Chai Feldblum
USC Law School
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**The Right to Religious Accommodation:
Reflections on the 50th Anniversary of the CRA of 1964**

Thank you so much for inviting me to speak about the state of religious accommodation under Title VII of the CRA of 1964. It is a topic near and dear to my heart.

The CRA of 1964 passed just over 50 years ago. That law was a watershed moment for our country – a statement of who we wanted to be as a country in terms of achieving equality in various sectors of our society, on the bases of many characteristics that had been terrible sources of discrimination.

For this talk, I want to focus on the religious discrimination that is prohibited in Title VII of the CRA of 1964 – the section of the law that prohibits private employers with more than 15 employees from discriminating on the basis of a number of characteristics, including religion.

There are two provisions related to religion in Title VII.

The first is part of the overall prohibition that protects applicants and employees from discriminatory employment actions based on their race, color, national origin, or sex. This provision also protects applicants and employees from discriminatory employment actions based on their religious status or beliefs.

The second provision in Title VII protects religious organizations from the law's prohibition against religious discrimination. In other words, this provision provides religious organizations with an *exemption* from the otherwise general prohibition on employers taking religion into account.

Both of these provisions are designed to protect pluralism in our country. The social justice goals sought through these provisions are: 1) to protect the ability of religious individuals to be both religious and hold a job and 2)

to ensure that religious organizations can maintain their religious character by hiring people only of their own religion.

Let's start with the social justice goal of protecting religious individuals in employment.

Title VII states that employers may not discriminate on the basis of religion. But what does that provision mean? What does it include?

The Equal Employment Opportunity Commission (the Commission of which I am now one of the five Commissioners) was created by the 1964 CRA and the agency had to decide what that non-discrimination provision on the basis of religion meant.

One option for the agency was to say that employers had to ignore religious beliefs and practices of applicants and employees in making employment decisions. In other words, just as an employer had to ignore the race of an applicant or employee and not take that individual's race into account in making employment decisions – the employer had to act the same way with regard to religion.

That interpretation would certainly have been sufficient to invalidate a policy that said, for example: "No Jews or Muslims need apply for our jobs."

But what if an employer had a policy that required all employees to work a Saturday and Sunday shift every six weeks or that required all employees to be available for mandatory overtime any weekend that the employer needed their services.

Would that be a form of religious discrimination? As a practical matter, an Orthodox Jew or a Seventh Day Adventist would not be able to comply with this neutral, even-handed employment policy, because their religious beliefs would prohibit them from working from sundown on Friday night to sundown on Saturday night.

The EEOC lawyers took two stabs at this question. In the second round of its guidelines on this issue, in 1967, the EEOC said that an employer had to accommodate the religious beliefs of its employees, but those accommodations were limited to those that would not impose an "undue hardship" on the employer's business. So the EEOC created the term and

concept of “reasonable accommodation” to religious beliefs -- and also created a defense for employers.

Then the courts got involved. In 1969, Mr. Robert Dewey sued his employer, Reynolds Metal Company, charging employment discrimination based on religion. The company had negotiated a collective bargaining agreement that required all employees to be available for mandatory overtime, including on Sunday. Mr. Dewey, a member of the Faith Reformed Church, believed it was a sin to work on Sunday or for him to ask others to work in his stead and he asked to be exempted from the required overtime. The company refused, and after Mr. Dewey failed to show up on several Sundays without finding a replacement, he was fired.

The district court ruled that the company policy was discriminatory and violated Title VII – basically following the EEOC’s approach. The Sixth Circuit reversed, explaining that since Title VII prohibited only non-discrimination based on religion, it did not require the type of *special treatment* based on religion that Mr. Dewey was asking for.

Here’s what the 6th Circuit said:

> The fundamental error of Dewey and the Amici Curae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees.

Instead, as the court went on to explain:

> The simple answer ... to all of Dewey's claims is that the collective bargaining agreement was equal in its application to all employees and was uniformly applied, discriminating against no one.

In a per curiam opinion, in June 1971, the Supreme Court affirmed the appeals court decision -- by an equally divided Court.

Well, in this dance of creating law – Congress passes a law; an agency interprets the law; a court applies the law -- Congress can do another round in the dance and say – Supreme Court, we don’t agree with you. And that’s what happened here.

Congress was considering a bill in 1971 that was primarily focused on giving the EEOC additional enforcement power. But during Senate consideration of the bill, in 1972, Senator Randolph – who was a member of a Christian denomination that prohibited work on Sundays -- offered an amendment on the Senate floor that modified the definition of "religion" as follows: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of his business."

