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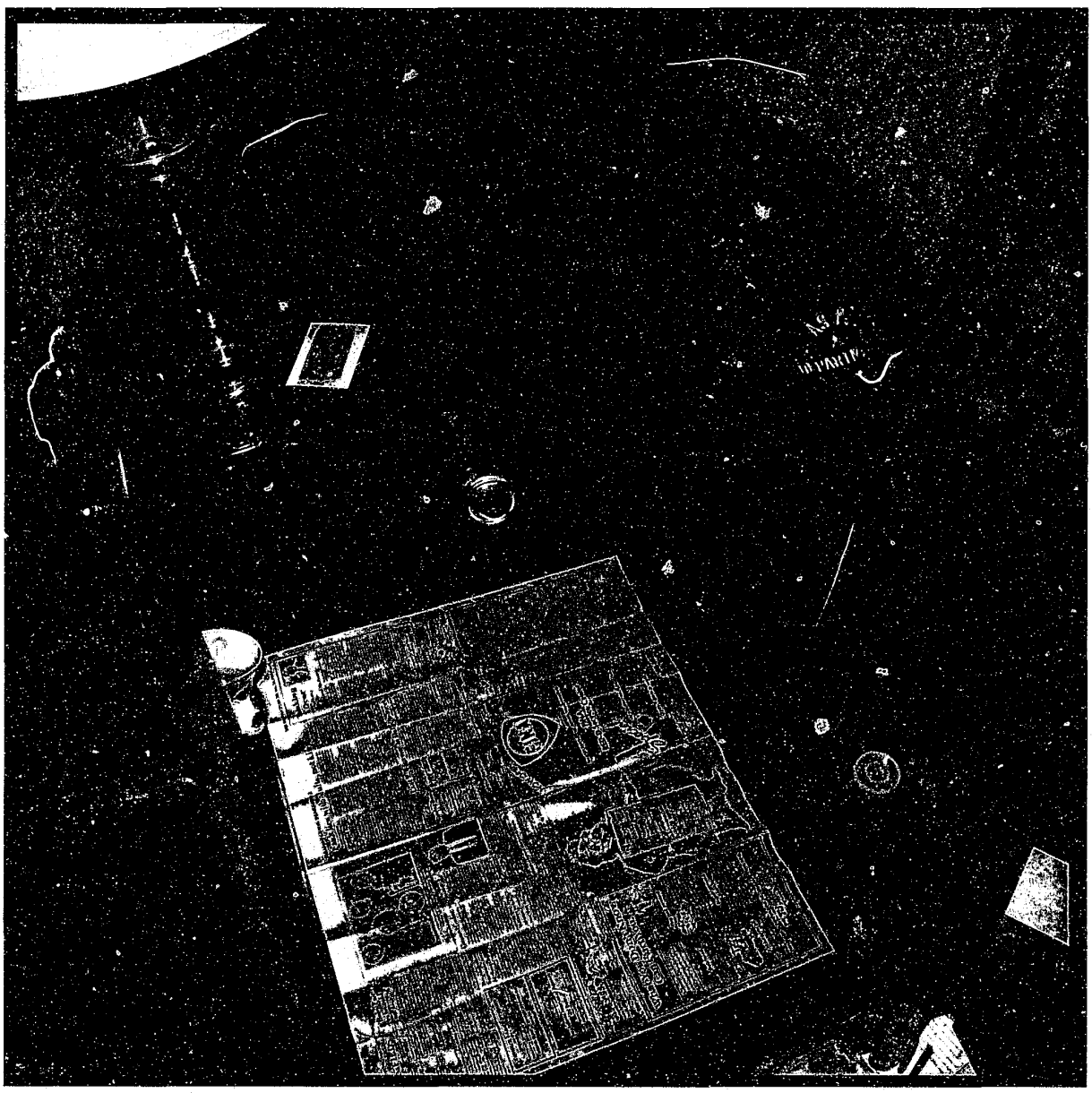

