Religious Minorities Need Not Apply: Legal Implications of Faith-Based Employment Advertising

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This article explains why job advertisements that identify the religious beliefs or affiliations of a secular employer violate federal and Colorado anti-discrimination in employment laws. It also discusses such advertisements in Colorado's legal community, which are part of an increase of religion-based employment discrimination claims. Finally, the article offers possible solutions to combat employment discrimination claims based on religion in the legal community and beyond.

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer:

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[1]

However, religious discrimination in the workplace is often treated less seriously, or viewed as less insidious, than other types of unlawful employment discrimination. This is due in part to the expansion of religious employer rights by the courts. The end result is often social acquiescence and inaction when private secular employers discriminate against employees on the basis of religion. Thus, it is no surprise that religious discrimination charges have more than doubled in the past fifteen years according to the Equal Employment Opportunity Commission (EEOC), far outpacing the rate of growth for discrimination charges generally.[2]

Symptomatic of this growth in religion-based discrimination are employment advertisements that explicitly or implicitly dissuade religious minorities from applying for job openings. For its part, Colorado's legal employment market has not been immune to employers openly stating their religious beliefs when searching for qualified applicants. In a February 2013 job posting on the CBA website, a law firm promoted its "Judeo/Christian Values" as a core value of the firm.[3] Similarly, a Colorado law firm posted an advertisement in October 2013 identifying itself as a "Christian Law Firm."[4]

This article begins by discussing the illegality of job advertisements that express an employer's religious beliefs and affiliations. It then explains how recent court decisions have contributed to the surge in claims alleging religion-based discrimination in employment. Finally, this article discusses potential large-scale solutions to religious discrimination, focusing on the use of testers and self-regulation of the legal profession.

Job Postings That Reference Religion

On February 11, 2013, the following advertisement appeared in the Employment and Classified Advertisements section of the CBA website, as well as on Craigslist:

> **Family-owned Law Firm seeks Experienced Litigation Attorney**
>
> Seeking a Litigation Attorney who has experience handling a litigation case from start to finish. Experience in Bankruptcy and Family Law is also preferred, but not required. Our Core Values: Unquestionable integrity and ethical values; Appropriate quality of life for firm employees; Strong work ethic; Enjoyable work environment; Continued improvement in practice areas; and Continued expansion into new practice areas; and *Judeo/Christian Values*. Please send your resume with cover letter to [REDACTED] and also complete our online application.

(Emphasis added). Although the CBA quickly removed the reference to "Judeo/Christian Values," the advertisement remained on the CBA's website. The "Judeo/Christian Values" language remained on the Craigslist posting.

A search of Craigslist job postings from a sampling of national locations during the summer of 2013 revealed numerous advertisements stating the employer's religious beliefs, such as a "Christian-based Nursing Staffing Company"; an insurance office looking for




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an administrative assistant to work in a "Christian environment"; a company seeking a home inspector "grounded by our Christian faith, which will never change"; and "a family owned and operated business . . . [r]ooted in Christian values" seeking a technical support representative. The following advertisements were posted by private Colorado companies:

- "Looking for an individual who is willing to join up w/ a Christian accounting company. Will be a fun filled environment that believes in honesty & integrity in all business activities."
- "Looking for several experienced warehouse associates. This is a GREAT position for students. . . . Must be conservative and comfortable working in a Christian environment."
- "We are a local Christian Company that provides home cleaning services. . . . You will know if you a right fit if you agree with the statements below. . . . You—Are someone who loves the Lord Jesus, and is not afraid to demonstrate it in your life and work."

On October 29, 2013, a Colorado law firm posted an advertisement for a civil law clerk position. The law firm identified itself as a "Christian Law Firm" and stated that "[a]s this is a Christian Law Firm, we ask you to be comfortable with your faith whatever it may be."

