The Best of "Legal/Legislative Update"

Your School May Discriminate on a Religious Basis in Personnel Decisions

Understanding the Religious Exemption Clause of Title VII

The commonly used phrase, "Title VII," refers to Title VII of the Civil Rights Act of 1964. The Act was passed at the height of the civil rights movement during the 1960s in an attempt to eradicate discrimination in the workplace, particularly discrimination based on race. Title VII bars an employer from discriminating against its employees (or employee applicants) based on race, sex, religion, and national origin. In subsequent years, Congress has amended Title VII to prohibit other forms of discrimination, such as discrimination based on pregnancy.

The central provision of Title VII states that it is unlawful for "an employer" to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin…" 42 U.S.C. §2000e-2(a). Several exceptions to this requirement protect the ability of religious institutions to hire employees based on their religious beliefs.

Congress has supplemented Title VII with the Age Discrimination in Employment Act (ADEA), which prohibits discrimination in hiring and employment against individuals over the age of 40, and the Americans with Disabilities Act (ADA), which prohibits discrimination against individuals with physical and mental disabilities. Congress has also passed other laws that deal with issues such as discrimination on the basis of pregnancy, and national origin in the employment settings, and gender bias in educational programs. The applicability of each of these laws to religious institutions depends upon the provision of the particular law. Because of space limitations, this article will focus on Title VII.

Each area of protection is known as a "protected classification." Thus, under federal law there are six protected classifications in the employment setting: race, sex, religion, national origin, age, and

disability. Individuals who may be impacted by discrimination on the basis of one of these classifications are known as being in a "protected class." Many states have enacted civil rights statutes as well. Often these statutes protect the same classes of individuals. However, eleven states (CA, CT, HI, MA, MN, NH, NJ, NV, RI, VT, WI) as of 1999 have added "sexual orientation" to the list of those who are protected. Federal law does not expressly prohibit discrimination on the basis of sexual orientation.

Who Must Comply With Title VII?

Under the Civil Rights Act, the term "employer" is defined to mean a person or entity which is engaged in an industry affecting interstate commerce which has "fifteen or more employees for each working day…" (42 U.S.C. §20003(b)). The US Supreme Court has ruled that all of an employer's full- and part-time employees count toward the fifteen employees when determining whether the law applies. [Note: In those states which have their own civil rights statutes, the laws are usually designed to apply to employers with fewer employees. Thus, even though an entity might not be covered by Title VII, it must still determine if it is covered by similar provisions of its state's laws.] An entity which is not in an industry affecting interstate commerce, or which employs fewer than fifteen employees is not covered by Title VII regardless of whether the business is religious or not.

The United States Supreme Court has defined interstate commerce so broadly that most religious institutions and virtually all schools are included. [Note: Because it would be extremely rare for a school to not qualify as not impacting interstate commerce, questions about this should be considered with the assistance of legal counsel.]

What Religious Exemption Exists in Title VII?

In addition to the threshold limitation of 15 employees, Congress enacted several other provisions that prevent blanket application of Title VII. Two of these exceptions benefit religious institutions. The first, Section 703, permits discrimination in hiring when the nature of a particular job is such that the employer legitimately requires a person of a particular religion. If a "bona fide occupational requirement" of a position includes certain religious beliefs, an employer can refuse to hire anyone other than a person who holds the required beliefs (42 U.S.C. §2000e - 2(e)).

The second exception, Section 702, creates a blanket exception for religious organizations. Specifically, Section 702 states that:

> This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities (42 U.S.C. §2000e - 1(a)).

This language protects the ability of a religious organization to hire employees who are members of its religious organization or who share its beliefs. This exception has been considered and upheld by a unanimous vote of the U. S. Supreme Court in *Corporation of Presiding Bishop v. Amos* 483 U.S.327 (1987).

