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Abstract
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Keywords
HR Review, Human Resources, Human Capital, Diversity, Benefits, Pension, Religion, ERISA, Accommodation, Discrimination

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CORNELL HR REVIEW

THE RIGHT TO RELIGIOUS ACCOMMODATIONS IN PENSION PLANS

Beverly I. Moran

I. Introduction

Picture the Human Resources Director of a Fortune 500 company explaining how his company prides itself on its global positioning—which includes its leadership in creating a diverse national and international workforce. In order to keep its varied workforce happy and productive, the company voluntarily accommodates various types of religious headgear, jewelry, and facial hair. In addition, the company's large number of employees allows for a fair amount of scheduling flexibility with non-Christian employees working during Christian holidays while Christian employees cover non-Christian holidays.

Now imagine the Human Resources Director's surprise when his company's Muslim employees request a Sharia-compliant investment option within the employer-sponsored pension plan. As a Roman Catholic, the Human Resources Director is vaguely aware of his Church's condemnation of usury and its instructions to invest with an eye toward the sacredness of human life and the alleviation of poverty. However, he is unaware of the Islamic law of finance. It now occurs to the Human Resources Director and his company's Board of Directors that even non-Muslim employees might have religious and ethical attitudes towards their pension fund investments. Must the company do anything in the face of an employee request for religious accommodation in the company's private pension plan investment options?

This article investigates the Supreme Court's religious accommodation in the workplace jurisprudence concerning and finds that employers are not presently obligated to offer religiously compliant investment options to their employees although a competing line of Supreme Court decisions in the tax area argues for the right of religious accommodation in pension investing.

II. The United States private pension system

The federal government regulates both mandatory and voluntary retirement programs. The two largest mandatory retirement programs are Social Security and Medicare. The most popular voluntary retirement programs are pension plans governed by the Employee Retirement Income Security Act (ERISA). ERISA's rules appear in both the Labor Law and the Internal Revenue Code. ERISA is completely voluntary. Employers are not required to set up ERISA qualified retirement plans and employees are not required to participate. Yet tens of thousands of employers maintain ERISA governed retirement plans that serve millions of private sector workers and contain trillions of dollars in assets.

ERISA's popularity rests on its protective regulations and generous tax benefits. The Labor side of ERISA protects workers' expectations in their retirement rights. The Tax side of ERISA gives employers immediate tax deductions and employees decades of tax deferral. ERISA gives employers control over pension plan sponsorship and design. Although employers are free to design any plan or no plan, ERISA's tax benefits only apply to "Qualified Plans."

This Article discusses §401(k) plans and §403(b) plans. Section 401(k) plans and §403(b) plans are pension plans that allow workers to contribute before tax dollars toward retirement and to direct where those dollars are invested within an employer-limited universe of options. The plans are named after the sections that create them in the Internal Revenue Code.

ERISA directly addresses discrimination in employee benefits and pensions based on age and income. ERISA's rules do not directly address other types of discrimination covered by Title VII such as sex, color, race, or national origin. Nevertheless, the rules for qualifying a pension plan under ERISA are meant to make pensions widely available. Further, as discussed below, the Supreme Court has read Title VII's non-discrimination protections into ERISA.

III. Islamic law and the prohibition against interest

Americans are often confused about Islamic observances and practices. Nowhere is this confusion more evident than in regard to Islamic law. Unlike state-centered law, Islamic law is religious law. As religious law, Islamic law controls Muslims' lives and actions wherever they live and whatever their secular obligations. In this sense, Islamic law is like Jewish law and Canon law—it travels with the believer across national and legal boundaries.

Theologically, Islamic law differs from Canon Law and Jewish law in that the Muslim tradition accepts the Quran as the direct word of God transcribed by the Prophet Mohammed without error. Yet, the three Abrahamic traditions share many common aspects. Although the general view in the West is that neither Christianity nor Judaism restricts it members' investment options, Muslims are not alone in facing religious restrictions on their economic activities. Because Canon Law still prohibits usury, Roman Catholics remain subject to restrictions on charging excessive interest. Additionally, Roman Catholic Bishops, including the current Pope Benedict XVI, direct Catholics to consider such issues as abortion, contraception, militarism, usury, and social justice when investing. Within Judaism, the Hebrew Bible also contains passages that prohibit usury, particularly when interest is charged to relatives or others to whom protection and charity is owed.

Like Canon law and Jewish law, Islamic law has specific rules regarding financial transactions. However, unlike many 21st Century Western Christians and Jews, Western Muslims are more likely to follow their religion's financial teachings and accordingly refrain from non-compliant investment options.

Although far from unique in the Abrahamic traditions, the Islamic prohibition against usury has attracted a great deal of attention and criticism from Western analysts. For years the Western critique was that the Islamic law of finance held Muslim countries and their economies hostage to pre-modern business practices. Recently, as the Western

world has faced economic collapse, the Islamic law of finance appears increasingly sound.

