

# When it comes to religion and work, company policy a factor

By Dan Eaton

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The U.S. Supreme Court recently heard argument on the case of a public high school football coach who lost his job for refusing to discontinue his practice of silently praying with willing members of his team and others on the 50-yard line after games, win or lose. The school argued allowing such prayer would constitute its unconstitutional endorsement of religion, with a coercive effect on players who participated and a stigmatizing effect on those who did not.

The school offered to accommodate the coach by providing a private place for him to pray after games away from students. The coach argued that to prohibit his postgame prayers on the field violated his constitutional rights to the free exercise of religion and free speech as a government employee.



The Law at Work (San Diego Union-Tribune)

In a few months, the court's ruling will answer the question of how far a public school instructor whose faith compels him to share his faith may do so in the presence of students without breaching the wall between church and state.

But employee prayer in the private sector raises a similar question: May a private-sector employer punish an employee for sharing that person's faith with others in the workplace when proselytizing is a core part of the person's faith? If any accommodation of such a practice would unduly disrupt the workplace, the answer is yes.

## Legal principles

Under the California Fair Employment & Housing Act (FEHA), an employer may not discharge an employee because of a conflict between the person's religious belief or observance and any employment requirement unless, after exploring any available reasonable alternative way of accommodating the religious belief, the employer is unable reasonably to accommodate the religious belief "without undue hardship."

Under federal law, an employer need not accommodate a religious practice that would impose anything more than a minimal expense or burden on company operations. Under FEHA, by contrast, undue hardship will not excuse an employer from accommodating a religious practice unless any reasonably available accommodation would impose "significant difficulty or expense" in light of, among other things, the impact of any accommodation on business operations and in light of the "type of operations, including the composition, structure, and functions of the workforce of the entity." Unlike federal law, California law applies the same "undue hardship" standard to accommodating religious practices and observances as it applies to accommodating disabilities.

## Illustration

In a 2006 unpublished ruling, the California Court of Appeal upheld summary dismissal of evangelical Christian employee Yuen Man Ng's claim that her employer Jacobs Engineering Group violated FEHA by terminating her employment when she persisted in sending unsolicited company emails to her co-workers and using company facilities for proselytizing her co-workers contrary to company policy and after repeated warnings. Jacobs Engineering policy required that workplace relationships be free of harassment, including religious harassment.

The court found that to require Jacobs Engineering to accommodate Ng's proselytizing would require the company to violate its own policy, which was "consistent with public policy embodied in FEHA" and subject it "to claims by other employees desiring to use company facilities to share their own religious beliefs."

## Best practices

The U.S. Court of Appeals for the 11th Circuit provided this sound guidance in a 1995 opinion: "To determine whether allowing or continuing to permit an employee to pray, proselytize, or engage in other forms of religiously oriented expression in the workplace would pose an undue hardship, employers should consider the potential disruption, if any, that will be posed by permitting this expression of religious belief. ... [R]elevant considerations may include the effect such expression has had, or can reasonably be expected to have, if permitted to continue, on co-workers, customers, or business operations."

To reduce the risk of legal trouble in this area, then, employers should:

- Adopt a neutral policy prohibiting unlawful harassment of any kind and apply it evenhandedly to all kinds of harassment and all levels of employees.
- Determine whether the religious practice genuinely conflicts with that policy.
- If there is a conflict between the manner in which the employee seeks to share his faith in the workplace and employer policies or operational needs, articulate the conflict, offer alternatives to the employee, and consider alternatives he offers. Document this process.
- Before imposing discipline, warn the employee in writing to discontinue the practice considered operationally disruptive and advise the employee of the consequences if the practice continues.

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