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Religious Accommodation in the Workplace:

Your Rights and Obligations

Religion in the American workplace is among the most contentious and difficult areas for employees and employers to navigate. In our increasingly diverse and religiously pluralistic society, conflict is bound to occur, and if Equal Employment Opportunity Commission (EEOC) statistics are correct, it is occurring at an ever quickening pace. EEOC religion-based charges of discrimination have increased approximately 41% since 1997, and payouts have increased approximately 174%. [1] The risks of getting it wrong - and, we believe, the rewards of getting it right - are powerful motivators to businesses to pay careful attention to this issue.

OVERVIEW OF THE LAW

Title VII of the Civil Rights Act of l964 ("Title VII") prohibits employers, except religious organizations [3] [4] [5], from discriminating against individuals because of their religion in hiring, firing, and other terms and conditions of employment. Title VII also requires employers to reasonably accommodate the religious practices of an employee or prospective employee, unless to do so would create an undue hardship upon the employer. This means that:

- Employers may not treat employees more or less favorably because of their religion.
- Employees cannot be required to participate "or to refrain from participating "in a religious activity as a condition of employment.
- Employers must reasonably accommodate employees' sincerely held religious practices unless doing so would impose an undue hardship on the employer.
- Employers must take steps to prevent religious harassment of their employees.
- Employers may not retaliate against employees for asserting rights under Title VII.

RELIGIOUS ACCOMMODATION

Introduction
Religious employees often confront conflicts between their employment obligations and their religious obligations; federal law (and many state and local laws) require employers to try to accommodate those obligations. Specifically, Title VII provides that an employer must reasonably accommodate an employee's religious beliefs and practices unless doing so would cause "undue hardship on the conduct of the employer's business."

What is a "reasonable accommodation"?
A reasonable accommodation is one that eliminates the employee's conflict between his religious practices and work requirements and that does not cause an undue hardship for the employer.

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Requested accommodations vary - an employee may need a particular day off each year for a religious holiday; or to refrain from work every week on his or her Sabbath; or to wear religious garb; or to have a place to pray. An employer must try to arrange to allow the employee to meet these religious obligations. Examples of possible accommodations may include shift swaps between employees, voluntary assignment substitutions, flexible scheduling (allowing an employee to work on Sundays, Christmas or other national holiday in place of the day he or she needs off), lateral transfers to other positions in the company, and use of lunch time in exchange for early departure. An employer could allow an employee who is a Friday-night Sabbath observer to work longer hours on Monday through Thursday to enable the employee to leave early on Friday to be home for the Sabbath. An employer may require an employee to use paid time off, such as personal or vacation days, to meet an employee's required accommodation.

An employer may not simply refuse to accommodate an employee. If the employer claims that accommodation is not feasible because it would result in an undue hardship (see below), the employer must demonstrate the effect accommodation would have on the business; that is, the employer must prove the undue hardship.

Therefore, employers are obligated to (1) try in good faith to resolve the conflict between the employee's religious needs and job requirements; and, where an accommodation cannot be granted, (2) identify an actual monetary or administrative expense.

The employer is not mandated to provide the specific accommodation requested by the employee. As long as the employer has reasonably accommodated an employee's religious needs, the employer need not consider the employee's alternative suggested accommodations even if the employee's preferred accommodation would not cause undue hardship to the employer [6].

An employer should not schedule tests or training in a manner that totally precludes the participation of Sabbath or religious holiday observers. As with the scheduling of work, the employer must attempt to accommodate the religious needs of the employee. The employee cannot be unreasonable in demanding accommodation. For example, if the same test or training is being given at another location on another day, the employee may be required to take it elsewhere. In addition, the employee may be required to use personal time to take the test or training.

What is an “undue hardship”?

