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BIBLE STUDIES IN THE WORKPLACE

Introduction

The First Amendment to the U.S. Constitution forbids censorship of private religious speech, such as a voluntary private or group Bible study taking place in the government workplace. In addition, Title VII of the Civil Rights Act of 1964 prohibits religious discrimination in both government and private workplaces.

I. The First Amendment To The U.S. Constitution Protects Private Religious Speech of Public Employees.

The First Amendment to the U.S. Constitution prohibits the government from "abridging the freedom of speech." U.S. Const., amend. I. Furthermore, government may not suppress a private citizen's speech solely because the speech is religious. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Virginia.*, 515 U.S. 819, 829 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995); *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384, 394 (1993); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). As the Supreme Court has explained:

> …private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Pinette, 515 U.S. at 760 (plurality opinion). It is further well established that public employees retain their First Amendment rights at their workplace. *See Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969) (noting that public school "teachers [do not] shed their constitutional rights . . . at the school house gate").

The right to free speech for public employees, however, is not an absolute one. The Supreme Court has developed a two-pronged test – the *Pickering-Connick* test – to determine valid restrictions on the content of public employees' speech, which asks the following:

1. Does the speech address "matters of public concern"? *Connick v. Myers,* 461 U.S. 138, 143 (1983).
2. Does the public employee's free speech interest outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"? *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

If the answer to both prongs is "yes," then the government may not restrict the content of a public employee's speech.

A public employee's speech addresses "matters of public concern," if the content, form, and context of the speech "relat[es] to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146-47. While this broad definition has been described as "imprecise," *Kirkland v. Northside Indep. Sch. Dist.,* 890 F.2d 794, 798 (5th Cir. 1989), several courts have specifically held that religious speech involves matters of public concern. *See*, *e.g.*, *Tucker v. California Dept. of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996) (rejecting the state's contention that speech about religion is not a matter of public concern); *Nichol v. Arin Intermediate Unit 28*, 268 F. Supp. 2d 536, 552 (W.D. Pa. 2003) (holding that wearing a cross necklace outside of one's clothing is "symbolic speech on a matter of public concern"); *Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608, 618 (W.D. Ky. 2005) (holding that a library employee's outward display of a cross pendant is religious expression on a matter of public concern). *But see Moscowitz v. Brown*, 850 F. Supp. 1185, 1194 (S.D.N.Y. 1994) (holding that a police officer's wearing of religious articles did not involve matters of public concern), *abrogated by*, *Lauture v. Int'l Business Machines Corp.*, 216 F.3d 258 (2d Cir. 2000). In most cases, therefore, religious speech by public employees, as expressed through the reading of their Bibles, or participation in Bible studies, will satisfy the first prong.

The second prong of the test requires the court to weigh the public employee's free speech interest against the government's interest in efficiency. "In performing the balancing, . . . the manner, time, and place of the employee's expression are relevant, as is the context." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). Other factors that can be considered include "whether the [employee's speech] impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* (citing *Pickering*, 391 U.S. at 570-573). In most cases, however, reading a Bible at your workplace, or participating in a Bible study, should not interfere with the efficient operation of the government workplace, as long as it takes place during nonworking hours. Thus, the right of public employees to read their Bibles and participate in Bible studies at their workplace is generally protected under the First Amendment.

The government can impose "time, place, and manner" regulations on employees' speech, provided that the regulations are both reasonable and viewpoint-neutral. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998); *Perry Educ. Ass'n v. Perry Local*

Educators' Ass'n, 460 U.S. 37, 46 (1983). The government cannot, however, discriminate against religion even when it imposes reasonable time, place, and manner restrictions on public employees' speech. *Lamb's Chapel*, 508 U.S. at 393-94.

For example, a government employer could strictly limit the use of a conference room for official purposes at all times. This would effectively bar employees from using that for Bible studies before or after work, but since the regulation is reasonable and viewpoint-neutral, it does not infringe on their First Amendment rights. If, however, employees are permitted to use the room for non-religious purposes after work hours, then the government must also allow the room to be used for Bible studies.

