Peace at Work: Balancing Religious Exercise Rights of Employers and Employees

by Theresa Lynn Sidebotham and Jessica Ross

This article explores the tension and intersection between religious rights for employers and employees in light of the U.S. Supreme Court's decision in Burwell v. Hobby Lobby, *and its implications for anti-discrimination and religious freedom. It provides suggestions for balancing the religious exercise rights of employers with employees' rights to be free from religious harassment.*

Religious beliefs can bring disagreement and tension, and some would prefer to resolve this discomfort by excluding religion from public life. Not only does that solution impose a monocultural, materialistic worldview, it is not legally supported. Can we live in peace with our diverse religious beliefs? The Hebrew word "shalom" means "peace," but not the peace of indifference or capitulation—rather the peace of wholeness in societal relations, justice, and truth.[1]

While protection of employee religious rights is long-established, the U.S. Supreme Court recently reaffirmed the religious rights of closely held for-profit corporations in *Burwell v. Hobby Lobby*.[2] This article discusses the tension and intersection between religious rights for employers and for employees. It will examine how *Hobby Lobby* affects the analysis of corporate exercise of religion; the legitimate expression of values by business; federal and Colorado anti-discrimination employment laws and religious freedom laws; job advertisements that identify the religious beliefs of a secular employer; and possible ways employers can engage in the free exercise of religion while employees remain protected in their own religious exercise rights.

Hobby Lobby Strengthened Religious Rights for For-Profit Corporations

For purposes of this article, the key issue in *Hobby Lobby* was whether a closely held for-profit corporation could assert a religious exercise interest under the Religious Freedom Restoration Act (RFRA). To summarize briefly, *Hobby Lobby* centered on whether certain regulations promulgated by the Department of Health and Human Services (HHS) under the Patient Protection and Affordable Care Act of 2010 (ACA), which required employers to furnish certain contraceptive services, violated the rights of three closely held corporations under RFRA.[3] The companies objected to offering contraceptive services they considered to be abortifacients, and claimed that paying for such services would violate their sincerely held religious beliefs.[4]

In a 5–4 decision, the U.S. Supreme Court held:

> the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.[5]

While this overall holding did not directly deal with employment discrimination law, a preliminary issue in the case does: whether the activities of closely held for-profit corporations are governed by RFRA.

Generally, the First Amendment permits neutral laws of general applicability, such as Title VII, to burden religious practices even when not supported by a compelling governmental interest.[6] RFRA, which was enacted in response to the Supreme Court's decision in *Employment Division v. Smith*,[7] imposes a higher burden on the federal government.[8]

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> RFRA prohibits the Government from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[9]

Crucial to the *Hobby Lobby* decision was the holding that for-profit corporations can take advantage of the broad protection for religious exercise that RFRA provides.[10]

In holding that a federal regulation's restriction on the activities of a closely held for-profit corporation must comply with RFRA, the Court made holdings relevant to this article. First, the Court emphasized that RFRA was enacted to provide broad protection for religious liberty.[11] The corporate form is a legal fiction that is intended to provide protection for human beings. So, protecting the free exercise rights of corporations by including them in the definition of a person under RFRA protects the religious liberties of the humans who own and control those companies.[12]

The Court also went on to hold that, at least in the case of closely held corporations, there was no doubt the companies could "exercise religion" as that term is used in RFRA. Neither the corporate form nor the profit-making objective could justify reaching the opposite conclusion.[13] The Court also noted that the reality of modern corporate practice rejects the confinement of a corporation's purpose to simply a profit-making objective:

> While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so.[14]

If corporations can be formed for any lawful purpose, *Hobby Lobby* emphasizes that running a business with religious objectives is not off-limits.[15] As one judge in the Third Circuit wryly put it, "seeking after filthy lucre" is not "sin enough to deprive one of constitutional protection."[16]

Hobby Lobby's conclusions about the nature of corporate free exercise of religion and protection for closely held for-profit corporations under RFRA have implications for secular, for-profit employers. Applying these principles, a company has a clear legal right to identify with a particular religion or express religious values, as well as other altruistic values it may have, though it must not discriminate on the basis of religion in violation of anti-discrimination statutes.

