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# Religion and Employment Antidiscrimination Law: Past, Present, and Post *Hosanna-Tabor*

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# RELIGION AND EMPLOYMENT ANTIDISCRIMINATION LAW: PAST, PRESENT, AND POST *HOSANNA-TABOR*†

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## INTRODUCTION

At the beginning of a new millennium, employment discrimination on the basis of religious affiliation remains a problem in the United States. Even though Europeans settled here to escape religious persecution, the Equal Employment Opportunity Commission (EEOC) reported that it had received 3811 allegations of employment discrimination on the basis of religion in 2012.[1] This figure accounted for 3.8% of the agency's total caseload for the fiscal year.[2] Although this number is small in comparison to other categories, such as discrimination based on sex (30,356 allegations) or race (33,512 allegations), the allegations of religious discrimination in employment have doubled since 1997, the first year for which statistics are available on the agency's website.[3] Of special concern

1. *Charge Statistics FY1997 Through FY2012*, U.S. Equal Emp. Opportunity Commission, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Apr. 28, 2013).

2. *Id.*

3. *Id.*

is the increase in allegations of discrimination made by Muslims since the terrorist attacks of September 11, 2001.[4]

While a complete review of law regarding religion and U.S. employment would take multiple volumes, this Article summarizes the history of and recent trends for two aspects of the law in this area. Part I surveys laws and case precedent that protect working religious adherents who claim discrimination, harassment, or a failure to accommodate. Adherents now bring most of their claims under Title VII of the Civil Rights Act of 1964[5] or equivalent state fair employment practice statutes.[6] However, isolated legislation, some arguably politically as well as religiously motivated, offers additional protections. Recently passed "refusal clauses," also known as "conscience clauses," relate to the sale of contraceptives or the provision of pregnancy termination services.[7] They highlight the importance of targeted and specific statutes. *Burwell v. Hobby Lobby Stores, Inc.* addresses whether for-profit, private *corporations* enjoy the same protections afforded by the Religious Freedom Restoration Act of 1993 (RFRA)[8] that religious *persons* may claim against governmental interference.[9]

Part II covers the protections for religious institutions that also operate as employers. The Supreme Court's 2012 decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*[10] indicates that the legal debate concerning the separation of church and state remains lively—at least where religious employers operate. The future direction of court interpretation of that precedent remains obscure. Some analysts suggest that the Court limited *Hosanna-Tabor*'s reach, while others contend that its influence may be

4. In the time period between the end of 2001 and 2012, charges filed by Muslims have risen from 15.5% to 20% of the total religious discrimination in employment charges filed. *Religion-Based Charges Filed from 10/01/2000 Through 3/31/2011?Showing Percentage Filed on the Basis of Religion-Muslim*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/events/9-11-11_religion_charges.cfm (last visited Nov. 16, 2014). The percentage rose dramatically in 2002 to 28% but has leveled off since then. *Id.*

5. 42 U.S.C. §§ 2000e to 2000e-17 (2012).

6. *See, e.g.*, Friedman v. S. Cal. Permanente Med. Grp., 125 Cal. Rptr. 2d 663 (Ct. App. 2002) (holding that plaintiff's veganism was not a religious creed as defined by California's Fair Employment and Housing Act).

7. *Pharmacist Conscience Clauses: Laws and Information*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/health/pharmacist-conscience-clauses-laws-and-information.aspx (last updated May 2012).

8. 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

9. 134 S. Ct. 2751 (2014).

10. 132 S. Ct. 694 (2012).

quite extensive. Finally, this Article concludes by making several observations about the evolution of religion and employment law.

## I.
## CAUSES OF ACTION AVAILABLE TO EMPLOYEES

Since its passage in 1964, Title VII has served as the primary legal vehicle for employment discrimination or harassment claims by religious adherents. However, a review of early religious discrimination claims brought under the First Amendment enhances an understanding of modern Title VII jurisprudence in at least three ways.

First, many of the early religious freedom cases highlight the tension between a court's mandate to remedy instances of religious discrimination and the historic separation of church and state. The First Amendment admonishes that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[11] Enforcement of these two First Amendment clauses, known respectively as the Establishment Clause and the Free Exercise Clause, often involves a balancing exercise. Courts acknowledge that in the protection of a citizen's free exercise of religion, courts risk inadvertently establishing or endorsing a religion. Endorsement of religion becomes a particular concern when two religious adherents have opposing interests.[12] Neutrality, as well as the protection of religious freedoms, surfaces as a primary goal of reviewing courts.

Second, the early cases reveal how courts strained to verify an adherent's religious beliefs in evaluating free exercise claims. Generally, courts examined what constitutes a religion and, more specifically, what constitutes a religious belief. Additionally, courts

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11. U.S. CONST. amend. I. The First Amendment is applicable to the states through the Fourteenth Amendment. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 460–61 (1958) (applying freedom of association to states); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (applying Free Exercise and Establishment Clauses to states).

12. *See, e.g.*, N.Y.C. Transit Auth. v. Exec. Dep't, Div. of Human Rights, 627 N.Y.S.2d 360, 363 (App. Div. 1995), *aff'd as modified*, 674 N.E.2d 305 (N.Y. 1996). The court explained:

> Simply put, to find the proper balance between the Free Exercise Clause and the Establishment Clause may not always be easy. Nevertheless, it is important to recognize that true religious liberty is damaged, not only where a penalty is attached to religious observance, but also where the State acts to promote the welfare of one religious group ahead of another. The Constitution firmly condemns both courses with the same neutral hand.

*Id.* at 362–63 (citation omitted).

explored how firmly established an adherent's belief had to be before it triggered First Amendment free exercise protection. Courts continue to struggle with these questions. They do so within the Title VII framework, guided by more recently passed religious protections, and in reliance on early court precedent.

Third, the early employment religious discrimination cases reveal possible biases on the part of legislatures and courts against minority religious adherents, such as Jehovah's Witnesses and Muslims. The Supreme Court acknowledged the problem of disfavored religious identity in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* when it dealt with a facially neutral law.[13] The Court explained "[f]acial neutrality is not determinative. . . . Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt."[14] The challenge for jurists is the identification of masked hostility.

### *A. First Amendment Employment Discrimination Claims*

Employment law application of the First Amendment's Free Exercise and Establishment Clauses gained strength during the industrialization of the U.S. economy. As factory jobs lured more workers from the agricultural fields, conflicts concerning the accommodation of religious freedoms arose between workers and their employers. Court resolution of these disputes necessitated judicial recognition of the limitations on government involvement in religion set by the First Amendment. Without targeted legislation, however, minority groups, including religious adherents, continued to suffer discrimination in both the public and private sectors.

Beginning in the early nineteenth century, individuals began to challenge state "blue laws" that regulate some forms of commercial conduct on particular days, usually Sundays.[15] Most U.S. blue

13. 508 U.S. 520, 524 (1993) (finding that a ban on killing animals violated the free exercise rights of Santería adherents who practice animal sacrifice as a form of religious devotion).

14. *Id.* at 534. Even though the *Lukumi* Court found the challenged ordinances facially neutral, it noted that the laws specifically targeted Santería sacrifice. *See id.* at 533–40.

15. *See* Commonwealth v. Wolf, 3 Serg. & Rawle 48, 51 (Pa. 1817) (affirming a penalty imposed on Jewish plaintiff for breaking Sunday Sabbath); Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675, 676 (2000) (providing a full historical accounting of the challenges presented by the "blue laws").