Home Invasions

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Louis J. Freeh
Director

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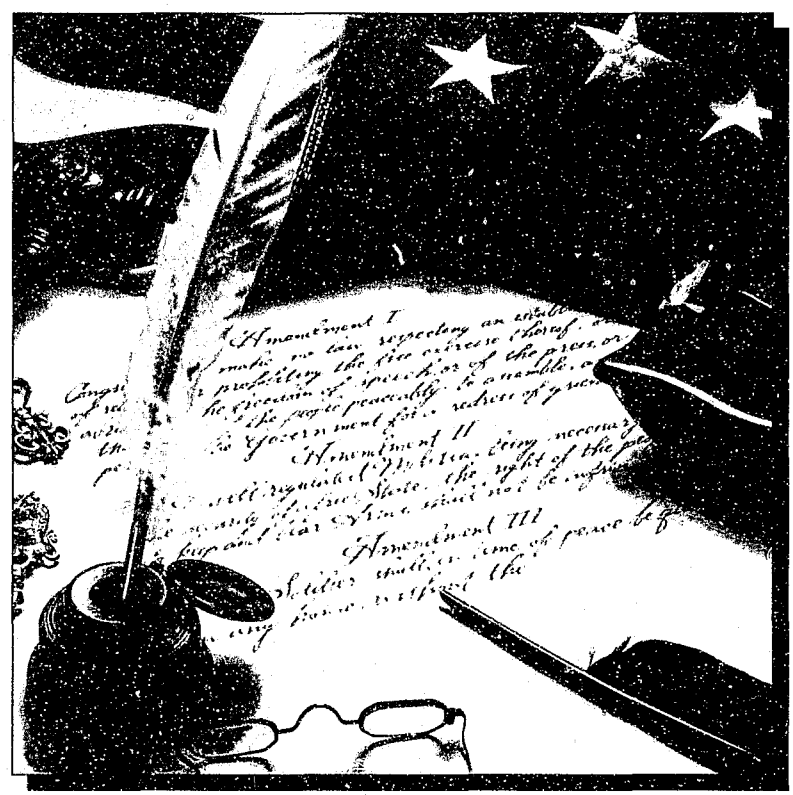
155706

Freedom of Religion and Law Enforcement Employment

Recent Court Decisions

By DANIEL L. SCHOFIELD, S.J.D.



The demands of law enforcement sometimes can conflict with the various religious faiths represented in the ranks of law enforcement employees. Recent court decisions have examined the extent to which law enforcement organizations can 1) investigate whether onduty religious activity adversely affects job performance, 2) place limitations on workplace proselytizing, 3) enforce work assignments that conflict with an employee's religious beliefs, and 4) require employees to work on their Sabbaths.

This article discusses Federal constitutional and statutory freedom of religion protection in the context of law enforcement employment.[1] It then identifies some potential areas of conflict between employees' religious beliefs and law enforcement interests and sets forth some general principles to guide the development of departmental policies regulating workplace religious activities.

Constitutional and Statutory Protections

The first amendment to the U.S. Constitution provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."[2] In addition to this constitutionally based protection provided by the "establishment" and "free exercise" clauses, religious freedom in the workplace also is protected by Title VII of the Civil Rights Act of 1964[3] (hereinafter Title VII), which makes it unlawful to discriminate on the basis of religion, and by the Religious Freedom Restoration Act of 1993[4] (RFRA), which restores for purposes of first amendment analysis the requirement that governmental actions that substantially burden freedom of religion be justified by a compelling interest.[5]

Investigating On-duty Religious Activity

Complaints of workplace misconduct relating to an officer's religious beliefs or practices can be

reasonably investigated to determine if legitimate law enforcement interests are affected adversely. In *Vernon* v. *City of Los Angeles*,[6] the U.S. Court of Appeals for the Ninth Circuit ruled that the actions of the City of Los Angeles did not violate the Federal constitutional rights of a former assistant chief of the Los Angeles Police Department when it investigated whether his religious views impermissibly affected his onduty performance.

The investigation, conducted by the police department under the supervision of the chief of police, failed to substantiate 1) that the assistant chief gave unfair advantage in hiring and promotion decisions to fellow church members and thwarted the progress of homosexual and female officers in the department; 2) that he improperly consulted religious elders on issues of public policy; and 3) that he sent official communications from his office that contained or displayed religious symbols. The assistant chief alleged that the investigation violated his rights under the free exercise and establishment clauses of the first amendment by causing him to suffer extreme embarrassment, anxiety, and fear in the pursuit of his religious beliefs.

