

December 7, 2020

Dear Chairman Dhillon,

The Jewish Coalition for Religious Liberty (JCRL) is a non-denominational organization of Jewish communal and lay leaders who seek to protect Americans' religious liberty. We broadly support the proposed update to the EEOC's Compliance Manual on Religious Discrimination. It is important that the Commission provide employers and employees with clear guidance regarding how it understands and intends to implement the rules under its purview. Such direction will allow all parties to an employment relationship to engage in good faith discussions regarding religious accommodations. Ambiguity can lead to unnecessary disputes, even among parties attempting to reach mutually beneficial—not to mention legally required—compromises.

We believe that this Manual mostly achieves that task. However, we are concerned that some of the language surrounding religious expression may be confusing, and we propose some changes that we think would provide greater clarity. The sections that discuss balancing employers' duty to allow religious expression with their obligation to prevent harassment should be clarified to ensure that readers understand that mere exposure to unpopular religious views does not create a hostile work environment or constitute harassment.

The Manual's explanation that the law protects each individual employee's sincerely held religious beliefs is particularly important to the Jewish community, since Judaism encompasses a wide variety of opinions. For instance, no Jewish employee should ever be denied an accommodation to take off for a holiday because other Jewish employees are willing to work that day. It should be sufficient that a Jewish employee requesting an accommodation sincerely believes that his faith requires the accommodation. No employer should ever consider denying a Jewish employee an accommodation because other employees observe Judaism differently.

The Coalition also agrees with the Manual's direction that "a sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance." A sincere religious observer may be strict in some areas and lax in others. A religious Jew sees himself in a constant state of self-improvement and movement toward God and his laws. The mere fact that a believer has occasional stumbles, or decides to incrementally increase his religious observance, should not justify an employer denying a sincerely sought religious accommodation.

We concur with the Manual's view that "the denial of reasonable religious accommodation absent undue hardship is actionable even if the employee has not separately suffered an independent adverse employment action." A religious employee who chooses to violate his conscience will often experience tremendous harm, and he should not forfeit his cause of action because he chose to endure that suffering rather than risk losing his job by defying his employer after being denied an accommodation.

JCRL supports the Manual's conclusion that "an adjustment offered by an employer is not a 'reasonable accommodation' if it merely lessens rather than eliminates the conflict between religion and work, provided that eliminating the conflict would not impose an undue hardship." In order to meaningfully comply with the law, where reasonable, an employer must provide an accommodation that eliminates the religious conflict. The notion, for instance, that an Orthodox Jewish employee has been meaningfully accommodated if he is exempted from some tasks that violate the Sabbath but not others, is nonsensical. For example, the accommodation discussed in Example 33, in which a Jewish employee was only required to work on some Sabbaths, would be ineffectual. In such circumstances, a partial accommodation is no accommodation at all.

We agree with the Manual's view that, even under the current understanding of title VII, employers must show more than hypothetical hardships, small administrative costs, or infrequent and temporary expenses in order to justify refusing an accommodation. For instance, rearranging schedules to allow a Jewish employee to take off for a holiday is a reasonable accommodation, even though the employer may incur some expense.

However, we believe that, contrary to the prevailing interpretation, Title VII requires employers to show significantly more than a de minimis hardship to justify denying a religious accommodation. As the Manual recognizes in footnote 205, the view that an employer can deny an accommodation based on such a minimal showing has recently come under criticism, including from members of the Supreme Court. The Commission should consider spelling out the controversy around this interpretation, and the prospect that it will be revised, in order to prepare employees and employers for that possibility.

While most of the Manual adds valuable clarity, JCRL is concerned that the section discussing balancing "anti-harassment and accommodation obligations with respect to religious expression," which begins on page 59, is ambiguous and confusing. For example, the Manual notes that "some employees may perceive . . . other religious expression as unwelcome based on their own religious beliefs and observance, or lack thereof." In the subsequent section titled "employee best practices," the guide suggests that "employees who find workplace religious conduct unwelcome should inform the individual engaging in the conduct that they wish it to stop . . ." We worry that such language is ambiguous and may give the misimpression that normal religious expression can constitute harassment if co-workers would prefer not to be exposed to any religious practice.