When Businesses Have Values

It is a widely acknowledged truth that businesses do better with values than without. Business writers like Patrick Lencioni challenge organizations to answer questions about why they exist, with a mild dig at businesses that exist only to create wealth ("a number of venture capitalists and law firms we've seen would probably fit").[17] Secular, for-profit employers are not values-neutral; they assert beliefs all the time. For-profit corporations, with ownership approval, proudly support a wide variety of charitable causes, including humanitarian and other altruistic objectives.[18] Multinational corporations take sides on polarizing political issues;[19] they give money to causes with which they agree; and they set corporate policies that reflect those values.[20] For example, Starbucks supports same-sex equality and gay marriage legislation.[21] Ben & Jerry's has a social mission.[22] Whole Foods practices environmental stewardship.[23] Toms gives away a pair of shoes for every pair sold.[24] Nordstrom wants to give people what they are looking for.[25] Southwest Airlines wants to democratize air travel in America.[26] A paving company was really about "helping poor, first-generation Americans find good jobs so they could buy their first homes and send their kids to college."[27]

Law firms are no exception. Some identify that they value and are committed to helping women succeed in the legal field. Others advertise that they are "women-owned." Those firms do not intend to discriminate on the basis of sex when they advertise such a value.

As the Supreme Court stated, if those activities are permissible, "there is no apparent reason" corporations "may not further religious objectives as well."[28] In fact, there is a strong historical argument that most of the corporate values above—and practically the entire field of human rights—spring originally from the Judeo-Christian ethic.[29] One judge commented on the HHS mandate dilemma:

> The government takes us down a rabbit hole where religious rights are determined by the tax code, with non-profit corporations able to express religious sentiments while for-profit corporations and their owners are told that business is business and faith is irrelevant. Meanwhile, up on the surface, where people try to live lives of integrity and purpose, that kind of division sounds as hollow as it truly is.[30]

It is no new thing for corporations to take a religious stand. In *Braunfeld v. Brown*, merchants owning an Orthodox Jewish business sued to be permitted to be open on Sundays, because their religious beliefs required that they be closed on Saturdays.[31] The Court denied their free exercise, equal protection, and establishment claims, with an indignant dissent by Justice Stewart, who stated that it was cruel to "compel an Orthodox Jew to choose between his religious faith and his economic survival."[32] Yet the Court took it for granted that the merchants could assert the claims on behalf of their business.

An Amish farmer/carpenter sued to avoid paying Social Security tax for his employees, because Amish religious belief was to provide for their own elderly and needy.[33] The Court agreed that the tax was a burden on his religious practice (and an exemption had been made for self-employed Amish persons), but held the government interest in a sound tax system was overriding.[34] Yet it was accepted that the Amish employer could legitimately assert his beliefs. Townley was a manufacturing company that had extensive religious practices. The Court took its religious practices as a company seriously, while examining whether they had infringed on employee rights.[35]

The Fallacy of Value Neutrality

Prohibiting employers from mentioning religion or religious values in commerce assumes that expressing such values is somehow inappropriate for a business. Some posit that the reason such expression should be singled out as off-limits is partly because religion is a suspect classification in employment discrimination laws. Yet this conclusion is beyond the mandate of anti-discrimination laws.[36]

> If the sole reason for the permissibility of particular beliefs or values is their secular or religious source, one can certainly make a facially compelling case that religious individuals and institutions are being denied equal protection of the laws.[37]

Singling out as discriminatory value judgments that are based on religion is highly suspect. Applying Title VII to attack corporate statements or employment advertisements that identify an employer's religious values or its affiliation with a particular religion would give rise to serious constitutional questions, and after *Hobby Lobby*, a compelling RFRA claim.