It is not clear from where the label "blue law" derives. *Compare* SAMUEL PETERS, A GENERAL HISTORY OF CONNECTICUT: FROM ITS FIRST SETTLEMENT UNDER GEORGE

laws protect the Christian Sunday Sabbath or Christian holidays, such as Christmas.[16] For example, Indiana still bans vehicle and off-premises alcohol sales on Sundays.[17] Arguably, these laws run afoul of the Establishment Clause by promoting Christianity. However, non-religious justifications, such as the welfare and morality of the community, enable the surviving laws to withstand judicial scrutiny.[18]

Often those who challenged blue law restrictions did so because they observed a Sabbath other than Sunday and did not want to lose two days of income.[19] Some Sunday work prohibition laws

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FENWICK, TO ITS LATEST PERIOD OF AMITY WITH GREAT BRITAIN PRIOR TO THE REVOLUTION (1829), *available at* http://archive.org/details/generalhistoryof00peter (referencing "blue laws" as religious laws written in a blue bound book), *with* W.L. Kingsley, *Lying as a Fine Art: And the Claims of Rev. Samuel Peters as an Artist*, XVI SCRIBNER'S MONTHLY 275, 279–80 (1878), *available at* http://www.unz.org/Pub/Century-1878jun-00275?View=PDFPages (disputing existence of Connecticut's blue book of religious laws and referring to Peters as "lying"). For an alternative origin of the term "blue laws," see W.F. Poole, *A Popular Cyclopaedia of United States History*, THE DIAL: A MONTHLY INDEX OF CURRENT LITERATURE, Jan. 1882, at 209, 210, *available at* http://babel.hathitrust.org/cgi/pt?view=image;size=100;id=mdp.39015030985850;page=root;seq=221;num=209) ("The word 'blue,' or 'blew,'—meaning fixed, faithful, constant,—is as old as Chaucer's time; and when fixed principles went out of fashion in England on the restoration of Charles II, whatever was fixed, serious and rigid in morals and religion was termed 'blue,' or 'true blue,' and was applied as a term of reproach to Puritans and Presbyterians. . . . The Connecticut code of 1650 was milder than that of Massachusetts, Virginia, or England; and yet to New Yorkers, who had no religion at all, it seemed strict, and hence 'blue.'").

16. *See Blue Laws in the United States*, WIKIPEDIA (Sept. 4, 2014), http://en.wikipedia.org/w/index.php?title=blue_laws_in_the_United_States&oldid=624088615.

17. IND. CODE ANN. §§ 7.1-3-1-14, 24-4-6-1(b) (West 2014)

18. *See, e.g.*, Commonwealth v. Has, 122 Mass. 40, 42 (1877). In *Has*, the court explained, "the legislative authority to provide for [the work cessation's/Sabbath's] observance is derived from [the state's] general authority to regulate the business of the community and to provide for its moral and physical welfare." *Id.* In other cases, however, judicial dicta revealed additional motivations. *See State* v. Barnes, 132 N.W. 215, 216 (N.D. 1911) (protecting the Christian Sabbath for observation by explaining "that this is a Christian nation"). The *Barnes* court also suggested that Sunday is the one day of rest typically observed by "civilized peoples." *Id. See also id.* at 216–17 (documenting support for the designation of Sunday as a day of rest throughout history, dating back to AD 321).

19. *See, e.g.*, Scoles v. State, 1 S.W. 769 (Ark. 1886) (finding Seventh-day Adventist guilty of working on Sunday); Commonwealth v. Starr, 11 N.E. 533, 534 (Mass. 1887) (affirming lower court decision that statute prohibited Jewish shopkeeper from remaining open on Sunday to serve other Jews); *see also* State v. Blair, 288 P. 729 (Kan. 1930) (considering a defendant who claimed no particular religion but resisted the imposition of a religious day of rest).

remained in force through the middle of the twentieth century.[20] Only gradually did more leniency for Saturday Sabbatarians and others develop.[21]

Avoiding religionist justifications for blue laws, the Supreme Court echoed reasoning almost a century old in *Braunfeld v. Brown*:

> [W]e cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquility—a day when the hectic tempo of everyday existence ceases and a more pleasant atmosphere is created, a day which all members of the family and community have the opportunity to spend and enjoy together . . . .[22]

The Court found it within the state's general police powers to designate one day of the week as a day of rest "when the atmosphere is one of calm and relaxation rather than one of commercialism."[23] The Supreme Court, like other courts that had examined the issue before, failed to consider that the designated day was sacred to some, but not all, citizens.

While many of the old work-related blue laws have been repealed, many states still have remnant blue laws.[24] The evolution of remaining blue laws offers an important lens through which to view current legal practices that govern the expression and control of religion in the workplace. Veiled religious endorsements and possible biases warrant careful reading of judicial opinions and analysis of legislation. For example, one might argue that prohibitions on sex work (i.e., prostitution), while ostensibly passed for public health and morality reasons, reflect religious precepts against nonmarital, recreational sex.[25] As this Article moves through the

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20. Town of W. Orange v. Carr's Dep't Store, 147 A.2d 97, 101 (Essex County Ct. 1958) (finding that store owner violated local ordinance when employees were in store checking inventory on Sunday). In *Town of W. Orange*, the court allowed labor on the restricted day if work "performed [was] in [defendant's] dwelling house, work shop or on his premises, and [had] not disturbed other persons in the observance of the first day of the week as the Sabbath." *Id.*

21. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985) (explaining that "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all").

22. 366 U.S. 599, 607 (1961).

23. *Id.* at 602.

24. *See Blue Law*, WIKIPEDIA (Sept. 4, 2014), http://en.wikipedia.org/w/index.php?title=Blue_law&oldid=625617614; *see also Blue Laws in the United States*, *supra* note 16.

25. *See, e.g.*, Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 437–38 (1998); *see also*

workplace religious rights of both employees and employers, it draws attention to alleged mixed-motive legislation and possible subtle religious endorsements or prejudices.

### 1. Possible Court Bias Against Minority Religious Adherents and the Tension with the Establishment Clause Implicated in Free Exercise Claims

Any government display of bias against or preference for a religion implicates First Amendment rights. This Part highlights the difficult balance courts must strike between the protection of religious freedoms, guaranteed by the Free Exercise Clause, and the maintenance of religious neutrality, mandated by the Establishment Clause.[26] One early employment case that raises questions about the application of laws of ostensibly neutral religious import is *Prince v. Massachusetts*.[27] In *Prince*, the Court upheld Massachusetts's child labor laws against a Jehovah's Witness who allowed her ordained nine-year-old niece to distribute their religious literature.[28] The Court reasoned that the state has an interest in protecting children from exploitative labor.[29] In doing so, the Court justified the infringement of free exercise and other constitutional rights by asserting public welfare, morality, and the protection of children.[30] Unlike the old blue laws, prohibitions against the exploitation of children carry no obvious religious endorsement. However, the Court's decision may be tied to a masked hostility towards Jehovah's Witnesses and other minority religious adherents, as illustrated in other cases, including, for example, child custody cases.[31] The reliance on neutral criteria allays some, but often not all, concerns.

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People v. Freaney, 488 N.Y.S.2d 759, 761 (App. Div. 1985). The *Freaney* court explained:

> Interestingly, prostitution itself was not a common-law crime, unless the manner in which it was engaged constituted a public nuisance. It became a crime by statute and, despite the suggestion that prostitution should be decriminalized and treated as a licensed, regulated activity, virtually all jurisdictions continue to punish prostitution for utilitarian reasons as well as religious and moral ones.

*Id.* (citing 2 WHARTON'S CRIMINAL LAW § 271 (14th ed. 1996) and Model Penal Code § 251.2 cmt. (1980).

26. U.S. CONST. amend. I.

27. 321 U.S. 158 (1944).

28. *Id.*

29. *Id.* at 166.

30. *Id.* at 166–67.

31. *Compare* Jennifer Ann Drobac, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609 (1998), *with Prince*, 321 U.S. at 170. The *Prince* Court held, "Parents may be free to become martyrs them-

If judicial or government officials display hostility to minority religious adherents, such as Jehovah's Witnesses, the animus carries other constitutional ramifications. When government officials prefer one religion over another faith or religion, or over no religious affiliation, the government's religious endorsement necessarily implicates Establishment Clause concerns. In *Everson v. Board of Education*, the Court evaluated the First Amendment's Establishment Clause and held, "Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[32] The Court perfected a test to determine whether governmental action violates the Establishment Clause in *Lemon v. Kurtzman*.[33] The three-part *Lemon* test requires that governmental action: (1) "have a secular legislative purpose"; (2) have a "principal or primary effect . . . that neither advances nor inhibits religion"; and (3) avoid "an excessive . . . entanglement with religion."[34] However, Supreme Court Justices, constitutional law scholars, and others have criticized the *Lemon* test in the decades since its formulation.[35] In *Van Orden v. Perry*, a plurality of the Court acknowledged, "Many of our recent cases simply have not applied the *Lemon* test. Others have applied it

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selves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Id.* Arguably, this dictum suggested that a child's martyrdom exacerbated the dangers to the *Prince* child and disparaged Mrs. Prince for her religiously associated behavior.

