Labor & Employment Law

Religious Accommodation in the Workplace: Current Trends Under Title VII

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A recent survey of American workers suggests that religious discrimination is a growing workplace concern.[1] Indeed, there has been an eighty-seven percent increase in the number of religious discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) over the past ten years.[2] Increasing religious diversity[3] in the workplace is just one reason for this trend. When conflicts arise between employer policies and employees' exercise of religious beliefs, employers must be aware of their rights and obligations with respect to providing religious accommodation. The EEOC recognized this conflict and in March 2014 issued "Religious Garb and Grooming in the Workplace: Rights and Responsibilities," which focuses on how Title VII applies to religious dress and grooming practices.[4] This guidance outlines the Commission's view of the employer's legal responsibility,[5] and offers examples of proper employer conduct.[6]

This article will review how religious accommodation came to be in Title VII of the Civil Rights Act and how courts are interpreting employers' accommodation duties.

I. Religious Accommodation and Title VII

Religious freedom is a foundational civil liberty enshrined in the First Amendment to The United States Constitution.[7]

Title VII of the Civil Rights Act of 1964 (Title VII) makes it unlawful to discriminate against employees on the basis of religion, in addition to race, color, national origin, and sex.[8] However, Title VII in its original form did not extend this protection to the accommodation of religious beliefs.[9] This omission was highlighted in the case of *Dewey v. Reynolds Metals Co.*[10]

Robert Kenneth Dewey began working for Reynolds Metals Company in 1951.[11] In 1961, Dewey became a member of the Faith Reformed Church.[12] His religious beliefs prevented him from working on Sundays.[13] The company and the union representing the workers had a collective bargaining agreement that, among other things, provided that all bargaining unit employees, "shall be obligated to perform all straight time and overtime work required of them by the company except when an employee has a substantial and justifiable reason for not working."[14] Dewey never volunteered for overtime work on Sundays.[15] Dewey refused to work on Sunday, November 21, 1965, because of his religious beliefs.[16] At that time, Dewey received a warning and was reminded that it was necessary for the company to maintain a seven-day work week.[17]

Dewey was able to avoid overtime work by seeking replacements to work for him between January and August of 1966, when he was scheduled to work on Sundays.[18] On August 28, 1966, and for the following two Sundays, Dewey declined to work and declined to seek a replacement due to his religious beliefs.[19] Consequently, Dewey was fired for violation of plant rules.[20] Dewey filed suit against Reynolds Metals for religious discrimination.[21]

Approximately ten months after Dewey's termination, the EEOC issued regulations that, for the first time, stated that Title VII's religious discrimination prohibition included the failure of an employer to reasonably accommodate the religious needs of employees where accommodations can be made without undue hardship on the conduct of the employer's business.[22]

After a bench trial, the federal district judge ruled in favor of Dewey.[23]

On appeal, the U.S. Court of Appeals for the Sixth Circuit reversed the district court's decision finding that the legislative history of Title VII was clear that it was aimed only at discriminatory practices.[24] The Sixth Circuit found that the collective bargaining agreement was not discriminatory, nor was it discriminatory in application.[25] A petition for Rehearing en banc was denied by the Court of Appeals. The United States Supreme Court affirmed the Sixth Circuit decision in a per curiam decision by an equally divided Court.[26]

As a result of *Dewey*, an amendment to Title VII was proposed by Senator Jennings Randolph (D-W. Va.). The Senator was a member of the Seventh Day Baptist Church whose Saturday Sabbath often conflicted with work requirements.[27] The 1972 amendment to Title VII required employers to reasonably accommodate an employee's religious practices.[28] Congress included the following definition of religion in its 1972 amendments to Title VII:

> The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[29]

The amendment remains the law, but has been interpreted by Supreme Court decisions.

II. Supreme Court Religious Accommodation Decisions

Subsequent to *Dewey* and the enactment of the 1972 amendment to Title VII, the United States Supreme Court addressed the issue of religious accommodation in two seminal cases: *Trans World Airlines Inc. v. Hardison*[30] and *Ansonia Board of Education v. Philbrook*.[31]

In *Hardison*, after a detailed review of the legislative history of the 1972 amendment, the Court determined that the intent and effect of the amendment was to make it an unlawful employment practice for an employer not to make reasonable accommodations, short of undue hardship, for the religious

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practices of employees and prospective employees.[32] The Court noted that the text of the 1972 amendment did not provide guidance in making a determination as to what constituted a reasonable accommodation; thus it was left to the Court to fashion a definition of what constitutes reasonable accommodation efforts.[33]

In the first case, Larry Hardison was hired by Trans World Airlines (TWA) at its maintenance and overhaul base in Kansas City, Missouri, on July 5, 1967, to work as a clerk in the Store Department.[34] The Store Department played an essential role in the operation of the TWA Kansas City Operation and it operated 24/7, 365 days per year.[35] The employees at the TWA Kansas City base were subject to a seniority system in a collective bargaining agreement.[36] In the spring of 1968, Hardison began studying the religion known as the Worldwide Church of God.[37] One of the tenets of that religion required observance of the Sabbath by refraining from performing any work from sunset Friday until sunset on Saturday and on certain specified religious holidays.[38] In April 1968, Hardison first advised his supervisor, Everett Kussman, of his religious beliefs and his need for accommodation for his religious observances.[39] Kussman agreed that the union steward should seek a job swap for Hardison or change his days off; that Hardison would have his religious holidays off whenever possible, if Hardison agreed to work the traditional holidays when asked; and that the supervisor would try to find Hardison another job that would be more compatible with his religious beliefs.[40] The issue was temporarily resolved when Hardison was transferred to the 11:00 p.m. -7:00 a.m. shift, which permitted him to observe his Sabbath.[41] This situation changed when Hardison bid into a day-shift position.[42] TWA agreed to allow the union to seek a change of work assignments for Hardison, but the Union was not willing to violate the seniority provisions of the collective bargaining agreement.[43] TWA rejected a proposal to allow Hardison to work four days per week, since his position was essential and he was the only available person on his shift to perform the job on weekends, thus leaving the position empty would impair the supply shop functions.[44] When an accommodation could not be reached, Hardison refused to report to work on Saturdays.[45] After a discharge hearing, Hardison was terminated on grounds of insubordination for his refusal to work during his designated shift.[46]

