



Losing My Religion— Religion in the Workplace Twists And Turns Again

Presented by Michael Porter

Tuesday, September 26, 2023









SUPREME COURT OF THE UNITED STATES

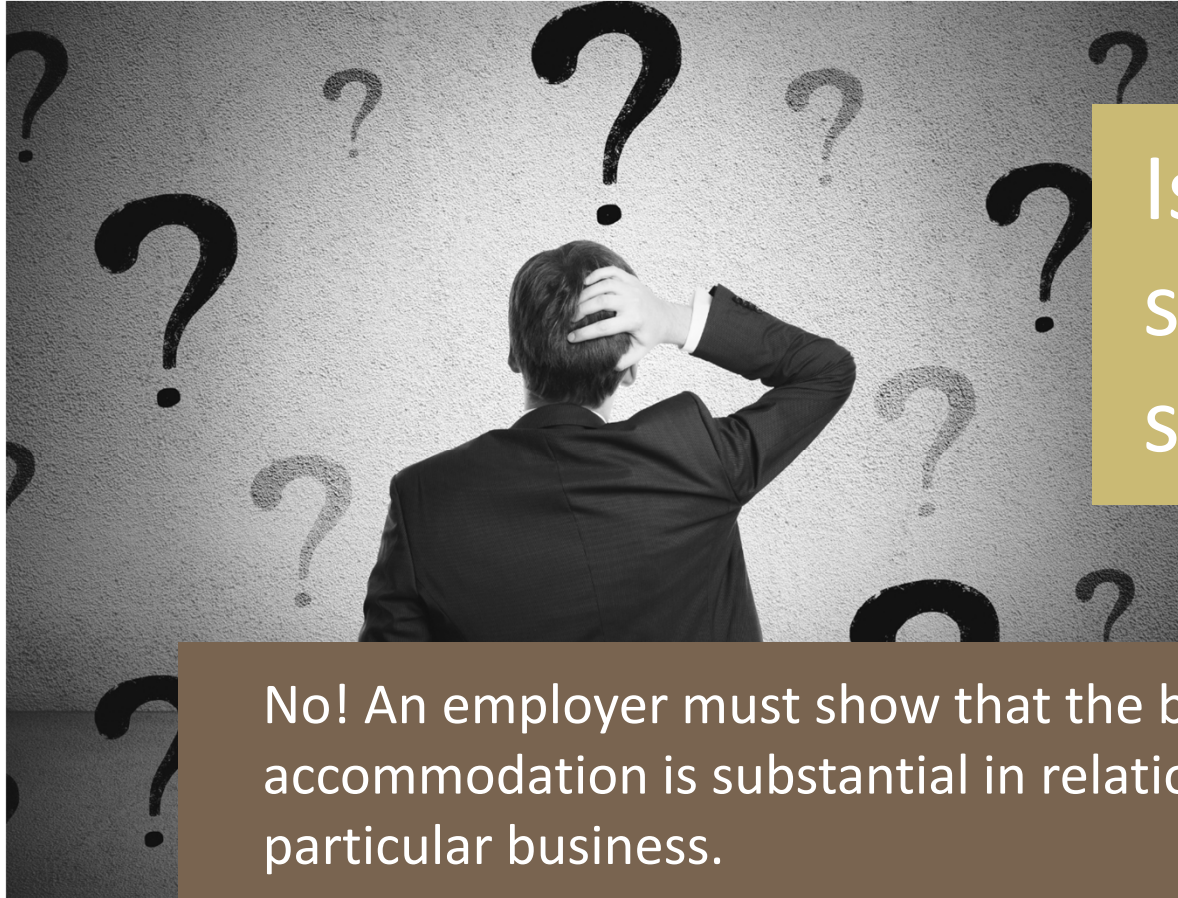
No. 22–174

**GERALD E. GROFF, PETITIONER *v.*
LOUIS DEJOY, POSTMASTER GENERAL**



Is de minimis
still the
standard?





