

LOS ANGELES

Daily Journal

FRIDAY,
APRIL 14, 2006
VOL. 119 NO. 72

© 2006 Daily Journal Corporation. All Rights Reserved

— SINCE 1888 —

OFFICIAL NEWSPAPER OF THE CITY OF LOS ANGELES AND THE COUNTY OF LOS ANGELES

www.dailyjournal.com

915 East First Street, Los Angeles, CA 90012 (213) 229-5300

\$ 2.50

Employment

LOS ANGELES DAILY JOURNAL • FRIDAY, APRIL 14, 2006 • PAGE 8

9th Circuit Draws Line Between Competing Beliefs and Workplace Hostility

In the world of employment law, one of the most controversial and unsettled issues is the ever-evolving conundrum of competing demands for accommodation between employees. On the federal level, this issue was addressed in a somewhat head-on manner by the 9th U.S. Circuit Court of Appeals in *Peterson v. Hewlett-Packard Co.* 358 F.3d 599 (2004).

In *Hewlett-Packard*, Richard Peterson was a nearly 21-year employee in the Boise, Idaho, Hewlett-Packard office. Peterson was a self-described devout Christian who believed that homosexual activities violate biblical tenets. Peterson also held a sincere belief that as a Christian, he had a duty "to expose evil when confronted with sin."

A conflict arose between Hewlett-Packard and Peterson when Hewlett-Packard installed "diversity posters" as part of its ongoing workplace diversity campaign. Each poster depicted a Hewlett-Packard employee with the caption "Black," "Blonde," "Old," "Gay," or "Hispanic." Although Peterson apparently had no objection to the other posters, in response to the poster labeled "Gay," Peterson posted Bible Scriptures in his work cubicle condemning homosexual activity. The Scriptures were large enough to be visible to co-workers, customers and other bystanders through an adjacent corridor.

After determining that the scriptural passages could be deemed offensive to other employees, Peterson's supervisor removed the passages from Peterson's cubicle. When Peterson met with Hewlett-Packard managers, he explained he intended for the passages to condemn "gay behavior" and that they were "intended to be hurtful." Hewlett-Packard then gave Peterson some time off to rethink his position.

When Peterson returned to work, he once again posted the Scriptures. At this point, Hewlett-Packard terminated Peterson for insubordination.

Following receipt of a right-to-sue letter from the Equal Employment Opportunity Commission, Peterson

filed a complaint alleging religious discrimination under Title VII. Title VII makes it unlawful for an employer to "discharge any individual ... because of such individual's ... religion[.]" 42 U.S.C. Section 2000e-2(a)(1).

Under a Title VII claim, one can assert religious discrimination including disparate treatment and failure to accommodate. Peterson relied on both of these theories in arguing that he was subjected to discrimination based upon his Christian religion. When both parties moved for summary judgment, the district court granted Hewlett-Packard's motion and denied Peterson's. Peterson then appealed. *Hewlett-Packard*.

First, to support a disparate impact claim, a plaintiff must prove that "similarly situated individuals outside his protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." *Hewlett-Packard*.

The 9th Circuit held that the evidence clearly indicated that Hewlett-Packard initiated the diversity campaign during a three-day diversity training conference with Hewlett-Packard's stated goal to increase tolerance of diversity in its workplace. While the diversity posters were simply communicating the view of Hewlett-Packard, Peterson was expressing his own personal views, which contradicted management's.

The 9th Circuit noted that the workplace diversity campaign "did not attack any group of employees on account of race, religion, or any other important individual characteristic." To the contrary, Hewlett-Packard's campaign was intended to "promote tolerance of the diversity that exists in its workforce." Thus, the 9th Circuit held that Peterson was discharged not because of his devout Christian religious beliefs, but because he violated Hewlett-Packard's anti-harassment policy by attempting to generate a hostile and intolerant work environment.

Second, Peterson appealed the district court's rejection of his failure-to-accommodate theory of

religious discrimination. In cases where the claim centers on a failure to accommodate based on religion, an employee can establish a claim even though the employee cannot show that other (unprotected) employees were treated more favorably and/or cannot rebut an employer's legitimate, non-discriminatory reason for discharge.

This is because an employer must, to an extent, actively attempt to accommodate an employee's religious expression or conduct even if, absent

moderate his beliefs. Peterson made it clear that the only two options for accommodation would be either that both the "Gay" diversity posters and Peterson's anti-gay postings remain, or that Hewlett-Packard remove the "Gay" diversity posters, with Peterson then removing the anti-gay messages.

The 9th Circuit held that given Peterson's refusal to consider other accommodations, the key issue is whether one or both of the "acceptable" accommodations would

The only two options for accommodation would be either that both the "Gay" diversity posters and Peterson's anti-gay postings remain, or that Hewlett-Packard remove the "Gay" diversity posters, with Peterson then removing the anti-gay messages.

religious motivation, the employee's conduct would supply a legitimate ground for discharge. *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996). In order for Peterson to establish religious discrimination on the basis of a failure-to-accommodate theory, he would have been required to first set forth a prima facie case that:

"[H]e had a bona fide religious belief, the practice of which conflicts with an employment duty; ... he informed his employer of the belief and conflict; and ... the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement." *Hewlett-Packard*.