Limiting values would also be very difficult to untangle. Would seeking same-sex equality be permissible as a secular value, but not if it were based on religious belief? Would helping poor first-generation Americans or promoting equality for women be permissible as secular values, but not as religious ones? A family-owned law firm with Judeo/Christian values advertised that it espoused a strong work ethic and enjoyable work environment. Would those values be impermissible to the extent they are part of the family's religious beliefs?[38] A Christian accounting company advertised a "fun filled environment that believes in honesty & integrity in all business activities."[39] Would those of other religions or no religion find those values impermissible? If cases were filed to argue these principles, both RFRA and the First Amendment would apply.

Also, to the extent the values expressed are general business values, it would be difficult for an employee to argue against them. Even if someone wanted to argue that their religious beliefs conflicted with values like honesty, integrity, promoting equality, or service, it would be an Establishment Clause violation to disallow religious values that are identical to the secular values of other companies.

Anti-Discrimination and Religious Freedom Protections

An article by Matthew J. Cron, Arash Jahanian, Qusair Mohamedbhai, and Siddhartha H. Rathod published in *The Colorado Lawyer* in April 2014 correctly states that "religious discrimination in the workplace is often treated less seriously, or viewed as less insidious, than other types of unlawful employment discrimination."[40] This problem deserves serious consideration.

Under Title VII of the Civil Rights Act of 1964, it is unlawful for an employer

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensations, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[41]

This provision has developed into a body of law requiring accommodation for employees' religious exercise rights where it is not an undue hardship to accommodate.

On a federal level, RFRA provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[42] It can only do so when it demonstrates that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[43]

The Colorado Anti-Discrimination Act (CADA) provides that it is discriminatory for

> an employer to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry.[44]

Colorado's Constitution, art. II, § 4, also provides that the

> free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion.[45]

The last sentence of the section is called the Preference Clause: "Nor shall any preference be given by law to any denomination or mode of worship." An allegation that the state favors one religious expression over another is evaluated under the *Lemon* test.[46] This test asks first whether the government purpose is secular; second, whether one of the principal effects is the advancement or inhibi-

tion of religion; and third, whether the government action "fosters excessive entanglement with religion."[47]

The civil rights of religious expression for employer and employee are both protected in law, must be balanced, and neither may be shut down.

"Religious Minorities Need Not Apply"

The Cron *et al*. article argued the dangers of faith-based employment advertising.[48] The article provided examples of how secular, for-profit companies, including law firms, were advertising their companies as adhering to certain religious values. The authors posited that for a company to identify such religious values constituted unlawful discrimination under Title VII and CADA, because the religious values might discourage a person who did not share in the employer's religion from answering the advertisement or applying for the position.[49] They expressed concern about advertisements for a "Christian Law Firm," or companies that hold themselves out as adhering to certain religious values ("a family owned and operated business . . . [r]ooted in Christian values" or "Our Core Values: . . . Judeo/Christian Values").[50]

The authors took the position that the religious organization exemption to Title VII and the Tenth Circuit decision in *Hobby Lobby Stores, Inc. v. Sibelius*[51] promoted religion-based discrimination.[52] They argued that employee rights were diminished by the decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[53] that upheld the "ministerial exception," and protected the relationship between a religious institution and its ministers from legal interference.[54]

Because no court has considered specifically whether employment advertising that includes faith-based values could be unlawful under anti-discrimination laws, the article discussed the potential ways a court might address such a situation. However, because it took issue with both Title VII and controlling legal precedent, it must be regarded as a policy argument, not an explanation of current law. While the policy argument might have been a fair one while *Hobby Lobby* was still pending, the legal argument that secular for-profit employers do not have the free exercise right to publicly identify their religious values is not tenable.

When corporations identify with a particular religion or religious standards, whether that is in a job advertisement or in corporate governance documents, they are essentially expressing a value. To what extent is this permitted or prohibited by anti-discrimination laws? The answer to the question is much more complicated than posited by the Cron *et al*. article.

