

No Relief Behind the Counter: Does Federal Law Protect a Pharmacist Who Refuses to Fill Birth Control Prescriptions?

No Relief Behind the Counter: Does Federal Law Protect a Pharmacist Who Refuses to Fill Birth Control Prescriptions?

David N. Michael

Employment E-Lert

The Federal Appeals Court in Chicago recently reviewed an employer's legal obligations to accommodate the religious beliefs of its employees and determined that religious accommodation for a pharmacist does not necessarily extend across the pharmacy counter.

In that case, Wal-Mart contacted a local staffing agency for temporary assistance in one of its pharmacies. Neil Noesen, the plaintiff, was a pharmacist whose license had been previously restricted by the state for refusing to fill contraception prescriptions. Pursuant to the restrictions, Noesen had to notify Wal-Mart that, due to his religious beliefs, he "declined to perform ... any activity related to the provision of contraceptive articles." Wal-Mart agreed to accommodate Noesen by segregating the prescriptions and relieving him of any duty relating to birth control. Once hired, however, Noesen's refusals became more pronounced, including placing any callers with birth control requests on hold and refusing to alert coworkers of the call. He treated walk-in customers the same way – refusing to provide any assistance whatsoever if the customer was seeking contraception. He told Wal-Mart that if he was required to speak with such customers then he would attempt to counsel them against using contraceptives and refuse to fill their prescriptions. In response, Wal-Mart again tried to accommodate Noesen by allowing him to assist only men and women that were not of child bearing age. Noesen refused, demanding that every pharmacy customer be pre-screened by other pharmacy employees and he only be assigned to those customers not seeking contraceptives. Wal-Mart agreed to prescreen walk-in customers but told Noesen that, due to the high volume of telephone calls, he would be expected to answer all incoming calls and, to the extent they sought contraception, transfer such calls to other pharmacy staff. When he refused to work with those accommodations, Wal-Mart terminated his employment. Noesen then filed suit under Title VII of the Civil Rights Act of 1964 ("Title VII") claiming that Wal-Mart failed to accommodate his religious beliefs.

Under Title VII, employers are prohibited from discriminating against employees based upon their religious beliefs. This prohibition against discrimination also includes an affirmative duty to provide a reasonable accommodation for any sincerely held religious practices or beliefs of an employee, unless such accommodation would create an undue hardship for the employer.

A number of courts have interpreted the actions required for an employer to satisfy its duty to provide a

reasonable accommodation. In an early case, the U.S. Supreme Court held that undue hardship exists when a religious accommodation would cause more than a *de minimis* hardship to the employer or other employees. The EEOC's regulations expand on this point, suggesting that an employer should consider accommodations such as: flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers, and modification of grooming requirements. The Supreme Court has also held that an accommodation does not necessarily need to be the employee's preferred alternative, stating, "Congress was understandably motivated by a desire to assure the individual additional opportunity to observe religious practices, but it did not impose a duty on the employer to accommodate at all costs." In a 1998 case, the Court in Chicago held that a reasonable accommodation of an employee's religion is one that eliminates the conflict between job requirements and religious practice. The court reasoned that the Chicago Police Department's offer of a transfer for a police officer who objected to patrolling in front of abortion clinics was a reasonable accommodation since it eliminated the religious conflict. On the other hand, in a 2003 case, the same Court held that a hotel manager who objected to attending a meeting with the suppliers of hotel bibles was not entitled to accommodation when he left the meeting without approval. The Court stated that "there is a line...between an employee who seeks an accommodation to his religious faith and an employee who asserts...an unqualified right to disobey orders..." In that case, the employee had crossed the line.

In the *Noesen* case, the Court had to decide whether Wal-Mart reasonably accommodated Noesen's religious beliefs. Noesen demanded that Wal-Mart accommodate him by removing all counter and telephone duties unless customers were first pre-screened by other employees to ensure they were not seeking birth control. Wal-Mart agreed to prescreen any walk-ins and told Noesen that while he would be expected to answer the telephone, he could refer any patients seeking birth control to other employees. Noesen refused this accommodation. The Court sided with Wal-Mart. It found that an employer is under no obligation to rearrange staffing and incur great cost to accommodate an inflexible employee. The court reasoned that Noesen's requested accommodation would have required Wal-Mart to shift a disproportionate amount of work to other employees and require those employees to divert from their normal duties. Moreover, the cost and burden of all uncompleted work resulting from Noesen's refusal to help customers would be entirely borne by Wal-Mart and the other employees. The Court found that such a requested accommodation caused more than minimal hardship to Wal-Mart and, therefore, was an undue hardship. Put simply, the Court in *Noesen* found that Wal-Mart had no obligation to rearrange staffing to accommodate Noesen's religious beliefs.

When an employer is faced with a request for accommodation of an employee's religious belief or practice, the employer should have a meeting with the employee to discuss the parameters of the request and to consider any and all alternatives that would resolve the conflict with the religious belief or practice. In making a decision as to whether to provide an accommodation and, if so, which accommodation to provide, the employer should consider whether it: requires more than ordinary administrative costs, diminishes efficiency in other jobs, causes co-workers to carry the accommodated employee's share of burdensome work

or otherwise increases their workload.

The *Noesen* standard will almost certainly be further clarified in future cases. The American Center for Law and Justice cites seven cases within Illinois with the issue of whether pharmacists must be relieved of filling morning-after pill prescriptions. Whatever the outcome of the new cases, *Noesen* will stand for the proposition that strong doses of burdensome religious accommodation may be just out of reach behind the counter.