



DISCRIMINATION IN THE WORKPLACE RELIGIOUS: NOTES FOR A CRITICAL REFLECTION

DISCRIMINAÇÃO RELIGIOSA NOS AMBIENTES DE TRABALHO: APONTAMENTOS A UMA REFLEXÃO CRÍTICA

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RESUMO

O objetivo desse estudo é analisar a discriminação religiosa nos ambientes de trabalho sob a égide da liberdade como digna de proteção em contraponto ao direito à liberdade empresarial. Parametrizado o escopo da liberdade religiosa e sua limitação, o artigo determina em que casos e condições uma conduta pode ser caracterizado como intolerância ou ser ponderada pelo empregador como acomodação razoável da religião no âmbito do trabalho. Para realizar esta análise utilizou-se da abordagem qualitativa, com procedimentos metodológicos bibliográficos e descritivos. Conclui-se que, para proteger a

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liberdade de crença e religião, a teoria liberal (política jurídica) é utilizada para a promoção da autonomia individual e da dignidade humana.

Palavras-chave: discriminação religiosa; ambientes de trabalho; liberdade religiosa; teoria liberal; acomodação razoável.

ABSTRACT

The purpose of this study is to analyze religious discrimination in work environments under the aegis of freedom as worthy of protection as opposed to the right to business freedom. With the scope of religious freedom and its limitation parametrized, the article determines in which cases and conditions conduct can be characterized as intolerance or be considered by the employer as reasonable accommodation of religion in the scope of work. To perform this analysis, a qualitative approach was used, with bibliographic and descriptive methodological procedures. It is concluded that, to protect freedom of belief and religion, liberal theory (legal policy) is used for the promotion of individual autonomy and human dignity.

Keywords: religious discrimination; work environments; religious freedom; liberal theory; reasonable accommodation.

INTRODUCTION

This study aims to analyze the observance of religious beliefs in workplaces by the employer ruled as wide freedom of individual belief arising from a fundamental value in Brazil, described in article 5, subsection VIII of the Federal Constitution.³ The central vision of the constituent was to believe that all people have the right to participate fully in the

³ "Article 5 [...] VIII. - no one can be deprived of their rights because of their adherence to a religious belief or its link with a philosophical or political conviction, unless he invokes them to evade a legal obligation imposed on everyone and refuse to comply with the replacement service provided by law." (BRAZIL, 1998).



benefits and privileges of society without confrontation or discrimination because of their religion.

The theme chosen is justified by the constitutional and legal guarantee that citizens are free to practice or engage (or deny the two) in any religion, even those that are minority in society. The study of the argumentative aspects of establishing a legal system of protection of religious beliefs and values, at the same time, protects the other rights of the individual.

This study results in a diverse set of practices and points of view concerning the religious phenomenon, which reflects in all aspects of society in general, including politics, schools, public meetings, among others. Then the object of this work is outlined, which are the rights of religion and beliefs at work – worthy of relative protection – to be considered before other fundamental rights and limited before the public order necessary for life in society and social progress.

By using the hypothetical-deductive research method, the work starts from the right to freedom of belief and religion, part of the list of personal rights, which must respect fundamental labor standards and, at the same time, articulate with the management and efficiency criteria aimed at the development of the economy.

The article is structured with the introduction in which the subject and the reason for the investigation are informed and the methodology is presented. The bibliographic review brings the controversial perception of religion in society, the protection of conscience and religious freedom in labor relations, and finally the threshold of the employer's duty to reasonable accommodation. The results of this study are summarized in the concluding remarks.

CONTROVERSIES OF RELIGIOUS BELIEF IN WESTERN SOCIETY



Religion is defined as the reverence of man to the divinity, expressed by beliefs, practices and world views of societies whose actions concerning man can be influenced and even directed (BEALS; HOIJER 1969, p. 89). On the other hand, religious beliefs imply the existence of something superior, superhuman, in which the individual recognizes and accepts the superiority of the supernatural both for its emotional and intellectual content (MARCONI; PRESOTTO, 2013, p. 151).

Given its social reach and being inherent to human life, the religious preference of Brazilian politicians is a subject of much discussion, especially during an election campaign. Religion is not limited to the task of guiding the practical behavior of the faithful, but it is radiated day by day, as seen in many sporting events where the match begins with a prayer, as well as in money emblazoned with religious phrases, for example, the Brazilian “Deus seja Louvado” (God be praised) and the American “In God We Trust”.