Is de minimis
still the
standard?

No! An employer must show that the burden of granting an accommodation is substantial in relation to the conduct of its particular business.



From the Supremes

What about employee morale?

JUSTICE BARRETT: Well, I mean, I have some of those same concerns because it seems to me in the ADA context, unlike this context, you may have fewer accommodation requests. I mean, you might have many religious people in a workplace seeking the same accommodation for Sundays off or -- or other kinds of accommodations.

And I guess it seems to me, as Justice Kavanaugh said, morale can be very important. It kind of seems to me that you're defining conduct of the business as the bottom line, like you want a dollar amount on it. So, if you lose

efficiency and you want to measure, like, well, we're not able to deliver as many Amazon packages, so it's costing us some of our contract. We're not as able to sell as many groceries, or we have to close early on Sundays because we can't cover it and we're losing the sales in that point -- part of the shift.



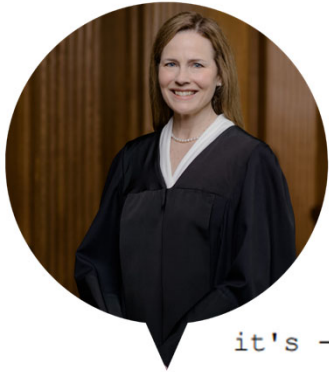
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From the Supremes

What about employee morale?

I mean, what if -- you know, what if it's -- just it's morale? You know, maybe employees aren't -- I mean, and things that might be very difficult to prove and put a dollar amount on, employees aren't as productive because they're grumbling, they're not willing to kind of go the extra mile, put their best foot forward, those might be very difficult things to put a dollar amount on, or the dollar amount might be small.

But why wouldn't they be things that affected the conduct of the business?

MR. STREETT: We do not advocate for a dollar amount test. It just needs to be concrete evidence that the employer is not able to -- to carry out its operations, and that is something that the employer has the burden to prove.

But we wouldn't accept, for example, in the ADA or in the Pregnant Workers Fairness Act context, that workers are upset because they're having to pick up a little bit of slack for their pregnant coworker or for their disabled coworker. That comes up in all the cases, and the cases always say morale itself is not enough because that just opens up the floodgates.



From the Supremes

What about employee morale?

JUSTICE BARRETT: So give me an example of when it wouldn't be a dollar amount. When you say "affect the operations of the business," that -- that doesn't sound like -- I realize you're saying morale isn't enough, but "affect the operation of the business," give me an example of when the effect on coworkers would do that.

MR. STREETT: Well, when a coworker quits would be an obvious example.

JUSTICE BARRETT: Quits because of morale, so it's just like morale has to get so bad, the employer has to wait until morale is so bad that employ -- that employees actually quit?

MR. STREETT: That's not our position, Your Honor, but that is an example of when morale would have a concrete effect, and we have the benefit of looking to New York and California, which has this test, and --

JUSTICE BARRETT: And when do they say it's enough?

MR. STREETT: It's the -- similar to what's the case in the ADA. It's not enough to have morale issues. It's not enough to just have grumbling. But, if you -- if the employee become -- the employer becomes shorthanded or the employees become so overburdened that they can't carry out their job, then that has an effect on the business. It doesn't need to be quantifiable in dollars and cents. But these are all context-specific cases.

Points Concerning Employee Morale

- 🦋 Employees gripe—not substantial
- 🦋 Employees file grievance—better case
- 🦋 Employees quit—winner
 - 🦋 (but...wait for bias)



From the Supremes

What about premium pay?

JUSTICE ALITO: -- all of these -- all of these groups -- groups actually misunderstand the effect that Hardison has had on -- on their members.

Let me ask you a question about premium pay. I don't know whether that means premium pay or premium pay or premium pay. I don't know whether it's super-duper premium pay.

Let me give you a hypothetical. Say Amazon has to offer a 16-hour -- \$16-an-hour rate instead of \$15-an-hour rate to get a consistent volunteer to take a Saturday -- Saturday shift for a Jehovah's Witness or an Orthodox Jew.

