

MEMORANDUM

To: ES&A Clients and Friends
From: Anna Elento-Sneed, Esq.
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Date: 3/3/2016
Subject: **Battle of Reasonable Accommodations**

SUMMARY

As the workforce diversifies, employers are required to juggle the interests of various protected classes of employees. Along the way, some employers have found that certain interests, such as religious and Lesbian Gay Bisexual and/or Transgender¹ (LGBT) interests, sometimes clash. Recent court rulings show that employers need to prepare for these clashes or pay in litigation.

APPLICABLE LAW & LEGAL TRENDS

Title VII of the Civil Rights Act and Haw. Rev. Stat. Chapter 378-2 protect employees from unlawful discrimination based on their protected class including, but not limited to, religion, sex, gender identity or expression, and sexual orientation. In addition, Title VII and Chapter 378 require employers to provide reasonable accommodations to employees based on their religious beliefs/practices unless the accommodation creates an undue hardship on the employer.

CLASH OF BELIEFS

To best address clashes in the workplace between LGBT employees and certain religious beliefs, employers should attempt to: (a) be as inclusive as possible; and (b) balance and accommodate as many beliefs as possible. If a resolution cannot be reached at the outset, employers should engage in the interactive process² by being open about the conflicting points of view and communicating the employer's willingness to discuss options. If the issue still cannot be resolved, the employer should make a decision on how to handle the conflict and communicate it in a firm manner to all employees

It is important to note that employers need not make accommodations that would result in discrimination against other employees or deprive employees of contractual or other statutory rights.³ For example, permission to engage in the following behaviors would not be considered "reasonable accommodations:" making derogatory comments to employees;⁴ repeatedly displaying offensive posters;⁵ requests to be excused from doing work that is related to

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¹ Transgender individuals are those who identify with a gender different from the sex they were biologically assigned at birth. University of Hawaii's Myron B. Thompson School of Social Work, <http://scholarspace.manoa.hawaii.edu/bitstream/10125/34267/1/LGBTQIHIPreliminary.pdf>

² *Slater v. Douglas Cty.*, 743 F. Supp. 2d 1188, 1193-4 (D. Or. 2010).

³ *Id.*

⁴ *Flanagan v. City of Richmond*, 2015 WL 5364881 (N.D. Cal. October 13, 2015).

⁵ *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 602 (9th Cir. 2004).

domestic partnerships;⁶ entertaining complaints of religious discrimination because a transgender female⁷ was using the woman's restroom;⁸ and enforcing an employee's religious beliefs on co-workers.⁹ In short, an employer need not accept the burdens that would result if the employer allowed an employee to engage in actions that demean or degrade others in the workforce.¹⁰

RECOMMENDATIONS FOR EMPLOYERS

Bring your workplace into compliance with federal and state laws:

- Establish anti-discrimination and anti-harassment policies and annual training;
- Establish diversity policies and conduct sensitivity training to develop managers' and employees' awareness of biases they or others have that may lead to discrimination
- Revise employer practices related to access to bathrooms for transgender employees
- Refrain from segregating employees, even if it is perceived as in the employee's best interest.
- Revise dress code and appearance policies to make them gender neutral and flexible for religious dress

Take precautions when engaging in the interactive reasonable accommodations process:

- Carefully craft communications before engaging in the interactive process
- Engage in interactive communication about accommodation requests
- Grant requests that accommodate the individual's religious beliefs or practice
- Be aware that accommodations cannot result in discrimination against other employees
- Know that employers are not required to give the exact accommodation requested, but should accommodate the religious practice or belief
- Lastly, when in doubt, call your legal counsel for specific guidance on your situation.

⁶ *Slater v. Douglas Cty.*, 743 F. Supp. 2d 1188, 1190 (D. Or. 2010).

⁷ People who identify as women, but were born biologically male. University of Hawaii's Myron B. Thompson School of Social Work, <http://scholarspace.manoa.hawaii.edu/bitstream/10125/34267/1/LGBTQIHIPreliminary.pdf>

⁸ *Cruzan v. Minneapolis Pub. Sch. Sys.*, 165 F. Supp. 2d 964, 966 (D. Minn. 2001) *aff'd sub nom Cruzan v. Special Sch. Dist, No. 1*, 294 F.3d 981 (8th Cir. 2002)

⁹ *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004)

¹⁰ *Id.*