

CHAPTER 5

RELIGIOUS CONFLICT IN THE WORKPLACE: THE PROBLEM OF THE PROSELYTIZING EMPLOYEE

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In this last election season, religion and its role in political discourse were much debated. It should not be surprising that religion has also become a point of friction in America's increasingly diverse workplaces. In some instances, these debates among employees have become adversarial and tendentious. Both private and public sector workplaces have experienced difficulties in preventing debates from turning into discord. Employers, mediators, and arbitrators trying to resolve such disputes have discovered that the courts are far from unanimous in defining the boundaries of religious expression in the workplace and that guidelines for resolving such disputes are still in a nascent stage of development. This chapter attempts to summarize the hodge-podge of precedent that currently applies to the private and public sectors.

Good News v. Hicks: Defining the Problem

The Good News Employee Association was created by several employees of the city of Oakland, California, to engage in prayer and other religious activities. The group also posted a flyer on a workplace bulletin board advertising its activities and principles, including the belief that the "Natural Family is defined as a man and a woman...." When a lesbian employee saw the flyer and complained, the employer instructed the association to remove the flyer, which it did. No one was disciplined. Members of the association sued, however, pointing out that the employee bulletin board previously had been used for posting a wide range of flyers on political, social, and religious topics (for example, hate crimes, Osama bin Laden, Christmas celebrations). The plaintiffs

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claimed that their flyer was singled out solely because of its content conveying the association's religious views, and that they had been denied their right of free expression under the First Amendment. In *Good News Employee Ass'n v. Hicks*,¹ the District Court for the Northern District of California and the U.S. Court of Appeals for the Ninth Circuit found the issue to be a "close" question, but concluded that the balancing of interests weighed in favor of the city's right to remove the flyer.

This kind of dispute among employees has become fairly common in the workplace, leading to increased litigation. These cases suggest a myriad of questions that courts have only begun to address. For example, what happens if a religious poster, similar to that in *Good News*, does not merely reference "natural marriage," but also proclaims that any deviation from the "natural" order of things leads straight to perdition? Can gay employees complain to management that they are being subjected to a hostile work environment?² Conversely, what happens if a gay employee hangs a poster protesting the Catholic Church's policy against gay marriage? Can a devout Catholic make a claim that the poster demeans and denigrates Catholicism? How much discomfort must co-workers tolerate for the sake of religious speech? How much turmoil must an employer tolerate?

The Private Sector Model

Title VII of the 1964 Civil Rights Act, as amended,³ guarantees to employees the right to an accommodation whenever their religious beliefs or practices come into conflict with their work; employers are required to offer an accommodation unless doing so would result in an "undue hardship." Employees seeking to avail themselves of this law have benefited from the fact that the courts have taken an expansive view of religion and what constitutes a religious practice. However, two Supreme Court cases have also placed significant limitations on the rights that employees might otherwise have expected to flow from this law. First, the Court

¹2005 U.S. Dist. LEXIS 5270 (N.D. Cal. 2005), *aff'd*, 223 Fed. Appx. 734, 2007 U.S. App. LEXIS 5514, 25 I.E.R. Cas. (BNA) 1254 (9th Cir. 2007).

²*See Meritor Savs. Bank v. Vinson*, 477 U.S. 576 (1986), in which the Supreme Court held that employees in a protected category have the right to be free of harassment that is so severe or pervasive as to create a hostile work environment that alters the conditions of employment.