Stating Religious Preferences in Employment Ads

Both federal and Colorado law prohibit employers from publishing discriminatory employment advertisements.[5] Title VII makes it unlawful for an employer to publish "any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination, based on . . . religion. . . ."[6] The Colorado Anti-Discrimination Act (CADA) provides that an employer may not

> print or circulate . . . any statement, advertisement, or publication . . . that expresses, either directly or indirectly, any limitation, specification, or discrimination as to . . . religion. . . .[7]

As explained by the EEOC:

> It is illegal for an employer to publish a job advertisement that shows a preference for or discourages someone from applying for a job because of his or her . . . religion. . . .[8]

The purpose of employment anti-discrimination laws is to remove "artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of . . . impermissible classification[s]."[9] The provisions in Title VII and CADA targeted at employment advertisements are necessary to serve this broad, remedial purpose. Once a person applies for employment, other provisions of Title VII and CADA protect an applicant's or employee's rights.[10] But these provisions protect only those who have sought or obtained employment; they contemplate that the applicant or employee has suffered some tangible harm from the employer's discriminatory employment practices. The provisions that prohibit employers from publishing and circulating discriminatory advertisements strive to ensure that persons will not be discouraged from applying for an open job position because of their "disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry."[11] Without these provisions, employers could artificially restrict applicant pools through advertisements, undermining Title VII and CADA's goal of removing "artificial, arbitrary and unnecessary barriers to employment."[12]

The advertisement provisions discussed above appear unlawful because they expressly seek applicants of a certain religion, such as the home cleaning service requiring applicants to "love[] the Lord Jesus." These advertisements express a "preference, limitation, specification, or discrimination," based on an applicant's religion because the applicant is required to possess a particular religious belief.[13]

The "Judeo/Christian Values" or the "Christian Law Firm" advertisements may be less obviously discriminatory than the "loves the Lord Jesus" advertisement. These two advertisements identify the employer's religious beliefs, but do not state that they will consider only Christian applicants. The "Christian Law Firm" advertisement also asks applicants "to be comfortable with [their] faith whatever it may be."

Even so, an employer's identification of its religious beliefs and affiliations in an employment advertisement is no less unlawful than the "loves the Lord Jesus" advertisement. An advertisement is discriminatory "if it would discourage an ordinary reader of a particular [religion] from answering it."[14] Intentionally or not, the invocation of "Judeo/Christian Values" or the self-identification of a law firm as a Christian employer will dissuade persons of other religions from applying for the position.[15] The end result is that these advertisements will net an applicant pool strained of religious minorities.

In *Housing Rights Center v. Donald Sterling Corp.*, the U.S. District Court for the Central District of California considered a motion for preliminary injunction based on a claim that a building owner violated the Fair Housing Act by using the word "Korean" in apartment building names.[16] The court found that the plaintiffs demonstrated a likelihood of success on the merits because the use of the word "Korean" would indicate to an ordinary reader that the building owner preferred Korean tenants.[17] Just as using the term "Korean" had no "obvious, nondiscriminatory meaning,"[18] the law firms' identification of their own religious beliefs, values, and affiliations serves no purpose other than to indicate a preference for employees with a particular religious view. An ordinary reader would likely surmise that the advertisement conveys a coded message: "[Christians] are welcome and preferred; others are not."[19]

One possible rationalization for the "Judeo/Christian Values" or the "Christian" law firms' advertisements may be rooted in the idea that the Free Exercise Clause of the First Amendment grants an employer the right to pronounce its religion.[20] However, although an individual employer or supervisor need not abandon his or her religious views in the workplace, the U.S. Supreme Court has not accepted the argument that the First Amendment provides a defense to unlawful employment discrimination in most circumstances. In *Hishon v. King & Spaulding*, for example, the Court explained that private discrimination "has never been accorded affirmative constitutional protections."[21] An employer's right to the free exercise of religion does not allow it to impose its religion on employees or force employees to partake in religious activities.[22]

The Bigger Issue: "No Religious Minorities Need Apply"

Discrimination in employment advertising harkens back to a time in American history when advertisements "routinely listed gender and ethnic qualifications," such as "no Irish need apply."[23]

The "presence of these 'smoking guns' left no doubt that discrimination persisted."[24] In discussing the scope of state employment law before Title VII, the Bureau of National Affairs in 1964 observed that:

> [a]bsolute proof of discrimination is next to impossible, except in the clear-cut case where an employer runs a "whites only" help-wanted advertisement or inquires as to race or religion in an employment application.[25]

Given this historical nexus between advertisements and discrimination, it is surprising to see employers using advertisements to publicly declare their preference for applicants of particular faiths.