32. 330 U.S. 1, 15 (1947). In *Everson* the Court sustained state reimbursement for the cost of transporting children to parochial schools by analogizing the reimbursement to state-paid police protection of schoolchildren regardless of whether they attend parochial schools. *Id.* at 18.

33. 403 U.S. 602, 606–07 (1971) (invalidating a 15% salary supplement to private school teachers of secular subjects).

34. *Id.* at 612–13 (internal quotation marks omitted).

35. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 63 (1985) (Powell, J., concurring) (referring to criticism by Justices O'Connor and Rehnquist); Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 359–79 (1995) (reviewing the fractured application of *Lemon* in subsequent cases). Donald Beschle comments, "Separationists find the [*Lemon*] test too loose in its acceptance of plausible secular state purposes and too pliable in its quest for a primary secular effect. Accommodationists point to the 'Catch-22' nature of the entanglement clause as an obstacle to conscientious legislative attempts to satisfy the 'effects' test." Donald. L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383, 394 (1989) (footnotes omitted).

only after concluding that the challenged practice was invalid under a different Establishment Clause test."[36]

In 1984, Justice O'Connor offered the "endorsement test" as an improvement upon and replacement for the *Lemon* test.[37] Over the years, the endorsement test has received sustained interest.[38] In *Lynch v. Donnelly*, Justice O'Connor suggested that the Establishment Clause prohibits two types of government action.[39] In her concurring opinion, she explained what these two types of government action are:

> One is excessive entanglements with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.[40]

The first prohibition closely resembles the third prong of the *Lemon* test, warning against "excessive entanglement." However, the second admonition—that government action must neither endorse nor disapprove of religion—is significantly different from the first two prongs of *Lemon*.

The *Lemon* "purpose" and "effects" prongs focus on the stated purpose and actual effects of governmental action or legislation.[41] In her explanation of the endorsement test, Justice O'Connor ad-

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36. 545 U.S. 677, 686 (2005) (internal citations omitted) (holding that Texas State Capitol Ten Commandments display carried a historical meaning and did not violate the Establishment Clause).

37. Lynch v. Donnelly, 465 U.S. 668, 688–94 (1984) (O'Connor, J., concurring) (finding that a city did not violate the Establishment Clause by displaying a nativity scene).

38. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 597 (1989) (adopting Justice O'Connor's endorsement test for the first time), *abrogated by* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014). Professor Greenawalt explained, however, "A majority of Justices do agree that 'endorsement' is the crucial inquiry for certain kinds of cases, but no majority agrees on the proper formulation of that test for at least some of these cases." Greenawalt, *supra* note 35, at 361.

39. 465 U.S. at 684–85.

40. *Id.* at 687–88.

41. 545 U.S. at 613.

vised, "The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion."[42] In applying the endorsement test, a court asks what the government intends by its action, which is not necessarily the same as the stated purpose. Justice O'Connor also counseled:

> [T]he effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion. . . . What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.[43]

This explanation emphasizes that the unconstitutionality of a message lies in its perception as government endorsement, and not in whether the government has, in reality, advanced or inhibited religion. The endorsement test, which ferrets out the appearance of inappropriate endorsement, sweeps much more broadly than one that requires actual advancement or inhibition of religion.

In *Wallace v. Jaffree*, Justice O'Connor further clarified the endorsement test.[44] She said in her concurrence, "The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement."[45] Justice O'Connor's intelligent objective observer is not an "average" person on the street, but one who, for example, is familiar with the legislative history of a statute.

Justice O'Connor gave more guidance concerning the objective observer in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[46] She noted that something more than historical facts determine whether the objective observer perceives a message of endorsement: "'Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious mes-

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42. *Lynch*, 465 U.S. at 691.

43. *Id.* at 691–92. Justice O'Connor added, "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Id.* at 694.

44. 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

45. *Id.*; *see also* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) (citing *Wallace* and discussing the objective observer's perception of government action); Thornton v. Caldor, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) (referencing the objective observer's understanding of a state endorsing one particular day as the Sabbath).

46. 483 U.S. at 348.

sage, in large part a legal question to be answered on the basis of judicial interpretation of social facts.'"[47] This elaboration leaves the qualifications of the objective observer frustratingly vague and confusing.

Justice O'Connor's objective observer is the "reasonable person" in tort law who understands complex statutes and their legislative histories. In *Capitol Square Review & Advisory Board v. Pinette*, Justice O'Connor explained, "In this respect, the applicable observer is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'"[48] This observer can both personify community ideals and engage in sophisticated judicial interpretation of the social elements he or she personifies.[49] What remains unclear, in part, is whether (and how) the objective observer represents all communities and how she harmonizes the reasonable person's conclusions with those of the judicial historian and interpreter.

Courts continue to struggle with Establishment Clause jurisprudence that still makes reference to both the *Lemon* and endorsement tests.[50] In 2011, Justice Thomas noted the lack of guidance as he dissented from the denial of certiorari in a case involving government display of highway crosses for slain police officers.[51] He lamented, "Our jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases."[52] This overview of Establishment Clause jurisprudence (if it can be called that) helps one understand the tension between Free Exercise and Establishment Clause claims in the evolution of employment law cases. The tightrope that courts walk, over the abyss of religious discrimination, demonstrates that a misstep may effectuate the violation of constitutional protections.

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47. *Id.* (quoting *Lynch*, 465 U.S. at 693–94).

48. 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring) (quoting W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984)).

49. *Id.*

50. *See, e.g.*, Salazar v. Buono, 559 U.S. 700, 707–09 (2010) (remanding a case involving the display of a Latin cross on national land and the transfer of that land).

51. Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12, 12 (2011) (Thomas, J., dissenting).

52. *Id.* at 14.

### 2. Free Exercise and Establishment Clause Issues in Unemployment Benefits Cases

Many religious discrimination employment cases involve a state's denial of unemployment benefits. Claimant workers quit or are fired from their jobs because of a religious conflict. In *Sherbert v. Verner*, a Seventh-day Adventist sought unemployment benefits after she was terminated for refusing to work on her Saturday Sabbath.[53] The U.S. Supreme Court reversed the South Carolina Supreme Court's denial of benefits.[54] The Court held, "The [South Carolina] ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[55] In deciding the case, the *Sherbert* Court established a balancing test that "asks whether [the law] substantially burden[s] a religious practice and, if it [does], whether the burden [is] justified by a compelling government interest."[56] This test tracks the "strict scrutiny" analysis used in *Wisconsin v. Yoder*, another case that considered the Free Exercise Clause.[57]

Justice Harlan's dissent in *Sherbert* deserves note for a number of reasons. First, he emphasized that the South Carolina law was one that the South Carolina Supreme Court had "uniformly applied . . . in conformity with its clearly expressed purpose."[58] Second, Harlan expressed his concern that allowing an exception for Sherbert based on her religion amounted to a de facto violation of the Establishment Clause.[59] Harlan alluded to the tension between the Free Exercise and Establishment Clauses; he reasoned that South Carolina "must single out for financial assistance those whose behavior is religiously motivated, even though it denies such assis-

53. 374 U.S. 398 (1963).

54. *Id.* at 402.

55. *Id.* at 404.

