Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment

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I. INTRODUCTION

The United States was founded as a haven for religious refugees, and since its establishment among the greatest and most valued of civil rights has been freedom of religion. In recent years, polls suggest that American society continues to value religion. A 1994 poll suggested that “at the end of the 20th century, the wealthiest, most powerful and best educated country on Earth is still one of the most religious.” Nearly ninety-five percent of Americans say that they believe in God or a universal spirit, and Americans’ voluntary giving to houses of worship is in the range of thirty eight billion dollars annually—exceeding the gross national product of many countries—and “there are more churches per capita in the United States than in any other nation on Earth.”

The fact that Americans value religion is also evident in the rhetoric of our nation’s leaders. In an effort to garner support, both Governor George

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3. Id. at 50.
4. Id.
5. Id. The argument has been made that even if Americans are religious they do not take their religious beliefs seriously. According to NEWSWEEK, “. . . three provocative new surveys, based on fresh sociological data, challenge the traditional image of the United States as a secular nation with the soul of a church. By using novel methods, asking more precise questions or simply polling many more Americans than ever before, these studies demonstrate that while religion pervades the American landscape, only a minority take it seriously.” Kenneth L. Woodward, The Rites of Americans, NEWSWEEK, Nov. 29, 1993, at 80, 80.

Similarly, Professor Stephen L. Carter argues that society discourages individuals from publicly acknowledging their religious convictions, explaining, “The message of contemporary culture seems to be that it is perfectly all right to believe that stuff - we have freedom of conscience, folks can believe what they like - but you really ought to keep it to yourself.” STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 25 (1993).
W. Bush and Vice President Al Gore have expressed their religious convictions while on the presidential campaign trail. Similarly, in the wake of the Lewinsky scandal, President Clinton's efforts to receive "pastoral care" from a small circle of ministers were highly publicized, indicating that the President understood that it would be politically advantageous to turn to religion in this manner.

Yet this represents only part of the picture, as there are also segments of American society which doubt the importance or validity of religion. As Professor Stephen Carter explained in The Culture of Disbelief:

[O]ne sees a trend in our political and legal cultures toward treating religious beliefs as arbitrary and unimportant, a trend supported by a rhetoric that implies that there is something wrong with religious devotion. More and more, our culture seems to take the position that believing deeply in the tenets of one's faith represents a kind of mystical irrationality, something that thoughtful, public-spirited American citizens would do better to avoid.

One area of the law that reflects this dichotomy is the case law interpreting § 701(j) of the Civil Rights Act of 1964, which affirmatively requires an employer to accommodate an employee's religious needs. The lower courts have, for the most part, interpreted § 701(j) as requiring only a minimal level of accommodation of religious employees. This is based, in part, on Supreme Court precedent, since the two times the Supreme Court has addressed the scope of § 701(j) it has narrowly interpreted an employer's obligation to accommodate a religious employee.

However, an examination of the language used in decisions narrowly interpreting an employer's obligation under § 701(j) also demonstrates that courts sometimes doubt the validity or importance of religion. Such skepticism stems in part, from the fact that religion is a belief system that

6. Kenneth L. Woodward, Finding God, NEWSWEEK, February 7, 2000, at 32. As NEWSWEEK explained, "The lesson for candidates seems to be: if you want to be president of all the people, invoke a generic deity everyone can salute." Id. Some people have expressed concern with the influence that born-again Protestants have in the Republican party. See generally Thomas B. Edsall, Senator Risking Key Constituency; Religious Right Crucial to GOP Coalition, WASH. POST, February 29, 2000, at A14.


8. See Kenneth L. Woodward, Should the President Be Forgiven?, NEWSWEEK, Nov. 23, 1998, at 70. Clinton's turn to religion was criticized in a statement by 90 religious scholars who believe that his behavior "suggests that his public display of repentance was intended to avoid political disfavor." Id.

9. CARTER, supra note 5, at 6-7.


11. § 701(j) requires accommodation unless the employer can demonstrate that "he is unable to reasonably accommodate... an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of [his] business." Id.
cannot be logically or rationally proven, a fact that troubles some courts in our modern rationalist society.

Similarly, courts at times express skepticism regarding the sincerity of an employee's religious beliefs and the extent to which an employee's request for religious accommodation is actually motivated by these beliefs. Courts do have the right to determine whether an employee has a religious belief entitled to protection under Title VII. However, even after determining that an employee has a belief entitled to protection under § 701(j), there are some courts that are skeptical of the employee's request for accommodation and imply that the employee is using religion for his personal secular benefit. Perhaps because religion is defined broadly for purposes of § 701(j), courts do not trust their own determination that an employee is entitled to protection under the statute.

The concern that an employee's request for religious accommodation may not, in fact, be motivated purely by religion is further evident in the union dues cases which are discussed in Part V. Courts have unanimously read the accommodation requirement more broadly in these cases, than in other § 701(j) contexts and have unanimously agreed that an employee who refuses to pay union dues based on his religious beliefs should be permitted to pay an amount equal to his union dues to charity. These cases suggest that courts are willing to require a higher level of accommodation because their skepticism regarding the sincerity of the employee's religious belief is relieved by the fact that the religious employee suffers the same financial burden as the dues-paying secular employee.

There are also cases narrowly interpreting an employer's obligation to accommodate his employee's religious needs that express neither doubt about the importance of religion nor skepticism regarding the sincerity of the employee's religious beliefs. These cases illustrate the general

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12. No attempt has been made in this article to define religion or to analyze the large body of literature that has done so. Rather, it is presumed - and in enacting § 701(j) Congress has concluded - that religion is important and worthy of protection. The author does agree with Professor Carter that religion "presupposes the existence of a sentience beyond the human and capable of acting outside of the observed principles and limits of natural science." CARTER, supra note 5, at 17.

13. This article does not discuss cases where there is a dispute as to whether the plaintiff has a religious belief entitled to protection under § 701(j), but rather addresses those cases where the parties have stipulated or the court has determined that the plaintiff has a religious belief entitled to such protection. In the majority of cases there is no dispute as to whether the plaintiff has a religious belief entitled to § 701(j)'s protection. See Karen Engle, The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII, 76 TEX. L. REV. 317, 359 (1997).

14. The Equal Employment Opportunity Commission (EEOC) has broadly interpreted religious practices "to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1 (1999).

15. See infra note 332.

16. See infra note 334.

17. See, e.g., Beadle v. Hillsborough County Sheriffs Dep't, 29 F.3d 589, 593 (11th Cir. 1994) (Explaining that in Trans World Airlines v. Hardison, 432 U.S. 63 (1977), the Court's focus was on the
discomfort that some courts feel about making meaningful adjustments in the workplace for religion. This discomfort can also be explained by the fact that courts are generally reluctant to require differential or preferential treatment based on any of the protected categories under Title VII.18

However, decisions that narrowly interpret an employer's obligation under § 701(j) represent only part of the picture. There are also courts that view an employee’s request for religious accommodation as important and worthy of protection, and that require a more significant level of accommodation.19 These decisions often show either an understanding of the religious employee’s needs or anger at the employer’s anti-religious attitude.20 There are also decisions that require such a high level of accommodation that they conflict with the Supreme Court’s narrow interpretation of § 701(j).21

Meaningful protection of religious employees cannot be achieved through the courts’ overall narrow interpretation of § 701(j), or through conflicting decisions regarding an employer’s duty to accommodate. Rather, this article argues that Congress intended § 701(j) to guarantee a higher level of accommodation than that required by the courts today, and a congressional amendment is necessary to clarify an employer’s accommodation obligation under § 701(j).

Part II of this Article examines both the history leading to the enactment of § 701(j) and the two Supreme Court cases which have addressed an employer’s obligation under this section. This Part highlights the narrowness of the Court’s interpretation of § 701(j); the lack of consensus between the courts, Congress and the EEOC; and the Supreme Court’s disregard of congressional intent.

Parts III and IV analyze how the lower courts have interpreted the terms “reasonable accommodation” and “undue hardship” respectively, focusing on the overall narrow interpretation of an employer’s obligation to accommodate. These Parts also point to the lack of agreement among the circuits regarding the accommodation requirement, and highlights some of the rhetoric reflecting the courts’ views of both religion and employees’ requests for religious accommodation.

Part V examines the union dues cases, which appear to underscore how courts are willing to require a more significant level of accommodation once any doubts about the sincerity of an employee’s religious convictions are removed.

“neutrality of the [seniority] system.”).

18. *See infra* notes 85-87 and accompanying text.
19. *See, e.g.*, Smith v. Pyro Mining Co., 827 F.2d 1081 (6th Cir. 1987); Opoku-Boateng v. California, 95 F.3d 1461, 1470 (9th Cir. 1996).
20. *See, e.g.*, Smith, 827 F.2d 1081, Cooper v. Oak Rubber Co., 15 F.3d 1375 (6th Cir. 1994).
Part VI concludes that Title VII should be amended to require a more meaningful level of accommodation of religious employees, and offers suggestions for such an amendment.

II.
THE HISTORY AND SUPREME COURT INTERPRETATION OF § 701(j)

The Civil Rights Act of 1964 was initially enacted for the purpose of prohibiting discrimination against minority groups in the United States. With regard to prohibitions on employment discrimination, Title VII, as originally passed, treated religion the same as race, color, sex, or national origin; the statute prohibited discrimination, but contained no language specifically requiring accommodation of religious employees. Cases soon reached the courts questioning whether the Act merely prohibited discrimination on the basis of religion or whether it also required employers to affirmatively accommodate an employee’s religious needs.

In 1972, Congress addressed this issue and amended the Civil Rights Act to include an affirmative duty of accommodation, which is incorporated rather awkwardly into Title VII’s definition of religion. Under § 701(j) of the Civil Rights Act of 1964, “[t]he term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”

This Part analyzes both the history leading to the enactment of § 701(j) and the two Supreme Court cases which have addressed an employer’s obligation under this section. While these two decisions ultimately determined that only a minimal level of accommodation was required of employers under § 701(j), the courts, Congress and the EEOC displayed a striking lack of consensus in reaching this conclusion. Not surprisingly, Congress and the EEOC—which passed § 701(j) and the regulations interpreting it—generally advocate a higher level of accommodation than do the courts. However, the extent to which the Supreme Court has ignored

22. The Act provides, “It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a) (1994).
both Congressional intent and the EEOC Guidelines is noteworthy.  
Furthermore, the lack of consensus regarding the appropriate treatment of religious employees is also evidenced by the fact that the courts,  
Congress, and the EEOC have all overturned their own decisions.

A. Religious Accommodation Prior to 1972

The EEOC first addressed the issue of reasonable accommodation in its 1966 Guidelines after receiving several complaints from employees who required time off for religious observance.  
Emphasizing the concept of neutrality, the Commission held that employers were free to “establish a normal work week (including paid holidays) generally applicable to all employees.”  
The Commission also stated that accommodation of the reasonable religious needs of employees should be made “where such accommodation can be made without serious inconvenience to the conduct of the business.”

However, the following year the Commission amended its Guidelines to require accommodation except in cases where “undue hardship,” as opposed to “serious inconvenience,” would result.  
In so doing, the EEOC essentially reversed its position and determined that employers could no longer rely on the establishment of a neutral work week as a defense against a claim of religious discrimination under Title VII. The Guidelines stated that “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.”  
As Justice Marshall explained in his dissent in TWA v. Hardison, this “example of ‘undue hardship’ given in the new guidelines . . . makes clear that the Commission believed, contrary to its earlier view, that in certain instances employers would be required to excuse employees from work for

26. See infra notes 91-2 and accompanying text; 141-3 and accompanying text.
27. In both Supreme Court cases the reasoning of the district court was rejected by the appellate court, and the appellate court’s reasoning was ultimately rejected by the Supreme Court. See Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877, 882 (W.D. Mo. 1974), rev’d, 527 F.2d 33 (8th Cir. 1975),
28. The enactment of §701(j), which amended the 1964 Civil Rights Act, expressed a new congressional intent regarding the appropriate treatment of religious employees in the workplace.
29. See supra notes 22-4 and accompanying text; infra note 131.
31. 29 C.F.R. § 1605.1 (1967). As an example, the Commission stated, “an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.” Id.
32. Id.
34. Id.
religious observances."

However, most courts chose not to follow the EEOC Guidelines. Two decisions in particular lead to the eventual enactment of § 701(j) in 1972. In 1971, in *Dewey v. Reynolds Metal Co.*, the Supreme Court—demonstrating its own internal division regarding the appropriate scope of § 701(j)—affirmed by a 4-4 vote, the Sixth Circuit’s determination that failure to accommodate an employee’s religious observance should not be equated with religious discrimination. Dewey was a member of the Faith Reformed Church who refused to work on Sundays or to find a replacement for his Sunday shift, believing that to do either was a sin. After refusing to work on a number of Sundays, Dewey was fired. In finding for the defendant employer, the Sixth Circuit stated that “[t]he reason for Dewey’s discharge was not discrimination on account of his religion; it was because he violated the provisions of the collective bargaining agreement entered into by his union with his employer, which provisions were applicable equally to all employees.”

The Sixth Circuit based its decision on the 1966 EEOC Guidelines, which were in effect at the time of Dewey’s discharge. However, the Sixth Circuit expressed doubt as to whether the EEOC even had authority to issue the 1967 Guidelines.

A particularly striking aspect of this decision is the contempt with which the court treated Dewey’s religious views, particularly his refusal to find a replacement for his Sunday work. The court sarcastically noted that Dewey “apparently did not regard it as sinful . . . to collect wages from an employer who was compelled to schedule overtime production in order to meet its contractual commitments and eventually meet its payroll.” The court also implied that Dewey’s refusal to accept his employer’s proposal of finding his own replacement stemmed from little more than a bad attitude, stating that “[h]e stubbornly refused to exercise this privilege.”

40. See id.
41. Id. at 330.
42. The court stated, “As we have pointed out, the gravaman of an offense under the statute is only discrimination. The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted.” Id. at 331 n.1. The Sixth Circuit also stated that even under the 1967 regulations Dewey would have been reasonably accommodated since he had the option of asking another employee to replace him. See id. at 330.
43. Id. at 330.
44. Id. at 331.
The same year, a district court in *Riley v. Bendix Corp.* followed Dewey’s reasoning in determining that failure to accommodate an employee’s religious observance should not be equated with religious discrimination. Riley, a member of the Seventh Day Adventist Church, refused to work on his Sabbath and was eventually discharged for insubordination. According to the court, “[d]efendant’s testimony clearly reveals that its rules and working conditions applied uniformly with respect to all of its employees and at no time did it ever discriminate against any person.” Clearly opposing a policy that required employers to accommodate religious employees, and instead placing the entire burden on the religious employee, the court continued:

[S]urely the great and diversified types of American business cannot be expected to accede to the wishes of every doctrine or religious belief. If one accepts a position knowing that it may in some way impinge upon his religious beliefs, he must conform to the working conditions of his employer or seek other employment.

Furthermore, despite relatively clear language to the contrary, the *Riley* Court held that the 1967 EEOC guidelines did not repeal the 1966 Guideline’s determination that “an employer is free ‘to establish a normal work week. . . generally applicable to all employees,’ notwithstanding that such a schedule ‘may not operate with uniformity in its effect upon the religious observances of his employees.'”

**B. Congress Enacts § 701(j)**

In 1972, in response to the refusal of the courts to follow the 1967 EEOC Guidelines, Congress enacted § 701(j), which tracks the language of the 1967 Guidelines and states, “[t]he 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

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47. *Id.* at 589.

48. *Id.* at 590.


employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”

A number of commentators, as well as the Supreme Court, have suggested that the legislative history of § 701(j) is not particularly helpful in interpreting the statute. While it is true that Congress could have been more articulate in stating its intent—and as discussed in Part VI of this Article, should be more articulate in the future—the legislative history does provide some guidance which has been largely ignored or misapplied by the Supreme Court.