A little bizarre to pack all of this into a definition (classic politics of amending a bill on the floor.) But the bottom line of this amendment was that it made the requirement of accommodating religion a core element of non-discrimination on the basis of religion.

Let's return, for a moment, to why this makes sense conceptually. In other words, why the EEOC got this right in the first place – and why Congress was right to codify this.

It doesn't really help a religious person if the law simply requires that employers *ignore* the religious beliefs of such individuals. Indeed, it is the very fact that an employer's policy is not taking the individual's religious practices and beliefs into account that causes the adverse employment action for these individuals.

For example – to take a modern example that happens way more than it should -- imagine you are a Muslin woman who shows up at the interview for a job with Abercrombie & Fitch and you are wearing a hijab, a headscarf. The hiring manager asks you if you are a Muslim and will you be required to wear your headscarf while working. You answer "yes," and the manager marks "not Abercrombie look" on your interview form. And you don't get the job.

Abercrombie & Fitch does have a "Look Policy" – which is a dress code for all employees that, among other things, prohibits wearing caps – which the company interprets to prohibit wearing any type of head covering.

Why shouldn't an employer be able to have that type of policy? Why should an employment civil rights law force an employer to change how it does business -- simply to accommodate what is probably going to be very few people?

I believe it is because our civil rights laws appropriately reflect a deep and rich view of equality. In many cases, equality will be achieved by treating everyone the same. That is a foundational principle for equality. But equality can never be **just** about treating everyone the same – because we are not all the same to begin with. Equality also means treating others "as equals" – with equal dignity and respect. And that means treating them in a way that fully acknowledges the integrity and fullness of who they are.

For example, this understanding of equality means it is not enough for the law to provide that someone who says "I am a Muslim" cannot be denied a job on that basis. It also means that the law has to ensure that a person can *live* as a Muslim – in the *totality* of what that means in terms of religious practice – and also have a job.

I think it is sometimes hard for members of religious faiths that do not have a ton of rules controlling dress, grooming, schedule, prayer or food to understand the "commanded-ness" aspect of religion.

So here's a story to illustrate how I experience this. I grew up as a very Orthodox Jew. When I was 12, I got a gold necklace that said "chayarachel" in Hebrew. I loved that necklace. I wore it all the time. I would not have been happy if I had been required to take that necklace off because the dress code of some job required that. But I could have taken the necklace off, if I needed to for the job.

But if someone had told my Orthodox Jewish brother that he needed to take his yamulke off to have a particular job -- he could not have taken the job. Under the rules of the religion, it is a sin not to wear that head covering. That's a commandment from God.

I think to achieve the social justice goal of ensuring that people of religious faith are treated as equals in a range of jobs, we need to educate people about the commanded-ness aspect of religion – even if some of the religious rules seem bizarre and not easy to comprehend.

It's really helpful to have a law that says that accommodations to religious beliefs and practices are required if they don't impose an undue hardship on the employer. But that's not enough for real social change. We also need employers to really absorb that requirement into their policies on the ground, into the training of their supervisors. And ultimately, we need to have a social norm in this country that recognizes the legitimacy of such protection. That is, in the hearts and minds of people across the country – people have to believe this is a good thing for us to protect as a country. Because otherwise, laws and policies will only go so far.

I am very proud that the EEOC – from the beginning of its existence leading up to now – has been a leader in protecting the rights of religious individuals in the workplace. We have taken in hundreds of charges from people across the country; we have settled hundreds of those charges in ways that are never made public but in which people get relief, and we have brought a number of high-profile pieces of litigation – prevailing in many of them through settlements or through court decisions. These cases have covered everything from scheduling issues to dress issues to grooming issues to not having to sing "Happy Birthday" as a waitress. And these charges have covered lots of different religions – from small obscure ones to major established ones.

The cases the EEOC has brought over the years have focused on helping employees get accommodations for religious beliefs and practices in which the requested accommodation has not collided with the rights of other individuals -- either co-workers or customers or clients. The scheduling, dress, grooming issues etc may have felt problematic to an employer – but making those accommodations has not harmed anyone else in the workplace.

The modern challenges are different. In the past few years, courts have dealt with a number of situations in which a requested accommodation for a religious employee did (or could) adversely affect another individual. For example, there was a case in which a therapist wanted to be able to stop a counseling session if she found out, during the session, that the client was gay. There have been cases in which employees have felt that they have been called, by their religion, to tell their gay co-workers on a daily basis that they must repent because homosexuality is sinful – and then have sued when they were fired for violating the company's anti-harassment policy.