In this case, the Supreme Court held that Section 702 gives religious organizations the right to make employment decisions based on religious criteria for all of their employees (including administrative staff). According to the Court, Section 702 permits religious discrimination even if the particular job is not strictly "religious" in nature. That is, Section 702 gives a church or religious school the right to use religious criteria in making hiring and employment decisions for every position in the church or school from the pastor to hourly support workers. Congress designed Section 702 in this manner to prevent courts from getting into the thorny question of what is a religious activity and what is not. In Amos, the Supreme Court recognized this goal of Congress.

Does Title VII Protect For-Profit Operations?

The Amos decision, however, did not answer all of the questions regarding Section 702. The case dealt with a non-profit religious institution. While Section 702 itself does not make a distinction between non-profit and for-profit organizations, several members of the Supreme Court indicated that had the case involved a for-profit institution they would have considered limiting the application of the exemption to positions of a religious character. Since the issue was not before the Court, however, it was left open.

It should be noted that many state civil rights statutes limit their exemptions for religious discrimination to non-profit institutions. As a

result, for-profit religious schools cannot rely on the Section 702 exemption to justify discrimination on the basis of religious belief with the same confidence that non-profit institutions can. For-profit schools wishing to restrict employment to those who share their faith, should consult with legal counsel in order to be certain that they understand the impact of Title VII and state law on their employment practices.

The Importance of Consistency

Institutions that are covered by Section 702 must keep in mind that they can waive the protection of the exemption. A waiver will occur if the organization is not consistent in applying its religious criteria to its hiring and employment practices. It will also occur if the religious criteria bear little relationship to the conduct of the organization's mission. For example, if a school's religious roots play only an incidental role in the operation of the school, it may lose the right to limit the selection of teachers to only those of a particular faith or denomination. Similarly, if a school does not require all of its teachers to share its faith, or to be members of its church or a certain category of churches (e.g., such as churches of a particular denomination, churches that are members of the National Association of Evangelicals, etc.), it may lose the right to require any of its teachers to do so.

Some Specific Examples of the Use of the Religious Exemption

With this background, what does the Section 702 exception allow religious schools to do that secular employers can't do? For those institutions which are clearly sectarian, and which are consistent in the application of their employment practices, Section 702 allows the use of religious criteria in making the employment decisions. This means that religious schools may require prospective employees to sign the school's statement of faith and acknowledge their agreement with it. In addition, if the employee later rejects portions of the statement of faith, the employee may be terminated.

Some religious schools wish to limit employment to individuals who are members in good standing of a particular church. Section 702 allows this as well. Similarly, if an employee ceases to be a member in good standing of that church, the school may terminate the employee.

The question is often raised whether sectarian schools can require their employees to abide by lifestyle standards. If the lifestyle standards are

tied to the religious purposes of the institution, Section 702 offers some assistance. In addition, Section 703, the "bona fide occupational qualification" exception, also is helpful. If the lifestyle standards are necessary for the individual to fulfill his or her duties, they can become a bona fide occupational qualification.

One example of this in operation can be found in a Christian school that requires its teachers to live lives consistent with its statement of faith. If, as a part of the educational philosophy of the school, the school believes that education occurs through the observation of the lives of the teachers (as illustrated by Luke 6:40), and if the school has as its principal purpose the Christian development of its young people, the failure of a teacher to live according to the school's standards would directly impact the educational process in the school.

In order to establish a bona fide occupational qualification of this type, it is wise for the institution to clearly set out in writing its religious beliefs, its religious purposes, and the lifestyle criteria that it requires. In addition, it is wise for it to be very clear what conduct is inappropriate. Vague statements that employees must live lives "which do not violate the organization's standards" are often inadequate. When a situation arises which the institution believes violates its standards, the employee will claim to have a different interpretation of the standards and argue, therefore, that he or she is not in violation. The importance of clarity in handling lifestyle matters cannot be overemphasized.

Examples of lifestyle standards often include things like smoking, drinking alcoholic beverages, dancing, and sexual activity outside of God-ordained marriage. Dress codes, or hair length codes, might also be lifestyle standards. In each case, the policy should be tied to the firmly held religious beliefs of the school.

