



Biometrics And “The Mark Of The Beast”: Dealing With Employee Accommodation Requests

Insights

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Employers are increasingly using biometric data such as facial characteristics, hand geometry, retina/iris scans, fingerprints and voiceprints in the workplace. Biometric data can be used to establish records of employee hours, to restrict access to specific areas, computer systems, data or devices, to provide security and to promote employee health, including through wellness programs.

Employers who use biometrics are rightfully worried about breaches of biometric data and complying with growing regulations that restrict their ability to collect, retain and use such data. The 4th Circuit, however, has recently reminded employers that they must not lose sight of their obligations under Title VII and similar anti-discrimination statutes when implementing such technologies.

In [U.S. Equal Employment Opportunity Commission v. Consol Energy Inc.](#), an evangelical Christian claimed he could not use an employer’s newly implemented biometric hand scanner because it violated his sincerely held religious beliefs. A three-judge panel of the 4th Circuit unanimously held the evidence at trial supported the jury verdict in the employee’s favor on his Title VII religious accommodation claim.

Consol owned and operated a West Virginia coal mine, where it implemented a biometric hand-scanner system to better monitor the attendance and work hours of its employees. The scanner system required each employee checking in or out of a shift to scan his or her right hand; the shape of the right hand was then linked to the worker’s unique personnel number. As compared to the previous system, in which the shift foreman manually tracked the time worked by employees, the scanner was thought to allow for more accurate and efficient reporting.

Beverly Butcher was a coal miner who worked at the mine for 37 years without incident. Butcher was also a devout evangelical Christian and ordained minister, and he informed management that his religious beliefs prevented him from using the biometric scanner. Specifically, Butcher thought that technology requiring workers to scan their hand to clock in and out signified the “Mark of the Beast” that appears on followers of the Antichrist in the Bible’s book of Revelation and condemns them to eternal punishment. He held this belief even though the scanner did not leave any physical or visible mark.

At the Company's request, Butcher provided a letter from his church pastor explaining his religious conviction against the scanner and why he needed a religious accommodation. Butcher also offered to check in with his shift supervisor or to punch in on a time clock, as he had in the past while working at the mine. The Company believed Butcher's interpretation of the Bible was erroneous and refused his religious accommodation request despite allowing two employees with hand injuries to enter their personnel numbers on a keypad attached to the system instead of scanning their hands. Butcher retired under protest because the Company would not exempt him from the hand scanner policy.

The Equal Employment Opportunity Commission (EEOC) brought a lawsuit on behalf of Butcher, alleging Consol violated Title VII by constructively discharging Butcher instead of accommodating his religious beliefs, and a West Virginia federal jury agreed in January 2015. The jury awarded Butcher almost \$600,000 in damages. Consol filed three post-verdict motions, which the district court denied. Consol appealed those decisions.

The 4th Circuit panel upheld the lower court's decisions, stating there was enough evidence for the jurors to conclude that Consol didn't make an accommodation available to Butcher that it did make available to other employees who couldn't use the hand scanners for nonreligious reasons (i.e., hand injuries). The Court noted that this was not a case where the employer could show that an accommodation was not feasible or would impose undue hardship. The panel also agreed with the jury that the EEOC had shown that Butcher possessed sincere religious beliefs in conflict with Consol's scanner policy, that he had informed Consol of the conflict and that Consol forced Butcher to quit for his refusal to comply.

The 4th Circuit panel said Consol failed to recognize the conflict between Butcher's beliefs and its hand scanner policy seemingly because it felt his beliefs were mistaken, saying that it is neither the employer's nor the court's place "to question the correctness or even the plausibility of Butcher's religious understandings." The panel further noted "there exists substantial evidence that Butcher was put in an intolerable position when Consol refused to accommodate his religious objection, requiring him to use a scanner system that Butcher sincerely believed would render him a follower of the Antichrist, "tormented with fire and brimstone." "So long as there is sufficient evidence that Butcher's beliefs are sincerely held — which the jury specifically found, and Consol does not dispute — and conflict with Consol's employment requirement, that is the end of the matter," the panel said.

The 4th Circuit's decision is a reminder to employers that as they implement biometric systems and other technologies that gather employees' personal, private information, being compliant with the latest data privacy laws and regulations is not the only requirement to consider. Employees may ask for exemptions from or modifications to employer technologies and policies to accommodate their religious beliefs (or disabilities). Such requests are protected by federal and state anti-discrimination laws and must be taken seriously. Employers who face religious accommodation requests should engage in discussions with the employee to consider whether any accommodation (even if it is not the one requested) can be offered. Remember that as long as the employee's

religious belief is sincere, it does not matter that the employer or any other individual may disagree with it. Employers may be able to show that certain requests pose an undue hardship, but must consider whether a reasonable and mutually agreeable accommodation can be found.