RELIGIOUS DISCRIMINATION LAW

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CHAPTER 12

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I. INTRODUCTION[1]

As the racial and ethnic diversity of the United States workforce has increased, so too has its religious diversity. American businesses have not always embraced the different belief systems or religious practices of their employees. Inevitable conflicts arise when employees' religious views and practices conflict with their employers' reluctance to accept or, when necessary, accommodate them.

One of the main bases for religious discrimination cases has to do with work scheduling. Although the holy days associated with mainstream belief systems are built into the American business model, employment of those that adhere to other religions may require alterations to work rules and schedules to accommodate additional religious practices. Problems can arise as a balance is struck between the need to respect different cultures and faiths, and the necessity of enforcing the work rules and schedule requirements necessary for a successful business. The resulting tensions frequently result in claims based on religious discrimination.

Those who are or are perceived to be Muslim, Arab, South Asian, or Sikh face new prejudices based on national and international events taking place in the last few years. However, even those employees from a Judeo-Christian belief system have run into workplace conflicts. For example, although employers seem to have become more open to gay, lesbian and bisexual employees, such acceptance can conflict with other employees' religious beliefs that condemn homosexuality. The number of discrimination suits filed by Christian adherents who feel that their employers have discriminated against them in this manner is growing.

In *Moranski v. General Motors Corp.*, 433 F.3d 537 (7th Cir. 2005), an employee unsuccessfully sued for religious discrimination under Title VII. General Motors had developed an "affinity group" program in an effort to make diverse corporate constituencies feel more welcomed and valued, to remove barriers to productivity for all employees, and to increase market share and customer enthusiasm in diverse market segments. *Id.* at 538. Although GM had various affinity groups designed around a multitude of social identities – including people with disabilities; gays and lesbians; those of African, Chinese, and other Asian ancestry; and veterans, among others – the company expressly did not recognize any affinity groups that promoted or advocated any religious positions.[2] Moranski sought to establish a "GM Christian Employee Network" as a sanctioned affinity group. *Id.* When GM denied his application, he sued claiming religious discrimination. *Id.* at 539. The Seventh Circuit affirmed dismissal of the complaint, holding that GM's refusal to recognize *any* religiously oriented affinity group, whether Christian, agnostic, atheist, or secular humanist, meant that no religious discrimination had occurred.

Also illustrative of the conflicts that can arise when religion is brought into the workplace is *Bodett v. CoxCom, Inc.*, 366 F.3d 736 (9th Cir. 2004), which involved an evangelical Christian supervisor's claim that she was fired due to religious discrimination. Bodett had supervised an employee who was a lesbian and several times counseled that subordinate, criticizing homosexuality in general and as being contrary to Bodett's religion. *Id.* at 740-41. Although the employee was initially open to those discussions, going so far as to ask Bodett to pray with her and attending church with Bodett at least once, she eventually cited her discomfort as a reason for

[1] The author gratefully acknowledges the contributions to this paper of Monica Wood, an associate attorney of Tanner & Troutt, PC.

[2] Other companies, however, have embraced the notion that religious employees should be afforded the same opportunity to form "diversity groups" as other identifiable groups. According to a Los Angeles Times article from May 2005 summarized on the website of Business & Legal Reports, such companies as AOL, Intel, American Express, American Airlines, and Ford Motor are giving employees more freedom to express their religion in the workplace, while limiting activities to lunch or break times and continuing to prohibit proselytizing so that workplace harmony is not disrupted. *See* http:// hr.blr.com /display.cfm/id/15215 (last visited on November 29, 2006).

accepting an intra-company transfer to another city. *Id*. at 741. After investigating, CoxCom fired Bodett for having violated its harassment policy. *Id*. at 742. Affirming summary judgment in the employer's favor, the Ninth Circuit held that in response to Bodett's assumed prima facie case, CoxCom presented a legitimate, nondiscriminatory reason (a "gross violation" of the harassment policy, *id.* at 742) for Bodett's termination, and Bodett failed to come forward with any evidence of pretext. *Id*. at 746. That is, she failed to satisfy her burden of persuasion that "religious discrimination more likely motivated Cox to terminate her. [Citation omitted.] Reliance on her discipline and complaint-free record is not sufficient to raise an inference that Cox was more likely motivated by her religion than by the behavior complained of by [the subordinate]." *Id.* at 745.

An employer must make also make an effort to investigate whether an employee has a valid objection to corporate "tolerance" efforts, and to see whether some accommodation can be reached. That was the result of a bench trial in *Buonanno v. AT&T Broadband, LLC*, 313 F. Supp. 2d 1069 (D. Colo. 2004), a case in which the plaintiff (a Christian) challenged his termination for declining to sign a mandatory anti-discrimination policy that required him to "value" the beliefs of his employer and fellow co-workers. Although Buonanno notified his employer in writing of his difficulty with signing an acknowledgment of this policy – he believed that some behavior and beliefs were deemed sinful by Scripture, and thus he could not "value" such behavior or beliefs without compromising his own religious beliefs – the company refused to clarify the language in the policy,[3] and would not attempt to reach any accommodation with Buonanno. *Id*. at 1075-76. As a result, "AT&T violated Title VII by failing to engage in the required dialogue with Buonanno upon notice of his concerns and by failing to clarify the challenged language to reasonably accommodate Buonanno's religious beliefs." *Id.* at 1083.

Those who file religious discrimination claims are not all persons of faith. In Florida, a former television producer, described in pleadings as a nonreligious Jew, sued WJMK Television Productions in 2003, alleging that she was fired after she complained about the company's promoting Bible study and including passages from Scripture inside paycheck envelopes. She also asserted that her employer withheld two weeks' severance pay because she would not drop a religious-discrimination complaint filed with the EEOC. *See* http://hr.blr.com/display.cfm/id/8045 (last visited November 29, 2006).

This paper focuses on recent cases relevant to practice in Texas that involve religious discrimination. It includes a discussion on the sources of protection against religious discrimination, how courts identify sincerely held beliefs, the employer's duty of reasonable accommodation, how the issue of national origin comes into play in religious discrimination cases and an overview of some of the other laws affecting religion in the workplace.

II. SOURCES OF PROTECTION AGAINST RELIGIOUS DISCRIMINATION IN THE WORKPLACE

A. First Amendment

As well as guaranteeing free speech rights,[4] the First Amendment to the United States Constitution forbids Congress from passing any law "prohibiting the free exercise" of religion, or from establishing a religion. While First Amendment concerns most directly affect only governmental employers, various federal and state laws restrict private employers from discriminating on the basis of religion.[5]

[3] Indeed, even AT&T's witnesses did not agree on what it meant to "value the differences among all of us." *Buonanno v. AT&T Broadband, LLC*, 313 F. Supp. 2d 1069, 1077-78 (D. Colo. 2004).

[4] As the Seventh Circuit has noted, unlike private entities, "a government body may not be able to open a forum for private speech and exclude from that forum speech regarding the entire subject matter of religion." *Moranski v. GMC,* 433 F.3d 537, 542 n.3 (7th Cir. 2005).

[5] The interplay between the First Amendment and Title VII is discussed, *infra*, in connection with the so-called "ministerial exception" and in connection with an employer's duty of accommodation. One court has observed that in the governmental employment context, the First Amendment "protects at least as much religious activity as Title VII does. . . . [A]ny religious activities of employees that can be accommodated without undue

B. Title VII

Foremost among these laws is Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, which makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Some eight years after enacting Title VII, Congress passed the Equal Employment Opportunity Act of 1972 and added the following definition of religion to Title VII:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, 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 business.

42 U.S.C. § 2000e(j).[6]

1. Threshold for Title VII's Application

In general, Title VII applies to employers having 15 or more employees, with the Supreme Court having recently held that this 15-employee threshold is a matter of a Title VII claim's substantive adequacy, not a jurisdictional one that can be raised defensively after a trial on the merits. *Arbaugh v. Y & H Corp.*, __ U.S. __, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) (construing 42 U.S.C. § 2000e(b)).

2. Exemption for Religious Institutions

Religious institutions are expressly exempt from Title VII's prohibition against religious discrimination. 42 U.S.C. § 2000e-1(a) ("This subchapter shall not apply to . . . 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."). Recently, in *Lown v. Salvation Army*, 393 F. Supp. 2d 223 (S.D. N.Y. 2005), the district court applied this provision to hold that employees could not sue the Salvation Army – an entity with a clear religious identity and mission – for religious discrimination. The court rejected the plaintiffs' argument of an Establishment Clause violation, an argument based on the fact that the Salvation Army receives government funding. *Id.* at 246-52.

A religious institution may, however, be sued for other types of prohibited discrimination (such as sex, race, and national origin) unless the so-called "ministerial exception" is found to apply. *See, e.g.,* EEOC Policy Guidance: *Religious Organizations that Pay Women Less than Men in Accordance with Religious Beliefs* (1990) (religious organization may not pay women less than men even if policy is in accordance with its religious beliefs).

3. Ministerial Exemption from Title VII

This exception has been generally held applicable where the plaintiff occupies a ministerial position, as opposed to performing an essentially secular job. The Fifth Circuit was the first to articulate the theory of a ministerial exception, in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). There, the court held that applying the provisions of Title VII to the employment relationship existing between the plaintiff (an ordained minister) and her church "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause." *Id.* at 560. Only in rare instances,

hardship to the governmental employer . . . are also protected by the first amendment." *Brown v. Polk County, Iowa*, 61 F.3d 650, 654 (8th Cir. 1995).

[6] The Supreme Court has noted the awkwardness of this language in that an employer's duty to accommodate is conceptually separate from a definition of religion. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986) ("The reasonable-accommodation duty was incorporated into the statute, somewhat awkwardly, in the definition of religion.").

where a compelling state interest in regulation of the subject within the state's constitutional power to regulate is shown, can a court uphold a state action that imposes even an incidental burden on the free exercise of religion. *Id.* at 558; *see also Combs v. Central Texas Annual Conf. of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (discussing the Free Exercise Clause's bar to an employment discrimination claim filed by a church's spiritual leader).

Justice Fletcher of the Ninth Circuit, in a concurring opinion, described the ministerial exception and its rationale as follows:

> Title VII does not contain an exception for plaintiffs employed as ministers. Rather, the "ministerial exception" to Title VII is carved out from the statute based on the commands of the Free Exercise and Establishment Clauses of the First Amendment. Because the "ministerial exception" is carved out of the otherwise applicable requirements of Title VII, the scope of the exception is limited to that which is required by the First Amendment. The ministerial exception protects the church's interest in choosing its ministers, and in deciding on the duties to be performed by those ministers. For example, the ministerial exception permits the Catholic Church to restrict the priesthood to men, and permits a church to prescribe the duties of a minister, free from scrutiny under Title VII.

Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 791 (9th Cir. 2005) (*op. denying reh'g en banc*) (Fletcher, J., concurring).[7]

The panel that earlier decided *Elvig* declined to allow damages to the plaintiff (an associate pastor who claimed she was sexually harassed by her church's pastor) for having been terminated, or for having been prevented from seeking ministerial employment at other churches, holding that those actions came within the ministerial exception and that damages for those actions would entail an unconstitutional intrusion into the ministerial relationship. On the other hand, the panel did allow Elvig to seek damages for the sexual harassment and retaliation she alleged:

> The termination of Elvig's ministry and her inability to find other pastoral employment are consequences of protected employment decisions. Consequently, a damage award based on lost or reduced pay Elvig may have suffered from those employment decisions would necessarily trench on the Church's protected ministerial decisions. The same would be true of emotional distress or reputational damages attributable to those decisions. On the other hand, Elvig may recover for emotional distress and reputational harm caused by the sexual harassment itself – or by retaliatory harassment – because such harassment implicates . . . decisions the ministerial exception does not protect.

Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 966 (9th Cir. 2004); *See also Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996 (D. Kan. 2004) (former pastor's sexual harassment claims not barred by ministerial exception).

The past two years have seen a number of other cases involving the ministerial exception. For example, the Ninth Circuit applied its reasoning in *Elvig* and the earlier case of *Bollard v. California Province of the Society of Jesus*, 106 F.3d 940 (9th Cir. 1999) (also holding that sexual harassment claims fall outside the ministerial exception), to hold that a minister could not maintain a claim that his church improperly refused to accommodate his disabilities and forced him to resign. *Werft v. Desert Southwest Annual Conference of the United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004).

In addition, expanding for the first time the ministerial exception to a claim brought under the Fair Labor Standards Act, 29 U.S.C. § 207(a), and applying it to a non-ordained position, the Fourth Circuit has held that the plaintiff was not entitled to overtime. *Shaliehsabou v. Hebrew Home of Greater Washington*, 363 F.3d 299 (4th Cir. 2004), *reh'g en banc denied*, 369 F.3d 797 (4th Cir. 2004). Shaliehsabou was a mashgiach, the person whose job

[7] The concurrence in and dissents from denial of rehearing *en banc* in *Elvig* make for quite entertaining reading.

it was to see that Jewish dietary laws were followed at his employer, a religious and charitable corporation providing elder care based on Jewish precepts and customs. The plaintiff's position, although not involving religious worship and ritual, was nonetheless central to Judaism, and the court was careful to note that "the exception does not apply to the religious employees of secular employers or to the secular employees of religious employers." *Id.* at 307.[8] *See also Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003) (applying ministerial exception to Hispanic communications director and noting that employee's duties rather than title should be examined to determine if exception applies); *EEOC v. Roman Catholic Diocese of Raleigh,* 213 F.3d 795, 805 (4th Cir. 2000) (music director deemed a minister).

Just a few months ago, the Seventh Circuit weighed in on this issue in *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006). After a dispute over Easter music, Tomic was fired from his position as the music director and organist of St. Mary's Cathedral and of the diocese itself; he claimed age discrimination. *Id.* at 1037. The appellate court affirmed dismissal of Tomic's case based on the ministerial exception, finding that because "[m]usic is an integral part of many different religious traditions," he performed tasks that were "traditionally ecclesiastical or religious." *Id.* at 1041. (internal quotation marks and citations omitted). With his usual flair, Judge Posner pithily refuted Tomic's position that his job was not essentially ministerial:

> At argument Tomic's lawyer astonished us by arguing that music has in itself no religious significance – its only religious significance is in its words. The implication is that it is a matter of indifference to the Church and its flock whether the words of the Gospel are set to Handel's *Messiah* or to "Three Blind Mice." That obviously is false.

Id. at *12-13.