Assuming *arguendo* that Peterson's religious beliefs were sincerely held, the 9th Circuit considered the conflict presented by Hewlett-Packard's diversity posters and Peterson's religious beliefs. The 9th Circuit reflected that an employer's duty to negotiate possible accommodations ordinarily requires it to take "some initial step to reasonably accommodate the religious belief of that employee."

Although Hewlett-Packard's managers met with Peterson on numerous occasions, Peterson claims the company did not reasonably accom-

moderate his beliefs. Peterson made it clear that the only two options for accommodation would be either that both the "Gay" diversity posters and Peterson's anti-gay postings remain, or that Hewlett-Packard remove the "Gay" diversity posters, with Peterson then removing the anti-gay messages.

moderate his beliefs. Peterson made it clear that the only two options for accommodation would be either that both the "Gay" diversity posters and Peterson's anti-gay postings remain, or that Hewlett-Packard remove the "Gay" diversity posters, with Peterson then removing the anti-gay messages.

moderate his beliefs. Peterson made it clear that the only two options for accommodation would be either that both the "Gay" diversity posters and Peterson's anti-gay postings remain, or that Hewlett-Packard remove the "Gay" diversity posters, with Peterson then removing the anti-gay messages.

moderate his beliefs. Peterson made it clear that the only two options for accommodation would be either that both the "Gay" diversity posters and Peterson's anti-gay postings remain, or that Hewlett-Packard remove the "Gay" diversity posters, with Peterson then removing the anti-gay messages.

would have infringed upon the company's right to promote diversity and encourage tolerance and good will among its workforce. Such values, the court recognizes, are "good business practices [that] are appropriately promoted by Hewlett-Packard's workplace diversity program."

Perhaps the most important issue is the fact Peterson's second proposal would have required the company to exclude sexual orientation from Hewlett-Packard's workplace diversity program. The 9th Circuit stated, "Either choice would have created an undue hardship for Hewlett-Packard because it would have inhibited its efforts to attract and retain a qualified, diverse workforce." Thus, the 9th Circuit indicated that when protective categories are at odds and must be balanced, promoting diversity is an important issue.

Some months after the 9th Circuit's decision in *Peterson v. Hewlett-Packard*, the court again considered sincerely held religious beliefs as a basis for a Title VII claim in *Bodett v. Coxcom Inc.*, 366 F.3d 737 (2004). In *Coxcom*, Coxcom fired the plaintiff, Evelyn Bodett, an evangelical Christian, for violating her company's harassment policy by coercing and harassing an openly gay subordinate.

After being terminated, Bodett sued Coxcom for religious discrimination under Title VII. The U.S. District Court granted summary judgment for Coxcom. Bodett appealed.

The 9th Circuit held the employer's preferred reason for terminating Bodett was legitimate and nondiscriminatory. The court stated, "Viewing the evidence that [Bodett] did present to the district court in the light most favorable to [her], we cannot say that she has demonstrated other circumstances surrounding her termination that demonstrate a bias or animus against her religion that give rise to an inference of discrimination."

Ultimately, because Bodett did not offer any other evidence of animus toward her religious beliefs as the true motivation for her termination, the court held Bodett failed to raise a genuine issue of material fact in

regards to whether Coxcom's reason for terminating Bodett was a pretext for discrimination.

In *Grutter v. Bollinger*, the Supreme Court stated, "Major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints" 539 U.S. 306 (2003). The 9th Circuit's recent holdings in *Hewlett-Packard* and *Coxcom* mirror the Supreme Court's decision in *Bollinger*. The message the 9th Circuit sends in *Hewlett-Packard* and *Coxcom* is clear. While employees are of course entitled to their beliefs, whether religious or secular, such beliefs do not translate into a license to harass co-workers using religion as a justification.

Recognizing that perfect workplace harmony is an unrealistic goal, the 9th Circuit in *Hewlett-Packard* fashioned a line between such competing interests: when an individual's infiltration of the workplace with demeaning and degrading postings result in a "hostile and intolerant work environment." *Hewlett-Packard*. The 9th Circuit held that requiring Hewlett-Packard to allow Peterson to post the anti-gay messages and Scriptures would amount to such undue hardship by creating a hostile work environment.

The court also suggested that when balancing an employee's freedom to express religious beliefs and the resulting undue hardship upon the employer, courts should favor whichever side "promote[s] diversity and encourage[s] tolerance and good will among its workforce." *Hewlett-Packard*.

While it is certain that the *Hewlett-Packard* case will not be the last word on such competing interests, what is not certain is where the courts will draw the line for each case. As such, cases will, as they must, depend upon the actions and behaviors of the competing parties.

Kere Tickner is a partner with Bremer Whyte Brown & O'Meara in Newport Beach office, where her practice emphasizes complex civil litigation. Joshua Bordin-Wosk is an associate in the same office.