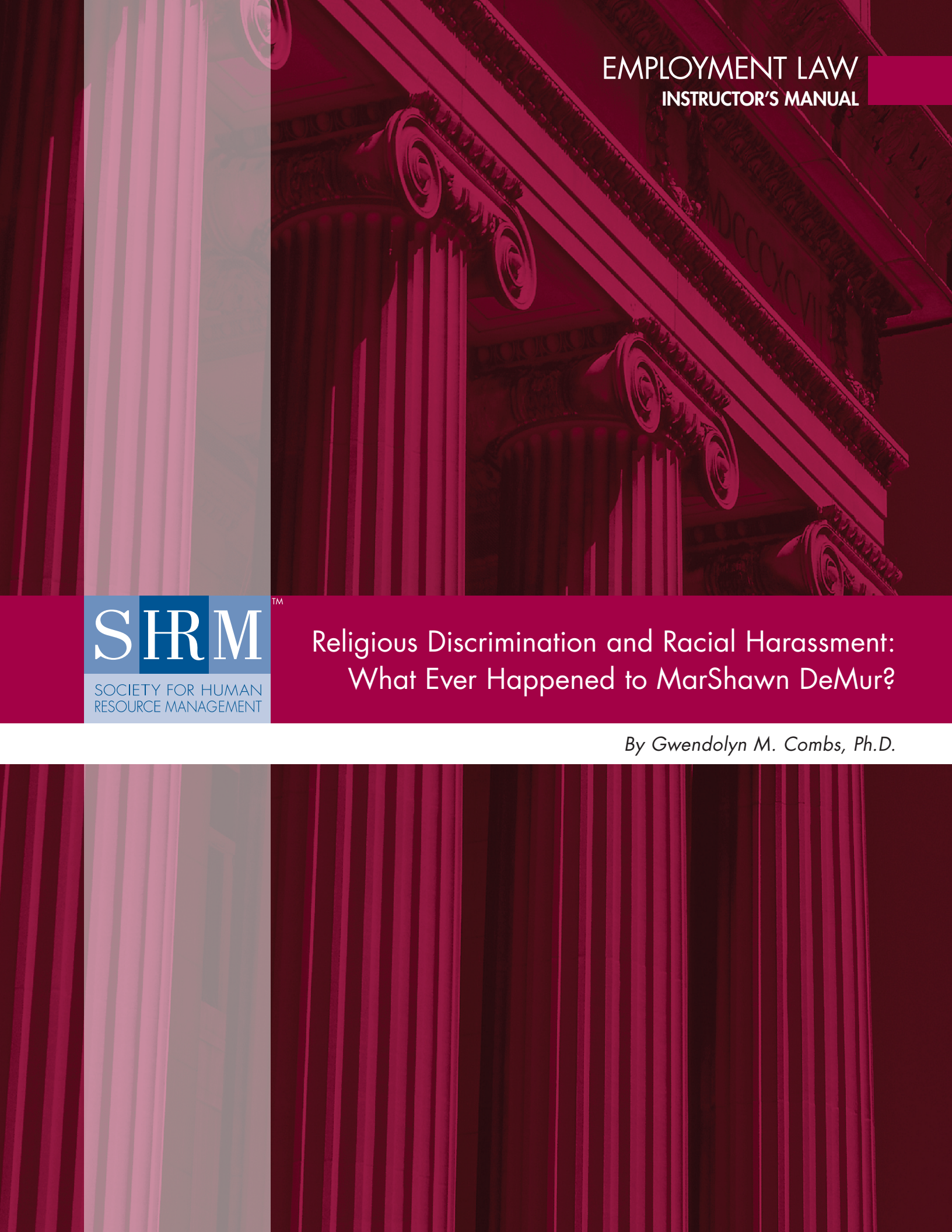

EMPLOYMENT LAW
INSTRUCTOR'S MANUAL

SHRM™
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Religious Discrimination and Racial Harassment: What Ever Happened to MarShawn DeMur?

By Gwendolyn M. Combs, Ph.D.

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09-0093

Instructor's Notes

Case Learning Objectives

- Establish the basis for and recognition of potential disparate treatment and disparate impact situations in the workplace.
- Analyze the legal requirements for employers in considering and/or accommodating employee religious beliefs and preferences in the workplace.
- Examine the interface of judicial precedent, legislative intent, Title VII and organizational policy/managerial decision-making.
- Recognize the roles and responsibilities of human resource (HR) professionals in addressing these issues.

Target Audience

Undergraduate and graduate level students who have a basic background in HR management and equal employment/diversity issues.

Time Allotment

Small Group/Large Group Discussion: 60-75 minutes.

Mock Trial: This approach will require either two standard 75-minute class periods (one for preparation of students and introduction of concepts and one for execution of the trial); or one class period for execution of the mock trial following approximately two to three hours of outside class preparation time for students.

SUGGESTIONS FOR CASE FACILITATION

This case works best in conjunction with the study of equal employment opportunity, diversity or selection. Before introducing the case, the instructor should develop students' knowledge and understanding of the basic legal and organizational concepts associated with these areas. This would include providing students with information about relevant laws and terms pertinent to this case (see Supplemental Instructor Materials). This can be done through a lecture with a slide presentation; alternatively, the instructor can distribute information to students prior to case presentation and assign them to research the terms as well as applicable laws, regulations and court decisions.

