

WORKPLACE RELIGIOUS FREEDOM: WHAT IS AN EMPLOYER'S DUTY TO ACCOMMODATE? A REVIEW OF RECENT CASES

Denise Smith*

INTRODUCTION

A social worker employed by a county agency is disciplined for refusing to remove her religious head covering while on the job because her supervisor told her that the headgear was a violation of agency dress code. Meanwhile, “[o]ther employees wore headgear or hats and were not threatened” as she was¹. In other jurisdictions, two employers refuse to hire job applicants because the applicants’ religious beliefs prohibit them from using social security numbers.² The Internal Revenue Code permits employers to apply for a “reasonable cause waiver”³ which would exempt them from a penalty for not providing employee social security numbers. The courts, however, viewed the application process as imposing an undue hardship on these employers and found they had not discriminated against the applicants on the basis of religion.

Religious discrimination complaints are on the rise. E.E.O.C. data indicate an 85% increase between 1992 and 2002 in religion-based charges filed against employers. During the same period, cases for which reasonable cause was found increased by 285%, while cases with no reasonable cause increased by 145%.⁴ The increase in charges appears more dramatic when compared to the growth in the number of persons employed from 1992 to 2002 – 15.2%.⁵

There are several legal theories under which an employee who believes he or she has been discriminated against on the basis of religion may seek redress.⁶ This paper will discuss the theory of discrimination by failure to accommodate an employee’s religious practices under Title VII of the Civil Rights Act of 1964⁷, and examine some recent decisions dealing with religious accommodation.

TITLE VII DUTY TO ACCOMMODATE

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against persons on the basis of religion, “unless an employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s

* J.D., MBA, Associate Professor, Missouri Western State College.

¹ *Holmes v. Marion County Office of Family and Children*, 184 F.Supp. 2d 828 (S.D. Ind., 2002), vacated by 334 F.3d 618 (7th Cir. 2003), vacated by 349 F.3d 914 (7th Cir. 2003).

² *Sutton v. Providence St. Joseph Medical Center* 192 F.3d 826 (9th Cir. 1999) and *Seaworth v. Pearson* 203 F.3d 1056 (8th Cir. 2000).

³ I.R.C. § 6724(a).

⁴ <http://www.eeoc.gov/stats/religion.html>

⁵ <http://data.bls.gov/servelet/SurveyOutputServlet>

⁶ U.S. Const. amend. I, U.S. Const. amend. XIV § 1.

⁷ *E.g.*, 42 USCS §§ 2000e et seq.

business.”⁸ Subsection (j) defines religion as including “all aspects of religious observance and practice, as well as belief.”

ESTABLISHING A PRIMA FACIE CASE

The Supreme Court has declined to articulate the elements of a prima facie case for discrimination for failure to accommodate a religious practice⁹ as it did for disparate treatment cases in *McDonnell Douglas Corp. v. Green*.¹⁰ However, Circuit Courts and the E.E.O.C. have developed and applied elements of a prima facie case that are clearly different from those announced in *McDonnell Douglas*.¹¹

“An employee establishes a prima facie case of religious discrimination by showing that: (1) the employee has a bona fide religious belief that conflicts with an employment requirement; (2) the employee informed the employer of this belief; (3) the employee was disciplined for failing to comply with the conflicting employment requirement”¹²

Bona Fide Religious Belief

Courts do not examine the beliefs of a religion in determining whether the employee has a bona fide religious belief, nor do they interpret Title VII’s protections as applying only to mandatory religious practices. U.S. Postal Service employee Hoffman, a Catholic, requested a voluntary shift swap so that he would not have to work on Sundays, stating that “he was raised to observe the Sunday Sabbath by abstaining from work on Sundays.”¹³ In support of this belief, Hoffman cited Roman Catholic church canon and the Ten Commandments. In its Final Agency Decision, the Postal Service held that the employee had failed to present a prima facie case, relying on the Service’s own interpretation of Catholic canons to determine that not working on Sunday was not a bona fide religious belief. Hoffman appealed the final agency decision to the EEOC. In its decision, the EEOC found that Hoffman had “persuasively stated that working on Sunday conflicts with his religious practice,”¹⁴ and that he had met his burden of presenting a prima facie case of discrimination. It was inappropriate for the Postal Service to inquire about the detailed beliefs of the Roman Catholic church, since the relevant information was the complainant’s own closely held beliefs, whether or not they were mandated by his faith. As one court noted, “When courts are required to determine

⁸ 42 USCS § 2000e (j).

⁹ See *Ansonia Board of Education v. Philbrook* 479 U.S. 60, 67 (1986).

¹⁰ 411 U.S. 792 (1973).

¹¹ See *Baum v. Barnhart* EEOC Appeal No. 01A05985 (2002) “[W]e note that the agency, in its FAD, applied the standards set forth in *McDonnell Douglas Corp. v. Green* and its burden-shifting requirements. Religious accommodation cases, however, do not follow this method of proof.”

¹² *Wilson v. US West Communications* 58 F. 3d 1337, 1340 (8th Cir. 1995), citing *Bhatia v. Chevron, USA*.

¹³ *Hoffman v. Henderson* 2001 WL 953477 (E.E.O.C.).

