Chapter 10

Religious Discrimination

Learning Objectives

By the time you finish studying this chapter, you should be able to:

- **LO1** Discuss the background of religious discrimination and give some contemporary issues.
- **LO2** Give Title VII's definition of religion for discrimination purposes.
- **LO3** Explain religious conflicts under Title VII and give examples.
- **LO4** Define religious accommodation and guidelines to its usage.
- **LO5** Define undue hardship as it allows an employer defense to religious discrimination claims.
- **LO6** Describe religious harassment and give examples.
- **LO7** Identify the ways in which unions and religious conflicts occur.
- **LO8** List some ways in which management can avoid religious discrimination conflicts.

Opening Scenarios

SCENARIO 1

1 Scenario

Mohammed, a member of the Sikh religion, wears a turban as part of his religious mandate, including at work. His supervisor tells him the turban makes his co-workers uncomfortable. Must he stop wearing it?

SCENARIO 2

2 Scenario

In his preemployment interview, Mosley stated that he would not work on Saturdays because that is the day of his Sabbath. As a result, he is not hired. Is this religious discrimination?

SCENARIO 3

3 Scenario

Three months after coming to work for Steel Bank, Jon joins a religious group whose Sabbath is on Tuesdays. Members of the religion are not to work on the Sabbath. Jon refuses to work on Tuesdays. He is terminated. Jon sues the employer, alleging religious discrimination. The employer defends by saying that (1) Jon was not of this religion when he was hired, (2) Tuesday is not a valid Sabbath day, and (3) any religious group that celebrates a Sabbath on Tuesday is not a valid religion and the employer does not have to honor it. Are any of the employer's defenses valid?

Statutory Basis

> 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 . . . religion . . . or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's religion . . . [Title VII of the Civil Rights Act of 1964, as amended; 42 U.S.C. § 20002-2(a).]

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . [First Amendment to the U.S. Constitution.]

This Is Not Your Forefather's Religious Discrimination

LO1

- Grammy-winning musician Carlos Santana ("You've Got to Change Your Evil Ways") is sued for unjust dismissal by a former personal assistant who claims Santana and his wife made the employee visit a chiropractor to be tested for his "closeness to God." Mrs. Santana said that when prospective employees were being evaluated for hire, she had the chiropractor "calibrate" them, as the more the chiropractor "enlightened" employees through treatments, the closer to God they became and the better employees they become.
- An employee sues to have the court impose an injunction allowing her to say "have a blessed day" in written communications to clients and customers.
- A Starbucks server sues Starbucks for retaliation after she refuses to remove her Wicca symbol necklace and her hours are reduced, she is not promoted or transferred, and her tardiness is scrutinized.

- An employee sues after being terminated for eating a bacon, lettuce, and tomato sandwich (BLT) at work, in violation of the "no pork or pork products" rule put in place in deference to Muslim employees and clients.
- A Muslim trucker is fired for refusing to pick up a load of beer from a brewer because Muslims are forbidden from handling alcohol. In Minnesota, Muslim taxi drivers are facing a possible crackdown for refusing to pick up passengers who carry alcohol purchased at airport duty-free shops, since alcohol violates their religion.
- General Motors wins a lawsuit by an employee who wants to form a Christian group at work like other affinity groups, claiming it is religious discrimination to allow those and not the Christian one. The court held that GM had no religious groups, so refusal to have a Christian one was not religious discrimination.
- A Jewish employee alleges his co-workers call him "Jew Boy" and other slurs and would not stop "witnessing" to him at work about their Christian faith.
- Pharmacists with religiously based objections to premarital sex or abortion are disciplined for refusing to fill prescriptions for birth control pills or the morning after pill.
- An Indiana state police officer is terminated for refusing a casino detail, saying gambling or being around it is against his religion.
- Employees whose religion requires them to "witness" or proselytize sue for the right to do so to their fellow employees in the workplace.
- The New York Police Department is found guilty of religious discrimination for banning the wearing of a turban on the job by a Sikh.
- Alabama supreme court chief justice Roy S. Moore is removed from office for refusing a court's order to remove a 5,280-pound granite carving of the Ten Commandments from the courthouse rotunda.
- A television producer is fired for complaining about the company including biblical scriptures inside paycheck envelopes and promoting office Bible study.
- A son sues his father, who is also his boss, alleging religious discrimination in that his father terminated him because the son was involved in an extramarital affair in violation of the father's religious beliefs.
- Muslim Target cashiers in Minneapolis are shifted to other jobs as a religious accommodation after refusing to scan pork products because it conflicts with their religion's ban on pork.
- An AT&T employee is terminated for refusing to sign a "Certificate of Understanding" requiring him to adhere to the company's diversity policy, which conflicted with the employee's religious beliefs about homosexuality.
- At Hewlett-Packard, in the same situation, an employee is terminated for refusing to remove biblical scriptures he placed on an overhead bin in his workplace cubicle, hoping his gay and lesbian co-workers would see them, be hurt, repent, and be saved.

- Minnesota employees who bring their Bibles to the diversity session on working with gays and lesbians sue their employers, saying punishing them for this was a violation of their constitutional rights.
- A UPS employee sues for religious discrimination after he is fired for refusing to cover his dreadlocks, which he says are a part of his religion, with a cap.
- A Race Trac Petroleum employee won $125,000 as part of a settlement when she was denied the right to wear a headdress to cover her dreadlocks, which hairstyle is worn as a sign of religious devotion.
- An employee belonging to the World Church of the Creator that teaches that "all people of color are savages who should go back to Africa and the Holocaust never happened and if it did, Nazi Germany would have done the world a tremendous favor" sues his employer after being terminated for giving a newspaper interview espousing these views. He wins.
- A terminated Starbuck's employee who wore a Wiccan necklace to work sues after her employer constantly comments on the necklace and does not treat employees with Christian jewelry the same way.

The face of religious discrimination has changed dramatically in just the past few years. Of course, in each of these situations, the employer argued that he or she had a workplace policy against religious discrimination and that they never engaged in such discrimination. Without guidance, it can be difficult to know. And those were just examples of religious issues in the workplace. That doesn't even include recent issues outside the workplace that also form a part of the religious landscape such as the armed forces settling a lawsuit by agreeing to add to the 38 existing religious symbols it permits on military burial monuments the Wiccan pentagram symbol; the Supreme Court case challenging the pledge of allegiance phrase "One nation under God"; the Supreme Court's decision on the exhibition of Ten Commandment monuments on federal or state premises; the Pennsylvania Amish winning a suit allowing them to use, for safety purposes, retroreflective tape to outline their buggies rather than the bright orange triangles, whose color and shape deeply offend their religious sensibilities; the University of Georgia Jewish cheerleader (one of our students) who alleged that the Christian cheerleading coach did not appoint her to the prestigious football cheering squad because she did not participate in pregame prayers or attend Bible studies held in the coach's home; the female Muslim University of South Florida basketball player who voluntarily resigned from the team after the coach refused to allow her to wear a uniform with long pants, long sleeves, and a head scarf in conformity with her religious dictates; or the Muslim sixth-grader who caused a stir in Oklahoma when she refused to remove her *hijab,* the head covering required by her religion, which the school said violated its dress code. There are many more we could add, but one thing is for sure: religious discrimination is no longer the backwater issue of Title VII that it once may have been perceived to be.

Religious discrimination has certainly come a long way from what was likely envisioned by our forefathers when they wrote its protection into our Constitution. As a nation of immigrants, the United States has always had a diversity of religions among its people. However, with the growing influx of even more types

Exhibit 10.1 *World Religions*

Group	Adherents	Percent of World Population
Major World Religions		
Christianity	2 billion	33.0%
Islam	1.3 billion	22.0
Hinduism	900 million	15.0
Buddhism	360 million	6.9
Judaism	14 million	0.4
Other Broad Religious Groupings		
Chinese folk religions	225 million	4.0%
African traditional and diasporic religions	95 million	3.0
Regional and Smaller Religious Groups		
Sikhism	23 million	0.34%
Spiritism	14 million	0.14
Bahaism	6 million	0.09
Jainism	4 million	0.07
Shintoism	4 million	0.07
Parsiism (Zoroastrianism)	150,000	0.01
Unaffiliated		
Secular/Nonreligious/Agnostic/Atheist	850 million	16.9%

Source: www.adherents.com.

of people from around the world, each expecting the freedom of religion that America felt strongly enough to include in its constitution, it has changed the face of what many of us have come to expect when we think of religious discrimination. (See Exhibits 10.1, "World Religions," and 10.2, "Major Religions and Denominations in the United States.")

Religion has unique significance in our country's creation and development. In the 16th century, when the Catholic Church did not allow King Henry VIII to divorce his wife Catherine of Aragon and to marry Anne Boleyn, Henry broke with Rome. This led to the establishment of a separate national church in England under the supreme headship of the king. Henry VIII was allowed to divorce Catherine (he eventually took six wives) and marry Anne, whom he ordered beheaded in 1536.

The aftermath of Henry's maneuvers was that the church became inextricably woven with the government, and religious freedom was virtually nonexistent

Exhibit 10.2 *Major Religions and Denominations in the United States*

Top Organized Religions	
Christianity	76.5%
Judaism	1.3
Islam	0.5
Buddhism	0.5
Hinduism	0.4
Unitarian Universalist	0.3
Wiccan/Pagan/Druid	0.1
Largest Denominational Families	
Catholic	24.5%
Baptist	16.3
Methodist	6.8
Lutheran	4.6
Pentecostal	2.1
Presbyterian	2.7
Mormon	1.3
Nondenominational Christians	1.2
Church of Christ	1.2
Episcopal/Anglican	1.7
Assemblies of God	0.5
Congregational/United Church of Christ	0.7
Seventh Day Adventist	0.3

Source: www.adherents.com/rel_usa.htm/families.

in the government from which America was born. The right to practice religion freely and not be required to blindly accept the government's state-imposed religious beliefs was a large part of what made America break away from Great Britain and its Church of England more than a century later.

Of course, this is only a simplified version of a very long and complex developmental process for our relationship as a country with religion. But the end product was that, rejecting the tyranny of this state-imposed religion, religious freedom was included in the U.S. Constitution, and freedom of religion has since always been highly valued and closely held, and it has enjoyed a protected position in American law.

Title VII embodies this protection in the employment arena by prohibiting discrimination in employment based on religion—either its beliefs or practices.

While litigation on the basis of religious discrimination may not occur as frequently as some of the other categories, or have as high a profile, it is just as important a concern for employers. The percentage of claims may seem small, but the more important factor is that there has been a steady increase in claims since 1993 and an absolute spike after September 11, 2001. In its 2002 comprehensive litigation report covering the five-year period of fiscal years 1997 through 2001, the last year for which such a comprehensive report was done, EEOC stated that of the total suits filed, cases alleging religious discrimination comprised 4.3 percent. This is in stark contrast to the 30.1 percent for gender cases or the 22.2 percent for retaliation cases, or even the 13.5 percent for race discrimination cases. However, religious discrimination is no less important. It is clear that this issue has taken on an even more pressing note since the tragic events of September 11, 2001. According to EEOC, federal, state, and local fair employment practice agencies have documented a significant increase in the number of charges of workplace harassment and discrimination claims based on national origin (with those perceived to be of Arab and South Asian descent being the target) and religion (Muslims, Sikhs). Employment discrimination claims increased by 4.5 percent from 2001 to 2002, with much of that increase coming from ethnicity and religion after 9/11. In fact, in issuing a new comprehensive directive on religious discrimination for the EEOC Compliance Manual on July 22, 2008, EEOC noted claims of religious discrimination had doubled between 1992 and 2007 and that as religious pluralism has increased, questions about religious discrimination have increased.[1]

Actually, the increase in litigation involving religious issues began to pick up when issues of workplace activities and harassment issues surrounding religious practices became more active in the late 1980s and early 1990s with the rising popularity of Fundamentalist Christianity and televangelism. Many of the Fundamentalists,commonly referred to as "born-again Christians," ran into trouble when, as an article of faith, they attempted to share their religion with others in the workplace, sometimes whether the co-worker wished to have it so or not. On the other hand, Fundamentalists experienced trouble when they were mocked, teased, or otherwise singled out for their religious beliefs at work.

These religious discrimination issues have now extended into issues surrounding the practices and dictates—and harassment—involving those of primarily Middle Eastern religions. Can a Sikh be required to remove his religiously dictated turban at work? Can a Muslim woman be terminated for wearing a religiously dictated head covering? Must a Muslim employee be allowed to attend a midday Friday religious service or have a place provided for religion-required prayer five times a day? All of these issues and those mentioned at the beginning of the chapter have been a part of the post–September 11, 2001, landscape and must be addressed consistent with Title VII and other legal dictates.

Federal and state constitutional guarantees of due process, equal protection, and freedom of religion also provide protection for federal, state, and local government employees. If the employer is a governmental entity, the employer must avoid workplace policies that have the effect of tending to establish or to interfere with the practice of the employee's religion. In determining whether the employer has discriminated on the basis of religion, the court must

sometimes first address whether even deciding the issue entangles the government excessively in the practice of religion. Title VII is the only legislation specifically prohibiting religious discrimination in employment, and consideration is given to constitutional issues where necessary.

Unlike the other categories included in Title VII, there is not an absolute prohibition against discrimination on the basis of religion. Rather, for the first time under Title VII, we see that a category has built into it a **duty to reasonably accommodate** the employee's religious conflict unless to do so would cause the employer **undue hardship**. There is no such reasonable accommodation requirement for race, gender, color, or national origin, but there is under the Americans with Disabilities Act (ADA) as we shall see in that chapter. However, the nature of the accommodation in the ADA is quite different.

duty to reasonably accommodate
The employer's Title VII duty to try to find a way to avoid conflict between workplace policies and an employee's religious practices or beliefs.

undue hardship
Burden imposed on employer, by accommodating employee's religious conflict, that would be too onerous for employer to bear.

To a great extent, religious organizations are exempt from the prohibitions in Title VII. As a general rule, they can discriminate so that, for instance, a Catholic church may legitimately refuse to hire a Baptist minister as its priest. Section 703(e)(2) of Title VII states that it is not an unlawful employment practice for a school, college, university, or other educational institution to hire or employ employees of a particular religion if the institution is in whole or in substantial part owned, supported, controlled, or managed by a particular religion or by a religious corporation, association, or society or if its curriculum is directed toward the propagation of a particular religion. That is, religion is recognized as a basis for a BFOQ reasonably necessary to the normal operation of that particular business or enterprise under section 703(e)(1) of Title VII. If the church has nonsectarian activities such as running a day care center, bookstore, or athletic club, it may enjoy the same broad type of freedom to discriminate on the basis of religion since these activities may have religion or propagation of the religion as an integral part of their activity. Employers should be cautioned that the specific facts play an important role in making this determination. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latterday Saints v. Amos,* included at the end of the chapter, the court upheld the church's termination of a janitor in the church-owned gym for not keeping current his church affiliation card.

Not very long ago, it was fairly routine for employers to be nearly as adamant about not hiring those of certain religious faiths, such as Jews, as it was about not hiring people of a certain race, ethnic background, or gender. Universities routinely imposed quotas on the number of Jewish students they would accept, just as restrictive covenants in real estate contracts routinely prohibited the sale of property to Jews. The issue has usually been more covertly handled, but it existed extensively, nonetheless. Title VII was enacted to remedy such practices in the workplace, just as fair housing legislation now prohibits restrictive covenants.

The more frequent basis for lawsuits today is that an employee is not hired or is terminated because of some religious practice that comes into conflict with the employer's workplace policies. The employee may to work on a particular day because it is the employee's Sabbath. Or the employee may dress a certain way for religious reasons, or to take certain days off for religious holidays or observances. When it conflicts with the employer's policies and the employee

refuses to attempt to accommodate the conflict, the employee is terminated and Title VII comes into play.

Frequently the employer discovers religious information through questions on an employment application or during a preemployment interview, either of which generally relates to notifying a religious figure or taking employee to a particular hospital in the event of on-the-job injury. To eliminate the appearance of illegal consideration of religion in hiring, employers should, instead, ask such questions after hire and then simply ask who should be notified or what hospital the employee prefers.

In this chapter, we will learn what is meant by religious discrimination, what the duty to accommodate involves, and how far an employer can go in handling management considerations when religious conflict is at issue.

Case 2

In the *Tyson v. Clarian Health Partners, Inc.* case, provided at the end of the chapter, we see one of the growing post-9/11 areas of religious conflict: employers accommodating religious conflicts of those practicing the Muslim faith. As mentioned, the number of claims in this area has increased dramatically since 9/11.

What Is Religion?

LO2

Title VII originally provided no guidance as to what it meant by the word *religion.* In the 1972 amendments to Title VII, Congress addressed the issue. In section 701, providing definitions for terms within Title VII, section (j) states: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

The question frequently arises: "What if I never heard of the employee's religion? Must I still accommodate it?" The answer is based on two considerations: Whether the employee's belief is closely held and whether it takes the place of religion in the employee's life. The latter requirement means that even atheism has been considered a "religion" for Title VII purposes. If the answer to both queries is yes, then the employer must accept the belief as a religious belief and attempt accommodation for conflicts.