³42 U.S.C. § 2000e, et seq.

held in *TWA v. Hardison*⁴ that an undue hardship is anything that imposes more than a de minimis cost. In addition to holding that employers and unions cannot be required to violate the terms of a collective bargaining agreement, the Court also held that a monetary cost of even an insignificant amount can be considered to exceed the de minimis standard.⁵ Since *Hardison*, the lower courts have held that any proposed accommodation that would reduce safety, lower employee productivity, or violate public law cannot be imposed on an employer. With respect to employees who wish to proselytize in the workplace, an employer is also deemed to suffer an undue hardship whenever an accommodation risks creating a hostile work environment or alienating customers.⁶

The second Supreme Court decision of interest is *Ansonia Board of Education v. Philbrook*,⁷ in which the Court held that an employer may offer any accommodation that resolves the conflict between work and religion. Employers are not obligated to select an employee's preferred accommodation or even the accommodation that is least onerous to the employee. In *Ansonia*, an employee was absent from work for religious reasons six days out of the year; the collective bargaining agreement permitted paid leave for such events, but up to only three days per year. The employee requested paid leave for the three additional days, but the employer would approve only leave without pay for those days. The Supreme Court held that three days of unpaid leave was sufficient to resolve the conflict and therefore satisfied the employer's Title VII obligations. The net effect of *Hardison* and *Ansonia* is that employees may be required to forgo pay for the sake of practicing their religion, while an employer cannot be compelled to expend anything beyond a de minimis amount.

With respect to employees who wish to engage in religious expressions at work, these activities come in many forms: employees wearing religious clothing or symbols (e.g., yarmulke, cross, hijab), employees who address customers with comments such as "have a blessed day," and employees who spread the Gospel to co-workers. Deciding whether such activities are entitled to

⁴432 U.S. 66 (1977).

⁵In *Hardison*, the Court held that the expenditure of \$125 in overtime pay by TWA Airlines would be an undue hardship.

⁶*See, e.g.*, *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996), *cert. denied*, 118 S. Ct. 58 (1997) (proselytizing supervisor subjected employer to risk of harassment claim); *Johnson v. Halls Merchandising*, 49 FEP 527 (W.D. Mo. 1989) (proselytizing employee risked alienating customers).

⁷479 U.S. 60 (1986).

accommodation is fact-intensive. In one case, for example, the court found that cafeteria workers greeted customers with “God bless you” and “Praise the Lord.” The employer objected and requested that the employees end their blessings. The court sided with the employees because less than one percent of the customers complained and there was no evidence of a loss of business.⁸ In another case with very similar facts, a retail employee would greet customers by saying “in the name of Jesus Christ of Nazareth.” The company fired her when she refused to cease making this statement. The court sided with the employer because it believed that the mere risk of offending customers was sufficient to create an undue hardship.⁹ While a loss of business or customer loyalty clearly constitutes an undue hardship, the courts vary in how much evidence they will require from employers claiming that such a loss will result from an employee’s religious activities.

The impact that proselytizing has on employee morale and productivity similarly requires a fact-bound analysis. The precedent indicates that the courts are largely sympathetic to employers when they present evidence that proselytizing will endanger productivity or provoke harassment claims from co-workers. For example, an employee who wore a very large button showing an aborted fetus contended that this expression of opposition to abortion was religiously motivated. Other employees, including those who held similar anti-abortion views, complained to management that the button was too upsetting and that they did not want to attend meetings with the employee as long as she wore the button. The employer offered to let the employee keep her button as long as she wore it under a sweater or otherwise covered it up at work. The employee refused and was fired. The court accepted the button as a symbol of religious expression, but concluded that the deleterious impact on employee morale and productivity was real and intolerable for the employer; the termination was upheld.¹⁰ Similarly, both the courts and the Equal Employment Opportunity Commission (EEOC) have held that an employer need not tolerate proselytizing from supervisory employees when other employees have complained and there was a reasonable basis for believing that a hostile work environment claim could be filed.¹¹

⁸*Banks v. Service Am. Corp.*, 952 F. Supp. 703 (D. Kan. 1996).

⁹*Johnson*, 49 FEP 527.

¹⁰*Wilson v. U.S. W. Commc’ns*, 58 F.3d 1337 (8th Cir. 1995).