The Permissibility of Public Religious Expression

First, mentioning religious values in commerce, even in employment advertising, is not *per se* unlawful because religious expression, as distinguished from expression centered on other impermissible classifications such race, national origin, or sex, is treated uniquely in law.[55] When a secular, for-profit employer engages in religious expression, that employer is engaging in an activity that is protected by the First Amendment.[56] *Hobby Lobby* solidifies this concept by holding that closely held for-profit corporations can permissibly engage in the exercise of religion and seek protection from RFRA if they are substantially burdened by a federal law.[57]

Indeed, as the Court in *Hobby Lobby* noted, "the pursuit of profit in conformity with the owners' religious principles" is a "lawful purpose" of a for-profit corporation.[58]

The nature of religion's unique posture in both society and law makes analogizing to cases dealing with other suspect classes unpersuasive. For example, simple references to suspect classifications in employment advertising, such as race or national origin, might suggest to the ordinary reader that a certain race or national origin is preferred.[59] Yet because of the pervasive nature of religious speech in American culture, a simple reference to a specific religion or religious values should not necessarily signal to the ordinary reader that individuals of that religion are preferred. In addition, cases that have held advertising to be unlawfully discriminatory in other contexts, such as under the Fair Housing Act, may not be as persuasive because of the unique treatment of religion in employment laws such as Title VII.[60]

Because of Free Exercise concerns, Title VII, for example, specifically allows for an advertisement to indicate an overt preference for a specific religion when religion is a bona fide occupational qualification for employment.[61] While this exception is extremely narrow,[62] its application is truly fact-specific.[63] For example, an employer was permitted to require that a helicopter pilot whose duties included flying into Mecca must be a Muslim or sign a certificate of conversion.[64] Because non-Muslims are not permitted to enter Mecca and the penalty is beheading, religion was considered a bona fide occupational qualification in that case.[65]

The line between permissible exercise and unlawful discrimination is not as clear as indicated in the Cron *et al.* article.[66] As *Hobby Lobby* demonstrated, a corporate employer's right to free exercise of religion will often conflict with an employee's right—in that case, the right to employer paid-for contraceptive services—and whose rights should prevail is not always immediately apparent.[67]

Both employers and employees have positive rights that should be protected, but the approach must be more nuanced than just shutting down the religious expression of one or the other. Diversity in a truly pluralistic society is promoted by allowing differences—even differences one disapproves of—to coexist with mutual respect.

In employment advertisement cases, the clash of positive rights is as follows: An employer has the right to exercise religion and an employee has the right to equal opportunity employment.[68] In such situations, "Title VII does not, and could not, require individual employers to abandon their religion. Rather, Title VII attempts to reach a mutual accommodation of the conflicting religious practices."[69] This is all the more true in light of the Supreme Court's recent decision in *Hobby Lobby*.[70]

To be sure, *Hobby Lobby* does not provide employers a shield to cloak unlawful discrimination in hiring as a religious practice.[71] Employers must be sensitive to the fact that some religious expression may be impermissible, and should avoid crafting employment advertisements that specify a preference for a specific religion. For instance, advertisements seeking someone "who loves the Lord Jesus" would usually be impermissible.[72]

Lawyers as employers have the added responsibility of conducting business in compliance with the rules of professional conduct. Contrary to the suggestion of the Cron *et al.* article, lawyers need not remove all reference to religion from their employment advertisements or law firm values statements to comply with Colorado Rule of Professional Conduct (Rule) 8.4(h).[73] In fact, such an approach would be an impermissible attempt to circumvent existing constitutional law by narrowing the Rules.

As a practical matter, employees can specifically state that all applicants are welcome or that the law firm is an equal opportunity employer, assuming that designation applies. This will signal that, despite the firm's adherence to faith-based values, it welcomes applicants regardless of religion. For example, a "Christian law firm" advertisement suggested that candidates be "comfortable with your faith whatever it may be," indicating clearly that candidates of other religious backgrounds were welcome.[74]

Boundaries of Religious Expression at Work

Once an employee has joined a company, balancing positive rights of free exercise between employers and employees may create some ongoing tension, but a number of cases give guidance on seeking a balance and some general principles. Interestingly, not a single case has resolved the tension by requiring the company not to assert religious values at all.