It is important to point out that religion must be observed as a guarantee of respect for the religiosity of its people (OLIVEIRA; RENOSTO, 2016, 74). It should be added that the government must ensure respect for the religious cultural diversity of Brazil, such as Religious Education in public schools with optional registration, but its teaching must have a denominational character, that is, the classes may follow the instruction of a Catholic religious doctrine and other religious denominations. Private schools were left out of this debate and the implementation of religious education is circumscribed by the discernment of their direction. However, the municipality of Aparecida de Goiânia in the state of Goiás obliged the children to recite the Lord’s Prayer in public schools by determination of Law n. 3.316/2016 (APARECIDA DE GOIÂNIA, 2016).

In turn, Religious Education is governed by Article 210, paragraph 1, of the Constitution, in the Law of Guidelines and Bases (Law n. 9.394/1996) and in Decree n. 7.107/2010 due to a covenant agreement between the Vatican and Brazil to Brazilian education (BRAZIL, 1988; BRAZIL, 1996, BRAZIL, 2010). In 2017, religious



education in public schools was discussed in the plenary of the Federal Supreme Court (STF), which rejected the understanding of the Federal Public Ministry that the teacher should expose the curriculum of different religions without favoring any religion in respect to state laicity.

Following this logic, a family that decides to educate their children at home (homeschooling) with a suitable technical education to be examined by the state, followed by religious education, shall be unrestrictedly acting its free conviction (BERNARDES; MORAIS, 2016, p 154). In this sense, freedom of conscience and opinion, and freedom of religious belief comes from the intimate and personal choices and emerges in the spirit of tolerance and mutual, whose Parliament should not create laws favoring any particular religion or prohibiting the free exercise thereof.

Religious freedom is protected by other laws to ensure that there is no illegal or immoral practices or incitement to violence in religious cults. In this respect, religious freedom is distinguished, in substance, in new belief conversion, to refrain from belief, to believe in a belief, to support or be contrary to the beliefs and/or abandon the belief (ROTHENBURG, 2016, p. 50).

As a rule, state laicity does not imply having an official religion, nor does it have enmity with faith, so religiosity is circumscribed by the sphere of individual freedom and religion – as an institution – must be treated with freedom of association (BORGES, ALVES, 2013, p. 234). In other words, the norms of organization of the State do not allow that it have an official religion; that it establish a religion and that it propose usefulness/need of religion to the people.

The state should be laic, but its government, its representatives and its people cannot have affinity for one or another religion (CATAFESTA, 2013, p. 460). Therefore, the Basic Law of Bonn – experience of German dogmatics – expressly imposed various degrees



of legislative intervention in favor of the protection of this fundamental right, whose essential nucleus spread apart the constitutions (BARCELLOS ET AL., 2011, p. 15).

Point out, however, that entities of confessional nature with their religious practices can act, in any sector, in the form of collaboration with the public power, as outlined in article 19, subsection I, the Constitutional text, always in favor of public interest.⁴ Religious organizations that engage in activities or projects of public interest and of a social nature other than those destined exclusively for religious purposes may participate in measures of joint action with the public powers when they are Civil Society Organizations (CSOs), following the model of article 2, subsection I, of Law n. 13.019/2014 (BRAZIL, 2014).

Hence, religious freedom is characterized by freedom of conscience that goes beyond the religious aspect with the formulation of judgments and ideas about oneself and the exterior that surrounds it, so places of worship and liturgies are protected in the terms of law (CHIASSONI, 2017, p. 269). In addition, direct references to religions are found in regulations that generally focus on specific or contextualized issues in religious freedom arising, for example, with civil rights in the workplace.

Certain laws may cause confusion between the possibility of opening of stores on Sundays by demanding provision of work on these days. The first situation is for the Municipality and the Federal District, which has municipal powers to discipline local positions, provided that it is instigated by a specific intent, under the terms of article 30, subsection I, of the Constitution and in Statements 419 and 645 of the Federal Supreme Court.^{5, 6, 7} The second situation is allowed to the employer who must adjust by union

⁴ "Article 19. It is forbidden to the Federal Government, the States, the Federal District and the Municipalities: I - to establish religious services or churches, to subsidize them, to embarrass their operation or to maintain with them or their representatives relations of dependence or alliance, except, in the form of law, collaboration of public interest;" (BRAZIL, 1988).

