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DISCRIMINATION ON THE BASIS OF
RELIGION IS PROHIBITED!
BUT WHAT IS RELIGION?

BY BERNARD E. JACQUES*

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice to discriminate on the basis of religion.¹ The Connecticut Fair Employment Practices Act makes it illegal to discriminate on the basis of an employee's religious creed.² Discrimination includes the failure to reasonably accommodate the employee's religious observances or practices.³ But what is religion? What is a religious creed?⁴

On Sunday, March 19, 2000 an article appeared in the *Milwaukee Journal Sentinel* describing the World Church of the Creator, including an interview with one of its adherents, Christopher Lee Peterson.⁵ The World Church of the Creator preaches beliefs that it labels "Creativity."⁶ Among the tenets of Creativity are that people of color are "savage" and intent on "mongrelizing the White race, that African-Americans should be "shipped back to Africa," and that Jews control the nation and have instigated all of the wars in this century.⁷ Creativity considers itself a "religion," but it does not espouse a belief in God or a Supreme Being, nor does it

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¹ 42 U.S.C. § 2000e-2(a).

² CONN. GEN. STAT. § 46a-60(1).

³ 42 U.S.C. § 2000e(j). The Connecticut Fair Employment Practices Act, unlike Title VII, does not have language explicitly requiring an employer to reasonably accommodate an employee's religious observances and practices. Nor does the Connecticut statute explicitly require employers to accommodate an employee's disability. However, the Connecticut Supreme Court has held that the duty to reasonably accommodate an employee's disability was implicitly stated in the Connecticut statute. *Curry v. Allan S. Goodman, Inc.*, 286 Conn. 390 (2008). The rationale of *Curry* suggests that Connecticut courts would hold that the duty to reasonably accommodate an employee's religious observances and practices is implicitly stated in the statute.

⁴ *Peterson v. Wilmur Communications, Inc.*, 205 F. Supp. 2d 1014 (E.D. Wisc. 2002).

⁵ *Id.* at 1016.

⁶ The descriptions of the beliefs and practices of the World Church of the Creator are found in *Peterson. Id.* at 1014-16.

⁷ *Id.* at 1014-16.

believe in an afterlife.⁸ It derides such beliefs as “nonsense about angels and devils and gods and . . . silly spook craft.”⁹

The article also featured a picture of “Reverend Peterson” holding a tee-shirt bearing a picture of Benjamin Smith, who had targeted African-Americans, Asian-Americans and Jewish-Americans in a two-day shooting spree before killing himself.¹⁰ In the picture Mr. Smith was carrying a copy of *The White Man’s Bible*, one of the two central texts of the World Church of the Creator, which offers a vision of a white supremacist utopian world of “beautiful, healthy [white] people, free of disease, pollution, fear and hunger.”¹¹ According to the precepts of this “church,” this vision can only be realized through the degradation of all nonwhites.¹² Therefore, members, called “Creators,” should live their lives according to the principle that what is good for white people is the ultimate good and advancing their interests at the expense of nonwhites is virtuous.¹³

On the day that the article was published, Christopher Lee Peterson was employed as a manager by Wilmur Communications, responsible for supervising eight other employees, three of whom were nonwhite.¹⁴ In his six years of employment, Mr. Peterson had been disciplined once for a data entry mistake but had never been disciplined in connection with his role as a supervisor.¹⁵ The day after the article was published, he was suspended without pay.¹⁶ Two days later, he was reinstated but demoted to a lower paying posi-

⁸ *Peterson*, 205 F. Supp.2d at 1016.

⁹ *Id.*

¹⁰ *Id.* The “Pontifex Maximus” of the World Church of the Creator was indicted and convicted of attempting to assassinate a federal judge. *United States of America v. Hale*, 448 F.3d 971 (7th Cir. 2006).

¹¹ *Peterson*, 205 F. Supp.2d at 1016.

¹² *Id.*

¹³ The World Church of the Creator was required to change its name after it was successfully sued by the Church of the Creator in a trademark infringement action. *Te-Ta-Ma Truth Foundation v. World Church of the Creator*, 297 F.3d 662 (7th Cir. 2002). It now calls itself The Creativity Movement. Available at <http://www.creativitymovement.net>. For a history of the “church” see also <http://www.adl.org/backgrounders/wcote.asp>, which is a site maintained by the Anti-Defamation League.