The court rejected his free exercise claim because the assistant chief failed to establish that the government had placed a substantial burden on his exercise of religious freedom by conducting the investigation.[7] The court said the investigation did not interfere with his ability to communicate with his God or pastor, but only with his freedom to worship in the way he wants without repercussions. The court noted that the investigation was restricted in scope to consider only onduty activities and concluded that to the extent "...religious practices—namely, his consultation with church elders and his proselytism—were burdened at all, such burdens cannot be said to be substantial."[8]

> ***"A law enforcement agency is not obliged...to accommodate the religious beliefs of its employees by permitting them to refuse a lawful assignment."***

Special Agent Schofield is the chief of the Legal Instruction Unit at the FBI Academy.

Next, the court concluded that the investigation did not violate the establishment clause's mandate of government neutrality toward religion for several reasons. First, the investigation had a valid, secular purpose to determine whether the assistant chief's religious views affected his job performance in such a way as to violate either police department policies or the constitutional rights of employees. Second, the effect of the investigation neither advanced nor inhibited religion because its *primary* focus was to determine whether the assistant chief's religious beliefs led to impermissible onduty conduct. Finally, the investigation did not foster excessive government entanglement with religion because, at most, it only collaterally affected the church and was of limited scope and duration (5 months), creating neither the reality nor the appearance of ongoing government interference in church affairs.[9]

The court cautioned that its decision should not be interpreted as an endorsement of employer "witch hunts." Instead, it merely recognized that in order to ensure officers do not abuse police authority in the name of employee religious freedom, "...serious charges—even if thinly documented—against police officers regarding their on-duty performance must be investigated."[10]

Limiting Workplace Proselytizing

Law enforcement organizations may need to limit workplace proselytizing that either disrupts police functions or undermines mandated neutrality. For example, in *Brown* v. *Polk County*,[11] a Federal district court upheld the termination of a government supervisor for workplace proselytizing that contributed to the polarization of employees,

leading to reduced productivity and morale.

The supervisor allegedly caused a rift between employees who were born-again Christians and those who were not by engaging in the following religious activities in the workplace: 1) Holding prayer meetings with employees, 2) performing religious counseling, and 3) having his secretary type Bible study notes. Management subsequently ordered this supervisor to stop his workplace proselytizing and to remove from his office all religious paraphernalia, which included a wall plaque, a framed wall poster, a ceramic item with the Lord's prayer, and a small bible that he kept in his desk.

The court rejected the supervisor's Title VII claim for religious accommodation by noting that his asserted need to pray and quote scripture during work hours conflicted with the county's duty to maintain a religiously neutral working atmosphere. Accordingly, the court stated: "[A]llowing supervisors and employees to witness and pray on county time would work an undue hardship on the county's duty of religious neutrality."[12]

In addition, the court concluded that neither the free exercise clause nor the first amendment's free expression guarantee protected the supervisor's workplace proselytizing because where "...there is a danger that a supervisor's beliefs will impinge on the beliefs of subordinates, state regulation of religious conduct is particularly justified."[13] However, the court clearly was troubled by the directive to the supervisor to remove all religious items from his office because, unlike the order to cease disruptive proselytizing, the religious items in his office were primarily for his personal viewing and their removal was not essential to prevent the county's excessive entanglement with religion.[14]

Arguably, law enforcement organizations have a compelling interest to restrict employee workplace proselytizing that undermines the religious neutrality mandated by the first amendment's establishment clause. Religious neutrality especially is threatened when a supervisor proselytizes to subordinates in the workplace or when a law enforcement officer proselytizes to a private citizen during duty hours. The government's duty of neutrality in its role as public employer is to protect the religious beliefs of all employees by not encouraging or promoting one religion over other religions or any religion over nonreligion.

> ***"...employees have a duty to make a good faith attempt to accommodate their religious needs through the reasonable accommodations offered."***

Enforcing Work Assignments that Conflict with Religious Beliefs

A law enforcement agency is not obliged under Title VII or the Constitution to accommodate the religious beliefs of its employees by permitting them to refuse a lawful assignment. For example, in *Ryan* v. *United States Department of Justice*,[15] the U.S. Court of Appeals for the Seventh Circuit ruled lawful the discharge of an FBI special agent for his refusal, on religious grounds, to investigate groups that destroyed government property to express their opposition to violence. Basing its decision on Title VII, which the court said provides greater protection for workplace religious claims than the Constitution, the court rejected the argument that law enforcement organizations are obligated to accommodate the religious beliefs of employees by offering them reassignment or transfer when they find a particular assignment objectionable on religious grounds.[16]