⁵ "Article 30. It is the responsibility of the Municipalities: I - to legislate on matters of local interest;" (BRAZIL, 1988).



intermediation or directly with the employee, by virtue of article 1 of Law n. 605/1949 and article 7, XV, of the Constitution with the weights of the limitations given by the sole paragraph of article 6 of Law n. 10.101/2001.^{8,9,10}

In the face of a pluralistic society, Firpo (2014, pp. 129-130) reports on the *Eweida* case in which Ms Eweida, an employee of the British Airways airline, was banned from working with the Catholic crucifix on the lapel of the uniform as a rule of the company. Such a matter discussed in the judicial field was considered a violation of the right to manifest the religion and the company was condemned to civil indemnity by indirect discrimination.

Similarly, Silva and Silva; Serejo (2017, pp. 245-248) brings out the *Edir Macedo* case to recall the history of violence and religious intolerance against the African-Brazilian religions with its aura of mediumship, now brought to the courts of law with the debate of freedom of expression versus religious freedom.

The *Karaduman* case concerning the organization and functioning of public services in Turkey where the European Court of Human Rights appreciated the fact that students, in the act of enrolment at a lay university, submitted themselves to the university regulation (BIAZI, 2011, p. 220). The presence of students of different faith in the academic environment did not prevent them from using headscarves for corresponding to a religious practice that concerns the private sphere.

⁶ "The municipalities have the power to regulate local business hours, provided they do not infringe valid state or federal laws." (BRAZIL, 1964).

⁷ "The municipality is competent to fix the opening hours of commercial establishments." (BRAZIL, 2003).

⁸ "Article 1. Every employee is entitled to paid weekly rest of twenty-four consecutive hours, preferably on Sundays and, within the limits of the technical requirements of companies, on the civil and religious holidays, according to local tradition." (BRASIL, 1949).

⁹ "Article 7º Are rights of urban and rural workers, among others that aim to improve their social condition: [...] XV - paid weekly rest, preferably on Sundays;" (BRAZIL, 1988).

¹⁰ "Article 6. The work on Sundays in activities of commerce in general is authorized, observing the municipal legislation, under the terms of article 30, subsection I, of the Constitution." (BRASIL, 1988).

Sole paragraph. The paid weekly rest must coincide, at least once in the maximum period of three weeks, with Sunday, respecting the other norms of labor protection and others to be stipulated in collective bargaining." (BRASIL, 2001).



The three military men (Dimitrios Larissis, Ioannis Sarandis, and Savvas Mandalariades) attempted to convert Orthodox Christians into their Pentecostal faith. The court ruled that there was no violation of the European Convention on Human Rights in the cases where officers attempted to convert subordinates in the barracks because the men that tried it felt they were being pressured by their superiors. However, the European Court of Human Rights understood that there was a violation in the cases where officers attempted to convert civilians over whom they had no authority.

It is important to note that democracy advances insofar as there is a diversity of opinions and social perspectives, especially when portions of devotees and agnostics are willing to debate, that is, when both are willing to sublimate the national legal organization in the name of the public interest (LIMA E SILVA; SILVA, 2014, p. 10). Based on this premise, the principle of laicity, although it is influenced by the historical-social experience of each nation, does not allow to be modulated unequally based on specific requests from part of the population.

The political liberalism of Rawls (2000, p. 63) touts the limits of religious freedom when seeking equity acting reasonably, tolerance and respect for differences in favor of equal treatment. Such adjectives carry an important role in civil society and political culture, essential for the formation of agreements.

According to Viola (2005, p. 207), the liberal conception of justice in Rawls (2000) presupposes equity that should favor cooperation between free and equal citizens. In this sense, Rawlsian public reason is more legal than political because it excludes religious arguments that cannot be viewed as a justifiable principle for everyone because their conception is informed by the understanding of the American Supreme Court of separation of church and state.

In Brazil, the placement of crucifixes in public agencies, especially in the courtrooms and court sessions, was the subject of heated judicial debate. Part of society argues that the



Catholic crucifix is a symbol of Brazilian culture and, therefore, it does not disturb the decisions directed to the population. However, the Federal Public Prosecutor has filed several actions for understanding that it is confessional conduct, therefore, it would not be a national symbol that should appear alongside the seals, flag, arms and hymn (MARTINS; DANTAS, 2016, pp. 887-891).

In any case, the exercise of freedom of belief in the country must take place through the (effective) clarity that the state is laic, therefore, it should not present religious signals and representations in its public deliberations (NASCIMENTO; HAMEL, 2017, p. 169). Based on this, Ranquetat Júnior (2011, p. 117) believes that religious symbols in state settings denote the conservatism of actors within a Brazilian Catholic culture.