¹⁴ *Peterson*, 205 F. Supp.2d at 1016.

¹⁵ *Id.*

¹⁶ *Id.*

tion without supervisory duties.¹⁷ In the written demotion notice, his employer referred to the article and characterized the World Church of the Creator as a “White supremacist political organization.”¹⁸ The letter stated:

. . . It is your responsibility to train, evaluate, and supervise telephone solicitors. Our employees cannot have confidence in the objectivity of your training, evaluation, or supervision when you must compare Whites to non-whites.

Because the company, present employees, or future job applicants cannot be sure of your objectivity, you can no longer be a supervisor . . . ¹⁹

Mr. Peterson sued, claiming that his employer had demoted him because of his religion in violation of Title VII of the Civil Rights Act of 1964, which makes it unlawful for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s . . . religion.”²⁰ The statute defines “religion” to include “all aspects of religious observance and practice, as well as belief.”²¹ The statute imposes an “affirmative duty” on an employer to reasonably accommodate the “religious observance and practices of its employees, unless the employer can demonstrate that such an accommodation would cause undue hardship to the conduct of its business.”²² Thus, actions alleging employment discrimination on the basis of religion can be

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 42 U.S.C. § 2000e-2(a).

²¹ 42 U.S.C. § 2000e(j).

²² 42 U.S.C. § 2000e(j); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed. 2d 113 (1977) (Title VII requires an employer to make reasonable accommodation to an employee’s religious practices, but “to require [an employer] to bear more than a de minimis cost . . . is an undue hardship”). Although Title VII requires employers to provide a “reasonable accommodation” to their employees when there is conflict between the employees’ religious practices and their job responsibilities and the Americans With Disabilities Act (“ADA”) requires employers to provide a “reasonable accommodation” to employees with a disability, the “reasonable accommodation” required by Title VII is different than the “reasonable accommodation” required by the ADA. *Kalsi v. New York City Transit Authority*, 62 F. Supp.2d 745, 757 (E.D.N.Y. 1998) (“Title VII’s obligation to make a reasonable accommodation of religious practices should not be confused with the obligation imposed by the Americans With Disabilities Act (“ADA”) to make reasonable accommodation of disabilities. . . [I]n stark contrast to the ADA’s reasonable accommodation requirement, which has been interpreted broadly, the obligation under Title VII is very slight.”) *Compare* 42 U.S.C. § 12111(10)(A) where the

divided into two types: (1) that religion was a factor in an adverse employment decision, in which case religious discrimination claims are analyzed according to the traditional and well recognized standards of burden shifting found in *McDonnell Douglas Corp. v. Green*,²³ or (2) that the employee faced a conflict between his religious practices and the employer's dictates and the employer failed to reasonably accommodate the employee's religious practices.²⁴

The threshold issue in *Peterson* was whether Mr. Peterson's beliefs constituted a "religion," as that term is understood in Title VII jurisprudence, or whether those beliefs constituted his personal views on race relations, which are not protected.²⁵ Determining whether a belief is religious is "more often than not a difficult and delicate task" and one to which courts are ill-suited.²⁶ Distinguishing a

term "undue hardship" means an action requiring significant difficulty or expense with *Hardison* where the term "undue hardship" means anything more than *de minimis*. 432 U.S. at 84.

²³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). See *Mandell v. The County of Suffolk*, 316 F.3d 368 (2d Cir. 2003) (applying *McDonnell Douglas* to claims of religious discrimination in employment); *Feingold v. The State of New York*, 366 F.3d 138 (2d Cir. 2004). Of course, harassment that is based on an employee's protected class, which is severe or pervasive, is a form of discrimination. *Faragher v. Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed. 2d 662 (1998). See *EEOC v. Sunbelt Rentals*, 521 F.3d 306 (4th Cir. 2008) (Muslim employee who wore a kufi as part of his religious observance was subjected to hostile work environment in violation of Title VII where fellow employees repeatedly called him "Taliban" and "towel head" and made fun of his appearance, questioned his allegiance to the United States, suggested that he was a terrorist and made comments associating all Muslims with senseless violence).

