

# **Employment Law Conference**

**South Texas College of Law**

## **Religious Discrimination And Accommodation: Recent Case Law And The EEOC's 2008 Guidance**

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**RELIGIOUS DISCRIMINATION AND ACCOMMODATION: RECENT CASE LAW  
AND THE EEOC'S 2008 GUIDANCE**

**I. BACKGROUND**

Religious discrimination charge filings with the EEOC nationwide have risen substantially over the past 15 years, doubling from 1,388 in Fiscal Year 1992 to a record level of 2,880 in FY 2007. On July 22, 2008, the EEOC issued a new Compliance Manual Section regarding workplace discrimination on the basis of religion. A copy of this Section is attached as Exhibit A.

The Section includes a comprehensive review of the relevant provisions of Title VII of the Civil Rights Act of 1964 and the EEOC's policies regarding religious discrimination, harassment and accommodation. The EEOC also issued a companion question-and-answer fact sheet and best practices booklet. Both documents are available on the agency's web site at [www.eeoc.gov](http://www.eeoc.gov), and are also attached as Exhibits B and C.

In releasing the new guidance, the EEOC Chairperson stated that "Title VII of the Civil Rights Act of 1964 seeks to ensure that applicants and employees enjoy the freedom to compete, advance and succeed in the workplace, irrespective of their religious beliefs . . . This Compliance Manual Section serves as a valuable resource for employers, employees, practitioners and EEOC staff seeking information on Title VII's prohibition against religious discrimination."

The Section addresses what constitutes "religion" within the meaning of Title VII; disparate treatment based on religion; the requirement to reasonably accommodate religious beliefs and practices; religion-based harassment; and retaliation. The Section also provides guidance on the sometimes complex workplace issues involved in balancing employees' rights regarding religious expression with employers' need to maintain efficient, productive workplaces.

The EEOC issued this section in response to an increase in charges of religious discrimination, increased religious diversity in the United States, and requests for guidance from stakeholders and agency personnel investigating and litigating claims of religious discrimination.

**II. CASES OF NOTE FILED, SETTLED, OR DECIDED SINCE THE EEOC'S GUIDANCE WAS ISSUED**

**A. *E.E.O.C. v. Administaff Inc., D. Md., No. L09-cv-2881, consent decree entered 3/15/10.***

The Equal Employment Opportunity Commission and Administaff, a nationwide staffing firm, reach a \$115,000 settlement of an EEOC religious discrimination suit on behalf of two Jewish workers who alleged they were harassed by Administaff and the Maryland employer to whom they were assigned.

Under a two-year consent decree entered in federal district court in Maryland, Administaff settles EEOC's claims that brothers Scott and Joseph Jacobson were subjected to anti-Semitic epithets and physical abuse while working for co-defendant Conn-X LLC, in

Edgewood, Md. EEOC in its suit alleged that Administaff and Conn-X were the Jacobsons' co-employers, and EEOC's discrimination claims against Conn-X are still pending.

Administaff admits no Title VII liability by signing the decree, which does not constitute an "adjudication or finding on the merits of this case." In addition to the monetary award, Administaff must revise its discrimination complaint procedure, post workplace notices regarding the settlement at its Kingwood, Texas, headquarters, and conduct equal employment opportunity training for its headquarters managers.

**B. *E.E.O.C. v. Kelly Services, Inc.*, 598 F.3d 1022 (8th Cir. 2010)**

Kelly Services' explanation that it did not refer a Muslim woman to one of its clients because the company banned all headwear, including khimars, for safety reasons was sufficient to rebut the Equal Employment Opportunity Commission's claims of religious bias, the U.S. Court of Appeals for the Eighth Circuit held March 25.

In its first look at an employment agency's obligations under Title VII of the 1964 Civil Rights Act, the appeals court affirmed a lower court's dismissal of the EEOC's case against Kelly Services, which alleged that Kelly failed to refer Asthma Suliman to Nahan Printing Co. for hire.

A unanimous panel found that the burden-shifting framework traditionally applied in Title VII cases also applies when it is an employment agency rather than an employer that is being sued. Nevertheless, it decided, the distinction between the provisions of Title VII covering employers and those covering employment agencies still was central to the outcome of the case.

"[T]he EEOC sued Kelly in its capacity as an 'employment agency,' not an 'employer,' and nothing in [42 U.S.C.] § 2000e(j) suggests that an 'employment agency,' in defending itself against a claim of religious discrimination, must demonstrate that the employer to which it would be referring the temporary worker would suffer an undue hardship if it had to accommodate that worker," Judge Lavenski R. Smith wrote for the court. Even if Title VII requires an employment agency to show undue hardship, he added, Kelly likely met that obligation by offering Suliman seven or more other jobs.

As a temporary employment agency, Kelly Services conditionally hires individuals and assigns them to temporary positions based on the needs and requirements of its clients, the court recounted. Nahan, a Kelly client, is a commercial printing company that operates an industrial plant containing large machines with fast-moving parts, including machines that pull paper into printing presses and sorting, "jogging," binding, and packaging machines. The company requires all temporary employees to work along its assembly line, in close, waist-high proximity to rollers, chains, and other moving machine parts. Its dress policy applies to all permanent and temporary workers and prohibits headwear and loose-fitting clothing on the plant floor and is strictly and uniformly enforced, the court said. In the same handbook in which its dress policy is stated, Nahan also states that it does not discriminate on the basis of religion, the court noted.

In July 2004, Suliman, a Muslim who as part of her faith wears a khimar, applied to Kelly for temporary work. After taking and passing Kelly's skills test, she met with one of its staffing supervisors, Sarah Corrieri, to discuss possible job opportunities through Kelly.

Corrieri apparently mentioned Nahan, even though it was unclear whether it had a job opening at that time, and showed and reviewed with Suliman the company's brochure, including its dress policy. Corrieri told Suliman she would have to take off her khimar to work at Nahan and Suliman insisted that she could not do so because of her religious beliefs, even after Corrieri explained that the requirement was based on safety concerns. Corrieri had a Kelly co-worker confirm her statement of Nahan's policy and told Suliman, "I'm sorry. You have to make a wise choice."

Corrieri, according to the court, did not consider contacting Nahan to see if it could accommodate Suliman or discuss with Suliman the possibility of her tying back her khimar while on Nahan's plant floor. Corrieri had personally visited Nahan and knew of the dangerous nature of the company's machinery. Nahan, it added, previously had sent other Kelly-supplied, non-Muslim temporary workers home before the end of a shift for violating its dress policy and Kelly had referred other individuals that it believed to be Muslim to Nahan when they agreed to comply with the company's dress policy.

Suliman left and later returned to Kelly with her husband, and Corrieri explained and showed to him Nahan's dress policy, with its "no hats, no caps" requirement. Corrieri contacted Kelly branch manager Julie Hentges and told her about the incident with the Sulimans. Hentges previously had told Corrieri that no one would be allowed to wear anything on their head while working at Nahan because of the company's safety concerns about headwear getting caught in a machine. Hentges also testified that, after speaking with Corrieri, she called Nahan's employee relations leader Jackie Olson, who said Suliman could not work on Nahan's plant floor with her khimar tied back.

Olson testified that she previously had told Hentges that head coverings were prohibited on Nahan's plant floor. Also, although there were conflicts over whether she spoke with Hentges on the issue, Olson testified that a woman wearing a khimar could not tie it back to comply with Nahan's dress policy and that the company never granted a modification of its dress policy for a temporary worker.

Kelly subsequently offered Suliman at least seven jobs with clients other than Nahan, where her khimar would not raise safety issues. After apparently checking with her husband, Suliman turned down each offer.

Suliman ultimately filed a charge of discrimination that was investigated by the Minnesota Department of Human Rights. During that investigation, a nonsupervisory employee who claimed to be filling in as a shift leader confirmed Nahan's "no-headwear" policy but said, instead of asking a Muslim female working at Nahan that day to remove her headdress, he moved her to a job stacking paper because he "assumed it was a religious situation" and understood that Nahan's handbook prohibited religious bias.

EEOC later sued on Suliman's behalf and Kelly sought summary judgment. The trial court granted the motion on three grounds: EEOC did not establish a *prima facie* case because it could not prove that Suliman experienced an adverse employment action; even if EEOC established a *prima facie* case, Kelly showed that it reasonably accommodated Suliman by

offering her several other jobs; and given its safety-based dress policy, Nahan could not have reasonably accommodated Suliman without undue hardship.

On appeal by EEOC, the appeals court noted that Section 2000e-2(b) of Title VII prohibits employment agencies from failing or refusing to refer anyone for employment because of their religion. “An employment agency’s referral obligations under §2000e-2 is a question of first impression for this court,” Smith wrote.

The court decided that it did not need to resolve whether an employment agency’s failure to refer a job applicant for a particular assignment ever could constitute an adverse employment action for purposes of proving a *prima facie* case of religious discrimination. “The EEOC has failed to show that Nahan had an available position to which Kelly could actually refer Suliman when she applied for available temporary work through Kelly,” it said.

Instead, assuming a *prima facie* case could be shown, the court found that EEOC’s case still failed at the last two stages of the traditional burden-shifting framework under *McDonnell Douglas v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973). Because Kelly was sued as an “employment agency” and not an “employer,” it said, the issue of undue hardship was not implicated and “the only question before us is whether Kelly has provided a legitimate, nondiscriminatory reason for declining to refer Suliman to Nahan for employment.”

EEOC did not claim that Nahan’s safety-based dress policy was not a facially neutral requirement that was communicated to Kelly, the court noted. Leaving aside fact disputes regarding the timing and other specifics of conversations, “the record reflects that even if Kelly had asked whether Nahan could accommodate Suliman by allowing her to wear the khimar, the answer would have been ‘no,’ ” it said.

Moreover, there was no proof that Nahan’s dress policy was a pretext for discriminating against employees needing religious accommodation or that Kelly knew the policy was pretextual, the court said. “Nothing in §2000e-2(b) suggests that an employment agency should be held liable if the agency has no reason to believe that the “the employer’s claim of bona fide occupations qualification is without substance,” it said.

The court rejected EEOC’s attempted reliance on evidence relating to the MDHR investigator’s visit to Nahan’s plant. While potentially relevant if Nahan was the defendant, “the testimony does not impact our analysis of whether Kelly has established a legitimate, nondiscriminatory reason for not referring Suliman to Nahan,” it wrote.

**C. *Patterson v. Indiana Newspapers, Inc.*, 589 F.3d 357 (7th Cir. 2009).**

Two editorial writers who claimed that they lost their jobs at the Indianapolis Star because of their “traditional Christian” beliefs concerning homosexuality failed to present sufficient evidence of religious bias to warrant a trial of their claims under Title VII of the 1964 Civil Rights Act, the U.S. Court of Appeals for the Seventh Circuit held Dec. 8, 2009.

Writing for the court to affirm a trial court’s summary judgment in favor of Indiana Newspapers Inc., Judge Diane S. Sykes said that former employee Lisa Coffey claimed she was

reassigned and forced to resign because of her beliefs, but the evidence showed that she repeatedly violated the newspaper's overtime policy and was not meeting management's legitimate expectations of her employment.

The court also found that James Patterson was repeatedly warned about editorial problems and errors, and could not establish that he was fired because of his religion, race or filing of a discrimination charge, or that he was targeted for firing in violation of the Age Discrimination in Employment Act.

According to the decision, Coffey described herself as a "traditional Christian" who believed that homosexual conduct was sinful. Coffey joined the Star in 1999 as a copy editor, with additional administrative duties related to a newspaper internship program. Coffey asked to become an editorial writer, and the newspaper gave her that assignment in 2002, but she continued to spend two days a week managing the internship program.

