COURT PRESERVES LEGITIMACY OF RELIGION CLAUSE IN *MENES v. CITY OF NEW YORK*

By Kris Nejat*

I. Introduction

In *Menes v. City University of New York Hunter College*,[1] Plaintiff, Herman Menes ("Menes") sued his employer, University of New York Hunter College ("Hunter"), under both the Establishment Clause of the First Amendment ("Establishment Clause") and Title VII of the Civil Rights Act of 1964 ("Title VII").[2] Menes argued that Hunter College was not only promoting Christianity, but also discriminating against him based on his religious ancestry. However, on September 25, 2005, District Judge Richard J. Howell, of United States District Court for the Southern District of New York, made a Summary Judgment ruling in favor of Hunter.[3]

Menes is a very important case as it works to preserve confidence in both the efficiency and accuracy of the court system in the United States by urging restraint in the application of laws meant to protect against true religious discrimination. This note will take the position that Judge Howell arrived at the correct conclusion when he granted summary judgment in favor of Hunter College and in so doing established a president that maintains a reasonable

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[1] *Menes v. City Univ. of N.Y. Hunter College*, No. 06 -6358, 2008 U.S. Dist. LEXIS 73304 (S.D.N.Y. Sept. 28, 2008).

[2] *Menes*, 2008 U.S. Dist. LEXIS 73304 at *31. The Establishment Clause states, "Congress shall make no law respecting an establishment of religion." U.S. CONST.. amend. I. Title VII makes it unlawful for an employer to discriminate against any individual on account of privileges of employment. *See.* 42 U.S.C. § 2000e (2000).

[3] *Id.*

standard for plaintiffs bringing suit on the basis of religious discrimination in the workplace.[4]

II. BACKGROUND

Menes, began employment with Hunter College in 1998 as a college accountant in the Financial Aid Office. After numerous altercations with his supervisors and co-workers, Menes was transferred to the Bursar's Office in 2002. [5]

Menes first claimed that Hunter had promoted the religion of Christianity in its capacity as a state-funded institution. Menes based this allegation on four different sets of factual circumstances. Ironically, three of the four instances directly involved Menes' supervisor, Tom Crowfis ("Crowfis"). According to an employee evaluation conducted by Crowfis' supervisor, Theresa Matis ("Matis"), Menes had a personal vendetta against Crowfis which was negatively impacting the office.[6]

The animosity between Menes and Crowfis began when Crowfis, who is of the Christian faith, decided to decorate his cubicle and office area in the spirit of three main holidays, Christmas, St. Patrick's Day, and Thanksgiving. For example, during the Christmas season, Crowfis would place small angel figurines on the ledge of his cubicle and hang Christmas posters throughout the office.[7] Menes, who is of Jewish ancestry, took this as an assertion that Crowfis was promoting Christianity.[8]

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[4] *Id.* at *11.
[5] *Id.* at *4. Hunter College is a Public University located in New York City. The Bursar's Office work entails working directly with students in: (i) collecting tuition and fees; (ii) distributing financial aid checks; and (iii) providing customer service. An accountant in this office must be extremely efficient. *Id.* at *6.
[6] *Id.* at *11.
[7] *Id*. In Menes' deposition he admitted "that the posters did not ask the reader to adopt the Christian religion." *Id.*
[8] *Id.* at *12. The Bursar's Office's policy to allowed staff members, in their discretion, to decorate their office spaces with religious or non-religious items. *Id.*

This animosity continued and in June 2004, Crowfis brought an issue of *Time Magazine* into the office which featured the Pope. Although this magazine was left in the office for several months, Menes neither complained to anyone nor attempted to remove the magazine during his time at the Bursar's Office.[9]

Menes further asserted that the entire Bursar's Office had taken part in promoting Christianity through its annual winter party. Menes felt that simply attending the winter party worked as an affirmative endorsement of Christianity. Nevertheless, both a Christmas tree and a Menorah were displayed each year. [10]