56. *See* City of Boerne v. Flores, 521 U.S. 507, 513 (1997) (restating and confirming the *Sherbert* balancing test), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

57. 406 U.S. 205, 234 (1972). *Yoder* involved a challenge by Amish parents to a Wisconsin compulsory education law. *Id.* at 208–09. The Court held that the First and Fourteenth Amendments prevented the state from compelling Amish children to remain in school past the eighth grade until they are sixteen. *Id.* at 234. The Religious Freedom Restoration Act (RFRA) traces the compelling interest test back to *Sherbert* and Yoder. 42 U.S.C. § 2000bb (2012) (citations omitted) (stating that the purpose of the legislation is "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*").

58. 374 U.S. at 419 (Harlan, J., dissenting).

59. *Id.* at 422.

tance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated."[60]

Finally, Justice Harlan referenced *Braunfeld v. Brown*.[61] Recall that *Braunfeld* was a blue law case that had upheld the right of a state to prohibit work and provide for a day of rest on Sunday, even if it imposed a cost upon an individual citizen.[62] Harlan explained:

> The secular purpose of the statute before us today is even clearer than that involved in Braunfeld. And just as in Braunfeld—where exceptions to the Sunday closing laws for Sabbatarians would have been inconsistent with the purpose to achieve a uniform day of rest and would have required case-by-case inquiry into religious beliefs—so here, an exception to the rules of eligibility based on religious convictions would necessitate judicial examination of those convictions and would be at odds with the limited purpose of the statute to smooth out the economy during periods of industrial instability.[63]

Harlan regarded the *Sherbert* decision as a violation of the principle that the Court should avoid involvement with remedying a situation based on an individual's religious beliefs and should instead allow the statutes to fulfill their secular duty without judicial interference.

Thus, the *Sherbert* Court supported a religious exception to a rule of otherwise neutral application. Subsequent unemployment decisions confirmed the *Sherbert* majority view that favored accommodation of religious practices and found no constitutional conflict.[64] However, Harlan's position foreshadowed the majority decision in *Employment Division, Department of Human Resources v. Smith*, which held that a neutral law of general applicability did not violate the Free Exercise Clause.[65]

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60. *Id.* at 422. *But see* Von Stauffenberg v. Dist. Unemp't Comp. Bd., 459 F.2d 1128, 1133 (D.C. Cir. 1972) (holding that the exemption of religious organizations from unemployment compensation tax payments does not violate the Establishment Clause of the First Amendment).

61. *Sherbert*, 374 U.S. at 421 (citing Braunfeld v. Brown, 366 U.S. 599 (1961)).

62. 366 U.S. at 609.

63. *Sherbert*, 374 U.S. at 421.

64. *See generally* Abner S. Greene, *The Apparent Consistency of Religion Clauses Doctrine*, 21 WASH. U. J.L. & POL'Y 225, 260–61 (2006) (discussing *Thomas v. Review Board*, 450 U.S. 707 (1981), *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987), and *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989), as supporting the *Sherbert* majority view).

65. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014).

In another major decision concerning unemployment benefits, *Thomas v. Review Board*, the Supreme Court again applied the *Sherbert* test.[66] *Thomas* validated the free exercise rights of a Jehovah's Witness who had quit his job after a transfer to a position that required he build military equipment in violation of his religion's tenets.[67] The worker filed suit after a denial of unemployment benefits and later appealed from an Indiana Supreme Court decision that upheld the state's legitimate interests.[68] In overturning the Indiana Supreme Court, the U.S. Supreme Court reaffirmed that "[a] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."[69]

The *Thomas* Court specifically disapproved of the Indiana Supreme Court's willingness to explore what actions Thomas should have taken on the basis of his religious beliefs.[70] The Court reasoned, "Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."[71] In this passage, one sees how the *Thomas* Court disapproved of unreasonable court examination or verification of the adherent's religious beliefs. The Court added that "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."[72] Thus, in both *Sherbert* and *Thomas*, the Supreme Court resolved the tension between the Free Exercise and Establishment Clauses in favor of the religious adherents. The Court applied a balancing test that permitted exceptions to laws of neutral applicability for the individual religious needs of citizens.[73]

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66. 450 U.S. 707, 713 (1981).

67. *Id.* at 709–10.

68. *Id.* at 710–13.

69. *Id.* at 716; *see also* Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136, 146 (1987) (citing *Sherbert* and *Thomas* in concluding "that Florida's refusal to award unemployment compensation benefits to appellant violated the Free Exercise Clause of the First Amendment").

70. *Thomas*, 450 U.S. at 715.

71. *Id.*

72. *Id.* at 716.

73. *But see id.* at 720 (Rehnquist, J., dissenting). Justice Rehnquist's *Thomas* dissent revisited Justice Harlan's emphasis on *Braunfeld* in his *Sherbert* dissent:

> [I]n this case, it cannot be said that the State discriminated against Thomas on the basis of his religious beliefs or that he was denied benefits *because* he was a Jehovah's Witness. Where, as here, a State has enacted a general statute,

The Supreme Court extended the *Sherbert* and *Thomas* holdings in *Frazee v. Illinois Department of Employment Security*.[74] Frazee opposed working on Sunday because of his personal religious beliefs and was denied unemployment benefits.[75] Unlike Sherbert and Thomas, however, Frazee was not a member of an established religious sect or church, nor did he claim that his refusal to work on Sundays resulted from a "tenet, belief or teaching of an established religious body."[76] The Court held that Illinois had violated the Free Exercise Clause in denying Frazee unemployment benefits.[77] In reconciling its decision with *Sherbert* and *Thomas*, the Court explained, "Never did we suggest [in *Sherbert* and *Thomas*] that unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed a purely personal preference rather than a religious belief."[78] Thus, the Court affirmed that First Amendment free exercise protection mandates neither affiliation with a particular religious sect nor verification of religious zeal and sincerity. Once again, the Court held for the religious adherent.

A recent employment benefits case, *Employment Division, Department of Human Resources v. Smith,* involved two workers, Smith and Black, who were "fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church" of which they were members.[79] Smith and Black were held ineligible for em-

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> the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not in my view require the State to conform that statute to the dictates of religious conscience of any group. As Justice Harlan recognized in his dissent in *Sherbert v. Verner*: "Those situations in which the Constitution may require special treatment on account of religion are . . . few and far between." Like him I believe that although a State could choose to grant exemptions to religious persons from state unemployment regulations, a State is not constitutionally compelled to do so.

*Id.* at 722–23 (footnote omitted) (citations omitted) (quoting Sherbert v. Verner, 374 U.S. 398, 423 (1963)). Rehnquist stressed the neutrality of the state to justify his preferred outcome. *Id.* at 726–27. This theme later surfaced again, in *Smith*. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 882–84 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014).

74. 489 U.S. 829 (1989).

75. *Id.* at 830–31.

76. *Id.*

77. *Id.* at 829.

78. *Id.* at 832–33.

79. 494 U.S. 872, 874 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014).

ployment benefits because they had been fired for misconduct.[80] The Oregon Court of Appeals overturned the decision of the Employment Division on the basis that the activities of Smith and Black were religious and, therefore, were protected by the Free Exercise Clause of the First Amendment.[81] The Supreme Court of Oregon upheld the decision of the Court of Appeals, using the reasoning of *Sherbert* and *Thomas*.[82]

In reversing the decision of Oregon's Supreme Court, the U.S. Supreme Court opined, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."[83] The Court continued, "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[84] Without overruling *Sherbert*, the Supreme Court followed the reasoning in the *Sherbert* and *Thomas* dissents. It left the legal community to reconcile the decisions in this line of cases.

The primary distinguishing factor between *Smith* and other similar religious freedom cases is that the Supreme Court declined to designate Smith and Black's ingestion of peyote as religiously motivated. Rather, the Court emphasized that they had violated a criminal drug use statute.[85] This reasoning echoes that in *Prince v. Massachusetts* in which the Court upheld the facially neutral child labor laws against the free exercise claims of a Jehovah's Witness.[86] One wonders, based on the Court's treatment of Jehovah's Witnesses and the conjectures of bias following *Prince*, whether the Court would have come to the same conclusion in *Smith* if the rehab center had terminated Smith and Black for ingesting Christian sacramental wine. Arguably not, since the ingestion of sacramental wine does not otherwise constitute a crime involving a

80. *Id.*

81. *Id.*

82. Smith v. Emp't Div., Dep't of Human Res., 721 P.2d 445, 449 (Or. 1986), *vacated*, 485 U.S. 660 (1988), *adhered to*, 763 P.2d 146 (Or. 1988), *rev'd*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014).