A stated sexual activity standard, for example, might open by reflecting on the importance of role models in order for students to develop healthy, Godly values regarding sexuality. This is particularly important, the policy might say, in a society where children can become confused by the conflicting values reflected on TV and in the popular media. The policy might then move on to a discussion of the Biblical teaching about sexual activity and marriage. For example, it might point out that the Bible teaches that sexual intercourse is to be enjoyed within the bonds of marriage between one man and one woman. The policy might go on to say

that this necessarily means that those who are not involved in such a marriage are to live celibate lives. Finally, the policy should expressly state the school's requirement that its employees live by this Biblical standard.

In applying lifestyle standards, however, schools must use care. A good example of the traps for the unwary that exist in this area can be found in the case of *Vigars v. Valley Christian Center of Dublin, Cal*. 805 F.Supp. 802 (N.D. Cal. 1992). In that case a female librarian worked at a Christian school run by a church. During her employment with the church, the librarian became pregnant out of wedlock. The school fired the librarian, who responded by suing the school. The court stated that it was true that the church would have had the right to fire an employee who committed adultery because this behavior contravened the religious values of the church and school, but since that school had said it was firing the employee because she was pregnant out of wedlock, the school had violated the law prohibiting discrimination on the basis of pregnancy.

As was noted by the court in the *Vigars* case, there was nothing wrong with the school's lifestyle standard itself. It was important, however, that the school be clear that the decision to terminate the employee was based upon that standard and not her pregnancy. In this case, the school should have pointed to its policy about sexual conduct outside of wedlock and made the employment decision based upon that policy. The pregnancy was merely evidence that the policy had been violated.

While this might seem at first like a semantical argument, it can be quite important. Apart from court decisions, however, using care and precision in applying these standards is necessary in order to ensure that the policy is implemented fairly and consistently. In the pregnancy situation, for example, if the father is also an employee in the school, focusing on the extra-marital sexual activity, rather than the pregnancy, will lead the school to face applying its policy to the conduct of both the mother and the father. If the school focuses on the pregnancy, however, it might miss this point and apply its standards only to the mother.

As was discussed above, the policy of discrimination must be implemented consistently in order to retain exemption under Title VII. Thus, in the pregnancy example, the sexuality policy must be applied to both the mother and father.

Another lifestyle example which poses difficulties for schools is a policy regarding divorce. While a religious school might be able to establish a policy regarding divorce based upon Biblical standards, applying the policy consistently often is a problem because of the large number of divorced individuals in our society.

A divorce policy, unless it is religiously based, may violate the gender-based discrimination provisions of Title VII, and clearly violates the provisions of many state laws prohibiting discrimination on the basis of marital status. [Marital status is not expressly covered by Title VII, though some have argued that it is incorporated in the gender provisions of the Act.]

Schools have dealt with the divorce issue in different ways. For those schools that require employees to be members in good standing of a particular church, a divorce might result in discipline within the church which causes the employee to no longer be in good standing. In that event, the school could terminate the employee for no longer being a member in good standing of the church. Other schools have established a no-divorce standard and apply it to all employees consistently.

A third approach has been to deal with individuals who are "going through" a divorce, rather than those who have been divorced in the past. The rationale here is that, from a role model perspective, a person going through a divorce is likely to set a worse example than someone who was divorced in the past. This is particularly true if the divorce occurred in the distant past or occurred before the person became a Christian. It is also argued that individuals going through a divorce are likely to allow the divorce process to impact their Christian witness with the students.

While this approach is often the most attractive to schools, it can be the most difficult to defend. It is sometimes hard for a secular court to understand how a policy opposing divorce, which is based upon a firmly held religious belief, is limited just to individuals "currently going through" a divorce.

Whether a school chooses one of these approaches or a different one, it is important for the policy to be in writing, tied to the school's firmly held religious beliefs and its educational purposes, and be applied across the board. It is particularly important in using a policy covering "currently

going through" a divorce that the policy explain how that conduct impacts the ability of the school to achieve its religious mission.