The amendment was introduced by Senator Jennings Randolph, a Seventh-Day Baptist, with the express purpose of protecting Sabbatarians. According to Senator Randolph, the purpose of the Civil Rights Act of 1964 was to protect religious belief as well as religious conduct. However, he explained,

Unfortunately, the courts have, in a sense, come down on both sides of this issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question. This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved.

Senator Randolph added that the amendment was needed in part because “court decisions have clouded the matter with some uncertainty.” Also included in the congressional record were copies of the decisions discussed above, Dewey v. Reynolds Metal Co. and Riley v. Bendix Corp. Congress, without a doubt, intended to require employers to affirmatively accommodate religious employees and provide them with a benefit not provided to non-religious employees.

53. See Hardison, 432 U.S. at 74-75.
54. Senator Randolph stated, “There are approximately 750,000 men and women who are Orthodox Jews in the U.S. workforce who fall in this category of persons I am discussing. There are an additional 425,000 men and women in the workforce who are Seventh-day Adventists... [T]here has been a partial refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work... on particular days.” 118 CONG. REC. 705 (1972) (statement of Sen. Randolph).
55. Id.
56. Id. at 705-06
57. Id. at 706.
58. 429 F.2d 324 (6th Cir. 1970), aff’d mem. by an equally divided court, 402 U.S. 689 (1971) (per curiam).
However, Congress did not intend to require accommodation at any cost, but rather to require accommodation so long as it did not cause an employer “undue hardship.” It is true that “undue hardship” was not well-defined, and Senator Randolph acknowledged that there are “gray areas.”60 However, based on the two examples posed to the Senator,61 it does appear that the legislature intended to equate “undue hardship” with what commonly would be referred to as a significant or meaningful expense. This legislative intent is also evident by the fact that Senator Randolph assumed that § 701(j) would mandate accommodation in most cases and that only “in perhaps a very, very small percentage of cases” 62 would accommodation not be possible. Furthermore, the very language of the statute—which requires accommodation short of “undue hardship”—seems to anticipate a meaningful level of accommodation.63

C. The Supreme Court Interprets § 701(j)

The United States Supreme Court has twice interpreted § 701(j), and both times has narrowly defined an employer’s obligation to accommodate an employee’s religious needs.64 In interpreting § 701(j), the Supreme Court has been able to disregard Congressional intent both because of Congress’ poor articulation of an employer’s obligation under § 701(j), and the limited legislative history interpreting the section. The Supreme Court has thereby interpreted § 701(j) in a manner that is clearly at odds with its purpose. The history of both cases further demonstrates the conflicting views within the judicial system as to how religion should be treated. In each case, the reasoning of the district court was rejected by the appellate court, and the appellate court’s reasoning was ultimately rejected by the Supreme Court.

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60. 118 CONG. REC. 706 (1972).
61. Senator Domenick asked, “A young man I just talked to from Virginia, works 15 days on and then is off 15 days. Would the amendment require an employer to change that kind of employment ratio around, so that he would have to work a customary 5- or 6- day week?” Id. According to Senator Randolph, this type of rescheduling would not constitute “undue hardship.” Id. However, Senator Randolph did agree that there would be “undue hardship” in the following scenario posed by Senator Williams. “There are jobs that are Saturday and Sunday jobs, and that is all, serving resorts and other areas. Certainly the amendment would permit the employer not to hire a person who could not work on one of the two days of the employment; this would be an undue hardship, and the employer’s situation is protected under the amendment.” Id. As Professor Engle points out, “This particular discussion is rarely, if ever, referred to in litigation over undue hardship.” Engle, supra note 13, at 371 n.225.
1. Trans World Airlines v. Hardison

In *Trans World Airlines, Inc. v. Hardison*, the Supreme Court addressed both the definition of undue hardship and the deference that should be given to a seniority provision of a collective bargaining agreement prohibiting a religious employee from receiving time off for religious needs.

Larry Hardison, a member of the Worldwide Church of God, refused to work on his Sabbath for religious reasons and was ultimately discharged by Trans World Airlines ("TWA"). Hardison was hired by TWA to work in its Kansas City base in a department that operated 24 hours a day, 365 days a year. When he began study in the Worldwide Church of God, Hardison informed his manager that he would be unable to work on his Sabbath, from sunset on Friday until sunset on Saturday. Hardison's religious conflict was temporarily resolved when he transferred to the 11 p.m.—7 a.m. shift in Building 1 where he had sufficient seniority and was therefore able to observe his Sabbath.

However, Hardison's religious conflict reappeared when he bid for and received a transfer to the day shift in Building 2, where he was the second from the bottom on the seniority list. When a fellow employee went on vacation, Hardison was asked to work his shift, which included Saturdays. While TWA did permit the union to seek to change Hardison's work assignment, the union was unwilling to do so because it would have violated the seniority provision of the collective bargaining agreement. TWA also rejected Hardison's proposal that he work a four day week. An accommodation was not reached and Hardison refused to work on his Sabbath. Ultimately, Hardison was discharged on grounds of

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66. *Id.* at 67-69.
67. *Id.* at 66.
68. *Id.* at 67-68.
69. *Id.* at 68.
70. *Id.*
71. *Id.*
72. *Id.* The Supreme Court emphasized the effort that TWA had made to accommodate Hardison. Quoting from the district court opinion, the Court stated, "TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII. It held several meetings with plaintiff at which it attempted to find a solution to plaintiff's problems. It did accommodate plaintiff's observance of his special religious holidays. It authorized the union steward to search for someone who would swap shifts, which apparently was normal procedure." *Hardison v. Trans World Airlines, Inc.*, 375 F. Supp. 877, 890-91 (W.D. Mo. 1974). The Court added that TWA had also made an unsuccessful attempt to find another job for Hardison. *Id.*
73. *Id.* at 68.
74. *Id.* at 69.
insubordination.\textsuperscript{75}

The district court ruled in favor of both TWA and the union, finding that the union was not required to violate its seniority system in order to accommodate Hardison's religious beliefs.\textsuperscript{76} The district court also determined that TWA had satisfied its reasonable accommodation obligation under § 701(j), and that to require anything more of the company would cause it to suffer undue hardship.\textsuperscript{77}

This decision was reversed and remanded by the Court of Appeals for the Eighth Circuit with regard to TWA,\textsuperscript{78} based on its determination that TWA could have accommodated Hardison without incurring undue hardship.\textsuperscript{79} According to the Eighth Circuit, Hardison had proposed three possible reasonable accommodations which would not have caused TWA undue hardship. TWA could have allowed Hardison to work a four day week and on Saturdays either 1) replaced Hardison with another individual not assigned to do Sabbath work; 2) replaced Hardison with a supervisor or an employee from another area or; 3) arranged a shift swap between Hardison and another employee.\textsuperscript{80}

The Supreme Court reversed, holding that employers and unions are not required to violate a collectively bargained seniority system to accommodate an employee's religious needs. According to the Court, "[w]ithout a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances."\textsuperscript{81}

In reaching this conclusion the Court emphasized that the purpose of Title VII was to eliminate discrimination, and that violating a valid

\textsuperscript{75} Id. The Court seems to selectively read the facts, emphasizing the 24 hour-a-day, 365 day-a-year nature of the job and the fact that Hardison was a critical employee. Id. at 68. However, the Eighth Circuit had determined that there were approximately 200 employees who were able to perform Hardison’s job. Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 40 (8th Cir. 1975), rev’d, 432 U.S. 63 (1977). See also Silbiger, supra note 52, at 845 n.51.


\textsuperscript{77} Id. at 889.

\textsuperscript{78} Id. at 44.

\textsuperscript{79} Id. at 40-41.

\textsuperscript{80} Id. at 40-41.

\textsuperscript{81} Trans World Airlines, Inc. v. Hardison, 432 U.S. at 79. The Court further supported its conclusion by the fact that seniority systems are in fact given special treatment under Title VII: 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. ... 42 U.S.C. § 2000e-2(h) (1994).
seniority system to accommodate a religious employee would undermine the very purpose of Title VII by discriminating in favor of the religious employee. The Court explained that "[t]he repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities."

The Hardison Court also determined that the seniority system "itself represented a significant accommodation to the needs, both religious and secular, of all of TWA's employees. . . . the seniority system represents a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off."

The Hardison Court's hesitance to require differential treatment of Hardison can be understood in the context of the courts' general reluctance to require much more than neutrality in interpreting Title VII. As one legal commentator explained,

Title VII's prohibition of discrimination has generally been read as requiring that employers apply workplace requirements and regulations 'neutrally.' As a result of this reading, courts and scholars have long had a difficult time justifying affirmative action, since affirmative action requires treating members of some groups differently from members of other groups.

Religious accommodation can be seen as a form of affirmative action.

The Supreme Court next turned to the definition of undue hardship under § 701(j) and determined that requiring TWA to bear any cost greater than de minimis would constitute an undue hardship. Allowing Hardison to work a four day week and replacing him on his Sabbath with either supervisory personnel or employees from other departments, the Court found, would lead to lost efficiency and therefore constitute more than a de

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82. "[T]o give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath. Title VII does not contemplate such unequal treatment." Hardison, 432 U.S. at 81.
83. Id.
84. Id. at 78. While a seniority system is certainly a neutral means of determining days off, it is difficult to argue that it is any meaningful form of accommodation to religious employees, such as Hardison, who are low on the seniority list.
85. The fact that courts generally interpret Title VII as requiring little more than neutrality does not contradict the fact that a number of courts are particularly reluctant to require accommodation of an employee's religious needs under § 701(j). This reluctance is evident in judicial rhetoric expressing skepticism of or hostility towards religion.
86. Engle, supra note 13, at 320.
88. "To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." Hardison, 432 U.S. at 84.
minimis cost.\textsuperscript{89} Similarly, replacing Hardison with another employee not scheduled to work and then paying premium wages to this employee would require higher costs to TWA and thereby constitute more than a de minimis cost.\textsuperscript{90}

Despite the fact that § 701(j) was enacted for the express purpose of protecting Sabbatarians, the majority determined that the statute’s legislative history was of “little assistance.”\textsuperscript{91} The majority also ignored the fact that the 1967 EEOC Guidelines clearly contemplated something more than the neutral treatment of religious employees.\textsuperscript{92}

Furthermore, even though there had been only one other case involving a conflict between Sabbath observance and work schedules at TWA since 1945,\textsuperscript{93} the Court relied in part on the fact that “a company as large as TWA may have many employees whose religious observances, like Hardison’s, prohibit them from working on Saturdays or Sundays.”\textsuperscript{94}

In a strongly worded dissent, Justice Marshall, joined by Justice Brennan, persuasively argued that the accommodation requirement of 2000e(j) by definition requires some unequal treatment.\textsuperscript{95} If as the majority held, “an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with ‘sound and fury,’ ultimately ‘signify nothing.’”\textsuperscript{96} In response to the majority’s focus on TWA’s attempts at accommodation and determination that requiring anything more from TWA would cause the airline to suffer undue hardship, Justice Marshall stated that “[t]o conclude that TWA, one of the largest air carriers in the Nation, would have suffered undue hardship had it done anything more defies both reason and common sense.”\textsuperscript{97}

While Justice Marshall did “seriously question” whether “undue hardship” could be defined so broadly as to be equated with any cost more

\textsuperscript{89} Id.
\textsuperscript{90} Id. In fact, the Court went so far as to suggest that requiring an employer to incur any cost at all to accommodate a religious employee would be tantamount to discrimination. “Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.” Id. at 84. Furthermore, as the dissent pointed out, the actual overtime cost was only $150. Id. at 92 n.6 (Marshall, J., dissenting).
\textsuperscript{91} Id. at 74.
\textsuperscript{92} See supra notes 30-32 and accompanying text. Since § 701(j) ratified the 1967 EEOC Guidelines, the Court specifically declined to decide whether § 701(j) should be applied retroactively in this case. Hardison, 432 U.S. at 76 n.11.
\textsuperscript{93} Id. at 93 n.6 (Marshall, J., dissenting).
\textsuperscript{94} Id. at 84 n.15. As explained in Part III, this reliance on “hypothetical hardships” has for the most part not been followed by the lower courts.
\textsuperscript{95} Id. at 87 (Marshall, J., dissenting).
\textsuperscript{96} Id. (Marshall, J., dissenting).
\textsuperscript{97} Id. at 91 (Marshall, J., dissenting).
than *de minimis*,[^98] he nonetheless declined to define "undue hardship" based on his determination that accommodating Hardison would not have constituted even a *de minimis* cost.[^99] The dissent, however, did not disagree with the majority's determination that § 701(j) does not require an employer to violate an otherwise valid seniority agreement.[^100]

Justice Marshall concluded that "[w]hat makes today's decision most tragic, however, is not that respondent Hardison has been needlessly deprived of his livelihood simply because he chose to follow the dictates of his conscience. . . . The ultimate tragedy is that despite Congress' best efforts, one of this Nation's pillars of strength—our hospitality to religious diversity—has been seriously eroded. All Americans will be a little poorer until today's decision is erased."[^101]

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2. The EEOC's Response to Trans World Airlines v. Hardison

In 1980, in an effort to respond to the Supreme Court's decision in *TWA v. Hardison*, the EEOC issued its Guidelines on Discrimination Because of Religion.[^102] These Guidelines were issued after the Commission conducted public hearings and determined that there was "widespread confusion concerning the extent of accommodation under the *Hardison* decision"[^103] and that the "religious practices of some individuals and some groups of individuals [were] not being accommodated."[^104] However, the Commission also found that "[m]any of the employers who testified had developed alternative employment practices which accommodate the religious practices of employees and prospective employees and which [met] the employer's business needs."[^105] While employers did appear to have "substantial anticipatory concerns,"[^106] the Commission determined that "[l]ittle evidence was submitted by employers which showed actual attempts to accommodate religious practices with resultant unfavorable consequences to the employer's business."[^107] Therefore, the Commission concluded that accommodation of religious employees was possible in many cases.

[^98]: Id. at 93 n.6 (Marshall, J., dissenting).
[^99]: Id. (Marshall, J., dissenting).
[^100]: Id. at 95-96 (Marshall, J., dissenting).
[^101]: Id. at 96-97 (Marshall, J., dissenting).
[^104]: Id.
[^105]: Id.
[^106]: Id.
[^107]: Id.
The EEOC’s 1980 Guidelines specifically addressed a number of issues that have continued to resurface. Not surprisingly, these Guidelines require a high level of accommodation. For example, the Commission determined that “when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.” In other words, assuming that an employee’s preferred accommodation would be the accommodation that least disadvantages the employee, an employee is entitled to his or her preferred accommodation so long as it does not cause undue hardship to the employer.

The Guidelines also stipulated that undue hardship would only be found in cases where an employer could demonstrate an actual hardship and would not be found in cases where there was merely an anticipated or hypothetical hardship. In addition, the EEOC suggested a number of possible accommodations, including the use of voluntary substitutes, preferably with assistance from the employer or labor union in finding the substitute; the implementation of flexible work schedules; and if such accommodations were not possible, then the use of a lateral transfer. The Commission also determined that in some cases an employer would be required to absorb an economic cost in accommodating a religious employee.

Furthermore, after acknowledging that “[i]n most cases whether or not a practice or belief is religious is not at issue,” the Commission broadly

108. Since the EEOC is responsible for ensuring equal employment opportunities, it is not surprising that the 1980 Guidelines require significant accommodation of religious employees. However, the required level of accommodation under the Guidelines is particularly high in comparison to the Court’s narrow interpretation of an employer’s obligation just three years earlier in TWA v. Hardison.


110. 29 C.F.R. § 1605.2(c)(1). "A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated may also need accommodation is not evidence of undue hardship." 29 C.F.R. § 1605.2(c)(1).

111. 29 C.F.R. § 1605.2(d)(1)(i).

112. 29 C.F.R. § 1605.2(d)(1)(ii).