83. *Smith*, 494 U.S. at 878–79.

84. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

85. *Id.* at 875–76.

86. 321 U.S. 158 (1944).

controlled substance. *Smith* and *Prince* also raise the notion that, in addition to facial neutrality, strong public policy, such as the war on drugs or protection of children from exploitative labor, trumps free exercise rights. If that is the case, however, the Court might simply have cited the compelling governmental interest and validated the challenged *Smith* statute using narrow grounds.

*Smith* seemingly marks the Court's retreat from the *Sherbert*, *Thomas*, and *Frazee* holdings that free exercise protection mandates neither affiliation with a particular religious sect nor verification of religious sincerity. However, the *Smith* Court justified its rejection of the strict scrutiny standard in evaluating alleged free exercise violations by reasoning, "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' "[87]

The *Smith* Court explained that it invoked the compelling interest (strict scrutiny) test to evaluate free exercise claims only when the government had created a mechanism for individualized exemptions to generally applicable laws.[88] In *Sherbert*, the unemployment compensation administrative system allowed the state to analyze individual free exercise claims for exemption.[89] *Smith* noted that such cases "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[90] In *Smith*, no mechanism existed for the evaluation of free exercise claims against the otherwise valid and neutral Oregon criminal drug laws, and the Court refused to extend the heightened scrutiny standard to that type of case.

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).[91] Congress addressed its disapproval of *Smith*, stating, "[I]n *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws

87. 494 U.S. at 885 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

88. *Id.* at 884.

89. Sherbert v. Verner, 374 U.S. 398, 405–06 (1963).

90. 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

91. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)). For a more complete discussion of the RFRA and similar state statutes, see Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. Rev. 466 (2010).

neutral toward religion."[92] Congress then codified the *Sherbert* compelling interest test, explaining that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[93] In essence, Congress codified the strict scrutiny standard for Free Exercise Clause case evaluations.

The constitutionality of the RFRA came before the Supreme Court in *City of Boerne v. Flores*.[94] The original issue in the case concerned a dispute between the Catholic Archbishop of San Antonio and the City of Boerne regarding whether the Archbishop could invoke the RFRA to overcome the denial of a construction permit.[95] In coming to its conclusion that the RFRA was unconstitutional as applied to the states, the Court stated that as "[b]road as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."[96] *Boerne* references *Smith* and how it led Congress to pass the RFRA.[97] The *Boerne* majority noted that the Court had declined to apply the *Sherbert* test in *Smith*.[98] Three Justices—O'Connor, Souter, and Breyer—registered their disagreement with the majority decision in *Boerne*.[99] Justice O'Connor authored the lead dissent, arguing that the Court should take the opportunity presented by *Boerne* to revisit their

92. RFRA § 2(a)(4), 42 U.S.C. § 2000bb (citation omitted).

93. *Id.* § 3(b), 42 U.S.C. § 2000bb-1.

94. 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

95. *Id.* at 512.

96. *Id.* at 536.

97. *Id.* at 512.

98. *Id.* at 512–13.

99. *Id.* at 54465 (O'Connor, J., dissenting); *id.* at 565–66 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

*Smith* holding.[100] Her dissent advocated for a return to the *Sherbert* compelling interest test.[101]

More recently, in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, the Court returned to the *Sherbert* test codified in the RFRA.[102] Specifically, the Court rejected that U.S. Customs inspectors had a compelling interest in banning the respondent church's (UDV) sacramental use of hoasca, a brewed tea that contains DMT, a hallucinogen regulated under Schedule I of the Controlled Substances Act.[103] The Court explained why the *Smith* peyote case no longer controlled the outcome in *Gonzales*: "[W]e rejected the interpretation of the Free Exercise Clause announced in *Sherbert v. Verner,* and, in accord with earlier cases, held that the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws."[104] However the RFRA reintroduced the requirement of a strict scrutiny analysis.[105] Addressing changes wrought by the RFRA since *Smith*, the *Gonzales* Court explained, "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened. RFRA expressly adopted the compelling interest

100. 521 U.S. at 546 (O'Connor, J., dissenting). Justice O'Connor argued:

> [The Free Exercise Clause] is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law. Before *Smith*, our free exercise cases were generally in keeping with this idea: where a law substantially burdened religiously motivated conduct—regardless whether it was specifically targeted at religion or applied generally—we required government to justify that law with a compelling state interest and to use means narrowly tailored to achieve that interest.

*Id.*

101. *Id.* at 544–65. In response to *Boerne*, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), pursuant to its Spending Clause and Commerce Clause authority. Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2012)). The RLUIPA is limited in scope, targeting two areas of state and local action. *See id.* As its title indicates, the RLUIPA applies to land use regulation and restrictions on the free exercise of religion by institutionalized persons. *See generally* Sossamon v. Texas, 131 S. Ct. 1651, 1656 (2011) (discussing the RLUIPA and its precursor, the RFRA, with which Congress intended to re-establish the *Sherbert* compelling interest test post-*Smith*).

102. 546 U.S. 418 (2006).

103. *Id.* at 438.

104. *Id.* at 424 (citations omitted).

105. *Id.* at 430.

test 'as set forth in *Sherbert v. Verner*.'"[106] Conducting the strict scrutiny analysis mandated by the RFRA, the Court then upheld the preliminary injunction sought by UDV against U.S. Custom officials.[107]

This discussion of employment benefits cases and Supreme Court First Amendment jurisprudence indicates that free exercise claims for employment discrimination remain viable under the RFRA against federal government interference. Whether the Court will continue to analyze state action using a low-level *Smith* scrutiny or a strict scrutiny test, consistent with the RFRA and *Gonzales*, remains unclear.

3. Free Exercise and Establishment Clause Issues in Future Cases

Another question raised post-*Smith* and the RFRA is whether for-profit corporations can, on behalf of their owners or shareholders, allege free exercise violations against the federal government. The Court recently addressed this issue only with respect to the RFRA in *Burwell v. Hobby Lobby Stores, Inc.*[108] Hobby Lobby was attempting to use the RFRA to avoid providing its employees with health care coverage for certain contraceptives.[109] The Greens, owners of Hobby Lobby stores, "believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point."[110] The corporation's owners alleged that provision of such coverage, mandated by the 2010 Patient Protection and Affordable Care Act (ACA), violated their free exercise rights under the RFRA.[111] The plain language of the RFRA specifies that it applies to persons, but does not specifically define person: "Government shall not substantially burden a *person's* exercise of religion even if the burden results from a rule of general applicability."[112] Therefore, the *Hobby Lobby* Court relied on the Dictionary Act: "Under the Dictionary Act, 'the wor[d] "person" . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'"[113] Thus, the Court held that a "person"

106. *Id.* at 430–31 (citations omitted).
107. *Id.* at 439.
108. 134 S. Ct. 2751 (2014).
109. *Id.* at 2766.
110. *Id.*
111. *Id.* at 2765–66.
112. 42 U.S.C. § 2000bb-1(a) (2012) (emphasis added).
113. 134 S. Ct. at 2768 (quoting 1 U.S.C. § 1 (2012)).

covered by the RFRA includes a for-profit corporation, such as Hobby Lobby.[114]

Arguably, *Hobby Lobby* has limited relevance to the subject of employment discrimination on the basis of religion. It is not technically an employment discrimination case in that the corporate employer was not employed by the federal government. Hobby Lobby employees were not suing their corporate employer for religious accommodation nor asserting their free exercise rights. The Court noted the limits of its *Hobby Lobby* decision:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.[115]

Because the RFRA applies to for-profit corporations, however, one can expect to see further suits testing the range of RFRA protections.

