December 17, 2020

Public Input, EEOC
Executive Officer
131 M Street, N.E.
Washington, D.C. 20507

[VIA ELECTRONIC SUBMISSION at regulations.gov]

RE: Proposed Updated Compliance Manual on Religious Discrimination (EEOC-2020-0007-0001)

To Whom It May Concern:

The American Center for Law and Justice ("ACLJ") submits the following comments in response to the Proposed Updated Compliance Manual on Religious Discrimination (EEOC-2020-0007-0001) ("Manual") issued by the United States Equal Employment Opportunity Commission on November 17, 2020.

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of religion and speech.[1] For decades, the ACLJ has actively represented public and private employees who have faced discrimination and adverse employment actions on account of their religious beliefs and practices. As explained herein, it is the opinion of the ACLJ that the Manual should be finalized as proposed and published without delay. It has been twelve years since the publication of the last compliance manual addressing religious discrimination, and stakeholders—including employers, employees, attorneys, and EEOC investigators—are in need of up-to-date guidance regarding religion in the workplace.

I. Introduction

"The American story is one of religious pluralism. The Founders wrote that story into our Constitution in its very first amendment. And almost two-hundred years later, a new generation of leaders sought to continue that legacy in Title VII." *Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 829 (6th Cir. 2020) (Thapar, J., concurring). The Manual laudably extends that legacy even

[1] *See*, *e.g.*, *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (holding that the government is not required to accept counter-monuments when it displays a war memorial or Ten Commandments monument); *McConnell v. FEC*, 540 U.S. 93 (2003) (holding that minors have First Amendment rights); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (holding that denying a church access to public school premises to show a film series violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (striking down an airport's ban on First Amendment activities).

further by filling in statutory gaps with prudent "best practices" for employers and employees, sound directives to EEOC investigators, and clear counsel for all who are interested in understanding the contours of religious civil liberties in private and public employment. The Manual, when published, will support and promote the religious freedom and diversity in the workplace that Title VII was adopted to protect.

Since its inception, the ACLJ has represented a multitude of employees—in and out of court—whose religious beliefs and practices conflicted with an employment-related duty or obligation. Although the ACLJ has been involved in cases involving religious discrimination based on an employee's religious identity, *see*, *e.g.*, *Gaskell v. University of Kentucky*, No. 09-244-KSF, 2010 U.S. Dist. LEXIS 124572 (E.D. Ky. Nov. 23, 2010), the vast majority of ACLJ matters involving Title VII have involved the accommodation of the religious beliefs and practices of employees. The following comments therefore focus on the Manual's discussion of issues respecting religious accommodation in the workplace.

Each example discussed herein are based on cases or fact patterns that ACLJ attorneys have handled on behalf of clients for over two decades.

II. The Manual Correctly Emphasizes an Individualized and Personal Understanding of What Constitutes Religious Belief and Practice.

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … religion." 42 U.S.C. § 2000e-2(a)(1). In 1972, Congress incorporated the duty of reasonable accommodation into Title VII by defining "religion" to encompass "all aspects of *religious observance and practice*, as well as *belief*, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's … religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (emphasis added).

The Manual, in line with decisional law, correctly notes that a religious "belief" includes "religious views" that "are mainstream or non-traditional, and regardless of whether they are recognized by organized religion." Manual at 3. Secular employers are not permitted to become orthodoxy review boards.

Importantly, the Manual continues:

> An employee's belief, observance, or practice can be "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief, observance, or practice, or if few – or no – other people adhere to it.

Id. at 8; *see also* 29 C.F.R. § 1605.1 ("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.").

All too often, according to the ACLJ's direct involvement in such matters, employers have questioned or doubted an employee's determination of what religious practice fits within his or her belief-system for purposes of arranging job-related duties. For example, while some Christians believe as a religious matter that they should not engage in paid labor on Sundays, other Christians do not have such a belief. An employer—even if it employs numerous Christians who are willing to work on Sundays—has no authority under Title VII to question the veracity of the religious beliefs of those Christians who cannot, in good conscience, work on Sundays.[2] (This of course holds true with respect to any religious believer and that believer's understanding of which days of the week, month, or year that he or she must keep holy.)