Then, in late 2004, Menes submitted a complaint alleging that Crowfis was promoting Christianity.[11] This complaint was submitted to Matis as she is in charge of setting and enforcing any policy relating to office décor. Shortly after the complaint was filed, Matis informed Menes that employees are not prohibited from decorating their work areas. Menes then filed a second complaint with Matis' supervisors who, after hearing the facts, upheld Matis' prior ruling.[12]

Similarly, Menes had another claim against the school in which he alleged religious discrimination. He based this allegation on the erroneous theory that Crowfis was paid for time which he did not spend at work, while Menes was reprimanded for leaving the office during work hours."[13] Menes further asserted that this was because Crowfis was of Christian ancestry, while Menes was of Jewish ancestry.[14]

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[9] *Id.* at **8-9.
[10] *Id.* at *7. Plaintiff claimed that the Christmas tree was on display in the front office for a long time before and after the Christmas holiday and that the menorah was old and in a state of disrepair.
[11] *Id.* at *9.
[12] *Id.* Menes filed a complain with Sharon Neill who was the Business Manager and Laura Schacter who was the Dean of Diversity and Compliance.
[13] *Id.* at *26.
[14] *Id.*

However, evidence was presented by Hunter that contradicted Menes' claim. For instance, Matis stated in her deposition that "Crowfis is 'scrupulous' about requesting and using leave time when he leaves the office during regularly scheduled work hours and has never been absent from the office without leave."[15] Furthermore, Hunter presented the court with copies of the actual Leave Request Forms which unambiguously showed that: "between January 2002 and January 2004, Mr. Crowfis made at least seven requests to use his annual leave time in one to two hour increments."[16]

As Hunter's credibility soared, so Menes' credibility sank. In fact, Hunter provided evidence demonstrating Menes' mediocre attendance record:

> "In her June 21, 2005 letter to Ms. Neill requesting Plaintiff's transfer out of the Bursar's Office, Ms. Matis mentioned that Plaintiff leaves the office early each night, most days at 4:55 p.m Plaintiff's 'special evaluation' rated Plaintiff's attendance and punctuality as '[g]enerally acceptable,' but noted that he frequently left work early for medical appointments."[17]

Menes admitted that he neither requested time off for religious purposes, nor had a request to leave early denied during the entirety of his employment.[18]

III. COURT'S ANALYSIS

A. Court's Analysis of Establishment Clause Claim

In making its ruling for summary judgment, the Court first analyzed Plaintiff's claim[19] that the defendants violated the Establishment Clause.[20] As defined by

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[15] *Id.* at **26-27.
[16] *Id.* at *27. Although Crowfis was not required to provide reasons for requests, at least six times he indicated that the reason for the request was to attend a funeral or church service. *Id.*
[17] *Id.* at *28.
[18] *Id.* at *27.
[19] *Id.* This entire footnote should be in the body of your article. Menes claimed that the totality of the following circumstances would lead a reasonable person to believe that Hunter College was promoting Christianity:

> Plaintiff asserts that Defendants violated the Establishment Clause by (1) permitting Mr. Crowfis to keep figurines of angels at his cubicle; (2) permitting

Judge Howell, the purpose of the Establishment Clause as to prohibit the "government from officially preferring one religious denomination over another."[21] Moreover, the Establishment Clause's essential purpose is to maintain the separation of Church and State.[22] Generally, a state funded institution, such as Hunter College, is prohibited from endorsing or promoting one religion over another.[23]

Generally, when analyzing an alleged violation of the Establishment Clause, a court evaluates the claim based on a three-prong test which the United States Supreme Court set forth in *Lemon v. Kurtzman*.[24]

> "[G]overnment action that interacts with religion: (1) 'must have a secular . . . purpose,' (2) must have a 'principal or primary effect . . . that neither advances nor inhibits religion,' and (3) 'must not foster an excessive government entanglement with religion.' It is Plaintiff's burden to prove that the challenged policies violate the Establishment Clause."[25]