Similarly, in *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, Civil Action No. 05-CV-0404, 2005 U.S. Dist. LEXIS 22546 (E.D. Penn. Oct. 4, 2005) (memo. op.), the district court concluded that because the ministerial exception is based on the Free Exercise Clause, it applies to all federal employment laws. Accordingly, the plaintiff (a non-ordained music director) could not pursue claims under the Americans with Disabilities Act (42 U.S.C. §§ 12101, *et seq.*), the Family and Medical Leave Act of 1993 (29 U.S.C. §§ 2601, *et seq.*), or state employment laws, where the position of music director was considered ministerial in nature within the Catholic Church. *Fassl*, 2005 U.S. Dist. LEXIS 22546, at *36.

A former chaplain's Title VII claims of retaliation and gender-based discrimination against her university employer (a Catholic diocesan institution) were dismissed based on the ministerial exception in *Petruska v. Gannon Univ.*, 350 F. Supp. 2d 666 (W.D. Penn. 2004). Predicting that the Third Circuit – which has not yet formally addressed the issue – would adopt the ministerial exception, the district court discussed its genesis and rationale at length, beginning with the Supreme Court's First Amendment jurisprudence as it concerns church-related matters. *Id.* at 672-73 (citing, among others, *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America,* 344 U.S. 94, 116 (1952) (Free Exercise Clause protects the power of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."); *Gonzalez v. Roman Catholic Archbishop,* 280 U.S. 1, 16 (1929) ("it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them"); *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 717 (1976) ("questions of church discipline and the composition of church hierarchy are at the core of ecclesiastical concern.")).

In contrast, an employee of a religious institution whose duties were primarily those of a registrar was not a "minister," and thus her Title VII claims of gender discrimination and hostile work environment could proceed. *Patsakis v. Greek Orthodox Archdiocese of America*, 339 F. Supp. 2d 689, 697 (W.D. Penn. 2004) (summarizing holding by

[8] Judge Luttig lodged a strenuous dissent from both the panel opinion and the denial of *en banc* review, arguing that nothing in the FLSA suggested that it was subject to the ministerial exception.

noting that "whether an individual is important to the administrative functioning of the Church is critically less significant than whether she is important to the spiritual functioning of the Church. The lowest ranking nun or monk in the abbey is still a minister, whereas a clerical or administrative employee, no matter how indispensable, is not.").

4. Bona Fide Occupational Qualification

Title VII also provides that religion (or sex or national origin) may be a *bona fide* occupational qualification if the employer establishes it as "reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e–2(e). But "an employer seeking to establish either [a business-necessity or a BFOQ defense] bears a heavy burden." *Vigars v. Valley Christian Ctr. of Dublin*, 805 F. Supp. 802, 808 (N.D. Cal. 1992) (citing *Dothard v. Rawlinson*, 433 U.S. 321 (1977), and holding that Christian school could not assert BFOQ defense as a matter of law, for purposes of summary judgment, where it terminated librarian who became pregnant because of an extra-marital affair).

As *Dothard* established, the business-necessity and BFOQ defenses provide "only the narrowest of exceptions to the general rule requiring equality of employment opportunities," and the employer must demonstrate a "manifest relationship to the employment in question," or a "compelling need" to maintain the discriminatory practice. *Dothard*, 433 U.S. at 333-34.[9]

Because of the difficulty of establishing a business-necessity or BFOQ defense, it is rarely used. In *Kern v. Dynalectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), however, the employer successfully asserted the BFOQ defense to justify restricting pilot positions within Saudi Arabia to those who agreed to convert to the Muslim faith, since non-Muslims flying into Mecca could be beheaded. To the extent the defense was raised it failed, however, in *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986), a Title VII case involving the medical school's excluding Jews from participating in hospital rotation teams sent to King Faisal Hospital in Saudi Arabia. There, the court found that the medical school had not determined whether Saudi Arabia had an official policy that would preclude Jews from participating, nor did the school even formally assert the BFOQ defense, something the Fifth Circuit attributed to a reluctance to "'rock the boat' of its lucrative Saudi contributors by asking for a definitive statement of the Saudi position. *Id.* at 533.

C. Texas Commission on Human Rights Act

Texas law affords protections to employees from discrimination-based religion under the Texas Commission on Human Rights Act (TCHRA) as well as the statute's retaliation prohibitions. The number of employment discrimination cases — including religious discrimination cases — brought by employees in state courts under the TCHRA is increasing. Because Texas courts interpret the state statute in a manner consistent with federal law, an understanding of federal case law and EEOC regulations under Title VII as well as the TCHRA is important in cases brought under state law.

A. Coverage

Religious discrimination claims under the TCHRA present some unique threshold considerations. The statute exempts religious organizations and educational institutions:

> (a) A religious corporation, association, society, or educational institution or an educational organization operated, supervised, or controlled in whole or in substantial part by a religious corporation, association, or society does not commit an unlawful employment practice by limiting employment or by giving a preference to members of the same religion.
>
> (b) [the subchapter prohibiting discriminatory employment practices] does not apply to the employment of an individual of a particular religion

[9] *Dothard* involved a challenge to an Alabama law prohibiting women from working as guards in all-male prisons; the Court held that the BFOQ defense applied where legitimate safety concerns existed, given the violence among male prisoners.

> by a religious corporation, association, or society to perform work connected with the performance of religious activities by the corporation, association, or society.

TEX. LAB. CODE ANN. §21.109 (Vernon 2006); *see also EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989); 42 U.S.C. §§2000e-1(a), 2000e-2(e)(2) (2000). Moreover, religious organizations are exempt from EEOC reporting requirements (principally on First Amendment grounds). *See EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 286-88 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982).

a. Determination of Status

Whether an employer is a religious organization is determined by evaluating whether the organization was created for, and continues to serve, a religious purpose. *Fike v. United Methodist Children's Home*, 547 F. Supp. 286, 290 (E.D. Va. 1983), *aff'd*, 709 F.2d 284 (4th Cir. 1983); *McClure v. Salvation Army*, 323 F. Supp. 1100, 1102, 1104 (N.D. Ga. 1971), *aff'd*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972); *see also Speer v. Presbyterian Children's Home & Serv. Agency*, 824 S.W.2d 589 (Tex. App.—Dallas 1991), *writ granted, vacated as moot*, 847 S.W.2d 227 (Tex. 1993). Generally, the courts will consider eight factors in evaluating whether an organization is religious in nature:

1. Whether the organization operates for profit or on a nonprofit basis (*Townley*, 859 F.2d at 619);
2. Whether an administrative agency has made a determination regarding the entity's status (*Feldstein v. Christian Science Monitor*, 555 F. Supp. 974, 978 (D. Mass. 1983));
3. Whether the entity's articles of incorporation or other pertinent documents state a religious purpose (*Townley*, 859 F.2d at 619; *Feldstein*, 555 F. Supp. at 977);
4. Whether the entity represents to the church its sectarian nature while representing to the government its secular nature (*Fike*, 547 F. Supp. at 290);
5. Whether a church is involved in the management, operations and financial affairs of the organization in question (*Feldstein*, 555 F. Supp. at 977);
6. Whether a church supports or is affiliated with the organization in question (*Townley*, 859 F.2d at 619);
7. Whether the entity adheres to or deviates from an initial religious purpose (*Fike*, 547 F. Supp. at 290); and
8. Whether the entity conducts religious activities, services or instruction (*Fike*, 547 F. Supp. at 289-90).

b. Covered Activities

The religious institution exemptions of the TCHRA and Title VII extend to all activities of a religious organization without regard to whether any particular activity is "religious" in nature. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330-39 (1987) (religious exemption applied to church owned nonprofit corporation which had terminated employees in secular jobs because they were not qualified to become members of the church).

c. Scope of Religious Organization Exemption

The religious organization exemption applies only to discrimination based on religion. Religious organizations are prohibited from discriminating on the basis of race, color, sex, disability, age, national

origin or genetic information. *See, e.g., Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 269 (N.D. Iowa 1980) ("In enacting the . . . exemption, Congress expressly, specifically and narrowly exempted religious educational institutions only from liability for religious discrimination."); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004), *reh'g en banc den.*, 397 F.3d 790 (9th Cir. 2005) (ministerial exception precluded plaintiff's Title VII claims implicating church's protected ministerial decisions, but Title VII claims for sexual harassment and retaliation could proceed); *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 325 (3d Cir. 1993) (no exemption for age discrimination); *EEOC v. Mississippi College*, 626 F.2d 477, 483 (5th Cir. 1980) (no exemption for race discrimination), *cert. denied*, 453 U.S. 912 (1981); *EEOC v. Fremont Christian Sch.*, 609 F. Supp. 344, 352 (N.D. Cal. 1984) (no exemption for sex discrimination), *aff'd*, 781 F.2d 1362 (9th Cir. 1986).

However, if the church-minister exception applies to an employee, then the First Amendment precludes application of Title VII to that employee. *See, e.g., Combs v. Central Tex. Annual Conf. of the United Methodist Church,* 173 F.3d 343 (5th Cir. 1999) (barring Title VII sex discrimination claim by female minister); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999), *cert. denied,* 531 U.S. 814 (2000) (barring ADA claim brought by choirmaster); *but see Elvig*, 375 F.3d 952 (allowing associate pastor's sexual harassment and retaliation claims to go forward).

2. Unlawful Employment Practices

The TCHRA prohibits a broad range of employment practices that discriminate on the basis of religion. The statute provides in part:

> An employer commits an unlawful employment practice if because of . . . religion . . . the employer:
>
> (1) fails and refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions or privileges of employment; or
>
> (2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any manner the status of an employee.

TEX. LAB. CODE ANN. §21.051 (2006).

The TCHRA's prohibition of discrimination encompasses both religious practices and beliefs. The statute "applies to discrimination because of or on the basis of any aspect of religious observance, practice, or belief . . ." *Id.* §21.108. As with TCHRA claims involving other forms of discrimination, Texas courts addressing alleged religious discrimination claims filed under the TCHRA are guided by federal interpretations of Title VII. *Grant v. Joe Myers Toyota, Inc.,* 11 S.W.3d 419, 422 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

In a case in which the charging party claimed that his employer discriminated against him on the basis of his Mormon religion and then discharged him in retaliation for his subsequent complaint, the EEOC obtained a consent decree awarding the employee $159,000 in monetary relief. *EEOC v. Bombardier Aerospace Corp.*, No. 3-CV-1904-M (N.D. Tex. April 15, 2005) (head of sales told charging party that his Mormon faith hindered his ability to sell jets because he could not drink and smoke with customers; summary available at http://www.eeoc.gov/litigation/settlements/settlement 04-05.html).

3. Protected Activity

The EEOC guidelines state that religious practices "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. §1605.1 (2005).

a. Religious Beliefs

A religious belief is a sincere and meaningful belief that occupies in the life of its possessor a place parallel to that filled by a supreme being. *United States v. Seeger*, 380 U.S. 163, 176 (1965). *See also Grant,* 11 S.W.3d at 422 (defining religious beliefs as "moral or ethical beliefs as to what is right and wrong

which are sincerely held with the strength of traditional religious views" (*citing* EEOC Guidelines, 29 C.F.R. 1605 (2005)). Sincere and meaningful beliefs need not be confined in either source or content to traditional or parochial concepts of religion. *Welsh v. United States*, 398 U.S. 333, 339 (1970). Accordingly, both the TCHRA and Title VII protect an employee's freedom not to hold a belief in a supreme being or other religious tenets. In *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975), the employer compelled Young, an atheist, to attend monthly staff meetings in their entirety. The employer began every meeting with a prayer and a religious presentation. Young resigned to avoid attending further staff meetings. The Fifth Circuit held that the employer's conduct constituted discrimination based on religion and that the plaintiff had suffered a constructive discharge. *Id*. at 143; *see also Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985).

b. Religious Practices

An individual's religious practices need not be responsive to the commands of a particular religious organization in order to be protected under the TCHRA or Title VII; it is sufficient that the individual's practices spring from a sincerely held religious belief. *See Int'l Ass'n of Machinists & Aerospace Workers v. Boeing Co.,* 833 F.2d 165, 169 (9th Cir. 1987), *cert. denied,* 485 U.S. 1014 (1988) (holding that Title VII required employer to reasonably accommodate an employee's unorthodox religious objections to the payment of union dues by permitting her to contribute an equivalent amount to a charitable organization). Employment discrimination statutes do not, however, protect purely secular views. *See id.*

The TCHRA's prohibition of religious discrimination encompasses personal religious beliefs that are not in the mainstream of religious thought or that are not common to all members of a particular religious group. *See* 29 C.F.R. §1605.1 (2005). The fact that no religious group espouses an individual's belief or that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is religious in nature. *See, e.g.*, *Edwards v. School Bd. of Norton, Va.*, 483 F. Supp. 620 (W.D. Va. 1980), *vacated in part on other grounds*, 658 F.2d 951 (4th Cir. 1981) (employee's belief that she could not work for eight days because of "Feast of the Tabernacles" was a protected religious practice without regard to whether her church accepted such belief); *Carter v. Bruce Oakley, Inc*., 849 F. Supp. 673 (E.D. Ark. 1993) (employee's decision to wear a beard was protected, even though his beliefs did not fit into the belief system of any traditional religion, because he genuinely believed that the Bible mandated his decision).

c. Ministerial Duties

The protection of religious practices in the workplace under the TCHRA and Title VII extends to ministerial duties. For example, a minister's attendance at his church's monthly business meetings is a religious practice. *Weitkenaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284 (D. Vt. 1974). Teaching a weekly Bible study class also is a religious practice. *Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978).

4. <u>Reasonable Accommodation</u>

a. Overview

The principal basis of liability in most religious discrimination cases involves the employer's duty of reasonable accommodation. The reasonable accommodation model is unique to religious and disability discrimination cases. The TCHRA and Title VII require a covered employer to reasonably accommodate an employee's religious observances and practices unless such accommodation would result in undue hardship.

The duty to accommodate originated in the *1966 EEOC Guidelines on Discrimination Because of Religion*, which required an employer not only to refrain from discrimination, but also to accommodate affirmatively the reasonable religious needs of its employees where such accommodation could be made without serious inconvenience to the conduct of business. 29 C.F.R. §1605.1(b)(c), 31 FED. REG. 8370 (1966). The duty of accommodation is necessary to alleviate the impact of facially neutral employer

policies upon employees with sincere convictions about working on the Sabbath or other religious observances that affect their ability to obtain employment or continue working. This concept is consistent with the general view that apparently neutral policies violate Title VII and the TCHRA if they have an adverse impact upon protected groups.