As the Manual correctly notes:

> In etermining if a conflict exists, it is irrelevant that the employer does not view the work requirement as implicating a religious belief, or that most people of the applicant's or employee's faith would not; *it is the applicant's or employee's own religious beliefs that are relevant*.

Manual at 66 (emphasis added).

Similarly, in the healthcare context, while some Christian pharmacists who oppose abortion on religious grounds have no religious objection to Plan B, others adhere to the religious belief that filling a prescription for Plan B is tantamount to participating in an abortion. An employer has no authority under Title VII to discount or ignore the religious belief of the objecting pharmacist in deciding on an accommodation based on the fact that some other Christian pharmacists do not object. Nor may the employer discredit the objecting pharmacist's religious beliefs based on the employer's own understanding of medical literature, rules of professional ethics, etc. in making employment-related decisions.

Additionally, an employer has no right to question an employee's religious beliefs about what level of participation in an activity "crosses the line" for that employee. For example, while an employer may think that simply translating abortion-related information to non-English speakers is routine administrative work with no possible religious implications, if the translator's religious beliefs compel him or her not to participate in that activity, that religious belief and practice is protected under Title VII. *Cf. Moncivaiz v. Dekalb*, No. 03-C-50226, 2004 U.S. Dist. LEXIS 3997 (N.D. Ill. Mar. 12, 2004).[3] The same would hold true, for example, in the case of an insurance claims processor who objects to processing claims involving abortion. While the employer may not understand how such an employee could believe he or she is complicit in any wrongdoing—in this example, an abortion has already taken place—if the employee seeks a

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[2] While employers do not have the authority to question the theological veracity of an employee's religious beliefs in making job-related determinations, nothing in Title VII or relevant decisional law interpreting that statue, bars an employer from questioning the *sincerity* of an employee's religious beliefs. As the Manual correctly explains, "Title VII requires employers to accommodate those religious beliefs that are '*sincerely held*.'" *Id*. at 14 (emphasis added) (citations omitted). Nonetheless, as the Manual is correct to point out,"[b]ecause the definition of religion is broad and protects beliefs, observances, and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief." *Id*. at 17.

[3] *See also Baretela v. Unity Health System*, No. 08-cv-6110-L (W.D.N.Y., filed March 10, 2008), where a social worker was fired for her refusal, on religious grounds, to make referrals for abortions.

religious accommodation from participating in any activity relating to abortion, the employer must attempt to accommodate that belief (unless doing so imposes an undue hardship on the employer).

For these reasons, the Manual is correct to note that:

> [d]etermining whether a practice is religious turns not on the *nature of the activity*, but on the *employee's motivation* . . . Whether or not the practice is religious is . . . a situational, case-by-case inquiry, focusing not on what the activity is but on whether the employee's participation the activity is pursuant to a religious belief.

Manual at 10.

Employers, like courts of law, have no business scrutinizing an employee's religious understanding of his or her own moral complicity in participating in a job-related activity. "Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim." *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 724 (2014) (quoting *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990)). Like the Jehovah's Witness in *Thomas v. Review Bd. of Ind. Employment Security Div*., 450 U.S. 707 (1981), who did not object to helping manufacture steel used in making weapons, but objected to helping make the weapons themselves, it is not for the courts or the employer to say "that the line he drew was an unreasonable one." *Id*. at 715.

The updated guidance set forth in the Manual makes it clear that it is not the role of employers to rely on their own personal experience or information about what Catholics, Evangelicals, Jews, etc. believe about religious matters in making job-related determinations. Assuming that the employee sincerely holds the religious belief at issue, the employer must seek to accommodate that religious belief (absent undue hardship) no matter how strange, odd, or unique that belief may appear. As the Fifth Circuit accurately put it forty-five years ago: "all forms and aspects of religion, however eccentric, are protected." *Cooper v. Gen. Dynamics, Convair Aerospace Div*., 533 F.2d 163, 168 (5th Cir. 1976).