The religious belief need not be a belief in a religious deity as we generally know it. However, courts have determined that groups like the Ku Klux Klan are political, not religious, organizations, even though their members have closely held beliefs. The employer need not previously know of, or have heard of, or approve of the employee's religion in order to be required to accommodate it for Title VII purposes. Also, the employer cannot question the sincerity of the belief merely because it appears to the employer unorthodox. In the *Frazee v. Illinois Department of Employment Security* case, provided for your review, where the employee asserted he could not work on the Sabbath because he was a Christian even through he did not attend church, the Supreme Court held that the employee need not be a member of an organized religion at all. The case involves the Free Exercise Clause of the First Amendment to the U.S. Constitution, made applicable

Case 3

1 Scenario

to the states by the Fourteenth Amendment, but the considerations are similar to those of Title VII. This is why in opening scenario 1, the Sikh need not stop wearing his religiously mandated turban simply because other employees are "uncomfortable." That is to say, they are unfamiliar with the employee's religion and religious dictates and his wearing of a turban seems strange to them.

Perhaps the single most-asked question in this area is: "Must I accommodate the employee's religious conflict if the conflict did not exist when the employee was hired?" The answer is yes. The duty attaches to the conflict itself, not to when the conflict arises. The duty to accommodate, however, is only to the extent that it does not cause the employer undue hardship. What constitutes undue hardship will be discussed shortly.

The duty to accommodate only applies to religious *practices,* not religious *beliefs.* An employer is only required to accommodate a religious practice to the extent that it does not present an undue hardship on the employer, but religious beliefs do not have that limitation. That is, no matter how unorthodox, or even outrageous, an employee's religion may seem to the employer, the employer cannot take an adverse employment action against the employee simply because the employee holds that religious belief. In *Peterson v. Wilmur Communications, Inc.,* given at the end of the chapter, the employer was called upon to deal with one of the more unorthodox religions, one espousing racial separation much like the Ku Klux Klan. The court determined that the religion, unorthodox, and even as repulsive as it was, was required by Title VII to be treated just as any other religion.

Case 4

Religious Conflicts

LO3

Workplace conflict between employee religious practices at odds with workplace policies is probably the most frequent type of religious discrimination case. That is, it is not so much that the employer dislikes a particular religion and refuses to hire members of that religion. Rather, it is that the employee may engage in some religious practice that is not perceived to be compatible with the workplace. For instance, the employer may have a no-beard policy, but the employee's religion forbids shaving; the employer may have a policy forbidding the wearing of headgear, but the employee's religion requires the wearing of some sort of head cover; the employer may have a policy forbidding the wearing of long hair on males, but the employee's religion forbids the cutting of male hair except in certain limited circumstances; the employer may have a policy that all employees must work on Saturdays, but the employee's religious Sabbath may be on Saturday and followers may be forbidden to work on the Sabbath.

In fact, sometimes the conflict comes not with the employee's religion, but with that of the employer. In Exhibit 10.3, "The Lord at Work," the atheist employee is upset at having to attend mandatory Fundamentalist Christian workplace church services at the manufacturing plant in which he is employed.

As more and more employees come into the workplace who are not of the "traditional" religions with which an employer may be more familiar, and these

Exhibit 10.3 *The Lord at Work*

MANDATORY PRAYER MEETINGS PIT CHRISTIAN BOSS AGAINST ATHEIST WORKER

Jake Townley can't understand it—why this atheist from Arizona complained about these weekly devotional meetings, why anyone would. It's *paid* work time. Nobody's asking him to do anything except show up, just like all Townley Manufacturing employees are required to do. The meetings only last half an hour. They're harmless. They've been a Townley tradition for 25 years.

Until this Louis Pelvas came along.

Pelvas, a machinist in the Townley plant in Arizona, objected to the prayer meetings. He filed a complaint of religious discrimination with the Equal Employment Opportunity Commission raising questions about religion in the workplace. Questions Jake Townley thinks the government has no right asking.

Townley is seated on one of about 50 metal folding chairs in the Townley Manufacturing Company workshop in Candler [Florida]. It is 7 A.M. Tuesday, time for the weekly devotional meeting held at this and five other Townley Manufacturing plants in the United States.

The working men file through the door slow and easy, the way people amble into church on Sundays. The preacher sits, Bible in hand, by the welding station. The meeting begins. A man strums a red electric guitar and sings: "I won't walk without Jesus and I won't talk without Jesus . . ."

After the song, one manager speaks briefly about production schedules. Another manager talks just as quickly about safety regulations. Then the preacher rests his large hands on the lectern.

"Good morning," he says. "Praise the Lord."

He points out "Brother and Sister Townley," the company owners, and speaks of their blessed mission of gospel-sharing and toolmaking. He begins conversationally, as if he were addressing the family at the dinner table, but then picks up steam. "God is the one that breathes in us the breath of life, he made us, he created us, he loves us. . . ." The preacher's words rise from his belly, his voice swells. He cups his arms toward the ceiling. Tears moisten his cheeks.

The workers sit motionless, a sea of wooden faces. Twenty minutes pass. The preacher closes with a prayer. The men bow their heads.

Seconds later, the men are at their stations and Townley looks proud: That wasn't so bad, now was it?

The Townleys think they have a right to keep it that way.

But that may not be possible. The EEOC sued Townley Manufacturing, charging its policy of requiring attendance at devotional meetings violates Title VII of the Civil Rights Act of 1964.

Townley says the case will determine whether owners of private, for-profit companies can operate their businesses according to their religious beliefs.

The EEOC says Title VII requires employers to accommodate an employee's religious beliefs and practices unless it presents undue hardship.

All newly hired employees must read and sign an employee handbook, which states that all employees must attend weekly "non-denominational" services; missing them is grounds for termination. Profanity is also prohibited, and the handbook encourages employees to keep track of "how our politicians stand on various issues and to vote for those candidates who support a realistic and stable government policy toward business."

"We run the business according to Christian principles," Townley says. "Everyone may not agree with it, but we feel the Lord gave us the business and it's inseparable from what we do."

Pelvas says his family never went to church. "I was always brought up to the fact that religion and politics should never enter industry."

If he had known the meetings would start in Eloy [Arizona], he says, "I don't believe I would ever have taken the job."

Townley pressured the manager to comply with company policy, and pretty soon one atheist and a roomful of Hispanic Catholics got weekly doses of Bible readings. Pelvas asked to be allowed to work, instead, but was told to show up, even if he didn't pay attention.

Pelvas acquiesced. He listened to music from an ear plug attached to a radio. Sometimes he read.

continued

Exhibit 10.3 *continued*

Company business was never discussed, he says. Nor were the services "nondenominational."

"It was strictly born-again services. There were three different preachers. All three of 'em would start off with what a bad person they was—alcohol, woman chaser—and they must have seen the light because they're all different now. I'm 60-some years old, and I haven't seen the light yet."

"I went along with 'em for quite a while until I got disgusted with the whole thing."

The other employees wouldn't object because they were afraid of being fired, Pelvas said. Besides, they didn't mind "listening to some yo-yo blabber away as long as they're gettin' paid for it—I can't blame 'em for that."

Two men, two views: America means freedom of religion; America means freedom *from* religion.

Note: The EEOC decided in favor of Pelvas, 859 F.2d 610 (9th Cir. 1988).

Source: *St. Petersburg Times,* April. 24, 1988, p. 1F.

employees have an expectation of being accommodated in accordance with the law, employers will need to learn to effectively handle the religious differences that arise. The religious conflicts serving as the basis for discrimination claims have become more and more fascinating over the years. Recent conflicts have included such diverse situations as employees with dreadlocks claiming religious discrimination when told to wear a more conventional hairstyle; a woman suing for religious discrimination because her religion does not allow her to wear men's clothing (ie., pants), but her employer banned the wearing of loose-fitting clothing such as skirts and dresses because they might get caught in the metal-fabricating factory's machinery and present a safety hazard; a Jehovah's Witness who sued Chi-Chi's Mexican Restaurant for religious discrimination after being fired for not adhering to Chi-Chi's policy of all employees singing birthday songs to patrons on their birthday because the policy conflicted with her religion, which does not observe personal birthdays, believing they arise out of pagan celebrations; an employee refusing to answer the telephone with the hotel's required "happy holidays" greeting during the Christmas season, claiming her religious beliefs prohibited her from doing so; and a strict vegetarian bus driver who was fired for refusing to hand out coupons to riders for free hamburgers as part of a promotion between the bus company and a hamburger chain.

The key is for an employer to make sure that the basis for the conflict is a religious one and then to try to work out an accommodation. Once the employer is aware of the conflict, the employer must attempt a good-faith accommodation of the religious conflict and the employee must assist in that attempted accommodation. If none can be worked out and the employer has tried everything available that does not present an undue hardship, then the employer has fulfilled his or her Title VII obligation and there is no liability, even if the employee's religious conflict cannot be accommodated. Of course, because of the diversity of religious conflicts that are possible, there is no single set of rules that can be given to

Case 5

handle all religious conflicts. In *Goldman v. Weinberger,* supplied for your review, we see this issue arise in the context of the military, where a rabbi's wearing of the Jewish yarmulke head covering under his military uniform violated military dress regulations. The regulation was upheld by the U.S. Supreme Court.

We chose to include this case for several reasons. First, it presents a conflict between religious practice (wearing a yarmulke) and work (being a member of the military). It also allows you to see the U.S. Supreme Court's position on matters military and how they interact with Title VII and other protective legislation. As we are discussing Title VII, students frequently ask how the military can have the rules it has, which seem to be at odds with Title VII. Our answer is that the Court tends to view the military as being in a class all its own for most purposes. The military's need for "good order," cohesion, instant and unquestioning obedience, esprit de corps, morale, and other such interests as the Court discussed in the case usually end up with the Court deferring to the military when there are conflicts, for the reasons set forth in the *Goldman* opinion.

We also wanted you to understand that the right to be free of religious discrimination is not absolute. There are limitations to the right where there may be overriding considerations such as the military cohesion in *Goldman* or the undue hardship on the employer under Title VII.

Case 6

Not every conflict involving religion will necessarily be a religious conflict recognized by the law. In *Lumpkin v. Jordan,* included at the end of the chapter, the legitimate nondiscriminatory basis for termination was not deemed a religious conflict at all, even though it involved religion to an extent. In *Jordan,* a member of the San Francisco Human Rights Commission, who was also a minister, had religious beliefs in conflict with same-gender affinity orientation that put him at odds with the Commission's work in enforcing nondiscrimination laws, including on the basis of affinity orientation. The court upheld his termination, despite the minister's religious beliefs, since it conflicted with the very purpose of his job and its duties.

Employer's Duty to Reasonably Accommodate

LO4

Again, unlike the other categories under Title VII, the prohibition against religious discrimination is not "absolute." An employer can discriminate against an employee for religious reasons if to do otherwise causes the employer undue hardship. When the employer discovers a religious conflict between the employer's policy and the employee's religion, the employer's first responsibility is to attempt accommodation. If accommodation is not possible, the employer can implement the policy even though it has the effect of discriminating against the employee on the basis of religion.

The duty to reasonably accommodate is not a static concept. Due to the nature of religious conflicts and the fact that they can arise in all types of contexts and in many different ways, there is not one single action an employer must take to show that she or he has reasonably accommodated conflicting religious considerations. It depends on the circumstances and will vary from situation to situation. For example:

- The employer owns a sandwich shop. The employer's policy entitles employees to eat all the restaurant food they wish during their meal break free of charge. Employee's religion does not allow eating meat. Aside from the meat used for sandwiches, the employer has little else, other than sandwich trimmings like lettuce and tomatoes. The employee alleges it is religious discrimination to provide the benefits of free meals that the employee cannot eat for religious reasons while other employees receive full free meals. The duty to accommodate may be as simple as the employer arranging to have peanut butter and jelly, eggs, or a variety of vegetables or pasta available for the employee.
- The employer requires employees to work six days per week. An employee cannot work on Saturdays due to a religious conflict. The accommodation may be that the employee switches days with an employee who does not wish to work on Sundays—a day that the employee with the religious conflict is available to work.
- Employer grocery store has a policy requiring all counter clerks to be clean-shaven, to present the employer's view of a "clean-cut" image to the public. Employee cannot shave for religious reasons. The accommodation may be that the employer switches the employee to a job the employee can perform that does not require public contact such as stocking shelves or handling paperwork.

If it can be shown that the employer reasonably accommodated or attempted to accommodate the employee, then the employer is relieved of liability under Title VII. In *Wilson v. U.S. West Communications,* supplied for your review, the court found the employer's accommodation to be reasonable, but also found that the employee's claim of the problematic activity of "needing" to wear an antiabortion button with a graphic picture of a fetus on it was not based on religious requirements.

If an accommodation cannot be found, as *Williams v. Southern Union Gas Company* demonstrates, the employer's duty is discharged. The *Williams* case, which is provided at the conclusion of the chapter, involved an employee who was terminated for not working on Saturday, his Sabbath, but the court upheld the termination because it found that the employer accommodating the employee's religious conflict would have caused the employer undue hardship. This case is the basis for opening scenarios 2 and 3. The important factor is to attempt an accommodation rather than simply dismissing the conflict without even trying to do so.

Even where an employee's activity is religiously based, it need not be accommodated if doing so presents real problems for the employer. In the very interesting *Chalmers v. Tulon Company of Richmond* case, included at the end of the chapter, the employee believed it to be her religious duty to write letters to her coworkers telling them what she perceived as their religious shortcomings. When one letter led to an employee's wife thinking he had an affair, the court refused to find a basis for accommodation, even though the employee claimed she was doing what her religion dictated she do.

Employee's Duty to Cooperate in Accommodation

The U.S. Supreme Court has held that, in attempting to accommodate the employee, all that is required is that the employer attempt to make a reasonable accommodation. If one can be made, then any reasonable accommodation will do and it need not necessarily be the most reasonable accommodation or the one the employee wants. The employee also must be reasonable in considering accommodation alternatives. In *Vargas v. Sears, Roebuck & Company,* provided for your review, the employer attempted to accommodate the employee's religious belief involving wearing long hair, in violation of the employer's hair length policy, but the employee refused to compromise. The employer's only alternative may involve demoting or even terminating the employee, depending on the circumstances. This is not forbidden if all other alternatives present the employer with an undue hardship. EEOC and the courts will look to the following factors in determining whether the employer has successfully borne the burden of reasonably accommodating the employee's religious conflict:

- Whether the employer made an attempt at accommodation.
- The size of the employer's workforce.
- The type of job in which the conflict is present.
- The employer's checking with other employees to see if anyone was willing to assist in the accommodation.
- The cost of accommodation.
- The administrative aspects of accommodation.

Each factor will be considered and weighed as appropriate for the circumstances. If on balance the employer has considered the factors appropriate for the employer's particular circumstances and accommodation was not possible, there is usually no liability for religious discrimination.

What Constitutes Undue Hardship?

LO5

Just as reasonable accommodation varies from situation to situation, so, too, does what constitutes undue hardship. There are no set rules about what constitutes undue hardship since each employer operates under different circumstances. What may be hardship for one employer may not be for another. What constitutes an undue hardship is addressed by EEOC and courts on an individual basis.

It is clear, however, that the undue hardship may not be a mere inconvenience to the employer. EEOC has provided guidelines as to what factors it will consider in deciding whether the employer's accommodation would cause undue hardship.[2] Such factors include

- The nature of the employer's workplace.
- The type of job needing accommodation.

- The cost of the accommodation.
- The willingness of other employees to assist in the accommodation.
- The possibility of transfer of the employee and its effects.
- What is done by similarly situated employers.
- The number of employees available for accommodation.
- The burden of accommodation on the union (if any).

The factors are similar to those used to determine if the employer has reasonably accommodated. Generally speaking, EEOC's interpretation of what constitutes undue hardship and reasonable accommodation has been more stringent than the interpretation of undue hardship by the courts. However, since EEOC's guidelines are simply guidelines (through strong, well-respected ones) and thus not binding, and court decisions are, employers must look to the interpretation by courts in their own jurisdictions. Courts have found, among other things, that it would be an undue hardship if an employer had to violate the seniority provision of a valid collective bargaining agreement, to pay out more than a "de minimis" cost (in terms of money or efficiency) to replace a worker who has religious conflicts, or to force other employees who do not wish to do so to trade places with the employee who has a religious conflict. The U.S. Supreme Court's determination of what constitutes undue hardship was established in *Trans World Airlines v. Hardison,* which still stands today. As you can see, after reviewing the case at the end of the chapter, it did not place a very heavy burden on the employer.

Religion as a BFOQ

Title VII permits religion to be a bona fide occupational qualification if it is reasonably necessary to the employer's particular normal business operations. It also specifically permits educational institutions to employ those of a particular religion if they are owned in whole or in substantial part by a particular religion. In *Pime v. Loyola University of Chicago,* included at the end of the chapter, the court looked at whether a historically Jesuit university could have Jesuit membership as a BFOQ for philosophy professors. Exhibit 10.4, "Catholic Bishops Split on Women Priests," discusses the issue of being male as a BFOQ for being a Catholic priest.