¹¹*Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996), *cert. denied*, 118 S. Ct. 58 (1997); EEOC Dec. No. 72-1114, 4 FEP 842 (1972).

On the other hand, the courts have been willing to reject employers' undue hardship defenses when they prohibit workplace proselytizing in the absence of complaints from other employees or proof of actual disruption to productivity.¹²

In sum, Title VII's undue hardship/de minimis standard favors employers over employees. When proselytizing provokes complaints from other employees or from customers, most courts will find that the probability of a loss in productivity, an adverse impact on customer relations, or the filing of a harassment claim will be sufficient to satisfy the employer's burden of proving why an accommodation was not possible. To the extent that employers have failed to meet this burden, it is usually because the proselytizing was nonconfrontational and the employer's evidence was too speculative to prove that proselytizing was likely to result in an actual adverse consequence.¹³ A knee-jerk reaction by an employer is the surest way to lose a proselytizing case.

The Speech Rights of Public Employees: *Pickering v. Board of Education*

While Title VII applies to public sector employers, the governmental employer has the added burden of confronting the limits imposed on it by the First Amendment. When a governmental entity seeks to limit the First Amendment rights of a citizen, it often is required to justify its actions by pointing to a compelling governmental interest and, if one exists, proving that it utilized the least restrictive means of achieving its legitimate objective.¹⁴ However, limitations on the speech rights of government employees are judged under a very different standard as a result of the Supreme Court's 1968 decision in *Pickering v. Board of Education*.¹⁵

In *Pickering*, the Court held that a teacher could not be fired for writing a letter to a local newspaper criticizing the Board of Education's spending decisions and proposals for a tax increase. Because the teacher was speaking on a matter of "public concern,"¹⁶ and because his comments had no discernible impact on his ability to

¹² See, e.g., *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995).

¹³ See, e.g., *id.*; *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1211 (9th Cir. 1996).

¹⁴ See, e.g., *Thomas v. Review Bd. of Ind. Employment Sec.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁵ 391 U.S. 563 (1968).

¹⁶ When employees speak on matters of private concern (e.g., internal office issues), they are not entitled to constitutional protection under *Pickering*. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

fulfill his teaching duties, the Court held that the First Amendment barred his dismissal. The Court left open the possibility of dismissal in future cases if an employee were to knowingly or recklessly make false statements, if the statements had the effect of “seriously undermin[ing] the effectiveness of the working relationship” between the employee and his or her supervisor, or if the statements impaired “harmony among co-workers.”¹⁷

In a series of later cases interpreting *Pickering*, the Supreme Court emphasized the need to balance the government’s right to operate an efficient workplace with the employee’s right to engage in activities protected by the First Amendment.¹⁸ In applying this balancing test, the Court has cautioned that the government’s operational needs can justify restrictions on an employee’s speech that would be unconstitutional if applied to ordinary citizens. In other words, an employee trades away some of his or her speech rights when accepting employment with the government.

The *Pickering* test is complicated by its amorphousness and imprecision. How exactly should a court balance an individual’s right to free expression with a government’s need to operate efficiently? The Supreme Court’s guidance over the years has been less than illuminating. For example, it has stated that “private expression... may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency’s institutional efficiency may be threatened not only by the content of the employee’s message, but also by the manner, time, and place in which it is delivered.”¹⁹ The Court later expanded on this notion: “[E]mployee speech which transpires entirely on the employee’s own time, and in non-work areas of the office, bring different factors into the *Pickering* calculus....”²⁰ Realizing that a one-size-fits-all balancing standard was not possible, the Court instructed lower courts to consider various factors: Would the employee’s speech have an adverse effect on discipline or workplace harmony? Does the employment relationship require personal loyalty? Have the employee’s statements impeded work performance or interfered in office operations?²¹

¹⁷*Pickering*, 391 U.S. at 570.