Hardison invoked the administrative remedy provided by Title VII and filed a charge with the EEOC for religious discrimination. He later sought injunctive relief in the United States District Court against TWA and the union, claiming his discharge by TWA constituted religious discrimination and that he was entitled to reasonable accommodation of his religious needs whenever such accommodation would not work undue hardship on the employer.[47] Hardison and the EEOC argued that the statutory obligation to accommodate religious needs took precedence over both the collective bargaining agreement and the seniority rights of TWA's other employees. [48]

The Supreme Court agreed that neither a collective bargaining contract, nor a seniority system may be employed to violate Title VII, but declined to hold that the duty to accommodate required TWA to take steps inconsistent with the otherwise valid collective bargaining agreement. The Court found that 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.[49] It stated that without a clear and express indication from Congress that "we do not agree that an agreed-upon seniority system must give way when necessary to accommodate religious observances."[50]

The Court also found TWA made reasonable efforts to accommodate Hardison and that TWA established as a matter of fact that it took appropriate action to accommodate as required by Title VII. [51] It noted TWA held several meetings with Hardison in an attempt to find a solution to his religious conflict with TWA's business needs.[52] The Court found TWA accommodated Hardison's observance of his special religious holidays and authorized the union steward to search for someone who would swap shifts, which apparently was normal procedure.[53]

The Court further found that based on the repeated, unequivocal emphasis in the statutory language and the legislative history of Title VII on eliminating discrimination in employment, that such discrimination is proscribed when it is directed against majorities as well as minorities.[54] Therefore, the Court found TWA was not required by Title VII to carve out a special exception to its seniority system to help Hardison to meet his religious obligations.[55] Moreover, the Court reasoned that to require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off would impose an undue hardship.[56] It further reasoned that 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.[57] The Court concluded that an accommodation causes "undue hardship" whenever that accommodation results in "more than a de minimis cost" to the employer.[58]

The Supreme Court revisited the issue nearly ten years later. In *Philbrook*, Ronald Philbrook was a schoolteacher and his religious beliefs required him to refrain from secular employment on certain holy days. He missed approximately six school days each year, whereas the collective bargaining agreement under which the teacher worked allowed only three days' annual leave for religious observances and barred the use of additional personal business leave for religious observances or other specified purposes.[59] The local school board rejected Philbrook's suggestions that he be allowed to use personal business leave for religious observances or that he be paid for his additional leave days on the condition that he pay for a substitute teacher. Philbrook was forced to take unauthorized leave without pay or to schedule required hospital visits on his holy days to fully observe those days.[60] After exhausting available avenues of administrative relief, the teacher filed suit against the school board and others in the United States District Court for the District of Connecticut, alleging that prohibiting the use of personal leave for religious purposes violated Title VII.[61]

After a trial on the merits, the district court ruled in favor of the defendants, holding that Philbrook had failed to prove religious discrimination because he had not been forced

to choose between violating his religion and losing his job.[62]

The U.S. Court of Appeals for the Second Circuit reversed the district court. It held that (1) the teacher had established a prima facie case by showing that the conflict between his religious beliefs and the board's attendance requirements had led to a loss of pay; and (2) that where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the employee's proposal unless that accommodation causes undue hardship on the conduct of the employer's business.[63] The Second Circuit also assumed that the Board's leave policy constituted a reasonable accommodation to the teacher's belief.[64]

In *Philbrook*, the United States Supreme Court affirmed the judgment of the Second Circuit, but after examining the terms and legislative history of Title VII, the Court found that the Second Circuit's conclusion that an employer's accommodation obligation includes a duty to accept the employee's proposal unless that accommodation causes undue hardship on the conduct of the employer's business was incorrect.[65] Since both the disctrict court and the Second Circuit applied erroneous views of the law, neither considered the question of whether the the Board's leave policy constituted a reasonable accommodation of the teacher's beliefs. The Court instructed the district court on remand to make the necessary findings as to past and existing practice in the administration of the collective bargaining agreement.[66]

The Court in *Philbrook* reaffirmed its holding in *Hardison* that an employer satisfies its obligations under Title VII when it demonstrates that it has offered a reasonable accommodation to the employee in an attempt to resolve a religious conflict with workplace needs.[67] Examining the statutory language and the legislative history of Title VII, the Court found that there is no basis for requiring an employer to choose any particular reasonable accommodation.[68] It stated the terms of Title VII directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation and 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."[69] The Court reasoned that the statutory inquiry ends where the employer already has reasonably accommodated the employee's religious needs.[70] Thus, according to the Court, an employer need not further show that each of the employee's alternative accommodations would result in undue hardship.[71] The Court reaffirmed its decision in *Hardison* that the extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without undue hardship.[72]

Hardison and *Philbrook* define the criteria for an employer in making an assessment of whether a religious accommodation is reasonable and whether the employer can make the accommodation without undue hardship.

III. Religious Accommodation in Context: Illustrative Recent Decisions

A. Work Schedules and Leave Requests

A common request for religious accommodation is modification of a work schedule due to conflicts with religious beliefs or practices. The lower courts, following the guidance of the Court in *Hardison* and *Philbrook*, sometimes struggle with the determination of what constitutes a reasonable accommodation and undue hardship given the fact-specific nature of the inquiry.

