

## **Title VII Accommodations for Fossil-Free Retirement Funds**

### ***Introduction:***

Religious accommodation requirements under Title VII, in light of recent Supreme Court precedent, provide an opportunity for employees with sincere beliefs regarding environmental stewardship to seek employer accommodations to allow them invest in pension options that align with their moral/religious beliefs.

Title VII of the Civil Rights Act of 1964 (“Title VII”) 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.” Employers are required to provide religious accommodations to workers unless doing so would impose “undue hardship” on the employer. 42 U. S. C. §2000e(j) (1970 ed., Supp. II).

Historically, the burden for employers to show ‘undue hardship’ was quite low. Businesses did not have to provide religious accommodations if the burden of doing so was more than *de minimis*. However, last term, the Supreme Court revisited the issue in *Groff v. DeJoy* and determined that the *de minimis* standard is inappropriate. Instead, the Court held that statutory language “undue burden” means that employers must provide religious accommodations unless doing so would impose “substantial increased costs” on the employer.

This change is potentially very significant for employees who have religious/moral convictions against investment in environmentally destructive activities. If employees want retirement options that align with their religious/moral convictions, they may now seek a religious accommodation from their employer under the ‘substantial’ burden standard now applied.

Furthermore, where an employer accommodates a request by adding, for example, a fossil-free fund to the menu of retirement plan options, other employees will also have the option to select that fund. In practice, this means that a single accommodation should provide access to fossil-free funds for all employees at any given company.

### ***Religious Accommodation and Pensions***

The relevant law is provided by Title VII of the Civil Rights Act (42 U.S.C. §2000e) and EEOC regulations regarding same (29 CFR 1605). 29 CFR 1605.2 provides, in relevant part, that it is “an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.”

As discussed above, prior to *Groff*, courts had held that greater than *de minimis* costs imposed on a business were undue hardships justifying denial of accommodations. Now, however, courts are instructed to construe ‘undue hardship’ to mean that “an employer must show that the burden of

granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.” *Groff v. DeJoy*, 2023 WL 4239256, at \*11 (U.S. June 29, 2023).

### What Counts as “Religious” in the context of Title VII?

Per the EEOC regulations:

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions.<sup>[1]</sup> The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.

29 CFR 1605.1

Additional guidance from the EEOC and various commentators on employment law suggests that employers generally should not question the sincerity of employee beliefs, nor can inconsistent religious practice of the individual requesting accommodation be a basis for denial. Employers are allowed to ask for clarification about belief and sincerity, and may challenge the need to provide accommodations if the accommodation requested does not appear mandated by the belief or if the belief appears insincere. ([https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h\\_9376754934651610749843386](https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_9376754934651610749843386)) However, so long as the belief is espoused sincerely and in good faith, it should be accommodated where possible.

### ***Process***

Title VII accommodation requests occur as internal administrative processes between an employee and an employer. Some employers may have established processes in place for accommodations requests to be filed, otherwise a letter to management or to HR should suffice.

The employer will then have an option of either providing the accommodation, proposing an alternative accommodation, seeking more information, or denying the request.

If the request is approved, then the employee has access to an appropriate pension option, as do others in the company.

If the employer requests further information or mediation, that information should be provided and, ultimately, should inform the employer’s decision.

If the employer denies the accommodation, the employee can file a charge with the EEOC, which will investigate. The processes for pursuing action at the agency or in court are beyond the

scope of this memo, but employees do have those avenues available if they cannot come to terms with their employers over reasonable accommodations.