A corporation may not require employees to attend religious services when they do not want to, but may have services. Townley, a manufacturing company, was required to end mandatory attendance at its devotional services when an employee objected, but not to end the services altogether.[75]

Young, an atheist, claimed constructive discharge when she refused to attend staff meetings at her place of employment, a savings and loan association, because they began with a short religious talk and prayer. Because she was told that attendance was mandatory, her claim went forward.[76] As in *Townley*, the problem was that the religious meeting was mandatory, not that it existed.

Kolodziej complained that she was fired or demoted for failing to attend a religious seminar called Institute in Basic Youth Conflicts. Although the court agreed that she was penalized for refusing to attend, it concluded that the seminar was not a religious service. Although the seminar expressed religious views contrary to her beliefs, it did not require her to change her religious practice or faith.[77] (This case could have come out differently with a broader view of what constitutes religious expression or a religious service.)

A corporation may not fire or refuse to hire specifically because of religious beliefs when it is not a bona fide occupational qualification. Fischer, one of the sons in a family business where most of the family members were FLDS, objected to his relatives' planning to fire another employee for having left the church. He then filed a religious discrimination claim that he had been wrongfully discharged. The court denied his claim because there was no evidence he had been discharged, constructively or otherwise.[78] However, he also alleged the company refused to re-hire him unless he rejoined the FLDS church. The court allowed that claim to go forward.[79]

Of course, to be unlawful, the termination would have to be on religious grounds and not for cause. Didier filed a claim for unlawful termination on various grounds, including religious discrimination. The company had terminated her for improperly seeking reimbursement for personal expenses and violating its Code of Business Conduct.[80] She was a Catholic, and complained of religious discrimination because her Mormon supervisor sometimes discussed his religion in the workplace. The court found no evidence of religious discrimination.

DeFreitas was fired after taking a leave of absence for surgery. She alleged religious discrimination because she was a Catholic

and most of the employees were LDS. She and her supervisor talked about religion regularly and he joked about converting her and sometimes invited her to church.[81] The court rejected her claim, because she had been treated well and given raises, though she was known to be Catholic.[82] (The court let her FMLA claim go forward.)

An employer may discuss religious beliefs to some extent, but may create a harassing environment if the discussions intrude on employees' privacy or their own beliefs. The owner of a home healthcare company, Preferred Management, had strong Christian beliefs.[83] She shared these beliefs openly with employees. Devotional gatherings were effectively mandatory.[84] Personal spiritual information was requested and discussed in group meetings.[85] People were given religious materials and prayed for (in person) whether they liked it or not.[86] Employment decisions were made based on how people cooperated with these religious exercises. A performance improvement plan included daily Bible reading and prayer.[87] The court acknowledged that the case involved a clash between the Title VII rights of the plaintiffs and the RFRA rights of the employer.[88] After outlining numerous episodes of controlling and humiliating behavior, and pointing to considerable evidence of religious harassment and discriminatory discipline, the court let the case go forward to the jury.[89]

Another court upheld a jury award of compensatory and punitive damages to employees who filed a Title VII claim alleging, among other things, hostile work environment and failure to accommodate. Their supervisor repeatedly forced the recitation of prayers on the employees and tried to induce them to make medical decisions based on his personal beliefs. When employees complained, "he responded that UTS was his company and he could do what he wanted."[90]

Meltebeke, the proprietor of a painting business, believed it was part of his religious duty to witness to others persistently, including employees. The employee was annoyed by this witnessing (but apparently did not say so) and filed a complaint after being discharged for poor work performance. The Bureau of Labor and Industries (BOLI) found the employer had discriminated on the basis of religion. The employer objected that his free exercise rights were burdened. The court agreed, because BOLI had applied a reasonable person standard in evaluating religious harassment. Because the guarantees of religious freedom in Oregon were designed to protect the rights of religious minorities, the reasonable person standard was not the least restrictive means of eliminating religious harassment.[91] This case might have come out differently if the standard were different, and the Colorado standard is not clear.

