
any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

(2) As a result of the oral and written testimony submitted at the Commission's Hearings on Religious Discrimination, discussions with representatives of organizations interested in the issue of religious discrimination, and the comments received from the public on these Guidelines as proposed, the Commission has concluded that the use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on the employment opportunities of persons with certain religious practices. The use of such inquiries will, therefore, be considered to violate title VII unless the employer can show that it:

(i) Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for the same religious practices; or

(ii) Was otherwise justified by business necessity.

Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest and which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these Guidelines, whether an accommodation is possible. This type of inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of the usually small number of applicants who require an accommodation.

(3) The Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when: (i) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification; and (ii) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.

APPENDIX A TO §§ 1605.2 AND 1605.3—BACKGROUND INFORMATION

In 1966, the Commission adopted guidelines on religious discrimination which stated that an employer had an obligation to accommodate the religious practices of its employees or prospective employees unless to do so would create a "serious inconvenience to the conduct of the business". 29 CFR 1605.1(a)(2), 31 FR 3870 (1966).

In 1967, the Commission revised these guidelines to state that an employer had an obligation to reasonably accommodate the religious practices of its employees or prospective employees, unless the employer could prove that to do so would create an "undue hardship". 29 CFR 1605.1(b)(c), 32 FR 10298.

In 1972, Congress amended title VII to incorporate the obligation to accommodate expressed in the Commission's 1967 Guidelines by adding section 701(j).

In 1977, the United States Supreme Court issued its decision in the case of Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977). Hardison was brought under section 703(a)(1) because it involved facts occurring before the enactment of section 701(j). The Court applied the Commission's 1967 Guidelines, but indicated that the result would be the same under section 701(j). It stated that Trans World Airlines had made reasonable efforts to accommodate the religious needs of its employee, Hardison. The Court held that to require Trans World Airlines to make further attempts at accommodations—by unilaterally violating a seniority provision of the collective bargaining agreement, paying premium wages on a regular basis to another employee to replace Hardison, or creating a serious shortage of necessary employees in another department in order to replace Hardison—would create an undue hardship on the conduct of Trans World Airlines'
business, and would therefore, exceed the duty to accommodate Hardison.

In 1978, the Commission conducted public hearings on religious discrimination in New York City, Milwaukee, and Los Angeles in order to respond to the concerns raised by Hardison. Approximately 150 witnesses testified or submitted written statements. The witnesses included employers, employees, representatives of religious and labor organizations and representatives of Federal, State and local governments.

The Commission found from the hearings that:

(1) There is widespread confusion concerning the extent of accommodation under the Hardison decision.
(2) The religious practices of some individuals and some groups of individuals are not being accommodated.
(3) Some of those practices which are not being accommodated are:
   —Observance of a Sabbath or religious holidays;
   —Need for prayer break during working hours;
   —Practice of following certain dietary requirements;
   —Practice of not working during a mourning period for a deceased relative;
   —Prohibition against medical examinations;
   —Prohibition against membership in labor and other organizations; and
   —Practices concerning dress and other personal grooming habits.
(4) Many of the employers who testified had developed alternative employment practices which accommodate the religious practices of employees and prospective employees and which meet the employer’s business needs.
(5) Little evidence was submitted by employers which showed actual attempts to accommodate religious practices with resultant unfavorable consequences to the employer’s business. Employers appeared to have substantial anticipatory concerns but no, or very little, actual experience with the problems they theorized would emerge by providing reasonable accommodation for religious practices.

Based on these findings, the Commission is revising its Guidelines to clarify the obligation imposed by section 703(j) to accommodate the religious practices of employees and prospective employees.

5The transcript of the Commission’s Hearings on Religious Discrimination can be examined by the public at: The Equal Employment Opportunity Commission, 131 M Street, NE., Washington, DC 20507.

PART 1606—GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

§ 1606.1 Definition of national origin discrimination.

The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual’s name or spouse’s name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply general title VII principles, such as disparate treatment and adverse impact.

§ 1606.2 Scope of title VII protection.

Title VII of the Civil Rights Act of 1964, as amended, protects individuals against employment discrimination on the basis of race, color, religion, sex or