II. The Private Religious Speech of Public Employees Does Not Violate The Establishment Clause

Some government officials fear that they might violate the Establishment Clause if they permit Bible studies to occur on government premises. Supreme Court law clearly rejects this notion.

The Establishment Clause only limits the power of government; it does not restrict the rights of individuals acting on their own behalf. As the Supreme Court has declared, "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). Simply because a voluntary Bible study is attended by public employees and held in a government building does not mean that the employees' private speech is attributable to the government. The Supreme Court has rejected the idea that the government endorses the content of all speech occurring on its property that it fails to censor. *See Mergens*, 496 U.S. at 250 ("The proposition that [public] schools do not endorse everything they fail to censor is not complicated"). Furthermore, the Court has held in numerous cases that the Establishment Clause does not require censorship of private religious speech solely because it occurs on government property. *See, e.g.*, *Good News Club*, 533 U.S. at 115; *Rosenberger*, 515 U.S. at 842; *Pinette*, 515 U.S.at 762 (plurality opinion); *Lamb's Chapel*, 508 U.S. at 395 (1993); *Mergens*, 496 U.S. at 248-49; *Widmar*, 454 U.S at 274-75. In fact, the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); *see also Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

Thus, a reasonable person who learns of a voluntary Bible study taking place at a government building would be aware that our nation has a long history of accommodating the religious beliefs of public employees. *Lynch*, 465 U.S. at 677. For example, even the government has "long provided chapels in the Capitol for religious worship and meditation." *Id.* The reasonable person would understand that the religious activity in such Bible studies is attributable to the individuals attending, not to the government.

III. The Federal Government's *Guidelines On Religious Expression In The Workplace* Reinforce That Voluntary Bible Studies By Public Employees Are Constitutionally Permissible.

While not binding on state governments and private employers, the federal government's *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* ("Guidelines") are instructive on this issue. Incorporating the *Pickering-Connick* test and the permissibility of viewpoint neutral "time, place, and manner" regulations, the Guidelines provide that:

> Employees should be permitted to engage in religious expression with fellow employees, to the same extent that they may engage in comparable nonreligious private expression, subject to reasonable and content-neutral standards and restrictions: such expression should not be restricted so long as it does not interfere with workplace efficiency.

Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (issued Aug. 14, 1997), *available at* http://clinton2.nara.gov/WH/New/html/19970819-3275.html (last visited Apr. 12, 2012). The Guidelines specifically provide that if "[d]uring lunch, certain employees gather on their own time for prayer and Bible study in an empty conference room that employees are generally free to use on a first-come, first-served basis," "such a gathering may not be subject to discriminatory restrictions because of its religious content." *Id.* Moreover, "[s]uch a gathering does not constitute religious harassment even if other employees with different views on how to pray might feel excluded or ask that the group be disbanded." *Id.* In other words, "a hostile environment is not created by the bare expression of speech with which some employees might disagree." *Id.*

The Guidelines state further that "[a] person holding supervisory authority over an employee may not, explicitly or implicitly, insist that the employee participate in religious activities as a condition of continued employment, promotion, salary increases, preferred job assignments, or any other incidents of employment." *Id.* However, "[w]here a supervisor's religious expression is not coercive and is understood as his or her personal view, that expression is protected in the Federal workplace in the same way and to the same extent as other constitutionally valued speech." *Id.*

Thus, in sum, employees of the federal government enjoy the right to read their Bibles and attend Bible studies at their workplace, provided that (1) the conduct is voluntary, (2) the exercise of their right does not interfere with workplace efficiency, and (3) there are no reasonable and content-neutral restrictions.

IV. Federal Law Also Protects Employees From Religious Discrimination At Public Sector And Most Private Sector Workplaces.

Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII") prohibits discrimination on the basis of race, color, sex, religion, or national origin. 42 U.S.C. §§ 2000e, et seq. The law makes it unlawful for employers "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." *Id.* § 2000e-2(a)(1) (emphasis added). Exemptions are provided only where an employee's "religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," and for religious institutions. *Id.* §§ 2000e-2(e).