These discriminatory advertisements are emblematic of a striking rise in claims alleging religious-based employment discrimination. At the same time, the full extent of religious discrimination in the workplace is difficult to discern because neither the U.S. Census Bureau nor the Department of Labor collects data regarding religious beliefs.[26] Further, religious discrimination is likely underreported because "[m]any people are afraid that reporting it will negatively affect their careers and others are unaware of their rights."[27]

Nevertheless, recent years have seen a spike in the number of religious discrimination charges filed with the EEOC. As noted, religion-based discrimination charges filed with EEOC have more than doubled in the past fifteen years.[28] By comparison, the overall number of discrimination charges filed with the EEOC has risen only 16% since 1997.[29]

Religious discrimination has been especially prevalent against Muslims. Despite accounting for only 2% of the population, Muslim employees account for approximately 25% of religious discrimination complaints filed with the EEOC.[30] This statistical evidence, coupled with the religion-based advertisements discussed herein, demonstrates that religious discrimination in employment is a growing problem.

The Law's Role in Promoting Religious Discrimination

Our nation's historical jurisprudence and recent high-profile court cases may be contributing to the surge in religion-based discrimination. It is widely acknowledged that, until the middle of the 20th century, the Supreme Court was not concerned with protecting faiths other than Christianity.[31] In 1892, the Court declared that the United States was a "Christian nation,"[32] and in 1953 it professed that "[w]e are a religious people whose institutions presuppose a Supreme Being."[33] By the end of the century, however, the Court had recognized that the religion clauses in the First Amendment "guarantee[] religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'"[34] Nonetheless, recent decisions may have undermined these guarantees and further emboldened employers to discriminate on the basis of religion.

The Religious Organization Exemption

In the context of religion, the law recognizes the tension between an employee's rights and the First Amendment rights of religious employers. Accordingly, Title VII "exempts religious

organizations from [the] prohibition against discrimination in employment on the basis of religion."[35] This exemption was made "[i]n recognition of the constitutionally-protected interest of religious organizations in making religiously-motivated employment decisions."[36] The Supreme Court has interpreted the religious organization exemption to permit religious entities to discriminate on the basis of religion even for secular activities.[37] In other words, "it is not necessary that the activities of the employer be 'religious' activities for the exemption to apply."[38] Given this broad interpretation, religious institutions have unfettered discretion to discriminate against "any employee performing any job function at any time before or during employment" on the basis of that employee's religion."[39] Therefore, this exception is often used by religious employers to discriminate on the basis of religion, seemingly at odds with Title VII's broad, remedial purpose.[40]

In determining whether an entity may assert the religious organization exemption, courts will "look at all the facts" to "consider and weigh the religious and secular characteristics of the institution."[41] The different courts of appeals have set forth different tests for determining whether an organization is a religious organization for purposes of the exemption,[42] but the overarching inquiry is whether the organization "is primarily religious or secular.[43] Typically, this inquiry warrants little analysis because the result is obvious, as in the case of the Church of Jesus Christ of Latter-Day Saints:[44] "[T]he central function of [the religious organization exemption] has been to exempt churches, synagogues, and the like, and organizations closely affiliated with those entities."[45] Thus, there is no colorable argument that the religious organization exemption applies to private entities that are secular in nature like the "Judeo/Christian Values" or the "Christian" law firms, no matter how devout the employer may be.[46]

Recent Decisions of Significance

The Tenth Circuit's recent opinion in *Hobby Lobby Stores, Inc. v. Sibelius*,[47] though not directly applicable to Title VII or CADA, is an example of a judicial decision that may embolden employers to assert their own free exercise rights to justify discrimination on the basis of religion. In *Hobby Lobby*, a sharply divided *en banc* panel held that secular for-profit corporations have rights under the Free Exercise Clause and qualify as "persons exercising religion" under the Religious Freedom and Restoration Act (RFRA).[48] According to the Tenth Circuit, because Hobby Lobby's owners organized the company "with express religious principles in mind" and "allow[ed] their faith to guide business decisions,"[49] the company could show that the Affordable Care Act's requirement that it provide contraceptive coverage would violate its rights under RFRA.[50]

In dissent, Chief Judge Briscoe characterized the majority's holding as a drastic, unprecedented move:

> [I]f all it takes for a corporation to be categorized as a "faith based business" for purposes of RFRA is a combination of a general religious statement in the corporation's statement of purpose and more specific religious beliefs on the part of the corporation's founders or owners, the majority's holding will have, intentionally or unwittingly, opened the floodgates to RFRA litigation challenging any number of federal statutes that govern corporate affairs (e.g., Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act).[51]

Notably, a point of disagreement between the majority and the dissent was the effect of Title VII's limitation of the corporate religious exemption to religious organizations. The majority concluded that this limitation demonstrated that Congress could have created such a restriction in RFRA and did not in this case.[52] Although *Hobby Lobby* is not a Title VII religious discrimination case, an employer might interpret the holding that a secular for-profit corporation can deny healthcare coverage in the name of its religious freedom to mean that other "Christian" employers can legally say they do not want to employ members of other religions.