The Star published editorials, which appeared without a writer's name or byline, and opinion columns that were signed by the editorial writers. In 2003, after the U.S. Supreme Court issued a decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), concerning private homosexual conduct, Coffey wrote and submitted an opinion column describing HIV risks associated with sodomy. Editor Dennis Ryerson rejected the column, but told the Star's editorial page director that he would consider a less graphic column on the risks of unprotected sex.

Coffey and Ryerson later exchanged e-mails in which she acknowledged being angry at his rejection of her column, but recognized that they were both "seeking truth." Ryerson replied that editorials expressed opinions, and that he did not necessarily believe there was "one truth." Coffey replied that she had been "knocked out by the Holy Spirit," which the court said Ryerson viewed as an effort at workplace proselytizing that violated company policy. Ryerson wrote back to Coffey warning her that it was inappropriate to proselytize at work.

Sykes said that before and after her exchanges with Ryerson, Coffey "developed a habit" of working overtime hours that were not approved in advance by management. The company warned Coffey, but she later submitted a request to be paid for 50 unapproved overtime hours she spent preparing binders on candidates for election.

Several managers agreed that Coffey needed closer supervision, and in September 2003 Ryerson decided to reassign the internship program to other employees, leaving Coffey with only three days of work each week as an editorial writer. The newspaper offered as an alternative that Coffey could return to a full-time job on the copy desk, but she quit when the paper refused to let her combine three days of editorial writing with two days of copy desk work each week.

On her last day at work in October 2003, Coffey sent an e-mail to the Star president and publisher thanking her for the "privilege" of working for the newspaper. "I have enjoyed and appreciated it more than I can say," Coffey wrote.

Coffey alleged in a lawsuit that she and Patterson filed in the U.S. District Court for the Southern District of Indiana that although there were Christians in management positions at the Star, her religious beliefs about homosexuality caused her to be treated unfairly.

Sykes said the Seventh Circuit has recognized that discrimination can occur when a Christian manager does not approve of the “brand” of Christian belief held by an employee, but she observed that in order to sustain a claim under Title VII Coffey also was required to show that she was meeting the company’s legitimate expectations for her performance and that similarly situated employees who did not share her beliefs were treated more favorably by the employer.

The court said that it was undisputed that Coffey repeatedly violated the newspaper’s overtime policy and that Coffey failed to identify any employee who “violated the Star’s overtime policy—at all, much less repeatedly.”

Sykes added that to the extent Coffey’s Title VII claim was based on a constructive discharge allegation “it is exceedingly weak.” Noting that a showing of constructive discharge generally requires evidence that a reasonable employee would view working conditions as unbearable, the court said there was no evidence to support such a claim for Coffey. The court observed that Coffey’s final e-mail stating that she enjoyed and appreciated working at the Star “is not the statement of an employee who thinks her workplace is unbearable.”

The court said that Patterson, an African American who was 51 years old when he was fired by the newspaper, also described himself as a traditional Christian who opposed homosexual conduct.

Patterson joined the newspaper in 1995 as an editorial writer, but Sykes said he had a “mixed” history of employment, with managers finding that his work required more editing than the writing of other employees.

In 2003, after American military forces entered Iraq, Patterson submitted an editorial asking Star readers to pray for the U.S. troops. An editorial-page editor revised Patterson’s draft, and the newspaper published the editorial, but Ryerson expressed discomfort with urging readers to engage in religious prayers. Patterson alleged that after that incident, the Star would not publish religious-based opinion pieces if they differed from Ryerson’s viewpoint.

Patterson was placed on a performance improvement plan for 10 months, issued a written warning and discharged. He alleged that the employer took action because of his religious beliefs and his race, and because of a Title VII race discrimination charge he filed with the Equal Employment Opportunity Commission before he was fired.

“The basic problem with all of Patterson’s discrimination claims,” the court said, was that he could not show that he was meeting the newspaper’s legitimate expectations of an editorial writer.

On one occasion, Sykes said, Patterson wrote an editorial endorsing city council candidate “Vernon Smith,” but the candidate’s name was actually Vernon Brown. In another editorial, he wrote that Indiana governor Frank O’Bannon had accepted the resignation of a state official when O’Bannon had been dead for five months and the official had not resigned.

An “even greater cause for concern” was Patterson’s editorial that endorsed one company’s acquisition of an airline without contacting the competing bidder, Sykes wrote. The Star received dozens of complaints and had to apologize for the error, the court said.

Some of Patterson’s mistakes were caught by editors before they made it into the newspaper, but the court said that after repeated warnings, his performance remained poor. “We need not belabor this point,” the court said, adding that “it goes without saying that factual accuracy, adequate reporting and clean writing are legitimate performance expectations at a newspaper.”

Stating that Patterson failed to provide facts to support his claims that he was singled out for discriminatory or retaliatory treatment, the court said that summary judgment on all of his claims was properly awarded to Indiana Newspapers.

**D. *E.E.O.C. v. Mesaba Airlines*, D. Minn., No. 08-5308, consent decree entered 12/22/09.**

A federal district court in Minnesota approved a \$130,000 settlement of an Equal Employment Opportunity Commission suit claiming Mesaba Airlines failed to accommodate the religious beliefs of its employees and job applicants by barring probationary employees from adjusting their schedules to observe their Sabbath days

Under a two-year consent decree signed by Judge Donovan W. Frank, Mesaba will pay the settlement proceeds to Laura Vallejos, a former customer service agent who filed an EEOC charge after she was fired allegedly for refusing to work on the Jewish Sabbath. Four Mesaba job applicants whom EEOC claimed were rejected as customer service agents because they expressed interest in schedules that would permit Sunday church attendance also will receive settlement payments, the decree provides.

In a September 2008 lawsuit filed under Title VII of the 1964 Civil Rights Act, EEOC claimed Mesaba violated the act by refusing to accommodate the sincerely held religious beliefs of employees and job applicants who sought schedule modifications that would enable them to observe their religions. EEOC challenged an alleged Mesaba policy barring customer service agents during the first 90 days of employment from voluntarily swapping shifts with co-workers.

EEOC alleged that in October 2006 Mesaba fired Vallejos, who is Jewish, because for religious reasons she declined to work from sundown Friday until sundown on Saturday. The airline’s prohibition on shift swapping for probationary employees also caused hiring managers to reject customer service job applicants who expressed a need to attend religious services, including Christian church services on Sunday mornings, EEOC claimed. EEOC identified four Mesaba job applicants—Stephen Doncevic, Steven Mathias, Deborah Sellers, and Andrew Whellams—who it claimed were rejected because they sought weekend shifts that would not conflict with Sunday church attendance.

Under the settlement, Mesaba will pay \$65,000 to Vallejos, while Doncevic and Mathias will receive \$20,000 each, Sellers will receive \$15,000, and Whellams will receive \$10,000. Mesaba, a Delta Airlines subsidiary based in Eagan, Minn., also will conduct annual diversity training for its human resource personnel and hiring managers, including instruction on laws

prohibiting religious discrimination and employers' obligation to reasonably accommodate workers' religious beliefs, the decree provides.

"Employees should not be forced to choose between practicing their faith and keeping or getting a job," said EEOC Acting Chairman Stuart Ishimaru. "As this suit shows, the EEOC vigorously enforces Title VII's protection against religious discrimination."

Mesaba, which denied EEOC's claims, said in a statement that it has a longtime commitment to equal employment opportunity. "Mesaba is pleased to reach this agreement and looks forward to partnering with the EEOC in efforts to improve the workplace," the airline said Dec. 28. "Mesaba Airlines provides equal employment opportunities to all applicants for employment and has a long-standing history of being respectful and accommodating to religious beliefs and practices. This agreement is a demonstration of Mesaba's commitment."

Mesaba dropped the no shift swap policy after EEOC sued, and it no longer employs customer service agents, according to EEOC.

Some settlement terms, including that Mesaba report in writing to EEOC all religious accommodation requests it receives from customer service agents or applicants and that it notify EEOC about future religious discrimination or retaliation claims filed by such employees or applicants, would apply only if Mesaba employs such agents in the future, the decree provides.

Mesaba must post in all its facilities nationwide a workplace notice informing its employees about the settlement terms, the decree provides. The airline's president or chief executive officer also must publish a statement affirming Mesaba's commitment to treating all employees with respect and dignity, regardless of religion, the decree provides.

**E. *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951 (9th Cir. 2009), petition for certiorari filed, 78 USLW 3549 NO. 09-1071 (Mar 04, 2010).**

In this case, The U.S. Court of Appeals for the Ninth Circuit upheld a lower court opinion shooting down Go Daddy Group Inc.'s bid for a new trial following a jury's decision to slap the Internet company with a \$390,000 fine for firing a Muslim employee who claimed he was denied a management position because of his national origin and religion.

The U.S. Court of Appeals for the Ninth Circuit affirmed the U.S. District for the District of Arizona's denial of both Go Daddy's motion for a judgment as a matter of law and its motion for a new trial on the retaliation claims brought by former employee Youssef Bouamama, a Muslim from Morocco.

The appeals court rejected Go Daddy's arguments that there was insufficient evidence that Bouamama engaged in protected activity under Title VII of the Civil Rights Act or, if he did, that the evidence was insufficient to show that the activity caused his termination.

The U.S. Equal Employment Opportunity Commission originally sued Go Daddy in September 2004 on Bouamama's behalf, alleging that the Scottsdale, Ariz.-based registrar of Internet domain names had failed to select Bouamama for a supervisory position and wrongfully

terminated him on the basis of his religion and national origin and in retaliation for his discrimination complaints to the company's human resources department.

While the jury agreed with the retaliation claim, it gave Go Daddy a reprieve with regard to Bouamama's five other claims, ruling that the company's decision to fire Bouamama was not based on his religion or national origin.

After only four hours of deliberation, the jury awarded Bouamama \$5,000 for mental and emotional pain and suffering and \$135,000 for lost earnings, as well as \$250,000 in punitive damages.

Go Daddy filed its appeal seeking a new trial in July 2007, and the Ninth Circuit heard the case in January.

According to the appeals court, there is evidence to suggest Bouamama suffered a sustained pattern of discrimination, and because there is evidence in support of the jury verdict and Go Daddy failed to show that the district court made a mistake of law, the defendant's motions were correctly denied.

Judge John T. Noonan dissented from his colleagues in the Ninth Circuit, noting that the jury had voted no on the question of whether Go Daddy had discriminated against Bouamama and arguing that Bouamama had not taken the protected action of complaining about a pattern of discrimination but had instead reported "a single sentence that he deemed discriminatory."

**F. *Pedreira v. Kentucky Baptist Homes for Children, Inc.*, 579 F.3d 722 (6th Cir. 2009).**

KBHC is funded by Kentucky for its participation in the "Alternatives for Children Program," which provides placement resources for children who have been, or are at risk of being, abused or neglected. In 1998, plaintiff Alicia Pedreira was terminated from her job as a Family Specialist at Spring Meadows Children's Home, a facility owned and operated by KBHC, when members of KBHC's management discovered a photograph at the Kentucky State Fair of Pedreira and her female partner at an AIDS fundraiser. Pedreira's termination notice indicated that she was fired "because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values." After her termination, KBHC announced as official policy that "[i]t is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment."

Pedreira sued for religious discrimination under Title VII. Her case was dismissed under Rule 12(b)(6). It was undisputed that KBHC fired Pedreira on account of her sexuality. However, Pedreira did not explain how this constituted discrimination based on religion. Pedreira did not allege any particulars about her religion that would allow an inference that she was discriminated against on account of her religion, or more particularly, her religious differences with KBHC. Furthermore, Pedreira did not allege that her sexual orientation is premised on her religious beliefs or lack thereof, nor did she state whether she accepts or rejects Baptist beliefs. The court held that, "[w]hile there may be factual situations in which an employer equates an employee's sexuality with her religious beliefs or lack thereof, in this case, Pedreira has "failed to state a claim upon which relief could be granted." (citations omitted).