Is that -- is that an undue hardship?

GENERAL PRELOGAR: So the line that we understand Hardison to have drawn is based on the idea that you would have to incur substantial overtime costs on a regular ongoing basis.

And I don't think that it depends entirely on the ultimate at-the-end-of-the-day out-of-pocket costs for the employer because I acknowledge in the Amazon example, even if it were a significant delta and it was much greater wages, Amazon could probably afford that. But, instead, I think that this has to go to the nature of that type of accommodation.



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From the Supremes

What about premium pay?

JUSTICE ALITO: What's the answer to my question? It's a dollar an hour more and it's Amazon --

GENERAL PRELOGAR: I would want to know --

JUSTICE ALITO: -- or it's Walmart or it's the old TWA, but it's regular.

Is that -- is -- is -- is that an undue hardship, yes or no?

GENERAL PRELOGAR: I'm not sure that --

JUSTICE ALITO: Can you answer that for me?

GENERAL PRELOGAR: -- it would be proper to characterize a dollar-an-hour difference as -- as premium overtime wages. I think there would be an initial fact question about the different levels at which Amazon reimburses its employees.

JUSTICE ALITO: Okay. So premium --

GENERAL PRELOGAR: But if I could --

JUSTICE ALITO: -- premium --

GENERAL PRELOGAR: -- try to engage with a person --

JUSTICE ALITO: -- really, General, could you please answer my question? Premium doesn't mean just anything above the regular wage? Is that what you're saying?

GENERAL PRELOGAR: We're interpreting it the way the Court focused on that in Hardison. There, I believe it was time-and-a-half or maybe double time to fill those shifts, and the Court characterized that as a regular payment of overtime wages that crossed the line.

Points Concerning Premium Pay

✎ 35,000 student school district

✎ What impacts ability to operate in a meaningful way?

✎ 3,500 student school district

✎ What impacts ability to operate in a meaningful way?



From the Supremes

Anything on scheduling changes, dress, or expression?

JUSTICE KAGAN: And, General, can I take you back to something that you said to Justice Gorsuch and Justice Barrett? Because, when you were agreeing that this is not a -- a line about, you know, trivialities, but then I think you said at some point, but it would not be a good thing just to say, oh, well, you know, so now it's a substantial burden test going forward, and -- and leave it at that.

And why is that?

GENERAL PRELOGAR: Right. Our concern with that is, if the Court were to announce a new standard, I think it would come with all the costs of destabilizing this area of the law and unsettling whether the Court means to overrule *Hardison* on its facts, for example, or potentially call into question all of the established areas of law that have developed that we think have drawn the right lines here.

And if I could, there are really only three categories where religious accommodation requests come up again and again, and I think it might be helpful to the Court if I provide a really quick summary of those three categories, because I think it shows how the law has developed in this area.



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From the Supremes

Anything on scheduling changes, dress, or expression?

The first category is scheduling changes. That can include things like Sabbath observance, obviously, but also things like midday prayer breaks or wanting to come in later on a Sunday to permit church service.

And in that area, courts regularly are requiring employers to provide flexible work schedules if the work can be shifted to a different time of day. So you take your midday prayer break, but then you make it up on the back end. That is what courts are doing today.

Also, you can facilitate voluntary shift swaps. That is a common way to deal with Sabbath observance. And if those fail, you can consider lateral job transfer to a different position where there's not the Sabbath conflict for that accommodation.

In the second category, it's dress and grooming policies, and there today, courts are regularly granting accommodations and rejecting undue hardship defenses. The narrow category of cases where that's not happening is when there's a -- a legitimate safety concern, like you work in a steel mill and you can't modify the dress code because wearing a skirt will interfere with operating the machinery, for example.

The third category involves religious expression in the workplace. This can include displaying a religious symbol or potentially needing an exemption from employer-sponsored religious speech in a meeting.



