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Reflections on Title VII from the Standpoint of Customer Preference And Management Prerogative

James C. Oldham†

Although the Supreme Court has interpreted Title VII of the Civil Rights Act of 1964 to prohibit even facially neutral employment practices that disproportionately affect members of groups protected by that statute, recent court decisions evidence a trend away from that standard in sex discrimination cases when employers raise the defenses of customer preference and management prerogative. In religious discrimination cases, however, the courts, with some exceptions, have forced employers to meet the statutory standard of demonstrating that they have reasonably accommodated their employees' religious observances or that they would suffer undue hardship in attempting to do so. The author concludes that a similar burden should be placed on employers who raise the defenses of customer preference and management prerogative to charges of sex discrimination.

After a dozen years' experience with Title VII of the Civil Rights Act of 1964,1 wisdom about the statute is beginning to accumulate. The body of case law is substantial and is expanding exponentially. Even more substantial is the body of scholarly comment addressed to the irresistible, often delectable, analytical problems served up by the statute.

Sufficient work has been done to permit a sense of perspective about some of the currents eddying through various parts of the statute. Two such currents are customer preference, the notion that a business organization should be permitted to shape its policies to avoid offending customers, and management prerogative, the notion that management has certain express or implied rights to run its business according to its best judgment. In the retail and service trades, these two themes are directly connected. In manufacturing and other industries, customer preference is not prominent, but management prerogative looms large,

† B.S., 1962, Duke University; LL.B., 1965, Stanford University; M.S.B.A., 1967, University of Denver; Professor of Law, Georgetown University Law Center.
due to a strong union heritage and the struggle between labor and management over their respective fundamental rights.

This article will focus on the surprising number of Title VII cases in which courts expressly or, more often, implicitly consider notions of customer preference and management prerogative, occasionally in an outcome-determinative manner. Moreover, the management prerogative lens brings into focus the different approach taken by Congress and the courts in resolving religious discrimination cases compared with other forms of Title VII discrimination.

The ensuing discussion has been arranged along the following lines: Cases involving questions of sex discrimination will be treated first, in terms of both employment policies which overtly differentiate between protected classes of employees and neutral employment policies which have a disproportionate impact on a protected class, thus raising a Griggs issue. Thereafter, the “reasonable accommodation” principle applicable to religious discrimination will be examined, particularly with regard to its management prerogative implications. Finally, the possibility of augmenting Griggs by a “reasonable accommodation” requirement will be explored.

I.

SEX DISCRIMINATION

A. In General

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, religion, sex or national origin in hiring, promotion, and on-the-job treatment. As interpreted by the Supreme Court, the statute prohibits not only overt discrimination, but also the use of neutral employment practices which have an unjustifiably disproportionate impact on the members of any of the protected classes.

The major exception to the prohibitions of Title VII is found in the statute itself, which provides that discrimination based on sex, religion, or national origin can be justified if membership in the particular sex, religion, or national origin group is a “bona fide occupational qualification [bfoq] reasonable necessary to the normal operation” of the em-

2. Much of the analysis of these sex discrimination cases is applicable as well to cases involving racial and national origin discrimination.

3. Griggs v. Duke Power Co., 401 U.S. 424 (1971). In Griggs, The Supreme Court disapproved the use of “neutral” standardized employment tests as qualifying bases for jobs not demonstrably related to the content or predictiveness of the tests. Prior to reaching this result, the Court found that the tests, although fashioned and used in good faith, were discriminatory in effect by their disproportionate impact on blacks.


While, by itself, the "reasonably necessary to the normal operation" wording of the exception might give color to a defense of reasonable necessity whenever an employer's customers traditionally have preferred not to deal with members of a protected class, this interpretation has been rejected unequivocally by the Equal Employment Opportunity Commission (EEOC). The Commission states that, except where necessary for purposes of authenticity or genuineness, "the refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers" cannot warrant the application of the bona fide occupational qualification exception.  

The justification for the disapproval by the EEOC of customer preference as a legitimate basis for discriminatory employment policies is obvious—employers must not be permitted to cater to the societal biases that necessitated Title VII in the first place. Yet the impetus for employers to bow to customer preference is equally obvious—higher sales bring higher profits. There is nothing inherently wrong, even under Title VII, with seeking to enhance profitability; in fact, this is the bottom-line justification for the "business necessity" defense articulated in the Griggs case as well as for the bfoq doctrines that come into play after an employment policy has been demonstrated to be discriminatory. Employers are permitted to use such policies (that is, to continue to discriminate) if the continued discrimination is demonstrably related to efficiency and profitability in the context of the specific job. A potential clash of doctrines arises when courts articulate the

7. 29 C.F.R. § 1604.2(a)(1)(iii), (a)(2)(z) (1975). No similar guideline has been articulated by the Commission for either national origin discrimination or religious discrimination, but since the bona fide occupational qualification (bfoq) exception applies to all three types of discrimination, undoubtedly the Commission's position would extend to all three types. With regard to racial discrimination, the bfoq exception is inapplicable.
8. For a recent illustration of the impropriety of customer preference in a racial discrimination setting, see Faraca v. Clements, 10 FEP Cases 718 (N.D. Ga. 1973), aff'd, 506 F.2d 956 (5th Cir.), cert. denied, 422 U.S. 1006 (1975), involving a refusal to hire a qualified white applicant as an administrator at a state retardation center because of the applicant's marriage to a black woman. The court held that, notwithstanding complaints from patrons of the center and the public at large, the decision of the superintendent not to hire the plaintiff was "simply not legal." 10 FEP Cases at 723.
10. Profitability is pertinent, at least, to the interpretations of the bfoq exception advanced by the Fifth Circuit. See notes 13-14 infra, and accompanying text.
proposition that employers have certain fundamental freedoms and that as long as hostile motivation cannot be shown or inferred, employers are entitled to run their businesses in whatever manner they deem best. The dividing line between legitimate profit-oriented management prerogatives and illegitimate profit-oriented behavior, such as catering to customer preference, is a fine one indeed.

B. Customer Preference and Management Prerogative

Joined in the Retail and Service Trades

By and large, customer preference surfaces under Title VII in cases involving sex discrimination. Generally this occurs in two contexts: matters of personal intimacy, and situations involving stereotyped views of customers or co-workers.

Extended attention will not be given to the first of these two contexts. While the personal intimacy cases, be they hypothetical or real, present lively analytical questions, they will arise only in a miniscule portion of the job market. Because judges are human and are likely to be result-oriented on matters involving personal intimacy according to societal mores, resolution of these cases may be inconsistent with previously articulated Title VII principles.

For example, consider the hypothetical situation in which a male job applicant applies to a department store for an opening which has been advertised for a salesperson of women’s lingerie. Previously articulated Title VII principles would indicate that the male applicant should not be disqualified because of his sex from being considered for the position. The EEOC states that customer preference is inadequate as a basis for the bfoq exception, unless necessary for purposes of authenticity or genuineness,\textsuperscript{11} neither of which applies to this example. In the view of the Ninth Circuit, the bfoq exception would not be applicable since the job does not inherently require particular sexual characteristics.\textsuperscript{12} Likewise, under tests articulated in the Fifth Circuit, it could not be established that all or substantially all males could not safely and efficiently perform the work involved in selling lingerie,\textsuperscript{13} or that “the

\textsuperscript{11} 29 C.F.R. § 1604.2(a)(2) (1975).

\textsuperscript{12} Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971).

\textsuperscript{13} Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). The only basis for a contrary conclusion would be that all or substantially all males could not “efficiently” perform the work of selling since female customers would not buy from them. This is not at all what the Fifth Circuit was getting at in Weeks, however, where heavy lifting requirements were at issue. As has been previously observed by this author, the need for a test other than that articulated in Weeks to deal with customer preference prompted the approach taken by the Fifth Circuit in Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950 (1971). See Oldham, Questions of Exclusion and Exception Under Title VII—“Sex-Plus” and the BFOQ, 23 Hastings L.J. 55, 80 (1971).
essence of the business operation [in this case making retail sales] would be undermined."14 If the employer were precluded from hiring only women for the lingerie department.15 Nevertheless, it seems predictable that many courts would sustain an employer's position that women only should be hired as salespersons in the lingerie department.16 These cases, however, will not occur in great numbers.17 When they do occur, the best that can be hoped for is that the courts will be forthright about what they are doing, and will decide the cases in a manner that will not have undesirable implications for other situations that may be logically indistinguishable.18

The general problem of stereotyped attitudes of customers or co-workers extends beyond the small segment of the job market with "intimate" characteristics. Cases have occurred in a variety of contexts, ranging from stewardesses to Santa Clauses.19 Some of these decisions

14. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950 (1971). There the court held that a blanket policy against hiring male flight attendants violated Title VII even if most males could not perform all flight attendant functions as well as most females could.

15. The court in Diaz emphasized that the bfoq called for "a business necessity test, not a business convenience test." 442 F.2d at 388. Possibly the example in the text could be resolved by restating the Diaz test to refer to the essence of the employer's business as reflected in the particular job (see Oldham, supra note 13, at 90). The essence of the business then becomes selling lingerie, which could be undermined by the hiring of male salespersons. How a court would determine the projected impact of such a male salesperson is unclear, but perhaps a market study or statistical analysis of female department store customers would suffice. If so, the result would be a case in which customer preference squarely would be the basis for a bfoq exception. It is doubtful, however, that an employer would go to such expense in litigating a case of this type; more likely, the employer would exercise its prerogative to transfer an existing female employee to the lingerie department, avoiding the issue altogether.

16. The exact issue has been raised in a reverse context (a female employee deprived of the opportunity to work in the men's clothing department) in Roberts v. Union Co., 6 FEP Cases 1150 (S.D. Ohio), rev'd and remanded, 487 F.2d 387 (6th Cir. 1973). The employer argued that the intimate touching invariably associated with clothing alterations justified the application of the bfoq exception. However, for procedural reasons, the court found it unnecessary to reach the question.

17. To be sure, there may be personal intimacy cases in which courts will adhere to previously articulated Title VII principles. To illustrate, the Court of Appeals for the District of Columbia has ruled that a showing by a male nurse that a private hospital had refused to refer him to female patients on the grounds that the patients might not feel comfortable with a male nurse would bring the hospital "within the strictures of Title VII." Sibley Memorial Hospital v. Wilson, 488 F.2d 1338, 1342 (D.C. Cir. 1973).