Recently, the U.S. Court of Appeals for the Seventh Circuit ruled in *Adeyeye v. Heartland Sweeteners, LLC*, that two written requests from an employee for unpaid leave to attend funeral rites for his father in Africa created a genuine issue of material fact regarding notice of the religious nature of the request for accommodation purposes under Title VII.[73]

On July 19, 2010, Sikiru Adeyeye, a native of Nigeria who moved to the United States in 2008, provided a written request to Heartland Sweeteners of his need for five weeks' unpaid leave to participate in the funeral rites for this father in Africa according to his custom and tradition.[74] Adeyeye's request for leave included a chronology of events that would occur in Nigeria during the time requested for leave.[75] He also stated that if he failed to lead the burial rites, he and his family members would suffer at least spiritual death.[76] Heartland denied the request.[77] On September 15, 2010, Adeyeye made a second request for one week of his earned vacation and three weeks of unpaid leave.[78] In the second request, Adeyeye again stated the leave was to attend the "funeral ceremony of my father in my country, Nigeria—Africa[.]"[79] He also detailed, "I have to be there and involved totally in this burial ceremony being the first child and the only son of the family."[80] Heartland again denied his request.[81] Notwithstanding the denial of the leave request, Adeyeye traveled to Nigeria for the ceremony.[82] Upon Adeyeye's return to work, Heartland terminated his employment.[83]

Adeyeye later filed a lawsuit alleging Heartland's denial of his leave request and his subsequent termination violated Title VII. The District Court granted summary judgment in favor of Heartland, finding the two written leave requests did not present evidence sufficient for a reasonable jury to find that Adeyeye had provided Heartland with notice of the religious character of his request for unpaid leave. The case was then appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit disagreed with the district court and reversed the summary judgment ruling.

The Seventh Circuit noted the statutory definition of religion in Title VII is an unusual blend, combining a broad substantive definition of religion with an implied duty to accommodate an employee's religious beliefs and practices.[84] Further, the Seventh Circuit examined the Supreme Court's decision in *United States v. Seeger*, which held the key inquiry in a religious accommodation case "is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."[85] The Seventh Circuit found a genuinely held belief that involves matters of the afterlife, spirituality, or the soul among other possibilities, qualifies as religion under Title VII.[86] Further, these protections are not limited to familiar religions, it explained.[87]

The Seventh Circuit described three factors to consider when determining whether a belief is in fact religious for purpose of Title VII: "(1) the belief necessitating the accommoda-

tion must actually be religious, (2) that the religious belief must be sincerely held, and (3) accommodation of the sincerely held belief must not impose an undue hardship."[88]

The court specifically noted that Adeyeye in his two requests for leave referenced the "funeral ceremony" and "funeral rite," as well as the animal sacrifices and spiritual repercussions of his failure to attend.[89] These references, it said, would allow a reasonable jury to find that Adeyeye gave sufficient notice of the religious nature of his request for unpaid leave. The Seventh Circuit also found that the information provided by Adeyeye evidenced his own personal and sincerely held religious beliefs.[90] Further, it explained, the issue of undue hardship depends on close attention to the specific circumstances of the job and the leave schedule the employee believes is needed.[91] The Seventh Circuit's decision in *Adeyeye* illustrates the challenge that employers face in accommodating employee religious practices where non-traditional religions are increasing in the workplace.

The sincerity of employee's religious beliefs, was recently addressed by the Fifth Circuit in *Davis v. Fort Bend County*.[92] The plaintiff, Lois Davis, was a Desktop Support Supervisor and her team was assigned on the weekend of July 4, 2011 to assist with testing of computers to ensure that all the computers had been properly installed in the newly built Fort Bend County Justice Center.[93] Davis informed her supervisor that she would not be available to work during the morning of Sunday, July 3, 2011, due to a previous religious commitment.[94] Davis indicated that this was a special church service for the Church Without Walls because her church was breaking ground for a new church, and she "needed" to be at church that day.[95] Davis also stated that she would come in to work after the service and would find a replacement for her morning absence.[96] The absence was not approved and she was subsequently terminated.[97]

The district court granted summary judgment to Fort Bend on Davis's claims of retaliation and religious discrimination under Title VII by finding that the absence from work was due to a personal commitment, not a religious conviction because she described the obligation as a request from her pastor.[98]

The Fifth Circuit reversed the grant of summary judgment on the religious claim finding that neither Fort Bend nor the district court addressed whether Davis' belief was sincere and focused upon the nature of the activity itself.[99] The Fifth Circuit specifically stated that a showing of sincerity does not require proof that the July 3rd church event was in itself a true religious tenet, but only that Davis sincerely believed it to be religious in her own scheme of things.[100] The court of appeals further stated that even if attendance at the event was not a religious tenet, but a mere request of the pastor, these arguments address an issue that is not for the federal courts, powerless as they are to evaluate the logic or validity of beliefs found religious and sincerely held.[101] The Fifth Circuit concluded by stating that if the focus had been on the sincerity of Davis' belief then she would have satisfied the prima facie standard to survive summary judgment.[102]

In *Crider v. University of Tennessee at Knoxville*, the U.S. Court of Appeals for the Sixth Circuit found that the district court's granting of summary judgment in favor of the employer was inappropriate, since there existed a dispute of fact as to whether the offered accommodation related to a work schedule conflict was reasonable and whether the University was able to accommodate the plaintiff without undue hardship.[103] The University of Tennessee at Knoxville (UTK) hired Kimberley Crider in May 2008 as a Programs Abroad Coordinator.[104] Crider's job responsibilities included attending conferences on behalf of her department, traveling internationally on "site visits," and monitoring an emergency cell phone on a rotating basis, including weekends.[105] The emergency phone is the means for a student studying abroad to reach UTK in the event of an emergency.[106]