An employer is not required to provide an accommodation that causes it an "undue hardship." The U.S. Supreme Court has ruled that this means that an employer need not incur more than minimal costs in order to accommodate an employee's religious practices [7]. The EEOC has interpreted this to mean that an employer can show that a requested accommodation causes it an undue hardship if accommodating an employee's religious practices requires anything more than ordinary administrative costs, diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, causes coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work, or if the proposed accommodation conflicts with another law or regulation.

For example, an employer probably does not have to train a part-time employee at substantial cost in order to cover for another employee who is unable to work on Saturdays. Also, if a collective bargaining agreement is in force which sets forth rules regarding seniority and assignments, it may be an undue hardship to ask the employer to violate that agreement. An employer is also not required to pay premium

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or overtime costs in order to accommodate the religious needs of employees. Some employers do voluntarily pay these costs; however, this is up to the employer.

Are all employers required to try to accommodate their employees' religious needs?
Federal law applies only to companies with more than 15 employees, although many state and local employment laws protect employees of smaller companies. Many employers also have come to realize that in addition to the legal requirement to accommodate religious employees, a commitment to religious accommodation can improve employee morale and help retain valued employees who are religious.

What are the employee's responsibilities?
Employees seeking to observe their religious beliefs and practices have a responsibility to do their part to help resolve conflicts between job duties and religious needs. To this end, an employee must tell his or her employer about the religious commitment at the time the job is accepted or immediately upon becoming observant or aware of the need for an accommodation. Employees must also be clear when explaining why they need an accommodation. Vague objections such as saying that he or she cannot work on a particular day because of cultural tradition will not suffice; the employee must clearly state that he or she is required not to work because of religious beliefs.

Employees do not have to justify or prove anything about their religious belief to the employer (for example, the employee need not provide a note from clergy): an employer is required to accommodate - subject to the undue hardship rule - any of the employee's sincerely-held religious beliefs.

What counts as a religious belief that needs to be accommodated?
Although the law requires that employers must accommodate "sincerely held" religious beliefs that conflict with work requirements, courts rarely question either the sincerity or religiosity of a particular belief. The law's intention is to provide protection and accommodation for a broad spectrum of religious practices and belief - not merely those beliefs based upon organized or recognized teachings of a particular religion. Therefore, religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to be entitled to protection and courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. In short, the fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief.

However, it is equally clear that Title VII was intended only to protect and accommodate individuals with sincere religious beliefs and not those with political or other beliefs unrelated to religion. Thus, the religious accommodation rules do not apply to requirements based on personal preferences rooted in non-theological bases such as culture, heritage or politics.

May an employee wear religious garb or symbols to work?
Employers must attempt to accommodate employees who, for religious reasons, must maintain a particular physical appearance or manner of dress in keeping with the tenets of their religion. Again, accommodation is required only if it can be made without undue hardship to the employer. When it comes to religious apparel, typically only safety concerns constitute undue hardship.

Can an employer ask about religion on my job application?
No. Questions concerning an applicant's religion or the religious holidays observed by an applicant are impermissible. For example, an employer may not ask an applicant: "does your religion prevent you from

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working weekends or holidays?" or "What church do you attend?" However, during an interview an employer may describe the regular days, hours, or shifts of the job. Again, it is the employee's responsibility after he or she is hired to alert the employer of religious observances which require an accommodation.

Can an employee object to a diversity program or pledge on religious grounds?
This issue is likely to arise in the context of workplace diversity initiatives that include acceptance of certain people (such as gays and lesbians) or lifestyles (such as unwed motherhood) that some religious people claim to find offensive on the basis of religion. For example, in one case, an employee told his employer that his sincerely held religious beliefs against homosexuality conflicted with his employer's requirement that he sign a code of conduct that contains a diversity policy requiring each employee to "fully recognize, respect and value" differences among co-workers. He claimed that there was a conflict because he claimed he cannot value any "difference" that is "contrary to God's word."