18. For an example of a doctrine in the sex discrimination area carrying with it awkward implications, see the discussion of recent court of appeals decisions dealing with grooming and dress codes applicable to employees, notes 32-47 infra, and accompanying text.

occur in a *Griggs*-type setting, where neutral employment policies dis-proportionately affect a class protected under Title VII. Others involve employment policies which are overtly discriminatory. An example of the former type is the decision of the United States District Court for the Western District of Texas in *Wardlaw v. Austin Independent School District*. In *Wardlaw*, the unmarried plaintiff was involuntarily transferred from her job as a school teacher after it became known to her employer that she had become pregnant. The court accepted the school officials’ concerns over potential adverse reaction of the parents (the “customers”) to plaintiff’s “unconventional lifestyle” as a legitimate educational concern justifying plaintiff’s transfer. The court concluded that there was no sex discrimination against the plaintiff, since there was no evidence that unmarried male teachers who became expectant parents would be treated any differently from female teachers in such a position, notwithstanding the obvious fact that incipient illegitimate fatherhood can be and often is concealed, whereas pregnancy is necessarily public information.

The *Wardlaw* decision is clearly wrong. Nowhere in the decision is any reference made to the *Griggs* case, but under *Griggs*, the school district’s “neutral” employment policy against illegitimate parenthood affects women proportionately more than men, and must be justified on the basis of business necessity—in particular, job-relatedness. It is exceedingly unlikely that the job of school teaching, even teaching special education classes to mentally retarded adolescents as in *Wardlaw*, is significantly impeded by the status of the teacher as an unmarried expectant parent. In Judge Roberts’ opinion, all teachers in the Austin school system were “subject to assignment or reassignment” by the school superintendent based on any number of educational needs, adding that all teachers in the system “understand their

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21. *Id.* at 895. The Court in *Wardlaw* also rejected the plaintiff’s constitutional arguments, brushing aside authorities such as Faraca v. Clements, 10 FEP Cases 718 (N.D. Ga. 1973), and Andrews v. Municipal School Dist., 6 FEP Cases 872 (N.D. Miss. 1973), as factually distinguishable. See note 8 *supra*, note 22 *infra*.
22. *Cf.* Andrews v. Drew Municipal School Dist., 6 FEP Cases 872 (N.D. Miss. 1973), where it was held that:

> [t]he policy or practice of barring an otherwise qualified person from being employed, or considered for employment, in the public schools merely because of one's previously having had an illegitimate child has no rational relation to the objectives ostensibly sought to be achieved by the school officials and is fraught with invidious discrimination; thus it is constitutionally defective. . . .

*Id.* at 875-76.
availability for reassignment to be a condition of their employment." 24
By these findings, Judge Roberts presumably was intimating that the
defendant had exercised its normal managerial prerogative in transfer-
rning the plaintiff in response to legitimate educational needs. However,
this approach is misleading; no accepted or customary management pre-
rogative, in and of itself, can justify a result that would not pass muster
under a Griggs analysis.

As in the personal intimacy cases, the Wardlaw decision illustrates
the occasional temptation of courts to reach a "moral" result without
paying close attention to the method of getting there. Absent the
morality setting, this result-orientation recedes, and the Title VII issues
are addressed more directly. An example with customer preference
overtones is the decision of the Third Circuit in Wetzel v. Liberty
Mutual Insurance Co. 25 In Wetzel, summary judgment was granted
against the defendant insurance company because of discriminatory
hiring practices in staffing the positions of claims representatives and
claims adjustors. Although 99% of the thousands of claim representa-
tives employed by Liberty Mutual were female, the percentage of fe-
male among the even greater number of claims adjustors hired by the
company was insignificant. A likely explanation for this disparity was
the company's probable assumption that many policyholders would
respond more favorably to a male authority figure than to a female when
it came to assigning dollar amounts to insured damage. Nevertheless,
the Third Circuit Court of Appeals saw no basis for concluding "that
women were any less qualified to become claims adjusters than men." 26

Except for the "reasonable accommodation" principle of the religious
discrimination cases, 27 by far the most heavily litigated issue to date
involving both customer preference and management prerogative has
been the matter of grooming standards and dress codes. It is beyond
the mission of this article to review these cases in any detail. 28 However,
careful concern over the erosion of managerial prerogative has recently led

24. Id.
26. Id. at 258.
27. See text of the 1972 amendment to the Title VII definition of religion, which
provides:
The term "religion" includes all aspects of religious observance and practice,
as well as belief, unless an employer demonstrates that he is unable to reason-
ably accommodate to an employee's or prospective employee's religious observ-
ance or practice without undue hardship on the conduct of the employer's busi-
ness.
28. For a comprehensive review of the decisions as of 1973, see Dillof, Federal
Court Litigation Over the Regulation of Adult Grooming, 38 ALBANY L. REV. 387
(1974); Comment, Employer Dress and Appearance Codes and Title VII of the Civil
several circuit courts to recoil from the logical ramifications of Title VII proscriptions in this setting. This feature of the cases bears analysis, not only in terms of its intrinsic merit, but also in terms of its implication for other situations.

The ordinary factual setting of these decisions is one in which the employer maintains grooming standards for male and female employees that differ in certain respects. The most commonly litigated difference is a requirement that male employees may not wear their hair beyond a certain length, while no such limitation applies to female employees. Often, but not always, these standards are applied to employees whose jobs necessitate significant customer or public contact. Employer justifications for the hair-length limitation on male employees typically include enhancement of the employer's public image by hiring only individuals who are neat and who do not, by their appearance, engender a "counter-culture" identification.29

Conceptually, these practices are challenged under the authority of the Phillips decision,30 in which the so-called "sex-plus" theory was discredited.31 Thus, even though an employer would be perfectly content to replace a long-haired male employee or applicant with a short-haired male, the application of a hair length requirement to males only constitutes a discriminatory practice improperly impinging on one sex only. The logical conclusion is that such a grooming policy violates Title VII unless the policy can be shown, either in the context of a "business necessity" defense or a bfoq argument, to be functionally related to the performance of the work in question. Ordinarily this is not demonstrable.

The first reaction at the court of appeals level against this logical conclusion was that of the District of Columbia Circuit in Fagan v. National Cash Register Co.32 The court quoted with approval the views of Judge Bootle in Willingham v. Macon Telegraph Publishing Co.33 that:

[E]mployers, like employees, have rights. This court without a far more certain mandate from Congress than that contained in Title VII,

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31. The term "sex-plus" was coined to describe employment practices that single out a sub-class of individuals within one sex by virtue of an additional common characteristic. In Phillips, Martin Marietta's policy was not against hiring women (over three-fourths of the employees were female), but against women (but not men) with preschool age children. This was held to constitute sex-based discrimination within the meaning of Title VII. 400 U.S. at 544.
32. 481 F.2d 1115 (D.C. Cir. 1973).
will not be party to what it considers a ridiculous, unwarranted encroachment on a fundamental right of employers, i.e., the right to prescribe reasonable grooming standards which take cognizance of societal mores. 34

Speaking for the court, Judge Danaher added:

Perhaps no facet of business life is more important than a company’s place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known we may take judicial notice of an employer’s proper desire to achieve favorable acceptance. Good grooming regulations reflect a company’s policy in our highly competitive business environment. Reasonable requirements in furtherance of that policy are an aspect of managerial responsibility. Congress has said that no exercise of the responsibility may result in discriminatory deprivation of equal opportunity because of immutable race, national origin, color or sex classification. 35

Since hair length can readily be changed, it does not involve any immutable characteristic associated with a particular sex. Therefore, in Fagan, the employer’s grooming policies were found inoffensive under Title VII.

The “immutable characteristic” test articulated in Fagan was reaffirmed by the Court of Appeals for the District of Columbia five months later in Dodge v. Giant Food, Inc. 36 In a per curiam decision, the court concluded that hair length regulations and similar employment requirements are classifications by sex which do not limit employment opportunity by making distinctions based on immutable personal characteristics, which do not represent any attempt by the employer to prevent the employment of a particular sex, and which do not pose distinct employment disadvantages for one sex. Neither sex is elevated by these regulations to an appreciably higher occupational level than the other. We conclude that Title VII never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities. 37

The plaintiff in the Dodge case argued that marriage is not an immutable characteristic associated with a particular sex, yet the Seventh Circuit

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35. Id. at 1124-25. Religious discrimination was omitted from the “immutable” list, but a footnote to the opinion added that “likewise no discrimination can be based upon constitutionally protected rights such as religion.” Id. at 1125 n.22. Undoubtedly Judge Danaher perceived the inapplicability of the “immutable characteristic” test to the religion cases. See in this connection text following note 117 infra.
37. 488 F.2d at 1336-37 (footnote omitted).
had previously held in *Sprogis v. United Airlines, Inc.* that United's no-marriage policy for stewardesses constituted sex discrimination under Title VII because no such policy was applied to male flight employees. Acknowledging the point, the District of Columbia Circuit reconciled its opinion in *Dodge* with the *Sprogis* decision by pointing out that "marriage is more difficult to initiate or to terminate than long hair, and the legal and social ramifications are far more significant than the consequences of wearing long hair."  

The *Fagan* and *Dodge* decisions have had a bandwagon effect; more and more federal courts are climbing on board. One of the

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38. 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971). The court articulated what can be described as an "irrational impediment" test—that disparate treatment of male and female employees which creates irrational impediments to the job enjoyment of a particular sex is improper under Title VII. 444 F.2d at 1198. Judge Stevens (now Justice Stevens), who believed that an even application of the no-marriage policy applied within the narrow classification of stewardesses precluded any unlawful discrimination, wrote a lengthy dissent. He stated his view that the majority's "irrational impediment" test was not faithful to congressional intent, arguing that "[a] simple test for identifying a prima facie case of discrimination because of sex is whether the evidence shows treatment of a person in a manner which but for that person's sex would be different." 444 F.2d at 1205 (footnote omitted).


The *Baker* opinion is not a good one. Judge Trask there advanced the idea that *Fagan* received further support from the maxim *expressio unius est exclusio alterius*. 507 F.2d at 897. His point was: "Since race, national origin and color represent immutable characteristics logic dictates that sex is used in the same sense rather than to indicate personal modes of dress or cosmetic effects." *Id.* Inexplicably, however, no reference was made to religion, which has always been a prohibited basis for discrimination under Title VII and which obviously does not represent any immutable characteristic. Moreover, Judge Trask is surely not suggesting that, in cases of race, national origin and color, Title VII is applicable only to cases involving immutable characteristics of employees or applicants. To do so would reject a number of post-*Griggs* "disproportionate impact" decisions (including a Ninth Circuit determination) that hold employment policies to be racially discriminatory under Title VII. These cases involve the use by employers of policies on such things as garnishments or non-conviction arrest records, which are hardly immutable features of race, national origin or color. *See, e.g.*, *Gregory v. Litton Sys., Inc.*, 472 F.2d 631 (9th Cir. 1972); *Johnson v. Pike Corp. of America*, 332 F. Supp. 490 (C.D. Cal. 1970).