Included in the ripple effect of *Hobby Lobby* is the risk of Establishment Clause claims brought by non-religious employees. Hobby Lobby employees might argue, for example, that the ACA is a law of neutral application and that the Court has endorsed religious values over the rights to health care by the non-religious employees and women, thereby discriminating against non-adherents and women. Until its parameters are clearer, *Hobby Lobby* is really beyond the scope of this Article. However, the authors highlight *Hobby Lobby* as another case that may influence the future of employment-related First Amendment claims.

### *B. Title VII of the Civil Rights Act of 1964*

In the nineteenth and early twentieth centuries, when workers faced no state action or government interference with their free exercise rights they often had no recourse. The Constitution simply did not apply in disputes between private parties. In the mid-twentieth century, however, the civil rights movement forced a national discussion concerning the Constitution's failure to secure basic civil rights, regardless of race. Congressional debate over appropriately responsive legislation widened the circle of citizens covered by the

114. *Id.* at 2767–75.

115. *Id.* at 2783 (citations omitted).

proposed laws. Legislative proposals included protections for not only racial minorities but also for women, religious adherents, and other minority groups.[116] Congress passed the Civil Rights Act of 1964, including Title VII's protection from religious discrimination in employment, which supplemented the protections originally provided by the First Amendment and by more general employment laws.[117]

Today, Title VII of the Civil Rights Act of 1964 provides a primary legal cause of action for religious discrimination in employment.[118] Title VII offers employees two main avenues for redress of grievances: a request for accommodation[119] and a claim for discrimination on the basis of religion.[120] As will become apparent in this Article's review of court application of Title VII's protections, several themes prevalent in the First Amendment cases resurface. First, Title VII cases highlight the tension between a court's mandate to remedy instances of religious discrimination and the historic separation of church and state.[121] Second, Title VII cases also reveal how courts strain to verify an adherent's religious beliefs in evaluating claims. Generally, courts broadly define religion and what con-

116. *See, e.g.*, 110 CONG. REC. 2577 (1964) (statement of Rep. Howard Smith) (suggesting an amendment to the bill that would eventually become the Civil Rights Act to prohibit sex discrimination in employment). *Compare* H.R. 3994, 77th Cong. (1941) (proposing a prohibition on federal employment discrimination based only on race, color, or creed), *with* H.R. 7142, 77th Cong. (1942) (proposing a prohibition on federal employment discrimination based on race, color, creed, religion, national origin, or citizenship).

117. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1981 to 2000h-6 (2012)).

118. 42 U.S.C. §§ 2000e to 2000e-17 (2012).

119. 29 C.F.R. § 1605.2 (2014).

120. 42 U.S.C. § 2000e-2(a) (2012).

121. *See, e.g.*, EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 613 (9th Cir. 1988) (finding no Title VII exemption for a religious, for-profit corporation and that the corporation had discriminated against an atheist employee by requiring him to attend weekly devotional services on company time). In *Townley*, the court mentioned:

> We note that under the facts of this case, no construction of section 702 would avoid significant First Amendment questions. If we held that Townley was a 'religious corporation' under the meaning of section 702, and therefore exempt from Title VII's prohibition against religious discrimination, then we might be faced with a question the Supreme Court left open in *Corporation of the Presiding Bishop v. Amos*: whether exemption of a religious corporation's for-profit activities violates the Establishment Clause.

*Id.* at 613 n.2 (citation omitted). The issue that *Townley* decided against the employer that claimed Title VII exemption is similar to the one that the Supreme Court decided in *Hobby Lobby* regarding the for-profit corporation's appeal under RFRA. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

stitutes a religious belief.[122] Courts explore with great care how firmly established an adherent's belief must be before it triggers Title VII protection.

### 1. Failure to Accommodate—Section 701(j)

In an accommodation action, an employee typically alleges that an employer failed to allow the worker's religious practices, required by a religion or sect. For example, the employer might have denied the employee time off to observe his or her religion's Sabbath. Failure to accommodate religious practices accounts for a large percentage of religious discrimination in employment claims filed by workers.[123]

The original version of the 1964 Civil Rights Act did not define religion and early court decisions did not equate a lack of accommodation with discrimination.[124] Senator Jennings Randolph, a practicing Seventh-day Adventist and a Saturday Sabbatarian, believed that those early decisions would severely disadvantage worshippers like himself.[125] He succeeded in lobbying Congress to include an expanded definition when it amended the Civil Rights Act in 1972.[126] Section 701(j) now specifies, "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 re-

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122. *See infra* Part I.B.1.a.i.

123. *See Bases By Issue FY2010–FY2013*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm (last visited Apr. 28, 2013).

124. *See* Pub. L. No. 88-352, § 701, 78 Stat. 241, 253–55 (1964) (current version at 42 U.S.C. § 2000e (2012)); Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971), *superseded by statute*, Pub. L. No. 92-261, 86 Stat. 103, *as recognized in* Smith v. Pyro Mining Co., 827 F.2d 1081 (6th Cir. 1987); Riley v. Bendix Corp., 330 F. Supp. 583, 591 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972).

125. *See* 118 CONG. REC. 705 (1972) (statement of Sen. Randoph) ("[T]here has been a partial refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work . . . on particular days."); Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 584 (2000) ("The amendment [to Title VII] was introduced by Senator Jennings Randolph, a Seventh-Day Baptist, with the express purpose of protecting Sabbatarians."). See Justice Marshall's dissent in *Trans World Airlines, Inc. v. Hardison* for an overview of the possible effect of the decisions in *Dewey* and *Riley*. 432 U.S. 63, 88–89 (1977) (Marshall, J., dissenting).

126. *See Hardison*, 432 U.S. at 74–76 (majority opinion).

ligious observance or practice without undue hardship on the conduct of the employer's business."[127]

a. Prima Facie Case of Failure to Accommodate

To establish a failure to accommodate, the 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."[128] If the plaintiff succeeds in establishing a prima facie case, the burden then shifts to the employer to demonstrate that it could not reasonably accommodate the plaintiff's religious needs without undue hardship.[129] According to the court in *EEOC v. Firestone Fibers & Textiles Co.*:

> This is a two-prong inquiry. To satisfy its burden, the employer must demonstrate *either* (1) that it provided the plaintiff with a reasonable accommodation for his or her religious observances *or* (2) that such accommodation was not provided because it would have caused an undue hardship—that is, it would have "result[ed] in 'more than a *de minimis* cost' to the employer."[130]

In the years since Title VII's passage and amendment, litigants have challenged each prong of the prima facie case and employer burden, often in an attempt to define their seemingly amorphous terms.

i. Bona Fide Religious Belief

With respect to the employee's bona fide religious belief, employers have questioned the religion itself, the sincerity of the employee's belief, and the necessity of the practices for which the employee sought accommodation. Courts examine consistency in the employee's religious practices but allow plaintiffs some latitude for occasional deviations from established practices or for individual interpretation of tenets. The early free exercise cases brought under the First Amendment arguably influence court treatment of employee religious beliefs and practices under Title VII. For example, in *Boomsma v. Greyhound Food Management, Inc.*, a Michigan dis-

127. 42 U.S.C. § 2000e(j) (2012).

128. Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 481 (2d Cir. 1985) (citations omitted), *aff'd*, 479 U.S. 60 (1986).

129. Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1019 (4th Cir. 1996); *see also* 42 U.S.C. § 2000e(j).

130. 515 F.3d 307, 312 (4th Cir. 2008) (quoting *Philbrook*, 479 U.S. at 67).

trict court expressed its concern "that plaintiff had substituted for a fellow employee for Sunday work on one occasion, and . . . had performed Sunday duty for the Air Force National Guard."[131] The plaintiff failed to explain how his religious belief against working on Sundays permitted either of these activities.[132] Relying on Second Circuit guidance, however, the court concluded that "the burden on the plaintiff to establish a bona fide religious belief 'is not a heavy one.' "[133]

The EEOC's formal definition of religion incorporates the evaluative principles that the Supreme Court espoused in *United States v. Seeger*[134] and *Welsh v. United States*.[135] The EEOC explained that "the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[136] Additionally, the employee's belief system need not be formally recognized or incorporated into an established religion.[137] The Supreme Court also later held in *Thomas v. Review Board of the Indiana Employment Security Division* that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[138]

Although the EEOC and the courts are reluctant to delve into whether a religious practice stems from a legitimate religion that qualifies for protection under Title VII, occasionally courts find such an evaluation unavoidable.[139] Courts typically examine an em-

131. 639 F. Supp. 1448, 1453 (W.D. Mich. 1986).