**G. *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d. Cir. 2009).**

In this Title VII religious harassment case, Prowel admitted that no one at his employer, Wise, harassed him based on his religious beliefs. Rather, Prowel contended that he was harassed for failing to conform to Wise's religious beliefs. When asked to identify which of Wise's beliefs to which he failed to conform, Prowel could identify just one: "that a man should not lay with another man." In response to Wise's statement of undisputed material facts, Prowel admitted: "the only way in which [he] failed to conform to his co-workers' religious beliefs was by virtue of his status as a gay man." Finally, over a month after Wise moved for summary judgment, Prowel averred that he suffered religious harassment because: "I am a gay male, which status several of my co-workers considered to be contrary to being a good Christian."

The Sixth Circuit held that Prowel's identification of this single "religious" belief "leads ineluctably to the conclusion that he was harassed not 'because of religion,' but because of his sexual orientation. Given Congress's repeated rejection of legislation that would have extended Title VII to cover sexual orientation, . . . we cannot accept Prowel's *de facto* invitation to hold that he was discriminated against "because of religion" merely by virtue of his homosexuality." (citation omitted). Accordingly, the court affirmed summary judgment against the claim.

**H. *DeFreitas v. Horizon Inv. Management Corp.*, 577 F.3d 1151 (10th Cir. 2009).**

A female vice president for a property management firm who was fired while on medical leave for a hysterectomy raised a jury issue of a Family and Medical Leave Act violation but had no claim for religious discrimination under Title VII of the 1964 Civil Rights Act, the U.S. Court of Appeals for the Tenth Circuit ruled August 14, 2009.

Partially reversing summary judgment for Horizon Investment Management Corp., the court said plaintiff Nydia DeFreitas, fired with no prior warning a day after she informed the company president that she would need a full six weeks of leave, raised a triable issue of unlawful interference with her FMLA rights.

Although Horizon and company president James Terry argued DeFreitas was fired because of job performance issues, the court said the suspicious timing, DeFreitas' evidence of uniformly positive performance appraisals, and Horizon's failure to follow its own progressive discipline policy all would support a reasonable jury in finding DeFreitas' firing was related to her FMLA-protected leave.

"[W]e note the elephant in the room," Judge Harris L. Hartz wrote. "One reason that a reasonable jury could reject [Horizon's] assertions regarding the grounds for firing her is that there appears to have been another ground for her firing, a very simple, commonsensical one—namely, that she was missing too much work. This is hardly an unheard-of reason for an employer to discharge an employee."

Observing that the FMLA was enacted precisely because "employers had found it in their economic self-interest" to fire employees who were unable to work for medical reasons, the court said company president Terry's admission he had never heard of the FMLA prior to

DeFreitas's case makes it "eminently reasonable" to infer Horizon "would engage in the very practice" the law was designed to prevent.

The court affirmed summary judgment for Horizon, however, on DeFreitas's claim that Terry, a member of the Church of Jesus Christ of Latter-day Saints (LDS), fired DeFreitas because she was not a Mormon. Although the court said a reasonable jury could find Horizon's stated reasons for discharge were pretextual, it said DeFreitas, who is Roman Catholic, failed to produce evidence the company was motivated by religious bias.

Horizon, which has about 190 employees, manages residential properties in Nevada and Utah. In June 2004, the company hired DeFreitas as a property manager in North Ogden, Utah.

Company president Terry took notice of DeFreitas' ability and by November 2004, Horizon had transferred her to a more challenging assignment, the court said. That same month, Terry called DeFreitas a "dynamite employee" and told her "we are so glad to have you as part of our team."

After taking maternity leave in May 2005, DeFreitas returned to Horizon as a "floating manager" and Terry testified she did "very well" in that assignment, the court said. During the summer of 2005, another management company offered DeFreitas \$36,000 a year—\$8,000 more than her Horizon pay—to join them. When DeFreitas tendered her resignation, Terry convinced her to stay by raising her salary to \$38,000 a year and promoting her to regional vice president.

DeFreitas was put in charge of three Salt Lake City residential properties: Park Place Apartments, Edison Place Apartments, and Westgate. She regarded these building as among Horizon's most difficult to manage and Terry later testified that Park Place was "a beast with lots of tentacles." Jonathan Morse, the Park Place owner, was considered "very demanding," its occupancy rate was below Morse's expectations, and the building did not qualify for tax credits, the court said.

Nevertheless, Terry praised DeFreitas' performance, telling her in a November 2005 e-mail she was doing a "dynamite job." A Horizon executive committee member and Park Place property owner Morse's son also sent e-mails to DeFreitas praising her job performance.

In November 2005, DeFreitas informed Terry that she had to undergo a hysterectomy and would need about six weeks of medical leave. Terry never informed DeFreitas of her FMLA rights to take up to 12 weeks of leave for a serious health condition, the court said. Terry later testified he was unaware of the FMLA "until the situation came up" with DeFreitas.

On February 15, 2006, DeFreitas underwent surgery and began an approved leave, the court said. After surgery, DeFreitas initially informed Terry that she might be able to return to work by March 13. According to DeFreitas, Terry expressed concern about the length of her projected leave.

On Feb. 24, Terry told DeFreitas that things had become "crazy" at Park Place and that he had fired one of her staff members. During DeFreitas' leave, Horizon ultimately fired four of her staff members and a fifth one quit, the court said. On February 28, property owner Morse told DeFreitas that he and Terry had decided to remove her from managing Park Place. About

the same time, two maintenance workers called DeFreitas to warn her about rumors that she would be fired.

When DeFreitas questioned Terry about those rumors, he asked DeFreitas questions such as “why do you work?”; “do you really need the money?”; and “if you stayed at home, would that be OK?,” the court said. On March 9, after a medical checkup, DeFreitas told Terry that she would not be able to return before April 4. DeFreitas testified Terry told her not to worry and to “just get yourself better.”

On March 10, however, Terry fired DeFreitas through an e-mail with the subject line “Ecclesiastes 3.” Terry wrote that he had “agonized over this decision for weeks” but that “we have uncovered so many different issues at both Edison and Park Place that are expensive mistakes to the owner and our management company” that DeFreitas had to go. Contacted by a prospective employer for DeFreitas in April 2005, Terry indicated the plaintiff’s reason for leaving Horizon was “illness.”

After receiving a right-to-sue letter from the Equal Employment Opportunity Commission, DeFreitas sued Horizon under the FMLA and Title VII. A federal district court granted summary judgment to the company and DeFreitas appealed.

On appeal, Horizon argued it had legitimate, job-related reasons for firing DeFreitas that had nothing to do with her medical leave. The company cited concerns about DeFreitas’ alleged poor interpersonal skills, her submission of a false time slip, her “underperformance” in managing Park Place, and her alleged mishandling of tax-credit compliance as valid reasons for firing her.

Since Horizon did not contest that DeFreitas was entitled to FMLA leave or that an adverse action occurred, the court said, “we address only whether her firing was related to her taking leave, and whether she would have been fired anyway, regardless of leave.”

A reasonable jury could find in DeFreitas’ favor on both points, the court ruled. “Whenever termination occurs while the employee is on leave, that timing has significant probative force,” Hartz wrote. “The timing here is particularly suggestive. DeFreitas’ termination occurred just one day after she told Terry that she would need to take a full six weeks off and could not return sooner. Moreover, Terry later told DeFreitas’ prospective employer that the reason for her departure was ‘illness.’ There is additional evidence that her termination was related to her leave, but this will suffice.”

Horizon argued DeFreitas would have been fired regardless of her FMLA leave, but the court said “there is a good deal of evidence that [DeFreitas] was a highly valued employee doing excellent work.” Recounting the various e-mails praising her performance, the court said it was “particularly striking” that Horizon produced no critical e-mails, given that the company’s employee manual called for documenting employees’ alleged poor performance prior to any discipline and giving employees the opportunity to correct perceived shortcomings.

Horizon cited alleged complaints from DeFreitas’ subordinate employees about her deficient interpersonal skills. But the court observed those complaints were “inconsistent with one another,” as one employee cited how badly DeFreitas had treated him but other workers

complained the first employee was DeFreitas' "pet." Employees also complained about a surveillance camera DeFreitas had installed in the management office, but Terry acknowledged Horizon had instructed her to do so, the court said.

"More importantly, however, viewing the evidence in the light most favorable to DeFreitas, it might well strike the jury as passing strange that Terry would fire DeFreitas based on comments by subordinates without first asking her for her version of events, given that she had been considered such a stellar employee for at least 18 of her 21 months with Horizon," the court said.

As for religious discrimination claim, DeFreitas pointed out that Terry and much of Horizon' governing board are Mormon, that she was replaced by a Mormon employee, and that Terry had often discussed religion in the workplace, joking that he would "convert" her. When DeFreitas was on leave, the four staff members who were fired all were Catholic, she added.

Affirming summary judgment for Horizon, the court said that although a reasonable jury could find Terry's stated reasons for firing DeFreitas were a pretext, no evidence shows her religion motivated the company's decision. "The uncontradicted evidence is that her Catholicism was known throughout her tenure with Horizon, but Terry had treated her well," the court said, citing her relatively rapid promotion and salary raises. "DeFreitas points to nothing with religious overtones that occurred during her final months with Horizon that could account for any religious animosity by Terry toward her. In light of this history, it simply beggars the imagination to believe that she was fired on religious grounds."

**I. *Toronka v. Continental Airlines, Inc.*, 649 F. Supp. 2d 608 (S.D. Tex. 2009)**

Toronka contended that after his workplace accident he explained to his employer, Continental, that he could not control the vehicle despite hitting the brakes and that he believed the accident was inevitable because of a dream that his wife had about him earlier that day. Toronka argued that, because of his religious belief in the power of dreams, Continental, contrary to company practice in similar situations, subjected him to harsh employment conditions in violation of Title VII. However, Continental moved to dismiss Toronka's religious discrimination complaint under Rule 12(b)(6), contending that a belief in the power of dreams is not a bona fide religious belief. Moreover, Continental argues that it was unaware of Toronka's religious beliefs, and, thus, it was impossible for Continental to subject Toronka to harsh employment conditions on account of his religious beliefs. The court denied Continental's motion, stating:

Courts, in considering motions to dismiss discrimination claims, typically look to the elements of a *prima facie* case to determine whether the plaintiff has plead a valid claim for relief. *See Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315 (3d Cir. 2008). . . . To establish a *prima facie* claim for religious discrimination against an employer a plaintiff must prove: (1) he had a bona fide religious belief that conflicted with an employment requirement; (2) the employer was informed of that belief; and (3) the employee was discharged or disciplined

for failing to comply with the conflicting employment requirement. *Weber v. Roadway Exp., Inc.*, 199 F.3d 270, 273 (5th Cir. 2000).

Initially, the Court must determine whether Toronka's "moral and ethical belief in the power of dreams based on his religious convictions and traditions of his national origin of African descent" is a religious belief. In *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965), a case involving a conscientious objector to military service, the Supreme Court noted the "vast panoply of beliefs" present in this country and interpreted the meaning of religious training and beliefs so as to "embrace all religions." *Seeger*, 380 U.S. at 165, 175, 85 S.Ct. 850. The Equal Employment Opportunity Commission (EEOC) guidelines are similarly broad: "The Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1. The Fifth Circuit has held that the analysis for the religious nature of a belief does not turn on the veracity of a belief. See *Brown v. Resor*, 407 F.2d 281, 288 (5th Cir. 1969). Rather, the focus should be whether a belief, in the person's own scheme of things, is religious. *Therriault v. Carlson*, 495 F.2d 390, 394 (5th Cir. 1974). A religious belief is one which is based on a theory of "man's nature or his place in the Universe." *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 324 (5th Cir. 1977) (Roney, J., dissenting). "All forms and aspects of religion, however eccentric, are protected except those that cannot be, in practice and with [honest effort], reconciled with a businesslike operation." *Cooper v. General Dynamics*, 533 F.2d 163, 168-69 (5th Cir. 1976). Thus, sincerely held personal convictions, which others find nonsensical, may still fit within the framework of a religious belief. There is, however, a rational limit to what courts are willing to accept as religious beliefs. See, e.g., *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977) (holding plaintiff's "personal religious creed" of eating Kozy Kitten cat food was a personal preference and not a religious belief).