In *Baker*, Judge Trask took his cue from the sweeping language of the District of Columbia Circuit in *Fagan* (text accompanying note 35 *supra*). However, as previously noted, in discussing the *Dodge* case, the District of Columbia Circuit has already recanted its immutable characteristic test as to no-marriage rules. See text accompanying note 39, *supra*. Clearly the court in *Fagan* did not intend to be stating a principle inconsistent with previous Title VII racial discrimination precedent.

Judge Trask in *Baker* tried again by noting that:

The character of appellant's sex does not seem to have been a deterrent to his qualifications or he would not have obtained the job in the first place. It was
recent endorsements was that of the Fifth Circuit in the Willingham case. Sitting en banc, the court by an eleven to four vote reversed the previous decision of a three-judge panel, which had in turn reversed the district court. The majority acknowledged the customer preference underpinning of the newspaper company's grooming code, noting that the employer "was entitled to consider that the business community of Macon, including its own advertisers, was particularly sour on youthful long-haired males" at the time of the plaintiff's application for employment. The court reviewed the "sex-plus" theory in some detail, noting that the Supreme Court in Phillips "found expressly that 'sex-plus' discrimination violates the Civil Rights Act." Nevertheless, in language apparently contradictory to Phillips, the court concluded that the Civil Rights Act

should reach any device or policy of an employer which serves to deny acquisition and retention of a job or promotion in a job to an individual because the individual is either male or female. . . . [A]n employer cannot have one hiring policy for men and another for women if the distinction is based on some fundamental right. But a hiring policy that distinguishes on some other ground, such as grooming code or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity. Phillips was then distinguished because the condition there (having preschool age children) had been an existing condition not subject to change. Finally, after reviewing the Dodge and Fagan decisions of the District of Columbia Circuit, the court quoted from Dodge the view that "Title VII never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities."

What, then, are the intrinsic merits of the "immutable characteristic" test and what are its implications? On the merits, the District of Columbia and Fifth Circuits are surely on sound ground in suggesting that Congress never intended Title VII to reach grooming codes affect-

his violation of the company grooming standards after his employment which appears to have caused his termination, not his sex.

507 F.2d at 897-98. But exactly the same thing could be said of a woman in a Phillips situation, who is discharged for bearing children; Judge Trask's conclusion is pure "sex-plus," the theory rejected by the Supreme Court unless justified under the bfoq exception (a point not treated in Baker). See note 31 supra.

41. 507 F.2d 1084 (5th Cir. 1975). See note 33 supra.
42. 482 F.2d 535 (5th Cir. 1973).
43. 352 F. Supp. 1018 (M.D. Ga. 1972); note 33 supra.
44. 507 F.2d at 1087.
45. Id. at 1089.
46. Id. at 1091.
47. Id. at 1092.
ing long-haired males adversely. But it is not particularly meaningful to speak of congressional intent in view of the paucity of legislative history on Title VII, especially on the sex discrimination ban.\textsuperscript{48} Moreover, it is not uncommon to see broad-gauge pieces of remedial civil rights legislation interpreted and applied by the judiciary in ways not anticipated by legislative draftsmen. Thus the Congressional intent point, albeit valid, has little force.

Alternatively, it may be that the District of Columbia and Fifth Circuits merely are articulating a de minimis rule, stating in effect: “Please do not bother the federal courts with cases of such small moment as these.” Such a message might not be objectionable, but if that is the message (and it may be, in light of previously-quoted language in both \textit{Dodge} and \textit{Willingham} about situations having an insignificant effect on employment opportunities)\textsuperscript{49}, it would be better to say so in a forthright manner rather than to articulate a broad test applicable to all forms of discrimination which may have troublesome implications for the goal of eliminating sex discrimination.

As noted earlier,\textsuperscript{50} the “immutable characteristic” test, taken literally, would necessitate a disapproval of the \textit{Sprogis} decision involving United Airlines’ no-marriage policy—an implication disavowed by the Court of Appeals for the District of Columbia in its subsequent opinion in \textit{Dodge v. Giant Food}.\textsuperscript{51} Another difficulty with the test, however, is how it may apply when women are the affected

\begin{footnotes}
\footnote{49. Text accompanying note 47 \textit{supra}. This interpretation is supported by the views of Judge Gesell of the District Court for the District of Columbia in \textit{Boyce v. Safeway Stores, Inc.}, 351 F. Supp. 402 (D.D.C. 1972). Judge Gesell’s view (quoted with approval by the District of Columbia Circuit in \textit{Dodge}, 488 F.2d at 1336) was that:

The laws outlawing sex discrimination are important. They are a significant advance. They must be realistically interpreted, or they will be ignored or displaced.

351 F. Supp. at 404. Applying this view to the facts before him, Judge Gesell concluded (in language quoted with approval by the District of Columbia Circuit in \textit{Fagan}, 481 F.2d at 1123):

Congress by this Act did not give the federal courts the task of deciding whether hair at the collar level or one-half inch below is a bona fide occupational qualification. Such a suggestion is absurd; such a task borders on the non-justiciable.

351 F. Supp. at 404. (Even though the task bordered “on the nonjusticiable,” Judge Gesell adjudicated it by deciding in the next sentence that Safeway’s grooming code was reasonable and was a bfoq. \textit{Id.})

50. See text accompanying note 38 \textit{supra}.}
\footnote{51. 488 F.2d 1333 (D.C. Cir. 1973).}
class. The formula was prompted by circumstances in which the affected class was the male sex; apprehension was expressed that if long-haired men won their cases under Title VII, men should be able to wear dresses to work. Presumably this illustration was thought to be both absurd and shocking. Yet it follows from the "immutable characteristic" test articulated by the District of Columbia and Fifth Circuits that employers can not only prevent men from wearing dresses but also women from wearing pants, a result that would surely be thought by many to be at least absurd, if not shocking. It would also follow that employers can require certain color coordination of women's clothing at work, but not of men's clothing, or that women (but not men) could be required to carry certain types of luggage on business travel, and so on. These examples do not involve immutable characteristics of a particular sex—they are directly connected, instead, to the traditional management prerogative of structuring an image that will be pleasing to the consuming public. Yet Judge Aubrey Robinson of the District Court for the District of Columbia has recently held that Northwest Airlines cannot require female flight cabin attendants to carry specific brands of luggage, or to wear contact lenses instead of eyeglasses, without requiring the same for male flight cabin attendants. This conclusion is logically irreconcilable with Fagan, Dodge, and Willingham.

Are these examples as de minimis as the problem of long hair for male employees? Surely so under the view expressed in Fagan, Dodge, and Willingham. It is entirely possible that the District of Columbia and Fifth Circuit courts anticipated these problems, and concluded that management prerogative should cover them. A sounder view, however, would seem to be that employer policies placing cosmetic limitations on females (perhaps in deference to customers) but not on males perpetuate, to borrow language from the Sprogis case, "irrational impediments" to employment for the female sex at a time in our history when such impediments simply ought not to be countenanced. Despite the dearth of legislative history, it is clear that Title VII's ban on sex discrimination was designed to ameliorate the employment restrictions on women, and it may be appropriate to apply its strictures more rigorously against practices restricting the job enjoyment of women than

54. 444 F.2d at 1198.
55. See Developments in the Law, supra note 48, at 1166-68.
against practices restricting the job enjoyment of men.\footnote{But see EEOC Decision No. 76-102, 12 FEP Cases 1357 (March 25, 1976), in which the Commission rejected the contention of a male that there was reasonable cause to believe that an employer had violated Title VII by refusing to hire him as a telephone operator because of his arrest and conviction record. The Charging Party argued that, because the use of arrest records as a screening device disproportionately affected males, it constituted discrimination on the basis of sex. The Commission refused to apply this "impact theory," asserting in effect that it was applicable in sex discrimination cases only "when the reason for the disproportionate impact is biological" or when due to "historic deprivation of . . . rights predicated upon . . . sex." 12 FEP Cases at 1358.}

From this viewpoint, the "immutable characteristic" test is inadvisable.

\textbf{C. Traditional Management Rights}

\textit{Circumscribed by Title VII}

The term "management prerogative" has been used unhesitatingly in the preceding discussion as if the term carried with it some widely understood and accepted meaning. Of course, the term is by no means well defined, and some reflections are worthwhile to place it in perspective.

Under the National Labor Relations Act, the management prerogative notion emerged as a distinct concept from a line of Supreme Court decisions struggling with the difference between mandatory and permissive subjects of bargaining.\footnote{The principal decisions are NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).} Particularly influential have been the views of Justice Stewart, expressed in his concurring opinion in \textit{Fibreboard Paper Products Corp. v. NLRB},\footnote{379 U.S. at 217-26.} views analyzed extensively elsewhere.\footnote{See Oldham, \textit{Organized Labor, the Environment and the Taft-Hartley Act}, 71 Mich. L. Rev. 935, 983-90 (1973).} Justice Stewart pointed out that certain decisions "which lie at the core of entrepreneurial control," such as a decision to liquidate assets, to go out of business, to commit investment capital, or to change "the basic scope of the enterprise," should be left to management alone.\footnote{379 U.S. at 223.}

It is a long distance from the fundamental types of managerial decisions referred to by Justice Stewart to the particularized tension between certain employees and their employers over such matters as the length of one's hair, or the observance of one's religion. Yet the issue in both contexts is much the same—as the Fifth Circuit stated in the en banc opinion in \textit{Willingham}, the inquiry is the extent to which limitations have been placed on "an employer's right to exercise his informed
judgment as to how best to run his shop.”61 Over the years, employers and unions have recognized the employer’s right “to run his shop” by negotiating “management rights” clauses in collective bargaining agreements. These clauses typically encompass aspects of the day-to-day operations of an employer’s business—the setting in which Title VII conflicts of the type being discussed in this article tend to arise.