Prohibiting the use or display of any religious symbolism in the workplace shall not constitute direct discrimination against any person as it is interreligious discrimination (because it affects everyone), and is not a specific religious discrimination. Thus, the legal assessment for the grounds of justification are different in each case: direct discrimination on religious grounds can only be justified for certain reasons that are limited to the protection of human rights.

PROTECTION OF CONSCIENCE AND RELIGIOUS FREEDOM IN LABOR RELATIONS

The use of religious symbols by employees while working in activities that may cause economic harm to the employer may be vetoed by the employer. The loss can occur due to a decline in sales, due to the decline in the contracting of the company's services, which is closely correlated with the religious beliefs of its employees, such as the use of a burqa by a salesperson who maintains personal contact with the client, and it is crucial that her face is uncovered.

In the US, Muslim women workers do not have a wide religious freedom, being forced to remove their head coverings, the Khimars, the central element of their faith, based



on hypothetical dangers and imaginary damage dictated by the employer (BADER, 2011, pp. 261-264). From the pragmatic point of view, Catão and Amorim (2017, pp. 225-228) argue that the use of robes typically of Islamic culture in a public environment does not cause or brings imminent danger, yet the American determination serves as a limit for freedom of expression and expression of thought.

While some may argue that in some countries the current climate of fear and fanaticism directed against Muslims may seem necessary, religious discrimination is exposed to all Islamist supporters by intolerance. It is noteworthy that business freedom defines its own policy whereby workers must dress in a certain way, especially when it is necessary to require special clothing for reasons of safety or hygiene (HERNÁNDEZ, 2017, p. 7).

The main civil rights law in the workplace is contained in the Federal Constitution by prohibiting discrimination in the workplace, which will punish any breach of fundamental rights and freedoms. That being said, there is an affirmative duty imposed on employers, who must reasonably dispose religious practices to their employees.

In this line of action, Piovesan's understanding (2016, p. 344) asserts that religions are accessible and variable dynamic systems, that is, religious practice must coexist with plurality, heterogeneity and possible perspectives by promoting attitudes that open new horizons linked to human rights. Thus, the national human rights plan is directed towards some programmatic actions aimed at guaranteeing uniformity in diversity, especially the appreciation of state laicity and beliefs and freedom of worship (GABATZ; MARTINS, 2016, p. 306).

In particular, Blair (2010, pp. 523-525) points to two procedures. The first is to strengthen state laicity, especially the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief – Resolution 36/55 proclaimed by the United Nations General Assembly on November 25, 1981 - and the second refers to



reinforcing the progressive interpretations in the religious field that must dialogue between the religions. In any case, a comprehensive formulation and the ongoing implementation of public policies on human rights can contribute to the thinking and action of individuals (PEREIRA, 2017, p. 69).

The Constitution prohibits employers from making employment-related decisions based on religion and other protected categories, such as race, nationality, sex or age, by virtue of standards that give equal employment opportunity. So, for example, an employer cannot refuse to hire an employee with the imposition of stricter promotion requirements or different job requirements of an employee because of his religion.

It should be noted that in labor relations an employer cannot force an employee to participate in a religious activity as a condition of employment. The harassing behavior that abuses or strongly manifests his / her religiosity when protruding in time offends the fundamental right to the existential minimum.

Faith and work do not necessarily have to be in conflict. For Griebel, Park, and Neubert (2014, p. 783), many times, to avoid conflict, a combination of sensitivity to individual needs, some flexibility, and commitment to ethical behavior is enough. Religion may require special practices, such as special clothing, dietary restrictions, or time away from work. Some employees practice their faith by expressing to others their belief. In a faith-friendly workplace, this kind of expression would have to be done with mutual respect, without disrupting work.

Nonetheless, anti-discrimination legislation requires places of work without religious discrimination, employers offering reasonable accommodation (without undue hardship) and any religious activity being strictly voluntary (no one is punished or bothered not to participate). “Pro-faith” policies are beneficial only when they respect any faith, including lack thereof.



OBLIGATORY LIMIT OF THE EMPLOYER BEFORE REASONABLE ACCOMMODATION

In addition to guaranteeing a decent life, which is not limited to guaranteeing the right to live, employers can, if possible, offer reasonable accommodation (reasonable adjustment/adjustment) of religion in the workplace in order to respect the minorities. However, the duty of reasonable accommodation of religious practices does not mean material support or sponsorship for any belief and is stopped when there is an unequal obligation on the part of the enterprise.