¹⁴ *Id.* at 4.

whether a belief is religious in nature for purposes of Title VII, they generally avoid examining the tenets of religion.”¹⁵

The employee’s bona fide religious belief was also at issue in *EEOC v. Union Independiente*.¹⁶ Employee David Cruz-Carillo (Cruz) asked for an accommodation to exempt him from required union membership, claiming that his religion, Seventh-Day Adventist, prohibited him from joining a labor organization. The union (UIA) requested that the employer (AAA) suspend Cruz as required by the union security clause in its collective bargaining agreement. AAA subsequently discharged Cruz. Cruz filed a complaint with the EEOC, alleging that the union had failed to accommodate his religious beliefs. The district court entered a summary judgment for Cruz. On appeal, the UIA argued that because there were factual issues concerning Cruz’s claim of bona fide religious belief that had not been resolved, referred to as “specific undisputed evidence of conduct on Cruz’s part that is contrary to the tenets of his professed religious belief,”¹⁷ the summary judgment should be reversed. The circuit court reversed, stating that the “element of sincerity is fundamental, since ‘if the religious beliefs that apparently prompted a request are not sincerely held, there has been no showing of a religious observance or practice that conflicts with an employment requirement.’”¹⁸ As noted by another court, “While the ‘truth’ of a belief is not open to question, there remains the significant question of whether it is ‘truly held.’”¹⁹

The accommodation requested must be for the purpose of resolving a conflict between a job requirement and a religious practice that is perceived by the employee to be an important part of his or her religion, rather than for an optional religious activity. In *Terry v. Barreto*,²⁰ complainant, an employee of the Small Business Administration, requested to use compensatory time instead of leave in order to attend a religious conference.²¹ His employer denied the request, although it allowed him to use his annual leave for this purpose. The employee filed a complaint, alleging that his employer had failed to accommodate his religious activity. The EEOC found that “the attendance at a religious conference is an optional activity ... not compelled by a person’s belief in the tenets of a religion.”²² The complainant had admitted that conference attendance was not a mandatory part of his personal religious beliefs; it was an optional activity as opposed to one at which his attendance was “compelled.” Therefore, employee had failed to establish that this was a conflict between a work requirement and his religious beliefs.

¹⁵ *Id.*, referring to *Edwards v. School Board of the City of Norton, Virginia* 483 F.Supp. 620, 625 (W.D. Va. 1980).

¹⁶ 279 F.3d 49 (1st Cir. 2002).

¹⁷ *Id.* at 56.

¹⁸ *Id.* citing *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997).

¹⁹ *United States v. Seeger* 380 U.S. 163, 185 (1965).

²⁰ 2003 WL 22118458 (E.E.O.C).

²¹ 5 CFR 550.1001 allows Federal administrative personnel to accrue compensatory overtime in order to adjust work schedules for religious observances. Subsection (a) provides that “an employee whose personal religious beliefs require the abstention from work during certain periods of time may elect to engage in overtime work for time lost for meeting those religious requirements.”

²² *Id.* at 2.

The question of whether a non-mandatory religious practice is entitled to accommodation is determined with reference to the facts of a particular case. While it is clear that a practice does not need to be mandatory under the tenets of an individual claimant's religion²³, it must be the claimant's personal belief that the practice is required of him or her.

Employee's Duty to Inform of Conflict

An employee has the duty to notify the employer of the conflict between his or her religious practices and a requirement of the job. In order to meet this requirement, the complainant has to show that some kind of notice has been given to the employer. The employee may not assume that, because the employer is aware of the employee's religion that the employer is also aware of the particular practices followed by persons of that religion.²⁴

Two employees of the State of Connecticut were disciplined for engaging in religious speech and proselytizing when dealing with clients. The employees were disciplined when clients complained of this behavior to the State. Each employee filed charges alleging failure to accommodate, as well as charges of First Amendment violations. The Court held that neither employee had established prima facie cases. Although it was clear that both employees had bona fide religious beliefs and had been disciplined for failing to comply with their employer's request to not engage in religious speech with clients, neither had notified the employer of their "*need to evangelize*" (emphasis supplied). On appeal, the employees argued that since the employer knew they were "born-again Christians" it should have known of this need. The Court refused to impute this knowledge to the employer. "Knowledge that [complainants] are born-again Christians is insufficient to put their employers on notice of their need to evangelize to clients. To hold otherwise would place a heavy burden on employers, making them responsible for being aware of every aspect of every employee's religion which would require an accommodation."²⁵

However, there are circumstances short of an employee giving the employer actual notice of conflict that would put an employer on notice of a potential conflict. Brown, a supervisor in a county office met with employees in his office to pray before the beginning of the workday, offered prayers in department meetings, and quoted Scripture related to "work ethics." He was reprimanded, and eventually directed to remove all religious items from his office, including a Bible which was on his desk. He was eventually fired for "lack of judgment." With respect to Brown's accommodation claim, the county said that he had not explicitly requested an accommodation. However, the Court held that "defendants were well aware of the potential conflict between their

²³ *Supra* note 13, at 4.

²⁴ *See Chalmers v. Tulon* 101 F.3d 1012, 1020 (4th Cir. 1996), in which the Court stated that "[k]nowledge that an employee has strong religious beliefs does not place an employer on notice that she might engage in any religious activity, no matter how unusual."

²⁵ *Knight v. Connecticut* 275 F.3d 156 (2d Cir. 2001).

expectations and Mr. Brown's religious activities."²⁶ "An employer need have 'only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.'"²⁷ The employer was aware of Brown's religious activities because he had previously been disciplined for those activities. This circumstance was sufficient to put the employer on notice of a conflict between Brown's religious beliefs and job requirements without receiving a specific request from Brown.

