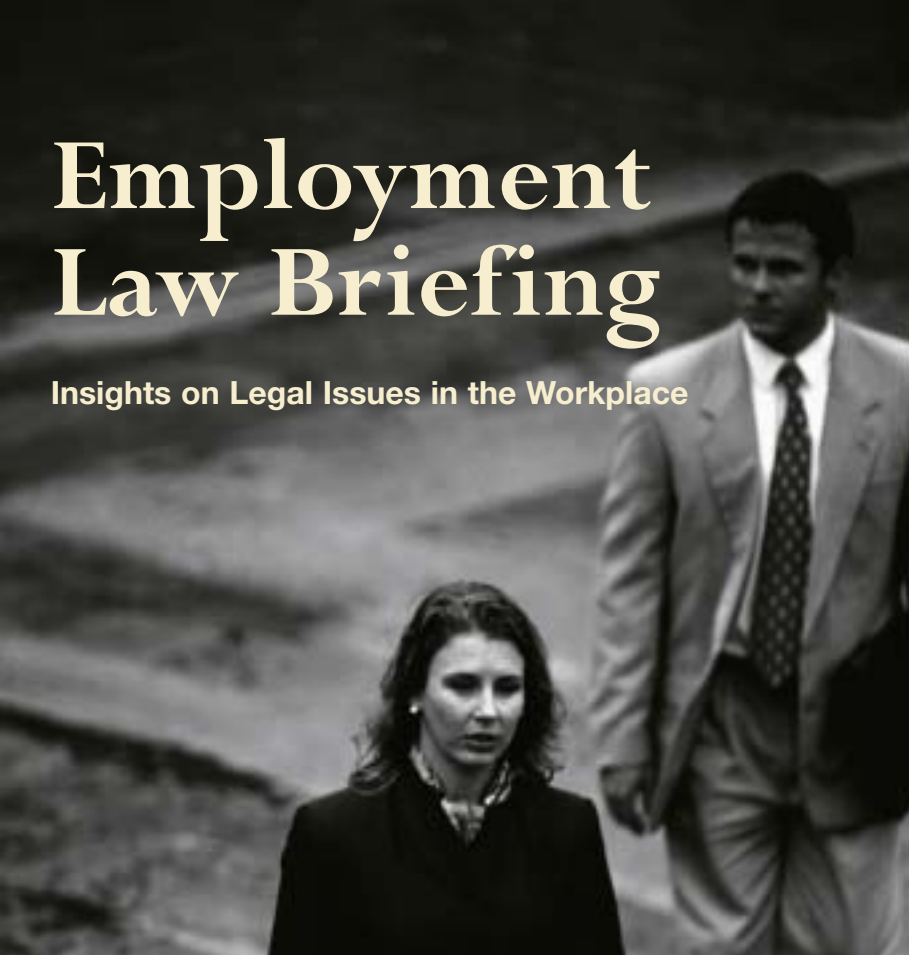


Employment Law Briefing

Insights on Legal Issues in the Workplace



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White Supremacy Held To Be a Religion Under Title VII

Title VII of the 1964 Civil Rights Act forbids employers from discriminating against employees based on their religious beliefs. But what about followers of a religion or belief system that doesn't believe in a god or a higher power and preaches white supremacy? Would Title VII protect jobs of these believers?

This was the question before a federal trial court. Let's take a look at the facts in *Peterson v. Wilmur Communications* and how the court ruled.

The Case Arises

When a communications company hired a man to supervise eight employees, including three nonwhites, it didn't know that he was a "reverend" in the World Church of the Creator, a religion that teaches white supremacy. But it found out when the *Milwaukee Journal Sentinel* interviewed the "reverend" and published an article describing church beliefs and his involvement in the church. The article included a photo of him holding a T-shirt bearing a picture of Benjamin Smith, a white supremacist who had targeted African-Americans, Jews and Asians in a 1999 two-day shooting spree.

The World Church of the Creator preaches a system of beliefs called Creativity. Creativity teaches that:

- ☞ *Jews control the nation and have instigated all wars in this century and should be driven from power,*
- ☞ *The Holocaust never occurred, but if it had, Nazi Germany "would have done the world a tremendous favor,"*

- ☞ *All people of color are "savages," and*
- ☞ *African-Americans are "subhuman and should be shipped back to Africa."*

Creativity considers itself a religion but doesn't teach belief in a god or any supreme being or an afterlife. It teaches members to live according to the principle that what is good for white people is the ultimate good and what is bad for white people is the ultimate sin.

The day after the article appeared, the company suspended the supervisor without pay, then demoted him to a lower-paying nonsupervisory position, because nonwhite subordinates could no longer be sure he was objective in evaluating their work. The employee alleged discrimination.