I think the courts have basically been getting these cases right. As I noted earlier, an employer must provide an accommodation – unless it would impose an undue hardship on the employer. The undue hardship defense is an individualized analysis. For example, in the case of the therapist, the court concluded that – in light of how the counseling structure was set up – the employer could not accommodate the therapist's request to be permitted to refuse to counsel gay clients without it being an undue hardship. Or, for example, in the cases of employee who were urging their gay coworkers to repent, the courts have held that – while an employer certainly may not require an employee to change his or her religious view – it is an undue hardship for an employer not to be able to enforce its internal anti-harassment policy.

So I come back to the social justice goal of supporting pluralism. The reality is that our society is made up not only of religious individuals in various jobs – but also of LGBT employees and LGBT members of the public who are seeking services. The statute, however -- thankfully -- already includes the balance that must be struck. If it would be an undue hardship for an employer to accommodate a religious individual's request for an accommodation, the employer is not required to provide that accommodation. And where there is harm that will be inflicted on another person as a result of that accommodation – that appropriately goes into the undue hardship determination.

In cases in which an accommodation for a religious person results in actual harm to others, I think it is likely that employers will prevail in arguing that it is an undue hardship for them to make the accommodation. But the balance changes significantly when we look at the second way in which Title VII protects religious pluralism -- which is by *exempting* religious organizations from the prohibition on religious discrimination.

The original CRA, in 1964, limited this exemption to the *religious* activities of religious organizations. But in the 1972 bill that amended Title VII, Congress expanded this exemption to permit religious organizations to discriminate on the basis of religion in *all* of its activities – religious or otherwise.

Given this broad allowance for religious organizations to discriminate on the basis of religion, the definition of what is a religious organization is very

important. The EEOC uses a "primarily religious" test that the 9th Circuit set forth in a 1988 case brought by the EEOC. This test weighs the various characteristics of an organization (e.g., tax status, the product or output of the organization, the mission of the organization as defined in foundational corporate documents, and formal or informal religious affiliations) to determine whether the entity is primarily religious or primarily secular. Other circuits look at similar factors, though they are often more lenient in their conclusions.

But basically, in order to qualify for the religious organization exemption -- under any of these tests -- an organization has to either engage in religious activity or be owned by or closely affiliated with a religious organization. For example, a gym owned by the Mormon Church or a publishing company owned by the Adventist Church – these would be religious organizations under Title VII.

So the next question is – what type of discrimination on the basis of religion does this religious organization exemption permit?

The statute says simply that Title VII does not apply to religious organizations "with respect to employment of individuals of a particular religion."

Clearly, that includes a decision not to hire people of a religion different from that of the religious organization. So, for example, if a Lutheran school wants to hire only Lutherans -- that is clearly permitted by the exemption. Meets the basic needs of pluralism – to maintain the religious character of a religious organization, you need to hire people of just that religion.

But what if the Lutheran school wants to go beyond hiring Lutherans – and wants to hire only practicing Lutherans or only Lutherans who believe in and practice certain religious Lutheran tenets? Does the statutory exemption – which simply says that Title VII does not apply to religious organizations "with respect to employment of individuals of a particular religion" –permit religious organizations to distinguish between people who are "Lutheran" – and those whom the organization believes are "good Lutherans" – and hire only the latter?

The Supreme Court gave us some guidance in this area in the 1987 case of *Corp. of the Presiding Bishop of the Church of Jesus Christ of Later-Day Saints v. Amos*, 483 U.S. 327 (1987). In that case, the religious organization was a gymnasium owned by the Mormon Church. The Mormon Church has something called a "temple recommend." These cards are issued by the leadership of a person's church and are distributed only to persons who comply with Mormon teachings. The gymnasium required all employees to possess active "temple recommends." Mr. Mayson had worked as a building engineer for the gymnasium for 16 years and then was discharged for failing to qualify for a "temple recommend."

The main question in the *Amos* case was whether Title VII's broad exemption for religious organizations violated the Establishment Clause by treating religious organizations more favorably than other employers – even for jobs that were not at all religious. The Court ruled that the broad exemption did not violate the Establishment Clause, at least when applied to non-profit religious organizations. And although the Court did not speak to this issue directly, presumably it believed that the exemption permitted the gym owned by the Mormon Church to impose a requirement of having a "temple recommend" on all its employees – that is, to be in compliance with a particular code of religious beliefs.

A number of religions may not have an equivalent to the "temple recommend." But, as a conceptual matter, it seems that courts are willing to say that Title VII's exemption permits a religious organization not only to hire a person of its own religion, but also to hire only the people who are practicing the religion the *way* that the particular religious organization thinks is appropriate.