Although the law is still evolving in this area, an employer may have to accommodate the objecting employee's religious point of view - but not to the extent that it causes the employer an undue hardship. As in a "typical" accommodation request, employers are obligated to (1) try in good faith to resolve the conflict between the employee's religious needs and the employer's needs; and, where an accommodation cannot be granted, (2) identify an actual, minimal monetary or administrative expense[8]

Do Public Employees Have Accommodation Rights Under Other Laws?

In addition to Title VII, public employees can seek religious accommodations under the First Amendment and other state laws. The First Amendment's free exercise clause may require a public employer to accommodate an employee's religious observance or practice. If the employer adversely treats religiously-motivated conduct compared to similar secular conduct, it can only justify its actions by demonstrating a narrow and compelling interest. [9] Demonstrating such an interest is much more difficult than establishing an undue burden under Title VII. For instance, a U.S. Court of Appeals invalidated a police department policy prohibiting officers from wearing beards for religious reasons, but allowing beards for medical reasons. [10]

Additionally, twenty states currently have laws - either by statute or court decision - called Religious Freedom Restoration Acts (RFRAs), which also require the government to demonstrate a narrow and compelling interest where a religious observance or practice is substantially burdened by a law, rule or practice. [11] For the purposes of these laws, it is irrelevant whether or not the law, rule or practice is general in nature or neutral towards religion. State courts have generally not ruled on whether or not RFRAs are applicable to the public workplace. Therefore, they may be another avenue for public employees to seek religious accommodations.

The First Amendment's free speech clause may also require a public employer to accommodate an employee's religious expression. To be protected by the free speech clause, the expression must not be made pursuant to the employee's official duties. [12] Furthermore, the employee must demonstrate that his or her expression is a matter of legitimate public concern, and the employee's interest in commenting on the matter must outweigh the employer's interests in operating efficiently and effectively. [13]

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Recap:

To show that an employee has had her rights violated under the religious accommodation rules, she must show that:

1. She has a bona fide religious belief that conflicts with an employment requirement
2. The employer was made aware of the conflict; and
3. She was subjected to an adverse action (such as dismissal) for not complying with the employment requirement.

To avoid liability, an employer must show must show that

1. The employer offered a reasonable accommodation; or
2. After a good faith effort, no accommodation that did not cause an undue hardship could be found.

RELIGIOUS HARASSMENT

Introduction
Under Title VII, an employer has an affirmative obligation to maintain a work environment free of harassment, intimidation and repeated insult.

What is harassment based on religion?
Just like sexual harassment, religious harassment can occur in either or both of two forms: quid pro quo harassment and hostile environment harassment. [14]

1. *Quid pro quo* harassment occurs when a harasser seeks to exchange a "tangible employment benefit" for compliance with a harasser's religious demands (for example conversion and participation in religious worship) and, when the demand is not complied with, the harasser engages in an adverse employment action. [15]

2. A hostile work environment occurs when there is offensive conduct directed at an employee because of that employee's religion, and where the conduct is so severe or pervasive that it affects the terms or conditions of employment and the employer fails to take reasonable steps to stop the conduct. To determine this, a court will look at the overall facts of the case, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

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The Supreme Court held that harassment need not seriously affect employees' psychological well-being in order to be problematic under Title VII so long as the environment would reasonably be perceived, and is perceived, as hostile or abusive. [16]

When is an employer liable for a hostile work environment?

If co-workers are creating a hostile work environment through religious harassment, an employer is liable if it knew or should have known of the religious harassment and failed to implement prompt and appropriate corrective action.

If a supervisor is creating a hostile work environment through religious harassment, an employer is liable. The employer can show, as a defense, that the harassment resulted in no tangible adverse employment action (such as demotion or termination).[17]

The only way an employer can avail itself of this "no tangible action" defense, however, is if (a) it exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

What about teasing and jokes?
There will be a hostile work environment only "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." [18]

The Supreme Court has consistently held that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.