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Small group/large group discussion. Due to the difficulty and interlocking nature of the actual and potential problems represented in this case, the instructor might find it helpful to divide the students into small groups of four to six individuals. Each group could be assigned one question to discuss and develop their best response. Depending on the number of resulting small groups, there may be more than one group discussing a given question. For example, the first question is a multifaceted one that could result in different responses depending on the group's understanding of the case and the application of Title VII. These contrasting views can provide excellent comparative discussion. Also, question 4 is a more reflective question that could generate different responses based on student experience and knowledge about HR policies. After allowing ample time for the small groups to draw conclusions and develop further questions, the instructor should facilitate group reporting of their answers and a large group discussion of the questions.

Mock trial. Students should be given:

- Prior preparation time to review the case and background materials.
- The opportunity to volunteer to present positions in support of Maalick's allegations or in defense of the company.
- Sufficient outside class time to prepare their arguments for their position.

On the scheduled day of case discussion, select three to seven members to serve as jury and persons to play the roles of Maalick, Jenkins, Ford and Dixon. Give each group representing Maalick or Treton time to consolidate their outside research and prepare arguments. Maalick will consult with the group representing his case and Jenkins, Ford and Dixon will confer with the group representing Treton. Opposing sides should determine who will serve as legal counsel representing their clients. The instructor will serve as judge and time keeper, with each group given time to present opening statements to the jury; present their case; present witnesses; conduct cross-examination of opponent's witnesses; and give closing remarks. Following the presentations from each side, the jury will deliberate and render a decision. The jury must explain the rationale for their decision(s).

SUGGESTED READINGS

Thomas, D. C. (2008). *Cross-cultural management: Essential concepts.* Los Angeles, CA: Sage Publications.

Society for Human Resource Management & Tannenbaum Center for Interreligious Understanding. (2001). *Religion in the workplace survey.* Retrieved June 11, 2008, from www.shrm.org/Research/SurveyFindings/Articles/Pages/ReligionintheWorkplace.aspx

Saee, J. (2005). *Managing organizations in a global economy: An intercultural perspective.* Mason, OH: Thomson South-Western.

Steingold, F. S. (2007). *The employer's legal handbook.* Berkley, CA: NOLO Publications.

Case Introduction

The diversity of the domestic and global workforce is increasing due to the growing number of immigrants and the expansion of global operations. The management of religious differences and the interface of varying religious beliefs and management practices are profound concerns for many organizations and human resource professionals. Religious communities may be quite different in beliefs and practices, and this can influence employee interaction with formal and informal work practices and social norms. Additionally, response to religious differences can sometimes be intertwined with racial biases and attitude predispositions. This case will depict a particular organizational situation involving an employee's religious beliefs and the resulting allegations of racial harassment and religious discrimination. (*Note: The people and facts in this case are fictitious and do not represent any known party, organization, religion or situation.*)

Organizational Profile

Treton Communications, Inc. is a public giant in the telecommunications industry. Headquartered in Eastern Michigan, Treton offers a range of wireless and wireline communications services to consumers, businesses and government users. In addition to its headquarters campus, Treton has call centers and regional operations throughout the United States. The company's gross revenue was $20 billion in 2007, with 30,000 employees worldwide. Two years ago, Treton expanded its operations with the opening of its Midwest facility and plans to add two more facilities in Southern and Northwestern locations in the United States. These new facilities offer many Treton employees exciting opportunities for advancement.

The Midwest facility is located in Chenworth, Kansas. It currently employs 360 workers, with plans to reach a full workforce complement of 800 employees within three years. Chenworth's demographics indicate a population that is predominantly white, with 7 percent racial/ethnic minorities. The demographics of the 360 employees of the Midwest facility similarly reflect a 5 percent racial/ethnic minority representation.

Employee Relations

Treton takes pride in its non-union status and strives to develop policy and implement programs that demonstrate its strong company culture of employee development and empowerment, procedural and operational integrity, and ethical decision-making. To sustain its culture and values, Treton has policies, procedures and guidelines that articulate its expectations of employee and employer behaviors. Promoting and facilitating workforce diversity is a guiding principle for Treton. The organization has written policies and directives regarding workforce diversity, equal employment opportunity/nondiscrimination and workplace harassment.

Principal Individuals

MarShawn DeMur (a.k.a. Maalick)	Employee filing the complaint
Clive Jenkins	Midwest facilities director and MarShawn's supervisor
Marta Ford	Midwest facility human resources director, EEO and diversity compliance officer
Judith Dixon	Corporate vice president for EEO and diversity

The Situation

MarShawn DeMur has worked for Treton for six years. He started as a management intern working summers while attending college. After graduation, he was hired as a customer service supervisor overseeing three technicians in one of the large customer service centers in Detroit, Michigan.

DeMur was encouraged by a manager at the Michigan center to apply for a promotion and transfer to the newly opened Midwest facility. DeMur, who is African American, had questions about the demographics of the location and the facility but decided to apply for an operations manager position at the Kansas facility. The operations manager position reported to the facility director, Clive Jenkins. DeMur was selected for an interview with Jenkins. During the interview, Jenkins discussed company philosophy and his vision that the facility would operate as "one big happy family." Employees would be evaluated on their strengths and productivity, and the benefits of diversity in all areas would be maximized. Jenkins assured DeMur that if hired, the management team would help him with his transition.

The day after the interview, Jenkins invited DeMur to attend his church to meet new people and get acquainted with others in the city. He was told that several facility employees were church members. Jenkins invited DeMur to his home for a casual dinner after church services. Most of the dinner guests were church members, with a few other community people in the mix. It was a pleasant affair where DeMur exchanged contact information with several people and received pledges from others to look out for him if he relocated. DeMur thought the new job would be a good career change, especially with such a supportive group of people. He was offered the position, accepted the job and moved to Kansas.