To get a sense of the types of management rights that may be affected by Title VII, a random sampling was undertaken of fifty current collective bargaining agreements maintained in the files of the Bureau of Labor Statistics.62 Of the fifty contracts examined, forty-three contained a clause extending to the employer the basic right to manage the business. Other more specific clauses occurring with considerable frequency were as follows:

<table>
<thead>
<tr>
<th>Contract Clause</th>
<th>No. of Contracts Containing Clause</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. To suspend, discharge or discipline employees</td>
<td>38</td>
</tr>
<tr>
<td>2. To select and hire employees</td>
<td>38</td>
</tr>
<tr>
<td>3. To direct the workforce (assign work)</td>
<td>36</td>
</tr>
<tr>
<td>4. To transfer, promote or demote employees</td>
<td>36</td>
</tr>
<tr>
<td>5. To lay off employees for lack of work or other legitimate reasons</td>
<td>26</td>
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<tr>
<td>6. To determine the method of manufacture</td>
<td>25</td>
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<tr>
<td>7. To make reasonable rules to maintain efficiency and discipline in the workforce</td>
<td>25</td>
</tr>
<tr>
<td>8. To set production schedules</td>
<td>21</td>
</tr>
</tbody>
</table>

None of the foregoing management rights can legitimize employer behavior prompted by a discriminatory motivation, unless it can be said that the “immutable characteristic” test of the Fagan line of cases permits this to some degree.63 As a rule, however, employment policies or standards are set as a natural exercise of the managing function, and

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61. 507 F.2d at 1092.
62. Only contracts covering at least one thousand employees were included in the study. The author is indebted to his research assistant, Jonathan F. Myers, for his excellent help in selecting and studying the fifty collective bargaining contracts.
63. Under the Fagan line of cases (notes 32, 36, 40 and 41, supra), differentiation between males and females that is not based on an “immutable characteristic” is not sex discrimination. The Fagan court noted that the employer in that case was not acting “otherwise than in complete good faith,” 481 F.2d at 1125. Nevertheless, the conclusion of Fagan and its progeny that no discrimination was present would allow employers to set different grooming policies for males and females for whatever reasons they choose, including hostility toward one sex or the other.
when these policies have a discriminatory impact, the conflict between management prerogative and Title VII is joined. When that happens, to what extent must traditional management prerogatives yield?

They must yield entirely unless saved by the business necessity defense (applicable to all types of discrimination prohibited by Title VII), the bfoq exception (applicable to sex, national origin, and religious discrimination) or the undue hardship component of the reasonable accommodation principle (applicable to religious discrimination). Since the bfoq exception has been interpreted in extremely narrow terms, the primary impact on management prerogative will occur in the business necessity and reasonable accommodation contexts.

With regard to business necessity, the key under Griggs is job-relatedness. If an employment requirement can not be "validated" by a convincing case that the requirement accurately measures skills properly associated with the job in question, or with a job or jobs in a virtually automatic line of progression, the employment requirement will fail, regardless of the cost of dispensing with it or of correcting it.

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65. See Oldham, supra note 13, at 76-91.
66. The Supreme Court's recent opinion in a non-Title VII case, Washington v. Davis, 44 U.S.L.W. 4789 (U.S. June 8, 1976), calls into question the degree of job-relatedness that will be required in future Title VII cases. The Court reversed the Court of Appeals for the District of Columbia and granted summary judgment to the Washington, D.C., police department, charged with hiring patrolmen on the basis of a test the results of which did not correlate with on-the-job performance and which a much higher proportion of blacks than whites failed. The Court accepted the department's defense that the tests were sufficiently job-related to satisfy 42 U.S.C. § 1981 and a District of Columbia statute prohibiting racial discrimination in public employment, since screening test scores were correlated with the results of a post-training-program examination. Although Title VII was not at issue, the Court seemed to endorse a job-relatedness standard for it based solely on success in the training program. Justice White, speaking for four other members of the Court (Justice Stevens concurred separately; Justice Stewart did not join in this part of the opinion) gratuitously stated:

... [T]he District Judge concluded that Test 21 was directly related to the requirements of a police training program and that a positive relationship between the test and training course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer. This conclusion of the District Judge that training-program validation may itself be sufficient ... [is not] foreclosed by either Griggs or Albermarle Paper Co. v. Moody; and it seems to us the more sensible construction of the job relatedness requirement.

Id. at 4795 (citation omitted).

Justice Brennan, joined by Justice Marshall, dissented on the ground that the police department had not met its burden of proving job-relatedness since there was no evidence that high post-training program examination scores had any relationship to on-the-job performance. Terming the majority decision "particularly unfortunate if it is extended to govern Title VII cases," Id. at 4800, he argued that under it employers could validate job screening tests simply by establishing a training program and giving a post-training examination that measured the same abilities that the screening test had—regardless of the relevance of those skills to the job.
ing these basic rules to the specific management rights listed above, the first, second, fourth, and fifth are frequently put under the Griggs microscope. Thus in hiring employees, an employer can not exercise its prerogative to use "neutral" employment screening devices such as standardized tests, 67 no-marriage policies, 68 or fixed height and weight rules 69 unless these requirements can be shown to have a neutral impact or to be validly related to job performance.

The third management right listed above, the right to direct the work force (assign work), has remained largely undiminished, at least with regard to race, sex, and national origin discrimination. That is, an employer has a fundamental right to set job content—to prepare job descriptions and classifications and to allocate work efficiently among employees. 70 As long as the job content is not fashioned as a pretext for discrimination, all that is required is that there be a demonstrable connection between job prerequisites and job content. Title VII does not instruct employers to attempt to rearrange jobs or to change the job content to avoid the discriminatory effect. For instance, in Pendleton v. East Los Angeles Community Union, 71 an employer's discharge of a female employee due to her refusal to wash coffee cups and make fresh coffee as a part of her secretarial job was upheld. Presumably the plaintiff's theory was that the employer's policy evidenced overt sex discrimination of the type proscribed by the Act. Nevertheless, the court concluded that "defendant's policy that all secretaries, including Plaintiff, make coffee and wash coffee cups was adopted pursuant to a valid business objective and purpose." 72

Similar results have been reached in the "disproportionate impact" cases relying on the Griggs decision. For example, in Faro v. New York University, 73 a medical school was able to justify its hiring of two male instructors over a female applicant by saying that the woman wanted a position leading to tenure whereas the available openings were not in the "tenure track." While the court made passing mention of the possibility that the nature of the openings had been due to the school's

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70. Since an applicant's qualifications are evaluated in relation to the job's specifications, freedom to set job content gives an employer some discretion in selecting and hiring employees.
71. 8 FEP Cases 514 (C.D. Cal. 1974).
72. Id. at 515.
73. 8 FEP Cases 319 (S.D.N.Y. 1973).
funding problems, no attempt was made to determine whether a potentially tenured position truly could not have been offered.\textsuperscript{74} Similarly, in \textit{Gillin v. Federal Paper Board Co.},\textsuperscript{75} the Second Circuit held that an employer could upgrade a job's requirements, disqualifying a female employee under consideration for promotion to the position, so long as the new requirements were "clearly job-related."\textsuperscript{76}

In the religious discrimination area a very different approach is required by the "reasonable accommodation" principle. If in the \textit{Pendleton} case washing coffee cups and making coffee had somehow been offensive to the plaintiff's religious beliefs (for example, if she had been a strict Mormon who disavowed either consuming or contributing to the consumption by others of caffeine), under most of the cases discussed in the succeeding section, the Los Angeles Community Union would have been required to accommodate this belief, and other employees would have had to make the coffee. Similarly, if the applicant in \textit{Faro} had been denied employment because of her insistence on a position that would not require her to work on her Sabbath, the school would probably have been required to make some effort to accommodate this demand. Thus for the employees in question the employer's management prerogative to direct the work force and to assign work would be restricted.

Beyond job content, other management prerogatives identified in the table above may be affected by the reasonable accommodation requirement of the ban on religious discrimination. This is particularly true of setting production schedules (including Saturday and Sunday work that conflicts with traditional days for religious observance) and maintaining efficiency and discipline in the work force. The extent of encroachment upon these traditional management rights by the reasonable accommodation principle is the topic to which discussion next turns.

\section*{II}

\textbf{THE REQUIREMENT OF REASONABLE ACCOMMODATION OF RELIGIOUS BELIEF}

\textbf{A. In General}

In religious discrimination cases, Congress has directed employers to seek ways to get the job done in a non-discriminatory fashion—in a

\textsuperscript{74} \textit{Id.} at 323.

\textsuperscript{75} 479 F.2d 97 (2d Cir. 1973).

\textsuperscript{76} \textit{Id.} at 101. However, discrimination was found because of independent explicit evidence that the employer had refused to give the employee even initial consideration for the upgraded position on account of her sex. The court remanded the case to the district court on the issue of damages. \textit{Id.} at 102.
fashion other than that selected by the employer in the exercise of its normal prerogative to set policies and work patterns determined to be the most efficient. At the same time employers are told that they need not suffer "undue hardship," generally meaning that no accommodation of religious beliefs is necessary if it costs too much. What is too much varies sharply from court to court.

Analytically, the religious discrimination cases are a variant of the Griggs situation. Neutral employment policies required in complete good faith by employers in connection with legitimate business purposes may nevertheless have a disproportionate impact on a particular religion. This characterization of the religious discrimination problem has been adopted both by the EEOC and the federal courts. For example, in Cummins v. Parker Seal Co. Judge Phillips of the Sixth Circuit Court of Appeals stated:

In practice, the reasonable accommodation rule restrains employers from enforcing uniform work rules that, although facially neutral, dis-


Statute:

[$§ 2000e(j)] 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 to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business, . . .

Regulation:

§ 1605.1 Observation of the Sabbath and other religious holidays.

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer 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. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

78. 516 F.2d 544 (6th Cir. 1975) aff'd by an equally divided Court, 13 FEP Cases 1178 (U.S. Nov. 2, 1976) (No. 75-478). See also Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972); EEOC Decision No. 71-463, 3 FEP Cases 385 (1970). In the EEOC decision, an employer's inflexible policy of scheduling vacations during a specific two-
Applying *Griggs*, results ought to turn on the definition of business necessity in the religious discrimination context. But in most cases, the *Griggs* formula for business necessity (i.e., job-relatedness) will not work as a tool to evaluate a charge of religious discrimination. Usually at stake are not employment policies designed as screening devices to locate, retain, or promote employees qualified to do certain jobs, but work rules designed to promote increased production and thus profitability. As to these, the attention of the courts will be focused upon the definition under the statute of the term "religion" and the hardship the employer would suffer in accommodating the employee's religious beliefs.

**B. Impact on Management Rights**

The most heavily litigated issue under the religious discrimination component of Title VII is the conflict between an employee's wish to be free from work on the Sabbath or other holy days observed by his

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week annual plant shutdown, thus precluding an employee from attending a religious conference, was disapproved. The Commission stated:

Where an employment policy has a disproportionate impact on members of a group protected by Title VII, the employer has the burden of showing that the policy is so necessary to the operation of his business as to justify the policy's discriminatory effects.

3 FEP Cases at 386.

79. 516 F.2d at 553.

