THE ARCHDIOCESE OF SAINT PAUL AND MINNEAPOLIS

SCHOOL LAW DAY

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DRESS CODE POLICIES AND RELIGIOUS ATTIRE

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Dress Code Policies & Religious Attire

- **Introduction**

- **Outline**
  - First Amendment Does Not Apply (but could under certain circumstances)
  - Minnesota Human Rights Act Requirements
  - Application to Catholic Schools, Students
  - Step-by-Step Process, Students
  - Requirements for Employees
  - Recommendations for Employee Religious Apparel Issues

- **First Amendment**
  - Only applies to the federal government
  - Fourteenth amendment makes it applicable to states as well
  - Public schools are considered state actors, so through the Fourteenth Amendment, the First Amendment applies to public schools
  - *Rendell-Baker* explains this, but goes on to state that a private party's acts will be considered state acts in certain circumstances when the private party acted in concert with the state actor[1]
    - Factors considered for this determination:
      - Degree to which the private entity is dependent on government aid
      - Extent and intrusiveness of the governmental regulatory scheme
      - Whether the scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation
      - Extent to which the entity serves a public function or acts as a surrogate for the state
      - Whether the entity has legitimate claims to recognition as a private entity in associational or other constitutional terms
  - First Amendment does not apply to private schools under most circumstances. But going forward, it is worthwhile to consider the level of government involvement and control over your school.

[1] *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

- **The Minnesota Human Rights Act**
    - Prohibits discrimination based on a number of characteristics, including religion[2]
    - Applies to both public and private schools
    - Schools must allow religious apparel when:
        - The apparel is worn because of a sincerely held religious belief, and
        - An exception does not impose a material and substantial interference
    - Examples of religious apparel:
        - Jewish yarmulke (skullcap), Muslim hijab, khimar, bhurka (headscarves and body wrap), some piercings/tattoos
    - Sincerely Held Religious Belief[3]
        - If not sincerely held, no exception necessary
        - If sincerely held, must make an exception (unless it imposes a material and substantial interference)
            - How to determine whether belief is "sincerely held?"
                - Again, no clear standard; but
                - Five traits looked for:
                    - Ultimate ideas
                    - Metaphysical beliefs
                    - Moral or ethical system
                    - Comprehensiveness of beliefs, and
                    - Accoutrements of religion[4]
                - Not just cultural or personal preference
                - Absent significant doubt of sincerity,[5] courts typically defer to an individual's claims regarding religion
        - When it is not clear whether belief is sincerely held, it is best to make an exception. Otherwise the school must wade into religious teachings, making judgments on an individual's religion. This is not good policy or good public relations, and could put the school at risk of religious discrimination.[6]

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[2] Minn. Stat. § 363A.13 Subd. 1.

[3] *Hill v. Blackwell*, 774 F.2d 338, 342-42 (C.A.8 1985).

[4] *U.S. v Quaintance*, 608 F.3d 717, 720, n. 1, (C.A.10 2010) (cited by *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2774 (U.S. 2014).

[5] *Id.* (where defendants claimed that they were members of the "Church of Cognizance", and believed that marijuana was a deity, the court held that because the defendants continuously referred to their marijuana dealing as "business", that the defendants also used cocaine, and that the religious ceremonies they performed appeared to be only a legal cover for their drug dealing, there was sufficient evidence that their religious beliefs were not sincerely held).

[6] Employers typically decide to simply not argue this point. *See, e.g., Cloutier v. Costco Wholesale*, 311 F.Supp.2d 190, 198 (D.Mass.2004) (employee was member of the "Church of Body Modification", which encourages piercings, tattoos, and alterations). There is "little room for a party to challenge the religious nature of an employee's

- Material and Substantial Interference
  - MHRA applied to private schools is a developing area of law, so little guidance exists currently – it is common for courts to borrow analogous case law. So it is likely a court would consider the liberty issues at public schools for guidance
  - If an exception to a dress code policy at a public school would create a material and substantial interference, the exception is not required
    - "Material and Substantial" means:
      - More than a mere desire to avoid discomfort and unpleasantness
      - Must be a specific and significant fear of disruption, not just some remote apprehension of disturbance[7]