Four days after starting her employment with UTK, Crider notified her supervisor that she is a Seventh Day Adventist and her religious beliefs prevented her from performing work-related tasks from sundown on Fridays until sundown on Saturdays.[107] One of the tasks she could not perform would be monitoring the emergency cell phone on Friday nights and Saturdays.[108] Crider's supervisor referred this matter to UTK's Office of Equity and Diversity.[109] Crider then was requested to put her request for religious accommodation in writing.[110] In June 2008, Crider learned that she was to carry the emergency phone on the upcoming Saturday.[111] Crider devised her own accommodation, which required the other two coordinators to cover the weekends, reducing the total number of days but increasing the number of weekends the others must work.[112] This proposal was provided to the other two coordinators who indicated they were unwilling to accept the arrangement because it prevented them from travel on the weekend and from disengaging from work.[113] UTK asked Crider whether she would be willing to carry the emergency phone on weekends if one of the other coordinators were out of town or had a family crisis.[114] Crider refused to monitor the phone on her Sabbath.[115] UTK rejected other proposals by Crider.[116] On June 20, 2008, UTK terminated Crider's employment because she was unable to fulfill her job duties.[117]

Finding summary judgment inappropriate, the Sixth Circuit stated that it was "debatable whether UTK had fulfilled its duty of reasonable accommodation."[118] The accommodation offered by UTK to Crider required her to be flexible and agree to carry the emergency phone on weekends in an emergency situation or when the other two coordinators were out of town, with which Crider disagreed.[119] The court also questioned whether the request would cause an undue hardship on UTK and indicated that the district court gave an inaccurate interpretation of the protections identified in *Hardison*. It stated that Title VII does not exempt accommodation which creates an undue hardship on the employees; rather Title VII requires reasonable accommodation "without undue hardship on the conduct of the employer's business.[120] The Sixth Circuit returned the case to the district court to explore whether the accommodation would create an undue hardship for UTK.

The U.S. Court of Appeals for the Seventh Circuit also addressed religious accommodation for a work schedule conflict in *Porter v. City of Chicago*.[121] The court noted that cooperation between the employee and employer was essential to address conflict and recognized that an employer must engage in dialogue with the employee in seeking accommodation.[122] The

plaintiff, Latice Porter, was a practicing Christian who sought religious accommodation to attend church services on Sunday morning. Porter was placed in work group with a schedule that provided for Sunday/Monday days off.[123] After Porter returned from Family Medical Leave and personal medical leave, she was placed in a work group with Friday/Saturday days off.[124] She sought a religious accommodation to attend Sunday services.[125] Porter's supervisor advised her that she could switch from day watch to the evening watch, which would allow her to attend Sunday morning services.[126] Porter did not demonstrate an interest in this option and did not pursue the watch change.[127] Subsequently, Porter went out on another leave of absence and never returned to work.[128] Porter later sued the employer, alleging, among other claims, religious discrimination for failure to accommodate her religious beliefs.

The Seventh Circuit reiterated that reasonable accommodation of an employee's religious practices is "one that eliminates the conflict between employment requirements and religious practices."[129] The Court of Appeals further stated that reasonable accommodation is intended to assure the employee an additional opportunity to observe religious practices, but it does not impose a duty on the employer to accommodate at all costs.[130]

Relying on this, the Seventh Circuit found that the City of Chicago had discharged its obligation under Title VII by offering Porter an accommodation (i.e., switch to evening watch) that would have eliminated the conflict between her work schedule and her religious practices of attending church on Sunday morning.[131]

The Eleventh Circuit in *Telefair v. Federal Express Corporation*[132] also found that offering the employee a different position even at a lower rate of pay was a reasonable accommodation if the transfer eliminated the scheduling conflict between the religious practice and the employment requirements.

Here, two African-American employees were practicing Jehovah Witnesses and alleged that their employer discriminated against them due to their race and religious beliefs when they were redeployed from a Monday through Friday shift to a Tuesday through Saturday work schedule.[133] Before the redeployment, the employees advised FedEx that they could not work on Saturdays due to their religious observation.[134] They both offered to work Tuesday through Friday which was denied by FedEx.[135] However, FedEx offered both a handler position that had a Monday through Friday schedule at a lower rate of pay.[136] They were also given the opportunity to apply for any open positions with the organization.[137] The employees did not apply for any positions nor did they accept the handler position.[138] Both employees were deemed to have resigned voluntarily.[139]

The district court granted summary judgment on all claims. The employees appealed only the religious accommodation claims arguing that the proffered religious accommodations were not reasonable due to less pay, commute times, loss of seniority for six months, and impacted prospects for promotion.[140]

The Eleventh Circuit affirmed the district court decision and reiterated that the employee need not give the employee a choice among several accommodations, nor is the employer required to provide the employee with the employee's preferred accommodation or show undue hardship resulting alternative accommodations proposed by the employer.[141]

In *EEOC v. Thompson Contracting, Grading, Paving, and Utilities, Inc.*,[142] the U.S. Court of Appeals for the Fourth Circuit found that the employer was not obligated to offer an employee a transfer to the position of general equipment operator and that it had satisfied its burden under the undue hardship prong by showing the other proposed accommodations would have resulted in more than de minimis cost to the employer, thus causing an undue hardship on the conduct of its business.[143]