The duty of reasonable accommodation raises First Amendment issues because it requires employers to undertake affirmative efforts to protect employment opportunities for persons having particular religious beliefs. In *Amos*, *supra,* the U.S. Supreme Court addressed a First Amendment challenge to Title VII's exemption for religious organizations and held that the exemption does not violate the Establishment Clause. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos,* 483 U.S. 327, 339 (1987); *see also Edwards v. Aguillard*, 482 U.S. 578, 618 (1987) (observing in dicta that neither Title VII's prohibition of religious discrimination in general nor the duty of reasonable accommodation in particular violates the Establishment Clause).

b. Scope of Duty

Under Title VII, the duty of reasonable accommodation without undue hardship is well established with respect to employees' religious beliefs. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977); 42 U.S.C. §2000e(j) (2000). The TCHRA has expressly adopted this discrimination model:

> A provision in this chapter referring to discrimination because of religion or on the basis of religion applies to discrimination because of or on the basis of any aspect of religious observance, practice, or belief, unless an employer demonstrates that the employer is unable to reasonably accommodate the religious observance or practice of an employee or applicant without undue hardship to the conduct of the employer's business.

TEX. LAB. CODE ANN. §21.108 (Vernon 2006).

The Texas Legislature has enacted a separate provision that specifically addresses reasonable accommodation by retail employers. *Id.* §52.001. This provision requires a retail employer to accommodate the religious beliefs and practices of an employee unless the employer can demonstrate that to do so would constitute an undue hardship on the conduct of the employer's business. *Id.* §52.001(c). In addition, a retail employer may not require an employee to work during a period that the employee requests time off to attend one regular worship service a week of the employee's religion. *Id.* In a religious discrimination case brought by a cashier against Costco, the First Circuit held that the defendant had no duty to accommodate the employee's religious beliefs of displaying body modifications (she was a member of the "Church of Body Modification"). Costco offered to accommodate the employee's beliefs by suggesting that she remove her facial jewelry and insert clear plastic retainers to prevent the piercings from closing or wear a band-aid over her jewelry, but the employee insisted that she be excused from the dress code altogether. Finding that the plaintiff's position precluded Costco from exercising its managerial discretion to search for a reasonable accommodation, the court held that the only accommodation the plaintiff would consider imposed an undue hardship on the employer, which had the discretion to decide that facial piercings detracted from the professional image it aimed to cultivate. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004).

Texas employers must reasonably accommodate their employees' religious observances and practices that conflict with employment practices so that the employees may continue to work and freely exercise their religious practices. Moreover, an employer may not permit an applicant's need for religious accommodation to affect its decision whether to hire the applicant unless it cannot reasonably accommodate the applicant's religious practices without undue hardship. *See* 29 C.F.R. §1605.3(b) (2005). When an employer makes no attempt to accommodate an employee's religious observance or practice because of "hypothetical hardship," it usually will be found liable for religious discrimination. *See Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 520-22 (6th Cir. 1975) (observing that employer should attempt various methods of accommodation and point to hardships that actually resulted).

Employees will sometimes request an

accommodation from their employer to fulfill a personal preference in exercising their religious beliefs. In *Dachman v. Shalala*, 9 Fed. Appx. 186 (4th Cir. 2001), the plaintiff requested leave from work to observe the Jewish Sabbath, which began at sundown on Friday. Although the employer allowed her to leave two hours before sundown, the plaintiff contended that this was an insufficient amount of time in which to buy the bread to be served and perform other household chores before sun set. *Id*. at 192. The Fourth Circuit held that she sought an accommodation that exceeded her religious obligation, where the bakery had bread available on Thursday evenings and no tenet of Judaism mandated that all preparation for the Sabbath take place on Friday. *Id*. Even though an employer has a duty to accommodate its employee's actual beliefs, that duty does not extend to accommodating an employee's personal preferences. *Id*.

In *Tiano v. Dillard Dept. Stores, Inc.,* 139 F.3d 679 (9th Cir. 1998), a devout Roman Catholic employee asked the employer for leave during the store's holiday season to attend a religious pilgrimage to Medjugorje, Yugoslavia. The employee hoped to see a reported vision of the Virgin Mary on the pilgrimage. *Id*. at 680. Because store policy prohibited such leave during busy retail seasons, her request was denied. *Id*. at 681. When she nonetheless went on the pilgrimage without authorization, Dillard's discharged her. *Id*. In rejecting her accommodation claim, the Ninth Circuit noted that although the employee had a bona fide belief that she was "called" to go on the pilgrimage, nothing in her religious beliefs required it to occur at a particular time. *Id*. at 680; *see also Elmenayer v. ABF Freight Sys*., No. 98-CV-4061, 2001 U.S. Dist. LEXIS 15357 (E.D.N.Y. Sept. 20, 2001), *aff'd*, 318 F.3d 130 (2d Cir. 2003) (holding that employer does not have to accept employee's proposed accommodation; the only relevant inquiry is whether employer's suggested accommodation is reasonable).

i. Selection of Accommodation

An employer is required generally to examine its options and offer to make an accommodation to an employee upon being notified that a conflict exists between a particular employment practice and the employee's religious observance or practice. In the event the employer cannot devise any reasonable accommodation, it must accept any reasonable accommodation offered by the employee. *See Kendall v. United Air Lines, Inc.*, 494 F. Supp. 1380, 1387, 1391 (N.D. Ill. 1980)*, decision supplemented,* 1981 WL 27010 (N.D. Ill. Oct. 27, 1981); *Kentucky Comm'n on Human Rights v. Commonwealth, Dep't for Human Resources*, 564 S.W.2d 38 (Ky. App. 1978).

For example, in *Bruff v. North Miss. Health Servs., Inc.*, 244 F.3d 495 (5th Cir.), *cert. denied*, 122 S. Ct. 348 (2001), a counselor objected to certain job duties on religious grounds. After outlining in writing its alternatives, the hospital employer gave its employee 30 days to obtain another position in the hospital that would not conflict with her religious views. During this 30-day period the employer informed the employee about a number of vacant positions. The employer also offered to give the counselor two tests to determine her various interests and aptitudes. The Court of Appeals concluded that the employer had reasonably accommodated the employee's religious views.

An employer obtained summary judgment in a case in which it had proposed several different ways to accommodate the plaintiff's Sabbath observance as a Seventh Day Adventist; the district court held that even if the plaintiff had established a prima facie case of religious discrimination (which he had not), the mere fact that one suggested accommodation resulted in lower compensation to the plaintiff did not render that accommodation unreasonable. *Vaughn v. Waffle House, Inc.*, 263 F. Supp. 2d 1075, 1082-84 (N.D. Tex. 2003).

ii. Employee Suggestions

An employee who experiences a conflict between his or her religious practice and an employment practice is not required to suggest any accommodations to the employer. *See, e.g., Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978) ("While we feel the plaintiff should be free, even encouraged, to suggest to his employer possible ways of accommodating his religious needs, we see nothing in the statute to support the position that this is part of plaintiff's burden of proof."); *Heller v. EBB Auto Co.*,

8 F.3d 1433, 1441 (9th Cir. 1993) (plaintiff had no duty to suggest alternatives or compromise his beliefs).

iii. Duty of Cooperation

An employee needing an accommodation must cooperate when an employer suggests a reasonable accommodation in good faith. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60(1986) (an employer is required only to reasonably accommodate the employee's religious beliefs and need not offer an accommodation proposed or preferred by the employee); *Shelton v. Univ. of Medicine & Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000) (employee nurse, whose religious beliefs forbade her from participating in labor and delivery procedures that might be construed as abortions, failed to cooperate in employer's accommodation efforts where she never contacted human resources department for assistance in finding comparable position within facility as employer expressly invited her to do, and failed to establish that offered transfer to neonatal unit would also implicate her religious beliefs); *Bruff*, 244 F.3d at 501; *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982) (employee has an obligation to make a good faith attempt to accommodate his or her religious needs through means offered by the employer). The employee's obligation to cooperate does not arise until the employer shows it has taken some initial steps to reasonably accommodate the employee's religious beliefs or practices. *See, e.g., Bruff,* 244 F.3d at 501; *Heller*, 8 F.3d at 1440. Moreover, an employer's unreasonable delay in offering an accommodation may form the basis of a discrimination claim under the TCHRA and Title VII. *See Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1483 (10th Cir. 1989), *cert. denied,* 495 U.S. 948 (1990) (employer's offer of reasonable accommodation during administrative proceedings after rejecting plaintiff's employment application does not obviate religious discrimination).

c. Types of Accommodations

i. Work Schedules

Work scheduling is one of the most common issues arising in religious discrimination cases because religious beliefs and practices often require time off work for Sabbath days and religious holidays. Consequently, EEOC guidelines suggest various work scheduling accommodations. These include the employer's assignment of a voluntary substitute with similar qualifications, creation of a flexible work schedule for individuals requiring accommodation, and a determination whether a lateral transfer or a change in job assignment may resolve the conflict. 29 C.F.R. §1605.2(d) (2005). An employer is not required to grant an employee time off with pay. *See Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390-91 (10th Cir. 1984).

Employers who fail to reasonably accommodate employees' scheduling needs based on their religious beliefs violate the TCHRA and Title VII. *See*, *e.g.*, *Cooper v. Oak Rubber Co.*, 15 F.3d 1375 (6th Cir. 1994) (finding that employer unreasonably required the employee to use all her vacation leave to be off on Saturdays for religious reasons); *Brown v. General Motors Corp.*, 601 F.2d 956, 959 (8th Cir. 1979) (allowing a worker to leave at sunset every Friday required only *de minimis* cost because a regular pool of replacements was available); *Vaughn v. Waffle House, Inc.*, 263 F. Supp. 2d 1075 (N.D. Tex. 2003) (employer offered reasonable accommodation to plaintiff's Saturday Sabbath observation); *Padon v. White*, 465 F. Supp. 602 (S.D. Tex. 1979) (finding that employee who had agreed to work Saturdays in emergencies but whose employer required him to work one Saturday when there was no emergency had not been accorded reasonable accommodation); *Willey v. Maben Mfg. Co.*, 479 F. Supp. 634 (N.D. Miss. 1979) (employer made no reasonable effort to find replacement workers or reschedule employees who needed an accommodation and, thus, employer could have avoided any hardship by preparing for the employees' absence). An employer is not required to make a work schedule accommodation that would require a change in shift assignments established by a bona fide seniority system. *Balint v. Carson City,* 180 F.3d 1047 (9th Cir. 1999).

ii. Religious Dress and Grooming Practices

An employee's dress and grooming practices based on his or her religious beliefs also require reasonable accommodation. *Carter v. Bruce Oakley, Inc.*, 849 F. Supp. 673 (W.D. Ark. 1993) (requiring employer to permit employee to wear a beard because he believed it was mandated by scripture); *EEOC v. Reads, Inc.*, 759 F. Supp. 1150, 1161 (E.D. Pa. 1991) (holding that employer's refusal to hire Muslim because of rule prohibiting religious garb in classroom violated Title VII).

iii. Testing and Screening

Employers who utilize employment tests must accommodate individuals who cannot attend a scheduled test because of their religious practices, unless the accommodation is an undue hardship. *Minkus v. Metro. Sanitary Dist. of Greater Chicago*, 600 F.2d 80, 84 (7th Cir. 1979); 29 C.F.R. §1605.3(a) (2005). Employers also should be conscious of the adverse impact of pre-employment screening on certain religious groups. A person employed to obtain or assist in obtaining positions for public school employees may not inquire, directly or indirectly, about the religion or religious affiliation of anyone applying for employment in the public schools of Texas. TEX. EDUC. CODE ANN. §22.901(a)(2006). Further, preemployment inquiries about an applicant's availability during normal work hours may exclude individuals who have certain religious practices from employment opportunities. *See* 29 C.F.R. §1605.3(b)(2) (2005); *see also* Ch. 6 (The Hiring Process). Such inquiries also may be used as evidence of discrimination. *See* 29 C.F.R. §1605.3(b)(2)(3) (2005). Thus, no public or private employer should inquire about an applicant's need for religious accommodation until after making the hiring decision. *See id.*

iv. Other Accommodations

Even though a desired accommodation may be somewhat unusual, it may nevertheless be mandated by the TCHRA and Title VII. For example, in *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1487-88 (10th Cir. 1989), the applicant was a member of the Native American Church whose religious observances involved the use of peyote. His use of the substance violated the employer's drug policy and the employer refused to accommodate his religious practices. The court held that the employer had a duty to at least attempt accommodation. 892 F.2d at 1487-88.

Further, courts generally will require an employer to reasonably accommodate an employee's religious beliefs on moral issues. *See Miller v. Drennon*, 56 Fair Empl. Prac. Cas. (BNA) 274 (D.S.C. 1991) (finding that employer reasonably accommodated male technician's religious beliefs which were in conflict with employer's requirement that on-call male technicians sleep in the same room as on-call female technicians), *aff'd*, 966 F.2d 1443 (4th Cir. 1992); *McGinnis v. United States Postal Serv.*, 512 F. Supp. 517 (N.D. Cal. 1980) (suggesting that employer should have attempted to accommodate the beliefs of a postal clerk who refused to distribute draft registration materials). *But see Ryan v. United States Dep't of Justice*, 950 F.2d 458 (7th Cir. 1991), *cert. denied*, 504 U.S. 958 (1992) (holding that FBI's termination of agent for his refusal to investigate pacifist antiwar protestors did not violate Title VII's reasonable accommodation requirement).

c. Undue Hardship

Many religious discrimination cases turn on the defense of undue hardship. Some considerations relevant to the defense are addressed below.

i. Genuine and Immediate Hardship

Courts draw a bright line between undue hardship that would be immediately experienced by an employer if an employee's religious practices were accommodated and the employer's projections of future hardship. The employer may not circumvent its duty of reasonable accommodation by claiming that a future hardship will result from a present accommodation. *See*, *e.g.*, *Haring v. Blumenthal*, 471 F. Supp. 1172 (D.D.C. 1979), *cert. denied*, 452 U.S. 939 (1981). Further, an employer's mere assumption that many more employees who exercise the same

religious practices as the person being accommodated also may need accommodation is not evidence of undue hardship. *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *see also* 29 C.F.R. §1605.2 (2005).

ii. Cost Considerations

Employers are not required to make accommodations if the costs that would be incurred are more than *de minimis*. *See* 29 C.F.R. §1605.2(e) (2005); *see also Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977). Moreover, such considerations are not limited to the direct expenditure of money. Any costs in efficiency or monetary expenditures that are more than *de minimis* may constitute an undue hardship. *See Mann v. Frank*, 7 F.3d 1365, 1370 (8th Cir. 1993); *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir.) (requiring city police department to grant employees shift exceptions imposed more than *de minimis* cost because of public health, safety and welfare considerations), *cert. denied*, 515 U.S. 1152 (1995); *Favero v. Huntsville Indep. Sch. Dist.*, 939 F. Supp. 1281, 1286 (S.D. Tex. 1996) (permitting school bus drivers unpaid leave for religious observances would be an undue burden because the school district would have to provide replacement drivers involving increased cost and inconvenience), *aff'd*, 110 F.3d 793 (5th Cir. 1997).

iii. Impact on Other Employees

A significant consideration in determining undue hardship is the effect of a requested or needed accommodation on other employees. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the plaintiff sought a change in shift assignments to accommodate his religious beliefs. A collective bargaining agreement governed the employer's job and shift assignments. The Supreme Court held that it would be unreasonable to require either TWA or the union to act inconsistently with a valid collective bargaining agreement, accept replacement workers if costs would be incurred, and impose an unwanted shift on other employees. 432 U.S. at 79, 81, 84. Similarly, it is an undue hardship to require an employer to force employees to permanently switch shifts over their objections to accommodate another employee's different observation of the Sabbath. *Eversley v. MBank Dallas*, 843 F.2d 172, 176 (5th Cir. 1988). *Also see Vaughn v. Waffle House,* Inc., 263 F. Supp. 2d 1075 (N.D. Tex. 2003) (accommodation of employee's religious beliefs does not require employer to impose additional responsibilities on co-workers); *EEOC v. Dalfort Aerospace, L.P.*, 2002 U.S. Dist. LEXIS 2771 (N.D. Tex. Feb. 19, 2002) (granting summary judgment for employer where evidence showed that employer could not accommodate the beliefs of a Seventh Day Adventist in light of certain job bidding procedures in a collective bargaining agreement).