The Court Rules

First, the court found that the employee had to show that his beliefs constituted a religion within Title VII's definition. To constitute a religion under Title VII, beliefs must:

- ☞ *Function as a religion in believers' lives,*
- ☞ *Occupy the same place in their lives as an orthodox belief in God holds in the life of someone with more traditional religious beliefs, and*
- ☞ *Be "sincerely held" and "religious" in each believer's own scheme of things.*

To meet this test, the court found that Title VII requires a belief system need not have a concept of a god, a supreme being or an afterlife. Purely moral and ethical beliefs can be religious as long as they're held with the

strength of religious convictions. Courts must give “great weight” to a claimant’s own characterization of his or her beliefs as “religious.”

The court found that Creativity constituted a religion under Title VII. It also noted that no one disputed that the employee had a sincere belief in Creativity’s teachings and that he considered Creativity to be his religion. So the court held that the company’s decision to demote him was motivated by his religious beliefs, and concluded that discharging a follower of the World Church of the Creator violated Title VII.

Employers’ Dilemma

This decision demonstrates substantial problems with Title VII’s definition of religion and can create a Catch-22 for employers. They may risk allegations of religious discrimination if they fail to protect

Purely moral and ethical beliefs can be religious as long as they’re held with the strength of religious convictions.

employees’ religious rights to believe in white supremacy. At the same time, they may risk allegations of race discrimination by nonwhite employees supervised by white supremacists.

The decision also opens the door for other groups to reformulate themselves into religions. For example, if pedophiles claimed their belief in adult-child sex constituted a religion, could they force school districts to hire them as elementary-school teachers?

Clearly, this decision calls for judicial or legislative adjustment to avoid these potential pitfalls. 🏛️

Is Arbitration the Best Way To Settle Employment Disputes?

In a landmark decision in 2001, the U.S. Supreme Court ruled on whether agreements to arbitrate employment disputes are generally enforceable under federal law. The Court held that they are — if the arbitration provides employees with the same rights and remedies that would be available to them in court (*Circuit City Stores v. Adams*).

After so ruling, the Court sent the case back to the 9th U.S. Circuit Court of Appeals to determine if the arbitration agreement was valid under the Court’s ruling. The 9th Circuit held that it was not valid because it:

1. *Precluded some remedies that would be available in court — such as front pay, punitive damages, injunctive relief, attorney fees and compensatory damages for emotional distress,*
2. *Required employees to pay higher fees than they’d have to pay if they sued, and*
3. *Allowed employers to bring any claims in court that they might have against employees.*

Since the U.S. Supreme Court ruled, several other courts have shed light on what circumstances will invalidate an arbitration agreement. Here’s a quick review of some of these decisions.

Murray v. United Food & Commercial Workers

This case arose when a union hired a white male as an organizer and required him to sign an arbitration agreement as a condition of employment. The union-drafted agreement required the employee to submit all employment disputes to an arbitrator selected from a list provided by the union president. The arbitration agreement forbade the arbitrator to “alter, change or diminish any power, right or authority” that the union’s bylaws granted the union president.

After the union terminated the organizer’s employment, he alleged that he was discharged because of his race in violation of Title VII. He argued that the union-drafted arbitration agreement was not valid and enforceable because it was structurally biased in the union’s favor. The trial court compelled arbitration and dismissed the employee’s discrimination claim.

When the employee appealed to the 4th Circuit, the union argued that the court should look beyond the agreement’s language to how the union had actually implemented the arbitration agreement. First, the union pointed out that it had not selected the arbitrator from a union-provided list. Rather, a panel of neutral arbitrators had selected the arbitrator from a list compiled by the American Arbitration Association. Second, the union maintained the arbitration had not been conducted irregularly.

Unpersuaded, the 4th Circuit rejected this “no-harm, no-foul” argument. It held that the union couldn’t rewrite the arbitration clause and adhere to unwritten standards case by case to make the clause valid.

The 4th Circuit held that the agreement was invalid because it placed the arbitrator choice exclusively in the union’s hands, and, in any event, the union could disregard the result because its bylaws authorized the president to discharge any employee at the end of an assignment or in the union’s best interest. The

4th Circuit revoked the arbitration agreement because it was so one-sided that its only possible purpose was to undermine arbitration neutrality.

McCaskill v. SCI Management Corp.

In this case, the 7th Circuit invalidated an arbitration agreement that required each party to pay its own attorneys’ fees and costs regardless of the outcome. The court found that Title VII allows a court to award attorneys’ fees to a prevailing plaintiff. The court held that the agreement was unenforceable because it deprived the employee of a Title VII remedy.