Religious Harassment

LO6

One of the most active areas under religious discrimination lately has been religious harassment. Several factors have come together and caused many employees to decide that expressing their religious views in some way in the workplace is something they are compelled to do, either by their religious dictates or their own interpretation of them.

For instance, employees may feel they must, or wish to, display crosses or other religious artifacts at work, display religious tracts on their desk or pass them out to co-workers, hold Bible or other religious study groups during the workday,

Exhibit 10.4 *Catholic Bishops Split on Women Priests*

In this piece, the use of gender as a BFOQ for a religious position is under discussion; more particularly, whether women can be ordained as priests in the Catholic church. The exhibit gives you some idea of the varying points of view on the subject, all of which would be considered internal religious affairs, and, thus, off limits to the use of Title VII.

DOCUMENT ON WOMEN'S ROLE IN CHURCH, SOCIETY REJECTED

WASHINGTON—Nine years of sharp debate and soul searching over the ordination of women priests ended Wednesday as the United States' Roman Catholic bishops rejected a controversial statement on the role of women in society and the church.

On a 137–110 vote, 53 short of the required two-thirds of eligible voters needed for passage, the prelate sealed a tumultuous chapter in the history of the American church over the ordination of women.

But it did not close the book on the debate over admitting women to the priesthood.

While the letter, which was repeatedly revised, strongly reaffirmed the church's ancient tradition of an all-male priesthood, many advocates of women's ordination said the mere fact that the bishops were debating the issue was a victory.

Some bishops stressed that the vote against the letter was not a vote against banning women priests.

Those bishops, including Cardinal Joseph Bernardin of Chicago, said the missive was rejected because it was either too insensitive in dealing with the subject of women's ordination, or too weak in advancing a rationale for upholding a male priesthood.

Others said the letter had strayed from the bishops' original intent to address pressing social concerns affecting women, such as sexism and domestic violence, and had become too political and divisive.

It marked the first time that a proposed pastoral letter, an authoritative teaching of bishops, had been defeated in the United States.

The letter's defeat came on the eve of the Episcopal Church's plans tonight to consecrate the Rev. Jane Holmes Dixon as the second woman bishop in its history and the third in the 70 million member worldwide Anglican Communion.

Last week, the Church of England—mother church of the Anglican Communion, which broke with Rome in the 16th century—voted to admit women to its priesthood.

Source: L. B. Stammer, *Palm Beach Post,* November. 19, 1992, p. 1A. Copyright 1992, *Los Angeles Times.* Reprinted by permission.

Note: On June 29, 2002, seven women were ordained as Catholic priests near Passau, Germany. Less than two weeks later, the Vatican threatened to excommunicate them unless they admitted that the ceremony was invalid and expressed repentance. www.womenpriests.org/called/woc_usa.htm.

preach, teach, testify, or "witness" to their co-workers in order to practice their religion, or engage in other such activities. As mentioned earlier, after the events of September 11, 2001, there was an increase in the number of claims of religious harassment. In one incident cited by EEOC, a Muslim employee who had experienced no workplace problems before September 11, 2001, reported that afterward none of his co-workers would speak to him and that when they did, they referred to him as "the local terrorist" or "camel jockey." This was an extremely frequent occurrence across the country for not only Muslims, but for anyone who even appeared to be of Middle Eastern descent. Unfortunately, such incidents still frequently occur in the workplace.

An article in *The Wall Street Journal* reported that a survey of 743 human resource professionals by the Society for Human Resource Management indicated that the most common religion-related issues among employees are employee proselytizing (20 percent), employees feeling harassed by co-workers' religious expressions (14 percent), employees objecting to job duties (9 percent), and employees harassing co-workers for their religious beliefs (6 percent).

This activity surrounding the issue of religious harassment is due, in part, to matters peripheral to workplace religious discrimination. In 1990, the U.S. Supreme Court rejected Native Americans' argument that they should be permitted the ritual use of the hallucenogenic drug peyote in their tribal religious ceremonies as a part of their First Amendment right to freedom of religion. With tremendous support from many quarters, in 1993 Congress passed the Religious Freedom Restoration Act (RFRA) in order to ensure the free exercise of religious practices. RFRA was an attempt to restore the previous status quo under which religious practices must be accommodated unless a compelling governmental interest can be demonstrated and advanced in the least restrictive manner. In 1997, the U.S. Supreme Court overturned RFRA as giving a governmental preference for religion, in violation of the First Amendment to the Constitution.[3]

While the matter of religious practices in the workplace was not at issue in these cases or this legislation, the national attention and debate about it, along with a growing religious presence in political issues and the media, extended the religious practices issue to the workplace by extrapolation. When the religious practices were challenged, religious harassment claims rose.

Of course, with all different types of religions in the workplace, it is predictable that there would be religious conflicts and that those with religions considered out of the ordinary or with religious practices that co-workers consider extreme would be the subject of religious harassment. In addition, it is often the nonreligious employees who allege they are being harassed by religious employees. For instance, in a case filed by information systems manager Rosamaria Machado-Wilson of DeLand, Florida, the employee alleged that she was fired after less than six months on the job after reporting religious harassment to the human resource office of her employer, BSG Laboratories. According to Machado-Wilson, a simple walk to the coffeepot sometimes meant "weaving past prostrate, praying co-workers and stopping for impromptu ceremonies spoken in tongues." She says she was forced to attend company prayer meetings and be baptized, employees were subjected to inquiries into and comments about their religious beliefs, and those found to be nonbelievers were fired.[4]

Of course, since Title VII prohibits religious discrimination, it also prohibits religious harassment. EEOC's guidelines on liability for workplace harassment explicitly cover religious harassment. In the wake of the RFRA situation, in 1997 President Clinton issued guidelines for the religious freedom of federal employees. The purpose of the guidelines is to accommodate religious observance in the workplace as an important national priority by striking a balance between religious observance and the requirements of the workplace. Under the guidelines, employees

- Should be permitted to engage in private religious expression in personal work areas not regularly open to the public to the same extent that they may engage in nonreligious private expression.
- Should be permitted to engage in religious expression with fellow employees, to the same extent they may engage in comparable nonreligious private expression, subject to reasonable restrictions.
- Are permitted to engage in religious expression directed at fellow employees, and may even attempt to persuade fellow employees of the correctness of their religious views. But employees must refrain from such expression when a fellow employee asks that it stop or otherwise demonstrates that it is unwelcome.

In order to best prevent liability for religious harassment, employers should be sure to protect employees from those religious employees who attempt to proselytize others who do not wish to be approached about religious matters, as well as to protect employees with permissible religious practices who are given a hard time by those who believe differently. Making sure that employees are given comparable opportunities to use workplace time and resources for religious practices if given for secular ones is also an important consideration, as otherwise it may appear that the employer is discriminating on the basis of religion.

The *Peterson v. Hewlett-Packard Co.* case, included at the end of the chapter, sets forth the very interesting issue of what to do when an employer's workplace diversity policy is at odds with an employee's religious beliefs, to the extent that the employee who opposes the policy feels harassed. The court upheld his termination after the employer posted diversity posters that included affinity orientation and the employee placed biblical passages on the overhead bins in his office for all to see with the goal of hurting gay and lesbian employees "so they would repent."

Keep in mind here that as an employer, the employer gets to call the shots about religion in the workplace within the confines of the law. Hopefully, they are consistent with law and promote workplace productivity. Employees who decide, for whatever reason, that they cannot abide the employer's lawful and legal policies always have the choice of either toughing it out or looking for a job that presents no such conflict. While the employer has no right to make employees choose between their religion and work, where a religious conflict does not pose an undue hardship, the employee also has no right to dictate to the employer what workplace policies must be. And, of course, harassment on the basis of religion is illegal under Title VII.

Union Activity and Religious Discrimination

LO7

As the earlier *Hardison* case discussed, at times the religious conflicts that arise between the employee and the employer are caused by collective-bargaining agreement provisions, rather than by policies unilaterally imposed by the employer. It has been determined that, even though Title VII defines the term "religion" with reference to an employer having a duty to reasonably accommodate, unions are also under a duty to reasonably accommodate religious conflicts.

The most frequent conflicts are requirements that employees be union members or pay union dues. Union membership, payment of union dues, or engaging

Management Tips

LO8

One of the primary reasons employers runs into trouble in this area is because they simply miss realizing the religious conflict when an employee notifies them, or they refuse to adequately address it if they do. Many of the conflicts can be avoided by following a few basic rules:

- Take all employee notices of religious conflicts seriously.
- Once an employee puts the employer on notice of a religious conflict, immediately try to find ways to avoid the conflict.
- Ask the employee with the conflict for suggestions on avoiding the conflict.
- Ask other employees if they can be of assistance, but make it clear that they are not required to do so.
- Keep workplace religious comments and criticisms to a minimum.
- Make sure all employees understand that they are not to discriminate in any way against employees on the basis of religion.
- Once an employee expresses conflict based on religion, do not challenge the employee's religious beliefs, though it is permissible to make sure of the conflict.
- Make sure undue hardship actually exists if it is claimed.
- Revisit issues such as "Christmas" bonuses and "Christmas" parties, and giving out Christmas turkeys or other gifts to see if it is more appropriate to use more inclusive language such as "holiday" to cover employees who do not celebrate the Christian holiday of Christmas—further, revisit the issue of whether all employees are being fairly covered by such policies and events.
- Revisit the issue of granting leave for religious events and make sure it does not favor one religion over another, such as giving employees paid leave for Christmas but requiring them to take their own leave for other religious holidays such as Rosh Hashana, Yom Kippur, or Ramadan.
- Make sure food at workplace events is inclusive of all employees, regardless of religion, such as having kosher (or at least nonpork or seafood) items for Jewish employees, having alternatives to alcoholic beverages for those who do not drink for religious reasons, having nonpork items for Muslims, and so on. Asking employees what religious dietary limitations they have or having employees bring a dish to share is an easy way to handle this. It may seem like a small, bothersome thing to deal with, but for those whose religions dictate these things, it is *very* significant. These types of things help to create (or not) a workplace that employees feel truly adheres to both the letter as well as the splrit of the law and this, in turn, impacts an employee's perception of discrimination.

in concerted activity such as picketing and striking conflicts with some religious beliefs. Employees also have objected to the payment of union dues as violating their First Amendment right to freedom of religion and Title VII's prohibition against religious discrimination. Unions have claimed that applying the religious proscription of Title VII violates the Establishment Clause of the First Amendment to the U.S. Constitution, ensuring government neutrality in religious matters.

Courts have ruled that union security agreements requiring that employees pay union dues within a certain time after the effective date of their employment or be discharged does not violate an employee's First Amendment rights. However, it violates Title VII for an employer to discharge an employee for refusal to join the union because of his or her religious beliefs.

Employees with religious objections must be reasonably accommodated, including the possibility of the alternative of keeping their job without paying union dues. However, the union could prove undue hardship if many of the employees chose to have their dues instead paid to a nonunion, nonsectarian charitable organization chosen by the union and the employer since the impact on the union would not be insubstantial.

In *Tooley v. Martin-Marietta Corp,*[5] Seventh Day Adventists who were prohibited by their religion from becoming members of, or paying a service fee to, a union offered to pay an amount equal to union dues to a mutually acceptable charity. The union refused and argued that to accommodate the employees violated the Establishment Clause ensuring governmental neutrality in matters of religion. The court said that the government could legitimately enforce accommodation of religious beliefs when the accommodation reflects the obligation of neutrality in the face of religious differences and does not constitute sponsorship, financial support, or active involvement of the sovereign in religious activities with which the Establishment Clause is mainly concerned. The Establishment Clause, typically applied to state legislation, such as in *Frazee,* discussed earlier, requires that the accommodation reflect a clearly secular purpose, have a primary effect that neither inhibits nor advances religion, and avoids excessive government entanglement with religion.

Whether the objection under Title VII is directed toward the employer or the union, a government employer still has a duty to reasonably accommodate the employee's religious conflict unless to do so would cause undue hardship or excessive entanglement with religion or violate the Establishment Clause.

Chapter Summary

- Employees are protected in the workplace in their right to adhere to and practice their religious beliefs, and the employer cannot discriminate against them on this basis unless to do so would be undue hardship on the employer.
- The employer cannot question the acceptability of an employee's religion or when or why the employee came to believe.
- The employer should be conscious of potential religious conflicts in developing and implementing workplace policies.
- The prohibition on religious discrimination is not absolute, as the employer has only the duty to reasonably accommodate the employee's religious conflict unless to do so would cause the employer undue hardship.
- While the employer must make a good-faith effort to reasonably accommodate religious conflicts, if such efforts fail, the employer will have discharged his or her legal duties under Title VII.

Chapter-End Questions

1. The *Christian Science Monitor* refused to hire Feldstein because he was not a Christian Scientist. The newspaper said they only hired those who were of the Christian Science religion, unless there are none qualified for a position. Is the newspaper's policy legal? Explain. [*Feldstein v. EEOC,* 547 F. Supp. 97 (D. Mass. 1982).]
2. Cynthia requested a two-week leave from her employer to go on a religious pilgrimage. The pilgrimage was not a requirement of her religion, but Cynthia felt it was a "calling from God." Will it violate Title VII if Cynthia's employer does not grant her the leave? Explain. [*Tiano v. Dillard Department Stores, Inc.,* 1998 WL 117864 (9th Cir. 1998).]
3. At the end of all her written communications, employee writes "have a blessed day." One of employer's most important clients requests that employee not do so and employer asks employee to stop. Employee refuses, saying it is a part of her religion. If employee sues the employer for religious discrimination, is she likely to win? [*Anderson v. USF Logistics (IMC), Inc.,* 274 F.3d 470 (7th Cir. 2001).]
4. Employee is terminated for refusal to cover or remove his confederate flag symbols as requested by his employer. He sues the employer, claiming discrimination on the basis of his religion as a Christian and his national origin as a "Confederate Southern American." Is he likely to win? [*Storey v. Burns International Security Service,* 390 F.3d 760 (3d Cir. 2004).]
5. A Michigan Holiday Inn fired a pregnant employee because the "very Christian" staff members were very upset by her talk of having an abortion. Has the employer violated Title VII? [*Turic v. Holland Hospitality, Inc.,* No. 1-93-CV-379 (W.D. Mich. 1994).]
6. A police officer who is assigned to a casino refuses the assignment, claiming his Baptist religion prohibits him from gambling or being around gambling. Is he legitimately able to do so? [*Endres v. Indiana State Police,* 349 F.3d 922 (7th Cir. 2003).]
7. Employer has a strict policy of not allowing employees with beards to work in public contact positions. All managerial positions are public contact positions. Employer does not make exceptions to its policies for those with religious objections to shaving, but it reasonably accommodates them by offering them other positions within the company. When employee applies for a driver position and is turned down, he sues employer. Does he win? [*EEOC v. UPS,* 94 F.3d 314 (7th Cir. 1996).]
8. Employee, a Muslim, is a management trainee at an airport car rental office. As part of her religious practice, employee wears a *hijab* (headscarf). She is told by her supervisor that the *hijab* does not match the uniforms she is required to wear, so she must stop wearing it or be transferred to another position with less customer interaction. Employee was later terminated as a part of a company cutback. She sues for religious discrimination. Does she win? Explain. [*Ali v. Alamo Rent-A-Car,* 246 F.3d 662 (4th Cir. 2001).]
9. A Pentecostal nurse claims she was constructively discharged after refusing to assist in medical procedures she considered to be abortions because of her religious beliefs. She was initially transferred from labor and delivery to the newborn intensive care unit. Employee found this unacceptable because she says she would once again be forced to refuse tasks that involved allowing infants to die. The hospital invited the employee to meet with human resources and to investigate available positions, but she refused. Employee says the duty to assist in an accommodation never arose because a transfer to any other department is not a viable option since it would require her to

give up her eight years of specialized training and education and undertake retraining. Employee is terminated and sues for religious discrimination. Does she win? Explain. [*Shelton v. University of Medicine & Dentistry of New Jersey,* 2000 U.S. App. LEXIS 19099 (3d Cir. 2000).]

10. A Baptist-run home for troubled youngsters terminates an employee for being a lesbian. Can it do so? [*Pedreira v. Kentucky Baptist Home for Children,* 186 F. Supp. 2d 757 (W.D. Ky. 2001).]

End Notes

1. http://eeoc.gov/policy/does/religion.html
2. 29 C.F.R. § 1605.1.
3. *City of Boerne, Texas v. Flores,* 521 U.S. 507 (1997).
4. *Rosamaria D. Machado-Wilson v. BSG Laboratories, Inc.,* Case No. 98-106601 CIDL (Cir. Ct., 7th Jud. Cir., Volusia County, Fla., 1998).
5. 648 F.2d 1239 (9th Cir. 1981).

