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DIVERSITY TRAINING

Many employers have begun instituting "diversity training" sessions in the workplace, designed to educate employees about harassment and discrimination policies as well as to increase sensitivity among employees. Unfortunately, in pursuit of these goals, employers may infringe upon an employee's sincerely-held religious beliefs through the use of certain materials, such as those mandating acceptance of the homosexual lifestyle.

As a general rule, employers may not discriminate on the basis of religion in the workplace. 42 U.S.C. § 2000e-2(a) (2006). Because few decided cases address the tension between diversity training and sincerely-held religious beliefs, however, the law is unclear as to when or if employer-mandated diversity training becomes religious discrimination. The outcome of such a case will largely depend on the severity of discipline the employee receives, the reasonableness of the employer's diversity-training requirement, and the conduct of the employee that gave rise to the discipline.

I. Title VII Requirements

Under Title VII of the Civil Rights Act of 1964, employers may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1) (2006). Discrimination against religious employees can take two forms—disparate treatment and failure to provide a reasonable accommodation.

A. Disparate treatment

To sustain a claim for disparate treatment, religious employees must show that "(1) they held a bona fide religious belief conflicting with an employment requirement; (2) they informed their employers of this belief; and (3) they were disciplined for failure to comply with the conflicting employment requirement." *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001); *see also Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 65–66 (1986).

An employee must also show (1) that he or she is a member of a protected class (such as a member of a religious group), (2) that the employee's job performance was satisfactory, (3) that the termination or discipline took place despite the satisfactory job performance, and (4) that either (a) the employee was replaced by someone not in the protected class or (b) other similarly-situated employees not in the protected class were treated more favorably. *Raggs v. Miss. Power & Light Co.*, 278 F.3d 463, 468 (5th Cir. 2002); *Clayton v. Meijer, Inc.*, 281 F.3d 605, 610 (6th Cir. 2002). Disparate treatment is difficult to prove, but at least one court has found that disparate treatment can result from employer-mandated diversity training. *See Altman v. Minn. Dep't of Corr.*, 251 F.3d 1199, 1203 (8th Cir. 2001).

B. Failure to provide a reasonable accommodation

Title VII also mandates that employers "reasonably accommodate to an employee's or prospective employee's religious observance or practice" unless it will result in "undue hardship on the conduct of the employer's business." 42 U.S.C. §§ 2000e(j), 2000e-2(a) (2006). Undue hardship has been defined by the Supreme Court as any cost that is "more than a de minimis cost," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), a very low threshold. Further, an employer is only required to provide an employee with a reasonable accommodation, not necessarily the accommodation of the employee's choice. *Philbrook*, 479 U.S. at 68. Like a disparate treatment claim, employees must first show that "(1) they held a bona fide religious belief conflicting with an employment requirement; (2) they informed their employers of this belief; and (3) they were disciplined for failure to comply with the conflicting employment requirement." *Knight*, 275 F.3d at 167; *see also Philbrook*, 479 U.S. at 65–66 (1986).

II. Case Law

No case directly addresses the issue of whether an employer must exempt an employee from religiously-objectionable diversity training. The following three cases, however, present general principles of law that will likely be applied if such a case ever arises.

A. *Altman v. Minnesota Department of Corrections*, 251 F.3d 1199 (8th Cir. 2001)

The most relevant case relating to employer-mandated diversity training is *Altman v. Minnesota Department of Corrections*, a case in which the Eighth Circuit found an employer liable under Title VII for disciplining employees who read their Bibles during a mandatory "gays-and-lesbians-in-the-workplace program." 251 F.3d at 1203. The Eighth Circuit based its decision primarily on the fact that other, non-religious employees were not disciplined for similar behavior during other training sessions. *Id.*

In *Altman*, employees objected to a mandatory "program dealing with issues of gays and lesbians in the workplace." *Id.* at 1201. After notifying their employer of their objection and reviewing the materials to be presented in the session, the employees came to the conclusion that the program was "state-sponsored indoctrination designed to sanction, condone, promote, and otherwise approve behavior and a style of life [the employees] believe[d] to be immoral, sinful, perverse, and contrary to the teachings of the Bible" and protested on religious grounds. *Id.* Their protest included being inattentive, reading their Bibles, and copying Scripture during the training

session. *Id.* They did not disrupt the meeting in any way. *Id.* Nevertheless, the employer reprimanded the employees and made them ineligible for promotion for two years. *Id.* at 1201–02. Other employees who did not pay attention during training sessions and who were caught "sleeping or reading magazines," however, did not receive penalties. *Id.* at 1202.

The employees sued the employer for religious discrimination under a disparate treatment theory. *Id.* at 1201. The Eighth Circuit found that, because the employer did not similarly discipline other, non-religious employees for similar behavior, the employer may have committed religious discrimination under Title VII, and remanded the case to the trial court. *Id.* at 1203. A federal jury later found that the employer did engage in religious discrimination against the plaintiffs.[1]

The essential holding of *Altman* is very narrow. *Altman* holds that an employer can be held liable for religious discrimination under Title VII when employees: (1) notify an employer of content they consider religiously-objectionable in diversity training, (2) review the training materials beforehand, (3) protest the meeting in a non-disruptive way, and (4) are treated more harshly than non-religious employees who engage in similar behavior during other meetings.

