

Insights, News & Events

## “MARK OF THE BEAST” WORKPLACE CONCERNS LEAD TO HALF-MILLION DOLLAR VERDICT

Insights  
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Here's some advice you probably didn't think you needed, employers: you should avoid, at all costs, giving or threatening to give your employees the biblical Mark of the Beast. And if they think you are doing so, you should accommodate them if possible. An employer in West Virginia ignored this advice and will now have to write a \$550,000 check to a former employee after the 4th Circuit Court of Appeals affirmed a whopping jury verdict earlier this week (*EEOC v. Consol Energy*).

### NEW TIMEKEEPING SYSTEM CAUSED RELIGIOUS FEARS

Consol Energy is a coal mining and natural gas company based out of Pittsburgh, with operations throughout the Appalachian region. Starting in 2012, the company sought to implement a more efficient way to track its employees' comings and goings for payroll purposes, and announced that all workers would be subjected to "biometric scanning."

It sounds scarier than it actually is: the scanning simply means that a small device would evaluate a person's hand geometry and store the information to identify them in a unique way. Rather than punching in and punching out with a clock, or logging in and out of a computer system, employees simply would have to wave their hand over a scanner when entering or leaving a worksite for tracking and attendance purposes.

The problems arose when Consol announced this change at its Robinson Run Mine in West Virginia. Beverly Butcher Jr.

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**Richard R. Meneghello**  
Chief Content Officer

503.205.8044

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had worked that mine for 35 years and by all accounts was a solid worker. He immediately objected on religious grounds when he learned about the new biometric scanning system; Butcher is an evangelical Christian and an ordained minister in his church. He claimed that submitting to the scanning would be like submitting to the "Mark of the Beast" and therefore was objectionable to him on religious grounds.

For those of you who haven't read the Bible's Book of Revelation recently, a passage talks about the apocalypse and describes a powerful dragon emerging from the sea and enslaving the world. According to Revelation 13:16, the dragon "forced all people, great and small, rich and poor, free and slave, to receive a mark on the right hands or on their foreheads... which is the name of the beast or the number of its name....That number is 666."

Butcher wrote a letter to management asking not to be subjected to the scanner, admitting that he knew that the hand scanner would not actually give him a number or a mark, but that "it is a device leading up to that time when it will come to fruition." He also submitted a letter from his pastor, both of which requested a religious accommodation for Butcher at work.

Consol Energy assured him that the hand scanner was passive and wouldn't imprint anything on him, but that did not convince Butcher. The company next pointed out that the biblical passage described the mark being placed on the right hand and told him that he could use his left hand when scanning in and out of the mine, but he still refused. Finally, as a matter of last resort, the company produced a letter from Recognition Systems Inc., the manufacturer of the biometric system, assuring him that their product "does not, in fact, assign the Mark of the Beast."

The letter did not convince Butcher and he still refused. Instead, he offered to continue to write down his hours by hand as he always had, but the company would not allow it. As a result, Butcher retired in protest, about five years earlier than he had planned. And that might have been the end of the story, except....

## **INCONSISTENT TREATMENT COSTS COMPANY BIGLY**

Several months later, Butcher learned that several of his former coworkers were exempted from the biometric

scanner because the machines wouldn't work on them due to missing fingers or other hand injuries. Instead, these workers were allowed to enter their employee numbers on a keypad to track their comings and goings. This is exactly the kind of accommodation that Butcher had been seeking, and he was incensed to learn that it was offered for physical reasons but not spiritual reasons. He enlisted the assistance of the Equal Employment Opportunity Commission (EEOC), and the agency filed a Title VII religious discrimination lawsuit on his behalf.

After several years of litigation, the case went to trial in early 2015. The company attempted to portray Butcher's beliefs as irrational, going so far as to question him and his family about their inherent distrust of supermarket scanners. But the key question in the trial was not whether his religious beliefs were correct, but whether they were sincerely held. If so, and if they could be easily and reasonably accommodated, they should have been.

The focus of every religious accommodation case is whether the employer can provide a reasonable accommodation without incurring an undue hardship. And the strongest argument for Butcher was that Consol Energy could easily accommodate its workers without undue hardship by establishing an alternative tracking method that did not require scanning. The jury was not asked to interpret the Bible, but instead whether the employer could have accommodated him. The jury ruled in his favor and awarded him \$150,000 in compensatory damages, and a judge then awarded him close to \$450,000 in economic damages. Consol appealed the verdict, and the 4th Circuit Court of Appeals affirmed the jury's decision in a June 12, 2017 decision.

The court first addressed Consol's argument that Butcher was, in its view, incorrect in his determination that the biometric scanner could imprint the Mark of the Beast. "It is not Consol's place as an employer, nor ours as a court," the three-judge panel wrote, "to question the correctness or even the plausibility of Butcher's religious understandings." Instead, his beliefs were held to fall under Title VII's protections because they were "sincerely held." And the court held that when you combine such a sincerely held religious belief with a conflicting employment requirement, there arises on the part of the employer an obligation to consider a religious accommodation.

The question of whether a religious accommodation was feasible was easy for the court to resolve. Consol admitted that the alternate keypad method of clocking in and out “would impose no additional burdens or costs on the company,” as demonstrated by the fact that others were allowed to do so. For that reason, the court of appeals found that there was no reason to question the jury’s determination in favor of Butcher.

## **AND IN THE END...**

The lesson for employers – besides not attempting to enslave the world – is not to judge an employee’s religious beliefs when faced with a work conflict, but instead look at the issue from the accommodation perspective. If it is easy to offer a shift change, or a modification to the dress code, or a flexible schedule, or some other alteration to your standard practices and policies, you should allow the accommodation without regard to whether you agree with their faith practices. If, however, the requested accommodation is not feasible or may impose an undue hardship on your operations, you are permitted to reject it and perhaps suggest an alternate solution. Because these are highly fact-specific considerations that should be assessed on a case-by-case basis, you would be well-served to involve your labor and employment counsel when faced with such a situation.

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