Banayah Yisrael was hired twice by Thompson as a dump truck driver.[144] Yisrael is an adherent of the Hebrew Israelite faith that observes its Sabbath on Saturday, which prohibits work from sunrise and sunset.[145] On the first Friday after being re-hired for the second time, Yisrael advised his supervisor that he could not work on Saturday because of his religious obligations.[146] All of the Thompson dump truck drivers worked that Saturday.[147] This occurred two other times before Yisrael's employment was terminated for failing to have regular and dependable attendance.[148]

The EEOC filed suit against Thompson alleging, among other claims, that the company discriminated against Yisrael when it failed to accommodate his religious beliefs and ultimately terminating him because of his religion.[149]

The Fourth Circuit analyzed each of the EEOC's proposed accommodations, but found they would have resulted in more than a de minimis cost to Thompson, thus causing an undue hardship on the conduct of its business. The court stated accommodation does not require the employer to offer employment arrangements that, based on the employee's own actions, it reasonably believes will be refused.[150] Thus, the Fourth Circuit found Thompson was not obliged to offer Yisrael a transfer to general equipment operator.[151]

As evidenced by the analysis of the cases, while the standards of *Hardison* and *Philbrook* are alive and well, courts are reaching decisions based on a fact-driven analysis under these standards.

B. Dress and Grooming

Religious dress and grooming cases are on the rise and challenge the limits of employer dress codes. Lower court decisions are mixed on what constitutes reasonable accommodation.[152] It is instructive to contrast a recent California district court case and the Tenth Circuit's recent decision on an unsuccessful applicant for employment who claimed she was denied employment in violation of Title VII because she wore a hijab.[153]

The U.S. Court of Appeals for the Tenth Circuit, in *EEOC v. Abercrombie & Fitch Stores*, found that the retailer's failure to hire a Muslim woman who wore a religious headscarf (i.e., hijab) was not an act of religious discrimination since the applicant never requested a religious accommodation and, thus, notice was lacking.[154]

Samantha Elauf, a Muslim, applied for a sales associate position with Abercrombie Kids (owned by Abercrombie & Fitch).[155] Elauf was familiar with the type of clothing Abercrombie sold and knew she would be required to wear similar

clothing if she became an employee.[156] During the interview, Elauf wore an Abercrombie-like T-shirt, jeans, and her headscarf/hijab.[157] Elauf acknowledged discussing the dress requirements for Abercrombie employees during the interview. The interviewer also informed Elauf she would be required to wear clothing similar to that sold by Abercrombie and, specifically, no heavy makeup or nail polish.[158] Abercrombie relies upon its Look Policy as being critical to the health and vitality of its "preppy" and "casual" brand. During the interview, Elauf never informed the interviewer she was Muslim, never mentioned she wore the headscarf for religious reasons and would need an accommodation to address the conflict between her religious practice and Abercrombie's clothing policy. The interviewer assumed Elauf was Muslim, but was uncertain of the requirements regarding the headscarf.[159] Abercrombie did not extend an offer of employment to Elauf.[160] Elauf learned from an employee of Abercrombie that she was not hired because of her headscarf.[161]

The EEOC filed suit against Abercrombie for religious discrimination and failure to accommodate Elauf's religious beliefs in violation of Title VII.[162] The district court granted summary judgment to the EEOC and denied summary judgment to Abercrombie. The Tenth Circuit, in a lengthy opinion, disagreed with the district court and reversed the decision. It ordered the case back to the district court with instructions to vacate its judgment and enter judgment in favor of Abercrombie.

The Tenth Circuit noted the EEOC had the burden of proving that Elauf had a bona fide religious belief that conflicted with the employer's requirements, that she informed her prospective employer of the conflicting belief, and that she was not hired because of the conflict.[163] Here, it found the EEOC failed to establish that Elauf informed the interviewer of her religious belief that conflicted with Abercrombie's Look Policy. The court reviewed the summary judgment record and the analysis used in cases under the Americans with Disabilities Act (ADA) and found the notice element was lacking, since Elauf failed to inform Abercrombie of her religious beliefs and her need for accommodation. The Tenth Circuit placed the burden on applicants or employees to initially inform employers of the religious nature of their conflict in practice and of the need for an accommodation to implicate the accommodation dialogue. The Supreme Court has has granted certiorari and will decide the case during its October 2014 Term.

By comparison, in a similar case against the same employer, a district court in California applied the same standards, but used a different basis for an opposite result.

In the California district court case, the EEOC and Umme-Hani Khan brought suit against Hollister (an Abercrombie & Fitch brand) alleging that Abercrombie failed to accommodate Khan's religious beliefs.[164] Khan is Muslim and believes that Islam dictates she wear clothes she considers modest, and further believes that Islam requires her to wear a headscarf, also known as a hijab, when in public or in the presence of men who are not immediate family members.[165] When Abercrombie hired Khan in October 2009, the 19-year-old had fully adopted the practice of wearing a hijab in public or when in the presence of males outside of her immediate family.[166] She wore a headscarf when she was interviewed for her position.[167] When hired, Khan acknowledged the Look Policy and agreed to abide by it.[168] As an "impact associate," the Muslim teen worked primarily in the stockroom and she was requested to wear headscarves in Hollister colors, which she agreed to do.[169] However, in mid-February 2010, Management advised Khan that her hijab violated the Look Policy and that she would be removed from the work schedule unless she removed her headscarf while at work.[170] Khan refused to remove her hijab because her religious beliefs compelled her to wear it.[171] Abercrombie terminated Khan's employment on February 23, 2010, for refusing to comply with the Look Policy.[172]

It was undisputed that a prima facie case was established, but Abercrombie argued it could not accommodate Khan's religious beliefs without undue hardship.[173] The district court rejected Abercrombie's argument and found it offered only unsubstantiated opinion testimony of its own employees to support its claim of undue hardship. Something more than subjective belief was necessary to meet its undue hardship burden, the court said.[174]

The district court granted the EEOC's and Khan's motion for partial summary judgment and dismissed other claims, leaving for trial only the issue of damages and injunctive relief.