Thus, according to *Lemon*, in order for the Court to find that Hunter was in violation of the Establishment Clause, Hunter must show that the complained of behavior, first, had a secular purpose; second, neither progresses nor hinders a particular religion; and third, does not take the effect of promoting Christianity.[26] To this end, if a defendant–government entity–can demonstrates that it has adhered to the requirements of the Establishment Clause, a court may grant

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> Mr. Crowfis to place a magazine with a cover photo of the Pope next to the office printer; (3) permitting Mr. Crowfis to post Christian-themed holiday posters in the office; (4) holding a seasonal holiday party; (5) displaying a Christmas tree while displaying a menorah that was 'very old and in disrepair' and (6) permitting Mr. Crowfis to take time off for religious functions without using leave time.

Id.

[20] *Id.* at *4.

[21] *Id.* at *34.

[22] *Id*.

[23] *Id*.

[24] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

[25] *Id.* ("To avoid conflict with the religion clauses of the First Amendment, statute must have secular legislative purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster excessive government entanglement with religion.").

[26] *Id.*

summary judgment in favor of that entity since the elements of an Establishment Clause claim are not present.[27]

The Court began its analysis by addressing whether the complained of behavior had a secular purpose through the eyes of an objective observer.[28] In doing so, the Court noted that Menes lacked sufficient evidence to show that the complained of behavior was prohibited. In fact, the Court ruled that all of the evidence provided by Menes was either insufficient to support this claim or hearsay. [29]

As applied to an objective observer, the Court held that Menes "was expressing not only his personal aversion to the displays and to the coworker but also his opinion that the displays constituted an unconstitutional endorsement of Christianity by a public institution."[30]

In summation, the Court stated that "there is no evidence from which an objective observer could conclude that any of the challenged policies had a non-secular purpose."[31] Therefore, since Menes' claims did not pass the second prong of the test set forth in determining whether an Establishment Clause violation occurred, the Court ruled in favor of Hunter on this claim.

B. Court's Analysis of Title VII Claim

Title VII prohibits an employer from discrimination which occurs as a result of an employee's race, color, religion, sex, and national origin. Thus, under Title VII any form of discrimination is affirmatively prohibited.

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[27] *Menes*, No. 06-6358, 2008 U.S. Dist. LEXIS 73304 at *33.
[28] *Id*. In order to satisfy the second prong of the *Lemon* test, the court must decide whether an objective observer "would view the government as acting with the intent of promoting a particular religious viewpoint." *Id.*
[29] *Id.* at *50.
[30] *Id.* at *11.
[31] *Id.*

Next, the Court had to make a ruling on whether or not Menes had fulfilled the requirements of a prima facie case of discrimination under Title VII. The Court stated that in the context of a Title VII discrimination case, for the plaintiff:

> [t]o survive summary judgment, Plaintiff must first establish a prima facie case by demonstrating that: (1) [he] is a member of a protected class; (2) [his] job performance was satisfactory; (3) [he] suffered adverse employment action; and (4) the action occurred under conditions giving rise to an inference of discrimination.[32]

In applying this standard, the Court first looked at whether the Plaintiff was a member of a protected class. Since Menes was of the Jewish religion, the Court noted that he satisfied this element. Thus, the Court moved to the second element of the test.

The second element required a showing of satisfactory job performance.[33] Since Menes' job performance was stagnant, the Court sidestepped this issue and temporarily gave Menes the benefit of the doubt in order to move to the crux of this test, the final two elements.[34]

The final two elements of the test determine whether an adverse employment action occurred, and if so, whether the action occurred under conditions giving rise to an inference of discrimination. The Court noted that an adverse employment action in this context is one that "would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights."[35] Plaintiff claimed that he suffered an adverse employment action because Crowfis was allowed to attend religious activities during work hours, without loss of pay or leave time, while he was reprimanding for leaving work early, even for documented medical appointments.[36]

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[32] *Menes*, No. 06-6358, 2008 U.S. Dist. LEXIS 73304 at **5-6.
[33] *Id*.
[34] *Id.*
[35] *Id.* at *36.
[36] *Id*. at **50-51.

