

HO-HO-HO-WHOA! DON'T SUE ME FOR THAT!

THE HOLIDAYS ARE FRAUGHT WITH RELIGIOUS SUBTEXT IN THE WORKPLACE. HERE'S HOW TO MAKE IT TO THE NEW YEAR WITHOUT GOING TO COURT. BY MATTHEW W. STILES



If you're like me, the holidays are more likely to bring questions over what to do with crazy Aunt Clara (whose holiday antics include wrapping up stuff around her house to give as gifts—like the year I received a half-used bottle of Windex and a door stop; drooling incessantly while distributing sloppy kisses; and talking aloud to long-since-departed relatives) than whether it's okay to say "Merry Christmas" at the office. But alas, it's the holidays—people become a little more sensitive to religion at work, and rightfully so. Religion (including what we've come to know as "Commercial Christmas") is all over the workplace this time of year. So here's a roadmap, compliments of applicable employment law and some handy common sense, for navigating your way through the ho-ho-ho's, the Hanukkah shaloms and the Kwanzaa kuumbas of 2007.

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MERRY CHRISTMAS VS. HAPPY HOLIDAYS AND WHETHER WE CAN DISPLAY THAT MENORAH

Let's quickly knock out a couple of workplace religious issues that always make headlines during the holidays. First, if you want to know whether you can display a menorah, Christmas tree, crèche or other religious holiday display, let me be direct: Private, non-governmental employers are free to display on their own property whatever appropriate holiday and religious symbols they want. A good rule of thumb on appropriateness is to stick with traditional symbols that do not include any written messages that could be deemed critical or judgmental of others.

Likewise, avoid imagery that may be suggestive of other hostile messages. Take for example the Halloween incident here in Sarasota a few years ago where a private individual's display of a Frankenstein hanging by his neck from a tree sparked protests by a local group of Uhorus. Personally, I don't think it would have ever occurred to

me that a hanging Frankenstein would be interpreted by some as a racist message, but the rule of thumb remains intact: Stick to traditional holiday displays and avoid sending (even subtle or inadvertent) messages of criticism, judgment or other hostility.

Now, if you're a governmental employer, before you light the first menorah candle or utter the next "merry" whatever pick up the phone and call your lawyer. There seems to be a new court ruling on government displays of religious symbols every year, and as absurd as it sounds, courts spend a lot of time writing legal opinions about just how many dreidels, sugar plums and snowmen have to be displayed before you can put up a baby Jesus, and so on. There's just no straightforward answer for government employers anymore.

Second, if you're looking for an answer to the debate over saying "Happy holidays" versus "Merry Christmas, Happy Hanukkah and Happy Kwanzaa," that's simple. The semantics of the holidays are left to personal preference, subject only to the winds of changing political correctness. The law seldom gets involved in this debate unless your use of holiday cheer is intended to jeer (or sneer) at someone else's religion. Take for example the now classic holiday comedy, *National Lampoon's Christmas Vacation*, where Clark W. Griswold (played by Chevy Chase), greets his boss and entourage of corporate "yes" men with, "Merry Christmas. Merry Christmas. Merry Christmas. Merry Christmas. Kiss my ass. Kiss his ass. Kiss your ass. Happy Hanukkah." I suspect overt religious harassment by the always affable Griswold was not the intent of the scene, but it's a fine example of where spreading holiday cheer crosses the line into something that implicates the employment laws.


TITLE VII'S RELIGIOUS ACCOMMODATION AND PROHIBITION ON RELIGIOUS DISCRIMINATION

The same law that prohibits discrimination on the basis of race, sex and national origin—Title VII of the 1964 Civil Rights Act—also prohibits religious discrimination but requires reasonable religious accommodation. Religious discrimination usually comes in one of two ways: disparate treatment or hostile environment (religious harassment). Both are illegal in the workplace. Disparate treatment religious discrimination occurs when you treat an employee different than others like him because of his religion (be it the employee's own religion or his apparent nonconformance to yours). Religious harassment is when you impose an unwelcome religious ideology or practices on an employee. Religious accommodation requires you to reasonably accommodate an employee's religious observances. Because one's religion is so deeply personal and reli-

gious observance manifests itself in so many different ways across the multitude of religions, workplace accommodation issues frequently lead to litigation.

There's a now infamous religious accommodation case from a few years ago where Costco terminated the employment of a delicatessen department employee, a member of the Church of Body Modification, because she refused to conform to Costco's dress code. The story is a little bizarre, hence the infamous reputation. When hired, the employee had only common ear piercings; but over time, she added many (as in many, many) piercings, tattoos and marks from cutting on her face and other exposed areas. Costco had a legitimate dress code that prohibited food handlers from having exposed piercings other than on the ears. Consistent with policy, Costco asked the employee not to wear the additional piercings while working. The employee said she had joined the Church of Body Modification and that it would be against her religion for her to remove the piercings. Suspicious of the asserted "religion," but willing to attempt a reasonable accommodation, the employer allowed her to wear the piercings if she would conceal them with band-aids. (If they were concerned about the piercings, I'm not sure why they weren't equally concerned about the many band-aids, but that's beside the point.) The employee refused and Costco fired her. She filed suit, and as a result of a subsequent appeal, the federal court held that Costco acted within the law when it offered her a reasonable accommodation (the band-aids) and then fired her when she refused.

A distinguished jurist once said, "Hard cases make bad law," but I've always found that it's the absurd cases that make great law. Solid legal rules to live by are often best illustrated by their application to extreme circumstances. Here, the rule is well-defined: Don't question an employee's religious conviction or the legitimacy of her asserted religion (even the courts don't like to do that), but rather make a good faith effort to reasonably accommodate that religion, and then you're acting within the law.

Of course, it frequently takes a lawyer to parse out the nuances of religious discrimination and accommodation law, but when in doubt this holiday season, you can fall back on some sage advice proffered to me in her more lucid youth by Aunt Clara (and probably provided by Aunt Claras everywhere to you and generations like you), when in need of a subject of conversation (in the workplace or elsewhere): "Don't talk about religion, sex or politics." My Aunt Clara added a second bit of advice: "In our household, steer clear of college football, too." At least it's still legal to discriminate on that basis. 

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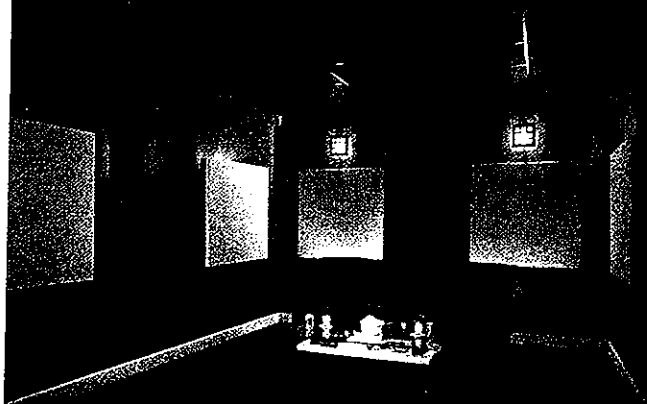
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