The case of *Weber v. Roadway Exp., Inc.*, 199 F.3d 270 (5th Cir. 2000), illustrates the undue burden element in religious discrimination cases. Shortly after being hired as a truck driver, plaintiff, a Jehovah's Witness, learned that Roadway employed female - drivers on overnight runs. Plaintiff immediately contacted his supervisor to notify him that he could not accept any run that included a female partner. *Id.* at 272. He was notified that if he did not accept these assignments, he would not be given any other assignments. He subsequently filed this action. The district court entered summary judgment in favor of the employer, which was upheld on appeal. The court concluded that Title VII does not require an employer to rearrange its schedule or force employees to "trade shifts" to accommodate the religious practices of an employee. *Id.* at 274-75. Skipping over plaintiff would constitute more than a *de minimis* expense because it would unduly burden his co-workers with respect to compensation and "time-off" concerns. Equally important, the court concluded that it was not necessary for the employer to wait until it felt the effects of plaintiff's proposal of skipping him in the rotation before it could decide to deny the accommodation. *Id.* at 274.

Also illustrative of the undue burden element is *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004). There, the plaintiff, a devout Christian, had repeatedly posted anti-homosexual passages from Scripture in his work space in response to his employer's diversity posters of various Hewlett-Packard employees labeled "Black," "Blonde," "Old," "Gay," and "Hispanic." The plaintiff's proposed

accommodation was that either the company's "Gay" posters and his own anti-homosexual postings would remain, or that both would be removed. Finding that the first alternative would result in discrimination against the plaintiff's co-workers, and that the second alternative would pose an undue burden on the company's effort to promote diversity in the workplace, the Ninth Circuit affirmed summary judgment against the plaintiff.

iv. Collective Bargaining Agreements

Scheduling accommodations constitute an undue hardship when they adversely affect seniority rights or impair neutral work scheduling requirements under an employer's collective bargaining agreement with a labor organization. *See Turpen v. Missouri-K.T. R. Co.*, 573 F. Supp. 820 (N.D. Tex. 1983), *aff'd*, 736 F.2d 1022 (5th Cir. 1984); *EEOC v. Dalfort Aerospace, L.P.*, 2002 U.S. Dist. LEXIS 2771 (N.D. Tex. Feb. 19, 2002) (granting summary judgment for employer where evidence showed that certain job bidding procedures in a collective bargaining agreement prevented employer from accommodating beliefs of Seventh Day Adventist); *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149 (10th Cir. 2000) (employee's request to have all Saturdays off for religious reasons would violate collective bargaining agreement); *Graff v. Henderson*, 30 Fed. Appx. 809 (10th Cir. 2002) (same result). Thus, an employer is not required to deviate from its seniority system in order to give an employee a shift preference for religious reasons. *Hardison*, 432 U.S. at 81; 29 C.F.R. §1605.2(e)(2) (2005).

v. Religious Activities in the Workplace

Generally, an accommodation that would allow an employee to engage in religious activities during working hours constitutes an undue hardship. *See*, *e.g.*, *Gillard v. Sears, Roebuck & Co.*, 32 Fair Empl. Prac. Cas. (BNA) 1274 (E.D. Pa. 1983) (holding that employer may insist on employee working during business hours rather than reading the Bible on the job).

vi. Illegality of Accommodation

Employers need not accommodate an employee's or applicant's religious beliefs if such accommodation would cause the employer to violate the law. *Seaworth v. Pearson*, 203 F.3d 1056 (8th Cir. 2000) (employer not liable for declining to hire plaintiff who refused to provide social security number for religious reasons, where employer's failure to provide an employee's social security number to Internal Revenue Service would cause employer to violate federal law); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9th Cir. 1999) (same holding).

III. IDENTIFICATION OF SINCERELY HELD BELIEFS

A. Historical Context

In its early cases on the subject of religious belief, the Supreme Court adopted a theistic definition. For example, in *Davis v. Beason*, 133 U.S. 333, 342 (1890), the Court stated that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character and obedience to his will." By the mid-twentieth century, that view had moderated and expanded, as seen in *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961), in which the Court noted that neither a state nor the federal government can constitutionally "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." By way of example, the Court included the following footnote: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Id.* n.11.

Soon after, in *United States v. Seeger*, 380 U.S. 163 (1965), the Court construed the conscientious-objector exemption from military service, the statutory basis of which defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior

to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." *Id.* at 165 (quoting 50 U.S.C. § 456(j)). The Court held that Congress's use of the term "Supreme Being" was meant to embrace all religions, and stated that:

> . . . the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not.

Id. at 165-66.

An element of subjectivity was thus injected into the consideration of whether one had a sincere religious belief, although the Court described the proper test as "essentially objective": "[N]amely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for the [military-service] exemption?" *Id.* at 184. The Court went on to charge draft boards and the courts with having to decide "whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." *Id.* at 184-85. *See also Welsh v. United States*, 398 U.S. 333, 338-40 (1970) ("If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons."); *Wisconsin v. Yoder*, 402 U.S. 205, 215-16 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.").

B. Religious Beliefs and Title VII

As noted earlier in this paper, Title VII was amended in 1972 to define religion as "all aspects of religious observance and practice, as well as belief . . . ." 42 U.S.C. § 2000e(j). Referring to the standards laid out in *Seeger* and *Welsh*, the applicable Equal Employment Opportunity Commission guideline states:

> In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to *include moral or ethical beliefs* as to what is right and wrong which are *sincerely held with the strength of traditional religious views*. . . . The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.

29 C.F.R. § 1605.1 (2003) (emphasis added).

The Fifth Circuit has noted that "all forms and aspects of religion, however eccentric, are protected . . . ." *Cooper v. General Dynamics, Conair Aerospace Div., Fort Worth Operation*, 533 F.2d 163, 168 (5th Cir. 1976). Another oft-cited case, *Redmond v. GAF Corp.*, 574 F.2d 897 (7th Cir. 1978), held that an alleged belief is a bona fide religious one if the belief for which protection is sought is "religious" in the person's own scheme of things, and is "sincerely held." *Id.* at 901 n.12. *See also EEOC v. READS, Inc.*, 759 F. Supp. 1150, 1159-60 (E.D. Pa. 1991) ("It is not necessary that the person's belief or practice be widely held or recognized by others as religious" in order to be protected). Although because of the breadth of this definition an employer will often accept that an employee or potential employee possesses a sincere religious belief, the issue is occasionally litigated.

For example, in *Hussein v. The Waldorf-Astoria Hotel*, 134 F. Supp. 2d 591 (S.D. N.Y. 2001), summary judgment was granted in the employer's favor on a Muslim employee's claim of religious discrimination. The employee contended that he was discriminated against when the hotel refused to let him work as a banquet waiter after he appeared for work

one evening with a beard, in violation of hotel rules. *Id*. at 592. On being questioned about the beard, Hussein responded that it "is part of my religion," although he had not previously told anyone at the hotel about his religion. *Id*. at 594. Moreover, until the night of the dispute, he had not worn a beard to work for some 14 years, nor did he claim a recent conversion to the Muslim faith; in addition, he later shaved his beard and continued to shave daily until the date of his deposition. *Id*. at 594.

On those facts, the district court concluded that even though it is "unusual to grant a summary judgment motion when a party's intent is at issue," "a reasonable jury could only find that Hussein's religious assertion was not bona fide." *Id.* at 597 (quoting *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985) ("It is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity . . . of someone's religious beliefs.").

Summary judgment in the EEOC's favor was reversed due to fact issues on the sincerity of the complainant's religious beliefs in *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.3d 49 (1st Cir. 2002), a case in which the complainant alleged that his Seventh Day Adventist beliefs should excuse him from mandatory union membership. Noting Title VII's "capacious" definition of religion, the First Circuit observed that the "statute thus leaves little room for a party to challenge the religious nature of an employee's professed beliefs." *Id.* at 56. But "while the 'truth' of a belief is not open to question, there remains the significant question of whether it is 'truly held.'" *Id.* (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)). Because the sincerity of a particular belief involves credibility issues ordinarily reserved for the trier of fact, summary judgment against the union was improper, especially where the union offered evidence suggesting that the complainant had on several occasions engaged in behavior that conflicted with the tenets of his faith. *Id.* at 56-57 ("Evidence tending to show that an employee acted in a manner inconsistent with his professed religious belief is, of course, relevant to the factfinder's evaluation of sincerity.").

Generally speaking, neither courts nor the EEOC delves into the tenets of a particular faith in order to determine whether a complainant holds a bona fide religious belief that conflicts with a work requirement. In *Hoffman v. Henderson*, 2001 WL 953477 (E.E.O.C.), Appeal No. 01A01092 (June 29, 2001), the EEOC disagreed with an agency finding that the complainant, a Catholic who contended that his beliefs precluded any work on Sundays, did not have a bona fide religious belief.

> In making this finding, [the agency] disagreed with the complainant's interpretation of Roman Catholic canons he cited in support of his Sunday Sabbath practice of not working. When courts are required to determine whether a belief is religious in nature for the purposes of Title VII, they generally avoid examining the tenets of religion. *See Edwards v. School Bd. of the City of Norton, Virginia*, 483 F. Supp. 620, 625 (W.D. Va. 1980), *vacated on other grounds*, 658 F.2d 951 (4th Cir. 1981). Further, Title VII protections are not restricted to mandated religious practices. *Heller* [*v. EBB Auto. Co.*], 8 F.3d [1433,] at 1438-39 [(9th Cir. 1993)]. The complainant persuasively stated that working on Sunday conflicts with his religious practice.

Id. at *4.

Although not a Title VII case, whether veganism qualifies as a religious creed was answered negatively in a case brought under California's Fair Employment and Housing Act ("FEHA") (Gov't Code §§ 12940, *et seq.*). *Friedman v. Southern Cal. Permanente Med. Group*, 102 Cal. App. 4th 39 (2002), *cert. denied*, 538 U.S. 1033 (2003). There, the plaintiff claimed that an offer of employment was wrongfully withdrawn after he refused to be immunized against mumps based on his strict vegan beliefs. (The mumps vaccine is grown in chicken embryos.)

Concluding that California's regulation defining religious creed is considerably narrower than the EEOC guideline quoted above (29 C.F.R. § 1605.1), the appellate court declined to hold that the plaintiff's purely moral and ethical beliefs were protected by the FEHA.[10] In determining whether a

[10] The California Code of Regulations § 7293.1 defines religious creed as "beliefs, observations or practices which

belief occupies a position parallel to that filled by God in traditional religions, the court adopted the test followed by the Third, Ninth, Eighth and Tenth Circuits[11] for recognizing a particular belief system as a religion:

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

Friedman, 102 Cal. App. 4th at 69 (quoting *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981)).

Veganism, the court held, did not satisfy this test on any ground. Veganism does not address fundamental questions such as the nature and purpose of human life or the purpose of humanity's place in the universe; nothing showed that veganism derives from a "power or being or faith to which all else is subordinate or upon which all else depends"; and veganism lacks the formal, outward signs of a religion such as "teachers or leaders; services or ceremonies; structure or organization; orders of worship or articles of faith; or holidays." *Id.* at 70.

If the California court of appeals is correct that the EEOC guidelines are broader than the state regulation at issue in *Friedman*, which indeed appears to be the case, it is likely that a plaintiff asserting that veganism is the equivalent of a sincerely held belief under Title VII would find more success in a federal court.

Often, courts simply duck the issue of whether a particular belief qualifies for Title VII's protections. In *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004), for example, the plaintiff was a member of the "Church of Body Modification" and sued for religious discrimination after being fired for refusing to cover various body piercings. Although the EEOC had determined that Cloutier's refusal to cover her facial piercings was "religiously based as defined by the EEOC" (*id.* at 130), both the district court and the court of appeals declined to rule on whether the plaintiff had a sincerely held religious belief:

> Determining whether a belief is religious is "more often than not a difficult and delicate task," one to which the courts are ill-suited. *Thomas v. Review Bd. of Indiana Employment Sec. Div.,* 450 U.S. 707, 714, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981). Fortunately, as the district court noted, there is no need for us to delve into this thorny question in the present case.

Id. at 132 (and holding that even if the plaintiff had established a prima facie case, her refusal to accept any accommodation, such as putting bandages over the facial piercings, would present an undue hardship to Costco, which had a legitimate concern about its employees' public image).

C. Distinguishing Personal Preferences from Protected Religious Beliefs

Employees will sometimes request accommodation for what is simply a personal preference in exercising their religion; those efforts usually fail.

In *Dachman v. Shalala*, 9 Fed. Appx. 186 (4th Cir. 2001), the plaintiff asked for time off to observe the Jewish Sabbath beginning at sundown Friday. Although her employer allowed her to leave two hours before sundown, she contended that this was an insufficient amount of time to pick up the bread to be served and do other household chores before the sun set. The Fourth Circuit held that Dachman was seeking an accommodation that exceeded her religious obligation, where the bakery had bread available on Thursday evenings and where nothing in Judaism mandated that all preparation for the Sabbath take place on Fridays. Even though an employer has a duty to accommodate its employees' actual beliefs,

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an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions."