From the Supremes

Anything on scheduling changes, dress, or expression?

There too, courts are regularly granting accommodations, and it's only in the circumstances, for example, where the religious speech would amount to harassment of coworkers or customers that the undue hardship defense is credited.

JUSTICE GORSUCH: And, General, you think all three of those categories under a proper understanding of the law, whatever standard verbal formulation one chooses, are required by Title VII?

GENERAL PRELOGAR: Yes, we think that accommodations in those categories are frequently granted in line with Title VII. Undue hardship defenses are frequently denied in line with Title VII. And what I'm asking the Court to do is not disrupt and -- and unsettle that area of the law.

JUSTICE GORSUCH: And I don't think your friend on the other side wants to unsettle those decisions either, right? So that's again a little more common ground amongst us.

GENERAL PRELOGAR: So I worry that he does, because he is asking this Court to adopt a brand-new standard. He has a different account.

He says -- his claim is that Hardison has been a disaster on the ground.

We do not think that that is reflected in the actual case law, certainly not in the Commission's experience in this area.

JUSTICE GORSUCH: But -- but in those -- I'm sorry to interrupt, but in those three buckets, I think there's common ground that the law would require those kinds of accommodations you just outlined.



From the Supremes

Anything on scheduling changes, dress, or expression?

GENERAL PRELOGAR: So I'm -- I'm not so sure. For example, let's take the facts of this case. Petitioner obviously thinks that he was entitled to an accommodation even though --

JUSTICE GORSUCH: I -- I -- actually, I don't want to take the facts of this case. I

GENERAL PRELOGAR: Yeah.

JUSTICE GORSUCH: Okay? And I'm looking for common ground here, and it seems to me that is common ground, that -- that -- that a proper understanding of Title VII requires those, even if sometimes they're more than de minimis. All of those things could be more than de minimis, and yet both sides agree that that's what Title VII should require.

GENERAL PRELOGAR: Yes, and if Petitioner is happy with the EEOC's guidance and with the case law in this area that summarizes those three buckets, then that is absolutely common ground.

JUSTICE GORSUCH: But those three --

JUSTICE KAGAN: Is -- is this case in the -- in the first bucket? Are you saying that this case is in the first bucket?

GENERAL PRELOGAR: Exactly, a requested scheduling change. So Sabbath cases fall in the first bucket, and in all honesty --

JUSTICE KAGAN: So you're not saying, like, all cases in the first bucket require an accommodation. You're saying some cases in the first bucket require an accommodation.

GENERAL PRELOGAR: Yes, of course. I was trying to give a sensible --

JUSTICE KAGAN: And -- and then there's a big difference as to which cases require an accommodation. So I'm happy that we're all kumbaya-ing together.

(Laughter.)

Points Concerning Scheduling Changes, Dress, and Expression

Scheduling Changes

-  Similar to morale and premium pay

-  Gripping versus no shows

-  Meaningful budget impact

Dress

-  Rare—see also ORS 659A.033 (more to come)

Expression

-  Danger!



From the Supremes

What about co-worker reaction based in bias?

JUSTICE ALITO: Well, your three buckets are quite helpful, and I think the argument has been productive in finding points of agreement. I just wanted to follow up on a few things.

In your second bucket, you have grooming standards. So let me take you back to a situation like the one in Abercrombie. You have an employer who generally prohibits employees from wearing anything on their heads, but a Muslim woman says, I am required for religious reasons to wear a scarf on my head. And this links up with the issue of the reaction of coworkers.

Suppose that the employer gets a -- a fierce reaction from coworkers if it -- when it says that it's inclined to provide an accommodation for that Muslim woman.

What would you make of that situation?

GENERAL PRELOGAR: So I would point to the EEOC guidance, which directly addresses this point and makes clear that mere coworker grumbling or resentment or even overt hostility to religious practice and expression in the workplace is not itself cognizable to factor into the undue hardship inquiry.