We understand that in some circumstances, such as when an employee makes repeated and unwanted attempts at proselytizing his co-workers, such behavior may constitute harassment. However, as the Manual establishes on page 55, there is no "hostile environment from comments that are not abusive and not directed at the complaining employee." We think that the Manual should reiterate this valuable guidance, which seems to be in tension with the sentences quoted in the previous paragraph, in the section that begins on page 59. That guidance should play an important role in governing potential conflicts between religious expression and anti-harassment obligations.

A discussion between two Jewish employees regarding the weekly Torah portion, for instance, is protected by Title VII and should not constitute impermissible harassment just because a third-party who overhears the discussion considers it unwelcome. We believe that this is the intent of the Manual, but we recommend reviewing the text on pages 59-62 in order to ensure that the language on this issue is clear and consistent. Ensuring that the Manual sends a clear and unambiguous message can help to prevent unnecessary conflict, complaints, and litigation.

In the same vein, page 95 of the Manual suggests that “prayer, proselytizing, and other forms of religious expression ... may also raise intentional discrimination or harassment issues.” Listing prayer and other forms of religious expression as if they belong in the same category as proselytizing may create confusion. Proselytizing is distinct from other types of religious expression, such as saying blessings before meals, in that it is by definition directed toward a listener and will often include repeated contacts with an uninterested recipient. Unlike proselytizing, it is hard to imagine many situations where a religious individual praying quietly at his desk could ever constitute harassment. We recommend discussing proselytizing separately from other forms of religious expression to highlight the unique potential for harassment it presents and not to taint other religious acts by association.

Page 96 suggests that “religious expression directed toward coworkers, made in coworkers’ presence, or that a coworker learns of might constitute harassment in some situations.” We find this statement confusing. Based on the standard laid on page 55 of the Manual, if religious expression is not directed at a coworker or made in his presence, it is very unlikely to constitute harassment of that co-worker. JCRL recommends bringing the language on page 96 into harmony with the language on page 55 in order to avoid apparent internal conflicts that may give readers a misimpression of the EEOC’s position.

A private discussion in the breakroom between willing participants regarding the weekly Torah portion, for instance, should almost never be considered harassment of a colleague who only hears about the discussion third hand. We suggest clarifying that situations in which such religious expression could constitute harassment would have to involve extraordinary circumstances.

On page 96, The Manual appropriately explains that, “Mere subjective offense or disagreement with unpopular religious views or practices by coworkers is not sufficient to rise to the level of harassment.” We strongly endorse this statement, but we find that it loses some of its clarity and force when it appears in proximity to the potentially contradictory sentences identified in the preceding paragraphs. We recommend reviewing pages 59-62, and 95-96 for statements that could potentially create doubt or confusion regarding the rights of unpopular religious minorities in the workplace.

JCRL understands that employers have a duty to protect their workers from harassment, unwelcome attempts at proselytization, and other forms of abusive conduct. We acknowledge that employers require leeway to deal with truly abusive situations. However, we are concerned that hostile actors could abuse that authority in order to suppress unpopular religious minorities.

Even well-meaning employers and colleagues might be confused by the ambiguous provisions that we highlighted. Since this is an area ripe for abuse, and because we have pointed to a number of statements that we think a malicious individual could exploit, we recommend giving extra scrutiny to the sections of the manual discussing balancing anti-harassment obligations with the requirement to respect religious expression.

JCRL supports much of the language in this manual and believes that it offers valuable clarity that will help protect religious employees. However, we have suggested narrow areas where we believe that it ought to be refined and clarified.

Sincerely,
Howard Slugh,
General Counsel