Accommodation

After an employee has presented facts that establish a prima facie case, the burden of production shifts to the employer to "demonstrate that it cannot reasonably accommodate the complainant without incurring undue hardship, or that complainant has been accommodated."²⁸

The employer's duty to accommodate a current or prospective employee's religious practices was addressed by the United State Supreme Court in *Trans World Airlines v. Hardison*.²⁹ In that case, the Court was asked to address the issue of what constitutes an "undue hardship" on the conduct of the employer's business. An employee requested the accommodation of a schedule change, so that he did not have to work on Saturday, the Sabbath observed by his religion. The requested accommodation would require TWA to either allow Hardison to work a four-day week, filling his position with a supervisor or another worker paid at overtime rates; or to breach the union's seniority system by allowing Hardison to swap shifts with another employee. The Court, noting that neither Congress nor the EEOC guidelines clearly defined an employer's duty of accommodation,³⁰ held that "[t]o require TWA to bear more than a de minimus cost in order to give Hardison Saturdays off is an undue hardship."³¹ Thus, a "de minimus" standard was established for the level of hardship an employer must incur when determining whether an employer has met its duty to accommodate under Title VII.

In *U.S. Airways v. Barnett*,³² a case involving an accommodation request under the Americans With Disabilities Act (ADA),³³ the Supreme Court discussed whether a seniority system "trumps" an accommodation claim. Although the ADA's duty of accommodation for a disability is different from the duty owed under Title VII, the Court relied in part on its reasoning in *Hardison* to decide that an able-bodied employee's right,

²⁶ *Brown v Polk County* 61 F.3d 650, 654 (8th Cir. 1995).

²⁷ *Id.*, citing *Heller v. EBB Auto Co.*, 8F.3d 1433,1439 (9th Cir. 1993).

²⁸ *Rechter v. Henderson* 2001 WL 284773 (E.E.O.C) at 2.

²⁹ 432 U.S. 63 (1977).

³⁰ *Id.*, at 75.

³¹ *Id.*, at 84.

³² 535 U.S. 391 (2002). Barnett had been injured on the job in his previous position as a cargo handler. Employer placed Barnett in the mail room, a job which was less physically demanding. Barnett later was terminated from this position when employees with more seniority bid on it and "bumped" him. Barnett claimed that the employer should have let him retain the mailroom position as an accommodation for his disability. The Court held that, in this case, it would not be a reasonable accommodation to require the employer to violate the terms of the seniority system established under a collective bargaining agreement.

³³ 42 USCS §§ 12001 et seq.

through a seniority system, to bid on a job took priority over a disabled employee's right to keep that same position as an accommodation. However, the Court went on to explain that in spite of a seniority system, a plaintiff may be able to show that "the requested 'accommodation' is 'reasonable on the particular facts.'"³⁴ For example, an employee may show that the "employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed – to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference."³⁵

The existence of a seniority system alone, therefore, will not relieve an employer of its duty to offer a reasonable accommodation for a religious conflict. In order to show undue hardship, the employer would also have to show that *any* accommodation would violate the system. In *Balint v. Carson City, Nevada*,³⁶ the Ninth Circuit addressed the issue of whether *Hardison* would relieve an employer of the duty to accommodate an employee's religious beliefs solely because of the existence of a seniority system. Balint, the complainant, was offered a job in the Sheriff's Department of Carson City. She requested a split shift in order to accommodate her strict observance of a Saturday Sabbath. After Balint was told that there could be no accommodation, she withdrew her application and filed suit. The employer relied on the existence of a seniority system in defending its refusal of Balint's request, without considering whether or not granting her request would violate the system, thus imposing more than a de minimus cost to the employer. The Court reversed the district court's summary judgment for the employer, stating that "the mere existence of a seniority system does not relieve an employer of the duty to attempt reasonable accommodation of its employees' religious practices, if such an accommodation can be accomplished without modification of the seniority system and with no more than a de minimus cost."³⁷

The Supreme Court further clarified the employer's duty to reasonably accommodate an employee's religious conflict under Title VII in its decision in *Ansonia Board of Education v. Philbrook et al.*³⁸ In *Philbrook*, a public school teacher was a member of a religion that required him to observe six holy days each year and to not work on these days. The collective bargaining agreement between the school district and the teacher's union allowed only three days annual leave per year for religious purposes, and did not allow the use of personal business leave for religious purposes. Although the school district allowed teachers to use unpaid leave for additional religious leave, Philbrook requested that the district accommodate his need for more than three days for religious observance by allowing him to either use personal business days or to allow him to take paid leave and to hire a substitute to be paid by him. Holding that the school district had offered a reasonable accommodation by allowing Philbrook to take unpaid leave, the Court stated that "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not

³⁴ *Supra* note 32 at 405.

³⁵ *Id.*

³⁶ 1880 F.3d 1047 (9th Cir. 1999).

³⁷ *Id.* at 1049.

