

Sixth Circuit Court Denies Employee's Religious Accommodation and Discrimination Claims

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The Sixth Circuit Court of Appeals has recently reviewed a case concerning religious accommodation and discrimination, ruling against the employee, and holding that job loss or actual discipline is needed before such a claim can be actionable.

In *Tepper v Potter*, ___ F.3d ___, 2007 WL 2983156 (6th Cir. Ohio), the plaintiff, Martin Tepper, a Messianic Jew, had been permitted for 10 years to avoid Saturday work assignments so he could observe his Sabbath, as well as be absent from work on other Jewish religious holidays. When staffing levels were decreased due to budget constraints, Tepper began to have difficulty scheduling his day off. Although the Postal Service attempted to accommodate Tepper's religious beliefs by requesting volunteers to work on Saturdays and/or dividing Tepper's Saturday route among other letter carriers, several of his co-employees complained to management that it was unfair. The Union ultimately held a meeting and unanimously voted to recommend termination of Tepper's accommodation. Management agreed.

Tepper was told the accommodation was eliminated because "management could no longer cover [the plaintiff's] route on Saturdays without putting undue hardship on other people." It was recommended that he reserve some of his vacation time for Saturday absences. In addition, he was allowed to take time off without pay and to exchange days off with other carriers.

In response, Tepper filed a complaint alleging violation of Title VII of the Civil Rights Act of 1964, as well as the Ohio counterpart to the federal law, for failure to accommodate his religion, as well as religious discrimination. The trial court dismissed Tepper's claims on a motion for summary judgment and Tepper appealed.

On appeal, the court reviewed the applicable section of Title VII, 42 U.S.C. § 2000e-2(a), and noted that in order to meet the initial burden of proof on an accommodation claim, Tepper was required to show that he: (1) held a sincere religious belief that conflicted with an employment requirement; (2) informed the employer about the conflict; and (3) was discharged or disciplined for failing to comply with the conflicting employment requirement. If Tepper met this burden, then the Postal Service would have to show that it could not reasonably accommodate his request for Saturdays off without undue hardship.

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The appellate court reviewed each requirement necessary to show a *prima facie* case on Tepper's accommodation claim, and ultimately concluded that Tepper could not establish the third requirement, i.e. that "he was discharged or disciplined for failing to comply with the conflicting employment requirement." While Tepper claimed that he had been forced to take days off from work without pay in order to avoid Saturday work, and that these days off reduced his annual pay and eventual pension, and constituted the "discipline or discharge" necessary to maintain his claim, the court disagreed. Rather, the court, citing the Supreme Court's precedent of *Ansonia Bd. of Educ. v Philbrook*, 479 U.S. 60, 70-71, 107 S. Ct. 367, 93 L. Ed.2d 305 (1986), which stated that "more than loss of pay is required to demonstrate discipline or discharge," and narrowly interpreted the requirements for a failure to accommodate claim to require either discipline or discharge as a result of the "conflict," rather than mere loss of pay.

Similarly, Tepper's religious discrimination claim failed because the removal of the accommodation had no effect on Tepper's title, job status, pay or job responsibilities and conditions. Further, the court concluded that a mere reduction in pay was insufficient to demonstrate an adverse employment action. The court was also swayed by the fact that Tepper could not show he was treated differently from similarly situated employees who were also required to work Saturdays.

While Tepper argued that other employees were permitted to take Sundays off to observe their Sabbath, the court rejected this argument finding that Tepper had no evidence to show that this was the reason for Sundays off. The court noted that only special deliveries were made on Sundays and, therefore, the Postal Service's business needs were minimal on that day.

Ultimately, the Tepper court's suggestion that a failure to accommodate claim will fail in the event that the employee is not discharged or disciplined is a narrow approach to the type of conduct Title VII is meant to protect against. Given the Supreme Court's recent expansion of the level of "retaliatory" conduct needed to establish a Title VII retaliation claim in the *Burlington Northern* case issued last year, this may not be a lasting approach. Moreover, under the Tepper court's reasoning, had Tepper actually quit his employment, he may have had a failure to accommodate and/or religious discrimination claim based on the theory of "constructive discharge." On these bases, it remains important to proceed with caution in this area, and tread lightly before denying or rescinding a religious accommodation on the basis of this decision.