80. It is not always possible to draw a clear line between screening devices, which interrelate with job specifications, see note 62 *supra*, and work rules, which can be characterized as constituent elements of any job's content. Furthermore, it is possible for a job-relatedness inquiry to occur in the religious discrimination context. One such possibility would be a policy concerning job-related working apparel or apparatus that would preclude the wearing of religious clothing. See notes 119-22 *infra*, and accompanying and following text. Moreover it is conceivable that an employment test would have a discriminatory effect on particular religions. In Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D.D.C. 1973), Judge Robinson found that the job of flight cabin attendant required "a high degree of poise, tact, friendliness, good judgment and adaptability." 366 F. Supp. at 780. Suppose that Northwest Airlines, striving to maximize these attributes within its work force, fashioned or commissioned a standardized psychological test designed to screen out all zealots from the pool of flight cabin attendant applicants. This test would inevitably have a disproportionate impact on members of some religious faiths. See, e.g., Smith v. Universal Servs., Inc., 4 FEP Cases 182 (E.D. La. 1971), *vacated and remanded*, 454 F.2d 154 (5th Cir.), *adhered to on reconsideration*, 360 F. Supp. 441 (E.D. La. 1972), dealing with a member of the Pentecostal faith who, among other things, sang hymns and preached to fellow workers while on the job. Would Northwest Airlines be susceptible to a religious discrimination charge from a Pentecostal applicant eliminated by the standardized test? Under *Griggs*, the answer would be yes and Northwest would be required to abandon the test or demonstrate its job-relatedness by having the test validated. Could Northwest demur on the ground that either validation or abandonment of the test would be quite costly and thus an undue
religion, and the employer's managerial rights to direct the work force, to set production schedules, and to maintain efficiency and discipline in the workplace. Employers argue, with some justification, that making special exceptions for employees under these circumstances not only disrupts production but also causes fellow employees to become disgruntled, creating significant morale problems. The courts have, with one exception, aligned themselves in two camps. One favors an expansive interpretation of the reasonable accommodation principle. The other favors a narrow interpretation by being quick to find an undue hardship. The exception is the Court of Appeals for the Sixth Circuit, which at present is in a remarkable state of disarray over the religious discrimination prohibition of Title VII.81

On the merits, some cases are disposed of by a conclusion that the employer took no affirmative steps of any consequence to accommodate the employee's beliefs. This was true in Shaffield v. Northrop Worldwide Aircraft Services, Inc.,82 where Judge Johnson of the Middle District of Alabama, noting that "inconvenience is not undue hardship," added:

[T]he burden is upon the employer to seek the cooperation of other employees, if necessary; and it is clear that the employer must show that it in fact attempted an accommodation, if it is to carry its burden of proof.83

Similarly, in Claybaugh v. Pacific Northwest Bell Telephone Co.,84 the affirmative nature of the employer's duty to accommodate an employee's religious beliefs was emphasized; Bell was required affirmatively (1) to seek out cooperation of other employees, (2) to seek out an open position within the organization where the employee's religious needs could be permanently accommodated, and (3) to seek union assistance

81. See notes 95-120 infra. Frequently a threshold question is what Congress intended by its 1972 adoption of the pre-existing EEOC interpretative guideline on religious discrimination containing the reasonable accommodation principle. For the most part, the courts have endorsed the proposition that the 1972 amendment represented a belated clarification of what Congress intended in 1964 when the religious discrimination prohibition was initially enacted. The leading case articulating this viewpoint is the Fifth Circuit's opinion in Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972). Accord, Weitkenau v. Goodyear Tire & Rubber Co., 381 F. Supp. (D. Vt. 1974); Hardison v. Trans World Airlines, 375 F. Supp. 877 (W.D. Mo. 1974), aff'd in part and rev'd in part, 527 F.2d 33 (8th Cir. 1975) cert. granted, 45 U.S.L.W. 3359 (U.S. Nov. 16, 1976); see Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975), rev'g and remanding 10 FEP Cases 535 (E.D. Tenn. 1974).
82. 373 F. Supp. 937 (M.D. Ala. 1974).
83. Id. at 941-42.
to work out either temporary or permanent accommodation. Judge Burns pointed out that "Bell's size as an employer defies any conclusion other than that an open position could be found within a short time where Claybaugh's religious needs could be permanently accommodat-ed." Acknowledging that the accommodation requirement "is not unbending," Judge Burns concluded that:

As the degree of business hardship increases, the quantity of conduct which will satisfy the reasonable accommodation requirement decreases. The balancing of reasonableness and hardship is what I believe Chief Justice Burger was referring to as the 'business necessity' which would qualify as a legitimate reason for discharging an employee.

The foregoing interpretation of the reasonable accommodation principle as an expansive affirmative duty on employers is by no means universally accepted. For example, in *Hardison v. Trans World Airlines*, Judge Oliver of the Western District of Missouri wrote:

The duty to accommodate does not require that an employer make every effort short of going out of business to permit his employees to stay on the job and also to observe their religion. The term 'reasonable accommodation' (emphasis added) should be read with the term 'undue hardship' to arrive at the proper standard.

The duty imposed on an employer by Title VII is not a duty to impose hardships on the rest of his employees or members to accommodate the religious beliefs of a few. It is simply a duty to take affirmative action to try to find a way to permit the employee to observe his religion as he wishes, as opposed to a duty simply not to intentionally discriminate.

In the *Hardison* case, TWA endeavored to accommodate plaintiff's sundown Friday to sundown Saturday Sabbath observance by permitting him to swap days off with the Union Steward, by excusing time off on religious holidays if he would agree to work on "Christian" holidays if requested, and by promising to attempt to find him another job. Even though TWA took no part in the search for employees willing to swap

85. *Id.* at 5-6.
86. *Id.* at 5.
87. *Id.* at 6 (footnote omitted). Judge Burns also dismissed as inapplicable the bfoq exception. *Id.* at n.12. His conclusion about Bell's size tends to corroborate an earlier prediction that undue hardship would be almost impossible for large corporate employers to demonstrate. See Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971).
89. *Id.* at 889. This interpretation of the reasonable accommodation principle was quoted with approval in *Dixon v. Omaha Pub. Power Dist.*, 385 F. Supp. 1382, 1387 (D. Neb. 1974).
shifts (falling short of the accommodation required by Judge Johnson in the *Shallield* case, above) the efforts by TWA were deemed adequate.

On appeal, Judge Oliver's finding of an adequate accommodation by TWA was reversed. Observing that "[t]he company many not accept the role of a Pontius Pilate," the Court of Appeals for the Eighth Circuit reviewed several feasible alternatives that had not been explored by TWA due to a presumed conflict with the collective bargaining agreement, and concluded that: "Before an employer can assert the defense of non-cooperation, it is incumbent upon it to establish the accommodation which it has tendered and with which the employee refused to cooperate."

Thus far, attention has been directed to the judicial construction of the "reasonable accommodation" words of the statute. A number of cases, however, have been decided under the "undue hardship" phrase. In these cases, courts have either concluded that the employer satisfied the affirmative duty to accommodate and inquired whether it would be an undue hardship to require more, or have ignored altogether any requirement that the employer take affirmative steps. In either case, the "hardship" analysis will generally encompass a number of criteria, including the following: (1) the degree of disruption to defendant's business for the plaintiff's job to remain unstaffed on the days in question; (2) the feasibility of other employees covering the work or of transferring the plaintiff to another comparable job the demands of which would not conflict with his or her religious observances; (3) the effect on other employees' morale and efficiency; and (4) the measurable cost of the various alternatives.

The various weights attached to these criteria and the aggregate "quantum" of hardship required in order to be designated "undue" vary from court to court. Sometimes, at least in the Sixth Circuit, they

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90. Hardison v. Trans World Airlines, 527 F.2d 33, 39 (8th Cir. 1975).
91. For treatment of the conflict between the accommodation requirement and union contracts, see notes 128-43 infra, and accompanying text.
92. 527 F.2d at 39.
93. In the *Hardison* case, the Eighth Circuit analyzed several alternatives in assessing the undue hardship argument of the defendant, treating in the process all of the above criteria except the third. Leaving Hardison's job unstaffed for the twilight shift on Fridays was not considered undue hardship by the court, 527 F.2d at 40. Covering Hardison's shift with other employees was also viewed as feasible; while substantial overtime costs necessary to "cover" for Hardison might constitute undue hardship, some cost to TWA would be required by the statute, and TWA did not carry its burden of proof on this point. *Id.* at 40-41. The Supreme Court has granted certiorari in the *Hardison* case, 45 U.S.L.W. 3359 (U.S. Nov. 16, 1976).
94. For an example of an unusually demanding accommodation holding, reflecting little sympathy for the employer's claim of hardship, see Scott v. Southern Cal. Gas Co., 7 FEP Cases 1030 (C.D. Cal. 1973). There, notwithstanding substantial efforts by the employer to relocate the plaintiff in one of several jobs for which he was qualified where there would be no religious conflict, coupled with a transition arrangement
vary from panel to panel within the same court. Exemplifying this phenomenon is the case of Reid v. Memphis Publishing Co.\textsuperscript{95}

The Reid case has a long history. Plaintiff was a qualified applicant for the post of copyreader for the Memphis Press-Scimitar, a job customarily filled by employees who were available, if necessary, seven days a week. Plaintiff was a Seventh Day Adventist who would have required exemption from Saturday availability. The employer declined to grant the exemption, and litigation followed. The district court rejected plaintiff’s claim of religious discrimination,\textsuperscript{96} ruling that the employer had no affirmative duty to accommodate an employee’s observance that conflicted with established work practices, and cited Dewey v. Reynolds Metals Co.\textsuperscript{97} for the proposition that the plaintiff had the burden of proving discrimination.

On appeal,\textsuperscript{98} the case was reversed and remanded for further proceedings. Judge Edwards, in a majority opinion joined by Judge Celebrezze, determined that the wrong legal standard had been applied that would respect the plaintiff's religious beliefs, Judge Ferguson held that reasonable accommodation “could only be made in the facts and circumstances of this case by permitting plaintiff to remain in the job classification of field service representative and to be permitted to observe the Sabbath of the Seventh Day Adventist religion.” \textit{Id.} at 1035-36. This conclusion was reached despite a previous finding that “[t]o the extent that plaintiff refuses Saturday work and to the extent that others more senior are required to work in his stead, the Company is in violation of the various labor agreements to which it is a party.” \textit{Id.} at 1033.

Illustrating a much different viewpoint are the opinions of Judge Wilson in Draper v. United States Pipe & Foundry Co., 10 FEP Cases 535 (E.D. Tenn. 1974), rev’d and remanded, 527 F.2d 575 (6th Cir. 1975) and Olds v. Tennessee Paper Mills, 11 FEP Cases 350 (E.D. Tenn. 1974), aff’d mem., 11 FEP Cases 1308 (6th Cir. 1975). In Draper, the plaintiff’s suggestions for varied shift arrangements that would take care of his problem were rejected as inefficient, impractical or objectionable to the union. 10 FEP cases at 537. (For the views of the Sixth Circuit in reversing Draper, see text accompanying notes 95-120 infra.) In Olds, borrowing (literally, but without quotes) some of his previous language from Draper, Judge Wilson emphasized the anticipated unavailability of the plaintiff, personnel director for the defendant, on Saturdays to cope with problems of absenteeism, safety, equipment breakdown and labor disputes. This projected unavailability was found to be undue hardship, although the only evidence of any attempted accommodation by the defendant was a persistent urging of the plaintiff to reconsider the needs of the company. 11 FEP Cases at 352.