¹⁸*Garcetti*, 547 U.S. 410; *United States v. National Treasury Employees Union* [NTEU], 513 U.S. 454 (1995); *Connick v. Myers*, 461 U.S. 138 (1983).

¹⁹*Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415 n.4 (1979).

²⁰*Connick*, 461 U.S. at 153 n.13 (1983).

²¹*Pickering v. Board of Educ.*, 391 U.S. 563, 569 (1968). *See also* *Akridge v. Wilkinson*, 178 Fed. Appx. 474 (6th Cir. 2006).

These generalized pronouncements and questions have not brought clarity to the issue. The uncertainty is most evident in the Court's treatment of forward-looking policies that restrict speech. On the one hand, the Court states that the burden on the government when it proscribes particular categories of employee speech is greater than when it merely disciplines employees after the fact. The Court has cautioned that a statutory restriction on employee speech must be supported by evidence of a "necessary impact on the actual operation' of the Government."²² Mere speculation as to workplace disruption is not sufficient.²³ In another case, however, the Court insisted that the judiciary must show "deference to government predictions of harm."²⁴ Moreover, it has commented that it is not necessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."²⁵ In other words, prescriptive, forward-looking policies that limit employee speech must satisfy a greater burden of justification, yet that burden requires only a "reasonable prediction" that workplace efficiency will be disrupted. How far is the leap from mere speculation to reasonable prediction?

The uncertainties inherent in the *Pickering* standard become magnified when public sector employers decide to limit an employee's *religious* speech in the workplace. The most common arguments raised by employers against permitting public employees to engage in religious speech are that the employee's actions: (1) run the risk of provoking a lawsuit claiming that government is violating the Establishment Clause of the First Amendment or, at the very least, undermining the public's faith in the religious neutrality of the government; (2) run the risk of a hostile environment lawsuit under Title VII; and (3) disrupt the workplace and impair productivity.

The classic case of an Establishment Clause violation arises when an employee proselytizes public clients. For example, in *Berry v. Department of Social Services*,²⁶ the plaintiff was a county employee who helped Welfare recipients enter the work force. He discussed

²²*NTEU*, 513 U.S. 454 (quoting *Pickering*, 391 U.S. at 571). In *NTEU*, the Court rejected Congress's effort to bar all executive branch employees from receiving honoraria for speeches and articles, even when those activities were unrelated to their jobs and on matters of public concern.

²³*NTEU*, 513 U.S. at 476.

²⁴*Waters v. Churchill*, 511 U.S. 661, 673 (1994).

²⁵*Connick v. Myers*, 461 U.S. 138, 152 (1983).

²⁶447 F.3d 642 (9th Cir. 2006).

religion while meeting with clients and decorated his cubicle with various religious symbols. The employer told the plaintiff that he could discuss religion with co-workers, but not with his public clients. He also was instructed to remove religious materials from his work area, as that was where he met with his clients. When the employee failed to follow the directive to maintain his work area free of religious items, he was reprimanded. He then took down the religious paraphernalia and filed charges with the EEOC. He eventually sued the city for infringing his rights under Title VII and the First Amendment. Applying the *Pickering* test, the courts in *Berry* concluded that the city's interest in avoiding an establishment of religion lawsuit outweighed the plaintiff's interests, especially as he was able to express his religious views both inside and outside of the workplace.²⁷

With respect to the potential for hostile environment claims, the courts have tended to apply *Pickering* in a way that permits an employer to limit employee speech in situations where one employee's espousal of religious views causes other employees to complain of harassment. For example, in *Leslie v. Johnson*,²⁸ the plaintiff was fired after peppering a co-worker with an unwanted stream of religious missives and comments, intermingled with equally unwanted romantic overtures. The court concluded that the plaintiff's rights to free speech and religion were not violated because the state employer had a paramount interest, under *Pickering*, of avoiding a harassment claim from the co-worker. The court noted that the Supreme Court has required employers to intervene in an employee–employee dispute before it becomes “sufficiently severe or pervasive to alter the conditions of the victim's employment.”²⁹ Other courts have held that enforcing anti-discrimination policies is a compelling interest, even when