The complaint links Toronka's belief in the power of dreams to the traditional religious convictions of his African origin. Toronka contends that his belief in dreams is "a moral and ethical belief . . . based on his religious convictions and traditions" (Pl.'s Am. Compl., Doc. 9 at ¶ 14). Although Continental asserts that Toronka never informed it of his belief in the power of dreams, Toronka's complaint alleges that he communicated his beliefs to Continental at the time of the accident and that the subsequent disciplinary actions that followed were on account of his religious beliefs. In construing all reasonable inferences in Plaintiff's favor and accepting all factual allegations pleaded as true, the Court finds that Toronka has asserted a claim for religious discrimination that is "plausible" on its face. Thus, the Court declines to dismiss Plaintiff's religious discrimination claims under Fed.R.Civ.P. 12(b)(6).

*Id.* at 612.

**J. *Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009).**

The U.S. Court of Appeals for the Third Circuit upheld a district court's dismissal of a discrimination suit filed on behalf of Kimberlie Webb, determining that accommodating her request could jeopardize the perception of the police force's religious impartiality.

"The district court correctly concluded the city would suffer undue hardship under Title VII if required to grant Webb's requested religious accommodation," Chief Judge Anthony J. Scirica said.

The dispute dates back to 2003, when Webb's request to wear a headpiece called a khimar to work was denied. Her captain said wearing the khimar would represent a violation of the Philadelphia Police Department's Directive 78, which does not authorize the wearing of religious symbols on the uniform or the wearing of religious apparel while on duty.

Webb, who has served on the police department for more than a dozen years, then filed a complaint with the U.S. Equal Employment Opportunity Commission, accusing the department of religious discrimination.

But while awaiting the outcome of this case, Webb repeatedly showed up to work wearing the khimar and was eventually suspended for 13 days without pay as punishment for her actions.

The EEOC filed her complaint against the city in 2005 in the U.S. District Court for the Eastern District of Pennsylvania. The suit included additional claims of retaliation and hostile work environment as well as sex discrimination.

But the district court in 2007 dismissed the claims, ruling that the Philadelphia Police Department's uniform policy should override an individual officer's religious obligations, triggering Webb's appeal. The city argued that if not for the strict enforcement of Directive 78, religious neutrality would be severely damaged to the detriment of the proper functioning of the police department.

The Third Circuit sided with the city, noting that it has recognized in previous cases that safety is of primary importance to the police department and that "uniform requirements are crucial to the safety of officers (so that the public will be able to identify officers as genuine, based on their uniform appearance), morale and esprit de corps, and public confidence in the police."

**K. *Xodus v. Wackenhut Corp.*, 626 F. Supp. 2d 861 (N.D. Ill. 2009).**

A job applicant who claimed he was rejected for a security guard position because he refused to cut his dreadlocks raised a triable religious discrimination claim under Title VII of the 1964 Civil Rights Act but may not recover punitive damages, the U.S. District Court for the Northern District of Illinois ruled on April 24, 2009.

Partially denying summary judgment to Wackenhut Corp., the court found that plaintiff Lord Osunfarian Exodus, a self-described Rastafarian/Hebrew Israelite who claims his religious

beliefs bar him from cutting his hair, succeeded in raising a jury issue about whether Wackenhut denied him a security guard position because of his faith.

Although Xodus claimed his job interview with a Wackenhut employee ended abruptly after Xodus informed the interviewer that he could not cut his hair for religious reasons, the company contended that Xodus had never mentioned religion or that the reason for not cutting his hair was religious. Instead, Wackenhut contended that when asked if he could comply with the company's grooming code, Xodus "merely stated that he refused to cut his hair because of his 'beliefs'" and that Xodus left after being informed Wackenhut could not hire him unless he conformed to its grooming policy.

Although Xodus contended that the interviewer mentioned that he could work at a dock security job without cutting his hair, but that no such job currently was available, Wackenhut denied that the interviewer ever mentioned any alternative jobs.

Wackenhut argued that even if a Title VII violation might have occurred, Xodus failed to mitigate his damages because he declined to accept a comparable job after being turned down by Wackenhut. Xodus replied that Wackenhut's refusal to hire him had aggravated a preexisting medical condition that limited his ability to work, causing his failure to accept a comparable job. Wackenhut denied any responsibility for Xodus' alleged medical condition and sought summary judgment on damages as well as liability.

A jury should decide whether Xodus was subjected to disparate treatment based on religion, the court decided. The parties' factual dispute about whether Wackenhut had notice that Xodus' "belief" about not cutting his hair is religious cannot be resolved on summary judgment, Judge Elaine E. Bucklo wrote.

To establish a Title VII prima facie case, a plaintiff must show that the observance or practice conflicting with an employment requirement is religious in nature; that he brought the religious observance or practice to the employer's attention; and that the religious observance or practice was the basis for a failure to hire or other discriminatory treatment.

Once a plaintiff makes a prima facie case, the burden shifts to the employer either to reasonably accommodate the religious practice or to show that any accommodation would result in undue hardship to the employer, the court said.

"The parties plainly dispute most, if not all, of the material facts in this case," Bucklo wrote, citing the parties' differing accounts of whether Xodus mentioned religion to the interviewer and how Xodus explained his discharge by Securitas, another security company.

"The parties do agree that [Xodus] did not specifically identify his religion at the interview, but that type of declaration is not required to prove religious discrimination," Bucklo wrote.

To the extent that Wackenhut's summary judgment motion is based on an argument that it could not reasonably accommodate Xodus' belief, the court said the motion still must be denied. "'Reasonable accommodation' and 'undue hardship' are relative terms requiring careful weighing of the facts, which in this case are clearly in dispute," Bucklo wrote.

Wackenhut is entitled to summary judgment, however, on its claims that Xodus failed to mitigate his damages and that punitive damages are not warranted, the court ruled.

Under Title VII, a plaintiff seeking back pay and other monetary relief must show that he made a reasonably diligent effort to find comparable employment and that he did not turn down a substantially equivalent job. The defendant has the burden of proving a failure to mitigate damages, which can reduce or eliminate the plaintiffs' monetary award.

Wackenhut argued that Xodus failed to mitigate damages because he did not work regularly when he could have and he did not accept other positions comparable to the Wackenhut job. Although Xodus acknowledged that he did not work regularly and that he had turned down at least one full-time job offer, Xodus contended that he had to do so because of a preexisting medical condition that was exacerbated by Wackenhut's alleged discrimination.

Pointing out that the only evidence supporting Xodus' position is "his own non-expert medical opinion," the court said that is insufficient to raise a jury issue on mitigation of damages. Xodus' own opinion that Wackenhut's conduct caused his alleged medical tailspin does not overcome the company's evidence that Xodus declined to take a comparable job when one was offered, the court said.

Xodus also cannot survive summary judgment regarding punitive damages, the court found. Under Title VII, as amended by the Civil Rights Act of 1991, a plaintiff may recover punitive damages if an employer engaged in intentional discrimination and acted with "malice or with reckless disregard to the plaintiff's federally protected rights."

Xodus acknowledged that he did not tell the interviewer that he is a Rastafarian/Hebrew Israelite and that the interviewer was not familiar with Xodus' religion or its tenets, the court said. The plaintiff also admitted that Wackenhut's interviewer was familiar with the company's equal employment opportunity policy and that the company promulgates and maintains an internal EEO policy that is disseminated to all its employees.

Rather, Xodus' "main complaint seems to be that [Wackenhut] area managers were not trained in accordance with [its EEO] policy dictates and that training was not properly tracked by the company," the court said. "[Wackenhut] of course denies this, but even assuming [Xodus'] allegations are true, they do not rise to the level of malice or reckless indifference required to sustain punitive damages and [Xodus] cites no case law to the contrary."

Xodus did not allege the company's EEO policy was "deficient in any way" and there is no evidence Wackenhut "has improperly addressed discrimination complaints in the past for lack of training or any other reason," Bucklo wrote.

**L. *EEOC v. Papin Enters. Inc., No. 6:07-cv-01548, Slip Copy, 2009 WL 961108, (M.D. Fla., Apr. 7, 2009).***

A Subway sandwich shop franchisee that fired an employee for refusing to remove a nose ring that she claimed to wear for religious reasons must stand trial under Title VII of the 1964 Civil Rights Act for failure to accommodate the worker's religious beliefs, the U.S. District Court for the Middle District of Florida ruled April 7, 2009.

Denying motions for summary judgment filed by the Subway franchisee and the company that franchises and safeguards the Subway brand in Florida, the court said the Equal Employment Opportunity Commission raised a jury issue that the defendants violated Title VII when they terminated Hawwah Santiago in May 2006.

Santiago, who worked for a New Smyrna Beach, Fla., Subway outlet for six months as a sandwich maker and assistant manager, was asked to remove her nose ring after an inspector from defendant Doctor's Associates Inc. (DAI), the Subway franchisor in Florida, found Santiago's store not in compliance with Subway's ban on employees wearing facial jewelry.

Joseph Papin, owner of the Subway franchise in New Smyrna, initially sought a waiver from DAI that would allow Santiago to wear her nose ring at work. In a letter from her mother, Santiago had informed Papin she wore the ring for religious reasons, though she did not identify any specific religion, text, or clergy that required the jewelry. After DAI denied the waiver request, however, Santiago was given five days to remove the nose ring or face termination. When Santiago declined to do so, Papin fired her.

In allowing EEOC to proceed, the court said a plaintiff establishes a prima facie case of failure to accommodate under Title VII through evidence that she had a "bona fide religious belief" that conflicted with an employment requirement; that she informed the employer about the belief; and that she was fired for failure to comply with the conflicting job requirement. Once a plaintiff establishes a prima facie case, the defendant must show it could not accommodate the plaintiff's belief or practice without undue hardship, the court said.

Regarding the prima facie case, Judge John Antoon II said two elements are clearly established, given that Santiago informed Papin of her religious belief and that she was fired for failure to remove her ring. As for whether Santiago had a "bona fide religious belief," the court observed that the defendants' attorneys conceded at oral argument that whether Santiago's alleged beliefs are sincerely held "is a question of fact and cannot be resolved at this stage of the proceedings."

Papin and DAI argued they are entitled to summary judgment because Santiago refused reasonable accommodations that were offered to her. The defendants contended that Papin's suggestions that Santiago either wear a plastic bandage over her nose at work or excuse herself from the store when a DAI inspector arrived to check compliance with Subway policies would have resolved the conflict.

The defendants also argued that Santiago's failure to engage in an "interactive process" with her employer regarding proposed accommodations bars EEOC from pursuing the Title VII claim.

Citing Eleventh Circuit precedent, Judge Antoon said a "reasonable" accommodation is "one that eliminates the conflict between employment requirements and religious practices." He added that Title VII does not require an employer to give an employee a choice among several proposed accommodations, and that the court's "inquiry ends when an employer shows that a reasonable accommodation was afforded" to the employee, even if it is not one the employee suggested.

