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March 25, 2015

By U.S. Mail and Email
Kevin Berry, Director
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Dear Mr. Berry:

We have learned that the Newark Area Office of the Equal Employment Opportunity Commission issued a final determination of reasonable cause against the Phillipsburg School District. According to the final determination, the School District fired teacher Walt Tutka after he distributed a Bible to a student – an action that the EEOC deemed to entail religious discrimination in violation of Title VII. The School District alleged that it fired Mr. Tutka not for distribution of religious materials, but for insubordination because Mr. Tutka refused to meet with the Board of Education about the matter.

Myriad court decisions demonstrate that a school district does not run afoul of Title VII or any other legal provision when it takes an adverse employment action against a teacher who advances religious messages to students. Because the EEOC's final determination lacked any discussion of this case law, we are unable to ascertain whether these decisions may have been overlooked. We write to ask that you consider this case law during the conciliation phase of resolving Mr. Tutka's charge. We further ask that the EEOC bear in mind these legal principles in evaluating future complaints of this nature.

I. Taking Adverse Action to Avoid the Risk of Violating the Establishment Clause Does Not Constitute Religious Discrimination Under Title VII.

As you know, once an aggrieved employee presents a *prima facie* case of religious discrimination, an employer may articulate a legitimate, nondiscriminatory reason for taking the adverse employment action in question. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Provision of a legitimate, nondiscriminatory reason terminates the Title VII inquiry unless the employee can show that the employer's proffered reason is pretextual. *Id.* at 804-05.

When a school district terminates an employee who has presented religious messages to students, and it does so in order to avoid the risk of violating the Establishment Clause, it has not taken the action *because* of the employee's religion. In *Grossman v. South Shore Public School District*, 507 F.3d 1097 (7th Cir. 2007), the Seventh Circuit rejected Title VII and First Amendment claims brought by a guidance counselor who had presented religious messages to students and was not rehired at the end of her contractual term. Although she was an exemplary guidance counselor, the school failed to renew the teacher's contract not because of her religion

per se, but because the school was concerned that it would be sued for violations of the Establishment Clause. *Id.* at 1099. The Seventh Circuit accepted the school's justification, concluding that"[t]eachers and other public school employees have no right to make the promotion of religion a part of their job description and by doing so precipitate a possible violation of the First Amendment's establishment clause." *Id.*

Similarly, in *Helland v. South Bend Community School Corp.*, 93 F.3d 327, 328 (7th Cir. 1996), the Seventh Circuit rejected a Title VII claim brought by a substitute teacher who lost his job in part because he injected religion into the classroom. The adverse employment action, said the court, was not an unlawful action taken *because* of the teacher's religion, but was a lawful response to conduct that exposed the school district to liability. *Id.* at 330.

The courts have uniformly held that the distribution of Bibles to public-school students during the school day—whether by school officials or outsiders, and whether in class or during non-instructional time—violates the Establishment Clause. *See, e.g.*, *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 559-61 (8th Cir. 2009); *Doe v. S. Iron R-1 Sch. Dist.*, 498 F.3d 878 (8th Cir. 2007); *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1170-71 (7th Cir. 1993); *Roe v. Tangipahoa Parish Sch. Bd.*, No. 07-2908, 2008 WL 1820420 (E.D. La. Apr. 22, 2008); *Jabr v. Rapides Parish Sch. Bd.*, 171 F. Supp. 2d 653, 661, 663-64 (W.D. La. 2001); *Chandler v. James*, 985 F. Supp. 1094, 1102 (M.D. Ala. 1997); *Goodwin v. Cross Cnty. Sch. Dist.*, 394 F. Supp. 417, 428 (E.D. Ark. 1973); *Tudor v. Bd. of Educ.*, 100 A.2d 857, 868 (N.J. 1953). Thus, the school would reasonably have been concerned that Mr. Tutka's behavior could have exposed the school to legal liability.

Indeed, once the school became aware of Mr. Tutka's actions, it was not just allowed, but *required*, to take corrective action because once an employer becomes aware of an employee's impermissible behavior, it becomes liable for that behavior unless the employer takes action to ensure that the behavior does not recur. *See, e.g.*, *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 511 (7th Cir. 1993); *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1481 (11th Cir. 1991); *Fletcher v. O'Donnell*, 867 F.2d 791 (3d Cir. 1989).

Thus, if the Phillipsburg School District terminated Mr. Tutka in order to avoid the risk of Establishment Clause liability, it cannot be said to have engaged in religious discrimination in violation of Title VII.

II. Requiring the School District to Accommodate Mr. Tutka's Behavior Would Impose an Undue Hardship.

Evaluating Mr. Tutka's claim with reference to the undue-hardship provision of Title VII yields the same result. Title VII defines "religion" to encompass forms of religious observance, practice, and belief that can be reasonably accommodated without placing an undue hardship on the employer's business. 42 U.S.C. §2000(j). A burden that triggers more than a *de minimis* cost imposes an undue hardship. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

Courts have overwhelmingly recognized that an accommodation is not reasonable, and imposes an undue hardship, when it would subject the employer to potential legal liability. *See,*

e.g., *Tagore v. United States*, 735 F.3d 324, 329 (5th Cir. 2013) (rejecting accommodation that would expose employer to liability for violating statutory prohibition against dangerous weapons in federal buildings); *Seaworth v. Pearson*, 203 F.3d 1056, 1057 (8th Cir. 2000) (per curiam) (employee must provide social-security number to employer because accommodation would impose on employer the undue hardship of violating the Internal Revenue Code); *Finnie v. Lee Cnty.*, 907 F. Supp. 2d 750, 778 (N.D. Miss. 2012) (noting that employer suffers undue hardship when accommodation would create significant legal risks); *Cherry v. Sunoco, Inc.*, 2009 WL 2518221, *6 (E.D. Pa. Aug. 17, 2009) (unreported) (finding undue hardship in exposing employer to risk of violating governmental regulations); *cf. Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1489-92 (10th Cir. 1989) (employer has Title VII duty to undertake accommodation that functionally eliminates risk of legal violation).

Thus, courts have rejected religious-discrimination claims under Title VII when accommodating the employee's religious practice would subject the employer to a risk of violating the Establishment Clause. *See Berry v. Dept. of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006) (public employer has no obligation to allow employee to display religious items in cubicle because accommodation would impose undue hardship by exposing employer to risk of violating Establishment Clause); *United States v. Bd. of Educ.*, 911 F.2d 882, 891 (3d Cir. 1990) (employee has no Title VII right to wear religious attire because accommodation would impose on school board the undue hardship of risking violation of legal prohibition meant to avoid potential Establishment Clause violations).

Thus, even if the EEOC were to conclude that Mr. Tutka was terminated because of a religious practice, it would be a practice that could not be accommodated without the School District's facing a risk of future legal liability. That accommodation would impose an undue hardship and would thus not be required by Title VII.

* * *

In sum, there is no Title VII violation if the Phillipsburg School District terminated Mr. Tutka in order to avoid exposure to legal liability. Even if the EEOC believes that the School District acted harshly when it fired Mr. Tutka, the nature of the School District's adverse action would not give rise to a right that does not otherwise exist. For all these reasons, we ask that the EEOC consider this case law during the conciliation phase of resolving Mr. Tutka's charge. We further ask that the EEOC bear in mind these legal principles in evaluating future complaints of this kind.

Sincerely,

Ayesha Khan, Legal Director
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