The arbitration agreement also required each party to pay half of the arbitrator’s fee and half of any other arbitration costs. The court decided not to decide whether this provision made the agreement unenforceable. But the court did note that some courts have refused to enforce arbitration agreements that require each party to pay half of arbitration costs. Other courts have considered whether this makes arbitration inaccessible.

Weigh the Consequences

Should these decisions — and the Supreme Court’s recent ruling in *EEOC v. Waffle House* that arbitration agreements don’t bar the EEOC from suing employers — discourage you from adopting a binding arbitration program for your employees? Probably not, because the EEOC files only a few lawsuits each year.

But you shouldn’t adopt an arbitration program without taking the steps necessary to ensure its validity. Your program must not take away any Title VII rights or remedies available to employees. And you’ll have to pay all or most arbitration costs in most cases.

Still, don’t overlook the many advantages of arbitration, including lower litigation costs, avoidance of jury verdicts and quicker determinations. You’ll want to thoroughly discuss and consider all the pros and cons of arbitration programs before you decide. 🏠

Court Upholds Employment at Will

Can a company discharge an employee merely because her police-officer husband arrested the owner's wife for drunken driving? It can, and it did, and the Wisconsin Supreme Court upheld the discharge as lawful.

The Facts

In *Bammert v. Don's SuperValu Inc.*, a 26-year employee's husband helped arrest the company owner's wife for drunken driving by administering a breathalyzer test. Shortly afterward, the company discharged the employee.

After the employee's claim of unlawful discrimination based on marital status was dismissed, she alleged wrongful discharge in retaliation for her husband's arrest role.

The company argued that its discharge was lawful because Wisconsin (like most states) follows the employment-at-will doctrine. That is, employers are free to discharge employees for any reason — or for no reason at all. At-will employees have no legal remedy for employers' unjustified discharge decisions.

The Exception

The employee alleged that her situation fell under Wisconsin's public-policy exception to the employment-at-will doctrine. Under this exception — also available in many other states — at-will employees may sue for wrongful discharge if they were discharged for fulfilling or refusing to violate:

- ✦ *A fundamental, well-defined public policy, or*
- ✦ *An affirmative legal obligation established by existing law.*

For example, Wisconsin courts have applied the exception to a clerk who refused to violate tax-withholding rules, a nursing home employee who reported patient abuse and a truck driver who refused to drive without an appropriate license.

The employee asked the court to apply the public-policy exception to her case even though Wisconsin courts had never applied it to discharges in retaliation for conduct outside the employment relationship. And they had never applied it to discharges in retaliation for a nonemployee's conduct.

The Decision

The employee's arguments fell on deaf ears, and Wisconsin Supreme Court refused to extend the

Exceptions to Employment at Will

The major exceptions to the employment-at-will doctrine are state, federal and local statutes that bar discrimination in employment based on factors such as race, sex, age, disability, religion, national origin, union activities and veteran status. But no statutes bar unjust or unfair discharges. To be protected from unjust or unfair discharges, employees must be covered by a union agreement or employment agreement that bars discharge except for just cause.

exception's scope. The court stressed that existing case law emphasizes the exception's limited scope. The court cited a decision warning that a broad interpretation of the public-policy exception would "interject government agencies and the courts into traditional employment relations in a manner inconsistent with employment at will." Another decision cautioned that expanding the exception would open a "Pandora's Box for employment litigation."

The court conceded that while her discharge may have been "reprehensible," it was not "actionable." So the court held that the employment-at-will doctrine inhibits

judicial "second-guessing" of discharge decisions — even if unfair, unfortunate or harsh.

Discharge Reasons Still Important

Most knowledgeable observers would note that the Pandora's Box of employment litigation has been open for a long time. Virtually every employee can challenge a discharge by claiming illegal discrimination based on race, sex, age, religion or national origin. Despite the court's ruling here, employers should be prepared to establish a legitimate, nondiscriminatory business reason for discharging a worker. 🏢

Employers Lose a Defense Against Quid Pro Quo Harassment

When a supervisor conditions an underling's continued employment or job benefits on sexual favors, it's called quid pro quo harassment. When an employer allows severe and pervasive offensive conduct in the workplace, it's called hostile-work-environment harassment.

Most employers are aware of these two types of sexual harassment, but they may not know that correctly categorizing the type is critical. Why? Because the U.S. Supreme Court held in 1998 that employers are "strictly liable" — regardless of actual negligence or intent to harm — for quid pro quo harassment (*Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*).

In other words, while employers have a potential defense if an employee proves hostile-environment

harassment, they have no defense if an employee proves quid pro quo harassment.