113. 29 C.F.R. § 1605.2(d)(1)(iii).

114. 29 C.F.R. § 1605.2(e)(1). “In general, the Commission interprets [more than a de minimis cost] as it was used in the Hardison decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in Hardison, would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation.” 29 C.F.R. § 1605.2(e)(1).

115. Id. at § 1605.1.
interpreted religious practices "to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious beliefs." The Guidelines further state that "[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee."

3. Ansonia Board of Education v. Philbrook

Six years after the EEOC issued its 1980 Guidelines, the Supreme Court narrowly interpreted § 701(j) in Ansonia Board of Education v. Philbrook. This case is best known for holding that "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship." In so ruling, the Court chose to disregard the EEOC's 1980 Guidelines.

Ronald Philbrook was a high school teacher and a member of the Worldwide Church of God, whose religious beliefs required that he be absent from school to celebrate approximately six religious holidays each year. Under the terms of the collective bargaining agreement in place, teachers were entitled to three paid days off for religious reasons. In addition, teachers were given three paid personal days off. Personal days, however, could not be used for purposes for which there was already a designated leave and therefore could not be used for religious reasons.

From 1967 through 1976, Philbrook took the three authorized days off for religious holidays and took unauthorized leave—time without pay—for any additional holidays. Starting in 1976, Philbrook stopped taking unauthorized leave for religious reasons, and instead scheduled hospital visits on his religious holidays so that they would qualify as personal days. On several of his holy days he worked.

116. Id.
117. Id. This article does not examine how the courts have defined religion under § 701(j). See supra note 12.
119. Id. at 68.
120. Id. at 62-63.
121. Id. at 63-64.
122. Id. at 64.
123. Id.
124. Id.
125. Id.
Philbrook was dissatisfied with this arrangement and suggested two alternatives.\(^\text{126}\) Philbrook’s preferred alternative was to use personal leave to celebrate the additional religious holy days on which he would not work.\(^\text{127}\) He also suggested that he would pay the cost of a substitute for the days that he could not work for religious reasons and in return receive full pay.\(^\text{128}\) Philbrook was willing to work closely with the substitute teacher and do other substantive work to make up for the days that he missed.\(^\text{129}\)

The district court held “that Philbrook had failed to prove a case of religious discrimination because he had not been placed by the school board in a position of violating his religion or losing his job.”\(^\text{130}\) The Second Circuit reversed this decision, concluding that Philbrook had established a prima facie case of religious discrimination.\(^\text{131}\) The court presumed that the school board’s policy of three days of paid time off and three days of unpaid leave for religious observances was a “reasonable accommodation.”\(^\text{132}\) However, turning to the undue hardship provision of §701(j), the court stated, “[w]here the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer’s conduct of his business.”\(^\text{133}\) In reaching its conclusion, the Second Circuit relied in part on the 1980 EEOC Guidelines.\(^\text{134}\) While the court did remand the case to the district court to determine if either of Philbrook’s suggested accommodations would cause undue hardship, it also noted that “on the record before us it appears that neither of the accommodations would lead to a greater than de minimis costs.”\(^\text{135}\)

The Supreme Court, in an opinion authored by Chief Justice Rehnquist, disagreed with the reasoning of the Second Circuit.\(^\text{136}\) The majority did, however, affirm the decision of the Second Circuit remanding the case to determine if unpaid leave was a reasonable accommodation in

\(^\text{126}\) Id. at 64-65.
\(^\text{127}\) Id.
\(^\text{128}\) As the Court explained, “[t]he suggested accommodation would reduce the financial costs to Philbrook of unauthorized absences. In 1984, for example, a substitute cost $30 per day, and respondent’s loss in pay from an unauthorized absence was over $130.” Id. at 65 n.3.
\(^\text{130}\) Ansonia, 479 U.S. at 65.
\(^\text{131}\) Philbrook v. Ansonia Bd. of Educ., 757 F.2d at 481.
\(^\text{132}\) Id. at 484.
\(^\text{133}\) Id.
\(^\text{134}\) Id. at 485. “The EEOC’s recent guidelines on religious discrimination - while not dispositive of the interpretation of Title VII . . . also suggest the approach we above suggest.” Id.
\(^\text{135}\) Id. (emphasis added).
this case. According to the Court, unpaid leave in general would be a reasonable accommodation since an employee would merely be giving up pay for a day that he did not work. In so concluding, the Court determined that loss of income does not directly affect employment opportunities or job status. The Court did acknowledge that unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes except religious ones. Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness. Whether the policy here violates this teaching turns on factual inquiry into past and present administration of the personal business leave provisions of the collective-bargaining agreement.

The majority opinion, therefore, rejected the EEOC's position, on which the Second Circuit had relied, that "the employer . . . must offer the [means of accommodation] which least disadvantages the individual with respect to his or her employment opportunities." Rather, the Supreme Court held, "[t]o the extent that the guideline, like the approach of the Court of Appeals, requires the employer to accept any alternative favored by the employee short of undue hardship, we find the guideline simply inconsistent with the plain meaning of the statute."

The Court's rhetoric reveals strong distrust of a religious employee's motive in requesting an accommodation. The Court implied that religious employees do not merely want to resolve their religious conflict, but rather are attempting to use religion for their personal advantage. As the Court explained, "[u]nder the approach articulated by the Court of Appeals, however, the employee is given every incentive to hold out for the most beneficial accommodation, despite the fact that an employer offers a reasonable resolution of the conflict."

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137. Id. at 66.
138. Id. at 70-71. "Generally speaking, '[t]he direct effect of [unpaid leave] is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status.' (quoting Nashville Gas Co. v. Satty, 434 U.S. 136, 145 (1977).) Ansonia, 479 U.S. at 70-71.
139. Id.
140. Id. at 71.
141. Later the Commission essentially reversed its position and on May 9, 1988 expressed support for the Supreme Court's decision in Ansonia. In a policy directive the EEOC stated, "It is the Commission's position that the guideline does not require an employer to provide any alternative favored by the employee and is, therefore, consistent with the Supreme Court's holding in Ansonia." Furthermore, according to the policy statement, the Commission had filed an amicus brief with the Supreme Court in Ansonia which "took the position that the Court of Appeals had overstated the extent of an employer's accommodation obligations under Title VII." See Robert M. Preer Jr., Reasonable Accommodation of Religious Practice: The Conflict Between the Courts and the EEOC, EMPLOYEE REL. L.J. 6799 (June 22, 1989).
143. Ansonia, 479 U.S. at 70 n.6.
144. Id. at 69.
Justice Stevens agreed with the majority's interpretation of § 701(j) but argued that the Court of Appeals decision should simply be reversed, since based on the record, Philbrook could not prevail. First, Stevens determined that the fact that the personal leave provision cannot be used for religious leave is not discriminatory since it is simply "part of the broader prohibition against using personal business leave for any of the purposes specifically authorized in the contract." Emphasizing the neutrality of the provision, Stevens maintained that Philbrook's "discrimination' argument states a grievance against equal treatment rather than a claim that he has been the recipient of unequal treatment." Second, Justice Stevens addressed Philbrook's claim that he was discriminated against since he was required to do some work without pay on the additional days that he was absent for religious reasons. Relying again on the concept of equal treatment, Stevens dismissed this complaint on the basis that all teachers taking unauthorized leave were required to make up missed work.

In a separate opinion, Justice Marshall stated that the case should be remanded for "factual findings on both the intended scope of the school board's leave provision and the reasonableness and expected hardship of Philbrook's proposals." Justice Marshall explained that Philbrook's conflict was not fully resolved since he would still be forced to give up pay in order to follow his religious beliefs. Therefore, even if the personal leave provision were narrow enough as to not discriminate against religion, the district court was still required to determine if further accommodation would have been possible without undue hardship. Marshall also took issue with the majority's concern that an employee "would hold out for the most beneficial accommodation."

145. Id. at 75 (Stevens, J., concurring in part and dissenting in part).
146. Id. at 80.
147. Id. at 79. Refusing to acknowledge that an employee's absence for religious reasons should be accorded any special treatment, Stevens stated that "Philbrook's wish to use his secular leave for religious purposes is thwarted by the same policy that denies an avid official delegate to a national veterans' organization use of secular leave days for that activity in excess of the days specifically allotted for it under the contract." Id. at 80.
148. Id. at 81. This focus on Title VII as an antidiscrimination statute that requires little more than equal treatment of all employees was also seen in Hardison. Supra notes 81-3 and accompanying text.
149. Id. at 75 (Marshall, J., concurring in part and dissenting in part) (emphasis omitted).
150. Id. at 74.
151. Marshall clearly believed accommodation would be possible in this case, stating that "[t]he Board's prior determination that the conduct of its educational program can withstand the paid absence of its teachers for up to six days each year for religious and personal reasons tends to indicate that granting Philbrook's similar request in this case for a total of six days paid religious leave and no personal leave is reasonable, would cause the Board no undue hardship, and hence falls within the scope of the Board's affirmative obligation under Title VII." Id. at 72.
152. Id. at 72-73. "The Court suggests that requiring an employer to consider an employee's proposals would enable the employee to hold his employer hostage in exchange for a particular accommodation... If the employer has offered a reasonable accommodation that fully resolves the
Marshall justified his conclusion based on the terms of the statute and the EEOC Guidelines. According to Marshall, in just the last term the Court had relied on EEOC guidelines in interpreting Title VII, and the Court’s refusal to rely on the EEOC’s interpretation in this case “rests on nothing more than a selective reading of the express provisions of Title VII and the guidelines.” 153 Marshall also disputed the majority’s interpretation of the legislative history, concluding that “[t]he statement of Senator Randolph, who sponsored the amendment . . . lends at least as much support to the concept of the employer’s continuing duty as it does to the Court’s reading of the statute.” 154

Finally, Marshall persuasively argued that the Court’s holding, that an employer who has reasonably accommodated a religious employee need not look at the employee’s preferred accommodations, conflicts with the analysis in *Trans World Airlines, Inc. v. Hardison.* As Marshall explained, “[i]n *Hardison,* the Court held that the employer’s chosen work schedule was a reasonable accommodation but nonetheless went on to consider and reject each of the alternative suggested accommodations.” 155

Therefore, despite a Congressional determination that an employee’s religious beliefs should be accommodated in the workplace, the Supreme Court has narrowly interpreted an employer’s obligation under § 701(j) in a manner that is at odds with Congressional intent. In so doing, the Court has ignored both the EEOC guidelines and the legislative history of § 701(j) and has, at times, shown distrust of a religious employee’s motives. Furthermore, in reaching this conclusion, the Supreme Court, Congress, and the EEOC have all displayed conflicting views regarding the appropriate treatment of religion in American society. As discussed in the following two parts, the lower courts have followed the Supreme Court both in their overall narrow interpretation of § 701(j), and in their conflicting views regarding the appropriate scope of § 701(j).

III.

**Reasonable Accommodation**

This Part examines how the term “reasonable accommodation” has been interpreted by the lower courts. Once a plaintiff has established a prima facie case of religious discrimination, 156 the courts next consider

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153. *Id.* at 74 (Marshall, J., concurring in part and dissenting in part).
154. *Id.* at 73.
155. *Id.* at 75.
156. The courts use a two-part procedure when analyzing claims under § 701(j). First, a plaintiff
whether the religious employee has been reasonably accommodated. As the Supreme Court clearly stated in Ansonia v. Philbrook, "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship." While the lower courts have generally defined reasonable accommodation as being synonymous with a very minimal level of accommodation, they have also displayed conflicting views regarding the appropriate interpretation of reasonable accommodation. It should be noted that reasonable accommodation and undue hardship are interconnected concepts and the pre-Ansonia decisions do not always clearly delineate between the two.

In determining whether an employer has reasonably accommodated a religious employee, courts face a number of subsidiary questions. To what extent must the employee cooperate with his employer, or even compromise his religious beliefs, in order to secure an accommodation of his religious needs? Must a reasonable accommodation guarantee that the conflict between the employee's religious beliefs and work requirements is eliminated? How much economic cost should an employee be required to bear before an accommodation is no longer considered reasonable? These questions are examined in this Part.

A. The Duty to Cooperate and the Duty to Compromise

The courts agree that a religious employee has a duty to cooperate with his employer in securing an accommodation for his religious needs. The

must meet a three-part test to establish a prima facie case of religious discrimination. "The employee must establish that (1) he had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer threatened him or subjected him to discriminatory treatment..." See Opuku-Boateng v. California, 95 F.3d 1461, 1467 (9th Cir. 1996) (quoting Heller v. EBB Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993)); see also Protos v. Volkswagen of America, Inc., 797 F.2d 129, 133 (3rd Cir. 1986), Smith v. Pyro Mining Co., 827 F.2d 1081, 1085 (6th Cir. 1987).

Once the plaintiff has established a prima facie case of religious discrimination "the burden then shifts to the employer to produce evidence showing that it cannot reasonably accommodate the worker without incurring undue hardship." Protos, 797 F.2d at 134; see also Smith, 827 F.2d at 1085; Opuku-Boateng, 95 F.3d at 1468; Heller, 8 F.3d at 1438.

479 U.S. at 68.

See, e.g., Beadle v. Hillsborough, 29 F.3d 589 (11th Cir. 1994) (A voluntary shift swap within a neutral rotating system is a reasonable means of accommodating an employee who requests time off for religious reasons even if there are no employees willing to swap shifts with the religious employee).

See infra notes 243-47 and accompanying text.

See, e.g., Brener, 671 F.2d 141. (The Brener court did not separately analyze the reasonable accommodation and undue hardship provisions of §701(j).)

See Hudson v. Western Airlines, Inc., 851 F.2d 261, 266-7 (9th Cir. 1988); Brener, 671 F.2d at
duty of employee cooperation was acknowledged in *Ansonia* when the Court stated that “Senator Randolph, the sponsor of the amendment that became § 701(j), expressed his hope that accommodation would be made with ‘flexibility’ and ‘a desire to achieve an adjustment’... Consistent with these goals, courts have noted that ‘bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee’s religion and the exigencies of the employer’s business.’”163

Employees, therefore, regularly lose when they fail to make use of means provided by the employer which could have resolved their conflict.164 In *Hudson v. Western Airlines, Inc.*,165 for example, both the employer and the union had explained to the religious plaintiff her options under the collective bargaining agreement.166 Since the plaintiff failed to make use of these options, the Ninth Circuit held that she had been reasonably accommodated, explaining that her “own failures to avail herself of reasonable means to eliminate the conflict between her religious beliefs and her employment demands undercut her claim that [the employer] violated Title VII by refusing to accommodate her further... Title VII does not allow [the religious employee] to ignore these reasonable accommodations and then demand further accommodations when she subsequently developed a conflict.”167

The courts also agree that an employee’s duty to cooperate only arises after the employer makes an initial attempt to accommodate the employee.168 As the Tenth Circuit stated, “[i]n *Ansonia Bd. of Educ.* the employee’s duty to cooperate was triggered by the employer’s initial efforts at accommodation. Here, to the contrary, [the employer] did not attempt to accommodate [the plaintiff’s] beliefs before it refused to hire him... [W]e conclude that [the plaintiff] did not breach his duty to cooperate with [the employer] in reaching a reasonable accommodation.”169 Similarly, the Ninth Circuit ruled that “[o]nly after the employer offers an accommodation does the employee’s reciprocal duty of cooperation begin.”170

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145-6.
164. *See, e.g. Hudson*, 851 F.2d at 266-7.
165. 851 F.2d 261.
166. *Id.* at 266.
167. *Id.* at 266-67; *see also Brener*, 671 F.2d 141; *Wright v. Runyon*, 2 F.3d 214 (7th Cir. 1993).
168. *See Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1488 (10th Cir. 1989); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1440 (9th Cir. 1993).
169. *Toledo*, 892 F.2d at 1488-89.
170. *Heller*, 8 F.3d at 1441.
1. An Employee's Duty to Compromise His Religious Beliefs

The courts, however, do not agree on how far this duty of employee cooperation extends. Some courts—although not most—have stated that the duty of cooperation places an obligation on an employee to compromise his or her religious beliefs. This court-imposed requirement of employee compromise is striking because of its implication that religion is an alterable characteristic that an individual can choose to follow or dismiss at will. Once a court has defined religion as being so adaptable, it is much easier for the court to determine that accommodation of the religious employee should not be required.

