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Commentary:

LEGALIZING RELIGIOUS DISCRIMINATION IN THE CALIF. WORKPLACE: SILO V. CHW MED. FOUND.

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Is religious discrimination in the workplace ever legal? The answer, at least in California, is "yes," but only in very limited circumstances. One such circumstance arose in Silo v. CHW Medical Foundation, 27 Cal.4th 1097 (Cal., 2002), where the California Supreme Court unanimously held that a religious hospital otherwise exempt from the anti-discrimination provisions of the Fair Employment and Housing Act, Cal. Gov. Code § 12900 et seq., could legally terminate an employee for advocating a religious message in the workplace that contradicted the hospital's own religious identity and message.

The Silo decision, however, does not reach most employers because the case only applies to religious organizations that are exempt from statutory anti- discrimination laws. Most other employers still need to accommodate the religious beliefs and practices of their employees unless doing so creates undue hardship for the employer.

General Rule Is At-Will Employment

The general rule in California is that employment relationships are terminable "at the will" of either the employer or the employee. See Cal. Labor Code § 2922. More than 20 years ago, however, the California Supreme Court recognized a narrow exception to this rule: While employers can generally discharge at-will employees for any reason, even arbitrary or irrational ones, employers may not terminate employees for unlawful reasons or for purposes that contravene the fundamental public policies of California. Tameny v. Atlantic Richfield Co., 27 Cal.3d 167 (1980). Employees terminated in violation of this exception to the at-will employment rule may assert a common-law tort action for wrongful discharge, now commonly known as a Tameny claim.

The plaintiff in Silo asserted a Tameny claim against his employer, a Catholic-affiliated hospital, after the hospital fired him for proselytizing at work. Terence Silo admitted that he had been repeatedly reprimanded for "preaching" and trying to "save souls" on hospital premises before his termination, but he claimed that the hospital's decision to terminate him violated the fundamental public policy against religious discrimination in employment set out in Article I, Section 8 of the California Constitution.

Silo's employer, on the other hand, claimed a counter-vailing right as a religious organization -- based on the free exercise and establishment clauses of the First Amendment to the U.S. Constitution and Article I, Section 4 of the California Constitution -- to choose employees who would further its religious mission and message, and to discharge those who did not.

The California Supreme Court unanimously sided with the employer and held that the hospital's right to control its religious message free from government interference trumped its employee's right to be protected from religious discrimination. "[W]e cannot say," Justice Carlos Moreno wrote for the court, "there is a fundamental and substantial public policy that prohibits a religious employer from terminating an employee because of his or her objectionable religious speech in the workplace."

On the other hand, restricting the ability of a religiously affiliated employer to control religious speech in the

workplace would not only potentially interfere with the organization's religious mission (thus violating the Free Exercise Clause), but could also excessively entangle the courts in deciding what kind of religious speech is appropriate in religious workplaces (thus violating the Establishment Clause). The court therefore held that the plaintiff's discrimination claims should yield to the hospital's constitutional right to sculpt its message and mission.

Silo Decision Limited

While the Silo decision is important to religious organizations such as churches, religious universities and parochial schools, its holding is limited for most other California employers for at least four reasons. First, the Fair Employment and Housing Act itself bars religious discrimination. Because the majority of employers fall within FEHA's broad reach, most victims of religious discrimination will be able to assert the statute as an independent basis of liability.

Second, as Justice Moreno recognized in Silo, the California Legislature amended FEHA in 1999 so that it now applies to religious hospitals that do not limit their health services to members of their own faith. If Silo had been terminated after 1999, he would have been able to state a FEHA discrimination claim against his employer.

Third, even those religious organizations still exempt from FEHA generally may not discriminate on non-religious grounds, such as sexual discrimination or racial discrimination, where such discrimination is neither a part of a religious doctrine nor furthers a religious mission.

Fourth, because public policy strongly condemns most forms of employment discrimination, other constitutional rights will trump discriminatory prohibitions only in the rarest of circumstances. For example, a white supremacist organization's constitutional right to freedom of assembly generally will not allow it to discriminate against its employees on the basis of their race.

Accommodation vs. 'Undue Hardship'

On the other hand, the Silo case does not require non-exempt employers to acquiesce to every religious practice of its employees. Rather, an employer need not accommodate an employee's religious practices if doing so would create an "undue hardship" for the employer. Rankins v. Commission on Prof'l Competence, 24 Cal.3d 167 (1979). Undue hardship exists where the required accommodation creates hardship for the employer's business and results in more than de minimis costs. Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826 (9th Cir., 1999). Undue hardship may also exist where the accommodation would significantly prejudice the rights of other employees. Opuku-Boateng v. State of Cal., 95 F.3d 1461 (1996).

Additionally, the duty to accommodate religious beliefs neither requires the employer to impose undesirable shift preferences on other employees nor undertake steps inconsistent with an otherwise valid collective bargaining agreement. Trans World Airlines v. Hardison, 432 U.S. 63 (1977). Employees also may be terminated for workplace religious practices that unreasonably interfere with the proper performance of their employment duties, or for directing religious activity at fellow employees who clearly object to such activity. See Knight v. Connecticut Dep't of Pub. Health, 275 F.3d 156 (2d Cir., 2001). Thus, even employers subject to FEHA may enforce some reasonable workplace prohibitions on religious activity.

Conclusion

The Silo decision frames one instance in which employers may legally discriminate against their employees' religious practices. However, because such religious discrimination is permitted in very limited circumstances, Silo will not directly affect most employers. Instead, the overall trend continues to be an increase in the variety and number of workplace religious practices faced by employers. Employers should continue to accommodate the religious beliefs and practices of their employees within the confines of cases such as Trans World Airlines and Rankins.

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