



message from partner in charge

We started this newsletter with the idea of giving our clients and friends our insights into a wide variety of legal issues that may affect their businesses. Our next issue certainly fits that bill.

Few issues are as personal and potentially divisive as religion. Bob Ludolph and Mary Deon discuss religious discrimination in the workplace, including how employers can deal with claims from employees that an employer did not accommodate their religious practices or beliefs and claims asserting religious harassment.

Switching gears to a hot topic in the real estate arena, Vicki Harding writes about how real estate developers, owners and tenants are beginning to realize the value in high performance “green” buildings and are getting LEED certification for retail projects.

We hope you enjoy these articles, and we encourage you to find even more informative content at our Web site, www.pepperlaw.com, and our latest podcasts at www.pepperpodcasts.com.

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Religious Discrimination in the Workplace

Few issues are as personal and potentially divisive as religion. Controversies generated by the “war on terror,” the abortion debate and other issues which indirectly may relate to religious beliefs lead one to question, where does religion begin and politics end. As these issues spill over into the workplace, an employer’s responsibility for accommodation of employees’ religious rights and practices continues to evolve.

Religious tolerance was a founding principle of our democracy. The right to be free from religious discrimination in the workplace is embedded in Title VII of the Civil Rights Act as well as state civil rights laws. This obligation to keep the workplace free from religious discrimination and harassment can raise a number of hot-button issues such as:

- Must an employer provide an area where employees may pray during the workday?
- Can an employer prevent an employee from placing a religious greeting or expression on business e-mails or voice mails?
- Under what circumstances can an employer prohibit an employee from wearing clothing or accessories of his or her faith?

Before civil rights obligations are triggered, the employee must first demonstrate that his or her beliefs constitute a “religion.” The Supreme Court defined religion as: “a sincere and meaningful belief which occupies in the life of the possessor a place parallel to that filled by God.” *United States v. Seeger*, 380 U.S. 163, 176; 85 S.Ct. 850 (1965). Under this test, courts ask whether a belief “functions as” religion in the plaintiff’s life.

A belief system does not require a belief in God, Supreme Being or afterlife, or derive from any outside source – so purely “moral and ethical beliefs” can be religious “so long as they are held with strength of religious convictions.” *Welsch v. United States*, 398 U.S. 333, 339-40, 90 S.Ct.

1792 (1970). As long as the belief is sincerely held and the plaintiff considers it to be religious, the court will find the belief is religious regardless of whether others find it comprehensible, logical or acceptable. This definition encompasses far more than the traditional religions.

Under this test, virtually any belief system constitutes “religion.” With such a broad definition, employers should tread lightly. Religious discrimination claims find support across the spectrum of judicial and political persuasion. In the current climate, even beliefs which appear more political than spiritual also may be found sufficiently religious to land its subscriber under Title VII’s expansive umbrella.

Once this threshold is met, an employer is required to reasonably accommodate an employee’s “religion.” The term “religion” includes all aspects of religious observance unless an employer demonstrates that it is unable to reasonably accommodate an employee’s religious practice without undue hardship on the conduct of the employer’s business.

A plaintiff claiming discrimination under an accommodation theory must demonstrate that he or she holds a sincere religious belief that conflicts with an employment requirement, the employer has been informed of the conflict, and that the plaintiff experienced some adverse employment action for failing to comply with the conflicting employment requirement. If the plaintiff makes this showing, the burden then shifts to the employer to demonstrate that it initiated good faith efforts to accommodate the employee’s religious practices or that it could not reasonably accommodate the employee without undue hardship in the conduct of its business. In general, an employer has considerable ability to restrict religious expression in the workplace. To require an employer to bear more than a *de minimis* cost in order to accommodate an employee’s religious beliefs is an undue hardship. Whether or not an accommodation is reasonable is determined on a case-by-case basis.

Somewhat more complicated are claims brought by individuals asserting religious harassment. To establish a religious harassment case, a plaintiff must demonstrate that he or she is a member of a protected class subjected to unwelcome harassment due to religion. The conduct must be severe and pervasive enough to create an environment that a reasonable person would find hostile, and that the employee subjectively believed it to be abusive or hostile. Such hostility may be found where an

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employee is subjected to frequent and unwelcome religious discussions or invitations to attend religious services or simply extensive displays of religious iconography at the employee’s work station.

Employers may insulate themselves from such claims by taking prompt and corrective action. Specifically, to hold an employer liable for co-workers’ harassment, plaintiffs must show that the employer knew or should have known of the harassment and the employer unreasonably failed to take prompt and appropriate corrective action.

The line between political and religious beliefs has always been a thin one. When dealing with a potential religious discrimination claim, employers are wise to assume that any sincere belief system, no matter how political the issues may appear, could fall within the broad legal definition of religion. While employers are required to reasonably accommodate employees’ religious practices, they are not required to endure even a *de minimis* hardship to that end. Although employers cannot tolerate consistent negative remarks regarding any particular religion in the workforce, employers also must guard against over-enthusiastic religious proselytizing, which may create a hostile work environment for subscribers of differing belief systems.