Professor Carter articulated the flaw in this line of reasoning in his analysis of Justice O'Connor's concurrence in *Estate of Thornton v. Caldor, Inc.*, a decision striking down a Connecticut statute that provided employees with the absolute right not to work on their Sabbath. According to Justice O'Connor, the statute unconstitutionally favored Sabbatarians because it gave them "the right to select the day of the week in which to refrain from labor." Professor Carter, pointing out a flaw in this reasoning, explained that as one scholar had noted, "It would come as some surprise to a devout Jew to find that he has 'selected the day of the week in which to refrain from labor,' since the Jewish people have been under the impression for some 3,000 years that this choice was made by God."

In *Chrysler v. Mann*, the Eighth Circuit held for the defendant-employer after determining that the plaintiff had failed "to consider any sort of a compromise insofar as his religion was concerned," or to "try to accommodate his own religious beliefs." While *Chrysler* has also been
read as merely requiring an employee to cooperate with his employer, as opposed to compromising his religious beliefs, the language the court used does imply that an employee also has a duty to compromise his religious beliefs.

In Johnson v. Halls Merchandising, Inc., a district court in the Eighth Circuit held that an employee may have an obligation to compromise her religious beliefs. The plaintiff in this case, for religious reasons, prefaced almost all of her sentences with the phrase “In the name of Jesus Christ of Nazareth.” In addition to determining that accommodating the religious employee would cause undue hardship to the employer who did not want to offend the religious beliefs of its customers, the court also found that the employee “did not make any effort to cooperate with her employer or to accommodate her beliefs to the legitimate and reasonable interests of her employer...” It is not surprising that the court required compromise in this case, since it involved a religious practice not widely shared by society and therefore more likely to be viewed by the courts as somewhat odd.

However, most courts examining the issue have ruled that an employee’s duty to cooperate does not encompass compromising his or her religious beliefs. The Fifth Circuit’s decision in Brener v. Diagnostic Center Hospital, is often quoted for its holding that “bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee’s religion and the exigencies of the employer’s business.” However, the Brener Court also stated that, “[o]f course, an employee is not required to modify his religious beliefs... only to attempt to satisfy them within procedures offered by the employer.”

The Seventh Circuit agrees

180. In Redmond v. GAF Corp., 574 F.2d 897, 902 n.13 (7th Cir. 1978), the Seventh Circuit stated: We believe that what the court in Chrysler was suggesting was that when procedures and scheduling already provide a measure of elasticity in switching work shifts and in allowing excused absences, a plaintiff’s failure to first seek an accommodation within these procedures indicates a lack of cooperation which, when combined with other factors, may render an accommodation impossible.

181. However, the Redmond court did acknowledge that Chrysler could also be read as requiring an employee to compromise his religious beliefs since it stated “to the extent that the Chrysler court may be interpreted to say that it is incumbent on plaintiff to show first that he has made some effort to either ‘compromise’ or accommodate his own religious beliefs before he can seek an accommodation from his employer, we disagree.” Id. at 901-02.


183. Id. at 529.

184. Id. at 529 (emphasis added).

185. See Brener v. Diagnostic Center Hospital, 671 F.2d 141 (5th Cir. 1982); Redmond v. GAF Corp., 574 F.2d 897 (7th Cir. 1978); EEOC v. IBP, Inc., 824 F. Supp. 147 (C.D. Ill. 1993). The employee-plaintiff in these cases, of course, does not automatically win. However, in cases where the court has determined that the employee must compromise his religious beliefs and the employee fails to do so, the employee-plaintiff will automatically lose.


187. Brener, 671 F.2d at 146 n.3. [relying on Redmond, 574 F.2d 897].
that an employee's obligation is to work with the employer and not to compromise his religious beliefs. 188

The duty of cooperation may also arise when an employee refuses to work on his Sabbath. While the courts are now in agreement that employees who are Sabbatarians need not compromise their religious belief to refrain from work on their Sabbath, 189 earlier cases in both the Fourth and Sixth Circuits required Sabbatarians to compromise these beliefs. 190 Despite the fact that these decisions are no longer good law, they are worth examining to the extent that the rhetoric employed illustrates the courts’ refusal to take the Sabbatarians’ religious beliefs seriously. Professor Carter describes this attitude as “if you must observe your Sabbath, have the good sense to understand that it is just like any other day off from work.” 191 These decisions are also noteworthy because they conflict with the legislative history of § 701(j), which makes clear that § 701(j) was enacted to protect Sabbatarians. 192

Discussing a Seventh Day Adventist, who, for religious reasons, refused to work on her Sabbath, the Fourth Circuit stated that “[the plaintiff’s] pre-requisite on its face was so unlimited and absolute in scope—never to work on Saturday—that it speaks its own unreasonableness and [is] thus beyond accommodation.” 193 The Fourth Circuit did not question the sincerity of the plaintiff’s religious belief, but nonetheless chose to impose its own view that the belief was unreasonable. However, as the dissent in the case correctly explained, plaintiff Jordan’s refusal to work on her Sabbath “is the beginning of the case, not the solution. It is the premise which invokes the Act and the regulation, for lacking one who has religious beliefs of the unbending nature of those held by plaintiff, neither Congress nor the Commission would have occasion to say that an employer has the duty to accommodate . . .” 194

Before eventually overruling Jordan, the Fourth Circuit relied on its reasoning in EEOC v. Ithaca Industries, Inc. 195 In Ithaca, a three-judge panel affirmed a district court decision which held that an employer was

188. See Redmond, 574 F.2d 897. See also IBP, Inc., 824 F. Supp. 147 (employee not required to compromise his religious belief that it is a sin to ask someone to work for him on his Sabbath).
192. See supra note 54 and accompanying text.
193. Jordan, 565 F.2d at 76.
194. Id. at 77 (Winter, J., dissenting).
195. 829 F.2d 519 (4th Cir. 1987), rev’d en banc, 849 F.2d 116 (4th Cir. 1988).
under no obligation to accommodate a Sabbatarian.\textsuperscript{196} The panel did not question that the plaintiff had a sincerely held religious belief, but nonetheless determined that the belief was simply too extreme.\textsuperscript{197} Emphasizing what it viewed as the employee’s unreasonable position, the court stated that “Dean’s uncompromising attitude and his desire for a guarantee for no Sunday work boxed Ithaca into a corner.”\textsuperscript{198} The Fourth Circuit further noted that “Dean refused to compromise in any way on the Sunday work issue . . . By his own absolutist position, Dean precluded Ithaca from making a reasonable accommodation for his religious practices.”\textsuperscript{199} 

*Ithaca* was, however, overturned by the Fourth Circuit sitting en banc.\textsuperscript{200} The Fourth Circuit explained that the district court’s reasoning “turns the statute on its head. It improperly places the burden on the employee to be reasonable rather than on the employer to attempt accommodation.”\textsuperscript{201} In the same decision, the Fourth Circuit also specifically overruled *Jordan* to the extent that it stands for the proposition that Sabbath work is beyond accommodation.\textsuperscript{202}

The reasoning of the *Jordan* Court was also relied upon in an unpublished Sixth Circuit decision, *Settles v. Wickes Lumber Div.*, which held that “[a]ppellant’s ultimatum that he would never work on Saturdays may well constitute the type of blanket demand that cannot reasonably be accommodated.”\textsuperscript{203} This ruling is particularly disturbing given that the court could have simply held for the employer on the grounds that accommodation would have caused undue hardship. The employer was in mass retailing and he required all salesmen to work on Saturday, which was his busiest day.\textsuperscript{204} Replacing the plaintiff would have required the employer to train another salesman at substantial cost.\textsuperscript{205} The court, however, took pains to emphasize that a Sabbatarian’s religious beliefs are by definition unreasonable. In contrast, subsequent Sixth Circuit decisions have not relied on the reasoning of the *Jordan* court and have instead required accommodation of Sabbatarians absent a showing of undue hardship.\textsuperscript{206}

Courts have also determined that an employee need not compromise

\textsuperscript{196.} *Id.*
\textsuperscript{197.} *Id.* at 521.
\textsuperscript{198.} *Id.*
\textsuperscript{199.} *Id.* at 521-22.
\textsuperscript{200.} *EEOC v. Ithaca Industries, Inc.* 849 F.2d 116 (4th Cir. 1988).
\textsuperscript{201.} *Id.* at 118.
\textsuperscript{202.} *Id.* at 119 n.3.
\textsuperscript{203.} *Settles v. Wickes Lumber Div.*, 624 F.2d 1101 (6th Cir. 1980) (unpublished decision).
\textsuperscript{204.} *Id.* at 1101.
\textsuperscript{205.} *Id.*
\textsuperscript{206.} *See Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987).
one religious belief in order to have another religious belief accommodated. The case which is perhaps most often cited for this holding is Smith v. Pyro Mining Co. Smith was a Sabbatarian who believed that it was a sin to ask another employee to swap jobs with him when he was assigned Sabbath work. Smith was, however, willing to participate in a job swap which was arranged by his employer. Nonetheless, when Smith was scheduled to work on his Sabbath, his employer told him to arrange a swap on his own. In affirming the district court decision in favor of Smith, the Sixth Circuit explained that while other circuits have determined that voluntary job swaps are a reasonable accommodation "where an employee sincerely believes that working on Sunday is morally wrong and that it is a sin to try to induce another to work in his stead, then an employer’s attempt at accommodation that requires the employee to seek his own replacement is not reasonable."

The Sixth Circuit opinion also demonstrated the court’s displeasure with the company’s insensitivity to its employees’ religious needs. In the instant case, the company explained its policy of allowing voluntary shift swaps through the use of a video presentation. Quoting from the district court opinion, the Sixth Circuit stated that this presentation used “crude language and a format that had to be an insult to the intelligence of the great majority of those who viewed it . . . The sum of this publication consisted of quick references toward the end of the video between two persons portraying miners . . . One employee asked, ‘What about preachers?’ The other one replies, ‘Hell, if they let us swap off to go fishing, I reckon they’ll let the preachers swap off.’"

It is worth noting that the fact pattern in Smith recalls the facts in Dewey v. Reynolds, another Sixth Circuit case. The Smith court correctly chose not to follow Dewey based on its determination that it had been superceded by § 701(j). However, while the Smith court showed its dissatisfaction with the employer’s insensitivity to religion, the Dewey court, which found for the defendant-employer on similar facts, spoke of Dewey’s religious-based refusal to find a replacement for his Sunday work with contempt.

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207. Id.
208. Id. at 1083-84.
209. Id. at 1084.
210. Id.
211. Id. at 1088.
212. Id. at 1083.
213. Id. at 1083 n.1.
214. As discussed in the previous Part, Dewey was one of the cases that eventually led to the enactment of § 701(j). See supra notes 37-44 and accompanying text.
216. See supra notes 43-4 and accompanying text.
Other courts addressing this issue have relied on *Smith* and have likewise determined that an employer must reasonably accommodate all of an employee’s religious beliefs and practices.217

2. An Employee’s Duty to Reschedule Religious Events

A related issue generating conflict among the courts is the question of whether an employee’s duty to cooperate includes a duty to reschedule his religious observances in cases where the rescheduling would not require the employee to compromise his religious beliefs. These cases differ significantly from cases requiring an employee to compromise his religious beliefs, since any inconvenience to the employee would affect him in a purely secular manner. There is only a limited body of case law addressing this issue.

In ruling that an employer did not discriminate against an employee who was also a minister by refusing to give him a busy Saturday off to officiate at a funeral, the Fifth Circuit implied that an employee does have an obligation to reschedule. The court stated that “[a]lthough plaintiff’s religion would have permitted a substitute minister to officiate at the funeral, he [plaintiff] made no effort to obtain one. Likewise, no effort was made to change the time of the funeral.”218

In contrast, the Ninth Circuit implied that the duty to cooperate does not necessarily include a duty to reschedule since “[a]n inflexible duty to reschedule would impose too great a burden on employees who desire to attend religious ceremonies for which they might be able to change the date or time, such as baptisms, confirmations, or weddings.”219

B. Elimination of the Employee’s Conflict

Relying on the *Ansonia* court’s holding that a reasonable accommodation is an accommodation that “eliminates the conflict between

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217. *See, e.g.*, EEOC v. IBP, Inc., 824 F. Supp. 147 (C.D. Ill. 1993) (allowing a religious employee who is a Sabbatharian to engage in a voluntary job swap is not a reasonable accommodation when employee believes it is a sin to ask another employee to work for him on the Sabbath).

218. Howard v. Haverty Furniture Companies, 615 F.2d 203, 205 (5th Cir. 1980). The employee was dismissed after taking the Saturday in question off to officiate at the funeral. *Id.* As a result of his absence the court determined that his employer suffered “undue hardship” in the form of lost efficiency since supervisory personnel were required to perform his job. *Id.* at 206.

219. Heller v. EBB Auto Co., 8 F.3d 1433, 1439 (9th Cir. 1993). The plaintiff made no attempt to reschedule his wife’s conversion ceremony, for which he needed time off from work, because he was under the mistaken impression that the date could not be changed. *See also* Tiano v. Dillard Dep’t Stores, Inc. 139 F.3d 679, 680 (9th Cir. 1998) (acknowledging that an employee does not have a duty to reschedule a religious ceremony, the court stated that the employee “must prove that the temporal mandate was part of the bona fide religious belief” in order to establish a prima facie case of religious discrimination).
[the employee's] employment requirements and religious practices," 220 lower courts generally refuse to find reasonable an accommodation that could not possibly eliminate this conflict. 221 For example, the Seventh Circuit determined that a Jewish employee who requested Yom Kippur off was not reasonably accommodated when her employer permitted her to take another day off instead, since this accommodation would "not eliminate the conflict between the employment requirement and the religious practice." 222 Similarly, one district court held that an employee who requested Easter Sunday off was not reasonably accommodated when her employer permitted her to take only part of the day off, 223 and another district court held that an employee who had requested eight days off to attend a religious festival was not reasonably accommodated when his employer permitted him to take a five-day leave. 224

However, the lower courts also agree that a voluntary shift swap, particularly if within a neutral rotating shift system, is a reasonable means of accommodating an employee who requests religious leave regardless of whether there are other employees willing to swap shifts with the religious employee. 225 The Sixth Circuit stated that "[u]ndoubtedly, one means of accommodating an employee who is unable to work on a particular day due to religious convictions is to allow the employee to trade work shifts with another qualified employee." 226 Similarly, in a case where an employee's religious need for time off was not accommodated, the Eleventh Circuit nonetheless concluded that "voluntary swaps instituted by employers within neutral rotating shift systems constitute reasonable accommodations under Title VII." 227

Some lower courts have specifically addressed how a voluntary shift swap

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221. See EEOC v. Ilona of Hungary, 108 F.3d 1569, 1576 (7th Cir. 1996); Cooper v. Oak Rubber Co., 15 F.3d 1375, 1380 (6th Cir. 1994); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 615 (9th Cir. 1988).
222. Ilona of Hungary, 108 F.3d at 1576. Other circuits have also stated that a reasonable accommodation is one that eliminates the conflict between the employee's religious practices and his work requirements. See, e.g., Cooper, 15 F.3d at 1380; Townley, 859 F.2d at 615. The Tenth Circuit has, however, specifically declined to determine whether an accommodation is only reasonable if it completely eliminates the employee's conflict. See Lee v. ABF Freight System, 22 F.3d 1019, 1023 n.4 (10th Cir. 1994).
225. See, e.g., Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141 (5th Cir. 1982); Beadle v. Hillsborough County Sheriff's Dep't, 29 F.3d 589 (11th Cir. 1994). See also Engle, supra note 13, at 397.
226. Smith v. Pyro Mining Co., 827 F.2d 1081, 1088 (6th Cir. 1987). In this case, a voluntary shift swap was determined not to be a reasonable accommodation because the religious plaintiff believed that it was a sin to ask a co-worker to work his Sabbath shift. See supra text accompanying notes 207-213.
swap can be a reasonable accommodation under § 701(j), even in cases where the religious employee’s conflict is not eliminated.\textsuperscript{228} One district court explained that “plaintiff suggests that unless the measures proposed by the employer completely eliminate the possibility of a religious conflict, they cannot be reasonable. This absolutist interpretation of an employer’s burden of accommodation is inconsistent with the thrust of judicial treatment of the issue.”\textsuperscript{229} Another district court maintained that voluntary shift swaps are reconcilable with court cases determining that a reasonable accommodation is an accommodation that eliminates the religious employee’s conflict because “on a conceptual level, a swap system at least carries the potential to eliminate the plaintiff’s religious conflict.”\textsuperscript{230}

The courts have, therefore, certainly engaged in rhetoric implying that voluntary shift swaps which fail to remove the religious employee’s conflict can be a reasonable accommodation under § 701(j). However, these decisions often emphasize either that these voluntary shift swaps are a reasonable accommodation because they do in fact resolve the religious employee’s conflict,\textsuperscript{231} or alternatively, that the employee was not able to find a replacement because he failed to actively shift swaps.\textsuperscript{232} Such conclusions demonstrate the American legal system’s ambivalence regarding religious accommodation in the workplace. Courts are uncomfortable articulating an “absolutist” interpretation of accommodation under § 701(j), and therefore tend to find that voluntary shift swaps are in general a reasonable accommodation. Yet, at the same time, courts are reluctant to hold that an accommodation is reasonable if it fails to remove the religious employee’s conflict. As a result, in cases where voluntary shift swaps fail to remove the employee’s conflict, courts tend to find that it is the employee’s fault that the “reasonable accommodation” does not work.