³⁸ 479 U.S. 60 (1986).

further show that each of the employee's alternative accommodations would result in hardship ... the extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship."³⁹ The *Ansonia* decision had the effect of modifying the application of a portion of the EEOC guidelines with respect to reasonable accommodation which states that "when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities."⁴⁰ Although the guidelines still contain this provision, a footnote in the *Ansonia* decision states that "to the extent that the guideline ... requires an employer to accept any alternative favored by the employee short of undue hardship, we find the guideline simply inconsistent with the plain meaning of the statute."⁴¹ The EEOC responded to the *Ansonia* decision by stating that 29 CFR § 1605.2(c)(2)(ii) should be used in determining whether an accommodation offered by the employer is reasonable in light of an employee's employment status.⁴² Later circuit court decisions have interpreted *Ansonia* to mean that the employer is not required to offer the "most reasonable" accommodation or the one that the employee favors.⁴³

Types of Accommodations

The Fifth Circuit has described two "fundamental" ways in which accommodation can take place: "(1) an employee can be accommodated in his or her current position by changing working conditions, or (2) the employer can offer to let the employee transfer to another reasonably comparable position where conflicts are less likely to occur."⁴⁴ Requested accommodations in cases reported since 2000 generally fall into the first category, with the requesting employee to remain in the position he or she held at the time of the request: Among the types of accommodations requested were scheduling or reassignment of duties, allowing the wearing of religious dress or symbols, the display of religious artifacts, and religious speech. Within each category of accommodation, outcomes may differ, depending on whether or not the employer is a private or public entity.⁴⁵

³⁹ *Id.* at 68, 69.

⁴⁰ 29 CFR § 1605.2(c)(2)(ii)

⁴¹ *Supra* note 9, footnote 6 at 69.

⁴² Policy Statement on *Ansonia Board of Education v. Philbrook* and Religious Accommodation, EEOC Compliance Manual Vol.II § 628.

⁴³ *See supra* note 12. Employer offered three alternative accommodations which employee rejected, and *Cosme v. Henderson* 287 F.3d 152 (2nd Cir. 2002), in which employer made at least four different offers of accommodation, which were all rejected by employee.

⁴⁴ *Bruff v. North Mississippi Health Services* 244 F.3d 495 (5th Cir. 2001).

⁴⁵ Employees of public employers are also protected against "state action" by the First Amendment protections for speech and religion and by the Fourteenth Amendment's guarantees of equal protection. There are also regulations and guidelines that afford special protection to Federal employees, notably 5 CFR 550.1002 which provides for compensatory time off for religious observance and the Office of Personnel Management's "Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, CCH Employment Practices Guide 3903-13 ¶3814. For the purpose of this paper, only the accommodation claims will be addressed here.

Scheduling or Reassignment of Duties

“Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules.”⁴⁶ EEOC guidelines suggest three alternatives that an employer may consider when offering a schedule accommodation. They are voluntary substitutes and “swaps,”⁴⁷ flexible scheduling,⁴⁸ and lateral transfer and change of job assignments.⁴⁹

As following three recent cases illustrate, requests to a private employer for scheduling changes are often denied, sometimes due to conflicts with collective bargaining agreements and sometimes due to an employer’s unwillingness to disturb the status quo or to ask other employees to help with the accommodation. It is not difficult for most private employers to argue that any change in scheduling would result in more than a de minimus cost and therefore, according to *Hardison*, an undue hardship.

The Sixth Circuit relied on *Hardison* in reaching its decision in *Creusere v. James Hunt Construction*.⁵⁰ Creusere, a carpenter, refused Saturday work because it conflicted with his religious beliefs, but instead offered to work on Sunday. His employer laid him off for not working on Saturday, and Creusere filed suit for religious discrimination. The union contract would have required the employer to pay higher wages for Sunday work than for Saturday work. Because of this, the employer was able to show that the cost of accommodating Creusere would be more than de minimus and would therefore impose an undue hardship.

Two trucking firms relied on *Hardison* when they denied drivers the right to refuse overnight runs with female partners. In the Fifth Circuit case of *Weber v. Roadway Express*,⁵¹ an employee, Weber, informed the employer that his religious beliefs as a Jehovah’s Witness prohibited him from making overnight runs with a female who was not his wife. The employee’s supervisor informed him that “working with women was part of his job and that he would have to work with women or would not receive any driving assignment.”⁵² Employee then filed suit against his employer for religious discrimination for failure to provide a reasonable accommodation for his religious beliefs. Weber established a prima facie case by informing his employer of his religious beliefs and the conflict between those beliefs and the job requirement of taking whatever run came up, regardless of whether the partner was female. He had also requested an accommodation – that he be skipped over if the run he would be scheduled for would be with a woman driver. The district court concluded that this accommodation would force the employer to deny the run and job preferences of Weber’s co-workers, which would constitute an undue hardship, according to *Hardison*. On appeal, the Fifth Circuit elaborated on the undue hardship that the employer could incur. If Weber were

⁴⁶ 29 CFR § 1605.2 (d)(1).

⁴⁷ 29 CFR § 1605.2 (d)(1)(i).

⁴⁸ 29 CFR § 1605.2 (d)(1)(ii).

⁴⁹ 29 CFR § 1605.2 (d)(1)(iii).

⁵⁰ 83 Fed. Appx. 709 (2003).

⁵¹ 199 F.3d 270 (5th Cir. 2000).