Cases

Case 1 Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos *483 U.S. 327 (1987)*

Employee terminated from his job as a janitor in a church-owned gym brought suit for religious discrimination under Title VII. The U.S. Supreme Court held that applying the religious exemption to Title VII's prohibition against religious discrimination in employment to secular nonprofit activities of religious organization did not violate the U.S. Constitution's Establishment Clause. That is, it is not a violation of Title VII for a religious employer to discriminate against employees on the basis of religion, even if the employees are not performing strictly religious functions.

White, J.

Section 702 of the Civil Rights Act of 1964 exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion. The question presented is whether applying the exemption to the secular nonprofit activities of religious organizations violates the Establishment Clause of the First Amendment. The District Court held that it does. We reverse.

The Deseret Gymnasium (Gymnasium) in Salt Lake City, Utah, is a nonprofit facility, open to the public, run by religious entities associated with The Church of Jesus Christ of Latter-day Saints (Church), an unincorporated religious association sometimes called the Mormon or LDS Church.

Employee Mayson worked at the Gymnasium for some 16 years as an assistant building engineer and then as building engineer. He was discharged in 1981 because he failed to qualify for a temple recommend, that is, a certificate that he is a member of the Church and eligible to attend its temples. Temple recommends are issued only to individuals who observe the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco.

Mayson brought an action against the Church alleging, among other things, discrimination on the basis of religion in violation of § 703 of the Civil Rights Act of 1964. The Church moved to dismiss this claim on the ground that § 702 shields them from liability. The employees contended that if construed to allow religious employers to discriminate on religious grounds in hiring for nonreligious jobs, the exemption of § 702 violates the Establishment Clause.

It is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Congress's purpose was to minimize governmental "interfer[ence] with the decision-making process in religions." We agree that this purpose does not violate the Establishment Clause.

The religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster. A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden "effects," it must be fair to say that the government itself has advanced religion through its own activities and influence.

The case before us involves a nonprofit activity instituted over 75 years ago in the hope that "all who assemble here, and who come for the benefit of their health, and for physical blessings, [may] feel that they are in a house dedicated to the Lord." Dedicatory Prayer for the Gymnasium. Mayson was not legally obligated to take the steps necessary to qualify for a temple recommend, and his discharge was not required by statute. We find no merit in his contention that § 702 "impermissibly delegates governmental power to religious employees and conveys a message of governmental endorsement of religious discrimination."

§ 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions.

It cannot be seriously contended that § 702 impermissibly entangles church and state; the statute effectuates a

more complete separation of the two and avoids intrusive inquiry into religious belief. The statute easily passes muster. REVERSED and REMANDED.

Case Questions

1. Are you surprised at the outcome of this case? Why?
2. As a church employer in your religion, what reason would you give for requiring that the building engineer be of the same religion?
3. Are you able to draw a bright line between excessive interference with church business and the government wanting to ensure employment protection for all? Explain.

Tyson v. Clarian Health Partners, Inc. *2004 U.S. Dist. LEXIS 13973 (S.D. Ind. 2004)*

Employee, a Muslim, was terminated, in part, for using an empty patient room bathroom to perform her religiously required preprayer ablutions of washing her hands, feet, and forehead, while at work. She also alleged the employer failed to reasonably accommodate her praying up to three times per day at work as required by her religion. The court held that the employer failed to reasonably accommodate the employee's religious conflict as to the ablutions, but not the prayer.

Hamilton, J.

Employee Fatou Tyson, a Muslim woman, worked as a Patient Service Assistant at Methodist Hospital, which is operated by defendant Clarian Health Partners. Clarian fired Tyson while she was still a probationary employee in her first six months of employment. Tyson has sued Clarian under Title VII of the Civil Rights Act of 1964, claiming [among other things] that it failed to reasonably accommodate her religion.

Tyson is a Muslim. Her religion calls for her to pray five times a day. The times at which she was required to pray varied somewhat over the course of her employment, but generally three of her daily prayer sessions coincided with her work shift at the hospital. Before she prayed, Tyson engaged in a religious cleaning ritual known as ablution. Typically, ablution takes two to three minutes and involves cleaning the feet, hands, and forehead.

Title VII imposes on employers a duty to provide a reasonable accommodation for an employee's religious beliefs and observances unless the employer can show it is unable to do so without undue hardship. To establish a *prima facie* case of religious discrimination by failure to accommodate, a plaintiff must show that: (1) she follows a bona fide religious practice that conflicts with an employment requirement; (2) she brought the practice to the employer's attention; and (3) the religious practice was the basis for an adverse employment action. The employer may respond to the *prima facie* case by proving either that it offered a reasonable accommodation that the employee did not accept, or that it was unable to provide a reasonable accommodation without undue hardship. The employer bears the burden of proof on these issues. An employee is not required to propose a specific accommodation.

As to the prayer issue, the parties agree on the essential facts, which show that Clarian accommodated Tyson's religious practice of prayer. Approximately a week into her employment with Clarian, Tyson told [her supervisor] Rios that she was a Muslim and would need to pray as many as three times during her work shift. Rios said that was "okay," and he showed her the hospital's two non-denominational chapels where she could pray. The undisputed evidence shows that Clarian offered and Tyson accepted a reasonable accommodation that enabled her to pursue her practice of prayer throughout the course of her employment. A reasonable accommodation of an employee's religion is one that "eliminates the conflict between employment requirements and religious practices." "Title VII requires only 'reasonable accommodation,' not satisfaction of an employee's every desire." Clarian provided Tyson with several spaces in the hospital where she could pray and allowed her to do so during work hours while she was on duty. According to the evidence, the only limit Clarian placed on Tyson's religious practice was the requirement that she notify

Rios when she went to pray. As a matter of law, Clarian provided reasonable accommodation for prayer.

The same cannot be said, however, concerning Tyson's practice of ablution. At issue is the third element of the *prima facie* test—whether Tyson has come forward with sufficient evidence to suggest that her practice of ablution was the basis for an adverse personnel action.

According to Clarian, Tyson was fired because she accumulated three relatively serious disciplinary violations within the probationary period of her employment. However, one of the violations was the disputed shower incident where Tyson has alleged that she was performing ablution in the shower of an empty patient room. Tyson contends that, to the extent Clarian based its decision to terminate her on this incident, she was in effect discharged for engaging in a religious practice, specifically ablution.

Clarian's position is that regardless of Tyson's activities in the shower, it was a serious breach of hospital policy for her to be using a patient room shower without permission for *any* reason. Viewing the facts in the light most favorable to Tyson, her religious practice of ablution was at least a factor, and more likely the decisive factor, in Clarian's decision to fire her. Tyson has met her burden of establishing a *prima facie* case that Clarian failed to accommodate her religious practices.

Clarian seems to view the Islamic practices of prayer and ablution as one religious practice that it reasonably accommodated by offering to let Tyson pray in the hospital's non-denominational chapels and basement. It is true that Tyson performed ablution in the basement and public restrooms of the hospital, but the record also contains evidence indicating that these venues were ill-suited for her needs. She testified that the sinks in public restrooms were too high for her to be able to wash her feet. The record is sparse regarding the precise practical requirements of ablution. The court does not find as a matter of law that Clarian provided Tyson with a reasonable accommodation for her religious practice of ablution. In this respect, summary judgment on Tyson's accommodation claim is DENIED.

Case Questions

1. Does this situation surprise you? Think about it. How much of your reaction is based on rejection of the situation itself, and how much is based on your discomfort with customs different from what you may be used to?
2. We had a student who confronted this situation during a summer internship when she walked into the bathroom and a Muslim employee was standing on the bathroom counter performing ablutions. What should be done about the discomfort of those not of the same religion?
3. As the employer, explore how you feel about having to accommodate religious practice differences. If your feelings run toward resentment, keep this in mind as you run into religious conflicts at work that must be accommodated.

Frazee v. Illinois Department of Employment Security *489 U.S. 829 (1989)*

Unemployment compensation was denied to an applicant who refused a temporary retail position because he would not work on Sundays for religious reasons. The Court held that the fact that the applicant did not belong to a particular religious organization did not mean he could not claim his religious freedom had been abridged.

White, J.

Frazee refused a temporary retail position offered him by Kelly Services because the job would have required him to work on Sunday. Frazee told Kelly that, as a Christian, he could not work on "the Lord's day." Frazee applied to the Illinois Department of Employment Security for unemployment benefits claiming there was good cause for his refusal to work on Sunday. His application was denied. Frazee appealed the denial of benefits to the Department's Board of Review, which also denied his claim. The Board of Review stated: "When a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and noncompelling and does not render the work unsuitable."

To the Illinois court, Frazee's position that he was "a Christian" and as such felt it wrong to work on Sunday was not enough. For a Free Exercise Clause claim to succeed, said the Illinois Appellate Court, "the injunction against Sunday labor must be found in a tenet or dogma of an established religious sect. Frazee does not profess to be a member of any such sect."

The courts below did not question his sincerity, and the State concedes it. Furthermore, the Board of Review characterized Frazee's views as "religious convictions," and the Illinois Appellate Court referred to his refusal to work on Sunday as based on a "personal professed religious belief."

Frazee asserted that he was a Christian, but did not claim to be a member of a particular Christian sect. It is also true that there are assorted Christian denominations that do not profess to be compelled by their religion to refuse Sunday work, but this does not diminish Frazee's protection flowing from the Free Exercise Clause. Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that, to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection. REVERSED and REMANDED.

Case Questions

1. As the employer here, how could you stay within the law and still have a policy in the best interest of your company?
2. If you were Kelly Services, what would you have done to avoid a conflict with Frazee?
3. As an employer, would you be concerned about how you could tell when an employee had a right to be protected under the law and when an employee was simply trying to get out of work? What would you do about it?

Peterson v. Wilmur Communications, Inc. *205 F. Supp. 2d 1014 (E.D. Wis. 2002)*

Employee, a member of a religious group that believed in white supremacy, was demoted when a newspaper article was published giving his religious views. The court held that though the employee's belief was similar to groups such as the KKK, which were political groups not given protection under Title VII, this was a religion that required Title VII protection and employee could not be demoted simply for having this religious belief.

Adelman, J.

Plaintiff/employee, Christopher Lee Peterson, is a follower of the World Church of the Creator, an organization that preaches a system of beliefs called Creativity, the central tenet of which is white supremacy. Creativity teaches that all people of color are "savage" and intent on "mongrelizing the White Race," that African-Americans are subhuman and should be "shipped back to Africa"; that Jews control the nation and have instigated all wars in this century and should be driven from power, and that the Holocaust never occurred, but if it had occurred, Nazi Germany "would have done the world a tremendous favor."

Creativity considers itself to be a religion, but it does not espouse a belief in a God, afterlife, or any sort of supreme being. "Frequently Asked Questions about CREATIVITY," a publication available on the World Church of the Creator's website, characterizes such beliefs as unsubstantiated "nonsense about angels and devils and gods and . . . silly spook craft" and rejects them in favor of "the Eternal Laws of Nature, about which [Creators say] the White Man does have an impressive fund of knowledge." The White Man's Bible, one of Creativity's two central texts, offers a vision of a white supremacist utopian world of "beautiful, healthy [white] people," free of disease, pollution, fear and hunger. This world can only be established through the degradation of all non-whites. Thus, Creativity teaches that Creators should live their lives according to the principle that what

is good for white people is the ultimate good and what is bad for white people is the ultimate sin. According to The White Man's Bible, the "survival" of white people must be ensured "at all costs." Employee holds these beliefs and, in June 1998, became a "reverend" in the World Church of the Creator.

In 2000, employee was employed by employer Wilmur Communications, Inc. as a Day Room Manager, a position which entailed supervising eight other employees, three of whom were not white. On Sunday, March 19, 2000, an article appeared in the *Milwaukee Journal Sentinel* discussing the World Church of the Creator, interviewing employee, and describing his involvement in the church and beliefs. The article included a photograph of him holding a tee-shirt bearing a picture of Benjamin Smith, who, carrying a copy of The White Man's Bible, had targeted African-American, Jewish and Asian people in a two-day shooting spree in Indiana and Illinois before shooting himself in the summer of 1999. The caption under the photograph read "Rev. C. Lee Peterson of Milwaukee holds a T-shirt commemorating Benjamin Smith, who killed two people and wounded nine others before shooting himself in a two-day spree last summer."

When employee arrived at work the next day, his supervisor and the president of the company, Dan Murphy, suspended him without pay. Two days later, employee received a letter from Murphy demoting him to the position of "telephone solicitor," a position with lower pay and no supervisory duties. During his six years of employment at Wilmur Communications, employee had been disciplined once for a data entry error but had never been disciplined for anything else.

Title VII makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." The statute defines "religion" to include "all aspects of religious observance and practice, as well as belief." § 2000e(j).

A test has emerged to determine whether beliefs are a religion for purposes of Title VII. Rather than define religion according to its content, the test requires the court should find beliefs to be a religion if they "occupy the same place in the life of the [individual] as an orthodox belief in God holds in the life of one clearly qualified." To satisfy this test, the employee must show that the belief at issue is "'sincerely held' and 'religious' in his [or her] own scheme of things." In evaluating whether a belief meets this test, courts must give "great weight" to the employee's own characterization of his or her beliefs as religious.

To be a religion under this test, a belief system need not have a concept of a God, supreme being, or afterlife. Courts also should not attempt to assess a belief's "truth" or "validity." So long as the belief is sincerely held and is religious in the employee's scheme of things, the belief is religious regardless of whether it is "acceptable, logical, consistent, or comprehensible to others." Once an employee establishes that his or her beliefs are a religion, the employee must offer evidence that his or her religion "played a motivating role" in the adverse employment action at issue. An employee can meet this burden by presenting direct evidence of the employer's discriminatory intent, the method that employee has chosen here, or by the indirect method.

The parties hotly dispute whether Creativity is a religion under Title VII. Thus, as an initial matter, I must determine whether employee's beliefs are "sincerely held" and "religious in his own scheme of things."

Here, the first prong is undisputed. Employee states that he has "a sincere belief" in the teachings of Creativity and employer offers no contrary evidence. Thus, employee meets the first prong of the test.

The second prong is also undisputed. Employee considers his beliefs religious and considers Creativity to be his religion. I must give "great weight" to that belief. In addition, Creativity plays a central role in employee's life. Employee has been a minister in the World Church of the Creator for more than three years.

Employee states that he "work[s] at putting [the teachings of Creativity] into practice every day." Thus, all the evidence conclusively reveals that the teachings of Creativity are "religious" in employee's "own scheme of things." These beliefs occupy for employee a place in his life parallel to that held by a belief in God for believers in more mainstream theistic religions. Thus, Creativity "functions as" religion for employee. Employee has met his initial burden of showing that his beliefs constitute a "religion" for purposes of Title VII.

Employer argues that the World Church of the Creator cannot be a religion under Title VII because it is similar to other white supremacist organizations that have been found to be political organizations and not religions. To be sure, Creativity shares some of the white supremacist beliefs of the KKK and the National Socialist White People's Party. However, the fact that employee's beliefs can be characterized as political does not mean they are not also religious. Thus, employee could share the beliefs of political organizations yet still establish that his beliefs function as religion for him.

Employer also argues that Creativity's beliefs cannot be religious because they are immoral and unethical, and

EEOC regulations define religious beliefs as "moral or ethical beliefs as to what is right and wrong." The EEOC regulation means that "religion" under Title VII includes belief systems which espouse notions of morality and ethics and supply a means of distinguishing right from wrong. Creativity has these characteristics. Creativity teaches that followers should live their lives according to what will best foster the advancement of white people and the denigration of all others. This precept, although simplistic and repugnant to the notions of equality that undergird the very non-discrimination statute at issue, is a means for determining right from wrong. Thus, employer's argument must be rejected. Employee has shown that Creativity functions as religion in his life; thus, Creativity is for him a religion regardless of whether it espouses goodness or ill. Employer's argument is again rejected.

Having established that Creativity is for employee a religion, the employee must offer evidence that his religion played a motivating role in the adverse employment action, in this case his demotion. Employee argues that Murphy's letter of demotion provides direct evidence that he was demoted because of his religion. The letter of demotion from Murphy plainly states that employee was being demoted because of his membership in the World Church of the Creator and his white supremacist beliefs. Thus, employee's beliefs caused employer to demote him and employer is, therefore, liable.

Employee's motion for summary judgment on the issue of liability must be GRANTED. Employer's motion for summary judgment is DENIED.

Case Questions

1. What would you have done if you were the employer who saw this news article? Why?
2. Does the court's decision surprise you? Explain.
3. If you were the employer, what would you do if the employee mistreated nonwhite employees in the workplace?

Goldman v. Weinberger *475 U.S. 503 (1986)*

A member of the military, an Orthodox Jew and ordained rabbi, brought suit against the Secretary of Defense claiming that application of Air Force regulation to prevent him from wearing his yarmulke infringed upon his First Amendment freedom to exercise his religious belief. The Supreme Court held that the First Amendment did not prohibit a regulation that prevented the wearing of a yarmulke by a member of the military while on duty and in uniform.

Rehnquist, J.

Petitioner S. Simcha Goldman contends that the Free Exercise Clause of the First Amendment to the United States Constitution permits him to wear a yarmulke while in uniform, notwithstanding an Air Force regulation mandating uniform dress for Air Force personnel.