An employee who needs a religious accommodation has some responsibility to identify his or her belief and the needed accommodation. Reed, the new executive housekeeper of a Holiday Inn, was supposed to see to it that a free copy of a Gideons Bible was placed in every room. When the Gideons delivered the Bible, they did some unexpected praying and Bible reading. Reed left in the middle of that meeting, and the manager later rebuked him. Reed said that the manager could not compel him to attend a religious event, and the manager fired him for insubordination. Reed never stated whether he had any religious beliefs. The court held that Reed did not succeed in showing religious discrimination, because the manager neither planned a religious event nor knew (then or later) anything about Reed's religious beliefs. Reed also failed on his accommodation claim because he did not request an accommodation. An employee cannot assert "an unqualified right to disobey orders that he deems inconsistent with his faith though he refuses to indicate at what points that faith intersects the requirements of his job."[92] (This case could have come out differently if Reed had politely requested an accommodation for religious beliefs.)

These cases provide some general principles. Although employers may run their businesses in accordance with religious principles and values, that right usually does not extend to coercing an employee to violate his or her conscience or denying a reasonable accommodation. A company may have religious values, but should not impose specific religious beliefs on employees, and may not require certain religious beliefs as a condition of hiring unless they are a bona fide qualification for the position. However, employers may have and practice religious values and beliefs.

Employees have the right to be free from religious harassment. They do not have the right to a religion-free environment. A company must seek to accommodate the religious expression of its employees, but employees must clarify when company policy conflicts with their religious belief, and ask for a reasonable accommodation. An employee has the right to be exempted from any objectionable religious activities, but the company need not provide a more general accommodation to an employee if it is an undue hardship.[93] The positive rights of employees and employers must be balanced, keeping in mind the strict standards of review provided by RFRA, and probably by the Colorado Constitution.

Conclusion

Closely held for-profit corporations have religious rights. *Hobby Lobby* has settled that for-profit corporate employers possess, and may exercise, their First Amendment rights—a change that may have far-reaching implications. Businesses are permitted to articulate values, including religious values. Employees also have religious rights. Rather than try to shut down the religious practice or religious freedom of one or the other, participants should engage in open, respectful dialogue that seeks to preserve the positive rights of all parties. True pluralism and diversity can accommodate viewpoints that are diverse to the point of strong disagreement. Rather than a peace of uniformity, true pluralism seeks a peace that promotes wholeness and justice.

Notes

1. *See Strong's Concordance*, 7965.shalom (Nov. 17, 2014), biblehub.com/hebrew/7965.html. *See also* Benjaminson, "What Does Shalom Mean?" Chabad.org (Nov. 17, 2014), www.chabad.org/library/article_cdo/aid/960878/jewish/What-Does-Shalom-Mean.htm; Ravitzky, "Shalom" (Nov. 17, 2014), www.myjewishlearning.com/beliefs/Issues/War_and_Peace/Peace_and_Nonviolence/Shalom.shtml.

2. *Burwell v. Hobby Lobby Stores, Inc.*, ___ U.S. ___, 134 S.Ct. 2751 (2014).

3. *Id.*; 42 USC §§ 2000bb-1(a) and (b).

4. *Hobby Lobby*, 134 S.Ct. at 2764-65.

5. *Hobby Lobby*, 134 S.Ct. at 2759.

6. *See id.* at 2761.

7. *Employment Division v. Smith*, 494 U.S. 872 (1990).

8. *Hobby Lobby*, 134 S.Ct. at 2761.

9. *Id.* at 2767 (quoting 42 USC §§ 2000bb-1(a) and (b)) (internal quotations and alterations omitted).

10. *Id.* at 2775.

11. *Id.* at 2767.

12. *Id.* at 2768.

13. *Id.* at 2772-73.

