

## **“Religious Nondiscrimination Is Good for Business”**

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Hello. I am Sharon Fast Gustafson, General Counsel of the Equal Employment Opportunity Commission (or the EEOC). The EEOC is a federal government agency whose primary mission is to prevent and remedy illegal employment discrimination.

Before joining the EEOC, I practiced employment law for twenty-eight years, advising and representing both employees and employers in employment-related legal matters as a solo practitioner in Virginia, Maryland, and the District of Columbia.

I would like to share with you my perspective on how religious nondiscrimination and accommodation are integral to the success of American workplaces and, conversely, why religious discrimination is bad for business.

First, two clarifications: I am not speaking on behalf of the Commission, the Agency’s policy-setting body. As General Counsel, I am the person responsible for conducting the Agency’s employment discrimination litigation and for ensuring compliance with the statutes we enforce. Second, today I am focusing on laws as they apply to secular employers or, employers who do not qualify as “religious organizations” under the statutes we enforce. There are several defenses for religious employers that may be available under the religious organization exemptions in Title VII and the Americans with Disabilities Act, the First Amendment—such as the ministerial exception—the Religious Freedom Restoration Act, and other applicable laws; but those are topics for another day.

Businesses across the country are touting the admirable goals of diversity and inclusion. But one aspect of diversity and inclusion that I fear gets overlooked is religious diversity and inclusion. Where there is religious diversity and inclusion, not every employee will share the same beliefs and practices with every other employee. And that is good. It means that true American pluralism is at work.

### First Principles

Religious belief (and lack of religious belief) is an integral part of American culture.

Religious freedom is part of the bedrock of our country. The Pilgrims came here to find religious freedom. Our country’s founding documents protect religious freedom as do the institutions and laws of our democracy. One could say that religious freedom is in our DNA. Perhaps that is one reason that religious nondiscrimination is important to Americans.

In the United States we permit one another to hold whatever religious beliefs one chooses to hold, even where those beliefs may be offensive to others. This permission is a right enshrined in our Constitution. The First Amendment prohibits the government from making laws

establishing religion or from making laws prohibiting the free exercise of religion. Article 6 says that “no religious test shall ever be required” for public office.

In contrast, many other countries have not held or do not hold religious freedom in the same regard. There are many examples of religious persecution throughout history, and religious persecution persists in many countries. One example is the Uyghur Muslims in China who are facing religious restrictions, imprisonments in labor camps, and executions. While we here in America seem far away from this type of state-sanctioned religious targeting, the discrimination against minority or unpopular religious groups may start with small actions of private actors.

As businesses and employers, you all have an opportunity and a moral and statutory responsibility to create a culture of religious nondiscrimination and accommodation. You can create a culture that respects and accommodates all the members of our pluralistic society, whatever their diverse religious beliefs or lack thereof.

Employees are often encouraged, “bring your whole self to work.” Religion is for many people an integral part of their identity. But are employees being given a conflicting message that religious expression in the workplace is not welcome?

In a case I recently heard about, Betsy Fresse, a coffeeshop barista for over three years, alleges that she was fired for stating that she did not want to wear a company LGBTQ Pride t-shirt because her religious beliefs prevented her from doing so. Ironically, Ms. Fresse’s separation notice indicated that she violated the company’s Core Values, which the company enforces by “embrac[ing] inclusion and diversity, and welcom[ing] and learn[ing] from people with different backgrounds and perspectives.” The company website states: “We’re committed to upholding a culture where inclusion, diversity, equity and accessibility are valued and respected. Your entire experience—starting with your application—is designed to be the beginning of an inspirational journey, where you are treated warmly and with transparency.” Apparently, this company’s commitment to inclusion and diversity does not extend to religious beliefs that it finds undesirable.

While the law doesn’t require diversity and inclusion, or love and kindness, it does require nondiscrimination and accommodation, which is what I am going to talk to you about today.

### Title VII & Nondiscrimination

One of the statutes EEOC enforces is Title VII, which prohibits discrimination on the basis of religion (in addition to race, color, sex, and national origin). As to each of these five bases, Title VII protects employees from discrimination in hiring, firing, promotions, training, wages, and benefits, as well as protects employees from a hostile work environment and from retaliation. Title VII also requires reasonable accommodation for religion in certain circumstances.

In practical terms, this means: (1) that the employer must treat the religious applicant or employee no worse than any other applicant or employee; (2) that the employer must keep the

workplace free from severe or pervasive religious harassment; and (3) that the employer must accommodate an applicant's or employee's religious beliefs, practices, and observances where the employer can do so without undue hardship.