Instead, coworker effects are relevant only when the accommodation is creating concrete burdens on the coworkers that's materially changing their terms and conditions --

JUSTICE ALITO: Okay. Suppose that then the employer has more difficulty -- employees quit and say this -- this employer accommodates Muslims, and so we're quitting, and it has more difficulty hiring people. What about that?



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What about co-worker reaction based in bias?

GENERAL PRELOGAR: So that also cannot factor into the undue hardship analysis because it would be giving effect to religious hostility and animus, and the guidance on this point is clear also.

JUSTICE ALITO: Would the employer have to inquire into the reasons why these employees are quitting? So, if the employees say, we're quitting because we just want to wear hats because it's fashionable, okay, you couldn't take that into account, but they say, we're quitting because we don't want to accommodate Muslims, then that would not be permissible?

GENERAL PRELOGAR: Actually, neither of those should be taken into account. When the -- the nature of the coworkers' dissatisfaction is just the mere fact that an accommodation is being provided on religious grounds, the guidelines make clear that that's not a cognizable form of hardship, and, instead, it's only when the coworkers express this dissatisfaction because they are actually being asked to take on additional work or have more undesirable shifts, for example, that that would be relevant to undue hardship.

Points Concerning Co-Worker Reaction Based in Bias

- ✎ May trigger other employer obligations
 - ✎ Harassment/discrimination obligations



From the Supremes

Where does this leave us?

JUSTICE SOTOMAYOR: What's clear to me after all this discussion is that as much as we -- some people might want to provide absolute clarity, there is none we can give, is there?

GENERAL PRELOGAR: That's --

JUSTICE SOTOMAYOR: Because it's all contextual.

GENERAL PRELOGAR: Yes.



SUPREME COURT OF THE UNITED STATES

Syllabus

KENNEDY *v.* BREMERTON SCHOOL DISTRICT

**CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**



From the Supremes

What about prayer and expression?

JUSTICE SOTOMAYOR: Mr. Clement, I -- I -- I have been trying to parse this out in a similar way to Justice Thomas, but let me just give you a certain number of hypotheticals, and tell me what's -- when it becomes private and when it's still public.

A teacher begins each of her classes with a silent prayer and an audible prayer. Now, when I say "begin," the bell rings, students are coming in, they sit down, teacher says the prayer privately or publicly. Is that within her duties as a teacher?

MR. CLEMENT: I -- I would think so, Justice Sotomayor.

JUSTICE SOTOMAYOR: Why?

MR. CLEMENT: Because it's -- it's

during instructional time. It's during a time where she has instructional duties --

JUSTICE SOTOMAYOR: How about before the bell rings?

MR. CLEMENT: So the --

JUSTICE SOTOMAYOR: Students are coming in. She's reading the Bible. She's reading it out loud before the bell. Is it the bell that makes it within the time or not within the time?

MR. CLEMENT: Well, I would say the bell is what makes your first hypothetical a relatively straightforward one.