As the foregoing cases demonstrate, there is a tendency to recite facts in some detail and to paste on a “reasonable accommodation” or “undue hardship” label without any particularly helpful indication of precisely why the facts justify the conclusion. Much more useful would be an overt identification and assessment of the criteria being applied to the facts.

95. 521 F.2d 512 (6th Cir. 1975).
96. The opinion in the initial district court decision is unreported. For its content and disposition, see the Sixth Circuit’s opinion on the first appeal, 468 F.2d 346 (6th Cir. 1972).
97. 429 F.2d 324 (6th Cir. 1970), aff’d by an equally divided Court, 402 U.S. 689 (1971).
98. See note 96 supra.
by the trial court, quoting the EEOC's new guidelines requiring employers to accommodate reasonably the religious needs of employees and prospective employees.  

On remand, District Judge McRae, after a supplemental evidentiary hearing, concluded that the defendant was unwilling to accommodate any employee's request to be off work on a particular day for religious purposes. Since the defendant's policy was to make no exceptions to its work practices for religious beliefs, Judge McRae found that the defendant "did not make any attempt to accommodate the religious needs of the plaintiff." Thus, plaintiff prevailed and a monetary award was calculated, although attorney's fees were denied. Both parties appealed.

Prior to the decision on this appeal, a Sixth Circuit panel comprised of Judges Phillips, Celebrezze, and McCree decided the case of Cummins v. Parker Seal Co. In Cummins, the plaintiff, a member of the World Wide Church of God, which observed the Sabbath on Saturdays, was discharged from his position as a salaried supervisor after complaints arose from fellow supervisors who were forced to substitute for him on Saturdays. In an opinion joined by Judge McCree, Judge Phillips held that:

[The objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business. If employees are disgruntled because an employer accommodates its work rules to the religious needs of one employee, under EEOC Regulation 1605 and § 2000e(j) such grumbling must yield to the single employee's right to practice his religion. Moreover, the fact that Saturday Sabbath observance by one employee forces other employees to substitute during weekend hours does not demonstrate an undue hardship on the employer's business. It is conceivable that employee morale problems could become so acute that they would constitute an undue hardship. The EEOC, in interpreting Regulation 1605, has noted the possibility of undue hardship when the

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99. The court disposed of two other issues concerning the impact of those guidelines. Judge Edwards noted that the codification of the reasonable accommodation requirement in 1972 expressed the prior intention of Congress, as had been shown in Riley v. Bendix Corporation, 468 F.2d at 351; see cases cited note 81 supra.

The court also concluded that whatever doubts there may have been about the constitutionality of the reasonable accommodation principle under the establishment clause had been laid to rest by the unanimous Supreme Court decision in the Griggs case. Judge Edwards noted that "Justice Burger's discussion of the 'business necessity' test laid down in Duke Power clearly extended to other prohibited forms of discrimination than race." Id. at 350.

101. Id. at 689.
102. 516 F.2d 544 (6th Cir. 1975) aff'd by an equally divided Court, 13 FEP Cases 1178 (U.S. Nov. 2, 1976) (No. 75-478).
employer can make a persuasive showing that employee discontent will produce 'chaotic personnel problems.'

Judge Phillips noted that complaints of fellow supervisors were mild and infrequent, and that the defendant could have pursued a much more active course of accommodation. Holding that no reasonable accommodation of the plaintiff's religious practice had been demonstrated, Judge Phillips acknowledged that the defendant was inconvenienced by the plaintiff's refusal to work on Saturdays, but stated that "to call the inconvenience shown on this record 'undue hardship' would be to venture into 'an Alice in Wonderland world where words have no meaning.'"

Less than three months after the Cummins decision, Judge Weick issued his surprising opinion in the second Reid appeal. The opinion is suspect because, as Judge Edwards pointed out in dissent, "the majority opinion retries this case on the written record, giving no weight to the great advantage the trial judge has in seeing, hearing and judging the credibility of the witnesses." Moreover, even accepting defendant's version of the facts, Judge Weick's opinion is incorrect because it reads the reasonable accommodation principle as having no affirmative component whatever, and the undue hardship limitation as being

103. 516 F.2d at 550. Compare the EEOC's "chaos" test regarding co-worker preference with its position on customer and co-worker preference in the sex discrimination context, quoted at text accompanying note 7 supra.

104. Id. at 550. Additionally, Judge Phillips affirmed his view of the constitutionality of the reasonable accommodation requirement, quoting, among other things, Judge Edwards' language on this point in the initial Sixth Circuit Reid decision. Id. at 551.

Judge Celebrezze dissented in Cummins, stating in some detail his view that the reasonable accommodation principle is unconstitutional. Id. at 554-60. He made no reference to his previous participation in the initial appellate opinion in Reid, where, as was pointed out, note 99 supra, he joined Judge Edwards in a general endorsement of the constitutionality of the reasonable accommodation requirement. Apparently upon reflection about the particular problems of the establishment clause, Judge Celebrezze changed his mind.

105. 521 F.2d 512 (6th Cir. 1975).

106. Id. at 523.

107. For example, Judge Weick noted that the defendant's other paper, The Commercial Appeal, operated on a schedule that would not have been disrupted by copyreaders who wished to have Saturdays off, but observed that "there was no proof offered that it had an opening for a copyreader." 521 F.2d at 515. Under virtually all previous judicial articulations of the reasonable accommodation principle, the defendant would have, at a minimum, the burden of proving that an easy transfer of the plaintiff would not solve the problem. See cases discussed at notes 82-87 supra, and accompanying text. Judge Weick's shifting of the burden back to the plaintiff was highlighted by Judge Edwards in his dissent, 521 F.2d at 523-24, in which he emphasized the trial judge's finding that defendant had made no effort to accommodate plaintiff's religious beliefs. 521 F.2d at 523.
satisfied by "serious morale problems among the other copyreaders." Invoking the Webster's New International Dictionary definitions of "undue" and "hardship," Judge Weick labeled "clearly erroneous" Judge McRae's determination that mere inconvenience does not meet the "undue hardship" test.

Judge Weick's opinion is disturbing because it appears to be disingenuous and because it blithely disregards Sixth Circuit precedent. No reference is made, for example, to the endorsement in Cummins of the EEOC view that "chaotic personnel problems" must be established by a persuasive showing to justify an undue hardship. Clearly such a showing was not made on the facts, notwithstanding Judge Weick's fear that accommodating Reid would create "havoc" among fellow employees. Weick's general attitude with regard to the intent of Congress in 1964 was:

The legislative history of the 1964 Act indicates that Congress was concerned that management prerogatives should be left undisturbed to the greatest extent possible, and that internal affairs of employers must not be interfered with except to the limited extent that correction is required in discriminatory practices.

Fortunately, Reid has not been the last word on the reasonable accommodation principle in the Sixth Circuit. The issue arose again in

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108. 521 F.2d at 517. This finding on employee morale was especially troublesome to Judge Edwards, who viewed it as sharply contradicted by the conclusions of the trier of fact. 521 F.2d at 527-29.

109. 521 F.2d at 517. Perhaps Judge Weick resorted to Webster's in response to Judge Phillips' "Alice in Wonderland" remarks in Cummins, text accompanying note 100 supra.

110. As Judge Edwards noted, 521 F.2d at 524 n.1, Judges Weick and Celebrezze both view the reasonable accommodation principle as unconstitutional. Judge Weick apparently believes that the requirement deprives employers of property without due process, while Judge Celebrezze believes that it constitutes governmental establishment of religion. However, not only was unconstitutionality not the basis for the majority opinion in the second Reid decision, it was not even mentioned.

111. Text at note 103 supra.

112. 521 F.2d at 521.

113. Id. at 518. With regard to the codification of the reasonable accommodation principle, note 81 supra, Judge Weick concluded that "[t]he subsequent enactment of § 2000e(j) in 1972 cannot be relied on to establish a Congressional intent with respect to the 1964 statute, which was not expressed in that statute." Id. at 520. This conclusion was reached despite, and without reference to, an exactly opposite conclusion by the same court in the same case the first time around. 521 F.2d at 525 (Edwards, J., dissenting).

Thus, in Judge Weick's opinion, the EEOC acted beyond its authority in its original promulgation of the reasonable accommodation requirement. One interpretation of the net effect of Judge Weick's opinion is that the regulation, which was adopted by the EEOC subsequent to the events complained of by Reid and which had no statutory status until 1972, simply should not be applied to the case. However, the opinion clearly does more. The reasonable accommodation principle is given a narrow interpretation and is in fact applied to the circumstances of the case.
Draper v. United States Pipe & Foundry Co.,114 this time before a panel comprised of Judges Phillips, Peck, and Engel. The court, with Judge Engel dissenting, held that the employer had failed to show undue hardship in accommodating the request of the plaintiff, an electrician who was a member of the World Wide Church of God, to be relieved of Saturday work. In a perfunctory footnote, Judge Phillips stated: "We do not consider that the second opinion of this court in Reid is controlling under the facts of the present case."115 It was determined that the company's attempts to transfer the plaintiff to a production job were inadequate, since a transfer would have meant a substantial reduction in pay and would have wasted the plaintiff's skills as an electrician.116

Quoting from its recent decision in Cummins, the court noted that

"undue hardship is something greater than hardship," and an employer does not sustain his burden of proof merely by showing that an accommodation would be bothersome to administer or disruptive of the operating routine. In addition, we are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice.117

This language stands in sharp contrast to the conclusion reached in the second Reid case.118 Also in contrast to Reid, Judge Phillips quoted the portion of the Cummins decision endorsing the EEOC requirement of "chaotic personnel problems" before employee morale difficulties will constitute undue hardship.119 Acknowledging that a heavier weight would be allocated to any safety problems created by an employer's accommodation, the court concluded that no significant safety problem associated with an accommodation of plaintiff's religious beliefs had been proved.120

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114. 527 F.2d 515 (6th Cir. 1975).
115. Id. at 517 n.2.
117. 527 F.2d at 520. Judge Engel dissented in Draper, urging, as did Judge Edwards in the second Reid appeal, that the trial judge's fact-finding should not be ignored. He stated:

... I am unable to veil a growing concern on my part that those who read our majority decision here and in Reid and Cummins may conclude that in this area of law our circuit in effect has instituted a practice of de novo review at the appellate level.