The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."

These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment. But "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. Not only are courts "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have," but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy. "[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."

The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble. We have acknowledged that "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."

To this end, the Air Force promulgated AFR 35-10, a 190-page document, which states that "Air Force members will wear the Air Force uniform while performing their military duties, except when authorized to wear civilian clothes on duty." The rest of the document describes in minute detail all of the various items of apparel that must be worn as part of the Air Force uniform. It authorizes a few individualized options with respect to certain pieces of jewelry and hairstyle, but even these are subject to severe limitations. In general, authorized headgear may be worn only out of doors. Indoors, "[h]eadgear [may] not be worn . . . except by armed security police in the performance of their duties." A narrow exception to this rule exists for headgear worn during indoor religious ceremonies. In addition, military commanders may in their discretion permit visible religious headgear and other such apparel in designated living quarters and nonvisible items generally.

Goldman contends that the Free Exercise Clause of the First Amendment requires the Air Force to make an exception to its uniform dress requirements for religious apparel unless the accouterments create a "clear danger" of undermining discipline and esprit de corps. He asserts that in general, visible but "unobtrusive" apparel will not create such a danger and must therefore be accommodated. He argues that the Air Force failed to prove that a specific exception for his practice of wearing an unobtrusive yarmulke would threaten discipline. He contends that the Air Force's assertion to the contrary is mere ipse dixit [a bare assertion], with no support from actual experience or a scientific study in the record, and is contradicted by expert testimony that religious exceptions to the policy are in fact desirable and will increase morale by making the Air Force a more humane place.

But whether or not expert witnesses may feel that religious exceptions to AFR 35-10 are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment. Quite obviously, to the extent the regulations do not permit the wearing of religious apparel such as a yarmulke, a practice described by Goldman as silent devotion akin to prayer, military life may be more objectionable for him and probably others. But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations. The Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity. The First Amendment therefore does not prohibit them from being applied to Goldman even though their effect is to restrict the wearing of the headgear required by his religious beliefs. The judgment of the Court of Appeals is AFFIRMED.

Case Questions

1. Do you agree with the Court's decision? Explain.
2. What do you think of Goldman's argument that wearing the yarmulke will help morale? Does that seem a valid argument for permitting the apparel exception?
3. Can you think of other types of clothing that people may want to wear as part of their religious practice that may present the same situation as here? Do you understand why it should not be permitted? Explain.

Lumpkin v. Jordan *49 Cal. App. 4th 1223 (1996)*

A minister who was a member of the San Francisco Human Rights Commission was terminated after making public statements to the press about homosexuality being an abomination, a position at odds

with the work of the Commission. The minister sued the city for religious discrimination under California's civil rights laws (comparable to Title VII). The court held for the city, deciding that the termination was based not on religion but rather on the minister's position being at odds with the position he held on the Commission.

Champlin, J.

This case concerns the alleged unlawful removal of Reverend Lumpkin from the City's Human Rights Commission (the Commission). Mayor Jordan, then Mayor of the City, appointed Reverend Lumpkin to serve as a member of the Commission. At the time of his appointment, Reverend Lumpkin was a Baptist minister who served as Pastor of the Ebenezer Baptist Church. Mayor Jordan and Reverend Lumpkin had known one another for over 15 years and, at the time of the appointment, Mayor Jordan was aware that Reverend Lumpkin was a Baptist minister.

Later the *San Francisco Chronicle* quoted Reverend Lumpkin as saying: "It's sad that people have AIDS and what have you, but it says right there in the scripture that the homosexual lifestyle is an abomination against God. So I have to preach that homosexuality is a sin." These remarks provoked a public controversy surrounding Reverend Lumpkin's membership on the Commission.

After meeting with Reverend Lumpkin, Mayor Jordan issued a press release announcing that he would not remove Reverend Lumpkin from the Commission. In this statement, Mayor Jordan stated that Reverend Lumpkin "has a solid and unambiguous record as a member of the Human Rights Commission. As a commissioner he has protected and advanced gay and lesbian civil rights."

In reaction to Mayor Jordan's announcement, the San Francisco Board of Supervisors adopted a resolution calling for Reverend Lumpkin's resignation or removal from the Commission. The resolution demanded that Mayor Jordan "restore public confidence in the role and mission of the Commission, especially with regards to the ability of the Commission to consider complaints and lead the community toward equality and respect for all lesbian and gay San Franciscans."

Reverend Lumpkin was interviewed during a live broadcast of a television news show, *Mornings on 2*. After the interviewer identified Reverend Lumpkin as a member of the Commission, he asked him if he believed homosexuality to be an "abomination." Reverend Lumpkin replied, "Sure, I believe, I believe everything the Bible sayeth." The following exchange ensued:

> "Interviewer: Leviticus also says that a man who sleeps with a man should be put to death. Do you believe that? Reverend Lumpkin: That's what it sayeth. Interviewer: Do you believe that? Reverend Lumpkin: That's—I said that's what the Book sayeth."

Later that day, after learning of the interview, Mayor Jordan asked Reverend Lumpkin to resign from the Commission. In a press release explaining his decision, Mayor Jordan stated: "While religious beliefs are constitutionally protected and cannot be the grounds to remove anyone from elected or appointed public office, the direct or indirect advocacy of violence is not, cannot and will not be condoned by this administration. . . . On the grounds of religious freedom and an unblemished record as a Human Rights Commissioner, I have supported Reverend Lumpkin for holding fundamentalist beliefs which are not my own. We part company when those beliefs imply that attacks against anyone can be justified by the scripture or on any other grounds."

Mayor Jordan met with Reverend Lumpkin, who refused to resign. After this meeting, Mayor Jordan announced his decision to remove Reverend Lumpkin from the Commission.

After his removal from the Commission, Reverend Lumpkin brought suit against Mayor Jordan, alleging that he had been terminated "solely because of his religious beliefs" in violation of the FEHA. The second cause of action alleged that defendants, acting under color of state law, deprived Reverend Lumpkin of the right to exercise his constitutionally protected religious beliefs as guaranteed by 42 United States Code section 1983.

Reverend Lumpkin's removal from the Commission did not violate his freedom of expression. The court reasoned that he was a policymaker with the Jordan administration and "Reverend Lumpkin's televised remarks regarding homosexuality could reasonably have been interpreted by the Mayor as undermining the very policies of the Commission to promote good will toward all people."

Reverend Lumpkin's removal did not violate his rights under the Free Exercise Clause. The court found that Mayor Jordan's interest in preventing disruption of the goals of his administration outweighed Reverend Lumpkin's right to religious expression. The court's opinion points out that "critical to this analysis is the fact

that Reverend Lumpkin was not removed solely for exercising his constitutional rights. He is, and at all times was, free to hold and to profess his religious beliefs; however, when the expression of those beliefs clashed with the goals of the Jordan Administration and undermined the public confidence in the ability of the Commission to effect its goals, the Mayor was justified in removing him."

Finally, the court's order held that Reverend Lumpkin's removal did not violate the Establishment Clause. The court explained that Reverend Lumpkin's removal could not reasonably be construed as sending a message either endorsing or disapproving of religion and that "his removal was based on secular concerns." The court emphasized that Reverend Lumpkin "was not removed because he believed in the inerrancy of the Bible; rather, he was removed because his religious beliefs were at odds with the goals of the Commission and disrupted Mayor Jordan's administration." AFFIRMED.

Case Questions

1. Do you agree that this case was not about religious discrimination? Explain.
2. Can you think of some other way to have handled this matter? Explain.
3. Do you agree with the minister that he could continue to do his job with no problems, despite the feelings he expressed to the media? Explain.

Wilson v. U.S. West Communications *58 F.3d 1337 (8th Cir. 1995)*

Employee was terminated when she refused to remove or cover a button she wore on her clothing depicting a graphic anti-abortion message that caused immediate and emotional reactions from co-workers. She brought suit against the employer claiming religious discrimination in violation of Title VII, claiming her religious "living witness" commitment required further accommodation. The court held that the employer reasonably accommodated the employee.

Gibson, J.

Wilson worked for U.S. West for nearly 20 years before U.S. West transferred her to another location as an information specialist, assisting U.S. West engineers in making and keeping records of the location of telephone cables. This facility had no dress code.

In late July 1990, Wilson, a Roman Catholic, made a religious vow that she would wear an anti-abortion button "until there was an end to abortion or until [she] could no longer fight the fight." The button was two inches in diameter and showed a color photograph of an eighteen to twenty-week old fetus. The button also contained the phrases "Stop Abortion," and "They're Forgetting Someone." Wilson chose this particular button because she wanted to be an instrument of God like the Virgin Mary. She believed that the Virgin Mary would have chosen this particular button. She wore the button at all times, unless she was sleeping or bathing. She believed that if she took off the button she would compromise her vow and lose her soul.

Wilson began wearing the button to work in August 1990. Another information specialist asked Wilson not to wear the button to a class she was teaching. Wilson explained her religious vow and refused to stop wearing the button. The button caused disruptions at work. Employees gathered to talk about the button. U.S. West identified Wilson's wearing of the button as a "time robbing" problem. Wilson acknowledged that the button caused a great deal of disruption. A union representative told Wilson's supervisor, Mary Jo Jensen, that some employees threatened to walk off their jobs because of the button. Wilson's co-workers testified that they found the button offensive and disturbing for "very personal reasons," such as infertility problems, miscarriage, and death of a premature infant, unrelated to any stance on abortion or religion.

In early August 1990, Wilson met with her supervisors, Jensen and Gail Klein, five times. Jensen and Klein are also Roman Catholics against abortion. Jensen and

Klein told Wilson of co-workers' complaints about the button and an anti-abortion T-shirt Wilson wore which also depicted a fetus. Jensen and Klein told Wilson that her co-workers were uncomfortable and upset and that some were refusing to do their work. Klein noted a 40 percent decline in the productivity of the information specialists since Wilson began wearing the button.

Wilson told her supervisors that she should not be singled out for wearing the button because the company had no dress code. She explained that she "just wanted to do [her] job," and suggested that co-workers offended by the button should be asked not to look at it. Klein and Jensen offered Wilson three options: (1) wear the button only in her work cubicle, leaving the button in the cubicle when she moved around the office; (2) cover the button while at work; or (3) wear a different button with the same message but without the photograph. Wilson responded that she could neither cover nor remove the button because it would break her promise to God to wear the button and be a "living witness." She suggested that management tell the other information specialists to "sit at their desks and do the job U.S. West was paying them to do."

On August 22, 1990, Wilson met with Klein, Jensen, and the union's chief steward. During the meeting, Klein again told Wilson that she could either wear the button only in her cubicle or cover the button. Klein explained that, if Wilson continued to wear the button to work, she would be sent home until she could come to work wearing proper attire.

In an August 27, 1990 letter, Klein reiterated Wilson's three options. He added that Wilson could use accrued personal and vacation time instead of reporting to work. Wilson filed suit but later dismissed the action when U.S. West agreed to allow her to return to work and wear the button pending an investigation by the Nebraska Equal Opportunity Commission.

Wilson returned to work on September 18, 1990, and disruptions resumed. Information specialists refused to go to group meetings with Wilson present. The employees complained that the button made them uneasy. Two employees filed grievances based on Wilson's button. Employees accused Jensen of harassment for not resolving the button issue to their satisfaction. Eventually, U.S. West told Wilson not to report to work wearing anything depicting a fetus, including the button or the T-shirt. U.S. West told Wilson again that she could cover or replace the button or wear it only in her cubicle. U.S. West sent Wilson home when she returned to work wearing the button and fired her for missing work unexcused for three consecutive days. Wilson sued U.S. West, claiming that her firing constituted religious discrimination.

The court considered the three offered accommodations and concluded that requiring Wilson to leave the button in her cubicle or to replace the button were not accommodations of Wilson's sincerely held religious beliefs because: (1) removing the button at work violated Wilson's vow to wear the button at all times; and (2) replacing the button prohibited Wilson from wearing the particular button encompassed by her vow. However, the court concluded that requiring Wilson to cover the button while at work was a reasonable accommodation. The court based this determination on its factual finding that Wilson's vow did not require her to be a living witness. The court reasoned that covering the button while at work complied with Wilson's vow but also reduced office turmoil. The court also concluded that, even if Wilson's vow required Catholic Voice, she said nothing about being a living witness. Klein testified that he never heard Wilson use the word *witness* in explaining her vow, but rather, that he understood Wilson's vow was to "wear the button until abortions were ended." Accordingly, the district court's finding is supported by the evidence and is not clearly erroneous.

We next consider Wilson's argument that the district court erred as a matter of law in concluding that U.S. West offered to reasonably accommodate Wilson's religious views. Wilson argues that her religious beliefs did not require her or any other employee to miss or rearrange work schedules, as typically causes a reasonable accommodation dispute. She argues that it was her co-workers' response to her beliefs that caused the workplace disruption, not her wearing the button. Wilson contends that U.S. West should have focused its attention on her co-workers not her. Wilson's brief states: "Quite frankly, . . . Klein and Jensen should have simply instructed the troublesome co-workers to ignore the button and get back to work."

The district court, however, succinctly answered Wilson's argument: Klein was unable to persuade the co-workers to ignore the button. Although Wilson's religious beliefs did not create scheduling conflicts or violate dress code or safety rules, Wilson's position would require U.S. West to allow Wilson to impose her beliefs as she chooses. Wilson concedes the button caused substantial disruption at work. To simply instruct Wilson's co-workers that they must accept Wilson's insistence on wearing a particular depiction of a fetus as part of her religious beliefs is antithetical to the concept of reasonable accommodation.

Moreover, U.S. West did not oppose Wilson's religious beliefs, but rather, was concerned with the photograph. The record demonstrates that U.S. West did not object to various other religious articles that Wilson had in her work cubicle or to another employee's anti-abortion button. It was the color photograph of the fetus that offended Wilson's co-workers, many of whom were reminded of circumstances unrelated to abortion. Indeed, many employees who opposed Wilson's button shared Wilson's religion and view on abortion.

Wilson also argues that requiring her to cover the button is not a reasonable accommodation. She argues that the accommodation offered required her to abandon her religious beliefs, and therefore, that the accommodation was no accommodation at all. Having affirmed the finding that Wilson's religious vow did not require her to be a living witness, we summarily reject this argument. U.S. West's proposal allowed Wilson to comply with her vow to wear the button and respected the desire of co-workers not to look at the button. Hence, the district court did not err in holding that U.S. West reasonably accommodated Wilson's religious beliefs.

Finally, Wilson argues that the district court erred in concluding that her suggested proposals would be an undue hardship for U.S. West.

The Supreme Court held that an employer is not required to select the employee's proposal of reasonable accommodation and that any reasonable accommodation by the employer is sufficient to comply with the statute. "The employer violates the statute unless it 'demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.'" When the employer reasonably accommodates the employee's religious beliefs, the statutory inquiry ends. The employer need not show that the employee's proposed accommodations would cause an undue hardship. Undue hardship is at issue "only where the employer claims that it is unable to offer any reasonable accommodation without such hardship."

Because we hold that U.S. West offered Wilson a reasonable accommodation, our inquiry ends, and we need not consider Wilson's argument that her suggested accommodations would not cause undue hardship.

We recognize that this case typifies workplace conflicts which result when employees hold strong views about emotionally charged issues. We reiterate that Title VII does not require an employer to allow an employee to impose his religious views on others. The employer is only required to reasonably accommodate an employee's religious views. AFFIRMED.

Case Questions

1. What do you think of the co-worker reaction to Wilson's button? Does it seem reasonable? Explain.
2. What do you think of Wilson's response to her supervisors that those who did not like the button should simply be told not to look at it? Does this seem to be a reasonable response for the employer to make? Explain.
3. If you were the employer here, what would you have done about Wilson?

Williams v. Southern Union Gas Company *529 F.2d 483 (10th Cir. 1976)*

Employee was terminated for not working on Saturday. His reason for not doing so was that it was against his religion to work on his sabbath. The court found that accommodating this religious conflict would cause the employer an undue hardship; therefore, the termination did not violate Title VII.

McWilliams, J.

When Williams went to work for Southern Union he was informed that it was a company policy that all employees should be available for work seven days a week 24 hours per day inasmuch as it was a public utility and was obligated to provide continuous and uninterrupted natural gas service to the general public. It was also Southern Union's policy, however, to schedule its employees for only five days of work each week, eight

hours per day. Williams in 1962 did not belong to any church and hence was under no prohibition, religious or otherwise, from working any day in the week.

During the fall of 1969 Williams became a member of the Worldwide Church of God. He informed his supervisor of his conversion and advised him that he would no longer be able to work between Friday at sundown and Saturday at sundown. The supervisor, Al Dean, explained that it would be difficult to promise that Williams would never be called on to work on a Saturday, but that he would do what he could. Coincidentally, or otherwise, at the time of his conversion Williams' regular work week was from Sunday through Thursday, with both Friday and Saturday off. It would appear that for obvious reasons most all employees desired to have Saturday off. At his supervisor's suggestion Williams checked back with his minister and was informed that he could work on Saturdays if there were an emergency, but that since this was a matter between Williams and his God, he (Williams), and not his employer, would have to make the decision as to whether a true emergency existed.

