NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

HHS RULE IGNORES SUCCESS OF EXISTING FEDERAL PROTECTION FOR RELIGION IN THE WORKPLACE

In an eleventh-hour attack on women's health, the Bush Administration has proposed a rule that could significantly alter patients' access to vital health services and information. In the rule, the Department of Health and Human Services (HHS) interprets existing law to expand the universe of health care professionals and institutions who can refuse to provide services, information or referrals for health care to which they have a religious or moral objection.

Workers who wish to assert a religious objection to a job assignment currently have protection under the federal law prohibiting employment discrimination on the basis of religion, Title VII of the Civil Rights Act of 1964. Title VII has been applied in many cases involving the religious rights of health care workers, the very same issue that the proposed rule seeks to address. Yet, the rule fails to mention the success of Title VII in allowing employers the flexibility to respect employees' religious beliefs while crafting solutions that allow timely access to health care services for customers and patients.

Title VII Protects Religious Employees from Discrimination in the Workplace

Title VII prohibits employers, employment agencies and unions from discriminating against an employee based on his or her religious beliefs. An employer[i] cannot fire (or refuse to hire) an employee based on his or her religious beliefs or practices; nor can an employer treat an employee in any unfavorable way in any of the terms and conditions of employment, such as assignments or benefits, on the basis of religion.

Cases interpreting Title VII have consistently held that employers have a duty to provide a reasonable accommodation of an employee or applicant's religious beliefs or practices, if an accommodation does not place an undue hardship on the business. Title VII allows a balance between the needs of the employer and its patients or customers, and the religious beliefs and practices of the employee.

Despite HHS's claim that this rule is necessitated by a lack of respect for health care workers' religious beliefs, courts have consistently found that employers have a duty to accommodate such beliefs. Cases decided under Title VII have directly addressed the subject of the proposed rule, and involve employees' objections to providing contraception or assisting in abortion services.[ii] These cases show that employees are well-aware of their rights, and that courts are willing to hold employers that do not respect the requirements of Title VII accountable.

Title VII Protects Employers' Ability to Meet the Needs of Their Patients and Customers

The cases cited herein show that there is current and adequate protection under Title VII for employees whose employers do not reasonably accommodate their religious beliefs. But Title VII precedent also shows that employers are not required to make accommodations that would prevent patients and customers from securing access to health care products and services in a timely and respectful manner.[iii]

Furthermore, the Equal Employment Opportunity Commission has just released a new section of its compliance manual http://www.eeoc.gov/policy/docs/religion.html in an effort to remind employers and employees about these existing rights and responsibilities. Approved unanimously by the bi-partisan Commission, the manual recognizes that the cases protecting patients' access to care strike the proper balance between respect for religious beliefs and employers' need to serve their customers and patients.

The Rule is Confusing with Regard to Employers' Obligations

The rule states that it is not intended to preempt existing laws, but employers who receive HHS funds will likely be confused by the rule and its relation to their existing obligations under Title VII, which occupies the exact same territory. The rule notes that the Public Health Service grant application "requires applicants to certify compliance with all federal nondiscrimination laws." Title VII is the nondiscrimination law prohibiting religious discrimination in employment, and nothing in this rule purports to change that. But while Title VII allows employers the flexibility to balance employees' religious beliefs and patients' and customers' needs, the proposed rule makes no such mention of employers' ability to deny accommodations that would impose an "undue hardship."

Employers could be under the impression that refusing to provide an accommodation would be considered "discrimination" under the rule, even though doing so would be consistent with Title VII.

This Rule Conflicts with Current Law's Proper Balance with Regard to Health Care Services

Title VII strikes the proper balance between religious beliefs and employers' ability to provide patients with access to health care. The federal antidiscrimination law has been effective in protecting the religious beliefs of employees, while not allowing those beliefs to result in harm to patients and customers seeking legal and necessary health care services. The EEOC's explicit advice to its own investigators, as well as employees and employers, about these existing rights and duties provides further evidence that the HHS rule, far from being necessary to protect employees' religious rights, is merely another effort to decimate women's access to reproductive health care.

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[i] Title VII exempts religious employers from the religious discrimination provision. A religious employer is defined as "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C § 2000e-1(a).

[ii] See Nead v. Board of Trustees of Eastern Ill. Univ., 2006 WL 1582454, 98 Fair Empl. Prac. Cas. (BNA) 594 (C.D. Ill. 2006) (employer failed to consider accommodation in denying a promotion to a nurse who said in her interview that she would not dispense emergency contraception); Hellinger v. Eckerd Corp., 67 F. Supp. 2d 1359 (S.D. Fla. 1999)(defendant failed to consider an accommodation for a pharmacist who refused to sell condoms and undue hardship was only "speculative"); Tramm v. Porter Mem'l Hosp., 1989 U.S. Dist. LEXIS 16391 (N.D. Ind.) (employer fired employee and made no attempt to accommodate religious objections to cleaning abortion instruments, including employee's request for a transfer to another department, in violation of a duty to accommodate).

[iii] See Shelton v. University of Med. and Dentistry of N.J., 223 F.3d 220 (3d Cir. 2000) (hospital offered reasonable accommodation to transfer a nurse to a different ward when she refused to treat certain pregnancy complications on the grounds that the treatment, in her view, amounted to an abortion; hospital did not have to risk that patients would be denied emergency medical treatment); Noesen v. Medical Staffing Network, Inc., 2006 WL 1529664 (W.D.

Wis.) (employer offered pharmacist option of notifying other members of the staff when a customer needed a contraceptive prescription filled; employer did not have to accommodate "abandonment" of customers), aff'd, 2007 WL 1302118, 100 Fair Empl. Prac. Cas. (BNA) 926, (7th Cir.) (slip op.); Grant v. Fairview Hosp., 2004 WL 326694, 93 Fair Empl. Prac. Cas. (BNA) 685 (D. Minn. 2006) (employer did not have to accommodate ultrasound technician's religiously based need to "counsel" pregnant patients who were considering abortions and risk harm to patients owed a duty of care by the defendant).