²⁴ See *Baker v. The Home Depot*, 445 F.3d 541 (2d Cir. 2006) (analyzing whether employer failed to reasonably accommodate plaintiff's religious practices); *Cosme v. Henderson*, 287 F.3d 152 (2d Cir. 2002).

²⁵ See *Slater v. King Soopers, Inc.*, 809 F. Supp. 809 (D. Colo. 1992) (finding that Klu Klux Klan is a political organization, not a religion under Title VII). The plaintiff in *Slater* was an active member of the Klu Klux Klan. After he organized a rally celebrating Adolph Hitler, he was terminated by his employer, a grocery chain. He sued claiming that he had been terminated because of his religious beliefs. The court held that the KKK is "political and social in nature" and, therefore not protected by Title VII. *Id.* at 810; *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973). Plaintiff, a member of the United Klans of America, was terminated and filed a claim alleging that his termination was based on his religious beliefs. The court held that the "racist and anti-Semitic ideology of the organization" showed it to be a political organization, rather than a religious one. *Id.* at 1027-28.

²⁶ *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed. 2d 624 (1981). See J. Ritter, *The Legal Definition of Religion: From Eating Cat Food to White Supremacy*, 20 *TOURO L. REV.* 751 (2004); S. Morz, *True Believers?: Problems of Definition in Title VII Religious Discrimination Jurisprudence*, 39 *IND. L. REV.* 145 (2005).

religion from other forms of belief has proven to be contentious and problematic.²⁷ In addition, the Supreme Court has cautioned courts that they must avoid making theological pronouncements or doctrinal interpretations under the guise of rendering judicial decisions.²⁸

To avoid being drawn into a constitutionally dubious process whereby a court determines if the content of the employees' belief warrants the conclusion that those beliefs are a religion and the necessary predicate of that conclusion—an inquiry into the substance of those beliefs, courts have used a functional test. Courts inquire not into what the beliefs are, but, rather ask whether those beliefs “function as” a religion in the life of the individual.²⁹ By focusing on the

²⁷ *Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981) (“Few tasks that confront a court require more circumspection than of determining whether a particular set of ideas constitutes a religion.”); *Equal Employment Opportunity Commission v. Allen-Dale Nursing Center*, 996 F. Supp. 712 (W.D. Mich. 1998) (“In the context of religious discrimination claims, courts have been reluctant to scrutinize an individual’s religious beliefs and have not required that the beliefs in question be based upon organized or recognized teachings of a particular sect.”) Of course, courts have also been asked to define religion in other contexts. Numerous individuals have sought to use freedom of religion to shield themselves from criminal drug use. For example, in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Supreme Court was asked to decide whether the sacramental use of peyote by Native Americans was protected by the First Amendment. It held it was not.

²⁸ *Id.* at 494 U.S. 872, 887, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

²⁹ *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L. Ed. 2d 733 (1970). However, although the court in *United States v. Kuch*, 288 F.Supp. 439 (D.C. 1968), noted that courts must be “careful not to permit their own moral and ethical standards to determine the religious implications of beliefs and practices of others, it is difficult to escape the conclusion that that is precisely what the court did do. The defendant in *Kuch*, who was indicted on several counts of possession, sale and delivery of marijuana and LSD, claimed that she was an ordained minister of the Neo-American Church. This “church” had many of the external trappings of other churches. It was incorporated as a nonprofit and had a nationwide membership of 20,000. It had a hierarchy that was analogous to priests and bishops. The top-ranking official of the “church” was referred to as “Chief Boo Hoo” and the ingestion of psychedelic drugs was celebrated as the “true host” and considered a sacramental duty. There was a written Catechism and handbook detailing the “church’s” practices and beliefs. Members were required to subscribe to three core beliefs: (1) everyone has the right to expand his or her consciousness; (2) psychedelic substances such as LSD are the true host of the “church” and not considered drugs; and (3) those unprepared should not be encouraged to use psychedelics. The court concluded:

Reading the so called ‘Catechism and Handbook’ of the Church containing the pronouncements of the Chief Boo Hoo, one gains the inescapable impression that the membership is mocking established institutions, playing with words and totally irreverent in any sense of the term. Each member carries a ‘martyrdom record’ to reflect his arrests. The Church symbol is a three-eyed