The court expressed sympathy for a dedicated agent trapped between his career and his faith and encouraged the government to be flexible in assignments, where feasible. Nonetheless, the court concluded that "[C]ompelled, as it is by Title VII, to have one rule for all the diverse religious beliefs and practices in the United States, the FBI may choose to be stingy with exceptions lest the demand for them overwhelm it."[17]

Similarly, in *Parrott* v. *District of Columbia*,[18] a Federal district court ruled lawful the suspension of a police sergeant for his unwillingness to arrest antiabortion demonstrators engaged in Operation Rescue missions. The sergeant opposed abortion and believed that persons actively attempting to save unborn children's lives at abortion clinics were not breaking the law. He repeatedly told his superiors that he would

go to jail himself rather than arrest such demonstrators and that he would be unable to direct his officers to arrest demonstrators actively engaged in antiabortion efforts.

The court said the burden of "reasonable accommodation" under Title VII does not require employers to accommodate employee religious beliefs, if to do so would involve more than a "de minimis cost." The sergeant argued that because he was the only officer asking for this specific exemption from duty, it would be a de minimis cost to the department to accommodate him.

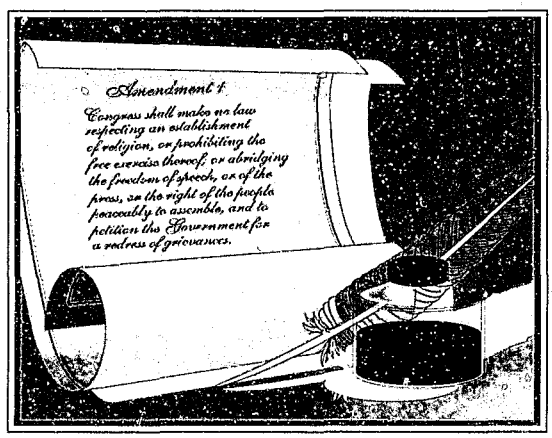
The court responded by suggesting that the sergeant probably was not the only officer with religious objections to abortion and that:

> ...there are certainly countless situations in which officers are called upon to uphold the law despite the fact that it interferes with their religious teachings or their moral preferences. However unfortunate this may be, it is inevitable, and special allowances cannot be made for each individual need.[19]

Thus, permitting officers to abstain from enforcing laws they believe are inappropriate would undermine the dependability and efficiency of the police.

Enforcing Neutral Work Schedules—Managerial Prerogatives

Citizens require law enforcement services 24 hours a day, 7 days a week which, at times, compels supervisors to schedule employees to work on their Sabbaths. In *Beadle* v. *Hillsborough County Sheriff's Department*,[20] the U.S. Court of Appeals for the 11th Circuit ruled that the discharge of an employee of the Sheriff's Detention Department for refusing to work on his Sabbath did not violate Title VII. The department told the employee he was free to arrange for shift swaps with other employees and gave him a roster. It also authorized him to advertise his need for swaps during daily roll calls and on the department's bulletin board. Further, the department allowed the employee to request use of his sick days, vacation time, and compensatory time if he was unable to secure a swap.



Not satisfied with these options, the employee argued unsuccessfully that his supervisors also should actively assist him in finding replacements for shifts that conflicted with his Sabbath. The employee even suggested that the department offer him a bailiff or process server position, which normally requires a Monday-through-Friday workweek.

On one occasion, when he was scheduled to work his Sabbath but was unable to obtain approval to use compensatory time or to negotiate a swap for his shift, the employee simply failed to come to work. On a second occasion, he abandoned his post during the middle of his shift, leaving two other deputies alone to supervise an area of dangerous inmates. This second incident ultimately led to his termination.

The court noted that under Title VII, employers have the burden of demonstrating they are unable to *reasonably accommodate* an employee's religious practices without *undue hardship* on the conduct of the businesses. The court defined "undue hardship" as "any act that would require an employer to bear greater than a de minimis cost in accommodating an employee's religious beliefs."[21] In that regard, the court stated:

> Title VII does not require an employer to give an employee a choice among several accommodations; nor is the employer required to demonstrate that alternative accommodations proposed by the employee constitute undue hardship. Rather, the inquiry ends when an employer shows that a reasonable accommodation was afforded, regardless of whether that accommodation is one which the employee suggested.[22]

The court found that the department's neutral rotating shift system and its authorization of shift swaps within the system represented

reasonable accommodation and that employees have a duty to make a good faith attempt to accommodate their religious needs through the reasonable accommodations offered.[23]

Judicial reluctance to interfere with a police department's reasonable scheduling practices resulted in the U.S. Court of Appeals for the 11th Circuit concluding that Title VII did not require the Tampa Police Department to grant shift exceptions to officers if such a practice would result in greater than de minimus cost.[24] The department did not allow recruit officers to use vacation or leave time during their first 6 months of employment and did not allow any of its employees to trade days off.