An employer can avoid liability in hostile-environment cases if it can show that it exercised reasonable care to prevent and promptly correct sexually harassing behavior. But what if an employee suffers no economic harm from a supervisor's harassment owing to the employee's submission to the demands? Does quid pro quo harassment then exist?

Let's take a look at how the 2nd U.S. Circuit Court of Appeals decided this issue in *Jin v. Metropolitan Life*.

The Harassment Begins

The case arose when, after four years of satisfactory employment, a female insurance agent's new supervisor began a pattern of egregiously and repeatedly:

- ☛ *Making crude sexual remarks,*
- ☛ *Requiring her to meet with him every Thursday night in his locked office where he subjected her to overt sexual advances and threats with a baseball bat,*
- ☛ *Threatening to fire her if she didn't acquiesce to his sexual demands, and*
- ☛ *Threatening her with physical harm.*

After tolerating this conduct for more than a year, the agent refused to attend any more evening meetings with her supervisor and tried to avoid him by working weekends and nights. The insurer denied her request for disability benefits because of the harassment's effects on her, and eventually discharged her.

The Harassee Files Suit

The agent sued the insurer for harassment in violation of Title VII. To establish a quid pro quo case, she had to show that her supervisor had taken "a tangible employment action" against her. The Supreme Court in *Ellerth* defined this as a significant change in employment status, such as hiring, firing, failing to promote, reassigning to a position with significantly different responsibilities or significantly changing benefits.

The trial court instructed the jury that only conduct that resulted in direct economic harm to the agent could constitute a tangible employment action. Because she wasn't directly harmed economically, the jury decided that the insurer wasn't liable.

The Appellate Court Decides

The employee appealed to the 2nd Circuit on the ground that the judge had incorrectly instructed the jury about what constitutes a tangible employment action. The 2nd Circuit agreed that the jury instruction was too narrow. The court refused to read Title VII so as "to punish the victims of sexual harassment who surrender to unwelcome sexual encounters" to avoid economic harm.

The court noted this anomaly: Finding an employer liable when an employee resisted a supervisor's advances and suffered economic harm — and finding an employer *not* liable when an employee was unable to resist and had to submit to sexual abuse to avoid economic harm. This "would punish employees who submit because, for example, they desperately need the income to make house payments And the employee who is coerced into satisfying a supervisor's sexual demands to keep her job may suffer a greater injury than the employee who is able to refuse those demands."

Accordingly, the 2nd Circuit held that an employer is automatically liable for the conduct of a supervisor who makes or threatens to make decisions affecting a worker's employment terms and conditions based on his or her submission to the supervisor's sexual advances.

The Lesson for Employers

This decision presents problems for employers. One is that they can become strictly liable (that is, liable regardless of actual negligence or intent to harm) for a supervisor's conduct based solely on an employee's testimony.

If actual economic harm is required as an element of proof, documentation must exist to verify that fact. But if employees merely have to testify that they submitted to supervisors' advances because of adverse-action threats, this can transform voluntary relationships into causes of action based solely on employee testimony. And if this testimony is believed, employers have no defense even if they have in place every proper complaint procedure and employees don't use them.

The only solution for employers may be to ban all relationships between supervisors and subordinates. But this may open a new set of enforcement and privacy-invasion issues. Either way, the 2nd Circuit has made things tougher for employers. 🏠



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We hope you enjoy this edition of the Employment Law Briefing. Our goal is to provide you with articles and information that will assist you in managing the employer/employee relationship, whether you are in the public or private sector. Should you have any questions regarding the topics in this newsletter, or any related employment matter, I would ask that you contact us.

Howd & Ludorf is a law firm which specializes in the representation of clients with complex litigation concerns. The firm's employment practices group focuses primarily on providing assistance to public entities and small to mid-sized manufacturing, high-tech and related industries.

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- ☛ Employee Handbooks
- ☛ Guidelines for Drug and Alcohol-Free Environments
- ☛ Confidentiality/Non-Compete Agreements
- ☛ Employment Downsizing (RIF Agreements)
- ☛ Sexual/Racial/Religious harassment training/prevention and policies
- ☛ Alternative Dispute Resolution

Our firm works to create legal infrastructures that reduce the potential for problems within the workplace. We work to resolve existing problems with your employees swiftly and effectively. Our focus is on producing measurable and meaningful results that prevent the need for litigation.

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We welcome feedback from you about this newsletter. We believe it is important to continue to apprise our friends, colleagues and clients of legal issues and ongoing changes in this most volatile and important area of law. You may also visit our website, which has recently been modified to include several helpful employment-related pages and sites at www.hl-law.com.

If you have any questions or comments about this publication, or if you know someone who would like to be included in our mailing list, please call **Michael J. Rose** at 860-249-1361 or e-mail me at mrose@hl-law.com.

Very truly yours,

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