III. The Manual Correctly Makes it Clear, in Light of Recent Supreme Court Precedent, that Title VII Specifically Grants Religion Favored Treatment.

Unfortunately, despite Title VII being on the books for more than fifty years, some employers continue to believe that so long as a workplace rule applies to all, the employer need not carve out exceptions for employees who have a religious belief or practice that conflicts with that rule. These employers mistakenly believe that granting employees a religious accommodation impermissibly forces them to favor religious employees over non-religious employees. ACLJ attorneys have encountered this misunderstanding of the law on numerous occasions and have intervened, including through litigation, when necessary.

The Manual, relying on the Supreme Court's recent decision in *EEOC v. Abercrombie & Fitch Stores, Inc*., 135 S. Ct. 2028 (2015)—decided seven years after publication of the 2008 EEOC religious compliance manual—is correct to make it clear that an employer cannot rely solely on a religion-neutral, across-the-board workplace rule to deny a request for a religious accommodation. As the Court held in that case:

> Title VII does not demand mere neutrality with regard to religious practices— that they be treated no worse than other practices. Rather, it gives them *favored treatment*, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual . . . because of such individual's" "religious observance and practice.'"

Abercrombie, 135 S. Ct. at 2034 (citations omitted) (alteration in original) (emphasis added).

In other words, "Title VII requires otherwise-neutral policies to give way to the need for an accommodation." *Id*. Take, for example, a driver for an ambulance or bus service who objects to transporting a person to a facility in order to procure an abortion. *See, e.g.*, *Adamson v. Superior Ambulance Service*, No. 04-C-3247 (N.D. Ill., filed May 7, 2004); *Graning v. Capital Area Rural Transportation System*, No. 1:10-cv-00523-LY (W.D. Tex., filed July 14, 2010). If accommodating that driver—say, by calling another driver to handle the transportation—can be accomplished without imposing an undue hardship on the business, then the employer has the obligation under Title VII to provide that accommodation, regardless of whether management may object or other employees may complain. The employer in this case cannot simply assert that because all employees must drive all persons, for whatever reason, to whatever destination they choose, then it need not offer an exception to an employee who objects to a specific transport on religious grounds.

The same would be true with respect to a publicly-employed doctor who does not wish to counsel teen patients about family planning services and provide such services, *see*, *e.g.*, *Fernandes v. City of Philadelphia*, No. 1:10-cv-00523-LY (E.D. Pa., filed Oct. 7, 2014), or a publicly-employed nurse who wishes to avoid participating in the provision and delivery of emergency contraception, *see*, *e.g.*, *Diaz v. County of Riverside Health Services Agency*, No. 5:00-cv-00936-VAP, (C.D. Cal., filed Nov. 30, 2000). Under Title VII, even if the government employer mandates that, in order to meet the needs of its patients, all medical personnel must be willing, ready, and able to provide any and all forms of appropriate health care, it must offer a religious believer a special exception from this mandate if it can do so without undue hardship.

In light of *Abercrombie*'s clear holding that Title VII requires employers, in certain circumstances, to accord religious believers special treatment, the updated Manual correctly advises employers that there are times when religiously-neutral, across-the-board work requirements must give way. This does not just apply to *hired employees* ("[t]he employer's duty to accommodate will usually entail making a special exception from, or adjustment to, the particular requirement that creates a conflict so that the employee or applicant will be able to observe or practice his or her religion," Manual at 63), but *to applicants for hire as well* ("an employer may not exclude an applicant from hire merely because the applicant may need a reasonable accommodation for his or her religious beliefs, observances, or practices that could be provided absent undue hardship," Manual at 35-36).

IV. The ACLJ Supports the EEOC's Position that the Denial of a Religious Accommodation Absent Undue Hardship is, Standing Alone, Actionable under Title VII.