DeMur started his new position with enthusiasm. He interacted well with co-workers and subordinates and demonstrated high technical competence in his work. Jenkins often complimented DeMur on his ideas and work ethic. His first annual performance appraisal was superior in all areas. DeMur liked his job and saw great potential for advancement in the company.

Before he had accepted his new job and moved to Kansas, DeMur decided to become a member of the Church of International Spirituality. The existence of a small African-American congregation of Internationalists in Chenworth, Kansas, influenced DeMur's decision to take the promotion and relocate. Although the Internationalist congregation in Chenworth was comprised of only 80 people,

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they held regular worship services and offered spiritual education classes. The Internationalists were regarded as a new-age religious group. They required members to commit to strict restrictions on diet, appearance, methods of worship and other areas of conduct. DeMur was quite committed to Internationalist beliefs. He was often found reading Internationalist materials on his work breaks and during lunch period.

The final step to become an Internationalist was a five-day intensive spiritual preparation and confirmation process. Participation in this religious practice required DeMur to be away from work for a week. He approached Jenkins about this need and requested a week of vacation to attend the final process for church membership. Jenkins inquired about the reason for the time off. He asked many questions about the Internationalist religion and admitted that he was not familiar with the religious group. He raised several questions about the authenticity of the religion. During the conversation, Jenkins told DeMur, "You know I am a religious person, but what you describe sounds quite strange. I need some information on this so-called religion before I can make a decision to give you a week off. We are quite busy, you know! I have been wondering about what I have seen you reading, and, frankly, some of your workers have asked me about the pamphlets you leave around your office." Although DeMur was disturbed by the conversation, he complied with the request for information. Jenkins reluctantly granted the time off.

A few days before DeMur was to leave for his vacation, several employees approached him and asked about his "so-called" religion. They told DeMur that the members of his new congregation were considered strange by others in the city. Many called them voodooists and partakers of witchcraft and sorcery. DeMur countered these remarks by providing more correct information about the Internationalist religion. He wondered about the source of his co-worker's perceptions. Despite this, DeMur left to attend his week-long confirmation ceremony excited about meeting other Internationalists.

Internationalists were required to change their names after confirmation to reflect their changed position based on spiritual doctrine. DeMur was given the spiritual name of Maalick and was required to use it at all times. When Maalick returned to work, he stopped by the HR department to complete the paperwork to formally change his name. He spoke with HR director, Marta Ford, about the questions his co-workers asked him about his religious beliefs. Ford assured him that his name change would be recognized and reflected in company records and told him not to worry about his co-workers. Maalick proceeded with his normal duties and began to sign correspondence with the name Maalick.

When he entered his department the next day, he noticed strange looks from his co-workers. As he greeted them, they simply nodded their heads, laughed and immediately walked away. When he entered his office, Maalick found it decorated with dolls with pins sticking out of various body parts, witch hats and containers of incense. On the wall behind his desk was a picture of Africa decorated with strange letterings and symbols. Maalick was astonished and immediately called Jenkins and

asked that he come to his office. When Jenkins saw the office, he laughed and said, "Well DeMur—or shall I say Maalick—I must say you have some admirers. As an American with African roots, you should have expected some lighthearted ribbing about your conversion to that strange religion of yours. Even you must admit that they do some weird things." Maalick replied, "No, I must say that I did not expect this!" Jenkins recognized that Maalick was angry and upset over the incident and promised to handle the situation.

Over the next several months, Maalick received a series of notes left on his desk and car referencing black cats, black magic, requests for palm readings and notices about the disappearance of MarShawn DeMur. Not wanting to cause any problems or be labeled as a troublemaker, Maalick ignored these incidents, thinking that people would tire of the pranks and things would die down. However, on one occasion, he found on his desk several sheets of what appeared to be chants with a title at the top that read "Prayers for Black Folk." Next to the pages was a book titled *Mystical Practices from the Negro Experience*. Maalick immediately took the materials to the HR department and met with Ford. Ford told Maalick, "I have been out of the office a lot helping with the staffing of the new Northwestern facility and had no idea you were having these kinds of problems. Do you have any idea who is responsible for these actions?"

"No I don't," said Maalick.

"This is not the type of behavior that is condoned at Treton. Don't worry, I will handle this immediately. I am so sorry about all of this," said Ford.

After Maalick left her office, Ford called a meeting of all department heads and informed them of the situation. Ford immediately sent an e-mail to all facility employees, reminding them of Treton's policies regarding discrimination and harassment and the penalties associated with such actions. By the end of the day, all department heads met with their employees with specific warnings and orders for the behaviors to cease and desist. The days following were a bit tense in the office but calm. Maalick was relieved to not find any more notes or messages.

Ford visited with Maalick on several occasions to ensure that he was not continuing to experience any problems. Maalick was happy to report that, in his opinion, all was well. On Ford's last visit, Maalick took the opportunity to ask about two new systems manager openings. Promotion to a systems manager position would assist Maalick's career goals for advancement with Treton. Ford sent Maalick the position description and encouraged him to apply. After reviewing the systems manager job requirements, Maalick believed that he had more than a good chance at a promotion. He spoke with Jenkins about the job duties and requirements and expressed his interest in the position. Maalick was informed that at that time, only one of the vacancies would be filled. The second vacancy would be filled within the next six months. These positions also reported to Jenkins.