Id. at 524.
118. See text accompanying note 108 supra.
119. Id. at 521.
120. Id. at 521-22.
The Court of Appeals for the Sixth Circuit will eventually pull itself together in the religious discrimination cases. The cases decided to date by the Circuit provide, however, an illuminating example of the disparate, strongly-held beliefs in the judiciary about where the line is to be drawn between an employer's management prerogatives and an employee's individual freedoms under Title VII.

Before concluding this overview of the extent to which the reasonable accommodation feature of the religious discrimination ban encroaches on management prerogative, passing attention should be directed to a problem treated earlier in this article—employer grooming and dress codes. There are instances in which employer dress codes will precipitate claims of religious discrimination. Two illustrations that came before the EEOC several years ago are the request of a female employee who was a member of the Black Muslim religion to wear the ankle-length dress required by that faith,\(^1\) and the request by a nurse who was an "Old Catholic" to wear a close-fitting scarf about her head at all times in lieu of the standard nursing cap.\(^2\) Both of these examples are disposed of easily under Griggs—if there is a functional necessity for the requirement (the absence of long dresses, or the presence of specified nursing caps) in order to perform the job in question, the requirement is justifiable; otherwise it is not. Both illustrations would in all likelihood fail the Griggs test, in that employment policies of this type will generally relate to an overall employee image rather than to specific job content.\(^3\)

Applying the Fagan formula, however, do these policies involve characteristics "immutably" associated with a particular religion? In one sense they do not, because employees can easily choose to dispense with long robes or close fitting scarves. But these cases are much more difficult since there are no physical characteristics to fasten upon; what is "immutable" depends upon a multiplicity of variables such as the existence of a specific credo governing the practice in question, the religious sanction associated with the violation of that credo, the degree of intensity of the individual's religious beliefs, and the breadth of the

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1. EEOC Decision No. 71-2620, 4 FEP Cases 23 (1971).
2. EEOC Decision No. 71-779, 3 FEP Cases 172 (1970). In both case before the EEOC, reasonable cause was found that the employers violated Title VII by failing to accommodate the dress requirements associated with the employees' religions. In Decision No. 71-2620, the Commission noted that no evidence had been presented to show that the absence of ankle-length dresses was necessary "to the safe and efficient operation of its business." 4 FEP Cases at 24.
3. For some jobs, obviously there may be a functional connection. Long robes or dresses could be inconsistent with safety requirements precluding loose clothing in operating heavy machinery, for example. But see in this connection text accompanying note 126 infra.
term "religion" as applied to the particular facts. The "immutable characteristic" test is simply not workable in the context of religious discrimination. But the test not only may be unworkable, it is also inconsistent with the statutory accommodation principle. Since employers are required by Title VII to effect a reasonable accommodation of employees' religious beliefs, employers do not retain the managerial prerogative to set policies that relate only to "image" unless it can be said that the deviation from the desired image constitutes undue hardship to the employer. For most courts, as indicated by the preceding discussion of representative decisions, more than this will be required to qualify for the undue hardship designation.

Many hard cases have yet to be litigated. Must an employer who requires all employees having public contact to wear a specific uniform or costume relent in the case of a Black Muslim? Does public contact alone justify standardized dress codes? If so (and some courts would undoubtedly reach this conclusion) then management prerogative will have been eroded only marginally, and customer preference can be the basis for religious discrimination. If not (undoubtedly the outcome in other courts) then something more must be established to prove "undue hardship," bringing this inquiry closer to the Griggs job-relatedness test. For example, an airline may suggest that uniforms at air terminals are essential in order to distinguish airline personnel from passengers, thus facilitating efficient crowd handling and giving passengers readily identifiable individuals from whom to seek assistance. This argument might persuade a court that the absence of a uniform on a Black Muslim employee would legitimately disqualify that individual from jobs involving public contact.

Nevertheless, it is clear that the accommodation process will require conclusions in religious discrimination cases that will not be reached under the "immutable characteristic" line of cases in the area of sex discrimination. This result is not necessarily surprising, nor necessarily wrong; it may be nothing more than a reflection of the deeply-rooted tradition in this country of accommodating sincerely-held religious beliefs. The enduring nature of that tradition is sharply illustrated by a recent Department of Labor ruling pertaining to hardhats. Acceding to the absolute requirement that members of the Sikh faith

124. For example, in Fagan v. National Cash Register Co., discussed at text accompanying notes 32-47 supra, the Court of Appeals for the District of Columbia noted:

If while engaged in company service Fagan had been required to wear a company prescribed uniform, there could be no valid claim of discrimination on the ground of sex.

481 F.2d 1115, 1121-22 (D.C. Cir. 1973) (footnote omitted). Possibly, the District of Columbia Circuit would reach a like result on the ground of religion.

125. See, e.g., cases discussed at text accompanying notes 82-87 supra.
wear tightly wrapped turbans at all times, and that members of the old order Amish wear wide-brimmed black felt hats "even when working," the Occupational Safety and Health Administration issued an exemption for members of these faiths from its hardhat requirements. Surely a hardhat requirement is as good an example as one can find of a valid application of the Griggs job-relatedness test. Yet in view of the Labor Department ruling, it is entirely feasible for a court to conclude that an employer which does not exempt members of the Sikh faith from its hardhat policy has not reasonably accommodated the employee's religious practices as required by Title VII, or conversely that an exemption would not create undue hardship for the employer. Religious discrimination cases may be a variant of the Griggs situation, the variant is one in which the Griggs job-relatedness solution ordinarily will not work.

Instead of the reasonable accommodation principle, the EEOC and Congress could have given Griggs a slight twist by permitting an employer to justify any facially neutral policy that interfered with an employee's religious practices by showing the "work-relatedness" of the requirement in question. This would enable an employer to preserve a requirement by a cost-saving justification. Such an approach would sanction blanket policies without regard to whether or not an individual employee's problem could be easily solved, however, prompting some courts to require an exceedingly strong cost justification. For this reason, the case-by-case feature of the reasonable accommodation principle is preferable.

C. Effect on Unions

The principal setting in which there is a recurring attempt to articulate management rights is, of course, the collective bargaining contract. Management rights spelled out in these agreements, such as

126. U.S. Dep't of Labor, Occupational Safety and Health Admin., Field Information Memorandum No. 75-11 (Feb. 4, 1975). It was noted in the memorandum that "... it is considered a breach of Amish religious principles to wear a 'hard hat' " and that a male member of the Sikh Dharma Brotherhood is required to "... tie his hair in a Rishi knot on the crown of his head to be covered by a cotton cloth known as a turban whenever in public. He will be obliged to keep a dastar (small turban) when he is without his turban." Id. at 1. Invoking "provisions of the United States Constitution relating to the free exercise of religion," and § 20(a)(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 669(a)(5) (1970), the Department of Labor concluded that employees would not be required to provide hard hats to these groups "as long as such employees have informed their employers of their religious objection to the wearing of hard hats." Id. at 2.

those tabulated previously, are usually not unlimited rights; they are subject to restrictions stated elsewhere in the agreement, such as the seniority provisions or restrictions on the use of compulsory overtime. It is clear that management rights must yield to the reasonable accommodation principle of the ban on religious discrimination. Must union rights yield to the same extent—union rights reflected in the seniority, overtime, and other provisions of the contract? This issue is both significant and unresolved. Although an extended treatment is beyond the goals of this article, it is appropriate to touch upon the central contours of the problem. Thus far, the issue has been skirted in the case law. In some cases in which the issue is raised, no true conflict with applicable collective bargaining contract provisions is discerned. In the rare case where the conflict is clear, little analysis has been forthcoming. In one instance a specific factual finding was made that the company's accommodation of an employee's refusal to work on his Sabbath would violate various labor agreements, but just such an accommodation was required by the court without any further attention to the labor contract.

Significant attention was devoted to the accommodation problem in a union context in the case of Hardison v. Trans World Airlines. There the plaintiff named three unions as defendants and argued that they discriminated against him by adhering to the contract and by refusing actively to support his efforts to avoid the seniority provisions. The threshold question before Judge Oliver of the Western District of Missouri was whether the requirement to accommodate an employee's religious beliefs had any applicability to unions. Judge Oliver squarely

128. Text at note 62 supra.

129. For a recent case imposing on a union the duty to reasonably accommodate the (anti-union) religious beliefs of a member, see Cooper v. General Dynamics, 12 FEP Cases 1549 (5th Cir. June 9, 1976).

130. For example, in Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975), Judge Phillips responded as follows to the defendants' argument that accommodating plaintiff would violate the seniority and overtime provisions of the labor agreement:

We are not convinced. The Company had the right to direct the work force and to assign employees to shifts without regard to seniority. If the Company had arranged a partial shift exchange to avoid Sabbath work for Draper, there would have been no disproportionate assignment of overtime to Draper and no reduction in the amount of overtime available to other employees. Moreover, there is no indication that the Union would have objected to a shift exchange arrangement so long as sixteen-hour days were not scheduled on a regular basis. We see here no insurmountable conflict between the collective bargaining agreement and the duty to accommodate Draper's religious practices.


held that the accommodation principle extended to unions as well as employers, but, particularly in view of section 703(h) of Title VII, concluded that the duty to accommodate “did not require the union to ignore its seniority system.” However, it was added that the accommodation duty “require[d] that the union fairly represent the plaintiff when it became aware of the fact that plaintiff was facing difficulty in scheduling for his Sabbath and that he was in danger of disciplinary action by the company.”

Judge Oliver’s view that the reasonable accommodation principle applied to unions as well as employers was specifically approved by the Eighth Circuit on appeal. Finding it unnecessary to reach the substantive correctness of Judge Oliver’s conclusion that the union was not required to ignore its seniority system, the court nevertheless observed that:

It would seem that a collective bargaining agreement, the seniority provisions of which preclude any reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act. We are not required to reach that point in this case, however, because the evidence is clear that TWA did not seek and the union therefore did not refuse to entertain a possible variance.

133. 42 U.S.C. § 2000e-2(h) (1970). Relevant text of the provision is as follows: Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

Much litigation has been brought recently to sort out the conflict caused by the discriminatory effects of “neutral” seniority rules, effects that are particularly harsh in hard economic times when massive lay-offs occur. In this litigation, section 703(h) plays a prominent part. See, e.g., Jersey Cent. Power & Light Co. v. IBEW Local Unions, 508 F.2d 687 (3d Cir. 1975), cert. granted sub nom. EEOC v. Jersey Cent. Power & Light Co., 96 S. Ct. 2196 (1976); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974), cert. denied, 96 S. Ct. 2214 (1976); Local 189, Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970). The uniform result reached in these decisions at the circuit court level is that seniority provisions remain valid, although plaintiffs who have been victims of past discrimination may be afforded relief from seniority clauses that perpetuate the effects of that past discrimination.