Other Types of Discrimination Are Not Permitted

While Section 702 allows religious organizations to discriminate on the basis of religious faith, it does not exempt religious organizations from the balance of Title VII. It is a violation of the statute for religious organizations such as Christian schools to discriminate on the basis of race, national origin, and gender.

Gender discrimination has presented particular problems for religious institutions. The Supreme Court has not directly addressed the issue, but the lower courts have been consistent in requiring religious institutions to not discriminate on the basis of gender. The only exception has been for positions that are ecclesiastical in character, such as clergy, where the firmly held religious beliefs of the organization require the selection of a man.

The courts have interpreted gender discrimination broadly. It includes not only limits on selection, but also compensation and benefits. Religious schools have had particular difficulty here, because historic "needs based" compensation systems, especially when they provide additional compensation for "heads of households," have been held by the courts to discriminate against women and, therefore, to violate Title VII. Similar problems have arisen with benefits programs which make special arrangements for heads of households. Two good examples of this problem can be found in *E.E.O.C. v. Fremont Christian School*, 781 F.2d 1362 (1986) where a benefits program was invalidated because it favored men, and *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (1990) where a needs based compensation system was found to discriminate against women and to violate the equal pay provisions of the Fair Labor Standards Act.

The gender bias provisions of Title VII have also been held to prohibit sexual harassment. While harassment which is based upon an individual being in any protected classification is illegal, sexual harassment has received the greatest attention recently. Religious employers are not immune from such claims. A strong policy prohibiting such harassment is important and employees and supervisors should be trained to deal

with complaints. A good policy, good training, and prompt investigations of complaints are the best defense to such claims.

[Editor's note: The Sexual Harassment Policies Packet is available from ACSI. It contains valuable information and model policies to prevent a problem occurring at your school. Call the ACSI Order Dept. at 1-800-367-0798].

The EEOC Enforces Title VII

Title VII is administered by the Equal Employment Opportunities Commission (EEOC). By law all claims brought by employees must be filed initially with the EEOC. [Where there is applicable state law as well, often the EEOC will have a work-sharing arrangement with its counterpart state agency. When a claim is filed with one agency, it will be automatically filed with the other. Only one of the two agencies will then undertake the investigation.] When a claim is filed, the EEOC will notify the employer and provide the employer with a copy of the charges. The employer will then be given an opportunity to respond to the charges. In addition, the EEOC case worker will often ask the employer to answer a series of questions related to the investigation.

When the case worker completes the investigation, he/she will either recommend that the EEOC initiate a lawsuit on behalf of the employee, or close the file. If the former route is taken, the case worker will usually make an effort to reach a settlement with the employer before referring the matter for litigation.

The majority of the cases filed with the EEOC are closed by the agency. This does not necessarily mean the agency does not think the cases have merit, but rather the agency is not interested in pursuing them. When a file is closed, the case worker will issue what is known as a "right to sue" letter. The employee then has the opportunity to initiate a lawsuit against the employer on his/her own should he/she wish to do so.

Although many EEOC claims appear to be frivolous, it is always wise to consult with an attorney before responding to the initial inquiry. A carefully worded response can go a long way toward properly framing the issues for the case worker and thereby limiting the investigation. [Please contact the Legal/Legislative Department at ACSI (719-528-6906) immediately if your school receives an initial inquiry from the EEOC. In

most instances, ACSI will provide legal help for your school through the ACSI Legal Defense Fund. — Editor]

Summary

As was noted at the beginning of this article, Title VII is the centerpiece of a complex body of law that Congress has developed to protect individuals who may have historically been discriminated against. The breadth of the laws, however, are such that they now cover nearly everyone in the workplace. As a result, and because of the ease associated with filing a claim with the EEOC, the laws are being used increasingly by disgruntled employees, regardless of the merit of their discrimination claims. It's imperative that Christian schools become familiar with the various employment laws. There can also be no substitute for developing a relationship with legal counsel who works regularly in the employment field. While it may only be necessary to contact the attorney occasionally, the best way to deal with the civil rights statutes is to put in place good procedures and practices and to respond promptly and appropriately when a potential claim arises.

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