Maalick applied for the position and was interviewed by Jenkins. The job was given to an outside candidate, Charles Bartlett. Maalick later discovered that Bartlett

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was a member of Jenkins' church. Given Maalick's perception of his qualifications and excellent performance record, he wondered if there were factors other than qualification that influenced the decision not to promote him. He also recalled Jenkins' conduct at the company holiday party where he joked about Maalick's conversion to the Internationalist faith. Maalick filed a formal complaint with Ford, alleging religious discrimination and racial harassment. As required by Treton policy, Ford reported the particulars of the complaint to Judith Dixon, vice president for EEO and diversity, at the corporate office. The next afternoon, Dixon was at the Chenworth facility meeting with Ford and Jenkins.

Questions for Discussion (see recommended answers on page 11)

1. Identify and describe the specific issues Maalick encountered in the workplace. Do the actions of other workers at Treton represent discrimination and harassment? What elements of law are important for Treton to consider?
2. Evaluate the actions of the HR director, Marta Ford, in response to Maalick's situation. What could she have done to prevent the situation and what more could she do to ensure that this type of situation would not occur in the future?
3. How would you characterize Clive Jenkins' behavior and response to this situation?
4. What resolution to this situation might Judith Dixon suggest?
5. What are the broader implications of this situation for Treton? What type of organizational review might Dixon initiate or suggest from a corporate perspective?

Treton Communications, Inc. EEO/Anti-Discrimination/Diversity/Harassment Policy

Revised 2007

EEO/Anti-Discrimination

Treton Communications, Inc. is an Equal Employment Opportunity employer. Policies of the company prohibit discrimination against an applicant or employee on the basis of race, color, religion, sex/gender (including pregnancy), national origin, age, disability, marital status or veteran status. The company will conform to the spirit as well as the letter of all applicable laws and regulations.

The policy of equal employment opportunity and anti-discrimination applies to all company facilities, employees and conditions of employment, including but not limited to hiring; promotion; transfer; evaluation; termination; layoff; training and accessibility to training; working conditions; wages and salary; employee benefits; and application of policies. Managers and supervisors at all levels have the responsibility to ensure equal employment opportunity. Managers and supervisors will be held accountable for achieving the adherence to this policy, and their annual performance will be evaluated in terms of this as well as other major organizational goals.

Diversity

Employees at Treton Communications, Inc. are critical to creating and sustaining the organization's competitive advantage. Diversity and inclusion are top priorities, and the company strives to maximize the benefits derived from the incorporation of diverse perspectives. It is Treton's position that a diverse workforce contributes to our strengths as a world-class provider of telecommunication services and enhances our ability to anticipate and satisfy the needs of our customers and clients. We leverage the benefits of diversity through our employee policies and practices, community investment and outreach.

Harassment

Harassment is a form of employment discrimination that violates one or more of the following: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA) and the Americans with Disabilities Act of 1990 (ADA). Harassment is defined as unwelcome verbal or physical conduct based on race, color, religion, sex (including same-gender harassment and gender identity harassment), national origin, age, disability or retaliation. Harassment becomes unlawful when:

1) Enduring the offensive conduct becomes a condition of continued employment, or;
2) The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive.

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Harassing behavior might be exhibited by anyone in the workplace, including management and supervisory staff, co-workers and peers, vendors/suppliers, contractors and subcontractors, or customer and clients. Victims of harassment can be anyone affected by the conduct, not just the individual at whom the offensive conduct is directed.

Internal Compliance

Employees at all levels, persons engaged in activities on the premises of Treton or persons who represent the company in any capacity are required to comply with the letter and spirit of this policy and all applicable and associated laws and regulations. Any employee or representative of Treton who believes that he or she:

1) Has been discriminated against;
2) Is the target of harassment;
3) Is being required to participate in unlawful discrimination and/or harassment and/or;
4) Has witnessed unlawful discrimination and/or harassment;