[11] *See Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981); *Wiggins v. Sargent*, 753 F.2d 1528 (8th Cir. 1985); *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1994); *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996).

that duty does not extend to accommodating an employee's personal preferences.

Similarly, in *Tiano v. Dillard Dept. Stores, Inc.*, 139 F.3d 679 (9th Cir. 1998), an employee who was a devout Roman Catholic asked for leave during the store's holiday season to attend a religious pilgrimage to Medjugorje, Yugoslavia, to see a purported vision of the Virgin Mary. Because store policy prohibited such leave during busy retail seasons, her request was denied. *Id.* at 680. When she nonetheless went on the pilgrimage without authorization, Dillard's fired her. *Id.* at 681. In rejecting her accommodation claim, the Ninth Circuit noted that although the employee had a bona fide belief that she was "called" to go on the pilgrimage, nothing in her religious beliefs required it to occur at a particular time. *See also Elmenayer v. ABF Freight Sys.*, No. 98-CV-4061, 2001 U.S. Dist. LEXIS 15357 (E.D. N.Y. Sept. 20, 2001), *aff'd*, 318 F.3d 130 (2d Cir. 2003) (employer does not have to accept employee's proposed accommodation; only relevant inquiry is whether employer's suggested accommodation is reasonable).

Additionally, a plaintiff may not transmute political or other nonreligious views into a claim of a sincerely held religious belief in order to obtain Title VII's protections. *See, e.g., Seshadri v. Kasraian*, 130 F.3d 798 (7th Cir. 1996) (belief in "scrupulous honesty" not a protected religious belief); *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256 (S.D.N.Y. 2002) (wearing dreadlocks as outward expression of internal commitment to Protestant faith and to Nubian belief system was mere personal preference);[12] *Keady v. Nike, Inc.*, 116 F. Supp. 2d 428 (S.D.N.Y. 2000) (discussing graduate student's opposition to wearing Nike products as ethical or sociopolitical protest, not religious objection); *Slater v. King Soopers, Inc.*, 809 F. Supp. 809 (D. Colo. 1992) (Ku Klux Klan member claimed religious discrimination after being fired for organizing pro-Nazi rally; suit dismissed because discharge was based on political and social views rather than religious beliefs); *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977) (even though ancient Egyptians worshiped cats, belief in deeply spiritual effects of eating Kozy Kitten People/Cat Food is not religious belief; plaintiff's consumption of the cat food was thus not a religious observance).

IV. EMPLOYER'S DUTY OF REASONABLE ACCOMMODATION

A. Overview

To establish a prima facie Title VII case of religious discrimination based on failure to accommodate, a plaintiff must establish that (1) he has a bona fide religious belief that conflicts with an employment requirement; (2) he informed the employer of this belief and requested an accommodation of it; and (3) he was disciplined or discharged for failing to comply with the conflicting employment requirement. *E.g., Daniels v. City of Arlington, Tex.*, 246 F.3d 500, 506 (5th Cir. 2001); *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 224 (3d Cir. 2000); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996).[13] Once an employee establishes a prima facie case, an employer may defend by showing that it offered the employee "reasonable accommodation" or that the accommodation sought cannot be accomplished without undue burden. *United States v. Bd. of Educ.*

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[12] On the other hand, at the end of 2005 Federal Express settled a charge brought by New York Attorney General Eliot Spitzer involving claimed religious discrimination for firing several employees who wore dreadlocks as an expression of their religious beliefs and who refused to cut their hair. As part of the settlement, FedEx agreed to change its Personal Appearance Policy, educate managers about requests for religious accommodations, and periodically inform the Attorney General's office about its handling for accommodation involving the wearing of dreadlocks. The press release announcing the settlement can be found at http://www.oag.state.ny.us/press/2005/dec/dec30a_05.html (last visited on December 11, 2006).

[13] The elements of prima facie case of disparate treatment based on religion are different: A plaintiff must show that "(1) she is a member of a protected class; (2) she was qualified for [her] position; (3) she experienced an adverse employment action; and (4) similarly situated individuals outside [her] protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." *E.g., Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004).

for Sch. Dist. of Phila., 911 F.2d 882, 886-87 (3d Cir. 1990).

An employer also has a duty to investigate to see whether some accommodation can in fact be reached in the first place. In *Buonanno v. AT&T Broadband, LLC*, 313 F. Supp. 2d 1069 (D. Colo. 2004), the plaintiff (a Christian) challenged his termination for declining to sign a mandatory anti-discrimination policy that required him to "value" the beliefs of his employer and fellow co-workers. Despite conflicting interpretations of that policy within AT&T's own management, the company refused to clarify the language in the policy, nor did it attempt to reach any accommodation with Buonanno. As a result, "AT&T violated Title VII by failing to engage in the required dialogue with Buonanno upon notice of his concerns and by failing to clarify the challenged language to reasonably accommodate Buonanno's religious beliefs." *Id.* at 1083.

The concept of accommodation first arose in a 1967 EEOC guideline, which declared that employers had an obligation "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1 (1968). Five years later, with the Equal Employment Act of 1972, Congress enshrined the notion of accommodation within Title VII. *See* 42 U.S.C. § 2000e(j). The Supreme Court later recognized that the "intent and effect of [the definition of 'religion'] was to make it an unlawful employment practice . . . for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

In *Hardison* and the later case of *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986), the Court limited an employer's obligations in several respects. *Hardison* established that a requested accommodation is unreasonable if granting it would require an employer to infringe on other employees' rights. *Hardison*, 432 U.S. at 79-81. The Court thus held that the airline need not allow the plaintiff to take Saturdays off for Sabbath observance if that accommodation would require employees with greater seniority to work on those days. *Hardison* also defined "undue hardship" as arising when an accommodation results in "more than a *de minimis* cost to the employer" (a very employer-friendly standard). *Id.* at 84.[14]

In *Ansonia*, the Court held that an employer need offer only a reasonable accommodation even if an alternative proposal would better protect the employee's interests. *Ansonia*, 479 U.S. at 66-69. As a result, the school board could require the plaintiff to use unpaid leave to fulfill his religious obligations where employees were already given three days of paid leave every year for religious reasons; the plaintiff was not entitled to additional paid leave as an accommodation.

An accommodation that would require an employer to violate federal or state law presents an undue hardship, as held in *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9th Cir. 1999). There, an unsuccessful job applicant sued for religious discrimination because he had refused to provide a social security number as federal law requires, believing that such a number was a "Mark of the Beast" as prophesied in the Book of Revelation. The Ninth Circuit held that the employer was not required to violate federal or state law in order to accommodate religious beliefs, and affirmed dismissal of the plaintiff's claims.

What constitutes a hardship that is more than *de minimis* is not susceptible of easy definition. Two cases illustrate the difficulties of establishing a hard and fast rule: in *EEOC v. Ilona of Hungary, Inc.*, 97 F.3d 204 (7th Cir. 1996), *modified*, 108 F.3d 1569

[14] If the Workplace Religious Freedom Act is enacted, *Hardison*'s *de minimis* standard will be overturned. *See* S. 677, 109th Cong. § 2(a)(4) (2005) (proposing to amend 42 U.S.C. § 2000e(j) to define "undue hardship" as an "accommodation requiring significant difficulty or expense"; factors to be considered include "(A) the identifiable cost of the accommodation, including the costs of loss of productivity and of retraining or hiring employees or transferring employees from one facility to another; (B) the overall financial resources and size of the employer involved, relative to the number of its employees; and (C) for an employer with multiple facilities, the geographic separateness or administrative or fiscal relationship of the facilities.").

(7th Cir. 1997), a beauty parlor's offer to give two Jewish employees a day off other than the requested Saturday Yom Kippur observance was not a reasonable accommodation even though the employer would lose money if the two employees were absent on that Saturday.

In contrast, a Seventh Day Adventist employee's refusal to work on Saturdays relieved the employer of a duty to accommodate him where there was a staff shortage and where the company would otherwise incur a significant cost. *Stevenson v. Southport, Inc.*, Civil Action No. 96-1971, 1997 U.S. Dist. LEXIS 3198 (E.D. La. Mar. 19, 1997).

Conflicting decisions also exist in the area of seniority systems and collective bargaining agreements. For example, an employer could not automatically rely on a seniority system as a reason not to accommodate the employee's Sabbath observance, where the employer had not considered accommodating the employee by such measures as allowing employees to trade shifts or allowing them to split their days off. *Balint v. Carson City, Nevada*, 180 F.3d 1047 (9th Cir. 1999). In that case, the plaintiff was offered a job in the sheriff's department; she asked for a split shift in order to accommodate her observance of Saturday Sabbath and sued after being told that there could be no accommodation. *Id*. at 1049. The employer defended its refusal to accommodate the request for a split shift by pointing to its seniority system, and obtained summary judgment in the district court. *Id*. at 1050. Reversing, the Ninth Circuit noted 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 minimis* cost." *Id.* at 1049.

On the other hand, an employer was not required to accommodate a male truck driver's request that he not be assigned to work with female drivers on "sleeper runs" due to his Christian belief requiring him to avoid the appearance of evil; such an accommodation would result in violation of the seniority provisions of a collective bargaining agreement and would affect other employees' contractual rights. *Virts v. Consolidated Freightways Corp.*, 285 F.3d 508 (6th Cir. 2002); *see also Weber v. Roadway Express, Inc.*, 199 F.3d 270, 274 (5th Cir. 2000) (finding undue hardship where Jehovah's Witness requested not to be assigned to overnight trucking runs with female drivers; "mere possibility of an adverse impact on co-workers" was sufficient).[15] Similarly, undue hardship was found to exist where a state trooper asked to swap shifts in order to observe the Sabbath. Because shift swapping was prohibited by the existing collective bargaining agreement during one's first year of employment, the employer was "not required by Title VII to carve out a special exception to its seniority system" in order to accommodate the employee. *Sides v. NYS Div. of State Police*, No. 03-CV-153, 2005 U.S. Dist. LEXIS 12635 at *14 (N.D.N.Y. June 28, 2005) (quoting *Hardison*, 432 U.S. at 83)). *See also Creusere v. James Hunt Constr.*, 83 Fed. Appx. 709 (6th Cir. 2003) (employer established undue hardship where accommodating employee's request for no Saturday work would have required it to pay more, under union contract, for allowing him to work Sundays instead, as he offered to do).

The duty of reasonable accommodation raises First Amendment issues because it requires employers to undertake affirmative efforts to protect employment opportunities for persons having particular religious beliefs. *See, e.g., Edwards v. Aguillard* 482 U.S. 578, 618 (1987) (observing in dicta that neither Title VII's prohibition of religious discrimination in general nor the duty of reasonable accommodation in particular violates the Establishment Clause).

1. Duty to Inform Employer of Conflict

Sanctions against a plaintiff's attorney for filing a baseless failure to accommodate claim were upheld in *Chaplin v. Du Pont Advance Fiber Sys.*, 124 Fed. Appx. 771 (4th Cir. 2005). In particular, no evidence existed to suggest that the plaintiffs – white

[15] Although the Fifth Circuit relied on *Hardison* in reaching its conclusion, the Supreme Court seemed instead to require more than a mere possibility; *Hardison* discussed the effects that *would* have occurred if the employee was accommodated. 432 U.S. at 81 (company "could have [accommodated the employee] only at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends.").

Christians and self-described "Confederate Southern Americans" who alleged discrimination on the basis of race, religion, and national origin when their employer forbade the display of the Confederate battle flag – ever requested an accommodation of their purported religious beliefs before filing EEOC charges. Although they had apparently told Du Pont of their beliefs, it was not until months after filing EEOC charges that the plaintiffs asked their supervisors in writing to be allowed to display Confederate flag symbols. The court found that the attorney's "eleventh-hour attempt to bolster his clients' religious discrimination claim was disingenuous at best . . .." *Id.* at 774. *See also Reed v. Great Lakes Cos., Inc.*, 330 F.3d 931 (7th Cir. 2003) (Title VII imposes duty on employer, but also on employee to give fair warning of which employment practices will interfere with religious practices and that employee wants to have waived or adjusted).

In *Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001), two state employees were disciplined for engaging in religious speech and for proselytizing while dealing with clients, some of whom complained of this behavior. Each employee filed charges claiming failure to accommodate, and also violations of their First Amendment rights. *Id.* at 160. Their accommodation claims failed, however, because the employees did not establish that they had informed the employer of their need to evangelize. *Id.* at 167. The employees argued on appeal that since the state employer knew they were "born-again Christians," it should have known of this need, but the Second Circuit declined to impute such knowledge to the employer. *Id.* at 167-68. "Knowledge that [plaintiffs] 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." *Id.* at 168 (citing *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1020 (4th Cir. 1996) ("Knowledge that an employee has strong religious beliefs does not place an employer on notice that she might engage in any religious activity . . . .").

2. Selection of Accommodation

In general, an employer must examine its options and offer to accommodate an employee upon being notified that a conflict exists between a particular employment practice and the employee's religious observance or practice. In *Bruff v. North Miss. Health Servs., Inc.*, 244 F.3d 495 (5th Cir. 2001), a counselor objected to certain job duties on religious grounds. After outlining in writing its alternatives, the hospital employer gave the employee 30 days to obtain another position in the hospital that would not conflict with her religious views. *Id.* at 498. During this 30-day period the employer informed the employee about a number of vacant positions and offered to give her two tests to determine her various interests and aptitudes. *Id.* The appellate court concluded that the employer had reasonably accommodated its employee's religious views. *Id.* at 503.

An employer obtained summary judgment in a case in which it had proposed several different ways to accommodate the plaintiff's Sabbath observance as a Seventh Day Adventist; the district court held that even if the plaintiff had established a prima facie case of religious discrimination (which he had not), the mere fact that one suggested accommodation resulted in lower compensation to the plaintiff did not render that accommodation unreasonable. *Vaughn v. Waffle House, Inc.*, 263 F. Supp. 2d 1075, 1082-84 (N.D. Tex. 2003).

As the Ninth Circuit has noted, "[a]n employer's duty to negotiate possible accommodations ordinarily requires it to take 'some initial step to reasonably accommodate the religious belief of that employee.'" *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) (quoting *Heller v. EBB Auto. Co.*, 8 F.3d 1433, 1440 (9th Cir. 1993)). Proposing at least one reasonable accommodation suffices to discharge an employer's burden under Title VII. *E.g., Rodriguez v. City of Chicago*, 156 F.3d 771, 777 (7th Cir. 1998).