The complaint alleges that since Crowfis took leave to attend functions at his Christian church and Menes, who is of Jewish ancestry, was never extended this courtesy, a reasonable person can infer that Menes was discriminated against. However, the Court disagreed with this logic.[37]

The Court approached these last two elements in the context of whether or not Crowfis was granted permission to use annual leave to attend activities at his Church, while Menes was not. Accordingly, the Court gave weight to the testimony of Matis which referred to annual leave as simply paid time off, whether it is for a vacation, personal day, or anything else. As the Court stated, "the evidence indicates that all leave time, including vacation time, was categorized as annual leave."[38]

Next, the Court looked at whether or not Crowfis was extended the benefit of taking time off without using his annual leave. The undisputed evidence showed that Crowfis would request and receive approval to use his annual leave in order to leave early and attend functions at his church and also showed that "he never left the office to attend church activities without using annual leave time."[39]

Thus, the Court's analysis turned to whether Menes was given the same right to use his annual leave. Consequently, the facts indicated that Menes had neither been granted nor denied his right to use annual leave. In other words, Menes never requested to use his annual leave in order to leave work early as Crowfis did, thus, Menes could not have been denied. Further, the Court noted that the evidence indicates that had Menes requested to use his annual leave for personal days, he would have been granted that right.[40] Consequently, the Court ruled that

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[37] *Id.*
[38] *Id.* at *52. Annual leave would be used in order to attend funerals and things of that nature. *Id.*
[39] *Id.* at *53.
[40] *Id.* The court explained, "because Plaintiff has not offered evidence that he was a victim of an adverse employment action or that Defendants acted with discriminatory intent, the Court grants Defendants' motion for summary judgment on Plaintiff's Title VII claim." *Id.*

since Menes "never requested to leave work for religious functions and that he was unaware whether any other employees had done so."[41]

Accordingly, the Court ruled that there was no evidence of differential treatment stating that "[p]laintiff has not made out a prima facie case of discrimination because he has not submitted any evidence of the alleged adverse employment action--the differential treatment of employees' absence from work."[42]

IV. EVALUATION

The Court was successful at distinguishing between a legitimate Establishment Clause and Title VII discrimination claim and a frivolous one in the case at hand. With respect to Menes' Establishment Clause claim, if there was a policy prohibiting visible religious expression by public employees, defendants may have been in violation of the Free Exercise Clause of the First Amendment.

For instance, in *Nickols v. Arin Intermediate Unit 28*, plaintiff Brenda Nickols, challenged a policy that prohibited Pennsylvania public school employees from wearing religious symbols at school.[43] Nickols, an employee of a Pennsylvania public school, was suspended by school officials after she refused to remove a necklace that displayed a cross. She argued that the policy violated the Free Exercise Clause because it permitting speech displaying secular messages, while punishing speech that exhibited religious beliefs. The Court agreed with Nickols. It held that the policy was unconstitutional because it punished only symbolic speech.[44]

Compared to the case at hand, *Nickol* brings to light the fact that although a government agency is free to employ a policy prohibiting an employee from

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[41] *Id.*
[42] *Id.* The court further noted that, "assuming Plaintiff had offered evidence that Mr. Crowfis attended religious functions without using leave time and that he did so with Defendants' knowledge and/or approval, Plaintiff's claim would still fail because there is no evidence of differential treatment--the basis for Plaintiff's allegation of discrimination." *Id.*
[43] *Nichol v. Arin Intermediate Unit 28,* 268 F. Supp. 2d 536, 542, (W.D. Pa. 2003). (Enjoining a school policy which prohibited teachers from wearing religious jewelry).
[44] *Id.* 542-43

exhibiting a religious displays, it must do so evenly and fairly, thus, it must prohibit all employee displays. Accordingly, there was no policy prohibiting employees' right to display religious symbols or secular symbols, thus, the Establishment Clause was not violated.

