Legal Update Article

What the Changed Standard for Religious Accommodations Means for the Shift-Based Retail Industry

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The retail industry is a shift-based industry, dependent on workers signing up for weekday and weekend shifts, for holidays, and for times when few average workers would dream of being awake and at work. What if an employee cannot work a required shift because of a sincerely held religious belief? The U.S. Supreme Court's accommodation decision in *Groff v. DeJoy,* 600 U.S. 447 (2023), may have a unique impact on this industry.

Under Title VII of the Civil Rights Act, employers may have to accommodate the sincerely held religious beliefs or practices of its employees, unless doing so creates an undue hardship. In *Groff,* the Supreme Court clarified what undue hardship means. Interpreting Title VII's language, the Court held that the long-applied "de minimis cost" standard was improper. Instead, it held an employer must show an accommodation poses a "substantial burden."

In *Groff,* a USPS employee who practiced as an Evangelical Christian requested a religious accommodation so he did not have to work on Sundays, a day of rest for Evangelical Christians. The USPS argued this request placed an undue hardship on business operations. The Court did not decide whether the specific accommodation request placed an undue hardship on the USPS, but it changed the standard for showing undue hardship and remanded the case to the lower courts for further determination.

An employer may refuse to accommodate an employee's religious accommodation request only if the accommodation would result in a substantial burden in the overall context of the employer's business, the Court explained. According to the Court, whether an accommodation poses an undue hardship must take into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer. Unfortunately, the Court's opinion did not explain what set of facts would meet this new burden, thus leaving employers guessing as to what is now required.

In the last two years, religious accommodation claims have increased markedly. The combined confluence of increased awareness and appetite to make accommodation requests and the increased standard from the Supreme Court may place retail employers in a pickle, as they face increased requests for accommodation that may affect scheduling and their otherwise normal course of business.

Two common areas for religious accommodation requests in the retail industry are grooming or dress codes and schedules. In the wake of the Supreme Court decision in June 2023, courts across the country have begun to apply the standard. The U.S. Court

of Appeals for the Fifth Circuit cited *Groff* in a scenario involving an employee refusing to cut his hair and beard for religious purposes. *See Hebrew v. Tex. Dep't of Criminal Just.,* 80 F.4th 717 (5th Cir. 2023). In *Hebrew,* the court held that under *Groff,* the company (a Department of Criminal Justice training academy for correctional officers) could not cite "undue burden" as a defense to the failure to accommodate the hair-related religious request as the request did not pose a substantial burden on the employer. The company cited grooming policies related to safety *(i.e.,* the ability to wear a gas mask) and hygiene *(i.e.,* the ability to hide contraband in long hair). For safety- or food- and beverage-focused retail employers, grooming or hygienic concerns could come into play with religious accommodations given strict grooming policies are mandated by, for instance, the Food and Drug Administration.

A district court in New York cited *Groff* in the education context, where a teacher belonging to the Seven Day Adventist religion requested a schedule change based on her mandatory observation of the Sabbath. The court found that the school needed to accommodate the teacher's schedule only in accordance with the observed Sabbath time. As that time changed in various months, it would not conflict with the teacher's duties at certain times of the year. *See Verne v. N.Y.C. Dep't of Educ.,* No. 21 Civ. 5427 (JPC), 2023 U.S. Dist. LEXIS 177183 (S.D.N.Y. Sept. 28, 2023).

A district court in the U.S. Court of Appeals for the Third Circuit, citing *Groff,* found a teacher who refused to work on the Sabbath was constructively discharged based on her religious views, because her only options were to resign or work on the Sabbath and was offered no other choices for accommodating her "mandatory" religious day off. *Johnson v. York Acad. Reg'l Charter Sch.,* No. 1:23-CV-00017, 2023 U.S. Dist. LEXIS 178435 (M.D. Pa. Oct. 3, 2023).

As the courts continue to apply *Groff,* it is important for employers to evaluate each religious accommodation on a case-by-case, fact-specific basis. Much like the above examples, not only should retail industry employers beware of an increase in religious accommodation requests generally, but also of accommodations requiring shift changes on weekends, evenings, and holidays (times of religious import) and their resulting obligations. Responses to accommodation requests that worked in the past, may be subject to additional challenge now. As always, you are encouraged to consult with counsel for specific matter-related advice.

Jackson Lewis attorneys will continue to monitor developments in this area.