3. Employee Suggestions

In keeping with this initial duty placed on the employer, an employee who experiences a conflict between his or her religious practice and an employment practice is not required to suggest any particular accommodations to the employer. *E.g.,*

Redmond v. GAF Corp., 574 F.2d 897, 901 (7th Cir. 1978) ("While we feel the plaintiff should be free, even encouraged, to suggest to his employer possible ways of accommodating his religious needs, we see nothing in the statute to support the position that this is part of the plaintiff's burden of proof."); *Heller*, 8 F.3d at 1441 (plaintiff had no duty to suggest alternatives or compromise his beliefs).

4. Duty to Cooperate

An employee needing an accommodation must cooperate when an employer suggests a reasonable accommodation in good faith. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986); *Peterson*, 358 F.3d at 607 (rejecting failure to accommodate claim where plaintiff refused to consider other alternatives, and employer showed that the only two alternatives acceptable to plaintiff would have resulted in undue burden on employer); *Cosme v. Henderson*, 287 F.3d 152 (2d Cir. 2002) (postal service offered employee four options to accommodate his request not to work on Saturdays; employee failed to show that the alternatives were unreasonable); *Shelton v. University of Med. & Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000) (employee nurse, whose religious beliefs forbade her from participating in labor and delivery procedures that might be construed as abortions, failed to cooperate in employer's accommodation efforts where she never contacted human resources department for assistance in finding comparable position with facility as employer expressly invited her to do, and failed to establish that offered transfer to neonatal unit would also implicate her religious beliefs).

The employee's obligation to cooperate does not arise until the employer shows it has taken some initial steps to reasonably accommodate the employee's religious beliefs or practices. *E.g., Bruff*, 244 F.3d at 501. Moreover, an employer's unreasonable delay in offering an accommodation may form the basis of a discrimination claim under Title VII. *See Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1483 (10th Cir. 1989) (employer's offer of reasonable accommodation during administrative proceedings after rejecting plaintiff's employment application does not obviate viable claim of religious discrimination)

5. Failure to Accommodate As Adverse Employment Action

Employees have been unsuccessful in arguing that a failure to accommodate is in and of itself an adverse employment action as the third prong of the prima facie test requires. The Ninth Circuit, for example, affirmed summary judgment against a Jehovah's Witness who concluded that, as a new cadet in the Washington State Patrol Academy, he was unable to salute the flag or take the trooper's oath because of his religious convictions. *Lawson v. Washington*, 296 F.3d 799 (9th Cir. 2002), *reh'g en banc denied*, 319 F.3d 498 (9th Cir. 2003). Although Lawson neither refused to do so nor was disciplined or threatened with discipline, he resigned without first asking about an accommodation and then sued for constructive discharge. *Washington*, 296 F.3d at 803. Because no reasonable person in Lawson's position would have felt compelled to resign, the court held that he had failed to make out a prima facie case. *Id.* at 805.

Four judges dissented from the denial of *en banc* review, arguing that because failure to accommodate is a separate violation of Title VII regardless of the failure of the constructive discharge claim, applying the prima facie test's requirement of an adverse employment action undermines the employer's duty of accommodation. *Washington*, 319 F.3d at 499. In those judges' view, an employer's failure to accommodate, without a showing that accommodation was impossible without undue hardship, is itself an actionable wrong. *Id.* at 500.

In *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629 (6th Cir. 2003), the Sixth Circuit affirmed summary judgment against plaintiffs who argued that they were constructively discharged or, in the alternative, that the "discipline or discharge" element had been eliminated by the 1991 amendments to 42 U.S.C. § 1981a(a)(1). Those amendments added the ability to recover compensatory and punitive damages for intentional employment discrimination even if a plaintiff was not discharged or disciplined. *Id.* at 636. (The plaintiffs, Orthodox Jews, had resigned as insurance agents before the effective date of a new Allstate policy requiring offices to remain open on Friday evenings and Saturday mornings. *Id.* at 632.)

Unimpressed, the court held that discipline or discharge remains an element of a prima facie case of religious discrimination, noting that in the then-12 years since the 1991 amendments, no court had so interpreted them as to eviscerate that requirement. *Id.* at 635; *Cf. Storey v. Burns Int'l Sec. Serv.*, 390 F.3d 760, 764 (3d Cir. 2004) (employer's failure to reasonably accommodate sincerely held religious belief that conflicts with a job requirement can amount to adverse employment action unless employer demonstrates that such accommodation would result in undue hardship).

B. Recent Accommodation Cases

1. Observation of Sabbath And Holy Days

Whether an employer has reasonably accommodated an employee's request for schedule adjustments in order to observe his or her Sabbath or holy days is frequently litigated. In April 2006, the Third Circuit affirmed the district court's grant of summary judgment in the employer's favor, where a prospective employee (an Orthodox Jew) claimed that he was not hired because of his stated refusal to work on Saturdays. *Aron v. Quest Diagnostics, Inc.*, No. 05-3500, 2006 U.S. App. LEXIS 8106 (3d Cir. April 3, 2006) (unpublished). Although the plaintiff had established a prima facie case of failure to accommodate, the court found that Quest had proffered sufficient evidence of undue hardship, where accommodating Aron would result in unequal treatment of its employees and negatively affect employee morale. *Id.* at *5. In addition, Quest's policy of "floating" phlebotomists among its patient service centers meant that it could not accommodate the plaintiff by assigning him only to those centers that were closed on Saturdays. *Id.* at *3. Aron's response that Quest would incur only minimal costs by hiring and training phlebotomists to cover his Saturday obligation was rejected as an unsupported contention. *Id.* at *4.

The Sixth Circuit has reversed summary judgment where it had been granted in the employer's favor, where the employer failed to show the reasonableness of its proposed Sabbath accommodation; a proposal that consisted of nothing more than letting the employee and his union try to find someone who would work additional overtime to cover the newly instituted mandatory overtime shifts. *EEOC v. Robert Bosch Corp.*, No. 05-1099, 2006 U.S. App. LEXIS 4289 (6th Cir. Feb. 21, 2006) (unpublished). Carter, the employee, had worked for Bosch for some 25 years, during which time the company had accommodated his observance of Sabbath from sundown on Friday until sundown on Saturday. *Id.* at *2. Then, for business reasons, the company's machine shop instituted a "100% situation" in which all employees were assigned a mandatory overtime shift. *Id.* at *3. Bosch was assigned to work from 11:00 p.m. on Fridays until 7:00 a.m. on Saturdays. *Id.* When Carter and his union were unable to find anyone to take that shift, he was fired. *Id.*

The appellate court first noted that the "reasonableness of an employer's attempt at accommodation must be determined on a case-by-case basis and is generally a question of fact for the jury, rather than a question of law for the court." *Id.* at *5 (citing cases). And while allowing an employee to trade shifts is one means of accommodating his or her religious observance, "[m]erely granting employees permission to find volunteers to swap shifts, however, does not definitively constitute 'reasonable accommodation' as a matter of law in all cases." *Id.* at *5-6. According to the EEOC, the employer's policy was designed in any event only to identify employees willing to work *additional* shifts but not to swap shifts. *Id.* at *8. In light of conflicting evidence about what Bosch was willing to do to accommodate Carter's Sabbath observance, summary judgment was improper. *Id.* at *10.

Summary judgment was proper, on the other hand, in *George v. Home Depot, Inc.*, Civil Action No. 00-2616, 2001 U.S. Dist. LEXIS 20627 (E.D. La. Dec. 6, 2001), *aff'd*, 51 Fed. Appx. 482 (5th Cir. 2002). In that case, the employer offered to schedule plaintiff's Sunday work around her Catholic mass, however the plaintiff contended that her religious beliefs precluded any work at all on Sundays. *Id.* at *2. Because she was the only greeter in her department, and because Sundays were busy days, the court held that the plaintiff's insistence on not working on Sunday would work an undue hardship on Home Depot. *Id.* at *30-31.

Summary judgment was also proper in *Austin v. Wal-Mart, Stores Texas L.P.*, 2006 U.S. Dist. LEXIS 73759 (N.D. Tex. October 5, 2006), where the employer terminated Austin, a cashier, after she undercharged an off-duty co-worker for groceries. When her co-worker told her that she could only spend three hundred dollars, Austin rang up certain items, then voided the charges for those items and placed them in her co-workers bags, stating "God is so good." *Id.* at *4. After her termination, Austin claimed that Wal-Mart had discriminated against her based on her religion — Holiness — because her supervisors accused her of using the statement "God is so good" as a secret signal to her coworker. *Id.* at *28. The court held that the supervisors' statements were insufficient to establish pretext or discriminatory motive for Austin's termination under the modified McDonnell Douglas framework. *Id.* Austin additionally asserted a claim for failure to accommodate, stating that the employer failed to accommodate her need to not be scheduled for work on weekends because it interfered with her duties as a minister at her church. *Id.* at *2 and *29. When she began working at Wal-Mart, she had requested that she not be scheduled to work on weekends, and Wal-Mart honored that request for approximately five years. *Id.* at *2. Then, according to Austin, her supervisor pressured her to confirm her willingness to work weekends on a Wal-Mart form. *Id.* Wal-Mart contended that Austin had never actually worked on a weekend and that she was not "discharged for failing to comply with the conflicting requirement" that she work on those days. *Id.* at *29. The court stated that it was unaware of any authority to support the notion that acquiescence in a business requirement that conflicts with a religious belief is sufficient to allege a prima facia case of religious discrimination. *Id.* at *30. The court granted Wal-Mart's motion for summary judgment as to Austin's claims of discrimination based on religion. *Id.* at *30.

The EEOC's Guidelines on Discrimination Because of Religion address an employer's duty to schedule work in such a way as to accommodate an employee's religious obligations. Noting that the list is not all-inclusive, the EEOC has identified the following as several ways to accommodate a request for time off to fulfill religious requirements:

(I) Voluntary Substitutes and Swaps.

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(II) Flexible Scheduling.

One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should consider is the creation of a flexible work schedule for individuals requesting accommodation.

The following list is an example of areas in which flexibility might be introduced: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.

29 C.F.R. § 1605.2(d).[16]

If sufficient evidence of religious discrimination otherwise exists, a court may not need to reach a claim of failure to accommodate. For example, in *Reed v. Mineta*, 93 Fed. Appx. 195 (10th Cir. 2004), *appeal after remand*, 438 F.3d 1063 (10th Cir. 2006), the record showed that an air traffic controller's supervisor "orchestrated the situation which led to Reed's absences [for Sabbath observance] and, ultimately, his termination." *Id.* at 199. In addition to creating a bidding situation for shifts that made it more difficult for Reed to find controllers willing to swap shifts with him, the supervisor referred to Reed's religion (Worldwide Church of God) as a "scam" and a religion of convenience, and repeatedly quizzed Reed about his religious beliefs. *Id.* at 200. Because these and other facts were sufficient evidence of intentional religious discrimination, the appellate court did not find it necessary to address that aspect of the jury verdict premised on the failure to accommodate claim. *Id.* at 200.

In *Lubetsky v. Applied Card Sys., Inc.*, 296 F.3d 1301 (11th Cir. 2002), the plaintiff contended that he was discriminated against because he had informed the company's interviewer that he would need certain days off to observe Jewish holy days. He was initially offered a position, only to have it rescinded later when a company manager recalled the plaintiff's rude demeanor at an earlier job fair. *Id.* at 1303. Because there was no evidence that the manager knew either that Lubetsky was Jewish, or that he had asked about having his religious beliefs accommodated, the plaintiff could not establish a prima facie case of religious discrimination. Id. at 1306.

In *EEOC v. Oberto Sausage Co.* (W.D. Wash. July 1, 2005), a manufacturer of processed meat snacks in Kent, Washington hired six Muslim packers, all Somali with limited English skills, for the day shift (7 a.m. to 3:30 p.m.). The Somali employees took 2- to 5-minute breaks throughout the workday for some of the five Muslim daily prayers without objection. Before the month of Ramadan began in 2003, the company announced that it was switching to a 12-hour-day shift (6:00 a.m. to 6:00 p.m.). The Somali employees (and a translator) met with supervisors to request a few (3-5) minutes off to pray and break their fast at sunset during the month of Ramadan. The company refused, even though the employees agreed to have the time taken out of their regular breaks or to clock out for the short time period involved. After Ramadan began, the Somali employees took 2- to 4-minute breaks each day at sunset. The company warned and then fired them, even though the breaks did not affect production. Under a consent decree, the company paid a total of $362,000 and is enjoined from engaging in religious discrimination. A similar issue was presented in *EEOC v. AFG Indus., Inc.* (E.D. Tenn. Sept. 29, 2005) (glass manufacturer in Tennessee refused to allow Seventh Day Adventist Saturdays off to observe Sabbath, even though he offered to use vacation days and two other employees volunteered to switch days; resolved for $45,000 and injunction).

2. Grooming and Dress Issues

Also frequently litigated are matters involving an employer's policies on grooming and dress, and the extent to which employees' religious practices must be accommodated.

A rather obscure religious practice was involved in a suit filed against Red Robin Gourmet Burgers, Inc., by the EEOC on behalf of Edward Rangel.[17] He is a member of the Kemetic religion -- the modern practice of ancient Egyptian traditions, founded in the late 1980s, which involves a rite of passage in which he received tattoos of religious inscriptions on his wrists. Rangel believes that he cannot intentionally conceal the tattoos, and sought an exemption from his employer's dress code, which prohibited visible tattoos. When Red Robin refused to alter its dress code as an accommodation and Rangel

[16] On September 29, 1978, Congress enacted such a provision for the accommodation of Federal employees' religious practices. See Pub. L. 95–390, 5 U.S.C. 5550a "Compensatory Time Off for Religious Observances." 29 C.F.R. § 1605.2(d), n.3.

[17] Mr. Rangel intervened in the action brought by the EEOC, represented by Kathleen Phair Barnard and Judith Krebs, Schwerin Campbell Barnard LLP, Seattle, WA.

refused to conceal the tattoos, he was terminated. After the court denied defendant's motion for summary judgment, the case ultimately settled for $150,000 and substantial policy and procedural changes to insure that management understood its obligations to accommodate religious beliefs. *Rangel v. Red Robin*, 2005 WL 2090677 (W.D. Wash. 2005). An EEOC attorney commented that "We live in a diverse society where individuals have the religious freedom to practice many different belief systems. We are pleased that Red Robin is willing to make changes to its policies in recognition of this rich variety of religious expression." The press release announcing the settlement can be found at http:www.eeoc.gov/press/9-16-05.html (last visited on November 30, 2006).