Though courts are split on the issue, as the Manual itself notes, at page 64 n.209, the ACLJ fully supports the "[t]he Commission's position . . . that the denial of reasonable religious accommodation absent undue hardship is actionable *even if* the employee has not separately suffered an independent adverse employment action, such as being disciplined, demoted, or discharged as a consequence of being denied accommodation." *Id.* at 62-63 (emphasis supplied).

For example, if hospital staff, knowing that a nurse has a religious objection to participating in an abortion, coerce or trick her into participating in the procedure, that necessarily alters the terms and conditions of her employment for the worse and should be considered a Title VII violation—*even if* she did not suffer a separate, independent adverse employment action.[4] *See Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 765 (3d Cir. 2004) ("An employer's failure to reasonably accommodate an employee's sincerely held religious belief that conflicts with a job requirement can also amount to an adverse employment action unless the employer can demonstrate that such an accommodation would result in 'undue hardship.'"); *Lawson v. State of Washington*, 319 F.3d 498, 501-02 (9th Cir. 2003) (Berzon, J., dissenting from denial of reh'g en banc) (because Title VII forbids employers from otherwise discriminating against any individual with respect to his terms, conditions, or privileges of employment, "imposing discriminatory terms can violate the statute, without more. And, since the statute defines 'religion' as including a failure to accommodate, an employer who unreasonably fails to accommodate religious practice absent undue hardship discriminates on the basis of religion in setting the terms of employment").

Forcing employees to act in violation of their religious beliefs, in the absence of undue hardship, because they do not wish to lose their job, contradicts the clear purpose of Title VII, which makes it unlawful "to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). As the Seventh Circuit correctly stated: "Title VII does not contemplate asking employees to sacrifice their jobs to observe their religious practices. At the risk of belaboring the obvious, Title VII aimed to ensure that employees would not have to sacrifice their jobs to observe their religious practices." *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 456 (7th Cir. 2013).

For decades, the ACLJ has counseled, and advocated for, employees who face a religious conflict in the workplace but who comply with the objectionable activity for fear of being fired. Those employees should not have to first face an adverse employment action before seeking redress under Title VII. The Ninth Circuit's observation in *EEOC v. Townley Eng'g & Mfg. Co.*, is undoubtedly correct:

> [A]lthough we have occasionally used language implying that the employer must discharge the employee because of the conflict, we have never in fact required that

[4] *See* Severino and Perez letter to University of Vermont Medical Center (Aug. 28, 2019), cited in the Manual at 75 n.235 (describing in full the facts of this concrete example in which the ACLJ represented the Complainant in a Complaint filed with the U.S. Department of Health and Human Services, Office of Civil Rights). After the Manual was released on November 17, 2020, the U.S. Department of Justice filed suit against the university, alleging violations of the Church Amendments: *U.S.A. v. University of Vermont Medical Center*, No. 2:20-cv-00213 (D. Vt. filed Dec. 16, 2020).

> the employee's penalty for observing his or her faith be so drastic. The threat of discharge (or of other adverse employment practices) is a sufficient penalty. An employee does not cease to be discriminated against because he temporarily gives up his religious practice and submits to the employment policy.

859 F.2d 610, 614 n.5 (9th Cir. 1988) (internal citations omitted).

V. The Manual Provides Important Updated Guidance Regarding an Employer's Notice of a Religious Accommodation.

ACLJ attorneys have worked with numerous clients over the years who have encountered religious discrimination in the workplace where, even though the employer had independent knowledge, or suspicion, of the employee's need of a religious accommodation, the employer took adverse action against the employee before the employee could formally make an accommodation request. In such cases, it was difficult to make a prima facie case of religious discrimination. As the 2008 religious discrimination compliance manual stated: "An applicant or employee who seeks religious accommodation *must* make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work." EEOC Compliance Manual (July 22, 2008) at 47 (emphasis added).

The Manual provides yet another critical update in light of the Supreme Court's decision in *Abercrombie*:

> Even in the absence of any notice that a religious accommodation is needed, an employer violates Title VII if it takes an adverse action against an applicant or employee (such as failing to hire) based on *its belief* that the applicant or employee *might need* a reasonable religious accommodation, unless the employer proves that such an accommodation would have imposed an undue hardship.