132. *Id.*

133. *Id.* (quoting *Philbrook*, 757 F.2d at 482).

134. 380 U.S. 163, 185 (1965) (explaining that the "task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious").

135. 398 U.S. 333, 339–40 (1970) ("[T]he central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life.").

136. 29 C.F.R. § 1605.1 (2014).

137. *Id.* ("The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.").

138. 450 U.S. 707, 714 (1981).

139. *See, e.g.*, Redmond v. GAF Corp., 574 F.2d 897, 899–900 (7th Cir. 1978) (explaining the interpretation of religion under the 1972 amendment to Title VII). The *Redmond* court held:

> The Supreme Court has never had the occasion to interpret this phrase of the 1972 amendment, but the two circuits which have considered it, the Fifth and Sixth Circuits, both have concluded that it is not to be given a narrow or limited interpretation. We conclude that conduct which is "religiously moti-

ployee's religious beliefs if they appear to constitute a philosophical attitude rather than an established religion or if a particular belief system differs dramatically from what one would consider a valid expression of faith. For example, the California Court of Appeal held that an employee's veganism reflected his personal life philosophy rather than an organized religion.[140] Therefore, Title VII's accommodation mandate did not apply.[141] However, in contrast, a Wisconsin district court held that the white supremacist belief system of "Creativity" did qualify as a religion in the employee's life and that the employee was entitled to protection under Title VII.[142]

In *Malnak v. Yogi,* the Third Circuit explored generally what constitutes a religion for interpretations of the First Amendment.[143] Referencing U.S. religious pluralism, a *Malnak* concurrence reasoned, "Under the modern view, 'religion' is not confined to the relationship of man with his Creator, either as a matter of law or as a matter of theology."[144] A number of federal circuit courts have relied on Judge Adams's concurring analysis in *Malnak*.[145]

Judge Adams identified three "indicia" to consider in an evaluation of whether a set of beliefs earns protection as a religion under

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vated," i.e., "all forms and aspects of religion, however eccentric . . . ." is protected.

*Id.* at 900 (quoting Cooper v. Gen. Dynamics, 533 F.2d 163, 168 (5th Cir. 1976)).

140. Friedman v. S. Cal. Permanente Med. Grp,, 125 Cal. Rptr. 2d 663, 667 (Ct. App. 2002).

141. *Id.* at 685.

142. Peterson v. Wilmur Commc'ns, Inc., 205 F. Supp. 2d 1014, 1022 (E.D. Wis. 2002). For a discussion of how white supremacist groups have sought and obtained Title VII protection, see Lawrence D. Rosenthal, *Title VII's Unintended Beneficiaries: How Some White Supremacist Groups Will Be Able to Use Title VII to Gain Protection from Discrimination in the Workplace*, 84 TEMP. L. REV. 443 (2012).

143. 592 F.2d 197 (3d Cir. 1979).

144. *Id.* at 207 (Adams, J., concurring). Judge Adams further explained:

> It seems unavoidable, from *Seeger*, *Welsh*, and *Torcaso*, that the Theistic formulation presumed to be applicable in the late nineteenth century cases is no longer sustainable. . . . Even theologians of traditionally recognized faiths have moved away from a strictly Theistic approach in explaining their own religions. Such movement, when coupled with the growth in the United States, of many Eastern and non-traditional belief systems, suggests that the older, limited definition would deny "religious" identification to faiths now adhered to by millions of Americans.

*Id.* (footnote omitted).

145. *See, e.g.*, DeHart v. Horn, 227 F.3d 47, 52 n.3 (3d Cir. 2000); Love v. Reed, 216 F.3d 682, 687 (8th Cir. 2000); Alvarado v. City of San Jose, 94 F.3d 1223, 1227 (9th Cir. 1996); United States v. Meyers, 95 F.3d 1475, 1483 (10th Cir. 1996); Dettmer v. Landon, 799 F.2d 929, 931 (4th Cir. 1986); Wiggins v. Sargent, 753 F.2d 663, 666 (8th Cir. 1985); Grove v. Mead Sch. Distr. No. 354, 753 F.2d 1528, 1534 (9th Cir. 1985); Africa v. Pennsylvania, 662 F.2d 1025, 1031–32 (3d Cir. 1981).

the First Amendment. The first indicium identifies "the content of the supposed religion, not to determine its truth or falsity, or whether it is schismatic or orthodox, but to determine whether the subject matter it comprehends is consistent with the assertion that it is, or is not, a religion."[146] The second indicium involves a determination of whether the belief system presented is comprehensive in its approach to answering life's "'ultimate' questions."[147] For the third indicium, a court must consider how well the "formal, external, or surface signs" of the religion in question compare to other accepted religions.[148] For example, these signs might include "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions."[149] However, Judge Adams also highlighted that "a religion may exist without any of these signs."[150]

While courts remain reluctant to question a given religious tradition, they more readily examine a self-professed adherent's sincerity and whether the accommodation request is based on religious motivations.[151] The inquiry includes whether professed religious dedication masks secular motives.[152] If the employee strays at

146. *Malnak*, 592 F.2d at 208.

147. *Id.* at 208–09.

148. *Id.* at 209.

149. *Id.*

150. *Id.*

151. *See* EEOC v. Abercrombie & Fitch Stores, Inc. (*Abercrombie I*), 798 F. Supp. 2d 1272, 1284 (N.D. Okla. 2011), rev'd on other grounds, 731 F.3d 1106 (10th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014). Note that the Tenth Circuit reversed because "Ms. Elauf never informed Abercrombie prior to its hiring decision that her practice of wearing a hijab was based on her religious beliefs and . . . that she would need an accommodation for the practice, because of a conflict between it and Abercrombie's clothing policy." EEOC v. Abercrombie & Fitch Stores, Inc. (*Abercrombie II*), 731 F.3d 1106, 1116 (10th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014). This holding helps explain the notice obligation discussed in Part. I.B.1.a.ii. Since granting certiorari, the Supreme Court has agreed to consider employer liability "under Title VII for refusing to hire an applicant or discharging an employee based on a 'religious observance and practice' only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee." Petition for Writ of Certiorari at I, EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 44 (No. 14-86), 2014 WL 3725025, at *I.

152. *See* Int'l Soc. for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 432 (2d Cir. 1981) ("Our openness is legitimately restricted only when underlying motives of deception and fraud hide behind a facade of conscience and religious belief."); EEOC v. Chemsico, Inc., 216 F. Supp. 2d 940, 948 (E.D. Mo. 2002) (noting union concern that allowing the accommodation would result in an increase in

all from the accepted tenets of his or her religious belief, an employer litigates the sincerity of the employee's belief to defeat the associated claim for workplace accommodation.[153] For example, clothing retailer Abercrombie & Fitch asserted doubts as to an employee's religious sincerity in two cases on point. In the first, an employee who had converted to the Apostolic faith after she was hired by Abercrombie requested to be allowed to wear modest clothing that did not conform to the retailer's "Look Policy."[154] In denying the plaintiff's motion for summary judgment, the court noted Abercrombie's evidence that the employee had arrived to depositions wearing clothing almost identical to garments that the retailer required that she wear in the store.[155]

In the second Abercrombie case, a female Muslim applicant who requested to wear her headscarf while working was refused employment because Abercrombie claimed the headscarf was contrary to its "Look Policy."[156] In presenting its side of the case, the retailer challenged the sincerity of the teenager's beliefs on the basis that "she did not know the street address of her mosque, does not regularly attend Friday services, and does not pray five times a day or every day."[157] In issuing a summary judgment decision in favor of the plaintiff, the district court stated:

> [Our] focus must be on the sincerity of Elauf's belief that she must wear a head scarf—not whether she observed all tenets of the Muslim faith—because it was her belief about head scarves that required accommodation. And the *purpose* of the inquiry, according to *Philbrook,* is whether this belief is held as a matter of conscience or instead, animated by motives of deception and fraud.[158]

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accommodation requests and that the representative already receives "three to four fake notes on any given Saturday").