Neither accommodation offered by the defendants to Santiago forecloses a jury trial regarding reasonable accommodation because neither appears to eliminate the conflict between Santiago's religious observance and workplace requirements, the court said.

"The court cannot hold as a matter of law that the offer to cover the nose ring with a Band-Aid was an offer of reasonable accommodation," Antoon wrote. "Santiago's suggestion that 'it would be like abnegating her religion' to cover the nose ring with a Band-Aid is sufficient to preclude a determination that the Band-Aid suggestion was a reasonable accommodation as a matter of law."

Assuming that Papin offered to allow Santiago to leave the store in the future when DAI inspectors arrived, that also was not a "reasonable accommodation," the court said. "[T]o endorse this practice would amount to encouraging subterfuge or fraud by the franchisee in order to enable it to avoid being deemed 'out of compliance' by the auditors who visited the store on DAI's behalf," Antoon wrote.

As for the defendants' argument that no Title VII claim arises because Santiago did not cooperate with Papin in trying to reach reasonable accommodation, the court observed that if Santiago's religious beliefs effectively prevented her from removing the nose ring, "then logically she would not be open to suggestions about covering it up or taking it off."

"The question then becomes whether it was possible to accommodate [Santiago] without undue hardship—the next step of the analysis—but her failure to agree to Papin's proposals or to come up with her own, assuming one is possible, does not warrant entry of judgment in favor of defendants," Antoon wrote.

Arguing it would be an "undue hardship" to permit Santiago to continue wearing the nose ring at work, the defendants contended "food safety standards" are at issue and they cited the First Circuit's ruling in *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004). In *Cloutier*, the appeals court affirmed summary judgment for Costco on a religious bias claim, finding that the bargain retailer could not accommodate a worker with an eyebrow piercing because Costco has a legitimate interest in maintaining grooming standards and any compromise "would cause [Costco] to lose control over its public image."

The defendants argued their "image"-based defense is even stronger than Costco's, because "it is reasonable that a company operating restaurant outlets, such as Papin, would impose strict, uniform food-safety requirements."

The court, however, said Papin "cannot sincerely argue" that his company had a strict food safety requirement barring nose rings at work when Papin also contended he had offered to allow Santiago to wear the ring, just not in the presence of DAI inspectors. "The Papin entities plainly did not care whether Santiago wore the nose ring or not; they only cared whether DAI found a store out of compliance for allowing an employee to wear a nose ring while working," Antoon wrote. "Thus, the Papin entities are not entitled to summary judgment based on their assertion of undue hardship."

DAI's undue hardship argument is "somewhat more complicated," the court acknowledged. Evidence indicates that unlike Papin, DAI was "diligent" in enforcing the no

facial jewelry rule for Subway employees, the court said. It added, however, that the record also shows DAI appeared willing to waive the rule if Santiago could produce satisfactory evidence of a religious text or a note from clergy supporting her assertion of a religious basis for the ring.

“[T]he fact that DAI would be willing to waive the requirement creates, at a minimum, an issue as to whether the safety standards it claims to require adherence to were actually important to DAI,” Antoon wrote. “Moreover, as the EEOC has pointed out, DAI allows the wearing of wristwatches and wedding bands, which are contrary to the food safety regulations upon which DAI relies.”

**M. *Daud v. Gold’n Plump Poultry, D. Minn., No. 08-CV-05137, settlement approved 3/31/09.***

The EEOC sued Gold’n Plump and the Work Connection last September, alleging that they had violated Title VII of the 1964 Civil Rights Act and the Civil Rights Act of 1990 by not accommodating the ritual prayer practices of its workers and forcing job applicants to sign forms that they would not refuse to handle pork products.

128 workers and former workers will share in \$215,000 from Gold’n Plump. The settlements will range from \$200 to \$18,800 per worker, with most receiving between \$500 and \$1,500. The individuals who initially brought the lawsuit will receive the largest settlements from the company. EEOC reviewed each worker’s claim, and the settlements take into account each worker’s experience with Gold’n Plump. While some workers were only disciplined for their call for prayer breaks, others were discharged.

With the settlements, Gold’n Plump will expand the paid breaks it provides workers. The workers’ first work session break will be reduced from 15 to 10 minutes and that another 10-minute break will be added during the second half of their shift.

The settlement also provides that employees who want their breaks to coincide with Islamic prayer time will have to work in an area of the plant called “second processing.” While the number of jobs in that area is limited, workers will be able to transfer there on a first-come, first-served basis. The timing of the breaks will be coordinated with the schedule of Islamic prayers, beginning at least five minutes prior to their start based on information gleaned from the Islamicfinder.org Web site. Prayer breaks are to include any time necessary for doffing and donning work wear, washing, and walking to the prayer sessions. The prayer breaks were arranged after consultation with local imams.

**N. *Potter v. District of Columbia, 558 F.3d 542 (D.C. Cir. 2009).***

Firefighters and emergency medical services workers who wear beards for religious reasons will not have to be clean-shaven in order to perform their duties, an appeals court has ruled.

In upholding a 2007 district court summary judgment, judges in the U.S. Court of Appeals for the District of Columbia Circuit on Friday ruled that the D.C. Department of Fire and Emergency Medical Services failed to prove that bearded firefighters cannot perform their duties as safely as clean-shaven ones.

Fire department officials have contended that facial hair can interfere with the fit of the face masks on the self-contained breathing apparatuses worn by firefighters.

In 2001, the Department of Fire and Emergency Medical Services implemented a “grooming policy” prohibiting beards. Firefighters challenged the policy with a lawsuit under the Religious Freedom Restoration Act and won a temporary injunction.

In 2005, a new safety policy banned department employees who wear tight-fitting face masks from having facial hair that would come between their faces and the masks. The firefighters sued again in 2005 and the two cases were combined.

The district court in 2005 modified the 2001 injunction to require the Department of Fire and Emergency Medical Services to allow firefighters to prove they could pass face-fit tests to show the masks’ airtightness over beards, and to allow it to assign employees who could not pass these tests to administrative duty.

“Considerable wrangling followed,” Judge Judith Rogers wrote in the majority opinion.

Both parties moved for summary judgment, which the district court granted to the firefighters, concluding that the clean-shaven policy was not tailored specifically enough and that bearded firefighters could still work safely, wearing the self-contained breathing apparatuses, in most circumstances.

In its appeal, the District of Columbia argued that bearded firefighters cannot safely wear self-contained breathing apparatuses and that the summary judgment was thus inappropriately granted.

The appeals court found that the District of Columbia had failed to prove that firefighters with beards could not safely operate self-contained breathing apparatuses and did not disprove the firefighters’ evidence of their safety to the court’s satisfaction in its appeal.

“Given the opportunity and the burden to dispute the safety of SCBAs, the District of Columbia instead offered only a technical quibble that did not reach the fundamental issue,” Judge Rogers wrote.

The court also took issue with the way the District of Columbia had appealed the summary judgment, noting that lawyers for the District had tried to introduce arguments against summary judgment that had not been presented in prior trial courts.

And in a concurring opinion, Senior Circuit Judge Stephen Williams criticized evidence lawyers for the District had presented as being “susceptible of two interpretations.”

“Unfortunately for the District, its own muddled litigation strategy rendered summary judgment for the plaintiffs a legitimate outcome,” he wrote.

Alan Etter, a spokesperson for the D.C. Department of Fire and Emergency Medical Services, said the six employees who had filed the complaint were currently on active firefighting duty. Though the department will comply with the court’s decision, he said it and the

city's office of attorney generals "will continue to appeal for the health and safety of our members."

**O. *Jones v. United Parcel Service Inc.*, 307 Fed. Appx. 864 (5th Cir. 2009).**

The U.S. Court of Appeals for the Fifth Circuit rejected the claims of a driver for United Parcel Service Inc. who alleged that the shipping giant discriminated against him because he was a Seventh-day Adventist. The Fifth Circuit tossed out the case brought by Jeffrey Jones, upholding a lower court's decision that UPS had not erred in its treatment of the employee.

"UPS offered Jones reasonable accommodations that Jones failed to avail himself of," the Fifth Circuit ruled.

The roots of the case date back to 2004, when Jones was a package truck driver for UPS at the company's Dallas-Fort Worth airport outpost, court documents state.

Jones, who is a member of the Seventh-day Adventist Church, must refrain from work from sundown on Friday through sundown on Saturday, according to his religious beliefs.

During the peak holiday season of November through December, UPS restricts the time employees can take off, a stipulation that was spelled out in Jones' contract.

"Pursuant to the [contract], drivers were assigned routes through a bidding process on a seniority basis," the court record said. "In August 2004, Jones failed to complete his route on a weekday other than Friday and was terminated."

The firing was later cut to a suspension and Jones was given another shot at UPS.

After he failed to complete his route on a Friday in December 2004, however, he was terminated for good, according to court documents.

Jones subsequently sued UPS, accusing the company of religious discrimination, but the charges fell on deaf ears at the district court.

The U.S. District Court for the Northern District of Texas granted summary judgment in favor of UPS, triggering Jones' appeal.

Upon review, the Fifth Circuit found that UPS had followed the law, which required employers to offer a reasonable accommodation to allow its employees to follow their religious practices.

While UPS limited employees' time-off requests during the peak season, UPS had 10 positions that did not involve work on Jones' Sabbath day that he could have bid on, the Fifth Circuit noted.

Despite this, Jones only vied for three of the 10 available slots and did not receive his preferences because of his seniority level, according to the court record.

“While Jones argues before this court that he did not bid on the other seven positions because he was out on leaves of absence, this argument was not presented to the district court,” the Fifth Circuit said.

The appellate court ruled that the district judge relied on the information and arguments presented by Jones and correctly dismissed his claims, the opinion said.

The Fifth Circuit chided Jones for failing to aid UPS in the reasonable accommodation of his religious beliefs, leading the court to uphold the district court’s ruling.

“Jones demonstrated no such cooperation,” the opinion said. “The judgment of the district court is therefore affirmed.”

**P. *EEOC v. Orrington D.M.D. Ltd., N.D. Ill., No. 07 C 5317, consent decree approved 1/13/09.***

A Chicago dentist who allegedly routinely sexually harassed female employees and forced them to participate in Church of Scientology religious practices will pay \$462,500 to settle a discrimination claim brought on behalf of 18 female employees, the Equal Employment Opportunity Commission announced Jan. 13, 2009.

Judge Robert Dow of the U.S. District Court for the Northern District of Illinois Jan. 13 entered a consent decree settling litigation brought by EEOC against James L. Orrington D.M.D. Ltd. The suit alleged that Orrington engaged in retaliation and sex and religious discrimination in violation of Title VII of the Civil Rights Act. The consent decree provides cash relief ranging from \$10,000 to \$42,000 for each of the 18 charging parties. In addition, the decree requires various training, monitoring, and reporting activities over three years.

“The misconduct here was shameful, combining sex, forced Scientology, and putting people’s jobs on the line. And it was especially shameful because the person doing it was a medical professional who occupied a position of trust in his community,” said John Hendrickson, EEOC regional attorney in Chicago. “Having the decree remain in effect for three years will let us be certain we really have put a stop to these illegal practices.”

According to an intervening complaint filed by a private attorney, Orrington’s conduct created a hostile work environment for the women working in his dental practice. Among other things, it said, Orrington engaged in “offensive touching, propositions for sex, daily sexual commentary, staring and exposure to pornographic materials in the workplace.” In one instance, the complaint said, Orrington offered an employee money for sex, demanded to “see her private parts,” and asked to take sexually explicit photographs of her. Another employee was offered an opportunity to repay a loan with sex.

Orrington maintained a wide range of pornographic material in his cabinets and computers, including lewd pictures of himself engaging in sexual acts. The complaint stated that Orrington regularly watched pornographic movies during work hours.