Manual at 65 (emphasis added).

Indeed, *Abercrombie*'s holding could not have been plainer: "an employer who acts with the motive of avoiding accommodation may violate Title VII *even if he has no more than an unsubstantiated suspicion that accommodation would be needed*." 135 S. Ct. at 2033 (emphasis added). As the Court noted using a hypothetical:

> For example, suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII.

Id.

The principle enunciated in *Abercrombie* that an employer could be liable under Title VII based merely on the suspicion that an employee or applicant might need a religious

accommodation marks a seismic shift in how Title VII is to be understood and applied in the courts and in the workplace. The Manual is correct to note that shift, and there is a critical need for employers to be made aware of this development though publication of the Manual.

VI. The Manual Provides Important Guidance Regarding the Fact-Sensitive Inquiry of What Constitutes Undue Hardship.

Under Title VII, employers must "reasonably accommodate" "all aspects" of an "employee's . . . religious observance or practice" that can be accommodated "without *undue hardship* on the conduct of the employer's business." 42 U.S.C. 2000e(j) (emphasis added). Though the Manual is correct to note that "undue hardship" has been interpreted by the Supreme Court to mean something "more than a *de minimis* cost," at 2 (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)), [5] the Manual is also correct to note that "undue hardship" is not whatever the employer happens to think it means. Rather, the employer bears the burden of persuasion based on concrete facts:

> To prove undue hardship, the employer will need to demonstrate how much cost or disruption the employee's proposed accommodation would involve. An employer cannot rely on hypothetical hardship when faced with a religious obligation that conflicts with scheduled work, but rather should rely on objective information.

Manual at 76-77; *see also*, *e.g.*, *Adeyeye*, 721 F.3d at 455 ("Title VII requires proof not of minor inconveniences but of hardship, and 'undue' hardship at that."); *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978) ("Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts.").

The Manual is also correct to emphasize that, when it comes to assessing undue hardship, there are few, if any, bright lines to be drawn. Undue hardship is a fact-sensitive and intensive analysis that turns on numerous factors and considerations, unique to each employer-employee relationship:

> The determination of whether a particular proposed accommodation imposes an undue hardship "must be made by considering the particular factual context of each case." Relevant factors may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.

Manual at 76.

[5] Several Justices of the Supreme Court have recently suggested that the Court "reconsider the proposition . . . that Title VII does not require an employer to make any accommodation for an employee's practice of religion if doing so would impose more than a *de minimis* burden." *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020) (Alito, J., concurring in the denial of certiorari, joined by Thomas, J., and Gorsuch, J.).

The fact-sensitive nature of what constitutes "undue hardship" takes on special importance in the healthcare context. Time and again, the ACLJ has handled situations involving medical personnel where employers have improperly cited customer/patient access to medical drugs or services as an excuse to deny religious accommodations. Those employers have asserted that any delay in providing medication or medical services imposes an undue hardship *per se*—even if (1) an objecting employee could swap jobs with a non-objecting one to fulfill the task; (2) the situation involves a non-immediate, elective procedure; or (3) the employer is able to accommodate the employee through some other means, such as allowing the employee to refer the customer/patient to another provider.

For example, in 2005, Illinois adopted a regulation providing that "[u]pon receipt of a valid, lawful prescription for a contraceptive, a pharmacy must dispense the contraceptive, or a suitable alternative permitted by the prescriber, to the patient or the patient's agent without delay." *Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052, 1053-54 (C.D. Ill. 2007). When an Illinois pharmacist had a religious objection to dispensing Plan B, and therefore could not dispense the drug "without delay," according to the pharmacy's implementation of the state regulation, he was placed on unpaid leave. During litigation, the court disagreed with the pharmacy's claim that accommodating the pharmacist would amount to an undue hardship as a matter of law:

> In this case, it is unclear at this stage whether Wal-Mart could comply with the Rule, and still accommodate Vandersand's beliefs, without an undue hardship. The Rule requires Division I pharmacies, such as the Pharmacy, to dispense Emergency Contraceptives without delay. The Rule does not say that each licensed pharmacist must dispense Emergency Contraceptives without delay. Thus, Wal-Mart might have been able to dispense Emergency Contraceptives without delay by other means. For example, another pharmacist at the Pharmacy might have been able to fill such prescriptions.

