



MEMORANDUM

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Diversity Training

Religious discrimination can still occur in the workplace when an employer wrongfully prohibits religious speech, such as prayer or other forms of religious expression. For example, if a government work place prohibits religious expression, the government may be violating the free speech, as well as free exercise rights, of employees. In *Draper v. Logan Cnty. Pub. Library*, 403 F.Supp.2d 608 (W.D. Ky. 2005), ACLJ attorneys represented a librarian who had been fired for wearing a cross necklace to work. The court ultimately ruled that the public library's policy prohibiting the wearing of a cross necklace to work violated the librarian's free speech and free exercise rights. *Id.* at 621, 623. As long as the expression didn't interfere with her work setting, the librarian had the constitutional right to express her faith. *Id.* at 619.

In addition to government work places, private work places are also constrained by federal law. The law prohibiting religious discrimination in the work place has been codified under Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"). 42 U.S.C. §§ 2000e et seq. Title VII also protects against discrimination based on race, color, sex or national origin. The Equal Employment Opportunity Commission (EEOC)¹ is the government agency in charge of investigating all claims of discrimination in the work place.

¹ U.S. Equal Employment Opportunity Commission, PO Box 7033 Lawrence, KS 66044 Phone: 800-669-4000, Fax: 703-997-4890, Email: info@eeoc.gov, Web: www.eeoc.gov.

A religious discrimination claim can arise in the context of a mandatory “diversity” training program. Over the past twenty years or so, public and private employers have glommed onto the concept of promoting “diversity” in the workforce. As a result, most employers have instituted mandatory programs in “Diversity Training.” Often, the content of these mandatory training sessions can be offensive because of the subtle but often times open hostility towards racial, ethnic and religious minorities. Accordingly, the question arises as to whether an employer can force an employee to participate in “Diversity Training.”

The simplest answer to the question is that the employers should give employees advance notice of the nature and content of the training. Additionally, employees should have the right to opt out of objectionable diversity training if it violates their sincerely held religious beliefs.

People have different views about the actual effects of work place diversity training. Its proponents think that it is morally right, because it respects diversity and recognizes the value and contributions of every human being.² Its opponents, however, think that diversity training reinforces differences between individuals instead of concentrating on their commonalities,³ which leads to a divisive and untrusting work environment. In *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257 (10th Cir. 1995), the court even mentioned that “[d]iversity training is perhaps a tyranny of virtue.”

Generally, employees who are required to attend a diversity training program may go to the human resources department and find out the curriculum for the program. After reviewing the program, they may inform the employer of any parts that violate their sincerely held religious beliefs. The key words are “sincerely held religious beliefs.” Legally, if the training violates an employee’s sincerely held religious beliefs, employers have to allow the employee to opt out.

In order for an employee to be protected under Title VII, he must show that:

- (1) He holds a sincere religious belief that conflicts with an employment requirement;
- (2) He has informed the employer about the conflict; and
- (3) He was discharged, disciplined or subjected to discriminatory treatment for failing to comply with the conflicting employment requirement.

² Gail Heriot: *White Guys Have No Rights. And They’d Better Shut Up If Think They Have (Part 1)* (Dec. 23, 2007) <http://rightcoast.typepad.com/rightcoast/2007/12/white-guys-have.html>.

³ Shankar Vedantam, *Most Diversity Training Ineffective, Study Finds*, THE WASHINGTON POST (Jan. 20, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/19/AR2008011901899.html>.

See Baker v. Home Depot, 445 F.3d 541, 546 (2d Cir. 2006); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993); *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984).

In sum, when employers violate Title VII, by requiring employees to participate in a program that violates employees' sincerely held religious beliefs without advance notice, the employees have the right to opt out in the future. In addition, good law has been developed that should enable employees to opt out of an objectionable diversity training program.