But what if a religious organization hires people of all different religions? Could that organization still require that all of its employees – regardless of their religion – conform to the tenets and practices of what the religious organization considers a person in good standing of its *own* religion is required to do?

I think this is a tougher question. Only one circuit court – the 3rd Circuit -- has addressed this question directly – and that circuit ruled in a manner very deferential to the religious organization. This was a 1991 case, *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991), in which a Catholic school hired a Protestant teacher and then fired her when she divorced and then

remarried. The court allowed the school to use the exemption to justify its termination of the teacher, even though the school knew the woman was a Protestant when they hired her.

The court's reasoning was that Congress' intent with regard to the exemption in Title VII was "to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices." And, according to that court, that included even requiring employees of other religions to follow the tenets of the religious organization.

But here's the biggest question. What happens when the beliefs and practices of a religious organization intersects in some way with the other protections of Title VII -- where there is no exemption for religious organizations? Title VII exempts religious organizations only from the prohibition of discrimination based on *religion*. It does not exempt them from the prohibition of discrimination based on race, color, national origin or sex.

So what if a religious organization claims, for example, that its tenets prohibit it from paying women equally with men? Or if a religious organization claims that its tenets prohibit it from hiring gay people? [Assume, for purposes of this discussion, that the courts have now all agreed with the EEOC's current position that discrimination on the basis of gender identity or sexual orientation is a form of sex discrimination – so this is a valid question under existing Title VII protection.]

The courts are really murky on this question. In some cases, courts have not permitted a religious organization to use the exemption when the religious rule has resulted in discrimination that is otherwise prohibited under Title VII. For example, a Christian school had a policy of providing health insurance to married male employees but not, in most cases, to married female employees. The school justified this on the religious belief that men are the appropriate heads of household and so men are responsible for securing insurance for a family through employment. But when the school tried to claim the exemption as justification for being allowed to discriminate on the basis of sex in this manner – the school lost. The 9th Circuit ruled, first, that "religious employers are not immune from liability [under Title VII] from discrimination based on . . . sex'" – and then second, that since church officials had testified that their religion did not

permit “unfair distinctions” against women, the school had actually not made a particularly compelling case that its practice was required by its religious beliefs. *EEOC v. Fremont*, 781 F.2d 1362 (9th Cir. 1986). There a few other cases along these lines. *EEOC v. Pacific Press*, 676 F.2d 1272 (9th Cir. 1982).

But what if an organization can prove that policy is very related to its religious principles and that the policy is applied in a universal matter? (For example, a policy about sexual practices that applies equally to women and men?)

In the case of *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000), a Catholic school didn’t renew the teaching contract of an unmarried pregnant teacher because her actions were inconsistent with the school’s religious principles. The Sixth Circuit agreed with the teacher that the Title VII exemption did not exempt religious organizations with respect to all discrimination” and “[b]ecause discrimination based on pregnancy is a clear form of discrimination based on sex, religious schools cannot discriminate based on pregnancy.” *Id.* at 658. But the court also held that “if the school’s purported discrimination is based on a policy of preventing nonmarital sexual activity which emanates from the religious and moral precepts of the school, and if that policy is applied equally to its male and female employees, then the school has not discriminated based on pregnancy in violation of Title VII.” *Id.*

So where are we now – particularly with regard to religious organizations that want to discriminate in employment against LGBT people because of the organization’s stated religious beliefs?

It’s murky! There are no clear answers. But just because the state of the law is murky doesn’t mean we don’t have an obligation to struggle with this – and figure out what the right answer is.

Indeed, I think that’s a moral obligation that all of us should feel responsible in taking on. Certainly, it’s an obligation for the EEOC, as the agency charged with implementing Title VII, and for the courts that will hear the specific cases – to figure out what the correct parameters are.

But I think this is also an obligation on all of us, as citizens, to consider what the right answer should be. How do we ensure that religious

organizations can maintain the integrity of their religious character? The exemption that Congress put into the statute to protect religious organizations has language that, on its face, is quite narrow. But should those words be read in a more expansive manner to ensure that we are protecting the viability of insular religious organizations?

None of these questions are easy. The modern challenges in supporting accommodations for employees with religious beliefs and practices, as well as the challenges in determining the correct parameters of the exemption for religious organizations from Title VII's prohibition on religious discrimination require all of us to engage in these challenges with an open heart and a commitment to justice.

And no matter how difficult the challenges – I believe that we, as a people, are up to the task.

Thank you.