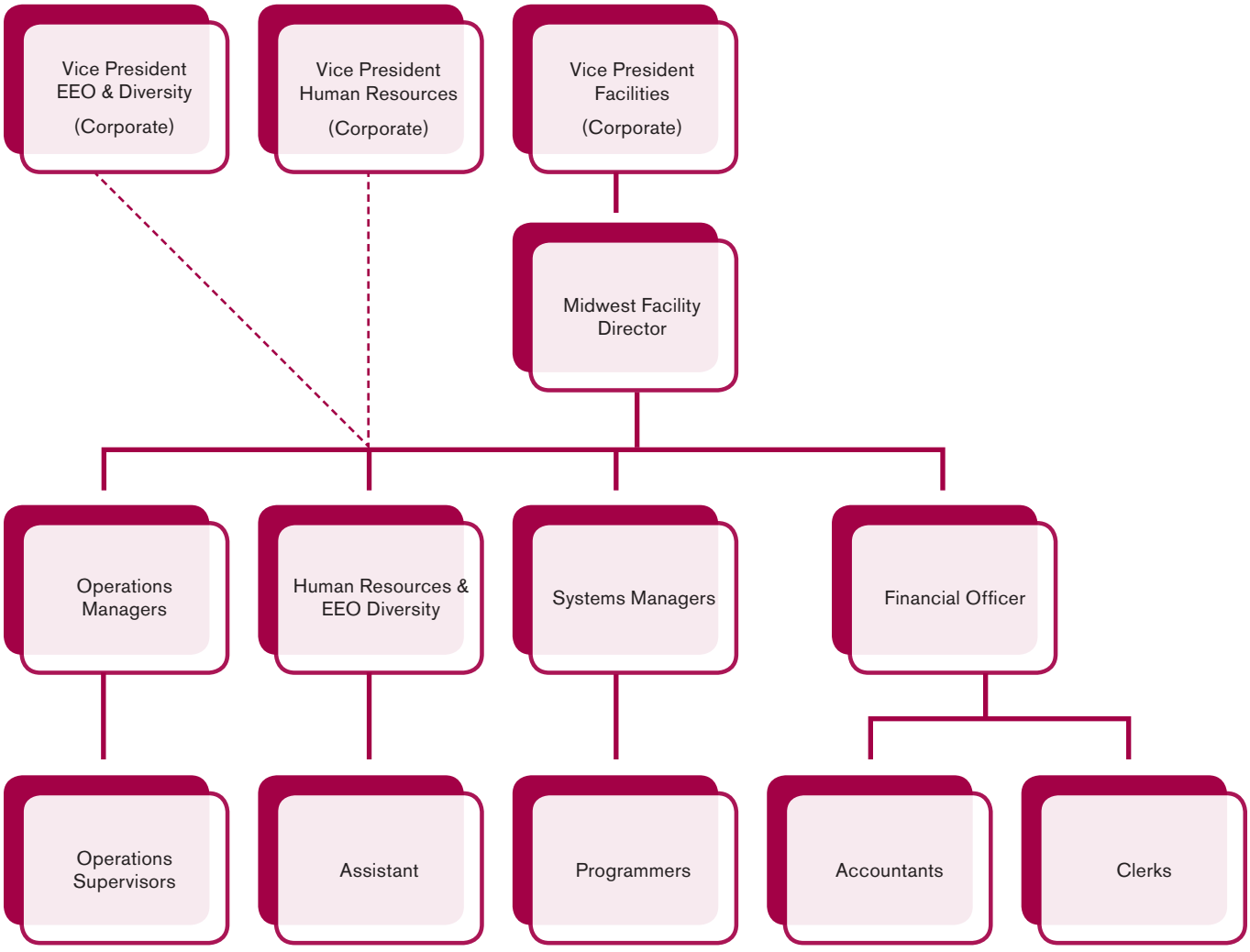
Should seek guidance from his or her supervisor, other management/supervisory personnel or the facility/location compliance officer. To the extent possible, all information will be maintained on a confidential basis. When a supervisor/manager is notified or is aware of discrimination or harassment, he or she must notify the facility compliance officer. The compliance offer for the Midwest facility is **Marta Ford, Director of Human Resources, Office 356, Phone 884-765-1234, e-mail martaford@treton.com.**

Violation of Policy

Violations of these policies, regardless of whether an actual law has been violated, will not be tolerated. The company will investigate every issue that is brought to its attention as relating to these policies and will take appropriate disciplinary action, up to and including termination of employment.

Treton Midwest Facility Organizational Chart

(Abbreviated)



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Recommended Answers to Questions and Discussion Points

1. Identify and describe the specific issues Maalick has encountered in the workplace. Do the actions of other workers at Treton represent discrimination and harassment? What elements of law are important for Treton to consider?

The instructor should review the concepts of disparate treatment, requirement to accommodate and harassment provided in the Supplemental Instructor Materials section.

Disparate Treatment: Maalick's allegation that he was not promoted due to religious bias.

Typically, the plaintiff (Maalick) must establish a *prima facie* case of religious discrimination in the hiring decision. In *McDonnell Douglas Corp. v. Green* 411 U.S. 792 (1973), the Supreme Court set the standard for the plaintiff's steps for establishing *prima facie*. Lower courts modified this requirement in religious discrimination cases, indicating that *prima facie* in this instance requires Maalick to show that:

(1) He was a member of and/or practiced a particular religion;

(2) He was qualified for the position for which he applied;

(3) He was subjected to an adverse employment action;

(4) The defendant (Treton) treated similarly situated employees outside his religious class more favorably; and

(5) The person who made the decision to impose the adverse employment action upon plaintiff was aware of the plaintiff's religious beliefs [See *Lubetsky v. Applied Card Systems, Inc.*, 296 F.3d 1301, 1306 n. 2 (11th Cir.2002); and *Generally Beasley v. Health Care Serv. Corp.*, 940 F.2d 1085, 1088 (7th Cir. 1991)].

Once Maalick meets the *prima facie* burden, the employer must present a reason for the adverse decision that is not predicated on the protected status of religion. Basically, Treton must show that Maalick would not have been promoted in spite of the knowledge of his religious beliefs. Once the employer states a non-discriminatory reason, the person alleging discrimination has the opportunity to show that the employer's stated reason is merely a pretext for discrimination.

As the case is presented, Treton may have difficulty convincing a court of the credibility of its non-discriminatory reason for refusal to promote Maalick. As the decision maker for the promotion, Jenkins' comments about Internationalists may

be extremely problematic. Comments by Jenkins at the time of Maalick's request for leave and when he witnessed the office decorations (e.g., use of the words "strange" and references to Maalick's reading materials) could be construed as direct evidence of an animus towards the Internationalist religion. While the courts have not often affirmed allegations of religious discrimination in hiring and promotion decisions, cases such as *Weiss v. Parker Hannifan Corp, 1990* should cause some concerns for Treton. In *Weiss v. Parker Hannifan Corp,* 747 F. Supp. 1118, 57 FEP 216 (D.NJ. 1990), the court in its review of a religious discrimination allegation concluded that derogatory statements made by the employee's supervisor were evidence of religious based discrimination. The court ruled that the denial of promotion to Weiss was based on his religion.

Requirement to Accommodate: There is no evidence in the case that Maalick was ever refused an accommodation requested due to his religious belief. In the one instance when he asked for a week's vacation to finalize his membership in the Internationalist faith, the leave was granted. If a conflict between an employee's religious beliefs and the employer's policy is articulated, Title VII requires the employer to attempt accommodation to remove the conflict. In this case, there was no articulated or resulting conflict stemming from denial of the leave request. Therefore, there was no discrimination triggered due to refusal to accommodate the religious practice because Maalick's request for vacation was granted.