In another recent high-profile case, the Tenth Circuit reversed a district court's finding that Abercrombie & Fitch violated Title VII by refusing to hire a Muslim woman because she wore a hijab.[53] The Tenth Circuit held that Abercrombie was entitled to summary judgment because the applicant had not informed Abercrombie that she wore a hijab for religious beliefs and that she would need a religious accommodation.[54] As pointed out by the opinion concurring in part and dissenting in part, however, the EEOC presented evidence that Abercrombie had refused to hire the plaintiff without informing her that wearing a hijab violated Abercrombie policy "to avoid having to discuss the possibility of reasonably accommodating [the plaintiff's] religious practice."[55] Thus, the majority's reasoning would permit an employer who may have "superior knowledge of a possible conflict" between an employer's policy and a plaintiff's religious practices to engage in discriminatory conduct as long as the applicant is unaware of the employee's policy.[56]

Recent Supreme Court cases have also furthered an increasingly pro-employer environment when it comes to religious rights. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court in 2012 recognized a

> "ministerial exception," grounded in the First Amendment, that precludes application of [Title VII and other employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers.[57]

The Court went on to find that the exception applied to preclude a lawsuit brought by a teacher who claimed to have been fired from a religious school in retaliation for threatening to sue under the Americans with Disabilities Act (ADA).[58]

In *University of Texas Southwestern Medical Center v. Nassar*, the Court further diminished the rights of employment discrimination victims generally when it held that "Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in §2000e-2(m) [requiring retaliation to be a motivating factor]."[59] Like recent Tenth Circuit decisions, these Supreme Court decisions foster an environment in which employees face increasing difficulty in bringing religious discrimination claims.

Possible Solutions

While the more widespread barriers facing religious minorities require institutional and possibly cultural change, religious discrimination in advertising can be attacked on a case-by-case basis through litigation. One helpful vehicle is testing, which can contribute to legal remedies by giving rise to ripe causes of action. Another method of combating some of the problematic conduct identified in this article is self-regulation of the legal profession.

Testing

Although this article has explained why advertisements that discourage religious minorities from applying for job openings violate anti-discrimination laws, claims challenging such advertising are rarely brought because of the difficulties in finding plaintiffs who have standing. As a result, there is minimal case law in the federal courts on the anti-discriminatory advertising provision of Title VII.[60] In one of the few cases analyzing Title VII's prohibition of discriminatory advertisements, the Fifth Circuit in *Hailes v. United Air Lines* held that "a mere casual reader of a[] [discriminatory] advertisement" may not bring suit under Title VII.[61] To have standing to bring a claim under Title VII, a plaintiff "must be able to demonstrate that he has a real, present interest in the type of employment advertised" and that "he was effectively deterred by the improper ad from applying for such employment."[62] The Fifth Circuit found that the male plaintiff could survive a motion to dismiss because of his allegation that he had previously read a similar advertisement by another employer and had been turned away because of his gender, so that he was deterred from applying for the job that was advertised in a "Help Wanted—Females" column.[63]

It is not difficult to conceive of potential plaintiffs who would be able to demonstrate "a real, present interest" in any number of advertised jobs, particularly in the current job market. Many religious minorities might also be able to demonstrate, similar to the plaintiff in *Hailes*, that they had previous experiences of discrimination that deterred them from applying for a job at, for example, an advertised "Christian Law Firm." However, many unsuccessful applicants for an open position will simply turn to the next employment opportunity, rather than dwell on their unsuccessful applications, while many others will be dissuaded from ever applying.