Recap:

To show that he was subject to workplace harassment based on religion, an employee must show that:

1. he was subjected to unwelcome religious harassment;

2. the harassment was based on religion;

3. the harassment had the effect of unreasonably interfering with his work performance by creating an intimidating, hostile, or offensive work environment; and

4. the employer was liable for the harassment

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RETALIATION

Introduction
An employer retaliates against an employee if, because the employee engaged in "protected activity," (such as opposing, complaining about, or testifying about discrimination) the employer took an adverse employment action against the employee.

This is important because the rapid increase in religion claims to EEOC are being eclipsed by the rise in retaliation charges. Over 37% of all EEOC filings contain a retaliation charge, and retaliation charges are the fastest growing category of complaint. [19] The U.S. Supreme Court's 2006 *Burlington Northern v White* decision makes it even more likely that more retaliation charges will be filed - and will be successful -- because it expands the kinds of actions that will be counted as retaliation. [20]

What is retaliation?
Title VII forbids employment discrimination against "any individual" based on that individual's "race, color, religion, sex, or national origin." 42 U.S.C. Sec. 2000e-2(a). A separate section of the Act - its anti-retaliation provision - forbids an employer from "discriminat[ing] against" an employee or job applicant because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation. Sec. 2000e-3(a).

What kind of conduct is protected from retaliation?
Filing a charge of discrimination; threatening to file a charge; complaining about, opposing or protesting perceived discrimination against yourself or another employee; assisting someone else in opposing discrimination; giving evidence or testimony to an investigator; refusing to engage in conduct that you believe to be unlawful; and refusing to assist an employer (by testimony or otherwise) in discriminating.

Can an employee allege retaliation if the employee is wrong about the discrimination they allege?
Retaliation is a separate charge. So, even if the underlying claim of discrimination ultimately is unfounded, an employer may be responsible for its conduct in response to the filing of that complaint. [21]

Workplace Proselytizing and Expression

Introduction
Workplace proselytizing presents a special challenge to employers, because the failure to respond to employees' complaints about proselytizing could lead to charges of religious harassment, but requiring a religious employee to cease proselytizing may result in liability for failure to reasonably accommodate the employee's beliefs.

What kind of guidance is available to deal with workplace proselytizing?
Although the law is developing in this area, some guidance is available. An employee has a right to engage in religious conduct to the extent that it is not an undue hardship on the employer. Harassing another employee is likely to be an undue hardship. Recall, however, that harassment is a fairly high - but not impossible - standard.
So, while the line between permissible proselytizing and workplace harassment is blurry, important factors that bear on the analysis include:

- the pervasiveness of the proselytizing;

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- its impact on coworkers and work performance (including profitability) and;
- the capacity and willingness of the employer to take steps to accommodate the aggrieved parties, such as by moving the proselytizing employee and the offended employee to different work stations.

May a company hire a "corporate chaplain?"
Some companies hire corporate chaplains to serve their workplace. This practice is not inherently unlawful and may even prove beneficial. Although the courts have not weighed in on this subject, all of the above employment law rules likely apply to such a situation:

- An employer cannot lawfully require an employee to engage in religious activity, and so employers must take care that no employee is required or coerced into engaging in religious activity as a term or condition of employment.
- Evangelism (especially sustained evangelism) by a minister may constitute or serve as evidence of-a hostile work environment.
- An employee is likely to be entitled to opt out of meeting with the minister if her religious beliefs prohibit it.

May a company allow prayer groups?
Yes, so long as participation in the prayer group is voluntary and that there are no employment-related consequences to participating or not participating. For example, if access to a supervisor who is involved in a prayer group leads to preferred assignments for an employee, other employees may have a claim for discrimination. If an employer insists on an employee's participation, that company may be liable for quid pro quo discrimination, as well. Finally, if pressure to attend is applied by supervisors or co-workers, an employer may be liable for a hostile work environment.