14. *Id.* at 2771.

15. *Id.*

16. *Conestoga Wood Specialties Corp. v. Sec'y of the United States Dep't of Health & Human Serv.*, 724 F.3d 377, 405 (3d Cir. 2013) (Jordan, J., dissenting), *rev'd by Hobby Lobby*, 134 S.Ct. 2751.

17. Lencioni, *The Advantage* 89 (Jossey-Bass, 2012).

18. *See Hobby Lobby*, 134 S.Ct. at 2771.

19. Garber, "Starbucks supports gay marriage legislation," *The Seattle Times* (Sept. 15, 2014), seattletimes.com/html/politicsnorthwest/2017323520_starbucks_supports_gay_marriag.html.

20. Hobby Lobby, "Our Company" (Sept. 17, 2014), www.hobbylobby.com/our_company.

21. *See* Garber, *supra* note 19.

22. Ben & Jerry's, "Our Values," www.benjerry.com/values.

23. Whole Foods Market, "Our Core Values," www.wholefoodsmarket.com/mission-values/core-values.

24. Toms, "Corporate Responsibility at Toms," www.toms.com/corporate-responsibility.

25. Lencioni, *supra* note 17 at 86.

26. *Id.* at 87.

27. *Id.* at 89.

28. *Hobby Lobby*, 134 S.Ct. at 2771.

29. Yancey, *Vanishing Grace* 170-71 (Zondervan, 2014).

30. *Conestoga Wood*, 724 F.3d at 405 (3d Cir. 2013) (Jordan, J., dissenting).

31. *Braunfeld v. Brown*, 366 U.S. 599 (1961).

32. *Id.* at 616 (Stewart, J., dissenting).

33. *United States v. Lee*, 455 U.S. 252 (1982).

34. *Id.* at 261.

35. *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988), *modified*, 946 F.2d 898 (9th Cir. 1991).

36. In another context, the EEOC has recognized that employers cannot preemptively ban all religious communication in the workplace to avoid potential objections to religious expression and that doing so may result in a violation of Title VII. *See* EEOC, *Compliance Manual: Religious Discrimination* 12-III(C), 44, www.eeoc.gov/policy/docs/religion.html#_Toc203359515.

37. Underkuffler, *"Discrimination' on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment*," 30 *William and Mary L.Rev.* 581, 608 (1989) (citing *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) ("[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'") (internal citation omitted)).

38. Cron *et al.*, "Religious Minorities Need Not Apply: Legal Implications of Faith-Based Employment Advertising," 43 *The Colorado Lawyer* 27 (April 2014).

39. *See id.* at 28.

40. *Id.* at 27.

41. 42 USC § 2000e-2(a)(1).

42. 42 USC § 2000bb-1(a).

43. 42 USC § 2000bb-1(b).

44. CRS § 24-34-402(1)(a).

45. Colo. Const. art. II, § 4.

46. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

47. *Conrad v. City & County of Denver*, 656 P.2d 662, 675 (Colo. 1982).

48. Cron, *supra* note 38 at 28.

49. *Id.* at 28-29.

50. *Id.* at 27-28.

51. *Hobby Lobby Stores, Inc. v. Sibelius*, 723 F.3d 1114 (10th Cir. 2013) *aff'd*, *Hobby Lobby*, 134 S.Ct. 2751.

52. Cron, *supra* note 38 at 30.

53. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, ___ U.S. ___, 132 S.Ct. 694 (2012).

54. Cron, *supra* note 38 at 30.

55. Underkuffler, *supra* note 37 at 610 ("Religion is unique among the prohibited classifications found in Title VII and other civil rights statutes. Only religious speech, exercise, and expression have intrinsic societally recognized and constitutionally enunciated value."); Magid and Prenkert, "The Religious and Associational Freedoms of Business Owners, 7 *U. Pennsylvania J. of Labor and Employment L.* 191, 194-95 (2005) (noting

that religion fails to conform to Title VII's traditional antidiscrimination paradigm).