In addition, Orrington forced his beliefs in Scientology on his employees and ordered them to participate in various religious activities. According to the complaint, Orrington required

workers to start each shift with a prayer and required employees to recite Scientology “formulas” and the Scientology “triangle of understanding.” Those failing to perform to his standards were cursed or punished in various ways. Some employees were ordered to recite the formulas on paydays before receiving their checks.

The complaint further alleged that Orrington retaliated against employees after they complained of the harassing conduct. In certain cases, it said, Orrington reduced work hours for employees who complained. In other scenarios he fired or constructively discharged complaining workers.

In addition to financial relief, under the consent decree, Orrington’s dental practice is barred from engaging in sexual discrimination in the workplace. It also is prohibited from making any effort to condition employment on the religious teachings or practices of Scientology. Moreover, the practice must contract with an outside firm to process and investigate complaints of sex and religious discrimination. The vendor is required to provide civil rights training to employees and make periodic reports on its activities to EEOC.

**Q. *Tagore vs. United States of America, Civ. Act. No. 09-cv-00027 (S.D. Tex. 2009).***

A Sikh woman from Texas has sued the U.S. government, alleging that her former employer, the U.S. Internal Revenue Service, discriminated against her when it prohibited her from carrying a small knife as part of her religious observances and eventually fired her.

According to the lawsuit, filed Thursday in the U.S. District Court for the Southern District of Texas, the IRS refused to provide reasonable accommodation for Kawaljeet K. Tagore, although doing so would not have placed an undue hardship on the agency.

In July 2004, Tagore began working for the IRS as an internal revenue agent, the lawsuit says. On or about April 14, 2005, consistent with the teachings of Sikhism, Tagore was formally initiated into the Sikh faith. On initiation, a Sikh is obligated to wear at all times five Sikh Articles of Faith — among them the knife, known as a kirpan.

According to the complaint, in April 2005, Tagore had a discussion with her supervisor, during which he expressed concern about her ability to carry her kirpan. Her supervisor asked for written information about the religious article.

As a result of this discussion, Tagore subsequently began carrying a shorter kirpan to work, one that, according to Tagore’s lawsuit, was as small as her religious conscience would allow.

The edge of this kirpan was approximately three inches long, the lawsuit says.

Later that month, the plaintiff’s supervisor informed Tagore she would have to leave work and that carrying her kirpan violated agency rules and federal law, which prohibits people from possessing or causing to be present dangerous weapons in federal facilities, including knives with blades 2.5 inches or longer.

After the IRS sent Tagore home, the agency initially told her that she must use her personal vacation days, the complaint says. The agency ultimately allowed Tagore to take flexi-place leave, through which she could work from home.

Tagore worked at home on flexi-place for more nine months. But, according to the complaint, as time passed she was increasingly given assignments that were below-grade work or clerical tasks.

When she tried to return to the work place in early 2006, the lawsuit says, she was denied admittance to the building and subsequently charged with being absent from work. The IRS then stopped paying Tagore's salary, according to the complaint.

In March 2006, Tagore filed a discrimination complaint with the government, and she was fired in July of that year.

Tagore's lawsuit is seeking a declaration that the policies and practices detailed in the lawsuit violate the Civil Rights Act, an injunction stopping the defendants from preventing her from wearing her kirpan, back pay, benefits and seniority associated with her IRS post, damages, and other relief.

The lawsuit notes that the blade did not set off metal detectors at her place of employment. It also notes that the IRS distributed scissors, letter openers, and box cutters to its employees. Unlike Tagore's kirpan, according to the suit, these objects were dangerous.

Sikhism is a monotheistic religion that originated in the 15th century in the Punjab region of South Asia. Approximately 500,000 Sikhs live in the United States.

**R. *EEOC v. Southwestern Bell Telephone LP, 550 F.3d 704 (8th Cir. 2008).***

A federal appeals court panel has upheld a \$756,000 jury award against AT&T Inc. for allegedly discriminating against two former customer service technicians who attended a Jehovah's Witnesses convention.

In its opinion, the U.S. Court of Appeals for the Eighth Circuit said that AT&T never filed a renewed motion for judgment as a matter of law after the lower court's entry of judgment.

As a result, it declined to consider the merits of AT&T's appeal. The telecommunications company had argued among other things that the two customer service technicians, Glenn Owen and Jose Gonzalez, did not hold a sincere religious belief requiring attendance at the convention and that the accommodation of allowing them to take a vacation day constituted undue burden.

"These were two outstanding employees who simply should have been allowed to attend the Jehovah's Witnesses convention as they had done during their employment," said EEOC trial attorney William Cash Jr., who represented Owen and Gonzalez in the matter.

"When employers or management officials attempt to make an example out of employees, as was done in this case, there is a high price to pay for that act," Cash added.

After failing to reach a settlement with AT&T, the EEOC filed the suit in September 2006 under Title VII of the Civil Rights Act of 1964, which prohibits religious bias by employers. The suit claimed that the company had engaged in unlawful employment practices in its facility in Jonesboro, Ark., since Jan. 1, 2005.

The suit alleged that the effect of AT&T's intentional practices was to deprive Owen and Gonzalez of equal employment opportunities and adversely affect their status as employees. The agency claimed that AT&T acted with malice or reckless indifference to the rights of Owen and Gonzalez.

During a four-day trial in October 2007 before the U.S. District Court for the Eastern District of Arkansas, EEOC attorneys told the jury that both employees had asked their manager in January 2005 for one day of leave to take part in a religious observance, which was held from Friday, July 15, to Sunday, July 17, 2005.

Though Jehovah's Witnesses do not celebrate holidays, Owen and Gonzalez "have a sincerely held religious belief that they must attend a religious convention each year," according to the complaint.

Both men had attended the summer religious convention in Little Rock, Ark., every year since their employment with the company, according to court papers.

When they could not get the leave, Owen and Gonzalez attended the convention anyway and were then discharged for misconduct, job abandonment, insubordination and failure to follow a work directive, according to court documents.

The jury determined that AT&T should pay Owen \$160,000 in back pay and \$230,000 in compensatory damages and offer Jose Gonzalez \$136,000 in back pay and \$230,000 in compensatory damages.

**S. *Hasan v. Foley & Lardner LLP*, 552 F.3d 520 (7th Cir. 2008).**

A Muslim attorney of Indian descent presented triable proof that bias stemming from the terrorist attacks of Sept. 11, 2001, led to his discharge a year later, the U.S. Court of Appeals for the Seventh Circuit held Dec. 15, reversing a lower court.

Zafar Hasan's evidence that on Sept. 11, 2001, a partner in Foley & Lardner's Chicago office said "those people don't belong here" and that another partner warned him about the post-Sept. 11 pro-Muslim articles he wrote and posted on his office door contributed to a "mosaic" of direct proof sufficient to survive summary judgment on his religious, national origin, race, and/or color discrimination claim under Title VII of the 1964 Civil Rights Act, a unanimous panel ruled. A federal trial court erred in finding that those comments, as well as evidence of alleged discrimination by the firm against other Muslim lawyers, could not be considered, it said.

*Paz v. Wauconda Healthcare & Rehab. Ctr. LLC*, 464 F.3d 659 (7th Cir. 2006) "does not require ... that a court ignore comments made by someone who is not directly responsible for an employee's supervision," Judge Kenneth F. Ripple wrote. "Rather, derogatory remarks are relevant if they are made by someone who provided input into the adverse employment

decision,” as was the case with the comments allegedly made by Foley partners George Simon and Doug Hagerman. That the comments were alleged to have been made a year before Hasan was fired was not enough of a reason, by itself, to disregard them, he said.

The firm’s treatment of other Muslim attorneys in its business law department also warranted closer consideration, the court added, noting that the U.S. Supreme Court recently “made clear that the relevance of ‘me too’ evidence cannot be resolved by application of a per se rule.” Coupled with Hasan’s other evidence of bias, a reasonable jury could find in his favor, it ruled.

For most of his first year with Foley’s business law department, which he joined in October 2000, Hasan received praise from partners and clients for his “great attitude,” eagerness to learn, work ethic, “good business sense,” maturity, and people management skills. Although certain of his substantive skills, such as drafting, efficiency, and attention to detail, were cited as needing improvement, the partners agreed he was “on track for advancement” and generally met or exceeded the firm’s expectations.

“Hasan and Foley agree that matters changed after the terrorist attacks of September 11, 2001,” Ripple said. On that day, Simon was overheard allegedly saying, “those people don’t belong here ... they should kick them all out.” And, when Hasan responded to the attacks by saying in published articles and on television that Islam is a peaceful religion and by posting copies of some of the articles on his office door, Hagerman allegedly warned him “not to upset any sacred cows” and asked if he really wanted the articles on his door.

Prior to Sept. 11, Hasan had the highest number of billable hours of any attorney in his practice group but after the attacks his “billable hours began to drop precipitously,” Ripple said, even though he sought work and other associates in the department started to bill more hours. He also was kept off of a project for a client that previously praised his work and wanted him on the new project, he alleged. He ultimately found work with another group but still ended up with the fewest billable hours in his department.

According to Hasan, while the partners with whom he worked the closest continued to praise his work, others with whom he worked less or little at all began to criticize his performance—including by noting his low number of billable hours—and he soon was threatened with “outplacement.” In addition, the partner who worked with him the most and described him as “a joy to work with” allegedly was asked by the department chairman to explain the inconsistency between his praise of Hasan and the other partners’ assessments. The partner later testified that he believed the chairman was trying to get him to retract his favorable review of Hasan’s work.

At an October 2002 meeting, the decision was made to fire Hasan. One partner who attended the meeting allegedly said that, after Simon—who had never worked with Hasan—criticized Hasan’s performance, it was essentially a “sand nigger pile-on,” and allegedly later told Hasan, “too bad that [Simon] and those guys took out their religious dispute in Israel on you and had you fired.”

Following the meeting, the department chairman e-mailed Foley's nationwide managing partner regarding the decision to terminate Hasan, saying he had "further background information" he wanted to discuss by phone. The chairman later admitted that the "background information" was that Hasan was Muslim.

Hasan's discharge was approved, but the firm did not go through with it right away and instead began searching for a job for him in one of its other offices. The search for a new job for what one of the lawyers involved described as "the well educated Muslim in Chicago" proved unsuccessful.

Hasan was informed in early December 2002 that he was fired, allegedly based on "deficiencies in performance," "a perception that he was behind the level of where he should be" professionally, and the business law department's lack of work. However, a memorandum issued by two partners about two weeks after he left the firm described its financial picture as "strong," with profits per partner exceeding the prior year by 25 percent, and in fall 2002 the business law department hired new associates from its summer associate class.

Hasan sued for discrimination and retaliation but his claims were dismissed on summary judgment. He did not appeal as to the latter claim.

The trial court, Ripple said, mistakenly excluded proof of Simon's comment on the ground that he was not Hasan's direct supervisor. Simon was a partner on Foley's management and compensation committees and attended the meeting at which the decision to terminate Hasan was made. "There is also evidence in the record that Simon's criticisms at that meeting incited anti-Muslim and racially charged commentary from other partners," he wrote, citing the one partner's description of the meeting as a "sand nigger pile-on."

The year-long time gap between Simon's comment and the decision to fire Hasan also did not disqualify it as evidence, the court ruled. "The recency of discriminatory comments, together with who made the comments and how extreme those comments were, is relevant to whether they help to build a total picture of discrimination. ... But the district court may not view recency alone as the decisive factor," it said.