²⁷The *Berry* decision should not be interpreted to mean that every public display of religion by an employee poses a risk of “establishing” religion. For example, an Orthodox Jew wearing a yarmulke or a Catholic wearing a cross pendant would not normally be subject to restrictions on the wearing of these items. Absent other forms of proselytizing, objects that merely display the *wearer's* religious beliefs do not convey to the public that government is endorsing or supporting the employees' religion. *See, e.g.,* *Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608 (W.D. Ky. 2003) (library could not compel employee to stop wearing cross necklace, as it did not disrupt workplace and did not, by itself, cause library to violate Establishment Clause). *Cf. Daniels v. City of Arlington, Tex.*, 246 F.3d 500 (5th Cir. 2001) (police force could direct officer not to wear cross pin on his uniform; wearing of pin was not statement of “public concern” and therefore not protected by *Pickering*). As a general matter, the courts tend to favor public safety agencies seeking to enforce dress regulations.

²⁸2006 U.S. Dist. LEXIS 24064 (S.D. Ohio 2006), *aff'd*, 2007 U.S. App. LEXIS 17775 (6th Cir. 2007).

²⁹*Id.* at *45 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)).

enforcement might infringe on religion.³⁰ As with concerns about the Establishment Clause, public employee speech that harasses other employees is likely to receive judicial disapproval; employers will be free to suppress proselytizing that crosses the line into harassment.

Unfortunately, judicial clarity begins to falter when the courts address the third argument commonly raised by employers in opposition to religious speech—those in which an employee's speech is not harassing, but is nevertheless disruptive or annoying to co-workers. What happens when an employee openly displays religious beliefs to co-workers, but engages in no overt proselytizing? What if some co-workers express displeasure at having to listen to those beliefs? What if some co-workers view the religious expressions as harassment, but they do not objectively rise to the level of a hostile work environment? What happens when one employee's anti-abortion poster is deemed insulting to other employees having differing views on the subject? What happens when a religiously oriented poster explicitly or implicitly besmirches the values of gay employees? These questions lead back to *Good News*.³¹

The facts in *Good News* are increasingly common in America's workplaces, both in the private and public sectors. Employees who wish to express their religious convictions run up against other employees who find those expressions of faith to be offensive. In *Good News*, a lesbian employee protested that a poster proclaiming the virtues of the "natural family" and "family values," and limiting marriage to that between a man and a woman, was homophobic. Members of the Good News Employee Association confirmed in their depositions the "anti-homosexual import" of their positions on these issues. They also conceded that they had other opportunities during the work day to meet and express their views (during lunches or breaks, for example). The employer also advised that they could use the e-mail system to publicize their meetings, as long as they omitted "verbiage that could be offensive to gay people."³²

In the end, the district court invoked the *Pickering* balancing test. It then opined that "neither side has presented a strong

³⁰Lumpkin v. Brown, 109 F.3d 1498 (9th Cir. 1997).

³¹Good News Employee Ass'n v. Hicks, 2005 U.S. Dist. LEXIS 5270 (N.D. Cal. 2005), *aff'd*, 223 Fed. Appx. 734, 2007 U.S. App. LEXIS 5514, 25 IER Cases 1254 (9th Cir. 2007).

³²*Id.*, 2005 U.S. Dist. LEXIS 5270 at *6.

case.”³³ It accepted that Good News members were attempting to speak on subjects of public concern, but observed that their ability to engage in religious discourse was not subjected to “whole-sale muzzling.” They retained the right to engage in meetings and speech, including in their work premises. The city, on the other hand, was faced with objections from only one employee. The court characterized the comments in the Good News flyer as not being inflammatory or “fighting words.” The court accepted that the flyer had caused some friction in the workplace, but that “there is a difference between episodes of friction—which are the daily incidents of life in a pluralistic society—and disruption—which impairs the government’s ability to discharge its duties to its citizens.”³⁴

Having described the city’s interest as being “slight,” the court nevertheless came down in favor of the city because it deserved “some leeway in fixing . . . employees’ attention on their tasks, free from upset stemming from public controversies having no bearing on the work of the employer.”³⁵ The court granted summary judgment for the city, commenting that the outcome might have been different if the plaintiffs had been disciplined for their actions.