Given these logistical hurdles in finding plaintiffs who have standing to bring discriminatory advertising claims, "testers" can be invaluable. Originally used in the context of fair housing claims, testers have been defined by the Supreme Court as "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices."[64] In the employment context, the

lower federal courts have recognized tester standing as "consistent with . . . the strong public interest in eradicating discrimination from the workplace."[65] Because mustering evidence of discriminatory employment practices can be difficult, testers advance the strong public interest by providing evidence of discrimination that "is frequently valuable, if not indispensable."[66] As the Seventh Circuit stated, "[t]he fact that testers have no interest in a job does not diminish the deterrent role they play by filing suit under Title VII."[67] For these reasons, the EEOC has also concluded that employment testers have standing to bring claims under Title VII.[68]

Because casual readers of discriminatory employment advertisements may be barred from bringing a Title VII claim against an employer, testers can serve an important function by exposing employers who discriminate in advertising to liability under Title VII and/or CADA. Further, testers would likely generate actionable failure-to-hire claims. Testers can therefore be instrumental in exposing the true extent of the problem of religious discrimination and punishing employers that hire their employees based on impermissible criteria such as religion.[69]

The Legal Profession's Responsibility

The most disheartening aspect of these discriminatory advertisements is that two of the advertisements were posted by Colorado law firms. As a profession that is charged with upholding and advancing the law, our community should be at the vanguard of efforts to combat discrimination and foster inclusion, not adding to the problem. Whatever reasons these law firms have for discouraging applicants of certain religious faiths, these reasons cannot constitute sufficient justification to exclude worthy and capable attorneys from their practices.

Discriminatory advertisements implicate the high ethical standards that govern attorneys' conduct. The Colorado Attorney Oath of Admission requires all attorneys practicing law in Colorado to swear or affirm that they will "employ only such means as are consistent with truth and honor" and "use [their] knowledge of the law for the betterment of society and the improvement of the legal system. . . ."[70] The Colorado Rules of Professional Conduct prohibit attorneys from "engag[ing] in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law."[71] These advertisements also should remind attorneys of our duties to self-regulate and to report misconduct.[72] While some might argue that posting a discriminatory advertisement does not directly violate the text of any ethical rules or implicate an attorney's fitness to practice law, an outward violation of anti-discrimination laws calls into question an attorney's dedication to upholding those laws, advancing justice, and bettering society. These advertisements are a reminder to our legal community that we have substantial work before us to combat unlawful discrimination within the profession.

Furthermore, these advertisements reflect another problem within our community. The legal profession is beleaguered with issues regarding inclusiveness and diversity.[73] These advertisements underscore the tremendous institutional barriers that often stand in the way of diverse attorneys and law students. Many law firms are heralded for their efforts to promote diversity in the profession and these firms should be looked to as models in the profession, but there is still much that can be done to promote diversity.

Conclusion

This nation's rich body of anti-discrimination laws and jurisprudence is the product of a history of struggle by those who faced barriers on a level unknown to many members of our society and legal profession. Yet the struggle continues on many levels and in many facets of our society. One part of this struggle is borne by victims of religious discrimination, whose challenges are growing. These victims are part of an employee applicant pool that finds its members facing advertisements telling them they are not wanted by certain employers, in a manner thought to have been eradicated decades ago. Furthermore, as these victims seek legal remedies, they find a court system that seems increasingly to favor employers. As lawyers combat this discrimination and pursue justice for these victims, they should use all tools available at their disposal to effect change on a case-by-case basis, while aspiring for the broader goals of societal change and improvement of the legal system and profession.

Notes

1. 42 USC § 2000e-2(a)(1). Other statutes protect employees from discrimination based on their age and their disabilities.

2. *See* EEOC, "Charge Statistics, FY 1997 Through FY 2013," www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm. The EEOC received 3,721 religion-based charges in fiscal year 2013, the fourth-highest number ever and slightly below the record of 4,151 set in 2011. *Id.*

3. As the U.S. District Court for the District of Colorado has recognized, the term "Judeo/Christian Values" refers "to a set of principles,

beliefs, ethics, or tradition common to both the Jewish and Christian religions." *Vigil v. Jones*, No. 09-01676, 2011 U.S. Dist. LEXIS 42589 at *10 (D.Colo. March 15, 2011) (citing *Van Orden v. Perry*, 545 U.S. 677, 688, 690 (2005); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *Marsh v. Chambers*, 463 U.S. 783, 799 (1983)).

4. These ads are on file with authors. Because Craigslist advertisements are not permanent, there are no active hyperlinks for these advertisements. However, the authors of this article have saved some of the Web pages in portable document format (PDF).