Title VII applies all federal, state and local governments. *Id*. § 2000e-16; § 2000e(a)-(b). In fact, Title VII provides the exclusive judicial remedy of injunctive relief for discrimination in federal employment. *Brown v. General Servs. Admin.*, 425 U.S. 820, 829 (1976).[1] Additionally, Title VII applies to employment agencies, labor organizations, and training programs. *Id*. § 2000e-2(b) to (d).

And most significantly for the vast number of Americans who work in the private sector, Title VII applies to all private employers in any industry affecting commerce that have fifteen or more employees on their payroll for at least twenty weeks during a given year. 42 U.S.C. § 2000e(b). As to what constitutes an "employee," the statute is not limited to traditional definitions, but includes all who "are susceptible to the kind of unlawful practices that Title VII was intended to remedy." Thus, Title VII may apply to some independent contractors, as well. *See, e.g., Armbruster v. Quinn*, 711 F.2d 1332, 1342 (6th Cir. 1983).

Specifically, with respect to religious liberty, Title VII requires employers to "reasonably accommodate . . . an employee's or prospective employee's religious observance or practice" as long as the accommodation does not impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 73-74 (1977).

"Accommodation" means that mere employer neutrality is not enough. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) ("Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"); *Reid v. Memphis Publ'g Co.*, 468 F.2d 346, 350-51 (6th Cir. 1972) (holding that simply because a particular policy is applied uniformly to all employees does not lessen its discriminatory effect upon a particular employee's religious beliefs).

However, the employer's accommodation need only be *reasonable*. "By its very terms [Title VII] directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation. . . . Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986).

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[1] Thus, federal employees must primarily rely on Title VII remedies for religious discrimination claims. In fact, many courts have even held that Title VII prevents federal employees from seeking damages under a First Amendment claim. *Sugrue v. Derwinski*, 26 F.3d 8, 11-12 (2nd Cir. 1994); *Assar v. Crescent Counties Foundations for Medical Care*, 13 F.3d 215, 218-19 (7th Cir. 1993); *Kizas v. Webster*, 707 F.2d 524, 542-43 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984); *White v. General Serv's Admin.*, 652 F.2d 913, 916-17 (9th Cir. 1981); *Porter v. Adams*, 639 F.2d 273, 278 (5th Cir. 1981); *Gissen v. Tackman*, 537 F.2d 784 (3d Cir. 1976).

Finally, the employer can claim an "undue hardship" if accommodating the religious practice (1) causes the employer to bear more than a *de minimus* cost, (2) burdens the conduct of the employer's business, or (3) conflicts with another law. U.S. Equal Employment Opportunity Commission, *Questions and Answers: Religious Discrimination in the Workplace*, *available at* http://www.eeoc.gov/policy/docs/qanda_religion.html (last updated Jan. 31, 2011). *See Hardison*, 432 U.S. at 85 (stating that if an employer incurs anything more than a *de minimis* cost there is undue hardship); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981) (stating that claims of undue hardship must be "supported by proof of actual imposition on co-workers or disruption of the work routine").

Ultimately, however, since "Title VII does not explicitly define the terms 'reasonably accommodate' or 'undue hardship,' the precise reach of the employer's obligation to its employee is unclear under the statute and must be determined on a case-by-case basis." *Dixon v. The Hallmark Co.*, Inc., 627 F.3d 849, 856 (11th Cir. 2010). *See Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999) ("undue hardship must be determined [by] the particular factual context of each case"); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994) ("The reasonableness of an employer's attempt to accommodate is determined on a case-by-case basis").

Nevertheless, Title VII provides reasonably generous protection to public and most private employees who wish to read their Bibles and attend voluntary Bible studies at their workplace. In most circumstances, providing reasonable accommodations for Bible studies will not impose an undue hardship upon the employer. For example, the employer can allow use of a room during breaks, or before or after the workday, without incurring anything more than a *de minimis* cost, or adversely affecting the efficiency of the workplace. Thus, most employers, both public and private, must accommodate employee requests to hold voluntary Bible studies during breaks, or before or after the work day.

Conclusion

To conclude, both the First Amendment of the U.S. Constitution and Title VII of the Civil Rights Act protect public and most private employees' right to practice their religion by reading their Bibles or attending voluntary Bible studies at the workplaces during breaks, or before or after work hours.