May an employee post posters, bible quotes, or other religious slogans?
Employees do have certain rights to express their religious views in the workplace. For example, most employers will not be able to show that it would be an undue hardship to permit one employee to wear a yarmulke or another to display a cross in his or her private office. Title VII does not compel employers to accommodate employees' religious expression that could reasonably be perceived by patrons as an expression of the employer's views. [22] An employer can also restrict expression that disrupts operations or that is hostile or demeaning to customers or colleagues. [23]

Sample Scenarios

?	A shipping company refused to hire a Jewish man as a driver because of his beard, which he wears for religious purposes. The company required him to either shave his beard or apply for an "inside," lower paying position that would not have contact with the public.
✓	Title VII of the Civil Rights Act of 1964 requires employers to make reasonable accommodations to employees' and applicants' sincerely held religious beliefs as long as this does not pose an undue hardship. If the company cannot show why a beard is a hardship, it must hire the man as a driver. Notably, the company may not argue that its customers would prefer non-bearded drivers as "customer preference" is not a valid basis for a hardship.

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?	A restaurant chain fires a server because he has small, quarter-inch wide ring of tattoos on his wrist. He wears these tattoos as a part of his sincerely held belief that his faith, the Kemetic religion, requires them. Once he explained his religion to management, he was fired. At a corporate meeting, management stated that the company has "Christian" values and that the company seeks out "that all-American kid" from the suburbs for its server positions. The restaurant maintained that any change to its dress code – including prohibitions on tattoos -- would detract from its "wholesome image," and would thus be an undue hardship.
✓	An employer is required to support its claims of undue hardship with more than hypothetical hardships based on unproven assumptions about image. Moreover, as noted above, customer preference is not a legitimate reason for not accommodating a religious need.
?	An employer of a particular faith requires her employees to read passages from her preferred religious text out loud at company meetings, offers paid days off to attend religious gatherings, and works closely to help advance the careers those employees who adopt her faith.
✓	An employee who refuses to participate in such activity must not be penalized An employer is not permitted to treat acceptance of religion or participation in religious rituals as a condition of employment, including advancing the careers of adherents or providing benefits not open to non-adherents, such as paid days off.
?	A co-worker occasionally teases a Muslim employee about her *hijab* (headscarf). Although the Muslim employee is offended and tells her colleague to stop, she continues to work productively and does not report it because the company has no reporting process in place. Later, a manager begins to constantly criticize her for wearing the *hijab*, and, as a consequence of his disapproval of her wearing it, moves her into a lower-paying back office position. In addition, in a fit of anger, he grabs at the *hijab* and tears it and knocks the employee down to the floor.
✓	The company is probably not liable for a hostile work environment on the basis of the co-worker's actions. The harassment was neither severe or pervasive and did not effect her terms and conditions of employment. The manager's actions probably gives rise to a hostile work environment. The constant criticism plus the physical assault are both likely to meet the "severe or pervasive" test. Moreover, there was a clear adverse employment action (the move to the back office). The employer will not be able to avoid liability because there was an adverse employment action and there was no reporting mechanism.
?	A co-worker refuses to sign a workplace pledge concerning tolerance of differences because he believes it is immoral and against God's word to tolerate homosexuals. Her manager orders him to sign it and he refuses. He fires him on the spot.
✓	The employer has an obligation to determine whether his refusal to sign the

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	pledge could be accommodated. By immediately firing him, the employer failed to determine if there was an accommodation available.
?	An employee had a religious belief that required her to wear an anti-abortion button that showed a color photograph of an eighteen to twenty-week old fetus. The button caused disruptions in the workplace, and the employee's co-workers complained about the button. In response, the employer offered the employee three accommodations: (1) wear the button only in her cubicle; (2) cover the button while at work; or (3) wear a different button with the same message but without the photograph. When she refused these accommodations, she was terminated.
✓	Title VII does not require an employer to allow an employee to impose her religious views on others. The employer is only required to reasonably accommodate an employee's religious views. In light of the workplace disruption and complaints, and given that the proposed accommodations allowed her religious expression, she was offered a reasonable accommodation and her refusal to accept them justified her termination.

