

**MORALLY OBJECTIONABLE WORK ASSIGNMENTS:
CATHOLIC SOCIAL TEACHING AND PUBLIC POLICY
PERSPECTIVES**

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This article examines the increasing problem of health care employees other than physicians and nurses, especially pharmacists, facing discipline or termination for refusing to engage in immoral practices such as dispensing contraceptives. The article considers the limitations of current anti-discrimination statutes in protecting such employees, and believes that “conscience laws”—which so far only a minority of states have enacted, but many are considering—afford the best possibility for protection.

In Ohio, a pharmacist is fired for refusing to fill a prescription for birth control pills. In Wisconsin, another pharmacist faces a similar fate plus sanctions from the state licensing board for refusing to fill a prescription for emergency contraceptives. In Illinois, an emergency medical technician is terminated for refusing to drive a woman to an abortion clinic. In each instance, the employee is placed in the untenable position of having to choose between providing services that are contrary to their deeply held religious beliefs or facing discipline and discharge for refusing to do so.

In the last several years, there has been a notable increase in the number of incidences of employees placed in such nightmarish dilemmas. Not coincidentally, most of the employees receiving media scrutiny are health care workers, particularly pharmacists. While doctors and nurses have long had the right to refuse morally objectionable work under state statutes, pharmacists and other health care workers have not. The statutory right of refusal has only recently been extended by a minority of states to other categories of health care employees.

Catholic Social Teaching

A vigorous and contentious national debate is now occurring over whether health care professionals have the right to withhold services for procedures they find morally objectionable. Advances in medical technology, coupled with the overall decline in morality in

society, make the outcome of this debate critical for society's long term welfare. Morally objectionable procedures and practices that were unthought-of in previous generations are now commonplace and either legally sanctioned or conceivably will be in the not too distant future.

Embryonic stem cell research, euthanasia, physician assisted suicide, abortion, abortifacients, artificial birth control, sterilization and artificial insemination are just a few of the procedures and practices that contribute to the "culture of death" enveloping society. The Catholic Church has consistently upheld the value and dignity of each human life and taught that life must be unequivocally protected in all its various stages. John Paul II persuasively articulated the gospel of life in *Evangelium Vitae*. In doing so, he underscored long-standing Church teaching. As the *Catechism* notes, abortion has been condemned by the Church since the first century.

Rational employees do not accept jobs or undertake professions that are opposed to their religious beliefs. In short, no morally upright person is going to voluntarily work for Don Corleone or become an abortionist. More commonly, employees enter into employment relationships that subsequently force them to make choices in morally compromising situations. In extreme scenarios, the employee may be compelled to leave a job to maintain his or her moral integrity. What is particularly pernicious with the current moral crisis facing the health care professions is that most employees enter into those professions with the understanding that they are embarking on a noble and moral career to help others. In most instances, the employee invests a great deal of time and expense getting an education for his or her profession. Increasingly, Catholic health care workers are now being confronted with having to choose between their jobs or their religious beliefs. In some cases, they may even have to leave their profession.

Existing public policy is somewhat muddled in both protecting and encroaching on the employee's right to refuse morally objectionable work. While there is some legal protection for an employee's right of refusal, that protection is very limited. Employees who refuse to perform morally objectionable work have essentially two legal avenues of recourse open to them. First, they can seek protection under existing federal and state discrimination laws. Second, if they live in a state with a "conscience law" covering their particular job, they can seek protection under it. On the other hand, there is a movement afoot to pass state statutes requiring certain health care providers to provide morally objectionable services.

Anti-Discrimination Statutes

Title VII of the Civil Rights Act of 1964 makes it illegal for a non-sectarian employer to discriminate against an applicant or employee on the basis of religion. All fifty states have similar prohibitions in their respective state anti-discrimination laws, as well as some municipalities. In addition to prohibiting employers from discriminating on the basis of religion, Title VII and related statutes require that the employer reasonably accommodate the religious beliefs and practices of their employees to the extent that it does not create an undue hardship on the business. There are essentially three common types of accommodations that employees seek. The first is accommodation for religious observances or practices, such as asking time off for Sabbath observance. The second is grooming and dress code accommodation, such as a Muslim woman asking to wear a hijab. The third and most contentious is accommodation for conscientious objections to assigned work which is in opposition to an employee's religious beliefs, such as a pharmacist requesting not to dispense emergency contraceptives.

Notably, the employer's duty to accommodate the religious beliefs and practices of their employees is not an absolute one. Rather, the employer has only a duty to reasonably accommodate an employee's request to the extent that it does not create an undue hardship on the business. Unlike disability cases, the Supreme Court ruled in *TWA v. Hardison*, 432 U.S. 63 (1973) that the obligation to accommodate religious beliefs and practices is a *de minimis* one. The Supreme Court held in *Ansonia Board of Education v. Philbrook*, 55 USLW 4019 (1996) that once the employer offers any reasonable accommodation, they have met their statutory burden. Notably, that accommodation need not be the most optimal one or the employee's preferred one. The determination of undue hardship is at issue only when the employer claims that it is unable to offer any reasonable accommodation without such hardship. The definition of undue hardship is essentially any accommodation that would be unduly costly, extensive, substantial, disruptive, or that would fundamentally alter the nature or operation of the business. Factors that would be taken into account in assessing undue hardship would be the nature of the business, the cost of the accommodation, the nature of the job needing accommodation, and the effect of the accommodation on the employer's operations. No bright line rule exists to determine precisely what constitutes an undue hardship. Rather the determination is made on a case-by-case basis contingent upon the particular factual scenario of each situation.