By contrast, in *EEOC v. Regency Health Associates*, a jury in Georgia found for the employer and rejected the employee's religious discrimination claims regarding her dress.[175]

In this case, a medical assistant in a pediatric health clinic started wearing a hijab after she was hired. She told management that she planned to eventually wear a full headpiece, with only her eyes showing. The clinic's management objected, explaining to her that given the nature of the pediatric practice and the reasonable desire of child patients and parents to see the face of the medical staff providers, it could not approve the wearing of a full headpiece.[176] Management told the employee that it would consider what reasonable accommodations could be made to its dress code policy.[177] Before it could do so, the plaintiff resigned and filed a lawsuit against the clinic.

The employer argued that the plaintiff had not given it sufficient time to consider her accommodation request nor provided enough information about her request for a reasonable accommodation to be made before she resigned.[178] The jury agreed and rejected the employee's claim.

C. Religious Beliefs and Job Duties

Religious beliefs that conflict with the actual work performed by the employee also create religious accommodation issues.

For example, in *Nobach v. Woodland Village Nursing Home Center, Inc.*,[179] the plaintiff, Kelsey Nobach, brought a claim for religious discrimination against the employer, asserting that she was discriminated against when she refused to pray the rosary with a patient at the nursing home, because it was against her own sincerely held religious beliefs.[180]

Nobach was hired as an activity aide for the residents of Woodland Village Nursing Home Center.[181] Her duties encompassed carrying out daily routines, including perform-

ing a devotional reading, which, according to Nobach was non-denominational, reading the newspaper to the residents, playing games with them, and generally keeping the residents entertained.[182] In September 2009, Nobach was called in to work to fill in at a different building.[183] During the shift, Nobach was requested by her supervisor to pray the rosary with a Catholic resident.[184] Nobach advised the supervisor that she was not Catholic and it was not her religion and if the supervisor wanted to conduct the rosary, "then she was welcome to it."[185] Nobach was subsequently issued a formal write-up for insubordination for not performing the rosary, and was terminated at that time and told that "it doesn't matter if its [sic] against your religion, if you refuse it's insubordination."[186]

The district court found that a material issue of fact was presented as to Nobach's religious belief conflicting with the praying of the rosary. It stated, "[T]he area of personal and sincerely held religious beliefs is exceedingly broad and courts . . . are not free to reject beliefs because they consider them incomprehensible. Their task is then decide whether the beliefs professed by the registrant are sincerely held and whether they are, in his own scheme of things, religious."[187] The district court also found, like the Tenth Circuit in *Abercrombie*, that there were disputed issues of fact regarding Woodland's knowledge of Nobach's religious beliefs, Nobach's lack of request for religious accommodation, and Woodland's lack of knowledge regarding her religious beliefs.[188] The district court, in utilizing a balancing test regarding undue hardship to Woodland, found that whether Woodland could accommodate the religious conflict without experiencing undue hardship was a question of fact and denied summary judgment.[189]

Conflict with religious beliefs and job duties also can arise where Muslims work in meat processing plants given the Quran's prohibition against the consumption and touching of pork.

In *Al-Jabery v. ConAgra Foods, Inc*., the plaintiff, Naim H. Al-Jabery, was a Muslim who emigrated from Iraq. Al-Jabery applied for employment at ConAgra and submitted an employment application stating he wanted to be considered for "[s]anitation/or any" position at the plant.[190] On August 26, 2003, the plaintiff was hired for a sanitation position, working as an "Equipment Cleaner."[191] He was to clean machines that processed pork, and it is undisputed that the plaintiff actually performed that work.[192] Al-Jabery claimed he was not compelled to actually pick up pork as a part of his sanitation job while working the evening shift.[193] Other Muslims work at the plant and some of them have worked on the production line.[194] No Muslim workers "have ever indicated" to the human resources manager "that their religion precludes them from touching pork."[195] ConAgra endeavored to accommodate the religious beliefs of its Muslim employees.[196] For example, Muslims were allowed to pray at work, to clean up before prayers, to extend their rest periods during Ramadan in order to break their fast, and, during Ramadan, not to work with exposed meat while they were fasting if they preferred not to do so.[197]

For about three weeks prior to June 14, 2005, the plaintiff had been supervised by Chasity Rutjens.[198] On June 14, 2005, Rutjens advised human resources manager Kevin Bartels that Al-Jabery was taking unauthorized breaks and his direct supervisor had been unable to locate him for approximately one hour.[199] After Rutjens had confirmed with two Vietnamese employees who worked on the sanitation crew that Al-Jabery had been missing from an area the sanitation crew was expected to clean and two other supervisors had told her that "Al-Jabery had a pattern of wondering off and taking excessive breaks," she told Al-Jabery that she was transferring him to the pork production line.[200] Al-Jabery protested, and Rutjens took him to Bartels, who supported Rutjens and told Al-Jabery that he must report to the pork production line, but that he would receive the same pay, hours, and benefits.[201] There is no evidence that Al-Jabery told Bartels or Rutjens that he could not work on the pork line because of his religious beliefs.[202] On June 15, 2005, Al-Jabery refused to report to the pork production line, left the facility and was termed a "voluntary quit" by ConAgra for refusing the transfer.[203] Suing the employer, Al-Jabery alleged, among other things, that ConAgra discriminated against him because of his religion.

The district court found Al-Jabery failed to present competent evidence that he informed ConAgra that he could not touch pork, thus failing to establish a prima facie case of religious discrimination.