The term "religion" is defined in Title VII to include "all aspects of religious observance and practice, as well as belief," which an employer must reasonably accommodate where he is able to do so without undue hardship to his business. This means that Title VII protects employees from discrimination not only on the basis of their religious beliefs, but also on the basis of their religious observance and practice. Employees are protected when their religion tells them that they must do something (for example, wear certain clothing or a beard, observe the Sabbath, or pray) and when their religious conscience tells them they must not do something (for example, take oaths, celebrate holidays, participate in abortion, dispense birth control, use technology, celebrate homosexuality, participate in a Bible study or prayer, and so on).

Title VII does not just protect popular or majority religions, religions with beliefs we find unoffensive, or those religions that an employer agrees with, or at least understands; Title VII protects *all* religious beliefs, observances, and practices. This is America. We get pluralism. We do that here. And as the name of the Equal Employment Opportunity Commission suggests, we do it equally.

### Religious Harassment

Title VII's prohibition against religious discrimination includes prohibiting a hostile work environment because of religion. Religious harassment is analyzed and proved in the same manner as harassment based on other traits protected by Title VII. However, the facts of religious harassment cases may present unique considerations, especially where the alleged harassment relates to another employee's religious practices.

An unlawful hostile environment based on religion can take the form of physical or verbal harassment, which would include the unwelcome imposition of beliefs or practices contrary to the employee's religion or lack thereof. However, Title VII is not a "general civility code," and does not render all insensitive or offensive comments, petty slights, and annoyances illegal. Religious harassment does not occur merely by talking about one's faith. Rather, harassment occurs when comments or conduct are unwelcome and when they become either severe or pervasive.

For example, I may talk about religious beliefs or matters with my coworker. If that conversation is welcomed by my coworker, it is not harassment. If that conversation is *not* welcomed by my coworker—if I understand that my coworker does not want to engage in the conversation about religion, or that my comments are offensive to my coworker—then it becomes unwelcome. Those comments have the potential of becoming harassment.

Similarly, if my comments on religion are particularly offensive or demeaning—they could become severe enough to become harassment. And if my comments, even though not severe, are pervasive—if I continue making unwelcome comments frequently and over time—those comments could become pervasive enough to constitute harassment.

## Religious Accommodation & Abercrombie

Title VII requires not only that an employer not discriminate and not permit harassment on the basis of religion. Title VII also requires employers to “reasonably accommodate” an employee’s religious beliefs, observances, and practices, unless an accommodation would create an “undue hardship on the conduct of the employer’s business.” The need for an accommodation arises when an employee’s religious beliefs, observances, or practices conflict with a specific job duty or with a neutral policy.

Of the recent cases with religious accommodation claims that EEOC has filed, most involve: (a) appearance, namely clothing and grooming brought on behalf of Muslims, Pentecostals, and Rastafarians; (b) observance, including of the Sabbath, holy days, and prayer breaks brought on behalf of Seventh-day Adventists, Jehovah’s Witnesses, Jews, and Muslims; and (c) forced participation, often flu vaccinations brought mainly on behalf of members of various Christian denominations.

Perhaps the most well-known recent Title VII religion case is one that the EEOC brought against Abercrombie & Fitch Stores. In that case, the clothing store refused to hire a Muslim applicant who wore a hijab to the interview because they assumed (correctly) that she would need an accommodation from Abercrombie’s “Look Policy,” which prohibited employees from wearing “caps.” The Supreme Court in 2015 found that Abercrombie violated Title VII because “[a]n employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.” The Court explained:

Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not “to fail or refuse to hire or discharge any individual . . . because of such individual’s” “religious observance and practice.”

In other words, the Court held that the law requires employers to actively accommodate the religious practices and conduct of employees. Going so far as to call it “favored treatment.”

### EEOC Religion Cases

EEOC religion charges make up about 3–4% of total charges. These charges led to EEOC filing 6 cases with religious discrimination claims out of 144 in fiscal year 2019 and 7 cases out of 93 for fiscal year 2020.

The EEOC has demonstrated its commitment to Title VII’s prohibition against religious discrimination by bringing cases on behalf of a variety of employees who alleged religious discrimination. By way of example, here are some of the allegations raised in recent cases we’ve brought:

- a Hasidic Jew who was not hired because of his beard;

- a Muslim employee who was constructively discharged because of her modest dress;
- a Messianic Jew who was not accommodated but constructively discharged because of his need to observe holy days;
- an employee who was fired because he objected to a company holiday party for religious reasons;
- Pentecostal employees who were subjected to derogatory remarks about Pentecostal persons and were treated less well than other employees in pay, leave, and hours of work; and
- a Buddhist pilot diagnosed with alcohol dependency who was not granted a religious accommodation by his employer when he wanted to attend a Buddhist-based peer treatment group instead Alcoholics Anonymous.