56. *Hobby Lobby,* 134 S.Ct. 2751.

57. *Id.* at 2759.

58. *Id.* at 2771.

59. *Cf. Housing Rights Ctr. v. Donald Sterling Corp.*, 274 F.Supp.2d 1129, 1139 (C.D.Cal. 2003) (advertisement for apartment building with "Korean" in the name of the building signaled national origin preference); *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972) (advertisement for apartment in a "white home" conveyed racial preference to ordinary reader).

60. *Cf. Housing Rights Ctr.*, 274 F.Supp.2d at 1139.

61. 42 USC § 2000e-3(b) (an "advertisement may indicate a preference . . . based on religion . . . when religion . . . is a bona fide occupational qualification for employment"). *See also, e.g., Banks v. Heun-Norwood*, 566 F.2d 1073 (8th Cir. 1977) (job advertising seeking "Young man with a college degree" violated Title VII by advertising specifically for a male). Colorado's anti-discrimination law provides a similar exception. CRS § 24-34-402 (1)(d).

62. *See Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

63. *See, e.g., Kern v. Dynalectron Corp.*, 577 F.Supp. 1196 (N.D.Tex. 1983).

64. *Id.* at 1197-98.

65. *Id.*

66. *See* EEOC, *supra* note 36.

67. *See Hobby Lobby*, 134 S.Ct. 2751. *See also* McArdle, "Who's the Real Hobby Lobby Bully," *BloombergView* (Sept. 17, 2014), www.bloombergview.com/articles/2014-07-07/who-s-the-real-hobby-lobby-bully (describing how *Hobby Lobby* presented a case of directly opposed "positive rights").

68. *See* Underkuffler, *supra* note 37. *See also* Kaminer, "When Religious Expression Creates a Hostile Work Environment: The Challenge of Balancing Competing Fundamental Rights," 4 *New York U. J. Legislation and Policy* 81 (2000).

69. *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 621 (9th Cir. 1988), *modified*, 946 F.2d 898 (9th Cir. 1991).

70. *See Hobby Lobby*, 134 S.Ct. at 2759. It is important to note, however, that the Supreme Court has made clear that the *Hobby Lobby* decision will not serve as a shield to practice racial discrimination in hiring, mainly because the government will always have a compelling interest in preventing racial discrimination, which is narrowly tailored by laws like Title VII.

71. *See id.* at 2783.

72. Cron, *supra* note 38 at 28.

73. *Id.* at 32.

74. *Id.* at 28.

75. *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 620 (9th Cir. 1988), *modified*, 946 F.2d 898 (9th Cir. 1991).

76. *Young v. Sw. Savings & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975).

77. *Kolodziej v. Smith*, 588 N.E.2d 634 (Mass. 1992).

78. *Fischer v. Forestwood Co.*, 525 F.3d 972, 981 (10th Cir. 2008).

79. *Id.* at 985.

80. *Didier v. Abbot Labs., Inc.*, No. 13-cv-2046 (D.Kan. May 13, 2014).

81. *DeFreitas v. Horizon Inv. Mgmt. Corp.*, 577 F.3d 1151, 1156 (10th Cir. 2009).

82. *Id.* at 1164.

83. *EEOC v. Preferred Mgmt. Corp.*, 216 F.Supp.2d 763 (S.D.Ind. 2002).

84. *Id.* at 774.

85. *Id.* at 779.

86. *Id.* at 782.

87. *Id.* at 854.

88. *Id.* at 805-06.

89. *Id.* at 855.

90. *Milazzo v. Universal Traffic Serv., Inc.*, 289 F.Supp.2d 1251, 1254 (D.Colo. 2003).

91. *Meltebeke v. Bureau of Labor & Indus.*, 852 P.2d 859 (Or.App. 1993).

92. *Reed v. The Great Lakes Co.*, 330 F.3d 931, 935 (7th Cir. 2003).

93. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1120 (10th Cir. 2013), *cert. granted*, 135 S.Ct. 44 (2014). ■