- **Step-by-Step Process, Students**
  - Is there a significant reason to not allow the apparel?
    - If no, then make an exception (but be consistent)
    - If yes, then:
  - Is the apparel worn because of a sincerely held religious belief?
    - If no, then it may be prohibited
    - If yes, then:
  - Does allowing the apparel create a material and substantial interference for the school?
    - If yes, then it may be prohibited
    - If no, it must be allowed

- **Requirements for Employees**
  - Title VII of the Civil Rights Act has employment requirements regarding religious discrimination.
    - But these requirements do not apply to religious schools because of an exception:
      - Title VII permits "a school . . . to hire and employ employees of a particular religion" if the institution is, in whole or substantial part, "owned, supported, controlled, or managed by" a particular religion, religious corporation, association or society, or if the

professed beliefs", and "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others." *E.E.O.C. v. Union Independiente*, 279 F.3d 49, 56 (C.A.1 2002).

[7] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969); *B.H. Ex Rel. Hawk v. Easton Area School District*, 725 F.3d 293 (3d Cir. 2013).

institution's curriculum is directed toward the propagation of a particular religion.[8]

- A Catholic school does not "lose its right to discriminate based on religion after it hire[s] . . . a non-Catholic. A religious organization's right to make employment decisions based on religion exists throughout the employment relationship, not just during the hiring process."[9]

- MHRA 363A.08 Subd. 2
  - "Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer, because of … religion, … to:
    - (1) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or
    - (2) discharge an employee; or
    - (3) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment."
  - Applies to all employers in Minnesota with at least one employee
  - An exception for "institutions organized for educational purposes that is operated, supervised, or controlled by a religious association, religious corporation, or religious society that is not organized for private profit", allows them to "limit[] admission to or giv[e] preference to persons of the same religion or denomination…"[10]
    - This allows Catholic schools to "give preference to" Catholics, but beyond this does not allow discrimination based on religion
- A developing area of law, so Minnesota courts borrow legal precedent from federal framework:
  - "In construing the MHRA, we apply law developed in federal cases arising under Title VII of the 1964 Civil Rights Act."[11]

[8] 42 U.S.C. § 2000e-2(e)(2). For example, in *Ginsburg v. Concordia Univ.*, 2010 WL 3720186 (D.Neb., 2010), the court held that where the school held itself out as a religious institution, was organized as a non-profit corporation organized expressly for religious purposes, campus activities included chapel services, and its curriculum included religious instruction, it was a religious organization exempt from a Titrle VII discrimination claim brought by a discharged Catholic softball coach.

[9] *Little v. St. Mary Magdalene Parish*, 739 F.Supp. 1003, 1006 (W.D.Pa. 1990) (citing *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

[10] Minn.Stat. §363A.26.

[11] *Fletcher v. St. Paul Pioneer Press*¸589 N.W.2d 96, 101 (Minn. 1999). *See also Hubbard v. United Press Intern., Inc.*, 330 N.W.2d 428, 441 (Minn. 1983) (stating that "Because of the substantial similarities in the language and purposes of the two statutes, in construing the Minnesota Human Rights Act this court has applied principles developed in the adjudication of claims arising under Title VII of the 1964 Civil Rights Act.")

- However, in applying Title VII, it is not clear whether Minnesota courts would also apply the exception to Title VII for religious employers…
    - If the exception is applied, then the religious discrimination provisions in Title VII of the Civil Rights Act and in the MHRA would not apply to Catholic Schools in MN.
    - If the exception is held to not apply, which is more likely, the MHRA could be interpreted as effectively imposing the case law of Title VII of the Civil Rights Act on Catholic Schools in MN. This is a possibility, and therefore it is important to analyze these rules.