5. Additionally, federal and Colorado law make it unlawful to discriminate on the basis of religion in employment. *See* 42 USC § 2000e-2(a)(1); CRS § 24-34-402(1)(a). The inclusion of religion as a protected category "is clearly consistent with the basic concept of religious freedom that is embodied in the First Amendment to the Constitution." Avery *et al., Employment Discrimination Law: Cases and Materials on Equality in the Workplace* 629 (8th ed., West, 2010). If employers could legally discriminate on the basis of religion, minority religious practitioners would be forced to hide their religious beliefs or face economic persecution. Stewart, "Opening the Broom Closet: Recognizing the Religious Rights of Wiccans, Witches, and Other Neo-Pagans," 32 *Northern Illinois University L.Rev.* 135, 180 (2011).

6. 42 USC § 2000e-3(b). Under Title VII, an employer is defined as a "person engaged in an industry affecting commerce who has fifteen or more employees. . . ." 42 USC § 2000e(b). For purposes of this article, we assume that all employment advertisements were made by employers with fifteen or more employees.

7. CRS § 24-34-402(1)(d). Under CADA, an "employer" is defined as:

> the state of Colorado or any political subdivision, commission, department, institution, or school district thereof, and every other person employing persons within the state; but it does not mean religious organizations or associations except such organizations or associations supported in whole or in part by money raised by taxation or public borrowing.

CRS § 24-34-401. Unlike federal law, this definition does not limit its applicability to employers with a minimum number of employees.

8. EEOC, "Prohibited Employment Policies/Practices," www.eeoc.gov/laws/practices/index.cfm. The EEOC, which enforces Title VII, further clarifies that:

> [q]uestions about an applicant's religious affiliation or beliefs (unless the religion is a bona fide occupational qualification (BFOQ)), are generally viewed as non job-related and problematic under federal law. . . . [E]mployers should avoid questions about an applicant's religious affiliation, such as place of worship, days of worship, and religious holidays and should not ask for references from religious leaders, e.g., minister, rabbi, priest, imam, or pastor.

EEOC, "Pre-Employment Inquiries and Religious Affiliation or Beliefs," www.eeoc.gov/laws/practices/inquiries_religious.cfm.

9. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

10. Title VII makes it unlawful for an employer

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . religion. . . .

42 USC § 2000e-2(a)(1). CADA makes it unlawful

> [f]or an employer to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of . . . religion. . . .

CRS § 24-34-402(1)(a).

11. *See* CRS § 24-34-402(1)(d).

12. *See Griggs*, 401 U.S. at 431.

13. *See* 42 USC § 2000e-3(b).

14. *See Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 266-67 (7th Cir. 1996) (remanding case for new trial where plaintiffs brought a Fair Housing Act discrimination claim based on an advertising campaign depicting only white human models).

15. A plaintiff need not show that the employer's advertisement was published with discriminatory intent. *See id.* at 267 (Fair Housing Act). *See also, e.g., Thomas v. Metroflight, Inc.*, 814 F.2d 1506, 1508 (10th Cir. 1987) ("Proof of discriminatory intent is not necessary for liability under Title VII. . . ."). When evidence of discriminatory intent is required, however, a discriminatory advertisement can constitute evidence of discrimination. *See Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 659 (5th Cir. 1983) (addressing a sex discrimination claim and concluding "that the advertising evidence is evidence of discrimination [that,] [w]hile not determinative by itself, . . . should have weighed in the EEOC's favor").

16. *Housing Rights Ctr. v. Donald Sterling Corp.*, 274 F.Supp.2d 1129, 1138-39 (C.D.Cal. 2003), *aff'd sub nom. Housing Rights Ctr. v. Sterling*, 84 F. App'x 801 (9th Cir. Dec. 12, 2003).

17. *Id.* at 1139 (citing *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972) (advertisement for apartment in a "white home" would naturally convey racial preference to the ordinary reader)).

18. *Id.* at 1140.

19. *See id.* at 1139.

20. *See* U.S. Const. amend. I.