\textbf{C. Costs that an Employee Can Be Required to Bear}

The courts agree that a reasonable accommodation can require an employee to bear some economic cost.\textsuperscript{233} In so determining, the courts clearly tip the balance of § 701(j) in favor of the employer and against the religious employee. As discussed in Part IV, employers—who in general

\begin{itemize}
\item \textsuperscript{228} Moore, 727 F. Supp. at 1161; Graves v. Nordstrom, 1994 WL 721589 (N.D. Cal. 1994).
\item \textsuperscript{229} Moore at 1161.
\item \textsuperscript{230} Graves, 1994 WL 721589 (N.D. Cal. 1994).
\item \textsuperscript{231} See, e.g., Moore, 727 F. Supp. at 1161.
\item \textsuperscript{232} See, e.g., Beadle, 29 F.3d 589 (11th Cir. 1994); Brener, 671 F.2d 141 (5th Cir. 1982).
\item \textsuperscript{233} See Pinsker v. Joint Dist. Number 28J, 735 F.2d 388 (10th Cir. 1984) (holding that school district’s policy allowing only two days paid “special leave” was not religious discrimination merely because it required employee to take unpaid leave to accommodate his religious holidays); Getz v. Pennsylvania, 802 F.2d 72 (3d Cir. 1986) (holding that employer could require religious employee to use some of her vacation days when she needed time off to celebrate her religious holidays.)
\end{itemize}
have deeper pockets and would be better able to absorb the cost—are virtually never required to bear an economic cost in accommodating a religious employee.\(^{234}\)

The issue of the cost that an employee may be required to bear arises in cases where an employee who requests a religious leave must either take the time off without pay or use vacation days;\(^ {235}\) the question also arises in cases where the religious employee is accommodated through a transfer to a less desirable position.\(^ {236}\) A number of these cases involve the lower courts’ analysis of the concepts of employment opportunities or job status. One should keep in mind that Title VII prohibits religious discrimination with respect to “compensation, terms, conditions or privileges of employment.”\(^ {237}\) In addition, the EEOC Guidelines require that accommodation of the religious employee’s “employment opportunities,”\(^ {238}\) include “compensation, terms, conditions or privileges of employment.”\(^ {239}\)

1. Loss of Vacation or Leave Time

Based upon Ansonia, unpaid leave which allows an employee to observe his religious holy days is a reasonable accommodation unless, “paid leave is provided for all purposes except religious ones.”\(^ {240}\) According to the Court, “[t]he direct effect of unpaid leave is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status.”\(^ {241}\) However, the lower courts have not determined whether unpaid leave would be a reasonable accommodation if a religious employee were regularly required to take time off and thereby suffered a more significant financial burden.\(^ {242}\)

Lower courts are in agreement that requiring an employee to use some


\(^{235}\) See Pinsker, 735 F.2d 388; Getz, 802 F.2d 72; Cooper v. Oak Rubber Co., 15 F.3d 1375 (6th Cir. 1994).

\(^{236}\) American Postal Workers Union v. Postmaster General, 781 F.2d 772 (9th Cir. 1986); Wright v. Runyon, 2 F.3d 214 (7th Cir. 1993).


\(^{239}\) Id.


\(^{241}\) Ansonia, 479 U.S. at 70-71. Justice Marshall vigorously argued that “[a] forced reduction in compensation based on an employee’s religious beliefs can be as much a violation of Title VII as a refusal to hire or grant a promotion.” Id. at 74 (Marshall, J., dissenting).

\(^{242}\) In Ansonia, the plaintiff’s religious beliefs required him to miss work approximately six days a year, and he was permitted three days off with pay for religious reasons. Id. at 62-64. An employer might also not be required to accommodate an employee who needed a significant amount of time off for religious reasons since such an accommodation would likely cause the employer to incur more than a de minimis cost.
of her vacation days to observe her religious holy days can be a reasonable accommodation. However, requiring an employee to potentially use all of her vacation time in order to refrain from work on her religious holidays is not a reasonable accommodation. It is unclear exactly how much vacation an employee can be required to use before the accommodation ceases to be reasonable.

The courts' biases regarding the use of vacation time for religious leave is evident in the rhetoric chosen. The Sixth Circuit, for example, held that the use of vacation was not a reasonable accommodation and phrased the religious employee’s request in sympathetic terms. According to the court, the plaintiff “was faced with the choice of working on the Sabbath or potentially using all of her accrued vacation to avoid doing so... [The plaintiff] stands to lose a benefit, vacation time, enjoyed by all other employees who do not share the same religious conflict, and is thus discriminated against...”

By contrast, the Third Circuit, in determining that an employee had been reasonably accommodated although she was required to use some of her vacation time in order to observe her religious holidays, simply dismissed the religious plaintiff as unreasonable. The court explained that the plaintiff “is able to worship fully. Her only complaint is that she wants to have her religious holidays and keep her vacation days as well.”

2. Transfer to Another Position

Transferring a religious employee to another position—even if the position is less desirable—has been deemed a reasonable accommodation so long as the employee’s employment status is reasonably preserved. In Wright v. Runyon, a Sabbatarian was given the opportunity to bid on and receive other positions which would have allowed him his Sabbath off. The Seventh Circuit determined that the employee had been reasonably accommodated, even though he did not bid for the other position which he

243. See, e.g., Getz v. Pennsylvania, 802 F.2d 72 (3d Cir. 1986); Cooper v. Oak Rubber Co., 15 F.3d 1375 (6th Cir. 1994).

244. See, e.g., Cooper, 15 F.3d at 1379.

245. Id. (emphasis added). While Cooper ruled that the religious plaintiff had not been reasonably accommodated, the court still affirmed the district court decision in favor of the defendant-employer on the grounds that accommodation would have caused the employer to suffer undue hardship. Id. at 1379-80.

246. Getz, 802 F.2d at 74. This case differs from Cooper in that Getz was able to have her religious holidays off without using up most of her vacation time. Id. at 73.

247. Id. at 74 (emphasis added).

248. See, e.g., American Postal Workers Union v. Postmaster General, 781 F.2d 772 (9th Cir. 1986).

249. Wright, 2 F.3d at 217.
The court acknowledged that "[w]e would be presented with a different question if Wright were a skilled craftsman asked to assume an unskilled position." The Seventh Circuit also emphasized that a "much more searching inquiry might also be necessary if Wright, in order to accommodate his religious practices, had to accept a reduction in pay or some other loss of benefits. But that is not this case. Wright simply had to take a job that most people did not want."

Dicta in the Fifth Circuit, however, suggests that an employee's employment status is reasonably preserved even if the employee is offered a job which would require him to take a twenty percent pay cut. In so determining, the Fifth Circuit emphasized the extent to which the employer had attempted to accommodate the religious employee.

D. Summary of Reasonable Accommodation

Overall, the lower courts have interpreted reasonable accommodation in a narrow manner which, while in line with Supreme Court precedent, is at odds with congressional intent. For example, voluntary shift swaps, regardless of whether they remove the employee's religious conflict are usually considered a reasonable accommodation, and employees can be required to bear some economic cost in securing an accommodation of their religious needs.

In addition to this general tendency to interpret reasonable accommodation narrowly, the courts have also expressed conflicting views regarding the appropriate scope of the reasonable accommodation provision. This stems, in part, from the fact that some courts clearly show a distrust of religion and an employee's request for religious accommodation. A court that requires an employee to compromise his religious beliefs is essentially holding that religion is nothing more than an alterable characteristic that one may chose to follow or dismiss at will. In cases determining whether an employee can be required to use vacation time for religious leave, courts betray their biases through their rhetoric.

However, even in cases where courts do not express any distrust of

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250. *Id.*
251. *Id.*
252. *Id.*
253. Eversley v. MBank Dallas, 843 F.2d 172, 176 (5th Cir. 1988). In this case, the employee was found to be reasonably accommodated based on the "entire context and situation" since the employer had counseled the employee, actively sought other employees who would switch shifts with him, and offered the employee another job at lower pay. *Id.* at 176. The employee asserted that the position would involve a twenty percent pay cut and was not therefore a reasonable accommodation. *Id.* at 175. Specifically addressing whether the offer of a lower paying job constituted a reasonable accommodation the court stated, "simply because the proposed accommodation would involve some cost to the employee does not make it unreasonable." *Id.* at 176.
254. *Id.* at 176.
religion, or of an employee's request for religious accommodation, they may still be ambivalent about the extent to which religion should be accommodated in the workplace. While courts generally hold that voluntary shift swaps are a reasonable accommodation, in cases where these voluntary swaps fail to remove an employee's conflict, the courts take pains to emphasize both that voluntary swaps are reasonable and that it was the religious employee's fault that the swap was unsuccessful. Furthermore, the courts have not articulated when the economic cost to a religious employee associated with an accommodation is sufficiently burdensome as to preclude a finding of reasonable accommodation. Finally, there is also no consensus as to whether an employee has an obligation to attempt to reschedule religious events.

IV.

UNDUE HARDSHIP

If a court finds that an employer has not reasonably accommodated an employee's religious needs, the court must then determine whether accommodation is possible without undue hardship. This Part addresses the lower courts' interpretation of the term undue hardship in the aftermath of Hardison. As explained in Part II, the Hardison court determined that any cost greater than de minimis constitutes undue hardship. Based in large part on this holding, the lower courts have interpreted undue hardship broadly, thereby requiring only a minimal level of accommodation of religious employees.

Courts unanimously agree that certain accommodations constitute undue hardship and are therefore not required under § 701(j). These include accommodations that violate state statutes or regulations, accommodations that would result in health or safety hazards, and accommodations that would violate a seniority provision of collective bargaining agreement. In addition, lower courts almost never require an employer to incur any economic or efficiency costs in accommodating a

257. See infra notes 279-295 and accompanying text.
258. See Weber v. Leaseway Dedicated Logistics, Inc., 5 F. Supp. 2d 1219, 1222 (D. Kan. 1998) (holding that requiring employer to violate DOT regulations and potentially subject itself to civil penalties for doing so would constitute undue hardship); Kalsi v. New York City Transit Auth., 62 F. Supp. 2d 745 (E.D.N.Y. 1998) (holding that employer did not violate § 701(j) in discharging an employee who, for religious reasons, refused to wear a hard hat, since the employer required that all similarly situated employees wear hard hats for safety reasons); Killebrew v. Local Union 1683, 651 F. Supp. 95, 101 (W.D. Ky. 1986) (holding that the duty to accommodate does not take precedence over seniority rights enunciated in a collective bargaining agreement).
259. Id.
religious employee. Courts, however, do generally agree that hypothetical hardships cannot constitute undue hardship. Courts are most divided regarding when an accommodation causes undue hardship based on its impact on a religious employee's colleagues.

**A. Hypothetical Hardships**

Many courts agree that an employer must establish that it will suffer an actual undue hardship in accommodating a religious employee, and that speculative or hypothetical hardships do not constitute undue hardship. The issue of hypothetical hardships arises both in cases where there may be other employees potentially in need of religious accommodation, as well as in cases where the costs of accommodating only the employee requesting the accommodation is speculative.

In determining that hypothetical hardships do not constitute undue hardship, lower courts have essentially ignored the Supreme Court's reasoning in *Hardison*. The *Hardison* Court, in dismissing the dissent's argument that accommodating Hardison would not result in more than a *de minimis* cost to TWA, stated that the dissent "ignores... the express finding of the District Court... and fails to take account of the likelihood that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working on Saturdays or Sundays." This refusal to equate hypothetical hardship with undue hardship illustrates the American legal system's ambivalence regarding religion and religious accommodation in the workplace. While courts may be skeptical or wary of religion or an employee's request for religious accommodation, they are nonetheless reluctant to interpret undue hardship in a manner that would essentially render § 701(j) meaningless.

In refusing to consider hypothetical hardships, the Eighth Circuit
explained that:

It seems to this Court that undue hardship must mean present undue hardship, as distinguished from anticipated or multiplied hardship. Were the law otherwise, any accommodation, however slight, would rise to the level of an undue hardship because, if sufficiently magnified through predictions of the future behavior of the employee's co-workers, even the most minute accommodation could be calculated to reach that level.265

The Eight Circuit specifically acknowledged the Supreme Court's concern in Hardison "that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working on Saturday or Sundays."266 However, in an attempt to distinguish Hardison, the Eighth Circuit emphasized that "the trial court in Hardison found greater than de minimis cost associated with accommodating only Hardison."267 In more recent cases the Eighth Circuit has continued to rely on this reasoning in determining that undue hardship cannot be proven by hypothetical hardships.268

Similarly, in holding that an employer would not suffer undue hardship in hiring a truck driver who used peyote for religious reasons, the Tenth Circuit in Toledo v. Nobel-Sysco, Inc. determined that:

[any proffered hardship, however, must be actual...We are convinced that the risks of increased liability created by hiring Toledo are too speculative to qualify as undue hardship. As the district court found, accommodating Toledo's practices by requiring him to take a day off after each ceremony would virtually eliminate the risk that the influences of peyote would cause an accident or be a factor in subsequent litigation.269

The Sixth Circuit270 and Ninth Circuit271 have also specifically refused to equate hypothetical or speculative hardships with undue hardship. In addition, relying on the reasoning of the appellate courts, a number of district courts have refused to consider hypothetical or speculative

265. Brown v. General Motors Corp., 601 F.2d 956, 961 (8th Cir. 1979). The Eighth Circuit further reasoned "[w]e are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted." Id. at 960 (quoting Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975)).