- "A plaintiff in a Title VII religious discrimination action has two legal theories available for the prosecution of his claims: 'disparate treatment' and 'failure to accommodate.' "[12]
- "Disparate treatment" claims under the MHRA are analyzed under Title VII's *McDonnell Douglas* framework:[13]
    - First, plaintiff must present a prima facie case of discrimination by a preponderance of the evidence
    - This creates a presumption that the employer unlawfully discriminated against the employee – the burden shifts to employer to show some legitimate, non-discriminatory reason for its actions
    - Finally, if employer shows this, burden shifts to plaintiff who may show that the reason is just a pretext for discrimination.[14]
- For prima facie cases of discrimination, *McDonnell Douglas* provides that this may be established by showing:
    - The plaintiff is a member of a protected class
    - The plaintiff was qualified for the opportunity in question
    - The plaintiff suffered an adverse action, such as discharge or refusal to hire,
    - The opportunity was given to someone with the plaintiff's qualifications, particularly a nonmember of the protected class.[15]

[12] *Breech v. Alabama Power Co.*, 962 F.Supp. 1447, 1456 (S.D.Ala. 1997), aff'd 140 F.3d 1043 (11th Cir. 1998); *see also Wilshin vl Allstate Insurance Co.*, 212 F.Supp.2d 1360, 1370-71 (M.D.Ga. 2002) (citing *Chalmers v. Tulon Company of Richmond*, 101 F.3d 1012, 1017-18 (4th Cir. 1996)).
[13] *Alagok v. State*, WL 1707692 *3 (Minn.App. 2013) (citing *Sigurdson v. Isanti Cnty.*, 386 N.W.2d 715, 719-20 (Minn. 1986); *see also Hubbard* at 441-42.
[14] *Sigurdson* at 722.

- Alternatively, "Failure to Accommodate" claims under Title VII are analyzed by a three part test:
    - Employee must have a sincerely held religious belief
    - When employee makes employer aware of a conflict with the employee's religious practice, employer's responsibilities are engaged.
    - Employer must then provide a "reasonable accommodation" for employees' religious practices
        - Unless this would create an "undue hardship" on the school.

- Sincerely Held Religious Belief
    - Same analysis as described above for students
- Employee Makes Employer Aware
    - Employee has a duty to "give fair warning of the employment practices that will interfere with his religion and that he therefore wants waived or adjusted."[16]
    - A simple announcement of belief in a certain religion is not sufficient notice of an employee's specific beliefs and observances.[17]
    - It is enough if the employer has "enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job description."[18]
- Reasonable Accommodation
    - The employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear, but the reach of that obligation has never been spelled out by Congress or by EEOC guidelines
    - Accommodation must "eliminate the conflict between employment requirements and religious practices."[19]
    - The accommodation does *not* have to be one preferred by the employee, as long as it eliminates the conflict.[20]

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[15] *McDonnell v. Green*, 409 U.S. 792, 802 (1973).
[16] *Reed v. Great Lakes Co.*, 330 F.3d 931 (7th Cir. 2001).
[17] *Wilkerson v. New Media Tech. Charter Sch., Inc.*, 522 F.3d 315, 319 (3d Cir. 2008).
[18] *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995). *E.g.*, in *EEOC v. GKN Driveline North America, Inc.* 2010 U.S. Dist. LEXIS 129815, *24 (M.D>N.C. Dec. 8, 2010), the court held that it was sufficient for the employee to tell his employer that he would rather take a drug test by urinalysis than by swab test "because of [his] religion."
[19] *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-70 (1986).

- Both employer *and employee* have a responsibility to search for a reasonable accommodation. "The employee has a duty to cooperate with the employer's good faith efforts to accommodate."[21]
- Accommodation may impose some costs on the employee.[22]
- Specific definition of "reasonable accommodation" left to "each case on an individual basis in an effort to seek an equitable application…", and is "quintessentially a fact-bound inquiry that depends on the unique circumstances of each case."[23]
- Some factors considered in finding that an employer has attempted to provide a reasonable accommodation:
    - Holding meetings with employee in attempt to reach a solution
    - For worker who felt religious obligation to wear a pro-life pin at all times, asking her to cover it while at work, but not requiring her to remove it, was reasonable accommodation[24]
    - For a worker who could not work on Sabbath, attempting (but failing) to find employees who would swap shifts[25]
    - Moving employee to job without customer contact[26]