Id. at 1056.

Thus, even in the case where a pharmacy implements a state regulation as a workplace rule, the demands of Title VII must still be satisfied and undue hardship demonstrated.

For these reasons, the Manual is correct to emphasize the "interactive process" that should take place between an employee and employer in discussing and potentially arriving at a reasonable accommodation:

> Employer-employee cooperation and flexibility are key to the search for a reasonable accommodation. If the accommodation solution is not immediately apparent, the employer should discuss the request with the employee to determine what accommodations might be effective. . . .
>
> Failure to confer with the employee is not an independent violation of Title VII but, as a practical matter, such failure can have adverse legal consequences. For example, in some cases where an employer has made no effort to act on an accommodation request, courts have found that the employer lacked the evidence

needed to meet its burden of proof to establish that the plaintiff's proposed accommodation would actually have posed an undue hardship.

Manual at 68; *ee also Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) (explaining that "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business") (internal quotation marks and citation omitted); *Porter v. City of Chi.*, 700 F.3d 944, 953 (7th Cir. 2012) ("In requiring employers to 'offer reasonable accommodations,' we have encouraged 'bilateral cooperation' between the employee and employer and recognized that employers must engage in a dialogue with an employee seeking an accommodation.") (citations omitted).

The ACLJ was recently contacted by pharmacist who has been employed by a large, nationwide pharmacy chain for over a decade. When she was told by her employer that she had to now start working on Sundays—after thirteen years of not being required to do so—she informed her employer that she could not agree to do so pursuant to her religious beliefs. Unfortunately, the answer to our client's request for a religious accommodation was a form letter with an outright rejection. The employer did not explain why it could not accommodate our client's religious beliefs, engage in any meaningful dialogue about how her religious beliefs could be accommodated, or articulate what alleged undue hardship the pharmacy would suffer if it agreed to our client's request.

After the ACLJ intervened, explaining to the corporation our client's rights and its duty under Title VII, the pharmacy backed down and provided our client with the accommodation she requested. The corporation should have known better than to deny a request for a religious accommodation for no meaningful, articulated reason. As the Manual correctly suggests as a "best practice" for employers: "Employers and employees should confer fully and promptly to the extent needed to share any necessary information about the employee's religious needs and the available accommodation options." Manual at 105.

In sum, even if Congress or the Supreme Court does not alter *Hardison*'s definition of "undue hardship" to mean something more than "*de minimis*," employers must understand, as the Manual clearly explains, that courts are not willing to rubber stamp what an employer claims rises to the level of undue hardship. Moreover, when employees and employers engage in dialogue about their respective concerns regarding religious accommodation and undue hardship, as the Manual suggests, many religious conflicts in the workplace can be resolved amicably. In the great majority of cases where the ACLJ has been contacted by an employee denied a religious accommodation, it has been able to successfully settle the matter with the employer through dialogue and negotiation and without the need for litigation.

VII. The Manual's Discussion of Religious Expression in the Workplace is Balanced and Measured.

The ACLJ has repeatedly intervened in situations where a public or private employer has prohibited its employees from engaging in religious expression in the workplace. In one case, a nurse was banned from displaying religious artwork inside her locker because, when the locker was opened, her colleagues could see—and might possibly be offended by—the religious content. In another case, an employee was disciplined for concluding emails with "God bless." And in yet

another situation, an employee was told to remove all Christmas-related decorations in her workspace.

The Manual's discussion of religious expression in the workplace is measured and well-balanced, emphasizing (again) the fact-sensitive nature of this area of the law. While "[e]mployers should allow religious expression among employees at least to the same extent that they allow other types of personal expression that are not harassing or disruptive," employers should also take steps to ensure that religious expression "does not become sufficiently severe or pervasive to create a hostile work environment." Manual at 61.