B. *Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004)*

In *Peterson v. Hewlett-Packard Co.*, the Ninth Circuit upheld the dismissal of an employee's religious discrimination claim after being terminated for violating the company's harassment policy. 358 F.3d at 601. In *Peterson*, the employer placed a series of "diversity posters" throughout its office as part of a company-wide diversity program. *Id*. A self-described "devout-Christian" employee objected to a poster that attempted to promote tolerance of homosexuality. *Id.* In response, the employee began posting Scriptures outside his cubicle condemning homosexuality with the hope "that his gay and lesbian co-workers would read the passages, repent, and be saved." *Id.* at 602. He also stated that the passages were "intended to be hurtful." *Id.* After repeated warnings to take down the Scriptures, the employee was found in violation of the company's uniformly-applied harassment policy and was terminated. *Id.*

The Ninth Circuit upheld the dismissal of the employee's claims of disparate treatment and failure of the employer to provide a reasonable accommodation. *Id.* at 601. The Ninth Circuit rejected the disparate treatment claim because the employee could not prove that the employer treated non-religious employees more favorably under the company's harassment policy. *Id.* at 603–04. The court held that the employee was "discharged, not because of his religious beliefs, but because he violated the company's harassment policy by attempting to generate a hostile and intolerant work environment and because he was insubordinate in that he repeatedly disregarded the company's instructions to remove the demeaning and degrading postings from his cubicle." *Id.* at 605.

The Ninth Circuit rejected the employee's reasonable accommodation claim because he was unwilling to accept a reasonable accommodation that would have avoided subjecting the employer to undue hardship. *Id.* at 606. In fact, the employee was resistant to any

[1] *See* Ellen Sorokin, *Rights Infringed by Midwest Prison; Jury Rules for Staff Who Read Bible, WASH. TIMES, Aug. 7, 2002, at A3.*

accommodation the employer had to offer, saying he would only stop posting the Scriptures if the employer removed the diversity posters. *Id.* The Ninth Circuit held that this accommodation would create an undue burden on the employer because it "infringed upon the company's right to promote diversity and encourage tolerance and good will among its workforce." *Id.* at 608. It also held that the company did not have to allow him to continue posting the Scriptures because employers should not be compelled to "permit an employee to post messages intended to demean and harass his co-workers." *Id.* at 607. The court further stated, "Either choice would have created undue hardship for [the employer] because it would have inhibited its efforts to attract and retain a qualified, diverse workforce, which the company reasonably views as vital to its commercial success; thus, neither provides a reasonable accommodation." *Id.*

Like *Altman*, the holding of *Peterson* is narrow. *Peterson* holds that an employer does not violate Title VII when an employee is terminated for violating a company's uniformly-applied harassment policy and refuses to accept reasonable accommodations.

C. *Buonanno v. AT&T Broadband, LLC*, 313 F. Supp. 2d 1069 (D. Colo. 2004)

In *Buonanno v. AT&T Broadband, LLC*, a federal trial court held that an employer violated Title VII by terminating an employee for his refusal to sign a Diversity Policy without first discussing a possible accommodation for the employee. 313 F. Supp. 2d at 1074, 1083. In *Buonanno*, a religious employee of AT&T, Albert Buonanno, was required to sign a certificate stating that he would follow the policies in AT&T's handbook for employees. *Id.* at 1074. The handbook included a section on diversity that stated, "Each person at AT&T Broadband is charged with the responsibility to fully recognize, respect and value the differences among all of us." *Id.* at 1074–75. Fearing that the policy would require him to "approv[e], endors[e], or esteem[] behavior or values that are repudiated by Scripture," Buonanno wrote AT&T's human resources director a letter explaining why he would not sign the policy. *Id.* at 1074.

After meeting with the human resources department and still refusing to sign the certificate, he was terminated. *Id.* at 1076–77. AT&T did not "gather[] any information about Mr. Buonanno's concerns" and did not discuss accommodating his beliefs. *Id.* at 1077. Both parties stipulated that, whatever his beliefs, Buonanno did not and would not "discriminate against another employee due to differences in belief, behavior, background or other attribute." *Id.* at 1074. Further, because AT&T's policy was extremely ambiguous, even AT&T could not explain the actual meaning of its diversity policy. *Id.* at 1077–78.

The court held that AT&T violated Title VII by not attempting to provide Buonanno with a reasonable accommodation. *Id.* at 1083. Almost as important in the court's reasoning was the ambiguity of the diversity policy. *Id.* at 1078, 1083. The court stated, "AT&T violated Title VII by failing to engage in the required dialogue with Buonanno upon notice of his concerns and by failing to clarify the challenged language to reasonably accommodate Buonanno's religious beliefs." *Id.* at 1083.