266. Id. at 961 n.6 (quoting Hardison, 432 U.S. 60, 84 n.15).

267. Id.

268. See Brown v. Polk County, Iowa, 61 F.3d 650 (8th Cir. 1995).


270. Smith, 827 F.2d 1081, 1085-86 (6th Cir. 1987) (quoting Draper, 527 F.2d at 520).

271. Opuku-Boateng v. California, 95 F.3d 1461, 1474 n.25 (9th Cir. 1996) (dismissing the defendant-employer's concern with hypothetical hardships, and agreeing with the Brown v. General Motors Corp. court's interpretation of footnote 15 in Hardison). See also EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 615 (9th Cir. 1988).
hardships in their undue hardship analysis.\textsuperscript{272}

The Fourth Circuit, in a 1994 decision, \textit{Benton v. Carded Graphics, Inc.}\textsuperscript{273} also held that hypothetical hardships do not constitute undue hardship. The Fourth Circuit found that Carded Graphics had failed to demonstrate that it would suffer an actual hardship in accommodating Benton, a Sabbatarian who was occasionally scheduled to work on her Sabbath.\textsuperscript{274} This represented a tacit reversal of the Fourth Circuit’s holding in \textit{Jordan v. North Carolina National Bank}, where the court, relying on the Supreme Court’s reasoning in \textit{Hardison}, had determined that hypothetical hardships could constitute undue hardship.\textsuperscript{275} In \textit{Jordan}, the employer was not required to accommodate an employee who was a Sabbatarian since “the grant of this guarantee to [the plaintiff] would obligate the bank to provide [the accommodation] for all of its employees and entail extra expense. This would constitute an ‘undue hardship’ as the Court noted in \textit{Trans World Airlines, Inc. v. Hardison}.”\textsuperscript{276}

By contrast, the Third Circuit, relying on footnote 15 in \textit{Hardison}, has determined that hypothetical hardships can constitute undue hardship.\textsuperscript{277} In \textit{Ward v. Allegheny}, the Third Circuit stated that “[t]he [\textit{Hardison}] Court may have indicated that whether a proposed accommodation would create costs that are more than \textit{de minimis} is a matter to be determined on the basis of the projected number of instances of accommodation that a company may have to undertake, rather than on the impact of the single case of the plaintiff before the Court.”\textsuperscript{278}

\textsuperscript{272} See, e.g., EEOC v. READS, Inc., 759 F. Supp. 1150, 1161 (E.D. Pa. 1991) (holding that employer cannot rely on its speculative concern that accommodating a religious employee would violate Department of Education’s standards, when in fact accommodation would not have caused a violation of standards); Drazewski and Brown v. Waukegan Dev. Ctr., 651 F. Supp. 754, 758 (N.D. Ill. 1986) (denying summary judgment for both the plaintiff and defendant and stating “In this court’s view an employer cannot escape its statutory burden by mere speculations about added costs”); EEOC v. J.P. Stevens & Co., Inc., 740 F. Supp. 1135, 1339 (M.D. N.C. 1990) (finding for three of the plaintiffs and stating “until the defendant has actually put this practice into effect and experienced undue hardships, this court will not consider what potential effects may be felt”); Stanley v. The Lawson Co., 993 F. Supp. 1084, 1091 (N.D. Ohio 1997) (denying summary judgment for the defendant and stating “[a]n employer must present evidence of undue hardship; it cannot rely merely on speculation”); Lee Ray Banks v. Service Am. Corp., 952 F. Supp. 703, 711 (D. Kan. 1996) (denying summary judgment for the defendant and stating “[a]n employer’s costs of accommodation ‘must mean present undue hardship, as distinguished from anticipated or multiplied hardship’” (quoting from Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992) and Brown v. General Motors Corp., 601 F.2d 956, 962 (8th Cir. 1979))).


\textsuperscript{274} Id.

\textsuperscript{275} 565 F.2d 72, 76 (4th Cir. 1977).

\textsuperscript{276} Id. at 76 (Winter, J., dissenting). The dissent in \textit{Jordan}, however, disagreed with the majority’s interpretation of \textit{TWA v. Hardison}. Id.

\textsuperscript{277} Ward v. Allegheny, 560 F.2d 579, 583 n.22 (3rd Cir. 1977).

\textsuperscript{278} Id. The author is unaware of any subsequent cases in the Third Circuit which have addressed the issue of whether hypothetical hardships can constitute undue hardship.
B. Economic Cost and Lost Efficiency

Relying primarily on the *de minimis* language of *Hardison*, the lower courts, on a case-by-case basis, have consistently concluded that employers are not required to incur any economic cost or cost in terms of lost efficiency in accommodating a religious employee. The courts, however, have not specifically articulated a rule that such accommodation always constitutes undue hardship, and have therefore left open the possibility that some economic or efficiency costs could be required of employers in future cases.

Undue hardship has been found in cases where the employer would have to make do without the religious employee, where accommodation would involve the complex shuffling of employees, where accommodation would involve administrative costs, where the employer

279. *The Hardison* Court did not require TWA to bear any financial cost in accommodating Hardison, despite the fact that it had been stipulated that the cost of accommodation would have only been $150. *TWA v. Hardison*, 432 U.S. 63, 95 (1977) (Marshall, J., dissenting).

280. *See* Zablotsky, *supra* note 52. “A method of accommodation is declared unduly harsh if it requires an employer to bear any additional cost whatsoever. Undue hardship is found regardless of the type of cost involved be it direct financial cost, such as costs incurred in securing a temporary replacement for an employee or costs involved in paying premium wages, or an indirect cost, such as costs resulting from lost efficiency or costs resulting from increased administrative workload.” *Id.* at 544. According to Professor Zablotsky, “(b)ecause of the per se nature of this approach, cost alternatives are generally no longer available to employees seeking accommodation under Title VII.” *Id.* at 547.

In more recent cases, courts have continued to hold that cost alternatives are not required. *See*, e.g., *Wilson v. U.S. West Communications*, 58 F.3d 1337, 1339 (8th Cir. 1995) (holding that employer was justified in requiring employee to cover the graphic anti-abortion button she wore for religious reasons since the button caused disruptions at work, including a 40% decline in productivity of information specialists); *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992) (holding that Chrysler was not required to excuse employee from work every Friday for religious reasons since accommodation proposals involved significant economic costs); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1380 (6th Cir. 1994) (“Title VII does not require an employer to bear more than a *de minimis* cost in accommodating an employee’s religious beliefs. Either alternative available to Oak, the hiring of an additional worker or risking the loss of production, would have entailed more than a *de minimis* cost, relieving Oak of the obligation to accommodate”).

281. A recent article has argued that while most courts do refuse to require an employer to incur economic or efficiency costs in accommodating a religious employee, “[s]ome federal courts . . . are not enamored with a per se rule of undue hardship for any and all financial costs.” *See* Sonny Franklin Miller, *Religious Accommodation under Title VII: The Burdenless Burden*, 42 J. CORP. L. 789, 796 (1994).

In addition to the cases cited in Miller’s article, there are also older cases requiring an employer to incur minimal efficiency costs. *See*, e.g., *Brown v. General Motors Corp.*, 601 F.2d 956, 959 (8th Cir. 1979) (giving the religious plaintiff his Sabbath off would not constitute undue hardship since his employer regularly employed “extra board men” who were always available to replace absent workers, and therefore there was no direct economic cost in accommodating the plaintiff, and the efficiency cost was a “mere drop in the bucket”).

282. *See* Mann v. Frank, 7 F.3d 1365, 1369 (8th Cir. 1993).

283. *Id.*

284. *See* Wisner v. Truck Cent., 784 F.2d 1571, 1573 (11th Cir. 1986).
would have to adopt a religious employee’s philosophy of patient care, where the employer would essentially be permitting a part-time employee to receive full-time benefits, where accommodation would cause a decrease in employee productivity, and where the employer would have to incur the cost of a replacement employee.

The courts' overriding concern with economic and efficiency costs stems from the fact that Title VII does not require employers to reasonably accommodate religious employees if the accommodation would cause "undue hardship on the conduct of the employer's business." Not surprisingly, courts are much less concerned with costs to an employer which will not effect its economic bottom line.

C. Non-Economic Costs

1. Violation of Statutes or Regulations

Lower courts agree that employers are not required to violate valid state laws or regulations in accommodating a religious employee, since requiring such a violation would constitute more than a de minimis cost.
Even without regard to Hardison, requiring an employer to break a valid state law would constitute a significant burden on the employer and therefore be an undue hardship under the plain language of § 701(j).

2. Health and Safety Concerns

The courts have almost unanimously determined that employers are not required to accommodate religious employees in a manner that would result in health or safety hazards.\(^{292}\) This concern with health and safety hazards has also been a factor in decisions that find in favor of employers who deal in public safety such as police departments and the FBI.\(^{293}\) Since the maintenance of health and safety is generally considered an important societal goal, it is not surprising that the cost of incurring health or safety hazards has been held to be more than *de minimis*. Even under the plain language of § 701(j), requiring an employer to accommodate an employee in a manner that causes health or safety hazards would constitute a significant burden on the employer and therefore be an undue hardship.

3. Impact on Others

a. Violation of Seniority Agreements

Based on the clear language of Hardison, the lower courts have unanimously held that employers and unions are not required to violate a seniority provision contained in a collective bargaining agreement in

\(^{292}\) See Silbiger, *supra* note 52, at 848. See also Kalsi v. New York City Transit Auth., 62 F. Supp. 2d 745 (E.D.N.Y. 1998) (holding that employer did not violate § 701(j) in discharging an employee who, for religious reasons, refused to wear a hard hat, since the employer required that all similarly situated employees wear hard hats for safety reasons); Killebrew v. Local Union 1683, 651 F. Supp. 95 (W.D. Ky. 1986) (holding that employer did not violate § 701(j) in discharging an employee who, for religious reasons, refused to wear pants, since the employer, for safety reasons, prohibited employees from wearing skirts and dresses). But see Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481 (10th Cir. 1989) (holding that employer violated § 701(j) in refusing to hire an employee who occasionally used peyote for religious reasons, since the employer could have accommodated the employee by requiring him to take a day off each time he used the peyote).

\(^{293}\) See, e.g., Beadle v. City of Tampa, 42 F.3d 633, 637 (8th Cir. 1995) ("We agree with the magistrate court's refusal to interfere with the Department's scheduling and training programs. When the employer's business involves the protection of lives and property, 'courts should go slow in restructuring [its] employment practices.'" (quoting United States v. City of Albuquerque, 545 F.2d 110, 114 (10th Cir. 1976)); Ryan v. United States Dep't of Justice, 950 F.2d 458, 462 (7th Cir. 1991) (upholding the discharge of an FBI agent who refused to investigate an unsolved nonviolent federal offense for religious reasons, stating, "It is difficult for any organization to accommodate employees who are choosy about assignments; for a paramilitary organization the tension is even greater.... Legal institutions lack the sense of nuance that will tell an experienced agent how far the rules may be bent without injury to the FBI's mission").
accommodating a religious employee.\textsuperscript{294} As the \textit{Hardison} Court explained,

We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. . . . Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances.\textsuperscript{295}

\textit{b. Employee Complaints and the De Minimis Standard}

While § 701(j) refers to "undue hardship on the conduct of an employer's business," courts agree that an employer can also demonstrate undue hardship by showing that an accommodation would adversely impact the religious employee's co-workers, such as by requiring the non-religious colleague to work the religious employee's less desirable shift.\textsuperscript{296} It should be recalled that the \textit{Hardison} Court was clearly as concerned with the effect Hardison's proposed accommodations would have on his colleagues as with the cost of these accommodations to TWA.\textsuperscript{297}

There is, however, a lack of consensus on the extent to which employee grumbling, or a decrease in employee morale regarding an accommodation should be a factor in determining whether co-workers have been adversely affected in a manner that constitutes undue hardship. While some courts have focused on employee complaints,\textsuperscript{298} other courts have gone a step further and have analyzed whether these employee complaints

\textsuperscript{294} See generally Silbiger, supra note 52, at 847-48; Engle, supra note 13, at 390; Zablotsky, \textit{supra} note 52, at 523-24. However, the existence of a seniority system does not necessarily relieve the employer's obligation to reasonably accommodate a religious employee if accommodation is possible without disruption of the seniority system and without more than \textit{de minimis} cost to the employer. \textit{See} Balint v. Carson City, Nev., 180 F.3d 1047 (9th Cir. 1999).


\textsuperscript{296} Silbiger argues that courts should not focus at all on the effect that the accommodation would have on a religious employee's colleagues, but rather should limit their analysis to the costs that would be incurred by the employer and the employer's ability to bear these cost. \textit{See} Silbiger, \textit{supra} note 52, at 857-61.

The courts clearly have not followed this approach. In fact, the Supreme Court ruled that a Connecticut statute which provided employees with the absolute right not to work on their Sabbath violated the Establishment Clause of the First Amendment, in part because it ignored the effect accommodation would have on the Sabbatarian's co-workers. Estate of Thornton v. Caldor, 472 U.S. 703, 709 (1985). According to the Court, the statute "imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the [religious] employee. . . . [T]he statute takes no account of the convenience of the employer or those of other employees who do not observe a Sabbath." \textit{Id.} (emphasis added).

\textsuperscript{297} Hardison, 432 U.S. at 81.

\textsuperscript{298} \textit{See} Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141 (5th Cir. 1982).
are, in fact, justified.\textsuperscript{299} There is also a lack of agreement as to when an imposition on co-workers becomes significant enough to constitute undue hardship, and whether undue hardship, in this context, might mean something more than a \textit{de minimis} imposition on co-workers.\textsuperscript{300}

In determining whether an accommodation constitutes undue hardship, the Ninth Circuit has focused on the actual burden the religious employee’s co-workers would suffer.\textsuperscript{301} For example, in finding that an employer of a “Christian, faith-operated business”\textsuperscript{302} would not suffer undue hardship in permitting an employee who was an atheist to be excused from mandatory devotional services, the court affirmed the district court’s determination that excusing the plaintiff “would not have disrupted other workers.”\textsuperscript{303} The Ninth Circuit dismissed the alleged spiritual hardships, stating that “‘proof of coworkers’ unhappiness with a particular accommodation’ is not enough to show undue hardship.”\textsuperscript{304} The Ninth Circuit further explained that a claim of undue hardship must “be supported by proof of ‘actual imposition on coworkers or disruption of the work routine.’”\textsuperscript{305}

Similarly, in \textit{Opuku-Boateng v. California}, the Ninth Circuit determined that a Sabbatarian could be accommodated at an inspection center that was open twenty-four hours a day, 7 days a week without causing the employer undue hardship since the plaintiff was willing to work an equal number of undesirable shifts in exchange for his Sabbath off.\textsuperscript{306} Refusing to rely on employee complaints, the Ninth Circuit stated that “[e]ven proof that employees would grumble about a particular accommodation is not enough to establish undue hardship.”\textsuperscript{307}

While the Ninth Circuit did quote the “\textit{de minimis}” language from \textit{Hardison},\textsuperscript{308} the court also implied that significantly more than a \textit{de minimis} impact on the religious employee’s colleagues might be necessary for a finding of undue hardship.\textsuperscript{309} Focusing heavily on the fact that the plaintiff was willing to work as many undesirable shifts as his colleagues, the court determined that there was no discriminatory impact on other employees, and therefore any employee complaints that might occur would

\textsuperscript{299} See \textit{Opuku-Boateng v. California}, 95 F.3d 1461, 1470 (9th Cir. 1996).
\textsuperscript{300} See \textit{id}.
\textsuperscript{301} See \textit{EEOC v. Townley Eng’g & Mfg. Co.}, 859 F.2d 610 (9th Cir. 1998).
\textsuperscript{302} \textit{Id}. at 612.
\textsuperscript{303} \textit{Id}. at 615.
\textsuperscript{304} \textit{Id}. at 615 (quoting \textit{Burns v. Southern Pacific Transp. Co.}, 589 F.2d 403, 407 (9th Cir. 1978)).
\textsuperscript{305} \textit{Id}. at 615 (quoting \textit{Tooley v. Martin-Marietta Corp.}, 648 F.2d 1239, 1243 (9th Cir. 1981) (quoting \textit{Burns}, 589 F.2d at 406-07)).
\textsuperscript{306} 95 F.3d 1461, 1470 (9th Cir. 1996).
\textsuperscript{307} \textit{Id}. at 1473.
\textsuperscript{308} \textit{Id}. at 1468.
\textsuperscript{309} “It is less clear what type of impact on coworkers, apart from a significant discriminatory impact, constitutes an undue hardship.” \textit{Id}.
clearly not rise to the level of undue hardship.\textsuperscript{310}