Harassment Based on Religion and Race: Title VII prohibits harassment based on religion and race. In this case, there is an intertwining of religious and racial harassment. The religious components derive from the negative perceptions of Maalick's co-workers and supervisor of the Internationalist faith. The racial component stems from the fact that Internationalists in Chenworth were a small group of African Americans. Co-workers' attitudes toward Internationalists seem to be tied to their prejudice towards Africa, African culture and African Americans. These perceptions about Internationalists and the linking of African mystical practices to African American religious belief and worship practices result in stereotypes and prejudice that give rise to harassing conduct.

There are several instances in this case that point to behaviors, actions and comments that could be construed as religious-based harassment. These would include the questioning of Maalick by his co-workers; decorating Maalick's office with voodo dolls and incense; notes left on his desk and car referencing black cats, black magic and requests for palm readings; and notices about the disappearance of MarShawn DeMur. Similarly, racial harassment could be construed from the picture of Africa decorated with strange letterings and symbols placed on Maalick's office wall. Racial undertones can be especially taken from last incident, where Maalick found sheets of what appeared to be chants with the title "Prayers for Black Folk" and the book titled *Mystical Practices from the Negro Experience*.

According to EEOC regulations (see Supplemental Instructor Materials), for conduct to be unlawful it must be unwelcome and create a work environment that would be intimidating, hostile or offensive to a reasonable person. Maalick did not

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witness or see individuals performing the harassing behaviors and therefore could not directly inform the perpetrators that the behavior was unwelcome. However, the fact that Maalick summoned Jenkins to his office and expressed his displeasure with the office decorations was a clear indication to Jenkins (his supervisor and agent of Treton) that the acts were not welcome. Additionally, the fact that Maalick felt that he would be considered a troublemaker if he reported the notes and other materials left on his car and in his office could be further indication of how intimidating the work environment was to him.

2. **Evaluate the actions of HR director, Marta Ford, in response to Maalick's situation. What could she have done to prevent this situation and what more could she do to ensure that this type of situation would not occur in the future?**

On the surface, one might say that Ford responded in an appropriate and thorough manner. If we dig deeper, though, we can assess that both more proactive and reactive actions should have occurred.

Proactive: When Maalick changed his name and told Ford about the comments and questions he received from his co-workers, Ford could have taken the opportunity to visit with Jenkins to alert him of potential problems. She could have reminded him of the policy on discrimination and harassment and informed him of his responsibility to ensure that no such behaviors occurred.

Reactive: Ford should have initiated some type of investigation into the matter to identify those involved in the harassment. Also, she could have taken the opportunity to initiate some type of diversity training to address issues of religious discrimination, racial harassment and other forms of discrimination. While her actual response was direct and immediate and appeared to resolve the problem, the organization's liability could have been further mitigated by a more proactive response and initiation of an investigation. Ford could ask other HR managers in the Treton organization and other organizations regarding their experiences. This could potentially provide Ford with historical, anecdotal and other insights about this situation.

3. **How would you characterize Jenkins' behavior and response to this situation?**

For an employee at his level, Jenkins does not appear to represent the espoused culture and values of Treton. His behaviors (e.g., statement to Maalick about office decorations and jokes told at the holiday party) were egregious for any employee but particularly for a person in his position. It would be difficult for him to enforce the company's EEO and diversity policies. Other employees, no doubt, look at his behavior and feel that they have license to violate the policy. Jenkins' behavior creates considerable ambiguity in the workplace. Additionally, Jenkins' actions and non-actions are in direct violation to Treton's EEO and discrimination policies. Jenkins had an obligation to report the first instance of harassing behavior to Ford as the facility compliance officer. Jenkins' behavior should be analyzed in terms of his

position of authority and responsibility to his employer. Some type of discipline may be warranted and should be considered.

4. What resolution to this situation might Judith Dixon suggest?

First, Dixon should stop the process to fill the remaining systems manager positions. Second, she should initiate a full investigation of Maalick's allegations. If an investigation concludes that there was religious discrimination against Maalick in the selection process, one way to resolve the issue may be to objectively review Maalick's qualifications. If Maalick's qualifications meet the minimum qualifications for the position, the company might make an administrative decision to grant him the promotion. This might require strong monitoring to guard against retaliation against Maalick. If there are similar position openings in another Treton location, it might be advisable to offer Maalick the opportunity to transfer to another facility. If the latter option is explored, Treton must be very careful so that Maalick does not feel that he must take a transfer to another facility.

At the very least, Dixon should mandate EEO and diversity training for all employees at the facility. There should probably be a separate training for managerial-level employees on their responsibilities as agents of the organization and the vicarious liability issues that their actions or inactions on and off the job can create for Treton.

There is a lot of potential blame to attribute in this case. There were missteps along the way for the two primary organizational representatives, Jenkins and Ford. Students might suggest some disciplinary action against Jenkins. Given the Treton's policy and the responsibility placed on managerial employees, this would be an appropriate suggestion. His response as a director was not in keeping with the EEO, diversity and harassment policies of Treton. The policies have a zero tolerance for discrimination and harassment and place the responsibility on management to ensure that employees are aware of the policy and to actively enforce the prohibitions against discrimination and harassment based on religion and race. Jenkins' initial response gave no indication that he was aware of the potentially negative ramifications of the office decorations. Jenkins seemed to be amused by the prank. While we are not sure from the case that Jenkins was aware of the subsequent actions of employees, students should be reminded of the inappropriate comments he made and questions he raised when Maalick asked for time off to complete his religious membership process. Additionally, the jokes about Maalick's conversion as an Internationalist were inappropriate. Jenkins' behavior, taken in total, would probably be heavily weighed against Treton, casting a discriminatory light on his decision not to hire Maalick.