Moreover, the court added, Simon's and Hagerman's comments came close in time to the drop in Hasan's hours, which later was cited as a reason for firing him. "Mr. Hasan's post-September 11 decrease in hours alone may not carry much meaning, but it gains substantial significance in the context of (1) partners' anti-Muslim comments, (2) their refusal to give him work even when he asked for it, (3) Mr. Hasan's good relationship with the department's primary client, (4) Mr. Hasan's previous positive performance reviews and (5) the fact that other associates had sufficient work and even increased their hours on average during the relevant period," it said.

The trial court also improperly found irrelevant the proffered evidence of Foley's treatment of other Muslim attorneys in its business law department, Ripple said. Under *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008) evidence of how an employer treated other employees in the plaintiff's protected class should not be excluded "as irrelevant

per se” and instead should be analyzed to determine if it could be “a relevant component of the ‘mosaic’ of evidence,” he wrote.

Hasan did not need to offer proof of how the firm treated non-Muslim lawyers to justify that evidence because he pursued his case under the direct rather than the indirect method of proof, Ripple noted. “It is true that, under the indirect method of proof, a plaintiff must produce evidence of how the employer treats similarly situated employees. ... But the direct method of proof imposes no such constraints,” he said.

**T. *EEOC v. University of Phoenix Inc., D. Ariz., No. 06-2303, consent decree approved 11/7/08.***

A federal district court in Arizona Nov. 7 approved an approximately \$1.9 million consent decree settling a religious discrimination suit in which the Equal Employment Opportunity Commission charged the University of Phoenix and its corporate parent with discriminating against non-Mormon employees in compensation, opportunities for promotion, and discipline.

Under a four-year consent decree signed by Judge Mary H. Murguia, 52 current and former online enrollment counselors for the University of Phoenix will split \$1.875 million representing back pay and compensatory damages. The University of Phoenix and Apollo Group Inc., its corporate parent, also will pay \$100,000 in attorneys’ fees to three individual plaintiffs who intervened in EEOC’s suit.

In its September 2006 lawsuit, EEOC had alleged the defendants violated Title VII of the 1964 Civil Rights Act by favoring online enrollment counselors who belong to the Church of Jesus Christ of Latter-day Saints (LDS) and by discriminating against non-LDS members in providing leads for new students, which affects the employees’ pay, advancement opportunities, and eligibility for employee tuition waivers. The defendants also disciplined non-LDS employees for workplace conduct for which Mormon employees were not punished and promoted less-qualified or unqualified Mormons to management jobs that were denied non-LDS employees, EEOC charged. EEOC sought remedies for a class of non-LDS enrollment counselors employed by the defendants from Jan. 1, 2001, to the present.

In addition to monetary relief, the decree requires the University of Phoenix to post workplace notices regarding the settlement, provide equal employment opportunity training for supervisors, employee relations specialists, and other employees, designate a diversity officer to monitor EEO compliance, and adopt a “zero tolerance” policy regarding religious discrimination.

“We are pleased that the University of Phoenix is going to stop condoning such favoritism toward Mormon employees and the resultant discrimination against non-Mormon employees,” said Mary Jo O’Neill, EEOC regional attorney in Phoenix. “It is EEOC’s belief that, for many years, the University of Phoenix condoned an environment in which Mormon managers felt free to engage in favoritism toward their Mormon employees, and did so by providing the Mormon employees things such as strong leads on potential students. Given that evaluations are based largely on recruitment numbers, this disproportionate assignment of leads affected a whole

host of matters for employees, including compensation, access to tuition waivers, and ability to be promoted.”

The consent decree provides that the defendants deny any wrongdoing and that the settlement is not an admission of Title VII violations. In a written statement sent to BNA Nov. 12, the university and Apollo said they were “pleased to have resolved this matter.”

“We are dedicated to providing a work environment in which our employees are treated fairly and with respect, and are recognized and rewarded based on their accomplishments,” the defendants said. “University of Phoenix is committed to providing equal opportunity in all aspects of employment and does not tolerate discrimination or harassment of any kind.”

Under the decree, the defendants agreed to pay varying amounts to the 52 claimants based on the nature of the discrimination they experienced. Claimants’ identities and the specific amounts each will receive were filed under seal, according to the decree. EEOC originally had sued on behalf of four charging parties and a proposed class of non-LDS employment counselors who worked for Phoenix’s online department at any time since Jan. 1, 2001. Three individual plaintiffs subsequently intervened.

The defendants must post a workplace notice regarding the settlement that includes information on Title VII rights and contact information for University of Phoenix human resources officials, EEOC’s Phoenix office, and the Arizona Civil Rights Division. Within 90 days of court approval, the defendants must conduct an initial orientation session regarding the consent decree for all managers and supervisory officials in the student enrollment department.

Each charging party and plaintiff-intervenor will receive a letter from company Chief Human Resources Officer Diane Thompson, in which she conveys her “sincere apology that some aspects of your experience while employed at the University of Phoenix failed to meet your expectations. In particular, I am sorry that you believe your religious beliefs may have been taken into consideration regarding various aspects of your employment.”

The defendants also must select a “diversity officer,” approved by EEOC, who will “review all policies and procedures” referred to in the decree, monitor the university’s compliance with the decree, and report periodically to EEOC on compliance.

The diversity officer will ensure the defendants’ compliance with the “zero tolerance” policy, which provides for immediate firing of any online enrollment department supervisor or manager who has a religious bias complaint “substantiated” against him or her in the future.

Supervisors and managers’ annual performance reviews will include consideration of their “overall compliance” with the defendants’ revised anti-discrimination policies as well as the terms of the court-approved consent decree, according to the decree.

The decree calls for annual “web-based interactive training seminars” for all employees of the online enrollment department, including the employee relations specialists who support that department. Nonsupervisory employees will receive at least one hour of EEO training, focused on religious discrimination and retaliation, while management employees will receive at least 90 minutes of EEO training that includes instruction on how to identify and process

discrimination complaints. Employee relations specialists must receive at least three hours of EEO training, according to the decree.

**U. *Riback v. Las Vegas Metro. Police Dep't, D. Nev., No. 2:07-cv-1152, Slip Copy, 2008 WL 3211279 (D. Nev., Aug. 6, 2008).***

The Las Vegas police department violated the First Amendment's free exercise clause when it denied an Orthodox Jewish police officer's request to wear a trimmed beard on the job, but it does not have to permit the officer to wear a yarmulke, the U.S. District Court for the District of Nevada ruled Aug. 6, 2008.

Granting partial summary judgment to plaintiff Steve Riback, the court said the Las Vegas Metropolitan Police Department (Metro) lacks a compelling reason for denying Riback permission to wear a beard as part of his religious observance when the city grants exemptions from its no-beard policy for medical reasons, such as skin conditions irritated by shaving. Although the department cited the importance of maintaining a religiously neutral appearance to the public and uniform personal appearance among its officers, the court said allowing Riback to wear a beard in a job in which he has limited public contact would not compromise those interests.

As for Riback's yarmulke request, however, the court evaluated the department's ban on headgear indoors under the standards set out in the U.S. Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, the court said the First Amendment's free exercise clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."

"Metro's headgear policy applies to all officers and there is no evidence that it is motivated by religious animus," Judge Roger L. Hunt wrote. "Accordingly, Riback's right of free exercise does not relieve him of his duty, as a Metro officer, of complying with Metro's headgear regulations."

The department's no-beard policy also runs afoul of the prohibition on religious discrimination under Title VII of the 1964 Civil Rights Act, the court ruled. However, Judge Hunt denied summary judgment under Title VII on the headgear issue, finding that material factual issues remain on whether Metro made a good faith effort to accommodate Riback's request to wear a yarmulke, or alternatively a baseball cap, and whether Riback's request places an undue hardship on Metro.

The court granted Metro summary judgment on Riback's 14th Amendment equal protection claim. "[E]ven though the burden of Metro's headgear policy may disproportionately impact a protected class of religionists, the regulation is not invidious," Hunt wrote. "As such, Metro need only justify the regulation under rational basis review. This is readily accomplished because the regulation advances Metro's interest in promoting the professional and uniform appearance of its officers."

Sometime after joining the police department, Riback began practicing the tenets of Orthodox Judaism. He worked undercover in the department's vice squad, which allowed him to wear a baseball cap and beard on the job. The vice squad, however, posed other conflicts with Riback's religion such as Saturday work and squad lunches at nonkosher restaurants. After Riback requested accommodation, Metro excused him from the squad meals but said it could not guarantee that he would not be assigned to work on Saturdays, Riback's Sabbath.

Riback transferred to the department's nonuniformed quality assurance unit, where employees typically worked only Monday through Friday. He received temporary permission to keep a trimmed beard but a deputy chief who observed Riback at work said his appearance conflicted with Metro's personal appearance and grooming policy. Riback thereafter shaved his beard but continued to wear his yarmulke on the job.

He filed a formal request for accommodation, explaining that his Orthodox Jewish faith required facial hair and a head covering indoors. Metro denied Riback's request, stating that beards prevent the proper fitting of face masks, provide suspects with the means to gain an advantage during physical confrontations with officers, and undermine the desired uniformity of police officers' appearance. Metro said Riback could not wear his yarmulke because wearing religious symbols would undermine officer neutrality and erode public trust.

In August 2007, Riback sued Metro in federal court, alleging violations of the First and 14th amendments, Title VII, the Nevada state constitution, and Nevada's state antidiscrimination statute. On Nov. 16, the district court granted Riback a preliminary injunction saying Metro could not punish the plaintiff for wearing a quarter-inch beard. The court, however, said Metro could continue to enforce its headgear policy prohibiting yarmulkes at work. Riback and Metro then moved for summary judgment on various counts of the complaint.

Metro contended the court should analyze Riback's accommodation requests "collectively," that is, consider the employer's past willingness to excuse Riback from employee meals in nonkosher restaurants and accommodate his Sabbath observance. The department argued that because it previously accommodated Riback, it has already satisfied its obligations under the First Amendment and Title VII.

The court, however, said it examines separately each accommodation request under the First Amendment and Title VII. "Metro's obligation to comply with the First Amendment and Title VII is ongoing and unaltered by its prior decisions to accommodate Riback's observance of kosher laws and the Sabbath," the court said.

Evaluating accommodation requests collectively could "lead to inconsistent results" as well as "prejudice religious adherents whose beliefs require a greater quantity of accommodations, and it is neither the court's nor Metro's prerogative to decide if a religion requires too much from its adherents," Hunt wrote. "[T]here is no constitutional cap on the amount of religious accommodation an individual may seek. Instead, courts and employers must independently evaluate each accommodation request, irrespective of how many previous requests have been granted or denied or which religion it derives from. And while this may still 'place at a relative disadvantage those religious practices that are not widely engaged in,' the court will at least have acted in a religiously neutral, even-handed manner."

In ruling that Riback has a First Amendment free exercise right to wear a beard, Judge Hunt cited with approval the Third Circuit's decision in *Fraternal Order of Police Newark Lodge No. 12 v. Newark*, 170 F.3d 359 (3d Cir. 1999). In that case, the court upheld a First Amendment challenge by two Sunni Muslims to the Newark, N.J., police department's no-beard rule, reasoning that a medical exemption undercut the department's purported interests in uniform appearance and officer morale. The Third Circuit found that given the department's grant of medical exemptions, "strict scrutiny" applied to the employer's refusal to grant religious exemptions.

Judge Hunt said strict scrutiny similarly applies in this case because Metro grants medical exemptions to its no-beard policy. The department, however, argued that even if strict scrutiny applies, its refusal to grant Riback an exemption serves compelling governmental interests. Metro distinguished police jobs in Las Vegas from those in Newark, citing statistics that Las Vegas's police department has about three times as many officers and employees, that the area's population is approximately 150 percent that of Newark, and that the department supervise a geographic area about as large as the entire state of New Jersey. Metro is "truly a unique police department, and the diversity burdens that [it] faces are much greater" than those in Newark, the department argued.

