Beliefs in the Workplace

New amendment imposes affirmative duty on employers

By Steve Adler and Jessica Juste

The New Jersey Law Against Discrimination (LAD), already one of the broadest civil rights statutes in the nation, recently were further extended to require accommodations by employers for their employees' religious beliefs.

On January 13, the New Jersey legislature amended the LAD (the "Amendment") to require New Jersey employers to provide reasonable accommodations for their employees' "sincerely held religious observance(s) or practice(s)." These accommodations include giving employees time off to tend to religious affairs such as their Sabbath or other holy days.

While LAD previously outlawed religious discrimination, the Amendment imposes an affirmative duty upon employers to reasonably accommodate an employee's sincerely held religious beliefs. In fact, this new obligation appears to go well beyond the existing obligations under federal law.

The legal analysis for determining both when a religious accommodation is required and the type of accommodation to provide mirrors that used in the disability realm. For example, like disability accommodations, employers are not required to provide a religious accommodation if it places an "undue hardship" on the employer. Similarly, like disability accommodations, an employer is not required to provide the best accommodation available, only a "reasonable" one.

The Amendment states that an employer is prohibited from imposing "upon any person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require a person to violate or forego a sincerely held religious practice or religious observance" except where "after engaging in a bona fide effort the employer demonstrates that it is unable to reasonably accommodate the religious observance or practice without undue hardship on the conduct of the employer's business."

The Amendment does not describe what accommodations would be deemed reasonable; rather, that answer is to be decided on a case-by-case basis. However, the Amendment does clearly delineate what constitutes an "undue hardship." As set forth in the Amendment, an undue hardship is an accommodation which would result in "significant unreasonable expense or difficulty, unreasonable interference with safety or efficient operation of the work place" or which would violate a bona fide seniority system or collective bargaining agreement.

The Amendment guides employers by setting forth certain factors that should be taken into account when deciding whether an accommodation amounts to an undue hardship. Such factors include "the identifiable cost of the accommodation, including the cost of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer" and "the number of individuals who will need the particular accommodation."

The Amendment also provides some protection for employers. It provides that "an accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform essential functions of the position in which he or she is employed"; and no accommodation is necessary "where the uniform application of terms and conditions of atten-

Adler is chair of the employment department at Cole, Schotz, Meisel, Forman & Leonard of Hackensack and Juste is an associate in that department.

dance to employees is essential to prevent undue hardship to the employer."

The Amendment allows employers to require employees to "make up" any time taken off given as a religious accommodation. Additionally, employers may charge the time off against employees' allotment of paid leave (except sick leave), or may categorize the time off as leave without pay.

The Amendment fails to address what conduct or rituals are religious in nature. It also fails to address whether employers may use their discretion when making this determination. Additionally, it fails to state whether employers may question the sincerity of their employees' religious beliefs.

Perhaps the best way to answer some of the questions likely to be raised by the Amendment is to look to the Title VII decisions regarding religious accommodations. How-ever, there are slight differences between the two. First, Title VII only covers employers having 15 or more employees. The Amendment covers every single employer in New Jersey regardless of size. Second, Title VII defines "religion" to include all aspects of religious observance and practice, as well as belief …." 42 U.S.C. § 2000(e)(i). As noted above, the Amendment, does not define religion. Third and perhaps most importantly, the Amendment appears to impose far greater obligations to accommodate religious beliefs and practices than Title VII.

Under Title VII, if an accommodation imposes anything greater than a "de minimis" burden on an employer, no accommodation is required. On the other hand, the Amendment requires employers to demonstrate that the accommodation would impose an "undue hardship."

The Amendment also has an impact on pay and benefits. For example, an employee will not be entitled to premium wages for working a night shift or a weekend shift if that time is to make up for a schedule change given as an accommodation. However, an employer is still obligated to pay overtime wages and any benefits due under a collective bargaining agreement. Also, an employer must count any hours performed by an employee as an accommodation "towards accruing seniority, pension and other benefits."

Courts analyzing religious discrimination claims apply a burden-shifting scheme, meaning that a plaintiff must be able to establish a prima facie claim by showing that (1) he or she has a bona fide religious belief or observance that conflicts with an employment requirement; (2) he or she informed the employer of that belief or observance; and (3) he or she was disciplined for failing to comply with the conflicting employment requirement. *EEOC v. Firestone & Textiles Company*, 2008 WL 352103 (4th Cir. 2208). See *Grigoletti v. Ortho Pharmaceutical Corp*., 118 N.J. 89, 97 (1990).

If the employee establishes a prima facie case, the burden then shifts to the employer. To satisfy its burden, the employer must demonstrate either (1) that it provided plaintiff with a reasonable accommodation for his or her religious beliefs or observances or (2) under Title VII that such accommodation was not provided because it would have resulted in more than a 'de minimis cost' to the employer. *Philbrook v. Ansonia Bd. of Educ*., 479 U.S. 60, 67 (1986). As noted above, under the LAD this second prong is more difficult for the employer. It requires an employer to establish that such accommodation was not provided because it would have resulted in an "undue hardship."

Once the employer has provided a reasonable (but not necessarily the best) accommodation, there is no requirement to examine whether alternative accommodations not offered would result in undue hardship. In fact, "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end." *Philbrook*, 479 U.S. at 68. So long as the employer has offered a reasonable accommodation, it has fulfilled its duty under Title VII.

While the Amendment leaves some issues unanswered, it is clear that it has changed the landscape with regard to an employer's duty to accommodate employees' sincerely held religious beliefs. ■