Some might suggest some form of disciplinary action against Ford. This would also be an appropriate action. Ford seems to be a very busy HR director who does not have a finger on the pulse of her facility. Given Maalick's discussion with her at the time he changed his name, she should have recognized a possible problem and should have addressed it (see question 2 above). Additionally, Ford made no effort to investigate the harassment targeted toward Maalick regarding the book and

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other materials found on his desk. Although the e-mail appeared to be effective, employee responsibility for the harassment (e.g., notes on Maalik's car, etc.) was not determined. Someone at the facility was aware of the identity of the harassing party or parties. By initiating an investigation, Ford would have reinforced company policy, demonstrated the seriousness of the harassment and opened the door to address actual and potential biases and prejudicial attitudes based on religious, racial and other employee differences.

5. What are the broader implications of this situation for Treton? What type of organizational review might Dixon initiate or suggest from a corporate perspective?

Dixon should order an extensive review of Treton EEO and diversity policy implementation and compliance processes. Issues to consider include how the policy is disseminated and how Treton ensures that employees are made aware of the policy; how management and leadership personnel are informed and educated on their responsibilities regarding compliance and enforcement; whether enforcement is consistent; and what precedent for disciplinary action results from policy violations.

This type of policy review is particularly important given Jenkins' potentially harassing behavior and his response to the behaviors of other employees directed toward Maalick. The instructor can lead the students in a discussion of the above questions and their impact. Additionally, organizations that experience this type of scenario would have concerns about effectiveness in terms of talent recruitment, employee satisfaction and retention, and the dynamics of organizational climate issues. Maximizing the strengths that come from a diverse workforce is critical to the competitive posture of global organizations such as Treton.

Supplemental Instructor Materials

1. DEFINITIONS

Disparate Treatment—Treating similarly situated employees differently because of a factor that is prohibited under Title VII.

Reasonable Accommodation—Providing an alternative approach to a religious conflict that does not place an undue burden/hardship on the employer based on the type of employer, the size of the employer, effect on the employer, willingness of other employees to help and the cost to the employer. There are no set rules to determine reasonable accommodation or what may constitute an undue hardship for the employer in terms of an accommodation request. In instances of religious discrimination, the standard for undue hardship in accommodation is regarded as set in *Trans World Airlines, Inc. v. Hardison* 432 U.S. 63 (1977). In this case, the Supreme Court suggested that collective bargaining agreements could not be breached by employers; that employers should incur no more than a de minimis cost for accommodations; and that the accommodation cannot cause unequal treatment of other employees due to their religion. [**NOTE:** The concept of accommodation for religious reasons is not the only application of a requirement for employers to accommodate. The concept is also used in a broader sense under the Americans with Disabilities Act].

Prima Facie—Means "on its face" in Latin and represents the initial burden placed on the plaintiff in a discrimination case to demonstrate illegal disparate treatment. If not rebutted, a *prima facie* case establishes sufficient evidence for the plaintiff to prevail with an allegation of discrimination.

Plaintiff—The person/entity who alleges discrimination and initiates a civil action. In a non-judicial proceeding, the plaintiff may be referred to as the complaining party.

2. DESCRIPTIONS FROM THE FEDERAL REGISTERS AND EEOC REGULATIONS

(URLs are provided so that most recent information can be accessed.)

RELIGIOUS DISCRIMINATION

The U.S. Equal Employment Opportunity Commission

eeoc.gov/types/religion.html

Title VII of the Civil Rights Act of l964 prohibits employers from discriminating against individuals because of their religion in hiring, firing and other terms and conditions of employment. Title VII covers employers with 15 or more employees,

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including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government.

Under Title VII:

- Employers may not treat employees or applicants more or less favorably because of their religious beliefs or practices—except to the extent a religious accommodation is warranted. For example, an employer may not refuse to hire individuals of a certain religion, may not impose stricter promotion requirements for persons of a certain religion and may not impose more or different work requirements on an employee because of that employee's religious beliefs or practices.
- Employees cannot be forced to participate—or not participate—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. A reasonable religious accommodation is any adjustment to the work environment that will allow the employee to practice his or her religion. An employer might accommodate an employee's religious beliefs or practices by allowing flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers, modification of grooming requirements and other workplace practices, policies and/or procedures.
- An employer is not required to accommodate an employee's religious beliefs and practices if doing so would impose an undue hardship on the employer's legitimate business interests. An employer can show undue hardship if accommodating an employee's religious practices requires more than ordinary administrative costs, diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work, or if the proposed accommodation conflicts with another law or regulation.
- Employers must permit employees to engage in religious expression, unless the religious expression would impose an undue hardship on the employer. Generally, an employer may not place more restrictions on religious expression than on other forms of expression that have a comparable effect on workplace efficiency.
- Employers must take steps to prevent religious harassment of their employees. An employer can reduce the chance that employees will engage in unlawful religious harassment by implementing an anti-harassment policy and having an effective procedure for reporting, investigating and correcting harassing conduct.

HARASSMENT

The U.S. Equal Employment Opportunity Commission

eeoc.gov/types/harassment.html

Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA) and the Americans with Disabilities Act of 1990 (ADA).

Harassment is unwelcome conduct that is based on race, color, sex, religion, national origin, disability and/or age. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive. Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge; testifying or participating in any way in an investigation, proceeding or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

Petty slights, annoyances and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile or offensive to reasonable people.

Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Harassment can occur in a variety of circumstances, including, but not limited to, the following:

- The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker or a non-employee.
- The victim does not have to be the person harassed but can be anyone affected by the offensive conduct.
- Unlawful harassment may occur without economic injury to, or discharge of, the victim.

Prevention is the best tool to eliminate harassment in the workplace. Employers are encouraged to take appropriate steps to prevent and correct unlawful harassment. They should clearly communicate to employees that unwelcome harassing conduct will not be tolerated. They can do this by establishing an effective complaint or grievance process, providing anti-harassment training to their managers and employees, and taking immediate and appropriate action when an employee complains. Employers should strive to create an environment in which employees feel free to raise concerns and are confident that those concerns will be addressed.

Employees are encouraged to inform the harasser directly that the conduct is unwelcome and must stop. Employees should also report harassment to management at an early stage to prevent its escalation.

EMPLOYER LIABILITY FOR HARASSMENT

The U.S. Equal Employment Opportunity Commission
eeoc.gov/types/harassment.html

The employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages. If the supervisor's harassment results in a hostile work environment, the

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employer can avoid liability only if it can prove that: 1) it reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew or should have known about the harassment and failed to take prompt and appropriate corrective action.

When investigating allegations of harassment, the EEOC looks at the entire record, including the nature of the conduct and the context in which the alleged incidents occurred. A determination of whether harassment is severe or pervasive enough to be illegal is made on a case-by-case basis.

The Code of Federal Regulations follows.

[Code of Federal Regulations]

[Title 29, Volume 4]

[Revised as of July 1, 2007]

From the U.S. Government Printing Office via GPO Access

[CITE: 29CFR1605.1]

edocket.access.gpo.gov/cfr_2007/julqtr/29cfr1605.2.htm

CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1605_GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION
Sec. 1605.1 "Religious" nature of a practice or belief

Appendix A to Sec. Sec. 1605.2 and 1605.3—Background Information. Authority: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. Source: 45 FR 72612, Oct. 31, 1980, unless otherwise noted.

In most cases, whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions. \1\ 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 of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in section 701(j), 42 U.S.C. 2000e(j).

\1\ See CD 76-104 (1976), CCH] 6500; CD 71-2620 (1971), CCH [6283; CD 71-779 (1970), CCH] 6180.

[Code of Federal Regulations]

[Title 29, Volume 4]

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CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1605 GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION Sec. 1605.2 Reasonable accommodation without undue hardship as required by section 701(j) of title VII of the Civil Rights Act of 1964.

(a) **Purpose of this section.** This section clarifies the obligation imposed by title VII of the Civil Rights Act of 1964, as amended(sections 701(j), 703 and 717), to accommodate the religious practices of employees and prospective employees. This section does not address other obligations under title VII not to discriminate on grounds of religion, nor other provisions of title VII. This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutional, or other statutory provisions; neither is it intended to provide guidance for statutes which require accommodation on bases other than religion such as section 503 of the Rehabilitation Act of 1973. The legal principles which have been developed with respect to discrimination prohibited by title VII on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) **Duty to accommodate.**

(1) Section 701(j) makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business. \2\

(2) Section 701(j), in conjunction with section 703(c), imposes an obligation on a labor organization to reasonably accommodate the religious practices of an employee or prospective employee, unless the labor organization demonstrates that accommodation would result in undue hardship.

\2\ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

(3) Section 1605.2 is primarily directed to obligations of employers or labor organizations, which are the entities covered by title VII that will most often be required to make an accommodation. However, the principles of Sec. 1605.2 also apply when an accommodation can be required of other entities covered by title VII, such as employment agencies (section 703(b)) or joint labor-

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management committees controlling apprenticeship or other training or retraining (section 703(d)). (See, for example, Sec. 1605.3(a) "Scheduling of Tests or Other Selection Procedures.")

(c) **Reasonable accommodation.**

(1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

(d) **Alternatives for accommodating religious practices.**

(1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation. See, for example, the Commission's finding number (3) from its Hearings on Religious Discrimination, in appendix A to Sec. Sec. 1605.2 and 1605.3. The principles expressed in these Guidelines apply as well to such requests for accommodation.

(i) Voluntary Substitutes and "Swaps:" Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with

substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations to facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(ii) Flexible Scheduling: One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should consider is the creation of a flexible work schedule for individuals requesting accommodation. The following list is an example of areas in which flexibility might be introduced: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices. \3\

\3\ On September 29, 1978, Congress enacted such a provision for the accommodation of Federal employees' religious practices. See Pub. L. 95-390, 5 U.S.C. 5550a ``Compensatory Time Off for Religious Observances.''

(iii) Lateral Transfer and Change of Job Assignments: When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer.

(2) Payment of Dues to a Labor Organization.

Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices do not permit compliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.

(e) **Undue hardship.**

(1) Cost. An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require "more than a de minimis cost." \4\ The Commission will determine what constitutes "more than a de minimis cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment

of premium wages of substitutes, which was at issue in Hardison, would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a de minimis cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(2) Seniority Rights. Undue hardship would also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. *Hardison*, supra, 432 U.S. at 80. Arrangements for voluntary substitutes and swaps (see paragraph (d)(1)(i) of this section) do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Statute or these Guidelines precludes an employer and a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.

\4\ *Hardison*, supra, 432 U.S. at 84.

TITLE VII OF THE CIVIL RIGHTS ACT 1964§ 2000e–2. Unlawful Employment Practices

www.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00002000—-e002-.html

(a) **Employer practices**

It shall be an unlawful employment practice for an employer—

(1) 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; or

(2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

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