Like the holdings in most diversity policy cases, *Buonanno's* holding is very limited. It holds only that an employer is in violation of Title VII when it fails to discuss accommodating a religious employee's objection to an ambiguous diversity policy.

III. Inferences From Case Law

Many issues remain unclear in this area of law. No case directly addresses whether an employer is liable under Title VII for disciplining or terminating an employee for refusing to attend a diversity training session the employee finds religiously objectionable. There is no direct Supreme Court authority apart from cases generally addressing religious discrimination as a whole under Title VII. Rather, the few cases touching diversity training and policies come from federal circuit courts of appeals and federal trial courts. Nevertheless, at least two guiding principles have been established. First, employers must, at the very least, attempt to accommodate religious employees who object to diversity training on religious grounds. Second, employers are likely able to discipline employees under a reasonable, uniformly-applied harassment policy without Title VII liability.

A. Employers must at least try to accommodate religious employees who object to diversity training on religious grounds

The plain language of Title VII makes it clear that an employer must "reasonably accommodate to an employee's or prospective employee's religious observance or practice." 42 U.S.C. §§ 2000e(j), 2000e-2(a) (2006). While "[c]omplete harmony in the workplace is not an objective of Title VII," *Peterson*, 358 F. 3d at 607, Title VII is designed in part to protect religious employees from being discriminated against solely because they hold a minority viewpoint. *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 775, (1976) (*quoting United States v. Bethlehem Steel Corp.,* 446 F.2d 652, 663 (2d Cir. 1971)) ("If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."). The court in *Buonanno* strongly relied on the employer's failure to discuss accommodating the employee in holding that the employer violated Title VII. 313 F. Supp. 2d at 1081–83. In contrast, the court found in favor of the employer in *Peterson* because of the employee's refusal to consider reasonable accommodations. 358 F.3d at 608.

Title VII, as applied, encourages employees and employers to openly discuss their differences. Both the employee and the employer must be willing to discuss reasonable accommodations in order to have any chance of success in a Title VII suit. Also, the employee must prove that he informed the employer of his religious objection. *Philbrook*, 479 U.S. at 65–66 (citing *Knight*, 275 F.3d at 167). The employer must then show that it at least attempted to provide a reasonable accommodation for the religious employee. *See Peterson*, 358 F.3d at 608; *Buonanno*, 313 F. Supp. 2d at 1081–83. It appears that any party that attempts to have an honest and open discussion about the conflict and genuinely attempts to resolve it has a significantly greater chance of succeeding under Title VII.

B. Employees that violate a company's reasonable, uniformly-enforced harassment policy do not succeed under Title VII

Employees that violate a company's uniformly-applied harassment policy tend to lose Title VII claims. In *Peterson*, the employee lost both the disparate treatment and failure-to-

accommodate claims that arose from his termination for violating the employer's harassment policy. 358 F.3d at 601. The court emphasized the fact that the employee stated that his violations of the harassment policy were "intended to be hurtful." *Id.* at 602. In contrast, the employees in both *Altman* and *Buonanno* objected to their employers' diversity training and policies peacefully and won their cases. *Altman*, 251 F.3d at 1203; *Buonanno*, 313 F. Supp. 2d at 1074, 1083. The employees in *Altman* protested by reading their Bibles during the training, which was considered by the court to be a non-disruptive and peaceful activity. 251 F. 3d at 1201, 1203. In arriving at its decision, the court in *Buonanno* found it significant that the employee did not, and would not, "discriminate against another employee" due to his beliefs. 313 F. Supp. 2d at 1074.

Other Title VII cases outside the diversity training context affirm this non-harassment principle. For instance, in *Bodett v. CoxCom, Inc.*, an employee was terminated after the court found that she harassed a homosexual subordinate by, among other things, stating during a performance review "that she would be disappointed if [the lesbian employee was] dating another woman, but happy if she [was] dating a man." *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 741 (9th Cir. 2004). The employee's Title VII claim against the employer was rejected because it was "within the power of management under the harassment policy to terminate" the employee. *Id.* at 746.

One of the fundamental requirements to establish a disparate treatment claim is for the employee to show (1) that the employer replaced him with someone not in the protected class or (2) that the employer treated other similarly-situated employees not in the protected class more favorably. *Raggs v. Miss. Power & Light Co.*, 278 F.3d 463, 468 (5th Cir. 2002); *Clayton v. Meijer, Inc.*, 281 F.3d 605, 610 (6th Cir. 2002). One of the main factors that persuaded the Eighth Circuit to rule in favor of the employees in *Altman* was that other inattentive employees were not disciplined like the religiously-motivated employees who also engaged in other activities during the diversity training. 251 F.3d at 1203, 1206.

Title VII attempts to remedy unfair, discriminatory conduct. To some degree, a reasonable harassment policy seeks to do the same thing. So long as an employer does not use its harassment policy as an excuse to impose discriminatory punishment, an employee that violates the policy appears to have a significantly reduced chance of succeeding under Title VII. If an employer uses an anti-harassment policy as a tool to discriminate against a particular religious employee or group of employees, however, it will likely be liable for religious discrimination under Title VII.