



WASHINGTON D.C.

WORKPLACE ACCOMODATIONS IN A POLITICALLY CORRECT WORLD

OCTOBER 2, 2019



**THE HOSPITALITY LAW
CONFERENCE SERIES 2.0**



**W. Barry Montgomery, Partner
KPM Law**

- **Over 20 years of litigation experience;**
- **Over 75 jury trials to verdict;**
- **Employment Litigation and Professional Liability Defense**

A cityscape with various buildings and greenery is visible in the background. A large, horizontal brown banner with a black border is overlaid on the image, containing the title text.

COMMON WORKPLACE ACCOMMODATION DEMANDS

Major Areas of Accommodation Requests:

- **Disability;**
- **Religion (dress/scheduling);**
- **Gender Identity;**

The American's With Disabilities Act– (“ADA”)

Title VII of the Civil Rights Act of 1964 (“Title VII”)



- **DISABILITY ACCOMMODATION**: A disabled employee may request a *reasonable accommodation* that enables him to perform the *essential job functions* and enjoy equal benefits as similarly situated employees without a disability. “**Disability**” is broadly defined by the ADA; Employers are prohibited from **retaliating** against an employee that requests the accommodation regardless of whether the request is granted.
- **RELIGIOUS ACCMODATION**: Title VII allows an employee to request a reasonable accommodation for a **sincerely held** religious belief. Title VII also prohibits retaliation. **Ex.: wearing religious garb; schedule changes for religious observances.**



TOTAL REASONABLE ACCOMODATION CHARGES FILED WITH EEOC UNDER THE ADA AND TITLE VII (Excludes State Agencies)

FY 2010	FY 2013	FY 2017	FY 2018
TITLE VII– 1,214	TITLE VII- 1,339	TITLE VII – 2,277	TITLE VII – 2,144
ADA– 8,400	ADA – 9,491	ADA – 11,754	ADA – 10,877 (14% of <u>all</u> charges filed)
			2018 Total EEOC: 76,418



- **There are three general categories of "reasonable accommodations" FOR EMPLOYEES:**
- **"(i) *modifications* or adjustments to a *job application process* that enable a qualified applicant with a disability to be considered for the position;**
- **(ii) *modifications* or adjustments to the *work environment, or to the circumstances under which the position held is performed*, that enable a qualified disabled employee to perform the essential functions of that position; or**
- **(iii) modifications or adjustments that enable the disabled employee to enjoy *equal benefits and privileges of employment* as are enjoyed by its other similarly situated employees without disabilities. **See 29 CFR pt. 1630.3(o)****



WHAT ARE YOUR RESPONSIBILITIES?

- ✓ **DO** Listen to your employee's request and document your consideration and reasonable attempt to accommodate the request;
- ✓ **DO** Consider (and document) the hardship to your business and potential danger to coworkers and customers;
- ✓ **DO** consider whether the employee can legitimately perform her essential job functions even with an accommodation;



REASONABLE ACCOMMODATIONS REQUIRED: You are *not* required to provide the *specific accommodation request*– only a *reasonable* one to enable employee to perform his *essential job functions*; (EEOC v. Newport News Shipbuilding, 949 F.Supp. 403 (1996)). You are not required to create a *new position*.

UNDUE HARDSHIP CLAIM: You can claim *undue hardship* in light of several factors:

- The **nature** and **net cost** of the accommodation needed;
- **Financial resources** of the **facility** and number of employees;
- **Overall financial resources of the employer** and number of employees;
- Types of **operations** of the employer, **structure and geographical relationship** of the organization

SPECIFIC EXAMPLES



RELIGION: Supreme Court found that Abercrombie & Fitch violated Title VII by **failing to accommodate a job applicant who wore a hijab**. The clothing chain declined to hire Samantha Elauf in 2008 as a sales associate because her hijab violated the company’s “look policy,” which at the time prohibited employees from wearing head coverings. **The Court held that even though Elauf failed to specifically request an accommodation, an applicant need only show that her need for an accommodation was a motivating factor in the employer’s decision.** The rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: **An employer may not make an applicant’s religious practice (confirmed or otherwise) a factor in employment decisions”** Opinion delivered by the late Justice Scalia. Suit filed by EEOC.



RELIGION: The customer is not always right.

Ex.: A Sikh employee works at a coffee shop and regularly wears a turban. The manager notices that a nearby construction crew no longer comes in the shop when the employee is working. The crew tells the manager that they believed the employee was Muslim and they were uncomfortable in light of the 911 Anniversary. The manager fires employee. Manager violated Title VII because he did not offer an accommodation and discriminated *based on customer preference*. See EEOC Compliance Manual



GENDER IDENTITY: Public bathroom accommodations.

California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, Washington D.C. Approximately 200 counties and municipalities have passed some sort of regulations protecting the rights of transgender persons to use the bathroom designated for the gender with which they identify.

Gender Identity Discrimination:

A long time funeral home worker identified as female and decided to live as a woman. Her employer had a dress code that required all male employees to wear a suit when presenting to the public. Plaintiff came to work wearing a dress and the employer fired her without any attempt at accommodation as her conduct would violate their dress code. The Sixth Circuit Court of appeals held that the employers conduct constituted gender discrimination and violated Title VII. R.G & G.R. Harris Funeral Home v. EEOC, 884 F.3d 560 (6th Cit. 2018). On appeal to the U.S. Supreme Court. Oral argument next week.





UPCOMING SUPREME COURT RULING:

On October 8, 2019, the Supreme Court is scheduled to hear arguments on three cases all involving the question of whether gender identity is a protected class under Title VII (gender discrimination). Many expect the Court to rule that gender identity discrimination (including failure to accommodate) is protected by Title VII.

Cases: Altitude Express, Inc. v. Zarda (appeal from 2nd Cir); Bostick v. Clayton County Georgia (5th Cir.); R.G. & G.R. Harris Funeral Home v. EEOC. (6th Cir.)