The terminology reasonable accommodation comes from the United States when approving the Equal Employment Opportunity Act of 1972 in order to combat discrimination in the labor market. Cox (2016, pp. 164-165) conceptualizes reasonable accommodation as an attempt of the company to adjust, without major difficulties, the working conditions or working hours of employees with disabilities or religious preferences.

In this context, the days of keeping, including Sundays and holidays, are a subjective right of the religious person to celebrate the festivities and have the exemption of classes/tests. The argument apparently violates the principle of state laicity, whose exercise of the religious freedom of the majority is maintained and of others, not. In this case, Adventist Christians have difficulty and obstacles decreed by the public power to reach an alternative solution of Sabbath enjoyment and carry out their productive activities. However, the law is valid for sectors of society with the existence of religious holidays such as Christmas, Our Lady Aparecida, Passion of Christ, Corpus Christi, among others (CARVALHO, 2014, p. 1060; GONÇALVES; MASCARENHAS, 2013, pp. 204-205).

Religious beliefs may include personal or secular preferences based on economic, social, or cultural values. On the other hand, religious beliefs do not include hidden values, that is, the company's employee professes a belief, but his actions demonstrate another one,



for example, a Seventh-day Adventist who works seven days a week to the point of his actions denying his statements.

Of course, religious principles can change over time. The fact that an employee seeks the current recognition of his religious beliefs, even when he has never maintained or practiced such beliefs, does not prevent these beliefs from being sincerely professed.

In turn, religious freedom can operate as a limit to the power of management of the employer and the company (SARLET, 2016, p. 98). Faithfully professed religious belief by an employee who needs a place at work for his or her practice provokes an affirmative duty of reasonable accommodation on the part of the employer which may be denied in the face of an undue difficulty to the business.

The employer should be notified of the desire for accommodation by the employee. This will allow the employer to understand the exact nature of the religious employee's claim and its limitations and therefore will allow the employer to better determine to what extent an accommodation is reasonable.

The employer enjoys a limited right to know if the employee's beliefs are indeed religious in nature and sincerity. A reasonable accommodation is a specific determination of the fact verified case by case and adjusted to the work environment that will allow the employee to practice his religion, so what can be a reasonable accommodation for an employee may not be reasonable to another one.

The word accommodation refers to the style of conflict management that involves accepting the wishes of another person, while the term reasonable accommodation is a relative term which necessarily depends on its own facts and circumstances, and comes down to a consistent determination in the unique circumstances of employer and individual employee relationship. It means in practice that the employer allows the employee a flexible schedule, exceptions to the rules regarding personal appearance, etc.



In the USA, the free development of the personality, the social function of the company, the affirmation of the identity and the human dignity indicate as a business obligation the accommodation of the religious rituals of the employees (SANTOS JÚNIOR, 2012, p. 438). A reasonable accommodation may impose undue hardship for the employer and/or its other employees, i.e., it is not a simple operation cost to the employer's business.

The employer's cost of accommodation may be the payment of administrative expenses, such as costs associated with rearranging schedules and recording substitutions for payroll purposes or temporary salary payments, premiums (for example, overtime rates). If the provision of accommodations for religious rituals and liturgies by the employee may reduce employee efficiency, impair safety at work or lead them to be accommodated in a potentially hazardous location, the employer has sound justifiable grounds for prohibition.

CONCLUSION

In fact, there are some circumstances in which discrimination in the workplace based on religious concepts is tolerated by law. Such cases involve religious organizations seeking to employ persons of the same religion to perform functions in their religious organizations or churches.

Thus, a Catholic school can refuse to hire a Protestant teacher because Catholicism is essential to its purpose of education. On the other hand, this same school could not refuse to hire a janitor who was Protestant, because the nature of their work is not essential for the purpose. Furthermore, a synagogue which is based on Judaism may require a professional qualification for the position of rabbi and refuse to hire someone for the non-Jewish position.



The protection of religious beliefs is a value for the country ensured in the Constitution. Under this premise, religious beliefs that employees sincerely profess, should be carefully analyzed, case by case, to verify the possibility of reasonable accommodation.

In the workplace, any religious discrimination should be rejected, and camaraderie and team spirit should be promoted. Moreover, it is concluded that the main source of religious freedom lies in the Federal Constitution to be accommodated with the dialogue between employer and employee and that best ensure the protection of interests and rights of both parties. In this sense, in Brazil and in the rest of the world there is a long way of defense and commitment to the religious freedom of citizens.

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