For example, Islamic financial ethics oppose selling financial instruments designed to fail. In contrast to Western economic traditions, which encourage arm's length relationships between lender and borrower, Islamic finance prefers economic partnerships where financiers maintain an economic stake in the outcome of the business activities their money supports. Had Goldman Sachs operated in a system that obligated equity interests in financial creations, Goldman's partners would have lost the incentive to develop and promote investments meant to fail.

IV. Supreme Court jurisprudence on religious accommodation in the workplace

The Equal Employment Opportunity Act (Title VII) applies to most employers—public and private. Title VII's basic purpose is to prohibit discrimination in hiring and employment on the basis of race, national origin, color, religion, and sex. Under Title VII, religion includes observance and practice, as well as belief. Thus, Title VII monitors more than hiring and promotion. The statute also requires employers to reasonably accommodate religious observance and practice. The Supreme Court has read Title VII into employee benefit and pension plans through such decisions as *Los Angeles Department of Water and Power v. Manhart*, *Arizona Governing Commission v. Morris*, and *Gilbert v. General Electric.*

Originally, Title VII only addressed religious discrimination in the workplace. The statute did not go on to require religious accommodation. The Equal Employment Opportunity Commission (EEOC) introduced the idea of religious accommodation in its 1967 rules directing employers "…to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business."

In support of the EEOC regulations, Congress amended Title VII in order to include religious accommodation within the statute's anti-discrimination protections. Nevertheless, in *TWA v. Hardison* and *Ansonia Board of Education v. Philbrook* the Supreme Court held that employers have no obligation to accommodate religious practice if the accommodation causes more than a *de minimus* business hardship and that, should the employer decide to accommodate, the employer's chosen method of accommodation will always override any employee preferences.

There are sharp contrasts between the statute, the Supreme Court decisions, and the EEOC rules on the question of what an employer owes an employee in the way of religious accommodation in the workplace. As a result, the Court's decisions give the employer maximum flexibility based on its taste for litigation.

Employers who wish to avoid litigation and be in complete compliance with the EEOC will follow the EEOC rules and review every reasonable alternative before determining that a religious accommodation presents an undue business hardship. Further, as between various reasonable alternatives, the employer will select the alternative that most accommodates the employee. These employers will readily adopt religiously compliant investments into their Qualified Plan options. On the other hand, employers who are willing to take on the EEOC if challenged can rely on the Supreme Court to avoid any religious accommodation obligation.

But even the most risk taking employer should consider that the Court has never faced a religious accommodation request made against the background of a substantial tax benefit. Under the Court's classic religious accommodation in the workplace jurisprudence, when Congress asks for religious accommodation from the employer but gives nothing in return the Court rejects the employer's obligation to accommodate unless the accommodation is cost-free. The following sections take up the question: what is Congress' power to demand employer compliance when the requested religious accommodation is wedded to a tax subsidy as is the case with pension plans?

V. The Supreme Court's tax jurisprudence and how it differs from its Title VII analysis

More than seventy years ago, Stanley Surry, Assistant Secretary of the U.S. Treasury for Tax Policy, introduced the concept of a tax expenditure budget. Tax expenditures are the cost to the government in lost revenues that arise from tax deductions, exclusions, and credits. Surry identified tax expenditures as hidden government subsidies.

Surry believed that the public's lack of concern over tax expenditures reflected the Internal Revenue Code's opacity. In order to make taxpayers aware of tax expenditures to the same extent as direct government subsidies, Surry convinced Congress to produce an annual tax expenditure budget. The tax expenditure budget shows the cost in revenue of significant tax benefits. For example, the charitable contribution deduction ranks as the sixth most costly tax benefit at an annual cost of $46.8 billion. In contrast, pension contributions rank as the second most costly tax benefit at an annual cost of $117.7 billion.

In contrast to the Supreme Court's Title VII decisions, the Court's federal subsidy decisions paint a different picture of Congressional power. In these federal subsidy decisions, the Court allows Congress to force relinquishment of constitutional rights in exchange for federal benefits.

In *South Dakota v. Dole*, Congress withheld five percent of federal highway funds from South Dakota because the State permitted 19 year olds to drink alcohol. The Supreme Court held that Congress was not unduly coercive when it withheld the federal funds even though the penalty was triggered when South Dakota exercised its constitutional right to regulate the public welfare within its borders. *South Dakota v. Dole* is one of several Supreme Court decisions that acknowledge Congress' right to demand forbearance of constitutional rights in exchange for receipt of government subsidy.

Another example of the Congress' right to demand the relinquishment of a constitutional right in exchange for a government subsidy was displayed in the debate over Bob Jones University's tax exempt status. Bob Jones University was dedicated to teaching fundamentalist Christian beliefs including prohibitions against interracial dating and marriage. Although not affiliated with any religious denomination, Bob Jones University was tax exempt as both an educational and a religious organization. To effectuate its religious views, Bob Jones University completely excluded "Negroes" from its student body until 1971. From 1971 to May 1975 the University continued to refuse

application from "unmarried Negroes" but did accept applications from "Negroes married within their race."