However, employers are not required to accommodate religious displays that are considered to be offensive to the general population. For example, in *Swartzentruber v. Gunite Corp.*, 99 F. Supp. 2d 976 (N.D. Ind. 2000), the employer properly refused to allow an employee to display a forearm tattoo of a hooded figure standing in front of a burning cross, something the employee argued was a sacred symbol of the Church of the American Knights of the Ku Klux Klan. The employee did "not present admissible evidence, or even contend without evidence, that being required to cover up his tattoo at work conflicts with his religious beliefs, or that he told Gunite about any conflict with his beliefs and Gunite's demand that he cover his tattoo. Mr. Swartzentruber doesn't satisfy the first and second elements of a prima facie case." *Id.* at 979.

In *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004), the plaintiff was a member of the Church of Body Modification, and claimed that she was required, for religious reasons, to display her facial piercings at all times. Her employer had a policy that prohibited facial jewelry, and suggested that she either cover her eyebrow piercing with a flesh-colored band-aid or replace it with a clear plastic retainer to prevent the skin from sealing back up. *Id.* at 130. Cloutier insisted instead on an exemption from the dress code, and sued after she was fired for not removing or covering the piercings. *Id.* Although the EEOC had determined that Costco's actions had violated Title VII, the First Circuit held that the only accommodation acceptable to the employee (a complete exemption) would create an undue hardship for her employer, which had a legitimate business interest in presenting a professional appearance through its employees. *Id.* at 137.

In the course of its opinion, the appellate court discussed a number of cases involving grooming or dress issues. One of those was *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984), which affirmed summary judgment for an employer who refused to exempt a Sikh employee from the requirement that all machinists be clean-shaven. The employer's policy was based on the necessity of being able to wear a respirator with a gas-tight face seal because of potential exposure to toxic gases. The Ninth Circuit held that accommodating the employee could result in the employer's liability under California occupational safety standards. *Id.* at 1384. Further, retaining the employee as a machinist but assigning him only to work that did not involve exposure to toxic gas would impose two undue hardships on the employer. *Id.* First, the employer would have to revamp its unpredictable system of work assignments; and second, the employer would have to require the plaintiff's co-workers to perform his share of dangerous work. Title VII, the court concluded, "does not require Chevron to go that far." *Id.*

More recently, safety issues were also involved in a case brought by the EEOC on behalf of a job applicant who was turned down because she refused, for religious reasons, to comply with the employer's "pants only" policy. *EEOC v. Oak-Rite Mfg. Corp.*, No. IP 99-1962-C, 2001 U.S. Dist. LEXIS 15621 (S.D. Ind. Aug. 27, 2001). The applicant maintained that her religion required women to wear modest skirts and dresses, and asked that she be allowed to wear a long skirt if hired as a press operator. *Id.* at *1. Finding that safety issues rendered the requested accommodation an undue hardship, the district court noted that although questions of undue hardship are generally issues of fact, they are sometimes resolved as a matter of law, especially where the employer showed that the proposed accommodation would either cause or increase safety risks. *Id.* at *31 (citing, e.g., *Kalsi v. New York City Transit Authority*, 62 F. Supp. 2d 745, 759-60 (E.D. N.Y 1998) (accommodating employee's refusal to wear hard hat would increase risk of injury

and liability), *aff'd mem.*, 189 F.3d 826 (2d Cir. 1999)).

Kalsi involved a Sikh employee whose religious beliefs required him to wear a turban at all times. *Id*. at 748. He was hired as a subway car inspector, a position that required him to wear a hard hat. *Id*. When he refused, he was fired. *Id*. Although Kalsi offered expert testimony to the effect that allowing him to work without a hard hat would make it unlikely that he would suffer a "catastrophic" head injury, the district court reasoned that "Title VII does not require employers to absorb the cost of all less than catastrophic physical injuries to their employees in order to accommodate religious practices." 62 F. Supp. 2d at 760. Too, the plaintiff's proposed accommodation did not involve risk to himself alone: his co-workers might also be exposed to a risk of injury if they were called on to rescue him or if he became incapacitated. *Id.*

Safety issues aside, in the older case of *EEOC v. United Parcel Serv.*, 94 F.3d 314 (7th Cir. 1996), the Seventh Circuit reversed a summary judgment for the defense on the basis that material facts were in dispute concerning UPS's proposed alternative accommodation. UPS maintained an across-the-board rule prohibiting the wearing of beards in its public contact positions. *Id*. at 315. When the plaintiff, a Muslim, obtained sufficient seniority as a part-timer to seek work as a regular full-time driver, UPS blocked him from consideration because, for religious reasons, he wore a beard. *Id*. UPS claimed that it offered the applicant an alternative "inside" regular full-time non-public contact position, which constituted a reasonable accommodation because its pay and benefits were equivalent to the driver position. *Id*. The Seventh Circuit outlined the evidentiary facts at issue concerning whether such an offer was made, and the alleged responses to it, and did not address explicitly whether the UPS across-the-board prohibition and its alternative job offer practice constituted a reasonable accommodation. *Id*. at 317. Instead, it remanded for trial on the merits. *Id*. at 320.

The plaintiff in *Ali v. Alamo Rent-A-Car*, No. 00-1041, 2001 U.S. App. LEXIS 3389 (4th Cir. Mar. 6, 2001), was not as successful, with the court noting that the employer need not accommodate the Muslim employee's request to wear a headscarf with her company uniform. The determinative factor in the court's holding was that the plaintiff conceded that she failed to show an adverse employment action where she was simply transferred to a position that had no contact with the public. The result may have been different if she had alleged that the transfer involved less desirable job duties or hours of work, less opportunity for advancement, or the like. Similarly, in *Daniels v. City of Arlington, Texas*, 246 F.3d 500 (5th Cir. 2001), the appellate court also ruled against the plaintiff police officer, who had requested that he be allowed to wear a gold cross on his uniform. Because that was the only accommodation the plaintiff proposed (which the court found unreasonable), and because he failed to respond to the police chief's reasonable offers of accommodation (including allowing the officer to wear a cross ring or bracelet instead), his claim failed. *Id*. at 507.

3. Union Membership

Employees sometimes seek an accommodation that would excuse them from compulsory union membership. Both Title VII and EEOC regulations impose a duty of reasonable accommodation in this regard:

> Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices do not permit compliance with such a provision, the labor organization would accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.

29 C.F.R. § 1605.2(d)(2).

This accommodation in the form of a charitable substitution has been consistently upheld. *E.g., EEOC v. University of Detroit*, 904 F.2d 331, 335 (6th Cir. 1990); *International Ass'n of Machinists v. Boeing*, 833 F.2d 165, 168-69 (9th Cir. 1987); *Tooley v. Martin-Marietta*, 648 F.2d 1239, 1242 (9th Cir. 1981); *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 451 (7th Cir. 1981).

The amount to be paid to charity by a dissenting employee was at issue in *Madsen v.*

Associated Chino Teachers, 317 F. Supp. 2d 1175 (C.D. Cal. 2004). There, the agreement between the union (ACT) and the school district provided that all teachers must either be members of ACT (and thus pay member dues) or be agency fee payers (and pay a fee "equivalent to that portion of the membership dues which is used for representation," *id.* at 1178-79, an amount that was significantly lower).[18] The agreement also provided that religious objectors, while they need not join the union, must pay to charity a sum equal to the (higher) membership dues. *Id*.

Madsen, a teacher, invoked the "religious objector" provision but argued that she should be required to pay to charity only the amount paid by agency fee payers. *Id*. According to Madsen, it was "discriminatory to require a religious objector to pay a greater sum than that of other agency fee payers" since "fee payers receive a rebate for that portion of union dues used for ideological and political purposes." *Id.* at 1179. The district court rejected Madsen's argument on the basis that Title VII does not require a union to give some employees preferential treatment to accommodate their religious beliefs. In the court's view, if religious objectors were allowed to pay only the agency fee amount, they would be receiving more favorable treatment because they would be maintaining control over their money but paying nothing for representation. *Id.* at 1184.

A different result was reached, albeit based on state law, in *O'Brien v. City of Springfield*, 319 F. Supp. 2d 90 (D. Mass. 2003). As did Madsen, O'Brien sought to pay only the agency fee to charity and not the full member dues amount. In considering the accommodation issue, the court agreed that a union cannot charge "whatever amount it wishes to someone making a charitable substitution . . . ." *Id.* at 106. The court thus held that "any demand of a non-union member at the full dues level (as opposed to the agency service fee) is a *per se* unreasonable accommodation." *Id.* at 106-07.

4. Other Religious Expression in the Workplace

The issues of whether and to what extent employees' religious beliefs must be accommodated by allowing displays of religious artifacts or other forms of expression (such as prayer) are not infrequently litigated. Perhaps the most well-publicized case in recent years is *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004), which involved a Christian employee's response to his employer's placing a series of diversity posters in the workplace, one of which featured a photograph of a Hewlett-Packard employee labeled "Gay." Peterson's response was to post anti-homosexual passages from Scripture in his work space; his employer demanded that they be removed as contrary to the company's policy on inclusiveness. *Id*. at 602. Peterson proposed two alternative accommodations: that either the company's "Gay" posters and his own anti-homosexual postings would remain, or that both would be removed. *Id*. The Ninth Circuit held against the employee (who was fired for insubordination), concluding that the first alternative would result in discrimination against the plaintiff's co-workers, and that the second would create an undue burden on the company's effort to promote diversity in the workplace. *Id*. at 608.

Allowing Peterson to leave his anti-homosexual messages would, in the court's view, have permitted an employee to "post messages intended to demean and harass his co-workers." *Id.* at 607. But an employer is not required to "accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights." *Id.* (citing *Hardison*, 432 U.S. at 81; *Opuku-Boateng v. California*, 95 F.3d 1461, 1468 (9th Cir. 1996)).

The second alternative – removing both Peterson's and Hewlett-Packard's gay-related messages – "would have infringed upon the company's right to promote diversity and encourage tolerance and good will among its workforce," thus also creating an undue hardship. *Id.* at 608.

A similar clash between an employee's "religious need to impose personally and directly on fellow employees, invading their privacy and criticizing their personal lives," *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1021 (4th Cir. 1996), and an employer's duty to protect the rights of

[18] Agency fees typically represent only costs associated with collective bargaining expenditures and do not include costs associated with political or ideological efforts.

co-workers was presented in the earlier case of *Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995). There, a Catholic employee made a religious vow that she would wear a graphic anti-abortion button "until there was an end to abortion or until [she] could no longer fight the fight." *Id.* at 1338. After a number of her fellow employees expressed their discomfort with the button, and with workplace productivity plummeting, Wilson's supervisors proposed that she either wear it only in her work cubicle, cover it while at work, or wear a different button without the photograph of a fetus. *Id*. at 1339. Wilson responded that any of these accommodations would break her vow to be a "living witness," and suggested that others be told simply not to look at her button if it bothered them. *Id*. Eventually, Wilson was fired for continuing to wear the button. *Id*. at 1340.

Affirming a district court judgment against her, the Eighth Circuit held that U.S. West's proposed accommodations were reasonable:

> . . . Wilson's position would require U.S. West to allow Wilson to impose her beliefs as she chooses. Wilson concedes the button caused substantial disruption at work. To simply instruct Wilson's co-workers that they must accept Wilson's insistence on wearing a particular depiction of a fetus as part of her religious beliefs is antithetical to the concept of reasonable accommodation. *See Hardison*, 432 U.S. at 81; *Mann v. Frank*, 7 F.3d 1365, 1369 (8th Cir. 1993).

Id. at 1341.

An employee's desire for basically unfettered religious expression was also rejected in *Anderson v. U.S.F. Logistics*, 274 F.3d 470 (7th Cir. 2001). The plaintiff, a Christian, had routinely concluded telephone calls and correspondence with the phrase "Have a Blessed Day." *Id*. at 473. After a Microsoft liaison (U.S.F.'s largest client) complained, the employer proposed that Anderson use the phrase only with co-workers but not with clients. *Id*. at 474. Upholding the denial of an injunction to the employee, the Seventh Circuit held that this proposal was a reasonable accommodation, particularly in light of the potential damage to U.S.F.'s relationship with Microsoft, and noted that the employer had continually allowed Anderson to display religious material in her work space, read the Bible on breaks, listen to Christian radio, and use the phrase with co-workers. *Id*. at 476.

In *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998), a police officer refused, on religious grounds, to protect employees of an abortion clinic and asked to be exempted from further assignments to guard an abortion clinic from protestors. Although the police department declined formally to exempt him, it did allow informal accommodations: Rodriguez's captain avoided assigning him to clinic duty, and Rodriguez took vacation time on the days when clinic patrol was most likely to be assigned. *Id.* at 773-74. Eventually, Rodriguez was assigned to clinic patrol. *Id*. at 744. When he again requested exemption, the on-duty sergeant told him he could not refuse an assignment. *Id*. Rodriguez took the assignment under protest, then sued under Title VII. *Id*. The Seventh Circuit affirmed summary judgment for the police department, holding that it had reasonably accommodated Rodriguez by providing him the opportunity, through a collective bargaining agreement, to transfer to another district at the same pay and benefit levels. *Id.* at 775. The accommodation was not unreasonable simply because it would have required Rodriguez to forfeit the right to stay in his district of choice. *Id*. at 776.

Public employers usually face a more difficult challenge in the area of employees' religious speech, since as representatives of the government, public employers may not abridge employees' First Amendment rights or violate their Fourteenth Amendment rights to equal protection, nor may public employers be seen as promoting a particular religion. Most cases involving a public employee's request for religious speech to be accommodated also include constitutional claims.

The undue hardship analysis in the public employer arena can turn on whether allowing religious expression will create an impression of official endorsement, something that raises Establishment Clause issues. For example, in *Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001), two state employees promoted religious messages while working with clients on state business. The Second Circuit held that no reasonable accommodation was available in connection with the

employees' stated need to evangelize, since allowing religious speech in counseling sessions would compromise the State's need to offer religiously neutral services. The Establishment Clause, noted the court, "prohibits government from appearing to take a position on questions of religious belief." *Id.* at 165 (citing *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 593-94 (1989)).

In contrast, in *Brown v. Polk County, Iowa*, 61 F.3d 650 (8th Cir. 1995), the court found no undue hardship to the municipal employer from allowing the employee's "spontaneous prayers, occasional affirmations of Christianity, and isolated references to Bible passages." *Id.* at 656. The potential effect on the employer was "insufficiently real" and "too hypothetical" to satisfy the standard required to show undue hardship, where the employer showed no "actual imposition on co-workers or disruption of the work routine." *Id.* at 657 (citations and internal quotation marks omitted). *Cf. Weber v. Roadway Express, Inc.*, 199 F.3d 270, 274 (5th Cir. 2000) ("mere possibility of an adverse impact on co-workers" was sufficient), and n. 15, *supra*. Moreover, the court found, the employer's stated interest in avoiding a claim that it had violated the Establishment Clause, thus justifying its prohibition against all religious expression, was "too extravagant to maintain, for it gives a dominance to the establishment clause that it does not have and that would allow it to trump the free exercise clause." *Id.* at 659.

