

# Balancing Anti-Discrimination Policies with Religious Protections

By Leah Shepherd

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**M**ost employers know their workforce encompasses a wide range of different religions, and sometimes that results in unintended conflicts with the company's anti-discrimination and social media policies. What should an employer do if employees say things that are offensive toward certain groups or religions?

Frequently making offensive, unwelcome remarks about a person's religious beliefs or practices is harassment if it goes beyond simple teasing, one offhand comment or an isolated incident that isn't very serious, according to the U.S. Equal Opportunity Commission. For example, subjecting a Muslim co-worker to many disparaging jokes about terrorists would be harassment. Repeatedly using derogatory terms or mocking someone for a religious practice, like wearing a Star of David necklace or praying before eating lunch, would constitute harassment.

It's important to know that the First Amendment rights in the U.S. Constitution don't permit employees to say whatever they want. "This is a frequent misunderstanding," said Alyesha Dotson, an attorney with Littler in Seattle. "There is no right to free speech in private employment. It only stops federal or state government from interfering. It doesn't protect an employee in the private sector."

However, under the National Labor Relations Act, employees do have the right to discuss wages and the terms and conditions of employment. "The employer is not allowed to chill that discussion," Dotson said.

You can discipline or fire employees for bad-mouthing the employer or other people's religions if their comments are not related to the terms and conditions of employment, although that distinction isn't always simple. "This is not cut and dry," Dotson said.

The same legal rules generally apply to both a company's intranet and external social media.

Even if it's legally permitted to, an employer still might decide to refrain from disciplining an employee for making remarks it doesn't like.

"If the employees are taking positions that are reasonably common in public discourse, there is no benefit in punishing them," said Peter Cappelli, director of the Center for Human Resources at the Wharton School of the University of Pennsylvania in Philadelphia. "It just looks petty and intolerant. That is obviously the case for political issues associated with supporting and opposing legislation. I don't think any company wants the reputation of requiring that all employees believe what their leaders believe on policy issues."

"The exception is when employees are engaged in activity that is so out of the mainstream that by association it damages the company," he added.

Disciplinary action might be warranted if a person identifies themselves as your employee or wears company logos while engaged in questionable behavior. "What I would do as an employer is state a policy going forward, giving [employees] guidance as to what is unacceptable, and I would be tolerant of anything that is in a gray area," Cappelli said.

If certain values, like diversity and inclusion, are important to a company, it might decide it's worthwhile to take on any legal risk that comes from disciplining an employee who makes comments that don't support those values.

"Sometimes employers hold their values to be so near and dear to their heart that it defines the brand," Dotson said. "An employer might make that decision with legal advice to take on that risk for brand and business reasons."

## Recent Case

In a recent case ([https://firstliberty.org/wp-content/uploads/2022/05/Dkt-001-20220517-Brown-Complaint\\_Redacted.pdf](https://firstliberty.org/wp-content/uploads/2022/05/Dkt-001-20220517-Brown-Complaint_Redacted.pdf)), two flight attendants for Alaska Airlines sued the airline and their union for religious discrimination because they were fired in 2021 after posting comments on the company intranet. They criticized the airline's support for the Equality Act, which was proposed federal legislation that would have prohibited employment discrimination on the basis of sexual orientation and gender identity.

"Does Alaska support: endangering the Church, encouraging suppression of religious freedom, obliterating women [sic] rights and parental rights? This act will Force [sic] every American to agree with controversial government-imposed ideology or be treated as an outlaw," one of the flight attendants wrote.

The airline deleted the comments and said they had violated the company's anti-discrimination policies.

The flight attendants said they were exemplary workers, and their comments were based on their Christian religious beliefs. The lawsuit claimed the airline's diversity trainings focused on other protected classes while staying silent or nearly silent about religious discrimination. The flight attendants also argued the union didn't defend them as vigorously as it defended others because of their religion.

On Nov. 23, 2022, the U.S. District Court for the Western District of Washington dismissed (<https://casetext.com/case/brown-v-alaska-airlines-inc-6>) the claim against the union.

In its answer to the plaintiffs' amended complaint, Alaska Airlines denied the plaintiffs were exemplary employees. Alaska Airlines also denied it had created a work environment hostile toward religion.

It can be challenging for employers to determine which comments are based on religious beliefs, rather than personal or political beliefs. To determine whether an employee's comments represent a sincerely held religious belief, an employer has to go through a case-by-case analysis on an individual basis, Dotson said.

## Tips for Employers

It's helpful to educate employees with examples of what's acceptable and unacceptable under your anti-discrimination policy and social media policy. "People say we have an anti-discrimination policy, but do we ever say what it looks like to honor it?" asked Ed Hasan, CEO of Kaizen Human Capital and an adjunct professor at Georgetown University in Washington, D.C.

Employers could advise workers to follow a culture of civility, not attack others for their beliefs, and not use hate speech.

"When an organization shares their thoughts or topics come up that could be controversial, they have to proactively define the parameters in which people can have a healthy conversation," Hasan said. "They have to have a clear definition of harassment or bullying in their policy."

Applying company policies consistently with everyone will help to avoid discrimination lawsuits.

Sometimes companies want to avoid any discussion of religion in the workplace, but that's a mistake, Hasan said. "You're actually not allowing people to be their authentic self when they show up to work," he said. Suppressing religion "is going to create conflict."

Faith-based employee resource groups are one way to encourage healthy dialog around religion. About 63 percent of American adults identify as Christian, while 2 percent identify as Jewish, and 1 percent identify as Muslim. About 29 percent consider themselves unaffiliated or having no religion, according to data (<https://www.pewresearch.org/religion/2023/01/03/faith-on-the-hill-2023/>) from the Pew Research Center.

Employers should review their social media policy, encompassing both the company intranet and external social media, each year and update it to conform with case law. "Employers also need to train their HR folks and managers about implementation of their policies," Dotson said. "Education is really important."

Because information travels so fast on social media today, HR professionals should understand that an employee liking or commenting on a post can be considered protected activity if it's about the terms and conditions of employment. Some company's social media policies have been written too broadly and have been invalidated by the courts, Dotson said.

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