A recruit officer randomly assigned to a training squad that worked Friday through Monday resigned after the department denied his request for his Sabbath off. The officer alleged the department failed to reasonably accommodate his religious practices because it could have assigned him to a field training officer who worked Sunday through Wednesday and after training to a squad that worked only Monday through Friday.

The court said that requiring law enforcement organizations to grant shift exceptions to officers could result in a greater than de minimis cost in light of the public health, safety, and welfare considerations associated with police work.[25] In this case, the court said the officer would not experience the educational benefits of working with different training officers if granted the requested shift exceptions.

Conclusion

One legal commentator suggests that the most important religious conflict in the United States is not the conflict of one religion against another but the secular against the religious. This secular-religious conflict often manifests itself in the workplace between employees with affirmative and negative views of religion.[26]

Conflicts that arise in the workplace between legitimate law enforcement interests and employee religious beliefs should be resolved carefully in accordance with the legal principles discussed in this article. A competent legal advisor also should be consulted prior to any policy decision limiting the workplace religious activities of law enforcement employees. ✦

> ***"Law enforcement organizations may need to limit workplace proselytizing that either disrupts police functions or undermines mandated neutrality."***

Endnotes

[1] Some State courts have interpreted their State constitutions to provide greater protection for religious exercise than is available under Federal law. *See*, Carmella, "State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith* Jurisprudence," 1993 Brigham Young Univ. L. Rev. 275 (1993).

[2] U.S. Const. Amend I. The first amendment, which is designed to promote religious liberty, can create conflict in the workplace when government employers accommodate an employee's exercise of religion in the workplace to the extent that an establishment clause violation may arise. *See*, Zeitlin, "A Test of Faith: Accommodating Religious Employees: Work-Related Misconduct in the United States and Canada," 15 Com. Lab. L. J. 250 (1994).

[3] 42 U.S.C. sec. 2000(e) - 2(a)(1). *See also*, 29 C.F.R. secs. 1605.1-1605.3 (1992).

[4] Pub. L. No. 103-141, 42 U.S.C. § 2000bb-1(c).

[5] Legal commentators suggest RFRA will have little impact on the scope of religious freedom afforded public employees in the workplace because (1) there is no indication Congress intended to modify the level of protection provided by Title VII; and (2) government employers have a duty under the establishment clause to maintain neutrality in the workplace. *See*, Whitbeck, "Restoring Rites and Rejecting Wrongs: The Religious Freedom Restoration Act," 18 Seton Hall Legislative Journal 821 (1994); and Laycock, "Free Exercise and the Religious Restoration Act," 62 Fordham L. Rev. 883 (1994).

[6] 27 F.3d 1385 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 510 (1994).

[7] *Id.* at 1393.

[8] *Id.* at 1395.

[9] This three-prong test was set forth by the Supreme Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

[10] 27 F.3d at 1401.

[11] 832 F Supp. 1305 (S.D. Iowa 1993). A panel affirmance by the court of appeals, reported at 37 F.3d 404 (8th Cir. 1994), was withdrawn and a rehearing *en banc* has been granted.

[12] *Id.* at 1314.

[13] *Id.* at 1315.

[14] *Id.* at 1316, n.22. The court said the order was "overzealous" but did not rise to the level of a constitutional violation.

[15] 950 F.2d 458 (7th Cir. 1991), *cert denied*, 112 S.Ct. 2309.

[16] *Id.* at 461.

[17] *Id.* at 462.

[18] 1991 WL 126020 (D.D.C. 1991)(Not reported in F.Supp.).

[19] *Id.*

[20] 29 F.3d 589 (11th Cir. 1994), *reh'g denied*, 40 F.3d 391 (11th Cir. 1994).

[21] *Id.* at 592.

[22] *Id.*

[23] *Id.* at 593.

[24] *Beadle* v. *City of Tampa*, 42 F.3d 633 (11th Cir. 1995).

[25] *Id.* at 637.

[26] *See* Laycock, "Free Exercise and the Religious Restoration Act," 62 Fordham L. Rev. 883 (1994).

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.