The Ninth Circuit, in a very brief opinion, accepted the applicability of *Pickering* and affirmed the district court decision. It concluded that the only curtailment of employee First Amendment rights was the removal of the flyer, with instructions not to repost the flyer without editorial changes. The Ninth Circuit found these actions to constitute “minimal interference with appellants’ free speech rights.”³⁶

When the standards under Title VII and under *Pickering* are compared, their language appears to be very different. The statute’s undue hardship/de minimis standard seems to accord much greater leeway to employers than is extended to public sector employers under the *Pickering* balancing test. Yet, in practice, the outcomes are not all that different. Because public employers are able to rely on reasonable predictions of harm—such as hostile work environment claims, establishment of religion claims, or lost productivity—the courts are willing to extend to them significant latitude as long as they show a willingness to consider accommodations for proselytizers and/or they offer concrete evidence of the

³³*Id.* at *25.

³⁴*Id.*

³⁵*Id.* at *27.

³⁶*Good News*, 223 Fed. Appx. at 735.

dangers of not censoring the religious speech. *Good News* is one such case in which the outcome would likely be the same under either a Title VII or *Pickering* analysis.

The Federal Sector and RFRA

In 1993, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA),³⁷ which states that governmental actions that “substantially burden a person’s exercise of religion” must be justified by a compelling interest and must be accomplished by the least restrictive alternative.³⁸ The Supreme Court ruled in *City of Boerne v. Flores*³⁹ that RFRA is unconstitutional as applied to state and local governments. It later ruled that the statute continues to be applicable to actions by the federal government.⁴⁰ The *Boerne* decision has the effect of creating a federal–state dichotomy. State actions that burden religious speech in the workplace have mostly been decided under the *Pickering*⁴¹ balancing test. In the federal sector, however, RFRA requires application of the compelling interest test to an employer’s efforts to regulate religious expressions by its employees.

What does this dichotomy mean in practice? For example, how would *Good News*⁴² have been decided had it arisen in the federal sector? The courts in *Good News* did not find a hostile work environment. While the homophobic attitudes of the *Good News* employees were offensive to other employees, they apparently did not rise to the level of a litigable harassment claim. As a result, the district court found the employer’s interest to be only “slight.” If so, how could those interests be “compelling,” as required by RFRA? While the district court in *Good News* found the city’s restrictions to be narrowly tailored, it clearly did not find its interests compelling.

³⁷42 U.S.C. §2000bb.

³⁸*Id.* RFRA was enacted specifically to overturn the Supreme Court’s Decision in *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990), which held that the compelling interest test should not be applied to laws of general applicability that have only an incidental impact on religious practices.

³⁹521 U.S. 507 (1997).

⁴⁰*Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006). See also *Francis v. Mineta*, 2007 U.S. App. LEXIS 23740 (3d Cir. 2007) (RFRA continues to apply to federal government, but plaintiff is still required to comply with procedural requirements of Title VII); *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) (RFRA applies to dispute between private litigants in which plaintiff claimed that federal law (Age Discrimination in Employment Act) placed substantial burden on exercise of religion).

⁴¹*Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

⁴²*Good News Employee Ass’n v. Hicks*, 2005 U.S. Dist. LEXIS 5270 (N.D. Cal. 2005), *aff’d*, 223 Fed. Appx. 734, 2007 U.S. App. LEXIS 5514, 25 IER Cases 1254 (9th Cir. 2007).