### *Kroger & Intersection Between Religion and Sex Discrimination*

In another recent case that garnered much media attention, Kroger, a large grocery store chain, instituted changes to its dress code, one of which required all employees to wear a new apron with a new logo—a rainbow heart embroidered on the top left portion of the bib. Two Kroger employees declined to wear aprons with what they understood to be LGBTQ Pride symbols, in violation of their sincerely held religious beliefs. Plaintiff Trudy Rickerd, a cashier with twelve years at Kroger, claims to have written her employer:

I have a sincerely held religious belief that I cannot wear a symbol that promotes or endorses something that is in violation of my religious faith. . . . I respect others who have a different opinion and am happy to work alongside others who desire to wear the symbol. I am happy to buy another apron to ensure there is no financial hardship on Kroger.

Plaintiff Brenda Lawson, an eight-year employee in Kroger’s deli, asked to be permitted to wear her name badge over the symbol on the new employee apron. All that Kroger needed to do was to permit the employees the requested no-cost accommodations. Instead, Kroger allegedly terminated Ms. Rickerd and Ms. Lawson, telling them that the logo should not violate their religious beliefs because it represents only company values. This is religious discrimination that violates Title VII. The EEOC must diligently combat such discrimination.

I received many questions about the *Kroger* case. Some expressed disappointment, claiming that it was “the first time . . . that EEOC has sided with an accommodation that will make it easier for employees to discriminate on prohibited bases against their fellow employees.” I’d like to spend a few minutes addressing the intersection between religion and sex discrimination and answer some common questions I’ve received.

Since the Supreme Court’s recent decision in *Bostock*, we know that Title VII protects employees from discrimination based on sexual orientation and transgender status. But at the

same time Title VII protects employees from discrimination based on their religious beliefs that prohibit them from approving of homosexual acts or gender reassignment.

Some opposed to EEOC bringing the *Kroger* case claim that Ms. Rickerd and Ms. Lawson are similar to racist and anti-Semite oppressors of Blacks and Jews. But this comparison may overlook an important distinction: An employee who wants to be left alone to do her job is quite different from an employee who berates, offends, or refuses to work with other employees. An employer's permitting illegal discrimination (including in the form of harassment) against an employee in a protected group is likewise a very different thing from an employer's requiring employees to affirmatively say things or to take actions that violate their religious consciences.

Think of how this rule applies in different contexts. The employer with a desire to combat anti-Semitism would not be permitted to require an employee to wear pro-Israel emblems, if doing so violated the employee's sincerely held religious belief. Likewise, a secular employer could not require a Jewish employee to wear a Christian cross or a Muslim crescent, or even a Christmas tree pin, if doing so violated the employee's religious belief. An employer who required its employees to wear such emblems in violation of their religious beliefs would be violating Title VII.

That is not to say that an employer may allow an employee with discriminatory attitudes or opinions about a protected trait to harass others, even if his harassment could be said to arise from sincerely held religious beliefs. The employer is permitted—in fact, is required—to run a workplace free of harassment based on protected traits. However, the employer may not force an employee to espouse—through the wearing of symbols or otherwise—beliefs that he does not hold and that contradict his religious convictions.

The same must be true for—and the same freedom must be extended to—the employee with a sincerely held religious belief that homosexual acts are sinful. Some criticisms of traditional sexual morality seem to assume that only bigotry could account for convictions against homosexuality; but the Supreme Court in *Obergefell* reminded us that “[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises.” Moreover, I hasten to affirm that religious freedom extends not only to religions that the majority finds “decent and honorable” but also even to those that the majority abhors. The employer with a necessary and laudable desire to combat LGBTQ discrimination or with a permissible desire to promote LGBTQ Pride may not require an employee with a contrary religious belief to espouse a position in violation of the employee's religious belief.

Kindness and civility are good. Love is even better. I aspire to these qualities, and I would be pleased if every employer and every employee in every workplace did the same. But the EEOC enforces no law requiring love or kindness or, even, civility. No such law has been enacted. Rather, we enforce, in Title VII, a law that requires nondiscrimination on the bases of race, sex, religion, color, and national origin. We must be committed to doing that job well, and as our name suggests, we must do it equally—for people whom we agree with and for people with whom we disagree. Title VII presumes that Americans who disagree with each other about important matters can nonetheless work side by side, and we know that this is most often not

difficult. However, this need to work beside those with whom we may disagree sometimes calls on a worker to shoulder the burden of a disapproving coworker. In return, we all get the freedom to live according to our own consciences. The alternative—allowing an employer to require consensus about anything and everything—would be unenforceable and un-American.

Nothing in the *Kroger* case will facilitate discrimination in the workplace. The plaintiffs were not harassing their fellow employees. They were simply asking to be permitted to do their jobs without being required to espouse positions contrary to their religious beliefs. In making this request, they were standing on the bedrock of American pluralism and Title VII's promise of religious nondiscrimination. The law requires that their request be granted.

The EEOC's mission is to protect all employees whom our statutes were meant to protect, and the Commission has set about to diligently enforce all of our statutes, even where the various protections may sometimes come in tension with each other. The law and American pluralism require no less.