The limited nature of an employer's *de minimis* legal obligation to accommodate an employee's religious beliefs and practices has serious implications for employees requesting to refrain from morally objectionable work assignments. In many instances, an employer could readily demonstrate undue hardship. For example, a pharmacist may request reasonable accommodation for his or her religious beliefs by being allowed not to fill customer prescriptions for emergency contraceptives. The employer can readily demonstrate undue hardship if the pharmacy normally has only one pharmacist on duty. It is impossible to foresee when a customer may appear at the counter with a prescription for emergency contraceptives. Thus only three practical accommodations could be made. First, the pharmacy could hire another pharmacist to be on site with the conscientious objector pharmacist. This obviously would entail extra expense. Second, the customer could be directed by the objecting pharmacist to another pharmacy. Third, the objecting pharmacist could direct the customer to return when a non-objecting pharmacist is on duty. The latter two alternatives would both entail possible lost revenue, customer alienation, bad publicity and lawsuits. Thus the employer could readily meet its *de minimis* obligation and demonstrate that it would create an undue hardship to accommodate the pharmacist with religious objections.

Because the bar is set so low for an employer to meet its duty of reasonable accommodation for religious beliefs and practices, existing federal and state anti-discrimination statutes provide inadequate legal protection for employees with moral and religious objections to assigned work. More often than not, such employees would find themselves disciplined or discharged with scant legal recourse. Because of this inadequate statutory protection, many observers believe that conscience laws are needed to provide more substantive protection to employees.

Conscience Laws

Conscience laws are laws that grant an employee a statutory right to refuse to perform work or provide services that violate their religious or moral beliefs (see: Dennis Rambaud, "Prescription Contraceptives and the Pharmacist's Right to Refuse: Examining the Efficacy of Conscience Laws," *Cardozo Public Law, Policy and Ethics Journal* (2006), 195-231). Conscience laws are also referred to as conscience clauses or right of refusal clauses. Conscience laws first appeared in the aftermath of *Roe v. Wade*, 410 U.S. 113 (1973) when

state laws were passed which permitted doctors and other direct providers of health care services the statutory right to refuse to provide or participate in abortions. In general, conscience laws would prevent an employer from taking coercive, adverse or discriminatory action against an employee who refuses to perform assigned work for reasons of conscience. Depending on the particular text of the statute, conscience clauses may additionally protect the worker from civil liability and from adverse action by licensing boards.

More recent conscience clauses have focused on pharmacists, although some have broader coverage. The impetus for the flurry in state legislative action was the FDA approval of the morning-after pill. In the wake of that approval, pharmacists who refused to dispense the drug on moral grounds increasingly faced discipline, discharge and confrontations with state licensing boards. The current status of state conscience laws and pending bills is constantly in flux as more legislatures consider such laws. According to the National Conference of State Legislatures at the time of this writing, Arkansas, Georgia, Mississippi and South Dakota have passed statutes which permit a pharmacist to refuse to dispense emergency contraception because of moral convictions. Four other states (Colorado, Florida, Maine and Tennessee) enacted conscience clauses that are broader in nature and do not specifically mention pharmacists. California has enacted a more restrictive conscience clause which permits a pharmacist to refuse to fill a prescription only if the employer approves the refusal and the customer can still have the prescription filled in a timely manner (see: National Conference of State Legislatures, "Pharmacist Conscience Clauses: Laws and Legislation," [October 2006], www.ncsl.org). At least 18 states are contemplating some 36 bills with varying scope and protection. Among those, nine states are considering conscience clauses that cover a broad array of health care workers. A few states are even considering bills that would permit insurance companies to opt out of providing coverage for morally objectionable services (see: Rob Stein, "Health Workers' Choice Debated," *Washington Post* [January 30, 2006], A01).

Needless to say, the surfeit of proposed state protective legislation has created an outcry among pro-choice and Planned Parenthood proponents. Some of this backlash is being translated into state law. In Illinois for example, the governor passed an emergency rule that requires a pharmacist to fill prescriptions for FDA-approved contraception. Several Illinois pharmacists have been fired for refusing to fill such prescriptions.

On the federal level in 2004, President Bush signed into law the Weldon Amendment which bars federal funding of any government program that subjects any institutional or individual health care provider to discrimination on the basis that the health care provider does not provide, pay for, provide coverage of, or refer for abortions. The U.S. Conference of Catholic Bishops has gone on record supporting the amendment. The State of California has filed a lawsuit challenging the constitutionality of the amendment.

Conscience laws seek to provide a balance between protecting workers compelled to choose between their livelihood and their religious beliefs and the public welfare. Whether American society will support this compromise or instead insist on forcing compliance by employees with moral objections to work assignments remains to be played out in the legal system.