It ruled in favor of the city only because of the leeway accorded employers under *Pickering*. Such leeway is absent from RFRA.

Given the district court's factual findings in *Good News*, it is difficult to envision how the same outcome could have been reached under RFRA. However, there are too many questions unanswered by the precedent to permit a facile and immediate conclusion as to the future outcome of all such cases in the federal sector. For example, the courts are reluctant to accord a heckler's veto over speech protected by the First Amendment.⁴³ Can one employee's annoyance over derogatory speech be catapulted into a compelling governmental interest, even when the speech does not create a hostile work environment and does not create an establishment of religion claim? The Supreme Court has pointedly cautioned that hostile work environment claims under Title VII should not be used to create a "general civility code" in the workplace.⁴⁴ Similarly, in 1997, the Clinton administration issued "Guidelines on Religious Exercise and Religious Expression in the Federal Workplace."⁴⁵ Those Guidelines cautioned agencies that they should exercise their power over employee speech with "restraint," keeping in mind that "Americans are used to expressions of disagreement on controversial subjects, including religious ones."⁴⁶ The Guidelines even extended protections to supervisors who wish to proselytize.

Given these standards under the First Amendment, it is not at all clear how future proselytizing cases will be decided in the federal sector. Perhaps one indication can be found in the recent case of *Lister v. Defense Logistics Agency*,⁴⁷ in which a federal agency told an employee to remove a flyer from a bulletin board routinely used by employees. The flyer included comments criticizing the Combined Federal Campaign (CFC), a charitable fundraising program for federal employees, because "your money may go to support the following—*abortion on demand * abortion for teens * sexual promiscuity * homosexual agenda * new age mysticism." The employee stated that his flyer was motivated by sincere religious beliefs and filed a charge of discrimination with the EEOC.

⁴³ See, e.g., *Melzer v. Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 336 F.3d 185 (2d Cir. 2003), cert. denied, 540 U.S. 1183 (2004).

⁴⁴ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

⁴⁵ Issued on August 14, 1997. Reprinted in Wolf, Friedman, & Sutherland, *Religion in the Workplace: A Comprehensive Guide to Legal Rights and Responsibilities* (ABA 1998), at Appendix H.

⁴⁶ *Id.*

⁴⁷ 482 F. Supp. 2d 1003 (S.D. Ohio 2007).

The essence of his complaint was that the bulletin board was used for all sorts of employee notices, including one supportive of the CFC. In that context, the plaintiff argued that the employer's policy of banning religious and ideological materials and campaigns during work hours was not content-neutral; instead, he argued, it unconstitutionally singled out religion for prohibition.

The District Court found that the employer was not required to maintain a bulletin board, but, once it did so and made it available to virtually all noncommercial messages, it could not exclude religious materials. The court concluded that the restriction on religious messages was unconstitutional.⁴⁸ Interestingly, the court also concluded that, in the absence of an actual disruption, the agency could not rely on the *potential* for disruption: "The mere speculative claim of potential for disruption of the workplace is an insufficient basis by itself for a limitation of otherwise protected speech."⁴⁹ The court abjured the "leeway," "latitude," and "reasonable predictions" that the courts have accorded to employers under *Pickering*. The court did not cite the RFRA, relying instead on Supreme Court decisions holding that the government may not censor or exclude religious speech while permitting similar types of noncommercial speech in the same forum.⁵⁰ However, there can be no doubt from the decision that the court would not have found a compelling governmental interest under the RFRA in removing the flyer. It is also of interest that the agency appealed this decision to the U.S. Court of Appeals for the Sixth Circuit, and later withdrew its appeal, leaving the district court decision in place.