21. *Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

22. *See Young v. Sw. Sav. & Loan Ass'n*, 509 F.2d 140, 143-44 (5th Cir. 1975) (insistence that employees participate in staff meetings that included "religious exercises" constituted religious harassment); *Mun v. Univ. of Alaska at Anchorage*, 378 F.Supp.2d 1149, 1160 (D. Alaska 2005) (employer's insistence that employees participate in prayer groups to win promotions constituted religious discrimination); *Millazzo v. Universal Traffic Serv., Inc.*, 289 F.Supp.2d 1251, 1257 (D.Colo. 2003) (upholding jury's award of punitive damages where the CEO saturated the workplace with his own religious views because it "was his company and he would do as he pleased."); *EEOC v. Preferred Mgmt. Corp.*, 216 F.Supp.2d 763, 819-24 (S.D.Ind. 2002) (holding that the EEOC presented sufficient evidence on a hostile work environment claim for a jury to find that the employer had "created and condoned a work environment in which their espousal of religious beliefs and practices was pervasive").

23. Levine, "Editorial: Overt Discrimination by Multinational Firms," 37 *Industrial Relations* 121 (1998).

24. *Id.*

25. Derum and Engle, "The Rise of the Personal Animosity Presumption in Title VII and the Return to 'No Cause' Employment," 81 *Texas L.Rev.* 1177, 1199-1200 (2003) (quoting Bureau of National Affairs, *The Civil Rights Act of 1964, Text, Analysis, Legislative History* 61 (1964)).

26. Tanenbaum Center for Interreligious Understanding, "Religion and Diversity in the Workplace" 1, www.tanenbaum.org/sites/default/files/Religion%20and%20Diversity%20in%20the%20Workplace%20Fact%20Sheet%20FORMATTED.pdf.

27. *See* Trottman, "Religious-Discrimination Claims on the Rise," *The Wall Street Journal* (Oct. 27, 2013), online.wsj.com/news/articles/SB10001424052702304682504579153462921346076.

28. EEOC, *supra* note 2.

29. *Id.*

30. *See* Greenhouse, "Muslims Report Rising Discrimination at Work," *The New York Times* (Sept. 23, 2010), www.nytimes.com/2010/09/24/business/24muslim.html.

31. *See, e.g.*, Conkle, "Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law," 10 *J.L. & Religion* 1, 5 (1994):

> The legal principle of religious freedom . . . was relatively weak throughout much of our history, and religious minorities often suffered legal disadvantages. Indeed, one could argue that from a legal perspective, religious freedom did not become a national priority until the 1940s, when the Supreme Court first began to apply the First Amendment's religion clauses to state and local government action. . . . Throughout much of our history, there has been an overt Christian, and primarily Protestant, dominance in American law and public life.

32. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

33. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

34. *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985)).

35. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329 (1987) (citing 42 USC § 2000e-1(a)). *See also* CRS § 24-34-402(6) and (7) (CADA provisions exempting religious employers). With regard to non-religious employers, such as the "Judeo/Christian Values" or the "Christian" law firms, there are no applicable exceptions to anti-discrimination laws.

36. *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 623 (6th Cir. 2000).

37. *Amos*, 483 U.S. at 331, 340 (holding that applying the religious organization exemption to "secular nonprofit activities of religious organization" does not violate the Establishment Clause of the First Amendment).

38. *Saeemodarae v. Mercy Health Servs.*, 456 F.Supp.2d 1021, 1035 (N.D. Iowa 2006).

39. Stewart, *supra* note 5 at 182 (citing *Amos*, 483 U.S. at 329-31).

40. *Id.* (citing *Saeemodarae*, 456 F.Supp.2d 1021).

41. *Hall*, 215 F.3d at 624.

42. *Spencer v. World Vision, Inc.*, 633 F.3d 723, 726-27 (9th Cir. 2011) (discussing approaches).

43. *Id.*

44. *Id.* at 726.

45. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988).

46. Title VII includes another express exemption from religious discrimination claims that is not applicable here. *See* 42 USC § 2000e-2(e). That section permits religious educational institutions

> to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution is directed toward the propagation of a particular religion.

47. *Hobby Lobby Stores, Inc. v. Sibelius*, 723 F.3d 1114 (10th Cir. 2013) (*en banc*), *cert. granted*, 134 S.Ct. 678 (2013).

48. *Id.* at 1128-37 (citing 42 USC §§ 2000bb, 2000bb-1, and 2000bb-3).

49. *Id.* at 1122.

50. *Id.* at 1128-37.

51. *Id.* at 1174 (Briscoe, C.J., dissenting).