The court, however, said it was "skeptical" that Las Vegas police work differs much from the same job in Newark. "[T]he court is at pains to understand how Metro's compelling demographics give it a compelling interest to deny an officer's request to wear a beard for religious reasons, but permit it to grant a waiver for medical reasons," Hunt wrote. "The court finds that Las Vegas' and Newark's demographic differences provide no cognizable basis to distinguish this case from *Fraternal Order*."

Metro asserted a compelling interest that its officers maintain a religiously neutral appearance, in part to avoid inflaming potential conflicts with criminal suspects or other members of the public who may react negatively to religious symbols. "Those concerns are not present in this case," the court said, observing that "most people are unlikely to consider a closely-trimmed beard" a religious symbol. Riback sought permission only to wear the beard while assigned to quality assurance, a position in which "he has limited public exposure and does not wear a uniform," Hunt wrote. "Consequently, the possibility of citizens perceiving his beard to be a religious symbol, already unlikely, is lessened."

Metro argued that as a paramilitary organization, it has a compelling interest in maintaining the uniform personal appearance of its officers to promote cooperation, foster esprit de corps, reinforce its command structure, and portray authority to the public. Although the court called the interest in a uniform appearance "significant," Hunt said like the Newark police department in *Fraternal Order*, "Metro fails to explain why religious beards undermine this interest but medical beards do not."

Denying summary judgment on Riback's yarmulke claim, the court said "strict scrutiny" does not apply to the First Amendment analysis of this claim because Metro does not permit "secular" exemptions to its general rule requiring the removal of headgear indoors.

Riback argued that the court should apply strict scrutiny because “pervasive religious expression occurs daily” at Metro, including officers having religious symbols on their desks. The court, however, said only Metro’s headgear policy is at issue. “Riback provides no evidence that the regulation is not neutral or generally applicable to all Metro officers,” Hunt wrote. “Moreover, the regulation does not provide individualized exemptions for any reason, secular or religious. Consequently, the court finds that Metro’s headgear policy does not violate Riback’s rights under the Free Exercise Clause.”

**V. *Noyes v. Kelly Servs. Inc.*, E.D. Cal., No. 2:02-cv-2685, Slip Copy, 2008 WL 2915113 (E.D. Cal., July 25, 2008), *aff’d*, 349 Fed.Appx. 185 (9th Cir. Oct 20, 2009).**

A former Kelly Services Inc. employee who alleged she was not promoted because she did not belong to the Fellowship of Friends, a religious group, produced sufficient evidence to support a jury verdict in her favor but is not entitled to \$5.9 million in punitive damages, the U.S. District Court for the Eastern District of California ruled July 25, 2008.

Partially granting Kelly Services’ post-trial motions, the court said the punitive damages award to plaintiff Lynn Noyes is “constitutionally excessive” under the 14th Amendment due process clause. Although Kelly’s conduct showed a “modest degree of reprehensibility” that supports a punitive damages award, the court said \$5.9 million is unwarranted because that is about nine times the \$647,000 in compensatory damages awarded to Noyes.

The court ruled that based on the relative severity of Kelly Services’ discriminatory conduct, a one-to-one ratio of compensatory and punitive damages is consistent with due process principles. It reduced Noyes’s punitive damages to \$647,000, giving her a total of approximately \$1.3 million in damages.

“Here, Noyes was awarded significant compensatory damages in the amount of \$647,174. In addition, while Kelly’s behavior was sufficiently reprehensible to warrant punitive damages, it was not highly egregious,” Judge Garland E. Burrell Jr. wrote. “Finally, \$500,000 of Noyes’s compensatory damages award is in emotional distress damages. ... Accordingly, a ratio of 1 to 1 [between punitive and compensatory damages] is the constitutional limit in this case.”

Noyes sued under Title VII of the 1964 Civil Rights Act and the California Fair Employment and Housing Act, alleging religious discrimination after she was denied a promotion in 2001 to software development manager in Nevada City, Calif. She claimed the hiring manager, a member of a group called Fellowship of Friends, instead promoted a fellow member of the group. Noyes also contended that in 1999, Kelly had been put on notice through an anonymous letter about alleged favoritism toward Fellowship of Friends members at the Nevada City location but the company failed to act.

Following trial, a federal district court jury in April ruled in Noyes’s favor, awarding her approximately \$147,000 in economic damages, \$500,000 in damages for emotional distress, and \$5.9 million in punitive damages under California law.

In a post-trial motion for judgment as a matter of law, Kelly contended that Noyes failed to produce sufficient evidence that manager William Heinz, the alleged decisionmaker,

considered the Fellowship of Friends a “religion” as opposed to a “social group” promoting spirituality. According to its Web site, the Fellowship is a spiritual group founded in 1970 that adheres to “esoteric Christianity.”

The company also contended that even if the group may be considered a religion, Noyes lacked evidence that any company executive ratified or condoned the alleged favoritism toward Fellowship of Friends members, such that Kelly could be held liable under Title VII or state law.

Kelly sought a new trial based on several alleged errors by the district court, including its decision to exclude at trial a California Department of Fair Employment and Housing (DFEH) determination letter that found insufficient evidence to support Noyes’s discrimination claim.

Noyes produced sufficient evidence both that the Fellowship of Friends is a religion and that Heinz considered it as such, the court decided. “The jury could have reasonably inferred from the evidence that the Fellowship was a religion and could have rejected the credibility of Heinz’s testimony that the Fellowship was not a religion to him,” Burrell wrote.

Among other things, the court noted that Noyes had presented evidence that as early as 1998, Kelly had been informed by a departing employee about the religious nature of the Fellowship and about some employees’ complaints that Fellowship members were being favored in Nevada City. “Since Heinz knew the Fellowship was a religion and he discriminated against Noyes because of her lack of religious beliefs, Kelly is liable for that discrimination,” the court said.

Kelly argued insufficient evidence existed for a jury to find that Heinz’s asserted reasons for awarding the software manager job to Joep Jilesen, a Fellowship member, were pretexts for religious discrimination. The company pointed out that Heinz first offered the job to an employee who was not a Fellowship member and that Jilesen was recommended by a supervisor who did not belong to the Fellowship. The court, however, said the jury had sufficient evidence to find Heinz did not select Noyes because the plaintiff was not a Fellowship member.

In moving for a new trial, Kelly contended the trial judge erred by not allowing the jury to consider the DFEH’s determination that Noyes lacked sufficient evidence to prove religious discrimination. The company argued the exclusion of such “relevant and highly probative evidence” about Noyes’s claim “constrained its defense,” particularly regarding punitive damages.

The court properly weighed the probative value of the DFEH’s determination against its potential “prejudicial effect” on the jury under Rule 403 of the Federal Rules of Evidence, Burrell said. He added that since the jury was made aware of the dates of the state agency’s investigation (albeit not its conclusion), Kelly was able to argue that the ongoing state investigation explained its “inaction” on Noyes’s religious bias complaint.

“[T]he probative value of the DFEH [determination] was substantially outweighed by the risk of unfair prejudice to Noyes that evidence of a final agency decision would pose and the mini-trial that would result on what evidence was and was not considered when the DFEH made its determination,” Burrell wrote.

Nor did the court err by instructing the jury that in order to prevail on her Title VII claim, Noyes need only show religion was “a motivating reason” for Kelly’s failure to promote her, not the “determining factor,” Burrell said. Citing the Ninth Circuit’s decision in *Costa v. Desert Palace Inc.*, 299 F.3d 838 (9th Cir. 2002), he reasoned that “single motive” and “mixed motive” Title VII cases are “not fundamentally different categories of cases” since both require plaintiffs to prove unlawful discrimination occurred.

Kelly argued the \$5.9 million punitive damages award is “unconstitutionally excessive” because the company did not act “reprehensibly” and a 40-to-1 ratio of punitive damages to Noyes’ economic damages is “plainly unconstitutional.” On the other hand, Noyes contended that a 9-to-1 ratio of punitive damages to her compensatory damages of \$647,000 fits within the constitutional parameters defined by the U.S. Supreme Court.

Citing relevant Supreme Court precedents, the district court said three guideposts determine whether a punitive award is unconstitutionally excessive: the degree of reprehensibility of the defendant’s conduct; the “disparity between the harm or potential harm” experienced by the plaintiff and the punitive award; and “the difference between this remedy and the civil penalties authorized or imposed in comparable cases.”

Using those standards, the court decided Kelly’s conduct, as found by the jury, was reprehensible enough to support a punitive damages award but not at the \$5.9 million level. It agreed with Noyes that the proper gauge for measuring the award is the ratio between the punitive award and total compensatory damages, not the wider disparity between punitive damages and the economic damages raised by Kelly.

“Substantial evidence supports the jury’s finding that Heinz acted with oppression, malice or fraud and that a managing agent of Kelly, [senior vice president for human resources Nina] Ramsey, knew of and ratified that conduct,” Burrell wrote. “While the record does not show that Ramsey herself discriminated against Noyes or directed Heinz to do so, evidence exists that she knew Heinz was discriminating against Noyes based on religion and she turned a blind eye. Kelly’s closing arguments and trial testimony indicate that deceitfulness was afoot.”

Nevertheless, the court decided that the 9-to-1 ratio between punitive damages and compensatory damages was excessive, particularly when \$500,000 of the compensatory award represented recovery for emotional distress. It cited the Supreme Court’s observation in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2002), that emotional distress compensatory awards and punitive awards can be duplicative because “much of the distress was caused by the outrage and humiliation” suffered by the plaintiff and “it is a major role of punitive awards to condemn such conduct.” The court therefore ruled that a 1-to-1 ratio of punitive to compensatory damages is all that can be sustained in Noyes’ case. In a separate order dated Aug. 4, the court awarded Noyes \$765,972 in attorneys’ fees. Noyes has appealed the reduced damages award to the Ninth Circuit.

**W. *Jeff Morgan v. Home Depot USA Inc.*, case number 08-cv-428  
(W.D. Wis. 2008)**

A Wisconsin man launched a discrimination suit against Home Depot USA Inc., alleging he was fired after voicing his religious views on homosexuality to a gay co-worker who “flaunted” his sexual preference.

The lawsuit, filed in the U.S. District Court for the Western District of Wisconsin, contends that the plaintiff, Jeff Morgan, expressed his beliefs to a co-worker, named in the suit as Rob Thompson, after Thompson “openly discussed, if not flaunted” his homosexuality.

Morgan, who is seeking back pay, future earnings, court costs and other losses as well as damages resulting from “emotional stress, humiliation and anxiety about his ability to support himself and his future employability,” has demanded a jury trial.

Morgan’s Christian beliefs made him the target of “unwelcome, hostile and offensive comments, ridicule, and other unlawful treatment” by his gay co-worker, according to the suit.

Morgan’s efforts to remedy the situation through the store’s human resources department were met with retaliation, the suit said.

At the time of the alleged harassment, Morgan was an assistant manager at a Home Depot store in Janesville, Wis., where he started working in November 2005.

When the harassment escalated, Morgan sought help from his bosses, but those efforts resulted in his being “unfairly criticized, written up, disciplined and unfairly placed on probation in July of 2006,” the suit said.

Morgan accuses Home Depot of failing to take “prompt and/or effective remedial action” as required by law and store policy. He was written up by his bosses and then investigated by human resources employees and the store’s manager as a result of his “legally protected” complaints about the gay employee’s alleged conduct, the suit said.

Morgan was fired in September 2006 “as a result of honestly, politely, and privately voicing his deeply held religious beliefs about homosexuality when asked about such belief,” he said.

Only three days passed between the time human resources began its investigation and his firing, according to the suit, which alleges the action was taken “in willful and/or reckless disregard for [Morgan’s] rights.”