As a result of RFRA and the Supreme Court's *Boerne*⁵¹ decision, the federal government is facing a much higher burden of proof in religious accommodation cases than do state and local governments or private sector employers. The burden of proving a compelling interest is much greater than proving an undue hardship under Title VII or an interference in workplace efficiency under *Pickering*. The federal government's obligation to offer the least restrictive means of advancing its compelling interest would also

⁴⁸*Id.* at 1012. The court also held that the employing agency had violated *Pickering* because the employee's comments in the flyer were not "derogatory or insubordinate towards superiors." One can question the accuracy of this interpretation of *Pickering*. Other courts have not limited an employer's interest to prohibiting "derogatory or insubordinate" comments.

⁴⁹*Id.*

⁵⁰*See, e.g.,* *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

⁵¹*City of Boerne v. Flores*, 521 U.S. 507 (1997).

seem to set a much higher bar than the one set by *Ansonia*⁵² for establishing a reasonable accommodation.

Employees are also protected under *Pickering* only if they are speaking on matters of “public concern.” Speech of a private concern, even if religious in nature, does not receive protection under *Pickering*. It is not a foregone conclusion that the courts will find all religious speech to be of public concern, and some courts have already concluded that certain forms of religious expression are purely private matters.⁵³ A state government has a relatively free hand in proscribing “private” religious speech as part of a neutral policy that does not single out religious discourse for special treatment. Under RFRA, however, an individual’s First Amendment right to practice or espouse religion is not limited to matters of *public* concern. Personal expressions of faith are protected by the compelling interest test. For this reason as well, RFRA has the potential to create very different standards for the federal employer that are not imposed on state and local governments.

Perhaps, over time, the courts will apply the RFRA test in such a way that it will produce the same results as reached under *Pickering*. Initial decisions, however, do not point in this direction. As in *Lister*, it is equally likely that there will be a fundamental difference between the latitude accorded employers under Title VII and *Pickering* and the more limited leeway that will be given to a federal agency trying to comply with RFRA.

In Sum

Many employers consider proselytizing employees to be nuisances and try to dismiss out of hand employee requests for permission to express their faith. Both Title VII and the First Amendment prevent employers from rejecting such requests without proving that harm would result from the proselytizing. Mere assumptions of calamity are usually insufficient to justify the refusal to accommodate. However, reasonable predictions that productivity, customer satisfaction, or workplace efficiency will suffer are recog-

⁵²*Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

⁵³*See, e.g.*, *Borden v. School Dist. of the Township of East Brunswick*, Case No. 06-3890 (3d Cir. Apr. 15, 2008) (high school football coach who participated in student-led prayer was not communicating on issue of public concern); *Nichols v. Caroline County Bd. of Educ.*, 114 Fed. Appx. 576 (4th Cir. 2004) (public school teacher who injected religion into class assignments was not addressing “issues of political, social or other concern to the community”).

nized bases for censoring employee religious speech. Speech that risks provoking a hostile environment claim also can be censored.

In the public sector, the governmental employer may additionally censor religious speech or punish it if the expressions of faith are reasonably likely to give rise to an establishment of religion claim against the employer. However, depending on how the courts interpret RFRA, the federal government may face a much greater burden of proving its justification for censoring or punishing religious speech. The federal employer also may be required to prove that it has offered an accommodation that is the least restrictive of several alternatives.

The EEOC reports that the filings of religious discrimination/accommodation charges have been growing at a much faster rate than claims of gender or racial discrimination. Many of those charges have been filed by employees who have engaged in religious speech (actual or symbolic). Notwithstanding increased judicial scrutiny, the state of the law regarding workplace proselytizing is still in flux. The circuit courts are not always in agreement on how to conceptually resolve disputes between religiously motivated employees and reluctant employers. To the extent that arbitrators are asked to address these issues, they must be careful to ensure that the parties fully brief them on the precedent appropriate to the judicial circuits in which they sit. They also need to pay special attention to the possibility of constitutional issues arising in the public sector. Most importantly, the outcomes of these cases will depend upon the development of complete factual records that address the issues discussed here.