⁵² *Id.* at 272.

skipped, it “*might* (emphasis added) lead his substitute to accept a shorter run”⁵³ or the substitute *might* (emphasis added) also receive less rest and time off between runs.”⁵⁴ This conclusion conflicts with 29 CFR 1605.2(c) which states that a “refusal to accommodate is justified only when an employer ... can demonstrate that an undue hardship *would in fact* (emphasis added) result from each available alternative method of accommodation.” Although the Court interpreted *Hardison* as providing authority for its statement that “the mere possibility of an adverse impact on co-workers” is enough to constitute undue hardship,⁵⁵ *Hardison*, in fact, does not go this far. The hardship discussed by the Court in *Hardison* referred not to the mere possibility of disadvantaging other workers, but discussed instead the effects that *would* have occurred had the requested accommodation been implemented – “[i]t could have done so only at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends.”⁵⁶

The situation in *Hardison* can also be distinguished from *Weber* in that *Hardison*’s Saturday shift would have to have been covered by another employee and by the fact that TWA was constrained by the terms of a seniority system pursuant to a collective bargaining agreement. TWA would have had to breach the system to require a replacement, since no one was willing to trade shifts voluntarily. The employees who would have been affected by an accommodation in *Weber*, on the other hand, were “casual” drivers⁵⁷ who were not under contract and were not protected by a formal seniority system. In *Weber*, the employer did not show that, in fact, any substitute driver would incur any more harm from being assigned to the run *Weber* skipped than he or she would have under normal shift assignments. Nevertheless, the Court held that *Weber*’s requested accommodation would impose more than a de minimus cost.

Weber also challenged the employer’s refusal to accommodate by citing the employer’s policies that would allow drivers to be skipped for non-religious reasons. The Court found that these non-secular exceptions to the assignment system were de minimus in that they were flexible and would only be accommodated if convenient to the business, whereas *Weber*’s request would be inflexible in that the employer would have to commit to skipping him, regardless of any other circumstances.⁵⁸ This commitment, in addition to the hypothetical burden on other employees, was considered to be more than de minimus cost to the employer. Therefore, the employer was not obligated to offer the accommodation to *Weber*.

In 2002, the Sixth Circuit heard a case with facts similar to those in *Weber*. However, in *Virts v. Consolidated Freightways*⁵⁹ all the truck drivers who would be affected by a “skipping” agreement between the employer and complainant *Virts* were subject to a collective bargaining agreement. The employer stated that “although

⁵³ *Id.* at 274.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Supra* note 29 at 81.

⁵⁷ *Id.* at 272.

⁵⁸ *Id.* at 275.

⁵⁹ 285 F.3d 508 (6th Cir. 2002).

attempts were made to come up with a resolution, there was not any accommodation that could be made for Plaintiff which would not violate the seniority provisions of the collective bargaining agreement.”⁶⁰ In *Virts*, the Court correctly applied the principles set forth in *Hardison*, finding that the employer was not required to violate an existing seniority system in order to provide an accommodation for Virts.

A review of EEOC decisions over the past three years indicates that some employees in the public sector were more successful in receiving scheduling accommodations than were those in the private sector. In each of the following three cases, the reasonableness of accommodation was at issue.

Postal employee Hoffman had voluntarily swapped shifts with a co-worker for over one year in order to not work on Sundays, the day he observed as the Sabbath.⁶¹ This voluntary arrangement, although technically classified as a “temporary shift change”, continued from April, 1996 until June, 1997, with Hoffman and his co-worker submitting quarterly forms to maintain this shift swapping arrangement. At the end of that time, Hoffman’s supervisor informed him that he would need to change back to his “regular” shift and would need to take annual and sick leave if he wanted to have Sundays off, even though the co-worker was still willing to swap shifts.

In holding for the complainant Hoffman, the EEOC distinguished the facts of this case from both *Hardison* and *Ansonia*. Since the collective bargaining agreement in question does not prohibit shift swapping, and since the arrangement between Hoffman and his co-worker did not deny another employee a shift preference, *Hardison*’s ruling with respect to bona fide seniority systems does not prevent this arrangement.⁶² *Ansonia*, as well, does not relieve the employer of the duty to offer a reasonable accommodation. Where there is more than one accommodation possible, the one that would impose the least burden on the employee should be considered. This is not the same as requiring an employer to offer the accommodation most favored by the employee.⁶³

In another *Cosme v. Henderson*⁶⁴, United States Postal Service case, the Second Circuit found that the employer had gone beyond its duties to offer accommodation under *Ansonia* by offering the complainant at least four different accommodations when he requested Saturdays off. “Given that [employer’s] multiple offers of accommodation were reasonable, appellant was not entitled to skip work on Saturdays after bidding on a position he knew would require work on his Sabbath.”⁶⁵ The employer did not discriminate against the employee when it disciplined him for failing to report to work on Saturdays.

⁶⁰ *Id.* 513.

⁶¹ *Supra* note 13.

⁶² *Id.*, at 4.

⁶³ *Id.*

⁶⁴ *Cosme v. Henderson* 287 F.3d 152 (2d Cir. 2002).

⁶⁵ *Id.* at 160.

In the November, 2003, decision in *Darland v. Rumsfeld*⁶⁶ the EEOC found that, although the employer had allowed complainant two hours off on Sundays in order to allow him to attend worship services, it had failed to “demonstrate that allowing complainant to have Sundays off would pose an undue hardship to the facility”⁶⁷ and that there was no evidence that the “facility’s operations would have been adversely affected.”⁶⁸ Instead of considering voluntary shift swaps or other scheduling options, the agency had “summarily found that any accommodation other than two hours off on Sundays would cause an undue hardship to the facility.”⁶⁹ In failing to consider other options, the employer had not met its duty to reasonably accommodate Darland’s beliefs.