52. *Compare id.* at 1130 ("[R]ather than providing contextual support for excluding for-profit corporations from RFRA, we think these exemptions show that Congress knows how to craft a corporate religious exemption, but chose not to do so in RFRA."), *with id.* at 1167 n.2 (Briscoe, C.J., dissenting) ("I believe we must assume just the opposite since, at the time of RFRA's passage, Congress had never exempted for-profit corporations, on the basis of religious reasons, from any of these employment laws.").

53. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1110-11 (10th Cir. 2013).

54. *Id.* at 1123.

55. *Id.* at 1143 (Ebel, J., concurring in part and dissenting in part).

56. *See id.* at 1150 (Ebel, J. concurring in part and dissenting in part).

57. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S.Ct. 694, 705 (2012).

58. *Id.* at 699-700, 707-09.

59. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2533 (2013).

60. *See Hailes v. United Air Lines*, 464 F.2d 1006, 1007 (5th Cir. 1972) (characterizing a Title VII suit alleging sex discrimination on basis of an advertisement as "novel"). *See also Boyd v. City of Wilmington*, 943 F.Supp. 585, 592 (E.D.N.C. 1996) (addressing a claim under the Age Discrimination in Employment Act and noting that discrimination claims on the basis of job advertisements have, "to this point, . . . received little judicial explication"). Presumably, plaintiffs are hard-pressed to find strong direct evidence of discrimination. *See* Derum and Engle, *supra* note 25 at 1199-1200.

61. *Hailes*, 464 F.2d at 1008.

62. *Id.*

63. *Id.*

64. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

65. *See Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 299 (7th Cir. 2000) (African-American employment testers had standing). Courts also recognize that testers have standing in the context of ADA claims. *See Tandy v. City of Wichita*, 380 F.3d 1277, 1287-88 (10th Cir. 2004) (disabled bus rider had standing to test accessibility of the system).

66. *Kyles*, 222 F.3d at 299 (quoting *Richardson v. Howard*, 712 F.2d 319, 321 (7th Cir. 1983)).

67. *Id.*

68. *See* EEOC, "Enforcement Guidance: Whether 'testers' can file charges and litigate claims of employment discrimination," www.eeoc.gov/policy/docs/testers.html.

69. Attorneys must be cautious of their ethical obligations if they are engaging in testing or employing testers. In 2012, the Pretexting Subcommittee of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct examined whether to make an explicit exception to Rule 8.4(c), which prohibits attorneys from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation," Colo. RPC 8.4(c), but ultimately did not make a recommendation either way. *See* Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct, "Agenda and Written Materials" (Feb. 1, 2013), www.courts.state.co.us/userfiles/file/agenda%20and%20materials%20for%20February%201,%202013%20meeting%281%29.pdf. In the past, the Colorado Supreme Court has strictly interpreted Rule 8.4(c) in other contexts. *See In re Paulter*, 47 P.3d 1175, 1176 (Colo. 2002) ("Purposeful deception by an attorney licensed in our state is intolerable, even when it is undertaken as part of attempting to secure the surrender of a murder suspect."). *See also* Isbell and Salvi, "Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct," 8 *Georgetown J. Legal Ethics* 791, 795 (1995) (concluding, "after close analysis of the nature of the misrepresentations involved and of the purpose and the text of the ostensibly pertinent Model Rules, that the misrepresentations of the investigator/tester for which a supervising lawyer has vicarious responsibility do not violate the Model Rules").

70. CBA, Colorado Attorney Oath of Admission, www.cobar.org/index.cfm/ID/1653/CLPE/Colorado-Attorney-Oath-of-Admission.

71. Colo. RPC 8.4(h). *Cf.* Colo. RPC 8.4(g) (declaring it professional misconduct for a lawyer to "engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status. . . .").

72. Colo. RPC 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

73. *See, e.g.*, Lynn *et al.*, "Diversity in Colorado's Legal Profession" 13 (2007), www.centerforlegalinclusiveness.org/clientuploads/pdfs/CSI_Diversity_Report_August_2007.pdf ("[D]iverse attorneys have slowly but steadily increased in numbers. However, the increase has failed to keep pace with minority representation in the general U.S. Population."); *id.* at 19 ("The disparities between diverse and non-diverse attorneys in terms of whether they were partners, their years in practice, and earnings were striking."). *See also* EEOC, "Diversity in Law Firms" (2003), www.eeoc.gov/eeoc/statistics/reports/diversitylaw/index.html. ■