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Eighth U.S. Circuit Court of Appeals Holds that Employee Request for Religious Accommodation May Not Be Protected Activity under Anti-Retaliation Provision of Title VII of Civil Rights Act

The case is *Equal Employment Opportunity Commission v. North Memorial Health Care*, No. 17-2926, decision filed November 13, 2018.

North Memorial Health Care conducts a specialized paid residency program for nurses who have worked in non-hospital settings such as home care and who wish to acquire the knowledge and skills to enable them to work in hospitals.

Emily Sure-Ondara, who is a Seventh Day Adventist, applied and was interviewed for a position in North Memorial's Collaborative Acute Care for the Elderly (CACE) Unit. At the interview, North Memorial staff explained that a registered nurse working in that unit was required to work eight hour shifts every other weekend as required by North Memorial's collective bargaining agreement with the Minnesota Nurses Association. Ms. Sure-Ondara did not disclose at that time that her religion would prevent her from working from sundown on Fridays to sundown on Saturdays (when Seventh Day Adventists observe the Sabbath).

Ms. Sure-Ondara was offered and accepted a conditional offer of employment within North Memorial's CACE. In its offer of employment North Memorial was clear that if she accepted the position Ms. Sure-Ondara would be "...scheduled to work 8 hour night shifts, including every other weekend." Only when she went to North Memorial to complete pre-employment paperwork did Ms. Sure-Ondara disclose that she needed to be accommodated "...because of my religious beliefs, that I need Friday nights off for Sabbath rest. I don't work Fridays."

North Memorial contacted Ms. Sure-Ondara to advise her that the union agreement required work every other weekend and—if she was unable to work that schedule—North Memorial might need to offer the position to another candidate who could work that schedule. Ms. Sure-Ondara indicated at that time that she did want the job and would find a substitute for her Friday shift or, in case of emergency, come in herself to the hospital.

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North Memorial rescinded its offer of employment, stating that the position required every other weekend work, that changing her schedule would conflict with the program requirement that she work with a preceptor, and that her conflicting statements about taking the position or making it work using a substitute led North Memorial to believe that she was not willing to work without a schedule accommodation.

North Memorial did offer to consider her for other positions within its system. Ms. Sure-Ondara applied for such other positions but was unsuccessful. She then took a job with another hospital that did accommodate her religious practice.

Ms. Sure-Ondara filed a discrimination charge with the federal Equal Employment Opportunity Commission (EEOC) claiming she was discriminated because of her religious beliefs “...and/or in retaliation for requesting religious accommodation.” The EEOC gave a letter of determination that it had reasonable cause to believe that North Memorial had discriminated against Ms. Sure-Ondara “when it retaliated against her for requesting a religious accommodation by rescinding the job offer...” The EEOC then filed an enforcement action seeking, among other remedies, compensatory and punitive damages for Ms. Sure-Ondara. The district court granted North Memorial summary judgment concluding that it had not violated the anti-retaliation provisions of Title VII. Ms. Sure-Ondara appealed.

The court noted that Ms. Sure-Ondara did not assert that North Memorial unlawfully refused to accommodate her religious beliefs. She *requested* an accommodation (emphasis in opinion) and it was undisputed that North Memorial’s non-discriminatory practice was to address such requests on a case-by-case basis. The court went on that when no mutually acceptable accommodation was reached in response to her request, the appropriate claim would have been for disparate treatment for failure to accommodate not for retaliation.

In its holding the court said: “If timely disclosed, North Memorial had a duty to attempt to accommodate her religious practice. But North Memorial presented evidence that it is not feasible to hire an untrained (nurse) into a team providing hospice and palliative care to elderly patients if the applicant will not work the collectively bargained schedule. There is no duty to accommodate an applicant or employee by hiring or transferring her into a position when she is unwilling or unable to perform one of its essential job function.”

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