Religious Dress or Artifacts – Public Employers

A recent district court dealt with the issue of whether the Eleventh Amendment bars plaintiff’s claim against a State for failure to accommodate under Title VII.⁷⁰ Patricia Holmes, an Indiana social worker sued her employer, Marion County (the State), for failure to accommodate her religious requirement of wearing a geles, a religious headwrap. Holmes’ supervisor instructed her to remove the geles or be disciplined for a dress code violation. Marion County, Indiana, challenged Holmes’ right to sue it under Title VII requirement of religious accommodation, claiming immunity under the Eleventh Amendment. The district court denied the State’s motion to dismiss. The State appealed and the district court’s decision was vacated.⁷¹ The Seventh circuit later *vacated* its previous order and granted Holmes an *en banc* hearing. The parties voluntarily dismissed at this point, and settled for an undisclosed amount.⁷² The only remaining court decision on record, therefore, is the one announced by the district court: “The State is not immune from Plaintiff’s failure to accommodate claim under Title VII because Congress validly exercised its authority under § 5 of the Fourteenth Amendment.”⁷³ It appears that no other States have raised this issue.

Whether an accommodation to allow an exception to dress code or to allow display of religious artifacts in an employee’s workspace is reasonable is more often an issue faced by public employers than by those in the private sector. This is due, in part, to the conflict between the duty of the public employer to accommodate an employee’s religious beliefs under Title VII, the employer’s duty under the Establishment Clause⁷⁴ to not appear to endorse a particular religion and the employer’s duty to not interfere with an employee’s rights under the Free Exercise Clause.⁷⁵

⁶⁶ 2003 WL 22763227 (E.E.O.C.).

⁶⁷ *Id.* at 3.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Supra* note 1.

⁷¹ 334 F.3d 618 (7th Cir. 2003).

⁷² Interview with Deborah E. Albright, counsel for Patricia Holmes, in Indianapolis, Ind. (February 6, 2004).

⁷³ 184 F. Supp. 2d 828, 838 (S.D. Ind., 2002).

⁷⁴ U.S. Const. amend. I.

⁷⁵ *Id.*

Public employers are required to balance their responsibilities as employers and as governmental units. This need for balance was addressed by the U.S. Supreme Court in a case dealing with a teacher's free speech rights and the employer's public service interests. "The problem ... is to arrive at a balance between the interests of the [employee], as a citizen ... and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."⁷⁶ Although this statement was made in the context of a First Amendment claim by an employee, it is also applicable to challenges faced by public employers when request for accommodation are made by employees who want to display religious items like pictures, Bibles, and other religious literature. The public employer must balance its duty to accommodate under Title VII with its duty to not appear to "endorse" any particular religious viewpoint. By appearing to endorse a religion, the employer could expose itself to liability under the Establishment Clause, a liability which would impose more than a de minimus cost on the employer.

*Juhl v. Ashcroft*⁷⁷ is a recent EEOC decision that illustrates this challenge for a public employer. A corrections counselor at a federal corrections facility was instructed by her supervisor to remove religious articles from her office in order to maintain a more professional atmosphere. This action was precipitated by one inmate's complaint about the counselor's "attempts at conversion or religious counseling."⁷⁸ It appeared from the record, however, that only one person complained. However, the Warden of the facility was concerned that the items would "give [inmates] the impression of being so committed to a particular religion that [complainant was] incapable of responding fully to the counseling concerns of an inmate who adheres to a different religion."⁷⁹ The Warden was unable to produce any evidence that the counselor's work was negatively impacted by the articles in her office, and therefore the employer was unable to prove that permitting complainant to display the articles was an undue hardship.

A similar conclusion was reached by the Eighth Circuit in *Brown v. Polk County*⁸⁰ when it held that, absent evidence that would indicate that Brown's personnel decisions were affected by his beliefs,⁸¹ the employer had failed to show how permitting religious objects in an employee's office and allowing an employee to pray and quote Scripture would result in undue hardship. The County could not produce any evidence that Brown's beliefs affected his hiring decisions, that they resulted in a showing of favoritism, or that they had a negative effect on office morale. The County relied on its belief that Brown's activities "had the 'potential' ... effect of 'generating an impression of preference for those who share similar beliefs'"⁸² The Court held that the hardship claimed by the County was too hypothetical to meet the standard of undue hardship and that the County had discriminated against Brown on the basis of religion.

⁷⁶ *Pickering v. Board of Education* 391 U.S. 563, 568 (1968).

⁷⁷ 2001 WL 1180901 (E.E.O.C.)

⁷⁸ *Id.* at 3.

⁷⁹ *Id.* at 5.

⁸⁰ *Supra* note 26.

⁸¹ *Id.* at 657.

⁸² *Id.*

Religious Speech – Private Employer

Employers are sometimes asked to accommodate an employee's religious speech. Private employers are not constrained by the free exercise or free speech requirements of the First Amendment as are public employers. Nevertheless, a private employer is required to accommodate employees' religious speech unless such accommodation would be an undue hardship. Frequently, employers are called upon to balance the requesting employee's rights against the rights of other employees to not be subjected to religious harassment or a hostile environment due to religion.