### Cost of Religious Discrimination

Religious discrimination is not only bad for business because it is illegal and discourages employee morale, but it can also be costly. For example, since 2018, EEOC has obtained the following settlements:

- \$4.9 million against the world's largest package delivery company after EEOC claimed it denied religious accommodations to a grooming policy that prohibited male employees from wearing beards or growing hair below collar length.
- \$90,000 against a security services company for allegedly denying a religious accommodation to the company grooming policy for a Muslim security guard.
- \$150,000 against a logistics company and communications, media, entertainment and technology company after EEOC alleged that they failed to provide religious accommodations to a dress policy that prohibited religious head covering, such as hijabs.
- \$25,000 against a restaurant for allegedly denying a religious accommodation to a female employee who asked that instead of wearing blue jean pants as prescribed by the dress code that she be allowed to wear a blue jean skirt in accordance with her Apostolic Pentecostal religious belief.
- Up to \$89,000 against several hospitals for not providing religious accommodations to mandatory flu vaccinations.
- Up to \$92,000 against multiple employers for suits involving denial of religious accommodations for Sabbath observance.

- \$275,000 against an energy industry employer who, according to the EEOC, subjected two Muslim Syrian and Indian oilfield workers to religious and national origin harassment and fired one employee in retaliation for reporting the mistreatment.

Although most EEOC religion cases settle before a jury trial, in April 2018, a unanimous jury awarded \$5.1 million to ten employees who were subjected to a hostile work environment by being coerced to engage in a variety of religious practices at work, including prayer, religious workshops, and spiritual cleansing rituals.

### Religious Discrimination Work Group Efforts

Throughout my years practicing employment law, I have sometimes been curious about how many religion charges EEOC receives and what those charges involved. What kinds of religious accommodations were employees asking for from their employers? Did they need time for prayer? Were they asking to be exempt from dress codes, as in *Abercrombie*? Were they trying to avoid having to participate in hot-button practices like abortion and abortion counseling or using LGBTQ pronouns? I had only anecdotal evidence.

When I came to the EEOC, I realized there wasn't an easy way to answer these questions, so I established a Religious Discrimination Work Group in May 2020 to look more closely at the full span of religious discrimination claims being filed so that we can better understand the various forms of workplace religious discrimination and improve our response to it. The Work Group is comprised of EEOC attorneys, deputy director, investigators, data analysts, and training and outreach liaisons from various EEOC offices across the country. We reviewed hundreds of recent religious accommodations claims and initiated tracking within our Agency of the four broad categories of those claims: appearance, observance, expression, and forced participation. We trained our investigators in spotting and classifying religious accommodation claims so that they can be better researched and handled.

This past November and December, we hosted four virtual listening sessions to hear from a diverse group of stakeholders, including religious leaders, nonprofit organizations, civil rights advocates, and health care professionals representing a range of religions and perspectives, including Christians, Hindus, Jews, Muslims, and Sikhs, to name a few. Participants were invited to share the experiences of their members, adherents, and clients, and offer input on how the EEOC can be more responsive to individuals experiencing religious discrimination. These discussions are documented in a report available on EEOC's website.

Participants shared that religious accommodations are often needed for Sabbath and religious holidays, as well as for clothing and grooming. Participants shared that many employees of faith feel unwelcome and fear retaliation, such as losing their jobs, if they express their religious beliefs, especially in ways that may contradict company policies or values. Participants also shared concerns about their members experiencing a hostile work environment based on religion, that may be created by an employer's attitude that protecting employees from discrimination on the basis of religious belief is not as important as protecting employees from discrimination on other bases, such as race or sex.



Participants also thought that employers and employees often lack knowledge that Title VII prevents religious discrimination and requires accommodations. One Participant explained that many employers often view religious accommodation as a way of being nice and helping employees, rather than as a legal obligation. Many indicated that EEOC guidance and resources on religious discrimination would be helpful.

### EEOC Religion Guidance

Last month, the Commission approved a revised version of its Compliance Manual Section on Religious Discrimination. (The prior version had been issued in 2008 and did not reflect recent legal developments and emerging issues, including several key Supreme Court (and lower court) decisions, such as *Abercrombie* in 2015.) The updated guidance describes ways in which Title VII protects individuals from religious discrimination in the workplace and discusses the legal protections available to religious employers.

While the Religion Guidance is not binding law, it serves as a helpful resource for EEOC investigators and the public.

### Conclusion

While I assume that each of you values diversity, inclusion, love, and civility, I want to leave you with an increased understanding of your legal obligations to religious nondiscrimination and accommodation, and the potential cost of religious discrimination. In our pluralistic society, it is critical that we protect employees with widely differing religious faiths and consciences from religious discrimination. Nondiscrimination is good for employees, and it is good for business.

Thank you.