▪ <u>Undue Hardship</u>

- Is a case by case, fact intensive determination, but must be more than *de minimis*.[27]
- Wide range of rulings on how to apply. Some of these include:
    - Causing a lack of necessary staffing
    - Jeopardizing security or health[28]
    - Forcing employer to ignore seniority system[29]
    - Must be more than a minimal increase in cost or expense[30]

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[20] *Sturgill v. United Parcel Service, Inc.* 512 F.3d 1024 (C.A.8 2008).
[21] *Cloutier v. Costco Wholesale*, 311 F.Supp.2d 190, 198 (D.Mass.2004) (employee was member of the "Church of Body Modification", and had facial piercings, which went against employers dress code).
[22] *Haliye v. Celestica Corp.*, 717 F.Supp.2d 873 (D.Minn. 2010).
[23] *Id.*
[24] *Wilson v. U.S. West Communications*, 58 F.3d 1337 (C.A.8 1995) (employee had made promise to God to wear pro-life pin).
[25] *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (employee would not work on Sabbath).
[26] *Brown v. F.L. Roberts & Co., Inc.*, 419 F.Supp.2d 7 (D.Mass. 2006).
[27] *Hardison, supra* note 16.
[28] *EEOC v. Kelly Servs., Inc.*, 598 F.3d 1022, 1031 (8th Cir. 2010) (printing company's safety policy prohibit all employees from wearing headwear was nondiscriminatory reason for not allowing Muslim employee to wear a headscarf).
[29] *Id.*

        - Co-worker disgruntlement is not undue hardship[31]
        - Hardship must be real, not merely conceivable or hypothetical[32]
        - Adverse impact on public image[33]
    - Important to note that this standard for religious accommodation is substantially lower than the "undue hardship" defense under the Americans with Disabilities Act, which is defined as "significant difficulty or expense."
- Examples:
    - *Cloutier v. Costco Wholesale* (2004)
        - Dress code policy prohibited facial jewelry (e.g. nose/eyebrow piercings)
        - Cashier had numerous facial piercings, refused to remove them, claimed to belong to the Church of Body Modification, which encourages body piercing and other body modifications
        - Employer offered accommodation, allowing employee to either (1) cover her piercings with a band-aid, or (2) insert a clear plastic spacer in the piercings.
        - The employee refused to accept either accommodation, sued employer for violation of Civil Rights Act.
        - Court held that offered accommodations were reasonable, rejected employee's claims.
    - *Brown v. F.L. Roberts & Co.* (D.Mass. 2006)
        - Dress code policy required all employees with customer contact to be clean-shaven and to keep their hair "clean, combed and neatly trimmed."
        - Plaintiff, a lube technician who had some customer contact, refused to shave or cut his hair due to his Rastafarian beliefs.
        - Employer restricted plaintiff's work to an area in which he would have no customer contact, which incidentally also had much worse working conditions.

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[30] *Id.*
[31] *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 407 (9th Cir. 1978).
[32] *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992).
[33] *Cloutier v. Costco* (cashier with facial jewelry, wanted complete exemption from dress code, held to be "undue hardship because it would adversely impact the employer's public image.")

- Court found for employer, stating that the accommodation provided was reasonable, and accommodation plaintiff was seeking (complete exemption from the policy), was an undue hardship on the employer.

- **Recommendations for addressing employee religious apparel issues**
  - Because it is not clear how Minnesota courts would apply the MHRA to a private, religious school, it is advisable for schools to follow the requirements of both the MHRA and Title VII of the Civil Rights Act.
  - To reduce the risk of violating the law and the risk of legal liability:
    - Avoid making decisions based on assumptions or stereotypes
    - Make a serious attempt to find an accommodation or compromise that meets both the school's and the employee's needs
    - Have open discussions about all possible accommodation alternatives with the employee
    - Conduct an analysis of the accommodations sought, taking into account specifics
    - Document the process

- **Conclusion**