In *Mitchell v. University Medical Center*, a Kentucky district court found that the defendant Hospital could not reasonably accommodate plaintiff Claudette Mitchell without undue hardship.[204] Mitchell, who is Christian, sought to have religious conversations with co-workers about the dates God sent her and whether they could be the date for the end of the world or the Antichrist.[205] This conduct was purportedly offensive and troubling to Mitchell's co-workers and violated the Hospital's harassment policies.[206] The district court found that any accommodation of Mitchell would infringe on the rights of other employees, thus imposing on undue hardship on the Hospital.[207]

The Eighth Circuit affirmed summary judgment in favor of the defendant in *Wilson v. U.S.W. Communications*, because the employer had provided a reasonable accommodation to the plaintiff.[208] Christine Wilson, a devout Roman Catholic, made a religious vow to wear an anti-abortion button.[209] The button depicted a graphic color photograph of a fetus.[210] Many of Wilson's co-workers found the button offensive, and the button caused work disruptions.[211] U.S.W. Communications (USW) offered three accommodations, including covering the button while at work.[212] Wilson was ultimately fired when she continued to wear the uncovered button.[213] Wilson brought an action against USW and her supervisors for religious discrimination.[214]

The Eighth Circuit upheld the district court decision, finding that USW's accommodation proposal allowed Wilson to comply with her vow while respecting the desire of her co-workers not to look at the button, thus USW provided a reasonable accommodation to Wilson's religious beliefs.[215] Because USW offered a reasonable accommodation, the employer did not have to show that Wilson's proposed accommodations would cause an undue hardship.[216]

IV. Conclusion

As the decisions discussed above show, lower courts con-

tinue to apply the standards set forth by the Supreme Court in *Hardison* and *Philbrook* in determining what constitutes reasonable accommodation and undue hardship in religious discrimination cases under Title VII. However, the fact-specific nature of the religious accommodation and undue hardship inquiry arguably makes it difficult to apply bright-line rules in individual cases. The notice component appears to have become a focal point for courts, where the existence of a religious conflict with the employer's workplace policies or job duties arises and an adverse employment action is taken. Courts appear willing to infer notice if an employee makes reference to religion or religious belief in workplace discussions with the employer over job requirements or employer policies. Another trend arguably present in more recent religious accommodation cases is the subtle redefining of the de minimis standard to place a more onerous burden on the employer to justify undue hardship than that originally contemplated in *Hardison* and *Philbrook*. The tension between religious accommodation and undue hardship will continue to grow and the case law will evolve in step with changes in the religious diversity of the American workplace.

Endnotes

1 Tanenbaum Center for Interreligious Understanding, What American Workers Really Think About Religion: Tanenbaum's 2013 Survey of American Workers and Religion 5 2013), *available at* http://op.bna.com/dlrcases.nsf/id/bpen-9b7pks/$File/2013TanenbaumWorkplaceAndReligionSurveyEmail.pdf.

2 Note, *Delimiting Title VII: Reverse Religious Discrimination and Proxy Claims in Employment Discrimination Litigation*, 67 Vand. L. Rev. 239, 259 (2014) (citing Courtney Rubin, *Religious Discrimination Complaints on the Rise at Work*, Inc., Oct. 20, 2010, http://www.inc.com/news/articles/2010/10/complaints-of-religious-discrimination-onthe-rise.html).

3 Society for Human Resource Management, Religion and Corporate Culture: Accommodating Religious Diversity in the Workplace (2008).

4 *Best Practices for Eradicating Religious Discrimination in the Workplace*, U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last modified July 23, 2008).

5 *Id.* The EEOC's guidance is not binding on courts, but is intended to assist employers with their legal responsibilities regarding religious accommodation issues that often arise in the workplace, which has been the focus of several recent religious discrimination lawsuits. The EEOC guidance focuses on several areas to include: 1) religious observation; 2) sincerely held belief; 3) undue hardship; 4) uniforms; and 5) workplace safety or health concerns. The issuance of the EEOC guidance reflects the EEOC's intent to hold employers responsible for accommodating a religious practice due to a conflict between the religious practice and the employer's neutral work rule.

6 *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm (last visited Sept. 23, 2014).

7 U.S. Const. amend. I. The First Amendment provides in pertinent part:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of . . . ."

8 42 U.S.C. § 2000e-2(a)-(d).

9 "No order of the court shall require . . . the hiring, reinstatement or promotion of an individual employee, or the payment to him of any back pay, if such individual . . . was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title." 42 U.S.C. § 2000e-5(g).

10 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971).

11 *Dewey*, 429 F. 2d at 329.

12 *Id.*

13 *Id.*

14 *Id.* at 328.

15 *Id.* at 329.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Dewey*, 429 F.2d at 331.

23 *Id.* at 328.

24 *Id.*

25 *Id.* at 329

26 402 U.S. 689 (1971).

27 Roberto L. Corrada, *Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases*, 77 U. Cin. L. Rev. 1411, 1428 (2009).

28 Corrada, *supra* note 27 (citing 42 U.S.C. §2000-e2(a)(1)(2006)).

29 § 701(j), 42 U.S.C. § 2000e(j) (1970 ed., Supp. V).

30 432 U.S. 63 (1977).

31 479 US 60 (1986).

32 *TWA*, 432 U.S. at 74.

33 *Id.*

34 *TWA*, 432 U.S. at 66.

35 *Id.*

36 *Id.* at 67.

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* at 68.

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *TWA*, 432 U.S. at 69.

47 *Id.*

48 *Id.*

49 *Id.* at 79.

50 *Id.*

51 *Id.*

52 *Id.* at 77 (citing Hardison v. Trans World Airlines, Inc., 375 F. Supp. at 890-891 (W.D. Mo. 1974)).