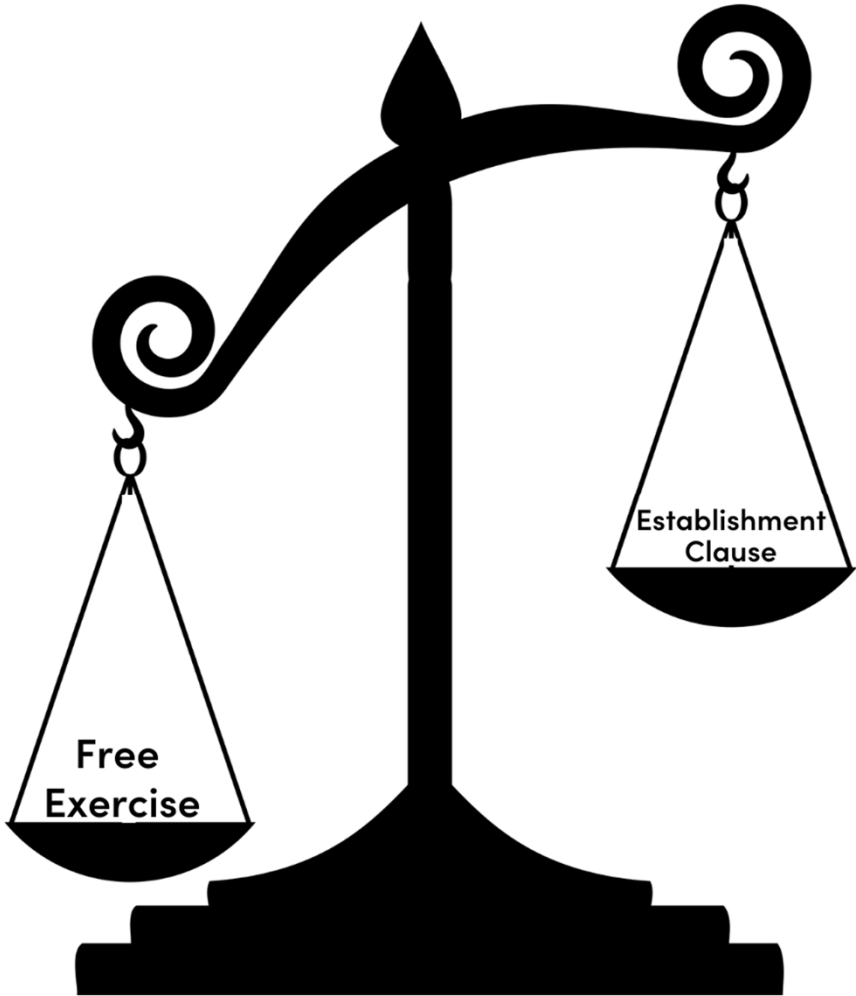
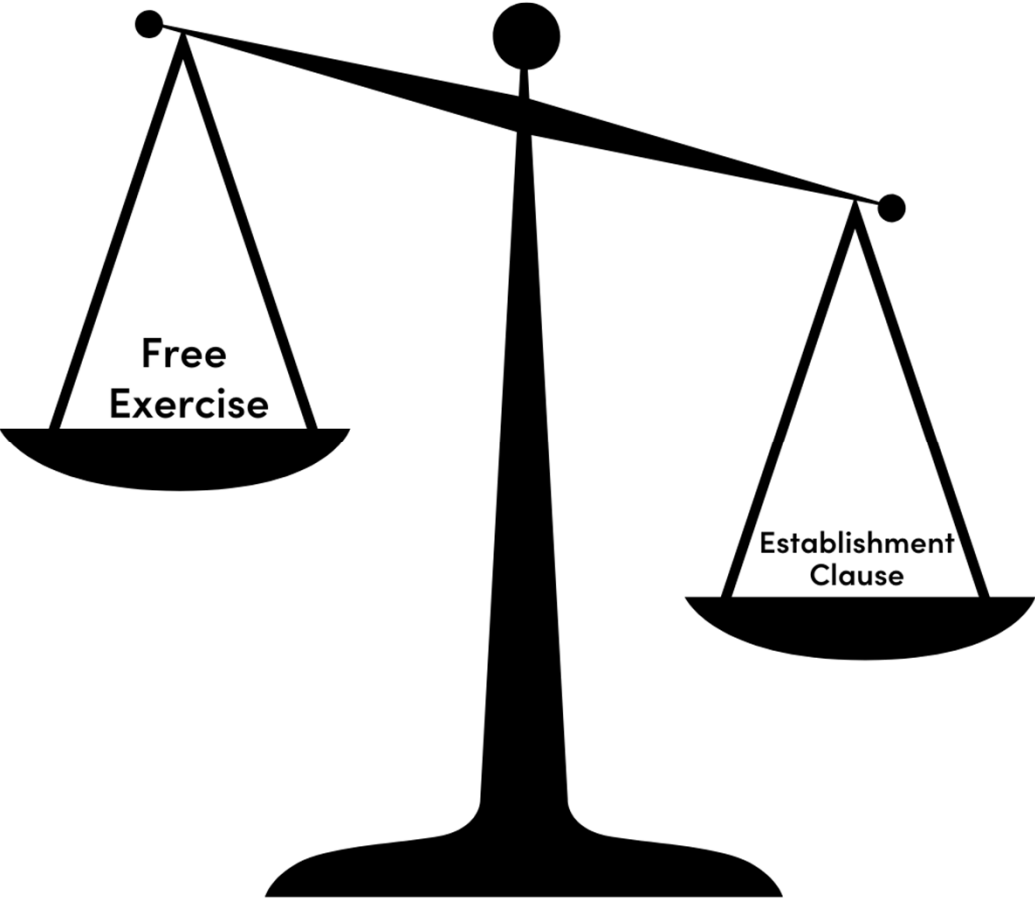