In \textit{Bynum v. Fort Worth Independent School District}, a Texas district court also focused on the actual imposition that accommodation had on the religious employee’s colleagues.\textsuperscript{311} The \textit{Bynum} court determined that the plaintiff, a Sabbatarian, had not even established a prima facie case of religious discrimination.\textsuperscript{312} However, the court still addressed the merits of the case and found that requiring Bynum’s colleagues to do his share of work on Friday evenings and Saturdays, without receiving additional compensation, constituted undue hardship.\textsuperscript{313} The court clearly believed that Bynum’s colleagues’ resentment at doing an “unequal share of the work”\textsuperscript{314} was justified. As the court explained, “An accommodation that would force other employees, against their wishes, to modify their work schedules to accommodate the religious beliefs of the complaining employee would be unreasonable and an undue hardship.”\textsuperscript{315}

Similarly, relying on the fact that employee complaints alone do not constitute undue hardship, a district court in Michigan rejected a defendant’s motion for summary judgment in a case where an employee was discharged for refusing to operate a machine located near sexually explicit pictures.\textsuperscript{316} The plaintiff allegedly objected to these pictures on religious grounds.\textsuperscript{317} The court initially determined that the defendant was unable to demonstrate that employee morale would decrease if the employees were required to take down the pictures, but then added that even if employee morale did decrease, “the Ninth Circuit has recognized that ‘proof of co-workers’ unhappiness’ with a particular accommodation is not enough to cause a hardship.”\textsuperscript{318}

There is one case where the Ninth Circuit did determine that accommodating a religious employee would have a sufficiently negative effect on the employee’s co-workers so as to constitute undue hardship. In

\textsuperscript{310} Id. at 1470. “So long as Opuku-Boateng worked that equal number of ‘undesirable shifts,’ being assigned a holiday, Sunday, or night shift for every shift he missed to observe the Sabbath, he would not have been granted any preferential treatment, nor would any cognizable burden have been imposed on other employees who simply were assigned one undesirable shift instead of another.” \textit{Id.}


\textsuperscript{312} Id. at 653.

\textsuperscript{313} Id. at 656.

\textsuperscript{314} Id. at 648.

\textsuperscript{315} Id. at 653.


\textsuperscript{317} Id. at 602.

\textsuperscript{318} Id. at 604 (quoting EEOC v. Townley Eng’g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988)). \textit{See also} Drazweski v. Waukegan Dev. Ctr., 651 F. Supp. 754, 758 (N.D. Ill. 1986) (determining that voluntary shift swaps were not prohibited by the collective bargaining agreement and that, “[d]efendants seem to imply that the union’s objection to voluntary swaps is enough to excuse them from trying it as a means of accommodation. But the union’s ‘grumbling’ about a ‘benefit’ allowed to plaintiffs would not absolve defendants of their statutory duty to accommodate” (citation omitted)).
this case, however, the court did not focus on employee complaints, but rather emphasized that co-workers would be required to take over the religious employee’s share of hazardous work.  

The Fifth Circuit, however, has placed more emphasis on the complaints of other employees or decreased employee morale. In *Brener v. Diagnostic Center Hospital*, a hospital pharmacist refused to work on his religious holidays and the Fifth Circuit agreed with the hospital that requiring other employees to trade shifts with the religious employee would cause undue hardship. While the pharmacy director had initially been willing to direct shift swaps for Brener, he stopped after receiving complaints from other employees. As in *Opuku-Boateng*, accommodation often involved the religious plaintiff working other undesirable shifts in exchange for his holy days off. It appears, therefore, that the actual imposition on Brener’s co-workers of a shift swap would have been extremely minimal.  

While the Fifth Circuit did conclude that the plaintiff’s “characterization of complaints by others as mere grumbling underestimates the actual imposition on other employees in depriving them of their shift preference,” the court was, in fact, primarily concerned with these complaints. The Fifth Circuit affirmed the district court’s decision that Brener could have potentially arranged a voluntary shift swap on his own and that his failure to do so did not result—as Brener claimed—from “the reluctance of other employees to trade schedules with him,” but rather, from the fact that he had made “only haphazard efforts to arrange schedule

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319. *Bhatia v. Chevron*, 734 F.2d 1382, 1384 (9th Cir. 1984). The *Opuku-Boateng* court distinguished the case before it from *Bhatia*, explaining that *Bhatia* “involved accommodations that would have resulted in a significant discriminatory impact on the plaintiff’s co-workers.” *Opuku-Boateng v. California*, 95 F.3d 1461, 1468 n.12. See also *Kalsi v. New York City Transit Auth.*, 62 F. Supp. 2d 745, 760 (E.D.N.Y. 1998) (determining that requiring an employer to accommodate a religious employee in a manner that would increase the potential for injury to the religious employee’s colleagues would constitute an undue hardship).  
320. 671 F.2d 141, 147 (5th Cir. 1982).  
321. *Id.* at 143. It may not be a coincidence that while the employer had directed shift swaps for Rosh Hashanah and Yom Kippur, the Jewish holidays Americans are most likely to be familiar with, the employer was unwilling to direct shift swaps so that Brener could have time off for Sukkos, a holiday that is less well-known to Americans.  
322. Brener had arranged a trade with a co-worker so that he could work Sunday when scheduled to work on a Saturday. *Id.* Furthermore, the last trade the pharmacy director arranged for Brener involved his working on the Christian holidays in return for getting off the Jewish holidays of Rosh Hashanah and Yom Kippur. *Id.*  
323. The court did, however, rely on the fact that the employer’s experiment with directing trade shifts “resulted in disruption of work routines and a lowering of morale among the other pharmacists,” while in *Opuku-Boateng* there was not attempted accommodation. *Id.* at 147.  
324. *Id.*  
325. *Id.* at 145.
trades. It is difficult to understand how the court could have both determined that there were other employees willing to trade shifts with Brener, but that, nonetheless, an employer-arranged shift swap would adversely impact other employees so as to cause undue hardship.

Two years later, the Fifth Circuit again emphasized the importance of employee complaints in determining that a particular accommodation was not required. Addressing the issue of employee complaints in a different context, the court determined that an employer was under no obligation to even pursue a voluntary swap for a religious employee since the employer believed that other employees' complaints regarding such a job swap would make the swap impossible.

The disagreement between the circuit courts reflects a lack of consensus in the American legal system regarding the weight which should be placed on a religious employee's needs when these needs inconvenience his or her co-workers. While the courts agree that at some point imposition on co-workers constitutes undue hardship under § 701(j), there is a lack of consensus regarding precisely when this occurs. It appears that the Ninth Circuit's determination that co-worker grumbling and complaints cannot alone constitute undue hardship is the correct interpretation of § 701(j). The Ninth Circuit perhaps best articulated why this is so when it stated, "[i]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."

D. Summary of Undue Hardship

Overall, the lower courts have interpreted the undue hardship provision of § 701(j) broadly, thereby requiring minimal accommodation of religious employees. Based largely on the de minimis standard articulated in Hardison, lower courts have determined that employers are virtually never required to bear any economic or efficiency costs in accommodating a religious employee. The lower courts have also unanimously held that employers are not required to violate statutes or regulations in accommodating a religious employee or to accommodate in a manner that

326. Id.
328. Id. at 1027. The employer determined that "other employee's complaints about filling in for Turpen indicated that 'such an inquiry [regarding a voluntary swap] would have been futile.'" Id.
329. Silbiger argued that in these cases "courts typically base their decisions more on societal notions of how much latitude the groups must cede to the nonconformist than on actual demands of the statute." See Silbiger, supra note 52, at 850.
330. Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 402 (9th Cir. 1978) (internal quotes and citations omitted).
would create health or safety hazards.

In addition to this general trend of interpreting undue hardship broadly, the lower courts have also expressed conflicting views regarding the appropriate scope of the undue hardship provision. Circuits remain divided on when an accommodation that adversely affects a religious employee’s colleagues constitutes undue hardship.

Furthermore, even though the courts, on a case-by-case basis, require little accommodation of religious employees, they are reluctant to interpret § 701(j) in a manner that would virtually never require accommodation and therefore generally refuse to equate hypothetical hardship with undue hardship.

V.

THE UNION DUES CASES

The cases that address an employer’s obligation to accommodate an employee, who for religious reasons refuses to pay union dues, differ significantly from the majority of decisions involving § 701(j). Courts have unanimously agreed that these employees should be permitted to pay an amount equal to their union dues to charity. Unlike in most other § 701(j) cases, employee plaintiffs regularly win, circuits agree that accommodation is required, and a less restrictive definition of undue hardship is applied. Moreover, these cases suggest that courts are willing to require a higher level of accommodation because the fact that the religious employee suffers the same financial burden as the dues-paying secular employee relieves the courts’ skepticism regarding the sincerity of the employee’s religious belief.

The union dues cases are the only § 701(j) cases where the courts regularly require an accommodation that involves an economic cost—the lost union dues. Courts have attempted to distinguish the union dues cases by emphasizing the minimal cost to the union. For example, in dismissing the union’s claim that it would suffer economic hardship if forced to allow a

331. These cases involve union security agreements which require all employees to pay union dues as a condition of their employment.


333. See, e.g., McDaniel, 696 F.2d at 37; Anderson, 589 F.2d at 402; Burns, 589 F.2d at 407; Tooley, 648 F.2d at 1243-4; Nottelson, 643 F.2d at 451-2.

334. See, e.g., Anderson, 589 F.2d at 402; Burns, 589 F.2d at 406; Tooley, 648 F.2d at 1243; Nottelson, 643 F.2d at 451.
religious employee to make a substitute charitable contribution, the Ninth Circuit in Burns v. Southern Pacific Transportation Co emphasized that the plaintiff’s dues were a mere $19 a month and that “the loss of dues to the Union is de minimis.” However, this $19 a month, within eight months, would have outweighed the economic cost of accommodating Hardison in Trans World Airlines, Inc. v. Hardison. Three years later, the Ninth Circuit affirmed a district court decision that had taken into account the union’s surplus reserves in determining that a substitute charitable contribution would not result in undue hardship.

Courts in the union dues cases do, however, acknowledge that a widespread refusal to pay union dues could constitute undue hardship. As the Burns court stated, “If, in the future, the expressed fear of widespread refusal to pay union dues on religious grounds should become a reality, undue hardship could be proved.”

In the union dues cases, the courts also reject the argument that employee complaints regarding an accommodation of a religious employee—absent an actual imposition on the religious employee’s colleagues—can constitute undue hardship. In Anderson v. General Dynamics Convair Aerospace Div., the Ninth Circuit stated that “[e]ven proof that employees would grumble about a particular accommodation is not enough to establish undue hardship.” The court continued, “[i]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.” In Burns, a companion case, the Ninth Circuit added that “undue hardship requires more than proof of some fellow-worker’s grumbling or unhappiness with a particular accommodation to a religious

335. Burns, 589 F.2d at 407.
336. The dissent in Hardison stated that the cost of accommodating Hardison would have been $150. See supra note 90.
337. See Tooley, 648 F.2d 1239. The Ninth Circuit specifically rejected the Steelworkers’ contention that the district court had departed from the de minimis standard in examining the union’s surplus funds. Id. at 1243.
338. 589 F.2d at 407. Nine years later, the Ninth Circuit again stated that “if there was widespread refusal to pay union dues, [the plaintiff’s] charitable contribution would be disallowed.” International Ass’n of Machinists & Aerospace Workers, Lodge 751 v. Boeing Co., 833 F.2d 165, 171 (9th Cir. 1987). See also E.E.O.C. v. Union Independiente De La Autoridad De Acueductos y Alcantarillados De Puerto Rico, 30 F. Supp. 2d 217 (D.P.R. 1998).
339. See Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397 (9th Cir. 1978); Burns, 589 F.2d 403 (9th Cir. 1978); Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445 (7th Cir. 1981).
belief."\textsuperscript{342}

The Seventh Circuit also refused to accept the union's argument that allowing a substitute charitable contribution would cause problems with employee morale, determining that there was no evidence "that the accommodation would lead to labor strife."\textsuperscript{343} While many non-union dues cases similarly require an actual imposition on co-workers, there are also cases that have relied, in part, on employee complaints in determining that an employer would suffer undue hardship.\textsuperscript{344}

In the union dues cases, courts have also dismissed the argument that hypothetical hardships can constitute "undue hardship."\textsuperscript{345} The \textit{Burns} court, in reversing the decision below, determined that "the district court accepted the Union's contention that accommodating Burns would open the gate to excusing vast numbers of persons who claimed to share Burns' beliefs, thence resulting in a greater than De minimis burden on the Union and Union members. The record does not support this speculation."\textsuperscript{346} Similarly, the \textit{Nottelson} court in dismissing what it viewed as hypothetical hardships, stated that "[t]here was also no evidence presented that other workers would seek similar accommodations... The Union President admitted that his fear of a 'steamroller effect' was purely conjectural and no other employee had sought such an accommodation."\textsuperscript{347} While the majority of courts in non-union dues cases also refuse to rely on hypothetical hardships, this refusal is not unanimous.\textsuperscript{348}

A number of explanations have been given as to why the courts unanimously require a higher level of accommodation in the union dues cases than in other § 701(j) cases. One explanation is that the courts employ a balancing test which is more likely to tip in favor of the religious employee's needs and against the importance of the union security provision.\textsuperscript{349} A second explanation is that courts treat these cases similarly

\textsuperscript{342} 589 F.2d at 407.
\textsuperscript{343} \textit{Nottelson}, 643 F.2d at 452 (7th Cir. 1981).
\textsuperscript{344} \textit{See supra} notes 296-330 and accompanying text.
\textsuperscript{345} \textit{Burns}, 589 F.2d at 407; \textit{Nottelson}, 643 F.2d at 452; \textit{Union Independiente}, 30 F. Supp. 2d at 223 (D.P.R. 1998).
\textsuperscript{346} 589 F.2d at 407.
\textsuperscript{347} 643 F.2d at 452.
\textsuperscript{348} \textit{See supra} notes 263-78 and accompanying text.
\textsuperscript{349} \textit{See} Zablotsky, \textit{supra} note 52. According to Professor Zablotsky, based on the Court's holding in \textit{TWA v. Hardison}, "the balancing process used to determine the reasonableness of the employer's efforts to accommodate when collective bargaining agreements are involved requires consideration of three factors: 1) the significance of the contractual provision at issue to the collective bargaining process; 2) the effect of religious accommodation of one employee on the contractual rights of other employees; and 3) the special treatment, if any, afforded the contractual provision under Title VII." \textit{Id.} at 523. Zablotsky explains that while union security agreements are an important aspect of the collective bargaining process, the second and third factors tip the balance in favor of the religious employee. \textit{Id.} at 527. This is so, because accommodation in these cases does not effect the contractual
to cases involving differential treatment based on gender, and that courts will permit differential treatment so long as all employees are equally burdened.\textsuperscript{350} A third explanation is that courts do not want to appear hostile to religion since other types of accommodations are available from union shops.\textsuperscript{351}

While these explanations are all valid, the union dues cases can also be understood in the context of how religion is viewed by the American legal system. As previously discussed, some courts are skeptical of religion since it is by definition a belief system that cannot be rationally proven. Related to this is the fact that some courts are concerned that employees who request accommodation of their religious needs may be trying to use religion to their personal advantage.\textsuperscript{352}

It should be reemphasized at this point that this article only addresses cases where a court has determined, or the parties have stipulated, that the plaintiff has a religious belief entitled to protection under § 701(j). However, as discussed throughout this article, even in these cases, courts may nonetheless evidence skepticism or doubt regarding the employee's religious beliefs. Such doubts, however, are not evident in the union dues cases involving mandatory substitute charitable contributions, because the religious plaintiffs are incurring the same financial burden as their colleagues.\textsuperscript{353}
This can best be seen in the courts’ recurring dismissal of the defendants’ argument that plaintiffs are “free riders.”\textsuperscript{354} As the Seventh Circuit explained, “[b]ecause a religious objector under a charity-substitute accommodation bears the same financial burden as his co-workers, he is not as the Union suggests, a ‘free rider’ seeking something for nothing.”\textsuperscript{355} The flip side of this statement, is, of course, that in other § 701(j) cases the religious plaintiff is “seeking something for nothing,” and attempting to take advantage of his employer.