Bob Jones University was inspired to open its admission to married Negroes in 1971 because of Revenue Ruling 71-447. Based on the "national policy to discourage racial discrimination in education," Revenue Ruling 71-447 declared that "…a private school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in sections 170 and 501 (c)(3) of the Code." In other words, a school that practiced race discrimination could not receive the tax benefits associated with charitable organizations such as tax exempt income and deductible charitable contributions.

Bob Jones University challenged the government's denial of its tax exempt status declaring that Revenue Ruling 71-447 burdened its sincerely held religious belief. Further, as Justice Rehnquist pointed out in his dissent in support of continuing the University's tax exemption, Revenue Ruling 71-447 imposed a greater restriction on the taxpayer than Congress itself required in IRC section 501 (c)(3). The University met the statutory criteria for both a religious and an educational organization. Nevertheless, although the statute did not directly prohibit race discrimination, the Court agreed with the Treasury that even religious schools are not exempt charities when they practice race discrimination.

While the Supreme Court refused mandatory religious accommodation under Title VII in *Hardison* and *Ansonia Board of Education*, the same Court had no qualms about burdening the University's Free Exercise of Religion in exchange for a government tax subsidy in *Bob Jones University*. *Regan v. Taxation with Representation*, which appears alongside *Bob Jones University* in the Supreme Court Reports, presents the same problem in a secular context: May Congress premise a tax exemption on the taxpayer relinquishing the right to Petition Government? Justice Rehnquist, who advocated in favor of Bob Jones University retaining its tax exemption, delivered the Court's opinion in *Taxation with Representation* upholding the IRC section 501(c)(3) limits on political speech:

> Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize other activities that nonprofit organizations undertake to promote the public welfare.

VI. Contrasting the Sabbatarian cases with pension plans

The two Supreme Court decisions that look at religious accommodation under Title VII concern private employers asked to rearrange employee work schedules to accommodate Sabbatarians. In both cases the employer faced a potential penalty for failure to provide religious accommodation but no benefit for compliance with the statute's requirements. In response to Congress' demands on the employer without a corresponding benefit, the Court treated the Title VII accommodation obligation as an Establishment of religion and as a burden on the employer's and non-believer employees' Free Exercise rights. Accordingly, the Court diminished Congress' religious accommodation rule under Title VII to the point that no motivated employer need ever accommodate an employee's religious practice.

Not all religious accommodations occur in the same context. As opposed to religious accommodation under Title VII, the Court generally gives Congress great deference when the legislature bestows tax benefits in exchange for taxpayers eschewing even constitutionally protected activities. Private pension plans are founded on the tremendous tax benefits bestowed on retirement accounts by the Employee Retirement Income Security Act (ERISA). These benefits invoke the deference to Congress exhibited in the Court's tax decisions specifically, and its government subsidy decisions generally, rather than the hostility to forced religious accommodation reflected in the Court's Title VII decisions.

Conclusion

This article asks whether employees whose religious beliefs prevent investment in their employers' private pension plans have a right to religious accommodation. This is a real issue for a growing part of the population whose spiritual lives are governed by rules that prohibit the giving or taking of interest as well as those whose Church requires them to consider other religious concerns in their investments. As one might expect, the investments available through most American pension plans involve some aspect of interest, thereby making those investments unsuitable retirement vehicles for devout Muslims. Many pension plans also have no social justice investment options making them equally inappropriate for devout Roman Catholics. Consequently, in order to secure their retirement income, religious employees are faced with either violating their religious beliefs, waiting for the American investment market to meet their religious needs, relying on their employer's goodwill, or religious accommodation through court or statute.

Religious accommodation in the workplace is governed by the Equal Employment Opportunity Act (Title VII). The statute is directive and punitive. There are potential money damages if an employer does not comply with Title VII's religious accommodation requirement but no benefit (monetary or otherwise) in exchange for compliance.

Using retirement savings as a model, this Article challenges the notion that a motivated employer can always avoid religious accommodation. Instead the Article argues that when the government confers tax benefits, as it does to private pensions, then Title VII's religious accommodation provisions—as well as its prohibitions against other types of discrimination—are greatly enhanced because Congress may impose obligations in return for tax benefits without violating constitutional prohibitions. The intersection of

tax policy and religious accommodation allows for greater consideration of Supreme Court decisions that reflect a more deferential attitude towards Congress and the penchant towards accommodation than the Court generally demonstrates under Title VII.

Thus, the Human Resources Director we encountered at the beginning of this article should consider that religious accommodation in pension investing is an even greater right than the headgear and jewelry that his company allows. Congress provides his company with nothing in exchange for its acceptance of a wide variety of religious practices. But Congress gives his company millions of dollars in tax benefits as part of encouraging the maintenance of its private pension. Just as Congress can force South Dakota to set a higher drinking age or Bob Jones University to admit students of all races in exchange for a government subsidy, Congress can demand religious accommodation of the company's employees as part of its private pension plan. ℵ

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