V. INTERSECTION OF NATIONAL ORIGIN AND RELIGIOUS DISCRIMINATION CASES

Most frequently – and particularly after September 11, 2001 – cases that raise claims of both national origin and religious discrimination are brought by plaintiffs who are Muslim. This is perhaps not surprising, given that the majority of Muslims in this country are closely identified with a particular country or region of the world. As the EEOC has noted:

> Title VII's prohibition against national origin discrimination often overlaps with the statute's prohibitions against discrimination based on race or religion. The same set of facts may state a claim of national origin discrimination and religious discrimination when a particular religion is strongly associated, or perceived to be associated, with a specific national origin.

See EEOC Compliance Manual, "Section 13: National Origin Discrimination," § 13-II(C), available at http:www.eeoc.gov/policy/docs/national-origin.html#N_2_ (last visited on November 30, 2006). The EEOC has also issued a statement specifically directed to this issue:

> Anger at those responsible for the tragic events of September 11 should not be misdirected against innocent individuals because of their religion, ethnicity, or country of origin. Employers and labor unions have a special role in guarding against unlawful workplace discrimination.
>
> Title VII of the Civil Rights Act of 1964 prohibits workplace discrimination based on religion, national origin, race, color, or sex. At this time, employers and unions should be particularly sensitive to potential discrimination or harassment against individuals who are – or are perceived to be – Muslim, Arab, Afghani, Middle Eastern or South Asian (Pakistani, Indian, etc.).
>
> The law's prohibitions include harassment or any other employment action based on any of the following:
>
> - Affiliation: Harassing or otherwise discriminating because an individual is affiliated with a particular religious or ethnic group. For example, harassing an individual because she is Arab or practices Islam, or paying an employee less because she is Middle Eastern.
>
> - Physical or cultural traits and clothing: Harassing or otherwise discriminating because of

physical, cultural, or linguistic characteristics, such as accent or dress associated with a particular religion, ethnicity, or country of origin. For example, harassing a woman wearing a hijab (a body covering and/or head-scarf worn by some Muslims), or not hiring a man with a dark complexion and an accent believed to be Arab.

- Perception: Harassing or otherwise discriminating because of the perception or belief that a person is a member of a particular racial, national origin, or religious group whether or not that perception is correct. For example, failing to hire a Hispanic person because the hiring official believed that he was from Pakistan, or harassing a Sikh man wearing a turban because the harasser thought he was Muslim.

- Association: Harassing or otherwise discriminating because of an individual's association with a person or organization of a particular religion or ethnicity. For example, harassing an employee whose husband is from Afghanistan, or refusing to promote an employee because he attends a Mosque.

See "Employment Discrimination Based on Religion, Ethnicity, or Country of Origin" (last revised March 21, 2005), available at http://www.eeoc.gov/facts/fs_religion_ethnic.html.

The EEOC General Counsel's Report for 2005 discusses a number of recent cases pursued by the Commission, including the following:

> In the wake of the terrorist attacks of 9/11 and the subsequent conflicts in Afghanistan and Iraq, the EEOC has litigated a number of suits alleging that individuals of Middle Eastern origin or of the Muslim faith were subjected to a hostile work environment. For example, managers at a luxury hotel in Manhattan began calling Arab and Muslim employees "Osama," "Al Qaeda," and "Taliban," and gave them keys in holders with labels such as "bin Laden" in place of their names. Although the hotel had promulgated an employee handbook containing an antidiscrimination policy, none of the victims had received the handbook or were aware of the policy. The hotel ignored some of the complaints about the harassment and failed to adequately investigate others. Under a consent decree in *EEOC v. Plaza Operating Partners Ltd. d/b/a The Plaza Hotel, Fairmont Hotels and Resorts, Inc.* (S.D. N.Y. June 8, 2005), the defendants will provide $525,000 to 12 victims and are prohibited from future discrimination. In addition, defendants will implement an antidiscrimination policy and provide extensive training to all managers and supervisors and to all Human Resources staff at 14 hotels throughout the United States. A summary of the policy will be posted on employee bulletin boards at each hotel, distributed to all employees, and translated into languages other than English upon request. New employees at the hotels will be given a 30-minute oral presentation on the policy as well as a copy of it during initial orientation.

See "FY 2005 Annual Report on the Operations and Accomplishments of the Office of the General Counsel," available at http:www.eeoc.gov/litigation/05annrpt/index.html#IID2 (last visited on November 30, 2006).

Last year, the Eighth Circuit ruled against a Shiite Muslim of Iraqi descent on his claims that he was discharged and harassed based on his race, sex, religion, and national origin. *Al-Zubaidy v. TEK Ind., Inc.*, 406 F.3d 1030 (8th Cir. 2005). Al-Zubaidy was an inmate who had worked for TEK under an arrangement between the Nebraska State Department of Corrections and that company, which had a manufacturing facility located at the prison in which

Al-Zubaidy was incarcerated. While working for TEK, the plaintiff claimed that he was subjected to a number of harassing incidents and comments from his manager. Affirming summary judgment in the employer's favor, the court found that even if the plaintiff had established a prima facie case of discriminatory discharge, the record showed that TEK had legitimate, non-discriminatory reasons for firing him for excessive absences. In response, Al-Zubaidy had the burden of showing pretext, but he "presented no evidence, other than mere contentions, that [the manager] set him up to discharge him." *Id.* at 1037.

Regarding the claim of a hostile work environment, the court first noted the Supreme Court's admonition that the "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.'" *Id.* at 1038 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)). "'[S]imple teasing,' offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Id.* at 1039 (quoting *Faragher*, 524 U.S. at 788)). Because Al-Zubaidy presented evidence of only a few comments made over a ten-month period, which were offhand and isolated and had little connection to race, sex, religion, or national origin, he failed to show that his workplace was "permeated with severe or pervasive harassment sufficient to alter the terms, conditions or privileges of employment." *Id. See also Davani v. Virginia Dep't of Transp.*, 434 F.3d 712 (4th Cir. 2006) (Iranian Muslim sued for discrimination on the basis of race, national origin, and religion; decision turned on jurisdictional issue discussed, *infra*, in connection with recent litigation issues).

The overlap between national origin and religious discrimination claims is not, of course, limited to those of Muslim identification. In the last couple of years, plaintiffs identifying themselves as "Confederate Southern American" Christians have sued for both forms of discrimination. One of these, *Chaplin v. Du Pont Advance Fiber Sys.*, 124 Fed. Appx. 771 (4th Cir. 2005), resulted in the affirmance of sanctions imposed on not only the plaintiffs themselves, but also on their lawyer. As to their religious discrimination claim, which arose out of Du Pont's ban on the display of offensive symbols on company property (including the Confederate battle flag), the Fourth Circuit held that it was frivolous based on the absence of any evidence to suggest that the plaintiffs requested an accommodation of their beliefs before filing their EEOC charge. With regard to the national origin and race discrimination claims, the appellate court affirmed because the plaintiffs failed to allege any adverse employment action, but disagreed with the district court's reasoning that "the fact that Appellants' national origin class is multiracial 'practically eviscerates' their racial discrimination claim." *Id.* at 775.

> [T]his logic is problematic. Generally speaking, every national origin class is multiracial. Thus, it is quite possible that an employee could have cognizable causes of action for both national origin discrimination and race discrimination. An employer could discriminate against all Caucasian employees, as well as all employees of confederate Southern American descent, or that employer could discriminate against only Caucasian employees who were also of Confederate Southern American descent. An attorney representing a member of both classes should not be threatened with the risk of sanctions for bringing causes of action for both race discrimination and national origin discrimination.

Id.

In *Storey v. Burns Int'l Sec. Serv.*, 390 F.3d 760 (3d Cir. 2004), a plaintiff who was fired for refusing to remove or cover Confederate flag symbols on his lunch box and pick-up truck sued for both national origin and religious discrimination. The Third Circuit affirmed dismissal of the suit, holding that the employee failed to allege that he suffered an adverse employment action within the meaning of Title VII; the court thus "need not address the delicate intricacies of the merits of either claim . . .." *Id.* at 761. The court did note, however, that:

> "National origin" usually "refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 88, 38 L. Ed. 2d 287, 94 S. Ct. 334 (1973). In

some cases, however, courts have been willing to expand the concept of "national origin" to include claims from persons such as cajuns or serbs based upon the unique historical, political and/or social circumstances of a given region. *See Pejic v. Hughes Helicopters*, 840 F.2d 667 (9th Cir. 1988) and *Roach v. Dresser Industrial Valve & Instrument Div.*, 494 F. Supp. 215, 218 (D. La. 1980), and *Kanaji v. Children's Hospital of Philadelphia*, 276 F. Supp. 2d 399, 401 (E.D. Pa. 2003).

Id. at 762 n.3.

The employee conceded that he was fired for disobeying the employer's order to remove or cover the symbols, and did not claim that anything fundamental to his national origin or religion required a display of Confederate symbols. Rather, the display was based on the employee's personal need to share his heritage; that need "can not be equated with something endemic to national origin or a religiously mandated observance. . . ." *Id.* at 765. As a result, even if the employee was a member of a protected class, and even if the Confederate flag could be viewed as a religious symbol, no prima facie case of national origin or religious discrimination was established.

In *McCoy v. Homestead Studio Suites Hotels*, 2006 U.S. App. LEXIS 10366 (Fifth Cir. April 26, 2006) (unpublished), the court considered a situation in which persons of the same national origin who also shared the same religious beliefs sued a hotel chain based on the chain's decision to invoke its "walk policy" with respect to the plaintiffs. The plaintiffs in that case were practitioners of Falun Gong – a spiritual belief system that boasts million of members – who were persecuted by the People's Republic of China ("PRC"). *Id.* at * 2. When Jiang Zemin, the former president of the PRC and adamant critic of Falun Gong, visited Houston, members of the belief system traveled there to protest his presence. *Id.* Zemin was to stay at the Intercontinental Hotel and the members of Falun Gong made reservations at Homestead Suites Hotel. *Id.* Representatives of the PRC later reserved a large block of rooms at the Homestead Suites Hotel for the duration of Zemin's visit, at a premium rate. *Id.* Due to overbooking, Homestead Suites Hotel then implemented its "walk policy" pursuant to which the hotel would bump the reservations of short-term guests, providing them with free transportation to and complimentary one night's stay at a neighboring hotel within the chain, or at a comparable hotel. *Id.* Homestead cancelled the reservations of the members of Falun Gong under this policy. *Id.* The members refused to accept the alternative accommodations and later the sued the hotel under theories of race and religious discrimination. *Id.* at *3.

The members of Falun Gong argued that the hotel chain violated their right to be free from racial or religious discrimination in places of public accommodation under Section 2000a. *Id.* at *3-5. As far as the plaintiff's claims of race discrimination, the Court held that even if the plaintiffs could show that they were members of a racial minority and that the discrimination that occurred concerned one of the activities listed in the statute, they could not show that the hotel chain harbored an intent to discriminate against them. *Id.* at *3-4. Likewise, the court held that the plaintiffs had offered no evidence that the they had received unequal treatment because of their religion in that they could not show that the hotel knew whether the particular patrons whose reservations they cancelled practiced Falun Gong. *Id.* at * 6-7.

VI. OTHER LAWS ADDRESSING RELIGION IN THE WORKPLACE

A. Workplace Religious Freedom Act

The bipartisan Workplace Religious Freedom Act, first proposed in 1997, was reintroduced in both houses of Congress in May 2005 (S. 677, H.R. 1445). Its intent is to undercut the Supreme Court's view that an employer may show an "undue hardship" – thus excusing it from accommodating an employee's religious practices – if the accommodation would impose more than a *de minimis* burden on the employer. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). If reintroduced and ultimately signed into law, this legislation would require employers to make more reasonable accommodations for an employee's religious practice or observation,

such as Holy Days and religious garb, than the law currently requires.

B. Workforce Investment Act

There has been much disagreement in Congress over reauthorization of the Workforce Investment Act of 1998 ("WIA"), Pub. L. 105-220, 112 Stat. 936 (1998), which was enacted to consolidate, coordinate, and improve employment, training, literacy, and vocational rehabilitation programs in the United States, among other things. In 2005, the House of Representatives (over Democratic opposition) proposed amending that act (H.R. 27) to allow faith-based employers receiving WIA funds to engage in religious-based hiring. The Senate version (S. 1021), introduced in May 2005, explicitly retains the existing restriction against such hiring. It appears unlikely that the two versions can be reconciled on this point, assuming reintroduction of these bills in 2006.

C. Religious Freedom Restoration Act

A potential for interesting application of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq.*, arises from the recent case of *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006). There, the Second Circuit held, over a strenuous dissent, that even though the defendant church did not raise it as a defense to the plaintiff's claim brought under the Age Discrimination in Employment Act (29 U.S.C. §§ 621, *et seq.*) that he was wrongly subjected to the church's mandatory retirement policy, RFRA was constitutional and applied to trump the ministerial exception. The majority reasoned that because the ministerial exception was judicially created, and because RFRA was broad enough to cover suits between private parties (something the dissent took particular issue with), that explicit enactment of Congress applied, despite the church's having declined to raise it.

The pertinent provisions of RFRA provide:

> (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [here, the ADEA], except as provided in subsection (b).
>
> (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[19]

According to the majority opinion in *Hankins*, "the RFRA must be deemed the full expression of Congress's intent with regard to the religion-related issues before us and displace earlier judge-made doctrines [such as the ministerial exception] that might have been used to ameliorate the ADEA's impact on religious organizations and activities." 438 F.3d at 169. Also finding RFRA constitutional as applied to federal laws, the majority held that RFRA effectively amended the ADEA. Whether RFRA will be extended to apply to such laws as Title VII remains to be seen, but the Second Circuit's novel interpretation of this statute is likely to fuel more litigation in this area.

Notably, however, the Seventh Circuit has already flatly rejected *Hankins*:

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[19] RFRA was Congress's direct response to *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), in which the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). RFRA expressly attempted to reverse *Smith* by restoring strict scrutiny to matters involving impingement on religious expression. *City of Boerne v. Flores*, 521 U.S. 507, 512-16 (1997).

The decision would, if sound, invalidate the many decisions in this and other circuits recognizing the ministerial exception to federal employment discrimination law. The decision is unsound. RFRA is applicable only to suits in which the government is a party.