Because courts do not suspect that a religious plaintiff desiring to make a substitute charitable contribution has an ulterior motive, they are quite willing to ignore the fact that the union receives nothing from the religious plaintiff.\textsuperscript{356} The Seventh Circuit essentially ignored the union’s need to collect its dues, stating that the substitute charitable contribution is a means of allowing plaintiffs to “fulfill their societal obligations in a different manner.”\textsuperscript{357} The union, of course, is interested in collecting its dues and is not interested in a plaintiff’s “societal obligations.”

Courts are willing to dismiss the argument that the religious plaintiffs are free-riders, both in cases where the plaintiff is a member of an organized religion which opposes union membership or the financial support of unions\textsuperscript{358} as well as in cases where it is the plaintiff’s personal religious belief which compels him not to pay union dues.\textsuperscript{359}

\textsuperscript{354} See Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 401 (9th Cir. 1978); Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 406 (9th Cir. 1978); Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 452 (7th Cir. 1981). One court has defined free-riders as “those who enjoy the benefits of the union’s negotiating efforts without assuming a corresponding portion of the union’s financial burden.” EEOC v. Davey, 671 F. Supp. 1260, 1261 (N.D. Cal. 1987) (quoting Buckley v. American Fed’n of Television and Radio Artists, 496 F.2d 305, 311 (2d Cir. 1974)).

\textsuperscript{355} See Nottelson, 643 F.2d at 451. Similarly, the Sixth Circuit deemed it significant to state that the religious plaintiff had written to her local union leader stating that “she was not seeking any financial advantage.” See McDaniel v. Essex International, Inc., 696 F.2d 34, 36 (6th Cir. 1982).

\textsuperscript{356} However, the dissent stated, “The fact should not be significant that by paying over to a charity an amount equivalent to dues Nottelson expends the same amount of money as does another employee who may not be in favor of the Union representing him but cannot fall back on a claimed religious tenet. The merchant who sells merchandise, or the lawyer who sells service, would scarcely regard that he was receiving a quid pro quo to which he was entitled if the price or the fee was paid instead to a charity no matter how worthwhile or deserving that other recipient might be. No more, it seems to me, should Nottelson be entitled to the services without paying for them in the same manner as his fellow employees. In sum, he is a ‘free rider,’ plain and simple.” Nottelson, 643 F.2d at 456 (Pell, J., dissenting).

\textsuperscript{357} Id. at 454.

\textsuperscript{358} The majority of plaintiffs in the union dues cases are members of the Seventh Day Adventist Church. The church “teaches that its adherents should not belong to labor unions or support them financially.” McDaniel, 696 F.2d at 35.

\textsuperscript{359} See EEOC v. University of Detroit, 904 F.2d 331 (6th Cir. 1990) (plaintiff refused to pay union dues since he opposed abortion on religious grounds and the union had campaigned on behalf of a woman’s right to choice); International Ass’n of Machinists, Lodge 751 v. Boeing Co., 833 F.2d 165 (9th Cir. 1987) (plaintiff belonged to church that permitted members to support labor unions but her personal bible study led her to oppose unions).
The fact that the courts do not view a plaintiff's request to make a mandatory substitute charitable contribution with skepticism is further evident upon an examination of the Ninth Circuit's reasoning in *Yott v. North American Rockwell Corp.*360 Kenneth Yott was a member of "The Church Which is Christ's Body."361 One tenet of the church is that members should neither join labor unions nor pay union dues, and a second church tenet is that charitable contributions must be voluntary.362 Based on these tenets, Yott refused to make a mandatory substitute charitable contribution, and the Ninth Circuit therefore determined that accommodating Yott would cause his employer "undue hardship."363

Although the Ninth Circuit found that "[i]t is undisputed that Yott has a sincere belief"364 in these tenets, the Court nonetheless expressed skepticism regarding Yott's refusal to make a mandatory substitute charitable contribution stating, "although it is against Yott’s religious belief to be compelled to contribute to his church, he is not compelled to work for Rockwell. Yott clearly supports his religion, thus, his refusal to accept the proposed accommodation is not entirely consistent with his otherwise unrestricted support of The Church Which is Christ's Body."365

The Ninth Circuit also determined that Yott should "accommodate himself,"366 or, in other words, compromise his religious beliefs, an argument sometimes relied upon in the non-union dues cases but not relied upon in the union dues cases involving mandatory substitute charitable contributions. Relying additionally on the possibility of further employee exemptions for religious reasons and future labor strife—in other words, both hypothetical hardships and employee complaints—the Court refused to grant Yott a total exemption from paying his dues.367 It is apparent that once the Ninth Circuit viewed Yott’s request with skepticism, it narrowly interpreted his employer’s obligation under § 701(j) in a manner more in line with the non union-dues cases than with the union dues cases involving mandatory substitute charitable contributions.

The union dues cases also illustrate that the courts are simply more skeptical of religious beliefs than of non-religious beliefs, such as political beliefs. In *Communication Workers of America v. Beck*, the Supreme Court determined that employees are not required to pay union dues to cover

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360. 602 F.2d 904 (9th Cir. 1979).
361. *Id.* at 906.
362. *Id.*
363. *Id.* at 908.
364. *Id.* at 906.
365. *Id.* at 907-08.
366. *Id.* at 908.
367. The court specifically relied on the history of tension between union and non-union workers at Rockwell. *Id.* at 909.
political activities that they do not support.\textsuperscript{368} Furthermore, as Professor Corrada explains, "[n]o one has ever proposed in this context that political objectors pay the 'equivalent' of political union dues and fees to a nonpolitical, non labor charitable fund. The free speech interest is thus granted complete exemption from nonpayment of dues that conflict with the speech right."\textsuperscript{369} Courts therefore appear to be particularly suspicious of religion and an employee's request for religious accommodation.\textsuperscript{370}

The union dues cases, therefore, illustrate that the courts have interpreted § 701(j) narrowly, in part because they are skeptical of religion and concerned that an employee requesting religious accommodation may in actuality be attempting to receive favored treatment. Consequently, so long as the religious employee is willing to suffer the same financial burden as the dues-paying secular employee, courts do not view the religious employee's accommodation request with skepticism and unanimously require accommodation.

VI.
PROPOSALS FOR AN AMENDMENT TO TITLE VII

As described in this article, meaningful protection of religious employees has not been achieved through the courts' overall narrow interpretation of § 701(j) or through conflicting decisions regarding an employer's duty to accommodate. Congress has itself recognized the need to amend § 701(j), and in 1994, the Workplace Religious Freedom Act (WRFA)—which would both broaden and clarify the scope of § 701(j)—was initially introduced in the United States House of Representatives.\textsuperscript{371} In 1996, WRFA was reintroduced in the House of Representatives and was also introduced in the Senate.\textsuperscript{372} WRFA has been reintroduced in each subsequent Congressional Session.\textsuperscript{373} In addition, in 1997, the White House issued Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (Guidelines),\textsuperscript{374} which mandate a higher level of religious accommodation for federal employees than that currently required.

\textsuperscript{368} 487 U.S. 735 (1988).
\textsuperscript{369} Corrada, supra note 332, at 248.
\textsuperscript{370} \textit{Beck} can be distinguished somewhat from the other cases discussed in this part, since the plaintiffs in \textit{Beck} only objected to paying fees for activities unrelated to collective bargaining, contract administration or grievance adjustment.
\textsuperscript{371} H.R. 5233, 103\textsuperscript{rd} Cong. (1994).
\textsuperscript{372} H.R. 4117, 104\textsuperscript{th} Cong. (1996); S. 2071, 104\textsuperscript{th} Cong. (1996).
\textsuperscript{373} H.R. 2948, 105\textsuperscript{th} Cong. (1997); S. 92, 105\textsuperscript{th} Cong. (1997); S. 1124, 105\textsuperscript{th} Cong. (1997); H.R. 4237, 106\textsuperscript{th} Cong. (2000); S. 1668, 106\textsuperscript{th} Cong. (1999). The language of WRFA has remained similar. When referring to WRFA the author will cite to the most recent Senate bill.
\textsuperscript{374} Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, August 14, 1997.
This article proposes that § 701(j) be amended in a manner that takes the following issues into consideration:

1. Congress should overrule Hardison's holding that any cost greater than de minimis constitutes undue hardship.\textsuperscript{375} Rather, undue hardship should be defined as a cost that is meaningful or significant.\textsuperscript{376} WRFA currently does so, by defining undue hardship as an accommodation "requiring significant difficulty or expense,"\textsuperscript{377} which is the definition of undue hardship applied under the Americans with Disabilities Act (ADA).\textsuperscript{378}

2. Congress should clarify that an accommodation must have a significant discriminatory impact on the religious employee's co-workers to constitute undue hardship, and that a decrease in employee morale or employee complaints resulting from an accommodation do not, standing alone, constitute undue hardship.

3. An amendment should clearly state that undue hardship cannot be demonstrated by hypothetical or speculative hardships, but rather can only be demonstrated by a showing of an actual hardship.\textsuperscript{379}

4. Congress should provide guidance to employers on how to deal with religious accommodation requests from more than one employee in cases where accommodating some of the employees requesting accommodation would not constitute undue hardship but accommodating

\textsuperscript{375} This article does not address overturning the Hardison court's determination that employers and unions are not required to violate a seniority system contained in a collective bargaining agreement in accommodating a religious employee. For a discussion of how the National Labor Relations Act should be amended to require greater accommodation of religious employees see generally Corrada, supra note 332.

\textsuperscript{376} While the Guidelines do quote the de minimis language from Hardison, they also state that "[i]n those cases where an agency's work rules impose a substantial burden on a particular employee's exercise of religion, the agency must go further: an agency should grant the employee an exemption from that rule unless the agency has a compelling interest in denying the exemption and there is no less restrictive means of furthering that interest." Guidelines, § 1(C). This has led some commentators to conclude that "[t]he compelling interest standard in the Guidelines appears to raise the bar of proof for the federal agency above and beyond the de minimis test of Hardison." Michael Wolf, Bruce Friedman, Daniel Sutherland, Religion in the Workplace: A Comprehensive Guide to Legal Rights and Responsibilities, American Bar Association 1998 at 172.

\textsuperscript{377} S. 1668 §2(a)(4), 106\textsuperscript{th} Cong. (1999).


\textsuperscript{379} WRFA states that in determining whether an accommodation would result in undue hardship, a court should look at the "identifiable cost" of the accommodation, thereby implying that hypothetical costs should not be considered. S. 1668, 106\textsuperscript{th} Cong. (1999) §2(a)(4). Similarly, the Guidelines state that cost must be "real rather than speculative or hypothetical." Guidelines, §1(C).
all the employees requesting accommodation would constitute undue hardship.\textsuperscript{380}

5. Congress should clearly state that an accommodation which requires an employee to bear a significant cost—either in terms of lost pay, lost vacation or a transfer to a less desirable position—will not constitute a reasonable accommodation.\textsuperscript{381}

6. Congress should clearly state that an accommodation is only reasonable if it resolves the employee’s religious conflict.\textsuperscript{382} Therefore, a voluntary shift swap is not a reasonable accommodation if there is no employee willing to swap shifts with the religious employee.

7. An amendment should state that while an employee is required to work cooperatively with his employer in resolving his religious conflict, an employee is never required to compromise his religious beliefs.\textsuperscript{383}

8. Congress should clearly state that the purpose of the amendment is not to provide preferential treatment for religious employees—which could raise establishment concerns\textsuperscript{384}—but rather to provide equal treatment.\textsuperscript{385}

\textsuperscript{380} This issue was raised during the Senate Hearings on WRFA. Workplace Religious Freedom Act: Hearings on S.B. 1124 Before the Senate Committee on Labor and Human Resources, 105th Cong. p. 5-6 (1997) (statement of Lawrence Z. Lorber, attorney). The number of employees needing a particular accommodation is currently one of the factors a court should consider under WRFA in determining whether accommodation would result in undue hardship. S. 1668, 106\textsuperscript{th} Cong. (1999) §2(a)(4).

\textsuperscript{381} While courts tend to agree that at some point the cost of accommodation to an employee becomes sufficiently significant so as to preclude a finding of reasonable accommodation, Congress needs to articulate factors courts should use in making this determination.

\textsuperscript{382} The author believes that an employee’s conflict could presumably be resolved, even if the employee were required to bear some minimal cost. See also S.B. 1124 Hearings, supra note 380, at 7-8 (statement of Lawrence Z. Lorber, attorney). \textit{But} WRFA states that “an accommodation by the employer shall not be deemed reasonable if such accommodation does not remove the conflict between employment requirements and the religious observance or practice of the employee.” S. 1668, 106\textsuperscript{th} Cong. (1994) § 2(b).

\textsuperscript{383} Congress should also address whether an employee’s duty to cooperate includes a duty to reschedule religious observances in cases where the rescheduling would not force the employee to compromise his religious beliefs. This is related to the issue of the costs that an employee can be required to bear.

\textsuperscript{384} Congress must be mindful of establishment clause concerns when amending § 701(j). The First Amendment to the U.S. Constitution states: “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I. While this article does not attempt to analyze these establishment clause concerns, the author believes that Congress could certainly mandate a higher level of religious accommodation than that currently required under § 701(j) without violating the establishment clause. The dissent in \textit{Hardison} argued that accommodating Hardison would not violate the establishment clause. See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 90-91, 96 n.13 (1977) (Marshall, J., dissenting).

For a discussion of why WRFA should not be viewed as an establishment of religion, see S.B. 1124 Hearings, supra note 380 (statements of Richard T. Foltin, Legislative Director and Counsel, American Jewish Committee and Prof. Roberto Corrada, law professor, University of Denver College of Law). For a discussion of why the establishment clause should permit legislative accommodation of religion, see generally Michael McConnell, \textit{Accommodation of Religion: An Update and Response to Critics}, 60 GEO. WASH. L. REV. 685 (1992); Carter, supra note 5.
In conclusion, Congress should both broaden and clarify the scope of § 701(j) in the manner described above to ensure that employees are uniformly entitled to meaningful protection of their religious needs in the workplace. As explained in this article, the majority of courts tend to interpret § 701(j) narrowly. While this is based, in part, on Supreme Court precedent, it is also due to the fact that some courts doubt the importance or validity of religion or are skeptical about the sincerity of an employee’s religious beliefs. However, there are other courts which view an employee’s request for religious accommodation as important and worthy of protection and require a higher level of accommodation. The result is that employees have not uniformly received meaningful protection of their religious needs. Section 701(j) should therefore be amended so that it is not, in the words of Justice Marshall, a statute that “while brimming with sound and fury, ultimately signifies nothing.”

385. WRFA currently provides that “[a]n employee should not be required to pay premium wages or confer premium benefits for work performed during hours to which such premium wages or benefits would ordinarily be applicable, if work is performed during such hours only to accommodate religious requirements of an employee.” S. 1668, 106th Cong. (1994) § 2(b). S.B. 1124 Hearings, supra note 380 (statement of Prof. Roberto Corrada, law professor, University of Denver College of Law).