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1 These statistics do not include monetary benefits obtained through litigation. See http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm

2 What follows is meant to serve as a general guide about protections for religious rights provided by federal employment law. Importantly, state law may provide different protection for employees. Government employees - including members of the armed services - may also have different rights in the workplace than private employees. Title VII of the Civil Rights Act of l964 only applies to employers with 15 or more employees; however, many state employment anti-discrimination statutes apply to employers with fewer employees.

3 See Section 702(a) of Title VII, 42 U.S.C. Sec. 2000e-1(a).

4 See Section 703(e)(2) of Title VII, 42 U.S.C. Sec. 2000e-2(e)(2).

5 According to the EEOC Compliance Manual, "[t]he exception applies only to those institutions whose "purpose and character are primarily religious" That determination is to be based on "[a]ll significant religious and secular characteristics" Although no one factor is dispositive, significant factors to consider that would indicate whether an entity is religious include: Do its articles of incorporation state a religious purpose; Are its day-to-day operations religious (e.g., are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion); Is it not-for-profit; [or] Is it affiliated with or supported by a church or other religious organization?" (Citations omitted). See U.S. Equal Employment Opportunity Commission, EEOC Compliance Manual, Section 12: Religious Discrimination, Directives Transmittal Number 915.003 (July 22, 2008), http://www.eeoc.gov/policy/docs/religion.html#_Toc203359493

6 *Ansonia Board of Education v. Philbrook,* 479 U.S. 60 (1986).

7 *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977).

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8 See, e.g, *Buonanno v. AT&T Broadband, LLC,* 313 F.Supp.2d 1069, 1083 (D.Colo. 2004); and see *Peterson v Hewlett-Packard*, 358 F.3d 599 (9th Cir. 2005).

9 See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993); *Rex Shrum v. City of Coweta* , 449 F.3d 1132 (10th Cir. 2006); FOP Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999), cert denied, 528 U.S. 817.

10 FOP Newark Lodge No. 12, 170 F.3d 359.

11 The twenty states are Alabama, Alaska, Arizona, Connecticut, Florida, Idaho, Illinois, Indiana, Massachusetts, Minnesota, Missouri, New Mexico, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Washington, and Wisconsin.

12 *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

13 *Garcetti*, 547 U.S. 410; *City of San Diego v. Roe*, 543 U.S. 77 (2004); *Pickering v. Board of Education of Township High School Dist.* 205, 391 U.S. 563 (1968); *Berry v. Department of Social Services,* 447 F.3d 642 (9th Cir. 2006); *Daniels v. City of Arlington*, 246 F.3d 500 (5th Cir. 2001), rehearing, en banc, denied by, 254 F.3d 72, cert. denied, 534 U.S. 951.

14 Most courts use sex-based harassment as a model for handling religious-based harassment.

15 An adverse employment action is anything that affects the "compensation, terms, conditions, or privileges of employment" or that "deprive[s the employee] of employment opportunities or otherwise adversely affect his status as an employee." Section 703(a)(1) & (2) of Title VII, 42 USC Sec. 2000e-2(a)(1) & (2).

16 *Harris v. Forklift Systems*, Inc., 510 U.S. 17 (1993).

17 See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998).

18 *Harris v. Forklift Sys.*, Inc., 510 U.S. 17, 21 (1993).

19 See http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm

20 548 U.S. 53 (2006) (held, the anti-retaliation protections of Title VII are not limited to actions and harms that are related to employment or occur at the workplace. Title VII's anti-retaliation protections extend to employer actions that would have been materially adverse to a reasonable employee or job applicant).

21 *Clark County v. Breeden*, 532 U. S. 268 (2001).

22 E.g., *Anderson v. U.S.F. Logistics* (IMC), Inc., 274 F.3d 470, 476 (7th Cir. 2001).

23 *Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995) and *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004).

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