Moreover, the Court in *Menes*, articulated that religious symbols do not constitute an endorsement of a particular religion. It determined that decorations are secular holiday symbols and thus, are not considered to be unconstitutional endorsements of religion.[45]

Similarly, the Court did an excellent job analyzing Menes' Title VII claim. There was no evidence of discrimination. In fact, not only was Menes' discrimination claim, in reference to Crowfis's use of leave time, unsupported by any evidence including Menes' personal knowledge, but documentary records contradicted this argument. Crowfis' deposition stated:

Q: Do you ever have occasion to take personal leave from the office?

A: Personal leave?

Q: Yes.

A: No, I've taken vacation and scheduled holidays.[46]

This short question and answer session shows that the documentation of Crowfis' leave request forms, stated that he used vacation time and not personal leave as Menes alleged. Clearly, Menes presented no evidence to support his charge of religious discrimination.

In *Thompson v. City of New York*, plaintiff teacher, Linda Thompson, who is an African-American female of Christian Faith, filed a Title VII cause of action

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[45] *Menes*, No. 06-6358, 2008 U.S. Dist. LEXIS 73304 at *26; *See Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1245 (2007) ("Christmas tree, Santa Claus, reindeer, candy canes, gingerbread boys and girls, tinsel garlands, strings of lights, ... Christmas wreaths, candles, stars, and presents….were secular holiday symbols.").

[46] *Id.* at *52.

against her employer, the New York Board of Education.[47] Thompson argued that her supervisors gave her negative reviews because she was Christian and African-American. Thompson, further alleged that as a direct result of the negative reviews, she was denied thirteen "comp-time" positions.[48] To support her claim, Thompson argued that the thirteen "comp-time" positions in question were granted only to white Jewish teachers who received exemplary reviews from her their supervisors simply because they were white and Jewish.[49]

In response, defendant New York Board of Education claimed that all reviews were done without bias. In support of this claim, defendant presented evidence of negative reviews to white Jewish teachers. Further, of the thirteen individuals that received "comp-time" positions, Thompson was only able to identify two who were both white and Jewish. Consequently, the Court granted defendant's summary judgment motion. It held that Thompson failed to establish a prima facie case of discrimination, noting that the evidence presented by the defendant had directly contradicted any inference that the Thompson's negative evaluations were based on her race or religion.[50]

The Court made the correct decision in coming to the summary judgment rulings on both the Establishment Clause Claim and the Title VII claim because in doing so it maintained a reasonable standard for assessing religious discrimination in the workplace.

V. CONCLUSION

The Court's final verdict said it all. First, the Court ruled that Menes offered nothing to support his conviction that the holiday party endorsed religion, holding that neither the *Time Magazine* cover nor the condition of the menorah at the

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[47] *Thompson v. City of New York*, No. 98-4725, 2002 U.S. Dist. LEXIS 23675, at *2 (S.D.N.Y. Dec. 9, 2002).

[48] *Id.* "Under [comp-time] positions, a teacher is released from part of her teaching duties, but receives no additional pay." *Id.* at *3.

[49] *Id.* at *2-3.

[50] *Id.* at *25-26; *Menes*, No. 06-6358, 2008 U.S. Dist. LEXIS 73304 at *26 (Noting that it is the responsibility of a plaintiff to "adequately inform defendants" of any questioned behavior.).

Christmas party offered sufficient evidence of intent. It noted that the holiday posters did not raise an issue of material fact regarding a non-secular purpose.

In addition, the Court ruled that Menes' assertion that Crowfis was permitted to leave work without using leave time was proven as incorrect. As a result, the Court granted Defendants' motion for summary judgment on both the Establishment Clause claim and the Title VII claim.

The Court in this case did an excellent job of distinguishing between an employee experiencing discrimination and one who is merely disgruntled. Further, the Court provided much needed clarification of doctrines that are often misused by angry employees to punish employers. Menes was simply a disgruntled employee trying to get even with his supervisors.

Had the Court ruled in favor of Menes, that decision would have not only undercut and circumvented the revolutionary protections that the United States government provides in regards to religious freedom, but it would have immensely trivialized the impact, importance, and necessity of both the Establishment Clause and Title VII.