From the date of his conversion in the fall of 1969 until October 3, 1970, Williams was never asked to work on Saturday. During the fall of 1970 Williams was assigned to work on the Dogie Canyon project in northwest New Mexico, a rather isolated location. This was a new pipeline about 25 miles long that was to expand the capacity of the pipeline system which took natural gas from the production area of the San Juan Basin and supplied the Los Alamos–Santa Fe area with natural gas. This project was running somewhat behind schedule and Southern Union, at least, was of the view that the pipeline had to be completed, purged of air, and brought up to pressure by Saturday, October 3, 1970.

On Wednesday, September 30, 1970, Williams went to Dean and told him that the next day, Thursday, was a special religious holiday in his church and that he would have to have the day off. Dean agreed that Williams could take Thursday off, but explained that the pipeline would have to be pressured up by Saturday, and that if the work were not completed by Friday night Williams would have to work Saturday. Williams testified that he made no protest at this time about the possibility of Saturday work, as he thought the project might very possibly be completed by Friday, and any confrontation would thereby be avoided.

Williams took Thursday off. Unfortunately for Williams, the job was not completed on Friday, and Friday evening Williams called Dean at the latter's home and told Dean that he would not report for work on Saturday morning, as he had been directed. Dean's response was that if Williams didn't show up he would be fired. Dean himself was scheduled to go on vacation starting Saturday. When Williams didn't show up for work on Saturday, Dean delayed the start of his vacation and completed the work himself. There was no one else with the expertise who could be called. It was in this factual setting that Dean fired Williams.

42 U.S.C. 2000e-2(a) provides that it is an unlawful employment practice for an employer to discriminate against an employee because of his religion. Under a regulation promulgated in 1966 an employer was allowed to establish a "normal work week" which would be generally applicable to all employees even though such would not operate uniformly in its effect upon the religious observances of all employees. In 1967 the following regulation which now appears as 29 C.F.R. 1605.1 (1975) was promulgated:

> Observation of the Sabbath and other religious holidays.
>
> (a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.
>
> (b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
>
> (c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

The foregoing regulation was given legislative approval when Congress amended the definition of religion, as that term is read in the Act, to read as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. 2000e(j).

Under the applicable statute and regulations the question before the trial court was whether Southern Union demonstrated that it was unable to reasonably accommodate to Williams' religious practice without undue hardship in the conduct of its business. The key phrases are "reasonably accommodate" and "undue hardship." The trial court's findings are not clearly erroneous and we affirm.

Most of the civil rights cases concerning those who celebrate the Sabbath on Saturday involve situations where the employer attempts to compel the employee to work on Saturdays as a part of his normal work week. Such is not true in the instant case. On the contrary Williams' normal work week was Sunday through Thursday. Furthermore, Southern Union did not ask Williams to perform work on a Saturday until approximately one year after his conversion. Williams' boss earlier explained that he could not promise Williams that he would never be asked to work on Saturday, and that he might well be asked to work in an emergency situation. The very nature of Southern Union's business required that service be available to the public 24 hours a day, 7 days per week. Someone was going to have to work on Saturdays, even though all employees understandably preferred Saturday off. Indeed, Williams himself recognized that his religion did not preclude him from working on Saturdays in the event of a special emergency. However, Williams insisted that he, rather than his employer, had the exclusive right to determine just what constituted an emergency.

Getting down to the events which immediately preceded Williams' discharge, Southern Union was engaged in certain pipeline construction which it felt had to be completed by Saturday, October 3, 1970. The record is such as to permit the inference that completion of the pipeline by that date was of critical importance. And such fact we deem to be of great significance and distinguishes the instant case from other cases cited to us by counsel, i.e., we are not concerned here with the employer's effort to compel Williams to work on a Saturday as a part of his normal work week; rather this is a situation where the employer was faced with an emergency situation in an isolated work area where there was no reserve of manpower who were qualified to complete the project and could be called in on a moment's notice. Williams, apparently without giving notice, advised his boss on Wednesday that he was taking off Thursday, a regular work day, for a special religious holiday. Whether this absence in anywise contributed to the failure to complete the project by Friday is not disclosed by the record. In any event, the project was not completed by Friday and it was only in this circumstance that Southern Union for the first time asked Williams to work on Saturday. When Williams refused, his boss had to delay his long scheduled vacation in which he was to meet someone from out of town at a remote location for an elk hunt, and he completed the job himself.

The phrases "reasonably accommodate" and "undue hardship" are relative terms and cannot be given any hard and fast meaning. In a sense the case boils down to a determination as to whether Southern Union acted reasonably under all the circumstances. On the one hand it had a duty to at least try to accommodate Williams' religious practices. On the other hand it also had a duty not only to serve the consuming public on a continuous and uninterrupted basis but also to adhere to employment practices that were fair to its other employees. In our view whether Southern Union in the instant case acted in a reasonable manner is a matter upon which reasonable minds might conceivably differ. Such fact, however, does not permit us to substitute our judgment for that of the trial court. It was the trial judge who heard the testimony and saw the various witnesses. He is the one who draws the inferences and finds the facts. He found that to have accommodated Williams' refusal to work on Saturday, October 3, 1970, would have placed an undue hardship on the Southern Gas and the conduct of its business, and as a result, Southern was justified in discharging Williams because of his refusal to work. In such circumstances we should not disturb his determination of the matter. Judgment AFFIRMED.

Case Questions

1. Do you agree with the court that the employer's duty was discharged in this case?
2. If you had been the employer, what would you have done when Williams came to you after his conversion, and later (if you decided to keep him on) when he requested the Thursday off?
3. As an employer, what questions would you ask yourself before deciding on a policy to handle religious conflicts?

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

The supervisory employee sued for religious discrimination and a failure to accommodate after being terminated for sending employees letters at home about their personal and religious lives. One employee received the letter while ill at home on leave after delivering a baby out of wedlock, and the other employee's wife opened the letter and became distraught because she thought the references in the letter meant her husband was having an affair. The court held that there was no duty to accommodate the terminated employee's religious practice of sending such letters.

Motz, J.

Chalmers, a supervisor, has been a Baptist all of her life, and in June 1984 became an evangelical Christian. At that time, she accepted Christ as her personal savior and determined to go forth and do work for him. As an evangelical Christian, Chalmers believes she should share the gospel and looks for opportunities to do so.

Chalmers felt that her supervisor, LaMantia, respected her, generally refraining from using profanity around her, while around other employees who did not care, "he would say whatever he wanted to say." She felt that she and LaMantia had a "personal relationship" and that she could talk to him. Chalmers stated that "in the past we have talked about God." Chalmers further testified that "starting off" she and LaMantia had discussed religion about "everytime he came to the service center . . . maybe every three months" but "then, towards the end maybe not as frequently." LaMantia never discouraged these conversations, expressed discomfort with them, or indicated that they were improper. In one of these conversations, LaMantia told Chalmers that three people had approached him about accepting Christ.

Two or three years after this conversation, Chalmers "knew it was time for [LaMantia] to accept God." She believed LaMantia had told customers information about the turnaround time for a job when he knew that information was not true. Chalmers testified that she was "led by the Lord" to write LaMantia and tell him "there were things he needed to get right with God, and that was one thing that . . . he needed to get right with him."

Accordingly, on Labor Day, September 6, 1993, Chalmers mailed the following letter to LaMantia at his home:

> Dear Rich:
>
> The reason I'm writing you is because the Lord wanted me to share somethings [sic] with you. After reading this letter you do not have to give me a call, but talk to God about everything.
>
> One thing the Lord wants you to do is get your life right with him. The Bible says in Romans 10:9vs that if you confess with your mouth the Lord Jesus and believe in your heart that God hath raised him from the dead, thou shalt be saved. vs 10—For with the heart man believeth unto righteousness, and with the mouth confession is made unto salvation. The two verse are [sic] saying for you to get right with God now.
>
> The last thing is, you are doing somethings [sic] in your life that God is not please [sic] with and He wants you to stop. All you have to do is go to God and ask for forgiveness before it's too late.
>
> I wrote this letter at home so if you have a problem with it you can't relate it to work.
>
> I have to answer to God just like you do, so that's why I wrote you this letter. Please take heed before it's too late.
>
> In his name,
>
> Charita Chalmers

On September 10, 1993 when Chalmers' letter arrived at LaMantia's home, he was out of town on Tulon business and his wife opened and read the letter in his absence. Mrs. LaMantia became distraught, interpreting the references to her husband's improper conduct as indicating that he was committing adultery. In tears, she called Chalmers and asked her if LaMantia was having an affair with someone in the New Hampshire area where LaMantia supervised another Tulon facility. Mrs. LaMantia explained that three years before she and LaMantia had separated because of his infidelity. Chalmers told Mrs. LaMantia that she did not know about any affair because she was in the Richmond area. When Mrs. LaMantia asked her what she had meant by writing that there was something in LaMantia's life that "he needed to get right with God," Chalmers explained about

the turnaround time problem. Mrs. LaMantia responded that she would take the letter and rip it up so LaMantia could not read it. Chalmers answered, "Please don't do that, the Lord led me to send this to Rich, so let him read it." The telephone conversation then ended.

Mrs. LaMantia promptly telephoned her husband, interrupting a Tulon business presentation, to accuse him of infidelity. LaMantia, in turn, called the Richmond office and asked to speak with Chalmers; she was in back and by the time she reached the telephone, LaMantia had hung up. Chalmers then telephoned the LaMantias' home and, when she failed to reach anyone, left a message on the answering machine that she was sorry "if the letter offended" LaMantia or his wife and that she "did not mean to offend him or make him upset about the letter."

LaMantia also telephoned Craig A. Faber, Vice President of Administration at Tulon. LaMantia told Faber that the letter had caused him personal anguish and placed a serious strain on his marriage. LaMantia informed Faber that he felt he could no longer work with Chalmers. LaMantia recommended that Tulon management terminate Chalmers' employment.

While investigating LaMantia's complaint, Faber discovered that Chalmers had sent a second letter, on the same day as she sent the letter to LaMantia, to another Tulon employee. That employee, Brenda Combs, worked as a repoint operator in the Richmond office and Chalmers was her direct supervisor. Chalmers knew that Combs was convalescing at her home, suffering from an undiagnosed illness after giving birth out of wedlock. Chalmers sent Combs the following letter:

> Brenda,
>
> You probably do not want to hear this at this time, but you need the Lord Jesus in your life right now.
>
> One thing about God, He doesn't like when people commit adultery. You know what you did is wrong, so now you need to go to God and ask for forgiveness.
>
> Let me explain something about God. He's a God of Love and a God of Wrath. When people sin against Him, He will allow things to happen to them or their family until they open their eyes and except [sic] Him. God can put a sickness on you that no doctor could ever find out what it is. I'm not saying this is what happened to you, all I'm saying is get right with God right now. Romans 10:9;10vs says that is [sic] you confess with your mouth the Lord Jesus and believe in your heart that God has raised him from the dead thou shalt be saved. For with the heart man believeth unto righteousness; and with the mouth confession is made unto salvation. All I'm saying is you need to invite God into your heart and live a life for Him and things in your life will get better.
>
> That's not saying you are not going to have problems but it's saying you have someone to go to.
>
> Please take this letter in love and be obedient to God.
>
> In his name,
>
> Charita Chalmers

Upon receiving the letter Combs wept. Faber discussed the letter with Combs who told him that she had been "crushed by the tone of the letter." Combs believed that Chalmers implied that "an immoral lifestyle" had caused her illness and found Chalmers' letter "cruel." Combs, in a later, unsworn statement, asserted that although the letter "upset her" it did not "offend" her or "damage her working relationship" with Chalmers.

Faber consulted with other members of upper management and concluded that the letters caused a negative impact on working relationships, disrupted the workplace, and inappropriately invaded employee privacy. On behalf of Tulon, Faber then sent Chalmers a memorandum, informing her that she was terminated from her position. The memorandum stated in relevant part:

> We have decided to terminate your employment with Tulon Co. effective today, September 21, 1993. Our decision is based on a serious error in judgment you made in sending letters to LaMantia and Combs, which criticized their personal lives and beliefs. The letters offended them, invaded their privacy, and damaged your work relationships, making it too difficult for you to continue to work here.
>
> We expect all of our employees to show good judgment, especially those in supervisory positions, such as yours. We would hope you can learn from this experience and avoid similar mistakes in the future.

As a result of the preceding events, Chalmers filed suit, alleging that Tulon discriminated against her based on her religion, in violation of Title VII. She contended that her letter writing constituted protected religious activity that Tulon, by law, should have accommodated with a lesser punishment than discharge.

In a religious accommodation case, an employee can establish a claim even though she cannot show that other

(unprotected) employees were treated more favorably or cannot rebut an employer's legitimate, nondiscriminatory reason for her discharge. This is because an employer must, to an extent, actively attempt to accommodate an employee's religious expression or conduct even if, absent the religious motivation, the employee's conduct would supply a legitimate ground for discharge.

Tulon's proffered reasons for discharging Chalmers—because her letters, which criticized her fellow employees' personal lives and beliefs, invaded the employees' privacy, offended them and damaged her working relationships—are legitimate and nondiscriminatory.

To establish a prima facie religious accommodation claim, a plaintiff must establish that: "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement."

Chalmers has alleged that she holds bona fide religious beliefs that caused her to write the letters. Tulon offers no evidence to the contrary. The parties agree that Tulon fired Chalmers because she wrote the letters. Accordingly, Chalmers has satisfied the first and third elements of the prima facie test. However, in other equally important respects, Chalmers' accommodation claim fails.

Chalmers cannot satisfy the second element of the prima facie test. She has forecast no evidence that she notified Tulon that her religious beliefs required her to send personal, disturbing letters to her co-workers. Therefore she did not allow the company any sort of opportunity to attempt reasonable accommodation of her beliefs.

Chalmers concedes that she did not expressly notify Tulon that her religion required her to write letters like those at issue here to her co-workers, or request that Tulon accommodate her conduct. Nonetheless, for several reasons, she contends that such notice was unnecessary in this case.

Initially, Chalmers asserts that Tulon never explicitly informed her of a company policy against writing religious letters to fellow employees at their homes and so she had "no reason to request an accommodation." However, companies cannot be expected to notify employees explicitly of all types of conduct that might annoy co-workers, damage working relationships, and thereby provide grounds for discharge. Chalmers implicitly acknowledged in the letters themselves that they might distress her co-workers. Moreover, she conceded that, as a supervisor, she had a responsibility to "promote harmony in the workplace."

Although a rule justifying discharge of an employee because she has disturbed co-workers requires careful application in the religious discrimination context (many religious practices might be perceived as "disturbing" to others), Chalmers, particularly as a supervisor, is expected to know that sending personal, distressing letters to co-workers' homes, criticizing them for assertedly ungodly, shameful conduct, would violate employment policy. Accordingly, the failure of the company to expressly forbid supervisors from disturbing other employees in this way provides Chalmers with no basis for failing to notify Tulon that her religious beliefs require her to write such letters.

Alternatively, Chalmers contends that the notoriety of her religious beliefs within the company put it on notice of her need to send these letters. In her view, Chalmers satisfied the notice requirement because Tulon required "only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements."

Knowledge that an employee has strong religious beliefs does not place an employer on notice that she might engage in any religious activity, no matter how unusual. Chalmers concedes that she did not know of any other employee who had ever written distressing or judgmental letters to co-workers before, and that nothing her co-workers had said or done indicated that such letters were acceptable. Accordingly, any knowledge Tulon may have possessed regarding Chalmers' beliefs could not reasonably have put it on notice that she would write and send accusatory letters to co-workers' homes.

Chalmers appears to contend that because Tulon was necessarily aware of the religious nature of the letters after her co-workers received them and before her discharge, Tulon should have attempted to accommodate her by giving her a sanction less than a discharge, such as a warning. This raises a false issue. There is nothing in Title VII that requires employers to give lesser punishments to employees who claim, after they violate company rules (or at the same time), that their religion caused them to transgress the rules.

Part of the reason for the advance notice requirement is to allow the company to avoid or limit any "injury" an employee's religious conduct may cause. Additionally, the refusal even to attempt to accommodate an employee's religious requests, prior to the employee's violation of employment rules and sanction, provides some indication, however slight, of improper motive on the employer's part. The proper issue, therefore, is whether

Chalmers made Tulon aware, prior to her letter writing, that her religious beliefs would cause her to send the letters. Since it is clear that she did not, her claims fail.

In sum, Chalmers has not pointed to any evidence that she gave Tulon—either directly or indirectly—advance notice of her need for accommodation. For this reason, Chalmers has failed to establish a prima facie case of discrimination under the religious accommodation theory.

If we had concluded that Chalmers had established a prima facie case, Chalmers' religious accommodation claim would nonetheless fail. This is so because Chalmers' conduct is not the type that an employer can possibly accommodate, even with notice.