Too often, public employers have inappropriately cited fears of violating the Establishment Clause as the reason to prohibit even nonobtrusive religious expression. In *Draper v. Logan Cty. Pub. Library*, 403 F. Supp. 2d 608 (W.D. Ky. 2003), for instance, the ACLJ filed suit on behalf of a public librarian who was fired from her job for failing to abide by a library employee policy providing that "[n]o clothing or ornament depicting religious, political, or potentially offensive decoration is permitted." *Id.* at 611. The employee wore a cross necklace as part of "her long-standing practice of her religious beliefs." *Id.* at 617-18. In rejecting the Establishment Clause defense raised by the employer, the court held:

> The Court need only make a cursory review of the facts of this case to determine that the Defendants' Establishment Clause concern is invalid. Permitting library employees to wear her cross pendants and other unobtrusive displays of religious adherence would not have a religious purpose, would not excessively entangle the government with religion, and, most importantly, could not be interpreted by a reasonable observer as governmental endorsement of religion. . . . There is simply no danger that Defendants might face an Establishment Clause violation because of Draper's conduct or similar conduct of her co-workers.

Id. at 621; *see also Nichol v. Arin Intermediate Unit 28*, 268 F. Supp. 2d 536, 554 (W.D. Pa. 2003) (rejecting Establishment Clause defense of school policy prohibiting employees from wearing "religious emblems, dress, or insignia," specifically including religious jewelry such as "crosses and Stars of David" as examples of prohibited religious apparel or accessories).

While *Draper* and *Nichol* were not brought under Title VII, but pursuant to 42 U.S.C. § 1983, they nonetheless reflect the truth that public employers are often too quick to think that the public workplace must be devoid of any and all religious expression. The Establishment Clause does not require that; and, as the Manual correctly explains, neither does Title VII. And in the private workplace, where the Establishment Clause does not even apply, employers need not purge workspaces of all religious content in order to avoid potential religious harassment claims. In fact, as the Manual correctly states:

> Title VII violations may result if an employer tries to avoid potential coworker objections to employee religious expression by preemptively banning all religious communications in the workplace or discriminating against unpopular religious views, since Title VII requires that employers do not discriminate based on religion and that employees' sincerely held religious observances, practices, and beliefs be reasonably accommodated as long as accommodation poses no undue hardship.

Manual at 60.

In sum, the Manual sets forth sound guidance and prudent best practices regarding religious expression in the workplace. When published, it will serve stakeholders well as they navigate the various interests at play in this fact-sensitive area of concern.

VIII. Conclusion

The religious diversity within the American workplace reflects the religious diversity of the country itself. Impermissibly discriminating against an employee because of his or her religion not only injures that individual but harms society as a whole, which has a committed interest—as the founders of the country well understood—to protecting the sanctity of conscience and religious exercise. Title VII reflects that commitment by standing for the proposition that persons need not abandon their religious identity and commitments when on the job. As the Fourth Circuit observed, "Free religious exercise would mean little if restricted to places of worship or days of observance, only to disappear the next morning at work." *EEOC v. Sunbelt Rentals*, Inc., 521 F.3d 306, 319 (4th Cir. 2008). Title VII furthers a healthy religious pluralism by aiming to strike a balance between the interests of the employer and the religious beliefs and practices of its employees.

The proposed Manual, fully in line with the letter and spirit of Title VII, articulates how that balance can be achieved through concrete examples, illuminating summations of decisional law, and much needed practical guidance for how employers and employees should go about resolving religious conflicts in the workplace. Most importantly, the Manual is timely, as it provides up-to-date explanations of recent case law, which, in some cases, have changed drastically how Title VII is to be understood and implemented. While it cannot of course speak to each and every hypothetical implicating religion in the workplace, the Manual nonetheless provides much needed guidance for all stakeholders interested in understanding and complying with Title VII and its purposes.

The ACLJ commends the EEOC for its work in researching, drafting, and proposing the updated Religious Discrimination Compliance Manual. It should be finalized and published without delay.

Very truly yours,

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