This result has recently been endorsed by the Supreme Court in Franks v. Bowman Transp. Co., 96 S. Ct. 1251 (1976). There the Court held that section 703(h) does not bar an award of retroactive seniority to those specifically discriminated against in order to put them where they would have been but for the illegal discrimination. The Court did not, however, address the question of the extent to which individuals unable to show specific acts of discrimination against them could be awarded retroactive seniority in a Title VII remedial order.

134. 375 F. Supp. at 883. 135. Id. at 883-84. 136. 527 F.2d 33 (8th Cir. 1975). 137. Id. at 41-42 (footnotes omitted). Later in its opinion, the court added:

We reserve for future cases the effect of a union's refusal to modify its em-
Judge Oliver is undoubtedly correct in his view that, from the union standpoint, the reasonable accommodation feature of the ban on religious discrimination of Title VII must take into account the duty of fair representation—a duty that was shaped by the judiciary in the racial discrimination setting.\textsuperscript{138} In this posture, the union's duty to accommodate may not mean very much. Under \textit{Vaca v. Sipes},\textsuperscript{139} the standard is simply that the union refrain from acting arbitrarily, discriminatorily or in bad faith. This standard has a relatively passive tone, clearly more so than the description by some courts of the affirmative nature of the employers' duty to accommodate religious beliefs.\textsuperscript{140} If this smacks of a double standard, it nevertheless seems the likely outcome given the secondary role of the union in the accommodation process.\textsuperscript{141}

The position of the EEOC has been stated in one case as follows:

\ldots  [I]f a collective bargaining agreement is so inflexible as to have the effect of requiring a party to the agreement to discriminate against an individual because of his religion, and if the inflexibility of the agreement is not justified by substantial business considerations, then Title VII requires that the agreement be modified so as to eliminate its discriminatory effect.\textsuperscript{142}

This broad, general statement does not address the complications of section 703(h), and it is likely that a careful articulation of the EEOC position concerning a union's duty to accommodate an employee's religious beliefs must await final resolution of current litigation dealing with the disproportionate impact of the seniority principle on minority groups and women.\textsuperscript{143}

\textbf{III.}

\textbf{THE POSSIBILITY OF AUGMENTING \textit{GRIGGS} WITH A REASONABLE ACCOMMODATION REQUIREMENT}

Previously the freedom of employers to determine job content was described and contrasted with the reasonable accommodation feature of...
the ban on religious discrimination. A legitimate question, however, and one as yet unexplored in the courts, is the propriety of extending the reasonable accommodation principle to the Griggs setting. That is, after an employer has demonstrated job-relatedness in a Griggs-type case of race, sex, or national origin discrimination, should the employer nevertheless be asked to explore whether the job could be restructured without undue hardship in order to remove any discriminatory effects? To be sure, such a requirement would trench further upon management prerogative but no more so than is legislatively required in the religious discrimination area.

A few cases will illustrate the point. In City of Philadelphia v. Pennsylvania Human Relations Commission, at issue was the city's insistence upon hiring only male supervisors for male juvenile offenders and female supervisors for female juvenile offenders. This policy was upheld by the Pennsylvania Commonwealth Court against the charge that it violated a state statute closely paralleling Title VII's ban against sex discrimination in employment. One of the major factors contributing to the court's decision was the requirement in the job description that the supervisor observe daily showers and varying degrees of undress and make periodic searches of individuals for contraband. The prospect of a male supervisor conducting these activities with female juveniles, particularly those with troubled social and emotional backgrounds, was too much for the court. Dissenting Judge Blatt, however, took the view that the case should not be decided by assuming that the job descriptions were immutable. Judge Blatt stated:

It is possible that the City is unable to separate those activities which reasonably should only be performed by someone of a specific sex from the numerous other activities which may be performed by any otherwise qualified person. But are we merely to guess at the answer? And is it not reasonable to suppose that the City could categorize and classify the duties of particular employees more specifically if it had a better job classification plan? In any event, should not the burden be on the employer to justify any suspect classification? The City might easily have shown that it would be inefficient or un economical to have separate job classifications for those employees, here grouped in a very generalized classification, who are dealing intimately with the children on a regular basis, and those others, in the same generalized classification, who have a merely supervisory, custodial or instructional job. But it has not done so.

144. Text accompanying notes 67-77 supra.
147. 7 Pa. Commw. at 517, 300 A.2d at 106.
Similar inquiries could be made with regard to numerous cases that have been decided under Title VII. For instance, reference was previously made to the case of Roberts v. Union Co., where the feasibility of a woman performing the job of salesperson in a men's clothing department was discussed. Although the substantive sex discrimination issues were not reached, the defendant did urge that its policy not to hire women in the men's clothing department was justified by a bfoq exception based upon embarrassment of male customers at having a female fit their clothes. The court's finding of fact on this point was:

In the alteration of men's clothing, it is customary to measure chest, waist, and hip circumference, arm length, distance from waist to floor and crotch to floor. The fitting of trousers frequently requires the gathering of excess material at the waist and posterior and the pinning thereof. All of the foregoing requires the touching of the customer's person by the salesman.

What the court did not ask, but could have, was how easily the employer could have accommodated this problem by having the alteration function performed by a male tailor or by male salespersons. In the abstract, this arrangement seems entirely feasible; such a result would probably be reached under the reasonable accommodation requirement in a religious discrimination setting.

Although courts have not required employers to do so, there are instances in which the EEOC has required employers to tamper with job descriptions. Occasionally job descriptions are viewed as unrealistic, supporting an inference of intentional discrimination. For example, in a case involving the job of vending machine servicing, the employer required trainees to be able to move vending machines single-handedly—a requirement that the charging party could not pass. However, after testimony from male servicemen that in actual practice moving of vending machines was done only by teams of several employees and always in the presence of a repairman, the Commission concluded:

We do not credit Respondent's assertion that being able to move machines by one's self is a qualification for efficient performance in that classification.

Occasionally, as a part of the conciliation process, the Commission has persuaded employers to refashion job classifications in order to accommodate protected classes of employees under Title VII who were being under-utilized. An excellent illustration was described in the

149. 6 FEP Cases at 1151.
The court there held that the company's classification of jobs as "heavy" or "light" was not a pretext to deny jobs to qualified women, although no women were employed in most of the jobs considered "heavy." The court did, however, review the history of certain conciliation conferences held by the EEOC during 1965 and 1966, as a result of which four jobs previously classified as heavy had been transformed into the "light" classification. In denying damages to prospective women employees for the period before the reclassification, the court said in effect that the earlier classifications had not been in violation of Title VII. Apparently the EEOC had persuaded Goodyear that certain tasks could be eliminated from the four positions without hardship, making the jobs accessible to women.

This type of accommodation is undoubtedly still a part of the conciliation and settlement conferences between the EEOC and respondents. Perhaps it should be required as a matter of course by engrafting the "accommodation" principle of religious discrimination cases onto the Griggs-type cases involving other forms of discrimination. The cost is a further diminution of management prerogative. The advantage is an increase in the accessibility of certain jobs to individuals protected under Title VII by eliminating the privileged nature of job descriptions that are fashioned in the exercise of good faith business judgment.

How this issue ought to be resolved depends upon the values one attaches to the increasingly scarce prerogatives associated with the free enterprise system, and the values one attaches to the availability of employment to individuals on a non-discriminatory basis. While a full-scale incorporation of the accommodation principle into cases involving race, sex, and national origin discrimination may not be called for, it does seem appropriate to borrow the accommodation concept by suggesting, as Judge Blatt did in the City of Philadelphia case, that at a minimum the burden should be on the employer to justify any job classification that appears to be unnecessarily exclusionary toward a class of individuals protected by Title VII.

IV.

CONCLUSION

As was true of the Wagner Act in 1935, Title VII of the Civil Rights Act of 1964 represents a sharp incursion into pre-existing management rights in the private sector—rights to set policies that will

151. 6 FEP Cases 50 (N.D. Ala. 1972).
152. Id. at 53.
153. Id. at 56-57.
154. 7 Pa. Commw. at 516, 517, 300 A.2d at 105.
enhance the business in the eyes of its customers, or that will effect an efficient, profitable composition of the work force and personnel allocation. To the extent that these pre-existing management rights permitted intentional discrimination based on race, sex, national origin, or religion no one will or should seriously question their curtailment.

The hard questions come, however, in evaluating the extent to which those management rights are to be limited by Title VII when no "intentional" discrimination occurs, but when employment policies or decisions implemented in good faith with a view toward enhancing profitability carry discriminatory effects. The Supreme Court spoke plainly on this question in Griggs; Congress spoke also, if not quite so plainly, in fashioning the bfoq exception in 1964 and in adopting the reasonable accommodation principle in 1972. Primarily in the areas of sex and religious discrimination, the courts have been striving to strike an appropriate balance between rights to be preserved for management and rights to be extended to individuals in these "neutral" situations:

Management prerogative has overtly prevailed over asserted individual rights in only two situations—the grooming and dress code cases (Willingham, Dodge, and Fagan) 155 and the undue hardship conclusion of some courts applying the reasonable accommodation principle (especially the second Reid case). 156 Overall, however, the individual rights protected by Title VII have prevailed even in those cases where no discriminatory motivation exists.

This widespread encroachment on traditional management prerogatives where there is no hostile discrimination exacts a societal cost. How large a cost, indeed whether the cost can be described in quantifiable or meaningful terms, is an open question, but the argument is repeatedly made that productivity of private enterprise has been overtaxed by proliferating government restrictions of which Title VII, as reflected in Griggs and in the reasonable accommodation principle, is a prime example. The Fagan, Dodge, and Willingham, and second Reid cases 157 mirror this message.

Nevertheless, few would suggest that Griggs was incorrectly decided. Employment practices with harmful discriminatory effects have lasted too long and run too deep to be treated timidly. It may be that a de minimis approach can appropriately be utilized to forestall some litigation, but this should be done forthrightly rather than by creating a new test, which carries with it counterproductive implications, as was done in

157. See notes 155 & 156 supra.
As to the reasonable accommodation principle, cases such as Draper, Riley, Shaffield and Claybaugh are correct in describing the duty to accommodate as an affirmative one resting on the employer. Beyond that, what constitutes undue hardship cannot be stated with precision, but courts can and should agree on what criteria ought to be looked to and what their relative weights ought to be in reaching a "hardship" judgment.

Finally, with further refinement of the reasonable accommodation process in the courts, it may prove appropriate to carry it back to Griggs in a limited fashion. As the EEOC has in the past requested in conciliation efforts, an employer could be asked to explore the feasibility of restructuring job content to accommodate an employee, even though the neutral yet discriminatory employment requirements for the existing job are job-related. At least courts ought not to omit this inquiry in seeking a just resolution of problems that have been of sufficient moment to be carried through the litigation process.

158. See text accompanying notes 50-54 supra.
160. See notes 93 & 94 supra and accompanying text.