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Going Green: LEED Certification for Retail Projects

Real estate developers, owners and tenants are beginning to realize the value of high performance “green” buildings. It is becoming apparent that green measures make economic, as well as environmental, sense – particularly when considered over the life cycle of a building.

LEED® (Leadership in Energy and Environmental Design) Certification

The leading benchmark for certifying green buildings is the LEED Green Building Rating Systems,™ which are developed by the U.S. Green Building Council (USGBC) through a consensus process that includes an opportunity for public comment and approval by a vote of USGBC members. (Pepper Hamilton LLP is a member of USGBC, and lawyers from the firm are active in regional USGBC chapters and the corresponding committees for current pilot LEED Rating Systems.)

If your vision of a “green” building consists of incorporating recycled materials in construction, you may be surprised to learn that in addition to conservation of materials and resources, LEED certification typically includes credits in the area of sustainable sites, energy efficiency, water efficiency and indoor environmental quality. Energy efficiency, which has always been a major component, is becoming a central consideration. Subject to approval of its members, USGBC is proposing to add a requirement effective at the end of June 2007 that all projects achieve a minimum of two energy efficiency credits as a condition of LEED certification.

Each of the LEED Rating Systems establishes prerequisites together with available credits in each of these areas by identifying the intent, requirements (including detailed metrics) and strategies for meeting the requirements for each item. If a building satisfies all of the prerequisites (which are mandatory) and achieves the designated number of credits, it can be LEED certified. The original rating system evolved into LEED-NC, which is applicable to new construction and major renovations. A variation was developed for certifying existing buildings (LEED-EB); and in recognition of the division of responsibility between the owner and tenants in a spec building, LEED-CS (Core and Shell) and LEED-CI (Commercial Interiors)

Responding to White Collar Investigations and Indictments: Leading Lawyers on Working with the Prosecution, Formulating a Defense, and Negotiating for the Best Possible Outcome (Inside the Minds)

Responding to White Collar Investigations and Indictments is an authoritative, insider’s perspective on best practices for litigating and settling white collar criminal cases.

Abraham Singer, Litigation Partner with Pepper Hamilton LLP, authored chapter six entitled “Strategic Defense of an Individual White Collar Client.”

Visit www.aspatore.com/store/bookdetails.asp?id=580 for more information or to order this publication.

were developed so that the owner and tenants can pursue certification independently for the base building and the tenant improvements.

LEED for Retail

LEED-NC was originally designed for rating commercial and institutional buildings, with an emphasis on office buildings. In some cases, the requirements can be difficult to apply in the retail context. For example, for an office building, determination of compliance with some of the daylighting and view credits in the indoor environmental quality area is based on the perspective of an office worker seated in a designated work space. How should this be applied to a retail sales clerk, who typically stands and moves about the store?

In recognition of this issue, USGBC has pilot projects underway to develop variations of LEED-NC and LEED-CI that have been specifically tailored for retail projects. So, for example, the water efficiency credits include a commercial equipment performance table to provide a baseline for a commercial clothes washer, commercial dishwasher, and other types of equipment commonly found in retail establishments. Similarly, the materials credits that permit consideration of furniture include retail display/shelving purchased as a unit as eligible furniture.

The core committee responsible for developing LEED for Retail includes representatives from such companies as Starbucks, Target Corporation and Forest City Commercial Development. The development of LEED for Retail based on input from people knowledgeable in the industry confirms that high performance “green” building is becoming a mainstream approach for retail projects.

Portfolio Program

It would be difficult to justify investing in LEED certification for each building in a large real estate portfolio. To address this issue, USGBC is working with companies such as PNC Bank, Cushman & Wakefield, Thomas Properties, Inc., and USAA Real Estate Company, on a pilot program that will permit a company to obtain LEED certification quickly on a large number of buildings. The program is designed to provide a streamlined process that can be applied on a portfolio level for companies willing to commit to certify at least 25 buildings or a minimum of 2 million square feet.

LEED Process and Strategies

LEED emphasizes the importance of adopting a multi-disciplinary approach that considers effective options and alternatives on an integrated basis from the beginning of a project. Even if formal LEED certification is not necessary or desired, both this process and the strategies developed in connection with LEED can provide valuable enhancements for a project that lead to direct economic benefits in decreased operating costs and increased productivity.

Lawyers in our Real Estate Practice Group are conversant with the LEED Rating Systems and ongoing developments in the area. We can participate as an effective part of a project team to identify opportunities to leverage LEED certification efforts or to identify appropriate LEED measures for consideration where formal certification is not being pursued.

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Detroit Office Sponsors Crain’s Detroit Business Ultimate House Party - September 20, 2007

Pepper was a gold sponsor for Crain’s Ultimate House Party on Thursday, September 20, 2007, from 5:30 to 9:30 p.m.

Last year, 900 attendees, 35 houses, 14 sponsors and 11 restaurants participated in the first Crain’s Ultimate Detroit House Party. Interest in this year’s event was even greater, with more than 40 houses, 18 sponsors and 11 restaurants participating. Some of Detroit’s most intriguing homes were showcased as executives networked with Southeast Michigan’s movers and shakers.

Call 313.446.0300 for more information on the event.

Pepper Hamilton LLP
Attorneys at Law

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