*Wilson v. U.S. West Communications*⁸³ is cited by many Circuits in decisions involving an employee's "religious need to impose personally and directly on fellow employees, invading their privacy and criticizing their personal lives..."⁸⁴ and the employer's duty to protect the rights of fellow employees. Plaintiff Wilson wore a button with a color photograph of an eighteen to twenty week old fetus, claiming that she had taken a religious vow to be a "living witness." The button caused disruptions in the workplace and upset fellow employees, even those who agreed with plaintiff's "pro-life" views. Employer U.S. West offered Wilson three reasonable accommodations, but plaintiff refused all of them. Two employees filed grievances based on plaintiff's button, and some accused plaintiff's supervisor of harassment for not resolving the issue. The Circuit Court followed *Ansonia*, finding that employer had offered reasonable accommodations which discharged its duties under Title VII.

The 2004 case of *Peterson v. Hewlett-Packard*⁸⁵ describes an "anti-gay" campaign undertaken by an employee in response to his employer's diversity campaign which featured five posters of employees, one of them highlighting the interests of a gay employee. Plaintiff Peterson printed scriptural passages condemning homosexuality in large font and posted them in an area of his cubicle that was visible to employees and customers who passed by. His supervisor determined that these posting violated the employer's anti-harassment policy and removed them. In a meeting with managers, plaintiff stated that the posters were "intended to be hurtful."⁸⁶ He requested two accommodations, both of which were refused by employer. After returning from leave, Peterson again posted the messages and was terminated. In Peterson's suit for religious discrimination, the Court ruled in favor of the employer. Neither accommodation requested by plaintiff was acceptable, because they would have "inhibited [the employer's] efforts to attract and retain a qualified, diverse workforce, which the company reasonably views as vital to its commercial success."⁸⁷ The Court stated, however, that sometimes employers may need to recognize that they may be required to accommodate an employee whose beliefs co-workers find "irritating or unwelcome" but

⁸³ *Supra* note 12.

⁸⁴ *Chalmers v. Tulon* 101 F.3d 1012 (4th Cir. 1996).

⁸⁵ 358 F.3d 599 (9th Cir. 2004).

⁸⁶ *Id.*

⁸⁷ *Id.*

added that a employer “need not accept the burdens that would result from allowing actions that demean or degrade ... members of its workforce.”⁸⁸ This opinion again reinforces an employer’s duty to balance the religion beliefs and requirements of an employee with the rights of his or her co-workers to not be subjected to harassing behavior or a religiously hostile environment.

Public Employer

The public employer faces a more difficult challenge than private employers with respect to employees’ religious speech. As representatives of “the State,” public employers must also not abridge employees’ First Amendment rights or violate employees’ Fourteenth Amendment rights to equal protection. Most cases involving a public employee’s request for an accommodation with respect to religious speech also include First Amendment and Fourteenth Amendment claims. For the purpose of this paper, only the accommodation issues will be addressed.

Public employers’ defense of undue hardship is often similar to that asserted in cases involving religious dress and religious artifacts – whether the employee’s speech leaves the impression that it is endorsed by the employer. If it is difficult for a hearer to distinguish between a speaker’s personal beliefs and those of the speaker’s employer, the employer may limit religious speech to avoid Establishment Clause violations. “[T]he Establishment Clause ... prohibits government from appearing to take a position on questions of religious belief.”⁸⁹ In *Knight v. Connecticut*, two state employees “promoted religious messages while working with clients on state business.”⁹⁰ No reasonable accommodation was available for these employees’ need to evangelize because allowing religious speech in counseling settings would compromise the State’s need to offer religion-neutral services to its clients.

DUTY TO ACCOMMODATE UNDER THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA)⁹¹ is the only other Federal law to impose a duty of accommodation on employers. However, the standard applied to determine “undue hardship” with respect to an employer’s duty to accommodate an employee’s disability under the ADA is more rigorous than the de minimus standard applied under Title VII per *Hardison*.

Under the ADA, “‘undue hardship’ means an action requiring *significant difficulty or expense...*”⁹²(emphasis added). The ADA lists four factors to be considered in determining whether an accommodation for a disabled employee would impose an undue hardship on the employer. These factors include “the nature and cost of the

⁸⁸ *Id.*

⁸⁹ *Knight v. Connecticut*, 275 F.3d 156, 165 (2d Cir. 2001), citing *County of Allegheny v. Am. Civil Liberties Union* 492 U.S. 573, 593-94 (1989).

⁹⁰ *Supra* note 35.

⁹¹ *Supra* note 33.

⁹² 42 USCS 12111 (10)(A).

accommodation,” “the overall financial resources of the facility or facilities” including the “impact upon the operation of the facility,” the “overall financial resources” of the employer, and “the type of operation or operations” of the employer, including the “composition, structure and functions of the workforce.”⁹³ E.E.O.C. regulations include a fifth factor, “the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties...”⁹⁴

The inclusion of the word “significant” in referring to undue hardship under the ADA imposes a higher duty on an employer than the duty to accommodate for religion under Title VII. However, with respect to bona fide seniority systems, a Sixth Circuit decision involving an employee’s request for accommodation of a disability under the ADA indicates that GM could not transfer or reassign employee “without violating its obligations under the collective bargaining agreement and, as such, GM could not provide her an accommodation”⁹⁵ This would be the same result that would be reached if a de minimus standard had been applied, and in fact the Court looked to its earlier decision in *Hardison* for support of its reasoning.