From the Supremes

What about prayer and expression?

As to your second hypotheticals, because I think there's two things there, I think, if the -- if the -- if the teacher were, before the bell, reading her Bible at her desk either silently or barely audibly, that would be private speech. That would be protected.

If before the bell but while the students are all there she's reading out loud to the class, I think that's -- that's kind of the -- the edge case, because there --





STATE OF OREGON



1859



ORS 659A.033



(1) An employer violates ORS 659A.030 if:

(a) The employer does not allow an employee to use vacation leave, or other leave available to the employee, for the purpose of allowing the employee to engage in the religious observance or practices of the employee; and

(b) Reasonably accommodating use of the leave by the employee will not impose an undue hardship on the operation of the business of the employer as described in subsections (4) and (5) of this section.

(3) An employer violates ORS 659A.030 if:

(a) The employer imposes an occupational requirement that restricts the ability of an employee to wear religious clothing in accordance with the employee's sincerely held religious beliefs, to take time off for a holy day or to take time off to participate in a religious observance or practice;

(b) Reasonably accommodating those activities does not impose an undue hardship on the operation of the business of the employer as described in subsections (4) and (5) of this section; and

(c) The activities have only a temporary or tangential impact on the employee's ability to perform the essential functions of the employee's job.

(4) A reasonable accommodation imposes an undue hardship on the operation of the business of the employer for the purposes of this section if the accommodation requires significant difficulty or expense. For the purpose of determining whether an accommodation requires significant difficulty or expense, the following factors shall be considered:

(a) The nature and the cost of the accommodation needed.



ORS 659A.033

(b) The overall financial resources of the facility or facilities involved in the provision of the accommodation, the number of persons employed at the facility and the effect on expenses and resources or other impacts on the operation of the facility caused by the accommodation.

(c) The overall financial resources of the employer, the overall size of the business of the employer with respect to the number of persons employed by the employer and the number, type and location of the employer's facilities.

(d) The type of business operations conducted by the employer, including the composition, structure and functions of the workforce of the employer and the geographic separateness and administrative or fiscal relationship of the facility or facilities of the employer.

(e) The safety and health requirements in a facility, including requirements for the safety of other employees and any other person whose safety may be adversely impacted by the requested accommodation.

(f) The degree to which an accommodation may constrain the obligation of a school district, education service district or public charter school to maintain a religiously neutral work environment.

(5) A reasonable accommodation imposes an undue hardship on the operation of the business of the employer for the purposes of this section if the accommodation would constrain the legal obligation of a school district, education service district or public charter school to:

(a) Maintain religious neutrality in the school environment; or

(b) Refrain from endorsing religion.

 Use the correct language

 “Not reasonable”

 “Substantial cost”

 “Significant difficult and expense”

In Practice

 Update policies

 Create a record if denying accommodations

 Consider ADA accommodations



Thank You

**Losing My Religion—
Religion in the Workplace Twists
And Turns Again**

Presented by Michael Porter

mike.porter@millernash.com | 503.205.2330

Tuesday, September 26, 2023