53 *TWA*, 432 U.S. at 77 (citing Hardison v. Trans World Airlines, Inc., 375 F. Supp. at 890-891 (W.D. Mo. 1974)).

54 *Id.* at 81.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 63 (1986).

60 *Id.*

61 *Id.*

62 *Id.* at 65.

63 *Id.* at 61.

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.* at 68-69.

68 *Id.*

69 *Id.* (citing 42 U. S. C. § 2000e(j)).

70 *Id.*

71 *Id.* at 68.

72 *Id.*

73 721 F.3d 444 (7th Cir. 2013).

74 *Id.* at 447.

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.* at 450.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* at 447.

83 *Id.*

84 *Id.* at 448.

85 *Id.* (citing United States v. Seeger, 380 U.S. 163, 165-66 (1965)).

86 *Id.* at 448.

87 *Id.*

88 *Id.*

89 *Id.* at 451.

90 *Id.*

91 *Id.*

92 __F.3d __ , No. 13-20610 (5th Cir. Aug. 26, 2014).

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*; *see* Cooper v. Gen. Dynamics, 533 F.2d 163, 166 n.4 (5th Cir. 1976) (chastising a district court for having "evaluated the tenet and concluded that it was irrational and specious").

102 *Id.*

103 492 Fed. Appx. 609 (6th Cir. 2012) (unpublished).

104 *Id.* at 610.

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.* at 611.

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.* at 613.

119 *Id.*

120 *Id.* at 614 (citing 42 USC § 2000e(j) (emphasis added)).

121 700 F. 3d 944 (7th Cir. 2012).

122 *Id.* at 953 (citing, Rodriguez v. City of Chicago, 156 F.3d 771,777 (7th Cir. 1998)).

123 *Id.* at 949.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.* at 952.

128 *Id.* at 951.

129 *Id.*

130 *Id.*

131 *Id.* at 953.

132 __ Fed. Appx. __ (11th Cir. 2014)

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 499 Fed. Appx. 275 (4th Cir. 2012) (unpublished).

143 *Id.*

144 *Id.* at 277.

145 *Id.* at 277.

146 *Id.* at 278.

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.* at 285.

151 *See* Farah v. A-1 Careers, No. 12-2692 (D. Kan. Nov. 20, 2013), *appeal docketed*, No. 13-3317 (10th Cir. Aug. 12, 2014). The Court found that it was an undue hardship on the defendants, who were tenants in multi-office building, to allow plaintiff, who is Muslim to pray in the lobby, since the complaints had been received that plaintiff's noon prayers were disrupting others. Defendants

and plaintiff had engaged in interactive process about the noon prayers, with defendants permitting plaintiff to go off-site for the prayers. The Court found this to be a reasonable accommodation.

152 *See* Tagore v. United States, 735 F.3d 324 (5th Cir. 2013). The Fifth Circuit found that a federal employer's termination of an employee, who wanted to wear a Sikh ceremonial sword at work, did not violate the employee's religious rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e *et seq.*, because accommodations by the employer would have violated the law and imposed more than de minimis costs on the employer.

153 Hijab or headscarf is for many Muslims females a visible expression of their faith, piety or modesty, and represents a tangible manifestation of their religious identity.

154 EEOC v. Abercrombie & Fitch Stores, No. 11-5110, 2013 App. LEXIS 20028 (10th Cir. Oct. 1, 2013), *cert granted*, (Oct. 2, 2014) (No. 14-86).

155 *Id.* at *6.

156 *Id.*

157 *Id.* at *9.

158 *Id.*

159 *Id.* at *11.

160 *Id.* at *12.

161 *Id.*

162 *Id.*

163 *Id.* at *16.

164 EEOC & Umme-Hani Khan v. Abercrombie & Fitch Stores, 2013 U.S. Dist. LEXIS 125628 (N.D. Cal. Sept. 2013).

165 *Id.* at *7-8.

166 *Id.* at *8.

167 *Id.*

168 *Id.*

169 *Id.* at *9.

170 *Id.* at *10.

171 *Id.*

172 *Id.* at *11.

173 *Id.* at *28.

174 *Id.* at *40.

175 No. 1:05-CV-2519 (N.D. Ga. *filed* Aug. 2, 2007).

176 Robert I. Gosseen, *Accommodating Islam in the Workplace: A Work in Progress*, Primerus, http://www.primerus.com/business-law-articles/accommodating-islam-in-the-workplace-a-work-in-progress-332011.htm (last visited Sept. 23, 2014).

177 *Id.*

178 *Id.*

179 2012 U.S. Dist. LEXIS 125037 (S.D. Miss. 2012).

180 *Id.* at *7.

181 *Id.* at *1.

182 *Id.* at *2.

183 *Id.*

184 *Id.*

185 *Id.*, at *3.

186 *Id.*

187 *Id.* at *8 (citing United States v. Seeger, 380 U.S. 163, 184-85, 85 (1965)).

188 *Id.* at *14.

189 *Id.* at *15.

190 2007 U.S. Dist. LEXIS 79080 (D. Neb. Oct. 24, 2007).

191 *Id.* at *3.

192 *Id.*

193 *Id.* at *3.

194 *Id.* at *6.

195 *Id.*

196 *Id.*

197 *Id.* at *7.

198 *Id.*

199 *Id.*

200 *Id.* at *8.

201 *Id.*

202 *Id.* at *9.

203 *Id.*

204 2010 U.S. Dist. LEXIS 80194, at *22 (W.D. KY 2010).

205 *Id.*

206 *Id.*

207 *Id.*

208 58 F.3d 1337 (8th Cir. 1995).

209 *Id.* at 1339.

210 *Id.*

211 *Id.*

212 *Id.* at 1340.

213 *Id.*

214 *Id.*

215 *Id.* at 1342.

216 *Id.*