WORKPLACE RELIGIOUS FREEDOM ACT OF 2003⁹⁶

The Workplace Religious Freedom Act of 2003 (WRFA) was introduced in the U.S. Senate April 11, 2003, by Republican Senator Rick Santorum of Pennsylvania and referred to the Committee on Health, Education, Labor, and Pensions on the same day. It is co-sponsored by a bipartisan group of twenty-one Senators – ten Republicans and eleven Democrats. The WRFA of 2003 is endorsed by such diverse groups as American Jewish Congress, Anti-Defamation League, Baptist Joint Committee on Public Affairs, International Council of Christians and Jews, Islamic Supreme Council of America, Sikh Council on Religion and Education, and National Council of Churches of Christ.⁹⁷

The WRFA is a proposed amendment to Title VII which would add provisions to define “undue hardship” in terms of “significant difficulty or expense,”⁹⁸ and includes factors to be considered in making that determination. These factors, listed under § (j) (3) include “(A) the identifiable cost of the accommodation..., (B) the overall financial resources and size of the employer involved..., and (C) ... the geographic separateness or administrative or fiscal relationship of the facilities.” These are similar to the factors listed under the ADA. However, the WRFA’s list does not include any of ADA’s consideration of the “impact upon the operation of the facility” or any reference to the composition and structure of the workforce. It would also modify the definition of “employee” by adding terminology similar to the ADA: one who “with or without reasonable accommodation, is qualified to perform the essential functions of the [job].”⁹⁹

⁹³ 42 USCS 12111 (10)(B).

⁹⁴ 29 CFR 1630.2(p)(2).

⁹⁵ *Lockard v. General Motors Corp.* 52 Fed. Appx. 782 (2002), 786-787, 2002 U.S. App. Lexis 25787.

⁹⁶ S. 893, 108th Congress (2003), available at <http://thomas.loc.gov>

⁹⁷ Statements on Introduced Bills and Joint Resolutions, United States Senate, April 11, 2003, available at <http://thomas.loc.gov>

⁹⁸ *Id.* § (j)(3) et seq.

⁹⁹ *Id.* § (j)(2)(A).

Essentially, the WRFA would change an employer's duty to accommodate a religious practice to a duty similar to that of an employer under the ADA.

Versions of the WRFA have been introduced in every Congress since 1994. Previous Bills have included provisions retaining exemptions for bona fide seniority systems and for relieving an employer of the duty to pay premium pay if work performed during a premium pay period was for purposes of religious accommodation.¹⁰⁰ These exemptions are not part of the current Bill.

Senator John Kerry's statement on the introduction of the Workplace Religious Freedom Act of 2003 provides insight into the purpose the Bill. Referring to the 1972 amendment to the Civil Rights Act of 1964 which added the requirement of accommodation of religious practice, he said

[It] has been interpreted by the courts so narrowly as to place little restraint on an employer's refusal to provide religious accommodation. The Workplace Religious Freedom Act will restore the weight to the religious accommodation provision that Congress originally intended and help assure that employers have a meaningful obligation to reasonably accommodate their employees' religious practices.¹⁰¹

Critics warn that the law would allow some employee's to force their religious beliefs on co-workers.¹⁰² This is misleading, and does not reflect any reasonable interpretation of WRFA. The WRFA would not remove the employer's right to use undue hardship as a defense; but would instead require the employer to show that an accommodation would impose "significant difficulty or expense" rather than the de minimus standard imposed by *Hardison*. Employers would still be able to demonstrate that an accommodation would be an undue hardship if it would expose the employer to liability to other workers for religious harassment or for permitting a religiously hostile environment, for example, or if it would result in *significant* hardship or *significant* overtime expense paid to other employees.

CONCLUSION

The safeguards provided for employee religious practices under Title VII have been so restricted by court decisions that an employee who requests a religious accommodation must rely more on an employer's generosity and goodwill than on statutory protection. In case after case, employers have chosen to deny employees' requests for accommodation by citing some trivial difficulty, perhaps even a "potential" hardship, as undue; in other words, requiring more than a de minimus cost. As Senator

¹⁰⁰ S. 1124, 105th Congress (1997), and S.1668, 106th Congress (1999), available at <http://thomas.loc.gov>

¹⁰¹ *Supra* note 97.

¹⁰² See Kevin Eckstrom, *Faith Groups Line Up Behind Workplace Freedom Bill*, The Pew Forum on Religion and Public Life, available at <http://pewforum.org/news/display.php?NewsID=2216>, quoting an ACLU spokesman as saying "One of the goals of the religious right is to use Title VII to get extra rights that would harm other people in the workplace."

Santorum, sponsor of the Workforce Religious Freedom Act stated in introducing the Bill in the U.S. Senate, “America is distinguished internationally as a land of religious freedom. It should be a place where people should not be forced to choose between their faith and keeping their job.”¹⁰³

Congress should address these injustices by passing the Workforce Religious Freedom Act of 2003. Unfortunately, the Bill was referred to the Committee on Health, Education, Labor, and Pensions on April 11, 2003, the day it was introduced in the Senate. As of this date, there have been no hearings on the Bill and none are scheduled. It appears that the 108th Congress’ version of the WRFA will die in committee, as have all of its predecessors.

¹⁰³ *Supra* note 97.