Chalmers concedes in the letters themselves that she knew the letters to her co-workers, accusing them of immoral conduct (in the letter to Combs, suggesting that Combs' immoral conduct caused her illness), might cause them distress. Even if Chalmers had notified Tulon expressly that her religious beliefs required her to write such letters, i.e. that she was "led by the Lord" to write them, Tulon was without power under any circumstances to accommodate Chalmers' need.

Typically, religious accommodation suits involve religious conduct, such as observing the Sabbath, wearing religious garb, etc., that result in indirect and minimal burdens, if any, on other employees. An employer can often accommodate such needs without inconveniencing or unduly burdening other employees.

In a case like the one at hand, however, where an employee contends that she has a religious need to impose personally and directly on fellow employees, invading their privacy and criticizing their personal lives, the employer is placed between a rock and a hard place. If Tulon had the power to authorize Chalmers to write such letters, and if Tulon had granted Chalmers' request to write the letters, the company would subject itself to possible suits from Combs and LaMantia claiming that Chalmers' conduct violated their religious freedoms or constituted religious harassment. Chalmers' supervisory position at the Richmond office heightens the possibility that Tulon (through Chalmers) would appear to be imposing religious beliefs on employees.

Thus, even if Chalmers had notified Tulon that her religion required her to send the letters at issue here to her co-workers, Tulon would have been unable to accommodate that conduct.

We do not in any way question the sincerity of Chalmers' religious beliefs or practices. However, it is undisputed that Chalmers failed to notify Tulon that her religious beliefs led her to send personal, disturbing letters to her fellow employees accusing them of immorality. It is also undisputed that the effect of a letter on one of the recipients, LaMantia's wife, whether intended or not, caused a co-worker, LaMantia, great stress and caused him to complain that he could no longer work with Chalmers. Finally, it is undisputed that another employee, Combs, told a company officer that Chalmers' letter upset her (although she later claimed that her working relationship with Chalmers was unaffected). Under these facts, Chalmers cannot establish a religious accommodation claim. Accordingly, the district court's order granting summary judgment to Tulon is AFFIRMED.

Case Questions

1. Is there any way the employer could have avoided this situation? Explain.
2. If the employee had initially told the employer of her plan to write the letters and the employer had told her not to send them, would the outcome be any different if she had done so anyway?
3. What would you have done if your employee's wife called as Mrs. LaMantia did?

Vargas v. Sears, Roebuck & Company *1998 U.S. Dist. LEXIS 21148 (E.D. Mich. 1998)*

A Mexican-American who practiced traditional Native American religion, which considers the wearing of long hair on men to be sacred, sued his employer when he was terminated for refusing to cut his hair or to wear it tucked into his shirt as an accommodation. The court held that the employee was required to try to help in making the accommodation, and the employee had not done so. The court therefore granted the employer's motion to dismiss the employee's complaint.

> Vargas was employed as a salesperson in Ann Arbor, Michigan's Briarwood Mall Sears store from October 1994 until February 1996. He worked on the selling floor in the Sears "Brand Central" home electronics department. When he was hired in the fall of 1994, Vargas was given a copy of the "Sears Associate Handbook," which provides, in pertinent part that all associates were to be neatly dressed in professional, businesslike clothing and for men, beards and contemporary hair styles are acceptable, but should be maintained in a neat, trimmed manner. When Vargas was hired by Sears in the fall of 1994, his hair was collar-length, and therefore, according to Sears, in compliance with store policy.

Rosen, J.

Vargas' supervisor Kevin Jones confronted Vargas about his hair in late summer 1995 when Vargas had his hair in a short pony tail. Jones did not discipline or direct Vargas to do anything about his hair, but rather, merely advised him that Walter Crockrel, the General Store Manager, did not approve of male salespersons wearing their hair in ponytails. Vargas did not tell Mr. Jones that wearing his hair long or in a ponytail was part of his Native American religion.

Vargas testified in his deposition that he adheres to the practices and customs of Native American religion, that he participates in Native American religious ceremonies, including conducting sweat lodge ceremonies. He further testified that in Native American religious practice, many of the beliefs and practices are "personal," and although long hair is not a requirement of his religion, he believes that the practice of Native American religion is dependent upon "your own spiritual development and the sacrifices you want to make for that." Shortly after Jones had this conversation with Vargas, Jones was replaced by Zerry Rue as Vargas' supervisor.

Zerry Rue addressed Vargas' hair with him in October 1995 upon the direction of Walter Crockrel. On October 25, 1995, Rue gave Vargas a memo stating that his ponytail and hair length were not in compliance with Sears personal appearance policies, and that he had until November 1st to bring himself within compliance with the policies. It was in connection with Rue's memo that Sears was informed that Vargas objected to Sears' hair length policy on religious grounds. On October 30, 1995, Vargas' attorney, Jane Bassett, wrote Crockrel that

> [Vargas] is of Mexican-American descent and he practices traditional Native American religion. Traditionally, growing the hair long has sacred significance in Native American religion. A policy which unequivocally prohibits male employees to have long hair discriminates against men who practice traditional Native American religion.

Upon becoming aware that Vargas' religious beliefs precluded him from cutting his hair, Mr. Crockrel, Mr. Rue and Susan Wisniewski, Sears' Human Resources Director, met with Vargas in the first week of November 1995 in an attempt to accommodate his religious beliefs, and asked him to tuck his hair into the collar of his shirt or jacket. Sears had used this accommodation with another Native American employee, Tony Goulet, who also worked at the Briarwood Mall store.

Vargas flatly refused to even attempt to tuck his hair in. He stated "I felt that it was an inhumane accommodation that was not reasonable. . . . It . . . put me in a position of ridicule and . . . didn't allow a conducive position for my spirit to be, you know, free. I felt that I was being made to do something that I didn't feel comfortable doing. I felt that this was another form of religious oppression. . . ."

At his deposition, Vargas, whose hair is now nearly waist-length, took the position that tucking his hair into his collar, no less than cutting his hair, would violate his religious convictions. He actually testified that any demand made upon him would violate his religious beliefs. It is undisputed, however, that during the course of his employment Vargas never told his employer that tucking his hair into his collar would violate his religious beliefs.

Despite Vargas' refusal to attempt to comply with Sears' proposed accommodation, Sears did not immediately terminate his employment. Rather, he was urged by his supervisor to go home and reconsider his position. Vargas eventually chose not to comply with Sears' proposed accommodation and thereby terminated his employment. At no time did Vargas offer any alternatives, but instead demanded that he be allowed to work and wear his hair any way he wanted.

In order for an employee to proceed with a claim of religious discrimination, he must first establish a prima facie case by establishing that (1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he has informed the employer about the conflict; and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement. If an employee establishes a prima facie case, the burden shifts to the employer to show that it offered a reasonable accommodation to the employee

or that it could reasonably accommodate the employee without incurring undue hardship.

Although the burden is on the employer to accommodate the employee's religious needs, the employee must make some effort to cooperate with an employer's attempt at accommodation. Where an employee "will not attempt to . . . cooperate with his employer in its conciliatory efforts, he may forgo the right to have his beliefs accommodated by his employer." An employee cannot shirk his duties to try to accommodate himself or to cooperate with his employer in reaching an accommodation by a mere recalcitrant citation of religious precepts. Nor can he thereby shift all responsibility for accommodation to his employer. Where an employee refuses to attempt to accommodate his own beliefs or to cooperate with his employer's attempt to reach a reasonable accommodation, he may render accommodation impossible. Moreover, any reasonable accommodation fulfills the employer's duty. The employee cannot reject the accommodation simply because he desires an alternative accommodation.

In this case, Vargas has not established a prima facie case of failure to accommodate. While Sears does not dispute that Vargas has religious beliefs that prohibit him from cutting his hair, it is clear from the record that Vargas was not terminated for failing to cut his hair. Vargas admitted in his deposition that he was given the option to tuck his hair into his collar to avoid termination of his employment. He, therefore, has not shown that he was discharged for failing to comply with an employment requirement that conflicted with his religious beliefs.

Although Vargas now takes the position that tucking his hair into his collar would also violate his religious beliefs, one of the elements that Vargas must satisfy in order to establish a prima facie case of religious discrimination is to establish that "he informed his employer about his [religious] conflict." There is no evidence whatsoever to establish that Vargas ever told any of his supervisors that his religion precluded him from tucking his hair into his collar. For all of the foregoing reasons, the Court finds that Vargas has failed to make out a prima facie claim of religious discrimination.

Moreover, even if the Court were to find that Vargas had established a prima facie claim, the Court finds that Sears attempted in good faith to reasonably accommodate Vargas' religious beliefs. As set forth above, where an employee refuses to attempt to accommodate his own beliefs or to cooperate with his employer's attempt to reach a reasonable accommodation, accommodation is deemed to be impossible. Vargas does not have the right to insist on his preferred accommodation. Vargas flatly refused to even attempt to comply with the accommodation of tucking his hair into his collar. He did not propose any alternative accommodation to his employer. In fact, Vargas testified that it was not "his job" to offer alternatives or cooperate in any accommodation proposals that were "imposed" on him or caused him any discomfort. Vargas' refusal to cooperate with Sears with respect to attempts to accommodate his religious beliefs precludes Vargas from challenging the sufficiency or "reasonableness" of Sears' offered accommodation.

For all of the foregoing reasons, Sears' Motion for Summary Judgment on Vargas' Title VII religious discrimination claim will be GRANTED.

Case Questions

1. Do you think that Sears' accommodation was sufficient? Explain.
2. Do you think Sears' policies adequately reflected its workforce? Explain.
3. What approach would you take to developing policies such as these?

Trans World Airlines, Inc. v. Hardison *432 U.S. 63 (1977)*

Employer was unable to accommodate employee's religious conflict of working on the sabbath, without undue hardship. The Court set forth the guidelines for determining what constitutes undue hardship.

White, J.

The employee, Hardison, was employed by Trans World Airlines (TWA), in a department that operated 24 hours a day throughout the year in connection with an airplane maintenance and overhaul base. Hardison was subject to a seniority system in a collective bargaining agreement between TWA and the International Association of Machinists & Aerospace Workers (union), whereby the most senior employees have first choice for job and shift assignments as they become available, and the most junior employees are required to work when enough employees to work at a particular time or in a particular job to fill TWA's needs cannot be found.

Because Hardison's religious beliefs prohibit him from working on Saturdays, attempts were made to accommodate him, and these were temporarily successful mainly because on his job at the time he had sufficient seniority regularly to observe Saturday as his Sabbath. But when he sought, and was transferred to, another job where he was asked to work Saturdays and where he had low seniority, problems began to arise. TWA agreed to permit the union to seek a change of work assignments, but the union was not willing to violate the seniority system, and Hardison had insufficient seniority to bid for a shift having Saturdays off. After TWA rejected a proposal that Hardison work only four days a week on the ground that this would impair critical functions in the airline operations, no accommodation could be reached, and Hardison was discharged for refusing to work on Saturdays.

We hold that TWA, which made reasonable efforts to accommodate Hardison's religious needs, did not violate Title VII, and each of the Court of Appeals' suggested alternatives would have been an undue hardship within the meaning of the statute as construed by the EEOC guidelines. The employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear, but the reach of that obligation has never been spelled out by Congress or by EEOC guidelines. With this in mind, we turn to a consideration of whether TWA has met its obligation under Title VII to accommodate the religious observances of its employees.

The Court of Appeals held that TWA had not made reasonable efforts to accommodate Hardison's religious needs. In its view, TWA had rejected three reasonable alternatives, any one of which would have satisfied its obligation without undue hardship. First, within the framework of the seniority system, TWA could have permitted Hardison to work a four-day week, utilizing in his place a supervisor or another worker on duty elsewhere. That this would have caused other shop functions to suffer was insufficient to amount to undue hardship in the opinion of the Court of Appeals. Second, also within the bounds of the collective-bargaining contract the company could have filled Hardison's Saturday shift from other available personnel competent to do the job, of which the court said there were at least 200. That this would have involved premium overtime pay was not deemed an undue hardship. Third, TWA could have arranged a "swap between Hardison and another employee either for another shift or for the Sabbath days." In response to the assertion that this would have involved a breach of the seniority provisions of the contract, the court noted that it had not been settled in the courts whether the required statutory accommodation to religious needs stopped short of transgressing seniority rules, but found it unnecessary to decide the issue because, as the Court of Appeals saw the record, TWA had not sought, and the union had therefore not declined to entertain, a possible variance from the seniority provisions of the collective-bargaining agreement. The company had simply left the entire matter to the union steward who the Court of Appeals said "likewise did nothing."

We disagree with the Court of Appeals in all relevant respects. It is our view that TWA made reasonable efforts to accommodate and that each of the suggested alternatives would have been an undue hardship within the meaning of the statute as construed by the EEOC guidelines.

It might be inferred from the Court of Appeals' opinion and from the brief of the EEOC in this Court that

TWA's efforts to accommodate were no more than negligible. The findings of the District Court, supported by the record, are to the contrary. In summarizing its more detailed findings, the District Court observed:

> "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."

It is also true that TWA itself attempted without success to find Hardison another job. The District Court's view was that TWA had done all that could reasonably be expected within the bounds of the seniority system.

We are also convinced, contrary to the Court of Appeals, that TWA itself cannot be faulted for having failed to work out a shift or job swap for Hardison. Both the union and TWA had agreed to the seniority system; the union was unwilling to entertain a variance over the objections of men senior to Hardison; and for TWA to have arranged unilaterally for a swap would have amounted to a breach of the collective-bargaining agreement.

Hardison and the EEOC insist that the statutory obligation to accommodate religious needs takes precedence over both the collective-bargaining contract and the seniority rights of TWA's other employees. 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. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. 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.

The Court of Appeals also suggested that TWA could have permitted Hardison to work a four-day week if necessary in order to avoid working on his Sabbath. Recognizing that this might have left TWA short-handed on the one shift each week that Hardison did not work, the court still concluded that TWA would suffer no undue hardship if it were required to replace Hardison either with supervisory personnel or with qualified personnel from other departments. Alternatively, the Court of Appeals suggested that TWA could have replaced Hardison on his Saturday shift with other available employees through the payment of premium wages. Both of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages.

To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship. 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. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs. While the cost may seem small for one employee compared to TWA's resources, TWA may have many employees who need such accommodation.

Case Questions

1. In your opinion, were the alternatives suggested by the court of appeals viable for TWA? Why or why not?
2. Does it seem inconsistent to prohibit religious discrimination yet say that collective bargaining agreements cannot be violated to accommodate religious differences? Explain.
3. If you had been Hardison's manager and he came to you with this conflict, how would you have handled it? Does that change now that you have seen the Court's decision? If so, how?

Case 12 Pime v. Loyola University of Chicago *803 F.2d 351 (7th Cir. 1986)*

The employee, Pime, brought suit against the university under Title VII for religious discrimination in the hiring of tenure track professors in its College of Arts and Sciences, Department of Philosophy. The Department passed a resolution reserving its next three vacancies in tenure track teaching positions for Jesuits, members of the Society of Jesus. The court held the Jesuit requirement to be a BFOQ and not violative of Title VII.

Fairchild, J.

Loyola asserts two affirmative defenses. First, it claimed that it could require its employees to be Jesuits (and thus Catholics) under 42 U.S.C. 2000e-2(e) permitting an educational institution to employ persons of a particular religion if the institution is "in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, . . . association, or society." It also claimed it could require those employees to be Jesuits according to 42 U.S.C. 2000e-2(e)(1) permitting an employer to employ an individual "on the basis of his religion, gender or national origin in those certain situations where religion, gender or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." (BFOQ)

After a bench trial, the district court granted judgment in favor of Loyola, finding that being a Jesuit is a BFOQ. Employee challenges the finding of BFOQ. Loyola challenges the trial court's finding that it could not rely on subsection (e)(2).

The Society of Jesus is a religious order of the Roman Catholic Church. Its members, who are, with few exceptions, priests, are called Jesuits. The order has been characterized by interests and particular energy in the promotion of education, and has established twenty-eight universities in the United States. Jesuits are required to complete a protracted course of training and to make perpetual vows. Once they accept positions as professors they continue to incorporate their religious mission into their professional work.

Loyola University of Chicago has a long Jesuit tradition. Since 1909 its legal entity has been an Illinois not-for-profit corporation. Until 1970, it was governed by a Board of Trustees, all members of which were Jesuits. It has become a large university, consisting of ten schools and colleges, a medical center and a hospital. Presently 93% of the academic administrators are non-Jesuits, as are 94% of the teaching staff.

Every undergraduate must take three Philosophy courses. About 75% of the students come from Catholic backgrounds. There was testimony by the President that, "I'm convinced that of all the things we say about Loyola, the most effective single adjective in attracting students and alumni support and benefactors is its Jesuitness."

In the fall of 1978, there were 31 tenure track positions in the Philosophy Department. Seven had been held by Jesuits, but one had resigned and two more retirements were imminent. On October 12, the department chair reported to a meeting of the department and faculty as follows:

> We anticipate 3 full-time faculty openings in the Philosophy Department beginning September 1979. They are the position of Fr. Dehler and those of Fr. Grant and Fr. Loftus after they retire at the end of the current academic year.
>
> There are two different kinds of departmental needs which seem to bear heavily on the decisions as to the kind of persons we should seek to hire for these openings.
>
> 1. The first is a need which the Chair voiced two years ago just after Fr. Dehler's resignation. That is, the need for an adequate Jesuit presence in the Department. We are a Philosophy Department in a University with a Jesuit tradition. It is mainly by reason of this tradition that philosophy has the importance it does in the education of Loyola undergraduates. Therefore, it behooves us, however strong we may feel about "the autonomy of philosophy," to acknowledge our association with this tradition. One very basic and obvious way of making such acknowledgments is by insisting upon an adequate Jesuit presence in the faculty of the Department. With the retirement of Father Grant and Father Loftus, we shall be left with 4 out of 31 faculty positions occupied by Jesuits. Four out of 31 is not an

adequate Jesuit presence in the Department. In the judgment of the Chair, it would be highly desirable to fill all three openings with professionally competent Jesuit philosophers. And it is his recommendation that we do so if we can.

The second kind of departmental need is for faculty, especially qualified to teach courses in the following areas: *a.* Applied ethics, especially medical ethics. There is an increasing student demand for such courses and for additional undergraduate course offerings at the Medical School. *b.* Philosophy of Law. This is one of the most popular of our 300-level course offerings. It needs to be offered annually both at Lake Shore Campus and Water Tower Campus. *c.* Logic. There is an exceedingly heavy student enrollment at both Lake Shore Campus and Water Tower Campus. Additional sections of courses in logic should be offered in each campus.

Consequently, we should seek persons who have special competence and interest in teaching courses in these areas. The Chair's recommendation is that we seek to hire persons who will help teach in these two areas.

These two kinds of needs are different, though not incompatible. The Chair's recommendation as to hiring is the following:

That for each of these 3 positions we seek to hire a professionally competent Jesuit philosopher—preferably a young Jesuit with competence to teach in one or several of the following areas: *a*) applied ethics, especially medical ethics; *b*) philosophy of law; and *c*) logic; and that if we should be unable to hire such, we hire temporary full-time person(s) with special competence to teach in one or several of these areas.

Pime, a Jew, had been employed in 1976 as a part-time lecturer in the department. He taught several courses. He expected to receive his doctorate in June 1979 and had received indications of approval of his work. He knew of the resolution of November 30, and asked the department chair when there would be a full-time tenure track position for him. The chair said he saw nothing in the way of a position for Pime in the next three or four years. Disappointed, Pime left Loyola after the spring semester.

There is no hint of invidious action against Pime on account of his religion. The faculty resolution excluded every non-Jesuit from consideration, whether of the Catholic faith or otherwise. We shall assume, however, that because Pime's faith would prevent his being a Jesuit, he has a claim on discrimination on account of religion.

The BFOQ involved in this case is membership in a religious order of a particular faith. There is evidence of the relationship of the order to Loyola and that Jesuit "presence" is important to the successful operation of the university. It appears to be significant to the educational tradition and character of the institution that students be assured a degree of contact with teachers who have received the training and accepted the obligation which are essential to membership in the Society of Jesus. It requires more to be a Jesuit than just adherence to the Catholic faith, and it seems wholly reasonable to believe that the educational experience at Loyola would be different if Jesuit presence were not maintained. As priests, Jesuits perform rites and sacraments, and counsel members of the university community, including students, faculty and staff. One witness expressed the objective as keeping a presence "so that students would occasionally encounter a Jesuit."

It is true that it has not been shown that Jesuit training is a superior academic qualification, applying objective criteria, to teach the particular courses. It is also true that in looking at claims of BFOQ, courts have considered only the content of the particular jobs at issue. Yet it seems to us here the evidence supports the more general proposition that having a Jesuit presence in the Philosophy faculty is "reasonably necessary to the normal operation" of the enterprise, and that fixing the number at 7 out of 31 is a reasonable determination.

Case Questions

1. Does the decision make sense to you? Explain.
2. Since such a high percentage of Loyola's faculty and administrators are non-Jesuits, does it seem as if an argument could be made that the school has thereby given up its legitimate claim to have being Jesuit be a BFOQ?
3. As an employer, do you think you would have to face dealing with the policy adopted here making other employees or applicants feel unwelcome? If so, what would you do?

Case 13 Peterson v. Hewlett-Packard Co. *358 F.3d 599 (9th Cir. 2004)*

Employee sued employer for religious discrimination and alleged religious harassment after being terminated for repeatedly refusing to remove biblical passages he posted in his workplace cubicle, easily seen by all, in response to employer's workplace diversity posters that included affinity orientation. The court upheld the termination, concluding that the employer was not required to go along with employee's admitted goal of hurting gay and lesbian employees in an effort to get them to "repent and be saved."

Reinhardt, J.

In this religious discrimination action under Title VII of the Civil Rights Act of 1964, Richard Peterson claims that his former employer, the Hewlett-Packard Company, engaged in disparate treatment by terminating him on account of his religious views and that it failed to accommodate his religious beliefs.

The conflict between Peterson and Hewlett-Packard arose when the company began displaying "diversity posters" in its Boise office as one component of its workplace diversity campaign. The first series consisted of five posters, each showing a photograph of a Hewlett-Packard employee above the caption "Black," "Blonde," "Old," "Gay," or "Hispanic." Posters in the second series included photographs of the same five employees and a description of the featured employee's personal interests, as well as the slogan "Diversity is Our Strength."

Peterson describes himself as a "devout Christian," who believes that homosexual activities violate the commandments contained in the Bible and that he has a duty "to expose evil when confronted with sin." In response to the posters that read "Gay," Peterson posted two Biblical scriptures on an overhead bin in his work cubicle. The scriptures were printed in a typeface large enough to be visible to co-workers, customers, and others who passed through an adjacent corridor.

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Peterson's direct supervisor removed the scriptural passages after consulting her supervisor and determining that they could be offensive to certain employees, and that the posting of the verses violated Hewlett-Packard's policy prohibiting harassment. Throughout the relevant period, Hewlett-Packard's harassment policy stated as follows: "Any comments or conduct relating to a person's race, gender, religion, disability, age, sexual orientation, or ethnic background that fail to respect the dignity and feeling [sic] of the individual are unacceptable."

Over the course of several days after Peterson posted the Biblical materials, he attended a series of meetings with Hewlett-Packard managers, during which he and they tried to explain to each other their respective positions. Peterson explained that he meant the passages to communicate a message condemning "gay behavior." The scriptural passages, he said, were "intended to be hurtful. And the reason [they were] intended to be hurtful is you cannot have correction unless people are faced with truth." Peterson hoped that his gay and lesbian coworkers would read the passages, repent, and be saved.

In these meetings, Peterson also asserted that Hewlett-Packard's workplace diversity campaign was an initiative to "target" heterosexual and fundamentalist Christian employees at Hewlett-Packard, in general, and him in particular. Ultimately, Peterson and the managers were unable to agree on how to resolve the conflict. Peterson proposed that he would remove the offending scriptural passages if Hewlett-Packard removed the "Gay" posters; if, however, Hewlett-Packard would not remove the posters, he would not remove the passages. When the managers rejected both options, Peterson responded: "I don't see any way that I can compromise what I am doing that would satisfy both [Hewlett-Packard] and my own conscience." He further remonstrated: "as long as [Hewlett-Packard] is condoning [homosexuality] I'm going to oppose it. . . ."

Peterson was given time off with pay to reconsider his position. When he returned to work, he again posted the scriptural passages and refused to remove them. After further meetings with Hewlett-Packard managers, Peterson was terminated for insubordination.

Following receipt of a right to sue notice from the EEOC, Peterson filed a complaint alleging religious discrimination in violation of Title VII and the Idaho Human Rights Act. Both parties moved for summary judgment. The district court granted Hewlett-Packard's motion and denied Peterson's. We affirm.

Title VII makes it unlawful for an employer "to discharge any individual . . . because of such individual's . . .

religion[.]" "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." Our analysis of Peterson's religious discrimination claims under the Idaho Human Rights Act is the same as under Title VII.

A claim for religious discrimination under Title VII can be asserted under several different theories, including disparate treatment and failure to accommodate. In arguing that Hewlett-Packard discriminated against him on account of his religious beliefs, Peterson relies on both these theories.

Peterson has the burden of establishing a prima facie case by showing that (1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. It is with respect to the fourth requirement that Peterson's case fails.

Initially, we address Peterson's argument that Hewlett-Packard's workplace diversity campaign was "a crusade to convert fundamentalist Christians to its values," including the promotion of "the homosexual lifestyle." The undisputed evidence shows that Hewlett-Packard carefully developed its campaign during a three-day diversity conference at its Boise facility in 1997 and subsequent planning meetings in which numerous employees participated. The campaign's stated goal—and no evidence suggests that it was pretextual—was to increase tolerance of diversity. Peterson may be correct that the campaign devoted special attention to combating prejudice against homosexuality, but such an emphasis is in no manner unlawful. To the contrary, Hewlett-Packard's efforts to eradicate discrimination against homosexuals in its workplace were entirely consistent with the goals and objectives of our civil rights statutes generally.

In addition to Peterson's allegations about the general purposes of the diversity initiative, he asserts that the campaign that Hewlett-Packard conducted, as well as "the entire disciplinary process" that it initiated in response to his posting of the scriptural passages, constituted "an inquisition serving no other purpose than to ferret out the extremity of Peterson's views on homosexuality." According to Peterson, Hewlett-Packard managers harassed him in order to convince him to change his religious beliefs. However, the evidence that Peterson cites in support of this theory shows that Hewlett-Packard managers acted in precisely the opposite manner. In numerous meetings, Hewlett-Packard managers acknowledged the sincerity of Peterson's beliefs and insisted that he need not change them. They did not object to Peterson's expression of his anti-gay views in a letter to the editor that was published in the *Idaho Statesman*—a letter in which Peterson stated that Hewlett-Packard was "on the rampage to change moral values in Idaho under the guise of diversity," and that the diversity campaign was a "platform to promote the homosexual agenda." Nor did the Hewlett-Packard managers prohibit him from parking his car in the company lot even though he had affixed to it a bumper sticker stating, "Sodomy is Not a Family Value." All that the managers did was explain Hewlett-Packard's diversity program to Peterson and ask him to treat his co-workers with respect. They simply requested that he remove the posters and not violate the company's harassment policy—a policy that was uniformly applied to all employees. No contrary inference may be drawn from anything in the record.

Peterson also maintains that the disciplinary proceedings and his subsequent termination stand in marked contrast to Hewlett-Packard's treatment of three other groups of similarly situated employees. Peterson compares himself, first, to the employees who hung the diversity posters. He argues that these posters were intended "to make people uncomfortable so they would think again about diversity and change their actions to be more positive." He likens these actions to his own intentions to make his "scriptures [] hurtful so that people would repent (change their actions) and experience the joys of being saved." This comparison fails because the employees who hung the diversity posters were simply communicating the views of Hewlett-Packard as they were directed to do by management, whereas Peterson was expressing his own personal views which contradicted those of management. Moreover, unlike Peterson's postings, the company's workplace diversity campaign did not attack any group of employees on account of race, religion, or any other important individual characteristic. To the contrary, Hewlett-Packard's initiative was intended to promote tolerance of the diversity that exists in its workforce. Hewlett-Packard's failure to fire employees for following management's instructions to hang the posters prepared by management provides no evidence of disparate treatment.

Second, Peterson compares himself with other employees who posted religious and secular messages and symbols in their work spaces. Yet Peterson failed to present any evidence that the posters in other Hewlett-Packard employees' cubicles were intended to be "hurtful" to, or critical of, any other employees or otherwise violated the company's harassment policy. In fact, the only posters in other employees' work spaces that Peterson identified were of "Native American dream catchers," "New Age pictures of whales," and a yinyang symbol.

Third, Peterson argues that he was similarly situated to the network group of homosexual employees that Hewlett-Packard permitted to organize in the workplace and advertise in the company's e-mail and its newsletter. Yet Peterson failed to present any evidence that communications from this network group were, let alone were intended to be, hurtful to any group of employees. Nor does anything in the record indicate that Hewlett-Packard permitted or would have permitted any network group or any individual employee to post messages of either a secular or religious variety that demeaned other employees or violated the company's harassment policy.

In short, we conclude that Peterson's evidence does not meet the threshold for defeating summary judgment in disparate treatment cases. Peterson offered *no* evidence, circumstantial or otherwise, that would support a reasonable inference that his termination was the result of disparate treatment on account of religion. Viewing the record in the light most favorable to Peterson, it is evident that he was discharged, not because of his religious beliefs, but because he violated the company's harassment policy by attempting to generate a hostile and intolerant work environment and because he was insubordinate in that he repeatedly disregarded the company's instructions to remove the demeaning and degrading postings from his cubicle.

Peterson also appeals the district court's rejection of his failure-to-accommodate theory of religious discrimination. An employee who fails to raise a reasonable inference of disparate treatment on account of religion may nonetheless show that his employer violated its affirmative duty under Title VII to reasonably accommodate employees' religious beliefs. To establish religious discrimination on the basis of a failure-to-accommodate theory, Peterson must first set forth a prima facie case that (1) he had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement. If Peterson makes out a prima facie failure-to-accommodate case, the burden then shifts to Hewlett-Packard to show that it "initiated good faith efforts to accommodate reasonably the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship."

As we explain below, it is readily apparent that the only accommodations that Peterson was willing to accept would have imposed undue hardship upon Hewlett-Packard. Therefore, we will assume *arguendo* that Peterson could establish a prima facie case that his posting of the anti-gay scriptural passages stemmed from his religious beliefs that homosexual activities "violate the commandments of God contained in the Holy Bible" and that those same religious beliefs imposed upon him "a duty to expose evil when confronted with sin." We make that assumption with considerable reservations, however, because we seriously doubt that the doctrines to which Peterson professes allegiance compel any employee to engage in either expressive or physical activity designed to hurt or harass one's fellow employees.

An employer's duty to negotiate possible accommodations ordinarily requires it to take "some initial step to reasonably accommodate the religious belief of that employee." Peterson contends that the company did not do so in this case even though Hewlett-Packard managers convened at least four meetings with him. In these meetings, they explained the reasons for the company's diversity campaign, allowed Peterson to explain fully his reasons for his postings, and attempted to determine whether it would be possible to resolve the conflict in a manner that would respect the dignity of Peterson's fellow employees. Peterson, however, repeatedly made it clear that only two options for accommodation would be acceptable to him, either that (1) both the "Gay" posters and anti-gay messages remain, or (2) Hewlett-Packard remove the "Gay" posters and he would then remove the anti-gay messages. Given Peterson's refusal to consider other accommodations, we proceed to evaluate whether one or both of the "acceptable" accommodations would have imposed undue hardship upon Hewlett-Packard, or to determine whether Hewlett-Packard carried its burden of showing that no reasonable accommodation was possible.

As we explain further below, Peterson's first proposed accommodation would have compelled Hewlett-Packard to permit an employee to post messages intended

to demean and harass his co-workers. His second proposed accommodation would have forced the company to exclude sexual orientation from its workplace diversity program. Either choice would have created undue hardship for Hewlett-Packard because it would have inhibited its efforts to attract and retain a qualified, diverse workforce, which the company reasonably views as vital to its commercial success; thus, neither provides a reasonable accommodation.

With respect to Peterson's first proposal, an employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights. Nor does Title VII require an employer to accommodate an employee's desire to impose his religious beliefs upon his co-workers.

That is not to say that accommodating an employee's religious beliefs creates undue hardship for an employer merely because the employee's co-workers find his conduct irritating or unwelcome. Complete harmony in the workplace is not an objective of Title VII. If 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. While Hewlett-Packard must tolerate some degree of employee discomfort in the process of taking steps required by Title VII to correct the wrongs of discrimination, it need not accept the burdens that would result from allowing actions that demean or degrade, or are designed to demean or degrade, members of its workforce. Thus, we conclude that Peterson's first proposed accommodation would have created undue hardship for his employer.

The only other alternative acceptable to Peterson—taking down all the posters—would also have inflicted undue hardship upon Hewlett-Packard because it would have infringed upon the company's right to promote diversity and encourage tolerance and good will among its workforce. The Supreme Court has acknowledged that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." These values and good business practices are appropriately promoted by Hewlett-Packard's workplace diversity program. To require Hewlett-Packard to exclude homosexuals from its voluntarily adopted program would create undue hardship for the company.

Because only two possible accommodations were acceptable to Peterson and implementing either would have imposed undue hardship upon Hewlett-Packard, we conclude that the company carried its burden of showing that no reasonable accommodation was possible, and we therefore reject Peterson's failure-to-accommodate claim.

Peterson failed to raise a triable issue of fact that his termination from employment at Hewlett-Packard was on account of his religious beliefs. The ruling of the district court is therefore AFFIRMED.

Case Questions

1. Do the employer's actions here seem reasonable to you (both those in response to diversity and those in response to the employee's reaction)?
2. Would you have balanced the two sides here the same as the court? Explain.
3. How would you design a diversity program that no employee would have problems with?