153. *See, e.g.*, EEOC v. Alamo Rent-A-Car LLC, 432 F. Supp. 2d 1006, 1011 (D. Ariz. 2006) (rejecting employer's contention that employee's willingness to remove headscarf during prior Ramadan compromised the sincerity of her belief and holding that the analysis must focus on the facts at issue and employee's sincerity at that point in time.); EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291JLR, 2005 WL 2090677, at *2 (W.D. Wash. Aug. 29, 2005) (finding that employee covered religious tattoos on occasion, but could articulate difference between purposeful and incidental coverage).

154. EEOC v. Abercrombie & Fitch Stores, Inc., No. 4:08CV1470 JCH, 2009 WL 3517578 (E.D. Mo. Oct. 26, 2009).

155. *Id.*, at *3.

156. *Abercrombie I*, 798 F. Supp. 2d at 1275.

157. *Id.* at 1284.

158. *Id.* at 1285 (citation omitted).

Thus, while employers suggest that any infraction constitutes evidence of insincerity, the courts require more for dismissal. Courts allow plaintiffs to grow in their religious practices and to vary the strength of their commitment over time.[159] Judges also acknowledge that plaintiffs are human and may not always meet the requirements of their faiths.[160] Finally, as evidenced above, adherents need not be experts in their faiths nor follow every rule to establish a prima facie case.[161] The Supreme Court has recently granted certiorari in the second *Abercrombie* case so jurists should check back for rulings on Abercrombie's actual knowledge.[162]

Employers also contest whether the practice or observance, for which the employee seeks accommodation, is religious in nature and covered by section 701(j). For example, a court held for an employer that setting up for a church play constituted a voluntary social obligation that merited no religious accommodation.[163] In another example, an employee failed to demonstrate that religion, rather than a personal aversion, motivated the refusal to wear a gingerbread necklace during the holiday season.[164] Court analysis of practice remains tricky because, as noted, an employee's religious beliefs need not derive from a recognized or organized religious tradition.[165] However, the employee must still demonstrate that the alleged protected activity is grounded in a faith for which the employee can establish a record of observation.[166]

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159. *See, e.g.*, EEOC v. Ilona of Hungary, Inc., 108 F.3d 1569, 1575–76 (7th Cir. 1997) (responding to employer, who questioned sincerity of employee's Judaism because she did not observe every Jewish holiday, that such observance was not essential and strength of faith could vary over time).

160. *See, e.g.*, EEOC v. Chemsico, Inc., 216 F. Supp. 2d 940, 950 (E.D. Mo. 2002) (finding that sincere religious belief of plaintiff, who was member of Church of God, which did not allow sex before marriage, and who had delivered a child out of wedlock, did not require that adherent never fell below religious standards).

161. *See supra* notes 159–60 and accompanying text.

162. *See supra* note 151.

163. Wessling v. Kroger Co., 554 F. Supp. 548, 552 (E.D. Mich. 1982).

164. Kreilkamp v. Roundy's, Inc., 428 F. Supp. 2d 903, 908 (W.D. Wis. 2006).

165. *See supra* note 137 and accompanying text.

166. *See, e.g.*, *Abercrombie II*, 731 F.3d 1106, 1119 (10th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014). The Tenth Circuit explained:

> First, an applicant or employee may engage in practices that are associated with a particular religion, but do so for cultural or other reasons that are not grounded in that religion. If so, an employer's discrimination against that individual for engaging in that practice . . . would not contravene Title VII's religion-discrimination provisions.

*Id.*

ii. Employer Notification of Belief

Courts have consistently held that an applicant or employee must notify the employer of his or her religious beliefs so that the employer is afforded an opportunity to accommodate related practices.[167] This notification must be specific enough so that the employer has a general understanding of what the employee's religious beliefs are and what accommodation of those beliefs might entail.[168] The Seventh Circuit clarified, "An employee has a duty to give fair notice of religious practices that might interfere with his employment. On the other hand, an employer cannot 'shield itself from liability by . . . intentionally remaining in the dark.' "[169]

Courts do not expect an employer to be an expert in all religions,[170] nor to monitor continually its work force for religious needs.[171] In *Reed v. Great Lakes Cos.*, the Seventh Circuit explained,

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167. *See, e.g.*, *id.* at 1116 (reversing lower court judgment for plaintiff because "[she] never informed Abercrombie prior to its hiring decision that her practice of wearing a hijab was based on her religious beliefs and . . . that she would need an accommodation for the practice").

168. *See, e.g.*, *id.*; Wilkerson v. New Media Tech. Charter Sch., Inc., 522 F.3d 315, 319–20 (3d Cir. 2008) (finding that informing employer she was a Christian was not sufficient to notify employer that school "libation ceremony" would offend employee's religion).

169. Xodus v. Wackenhut Corp., 619 F.3d 683, 686 (7th Cir. 2010) (citations omitted) (quoting EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 804 (7th Cir. 2005)).

170. *Wilkerson v. New Media Technology Charter School, Inc.* provides an example of a court's unwillingness to require that employers be familiar with every employee's nuanced faith traditions and accommodate the related practices. 522 F.3d at 319–20 ("[W]e do not impute to the employer the duty to possess knowledge of particularized beliefs of religious sects."). In that case, the Third Circuit affirmed a ruling that an employer's general knowledge of an employee's Christian beliefs was not sufficient to put the employer on notice that the employee would need an accommodation at a ceremony where alcoholic drinks were served. *Id.* at 319.

In another example, the Seventh Circuit held that an employer was not required to equate an applicant's use of the word "belief" with a particular religious tradition and that the applicant should have been more explicit regarding his need for accommodation. *Xodus*, 619 F.3d at 683. When Xodus applied for a position with Wackenhut Corporation, the hiring manager told Xodus that he would need to cut his dreadlocks to comply with the organization's grooming policy. *Id.* at 685. In affirming the lower court, the appellate court explained, "Xodus claims that his use of the word 'belief' and the dreadlocks themselves sufficed to notify McCuller of the religious nature of his hairstyle. But unlike race or sex, a person's religion is not always readily apparent." *Id.* at 686.

171. *See, e.g.*, Redmond v. GAF Corp., 574 F.2d 897, 902 (7th Cir. 1978) ("We agree with defendant that accommodation is not so onerous as to charge an employer with the responsibility for continually searching for each potential religious

"Even if he wears a religious symbol, such as a cross or a yarmulke, this may not pinpoint his particular beliefs and observances; and anyway employers are not charged with detailed knowledge of the beliefs and observances associated with particular sects."[172] Thus, courts have held that the appearance of an employee does not create a duty for an employer to understand how that employee may need to be accommodated.

Debates arise about whether an employee need directly and explicitly notify an employer of a need for religious accommodation to establish a prima facie case of a failure to accommodate.[173] For example, in the *Abercrombie* headscarf case, the district court held that the manager's past experience in hiring and the fact that the Muslim applicant wore a headscarf to her interview allowed for sufficient notice that the applicant would require an accommodation.[174] The court also noted that the hiring manager had contacted a district manager to discuss the possible need for an accommodation.[175] The Tenth Circuit reversed and remanded this case on the ground that "Ms. Elauf never informed Abercrombie *before* its hiring decision that her practice of wearing a hijab was based upon her religious beliefs and that she needed an accommo-

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conflict of every employee. The employee has the duty to inform his employer of his religious needs so that the employer has notice of the conflict.").

172. 330 F.3d 931, 936 (7th Cir. 2003).

173. In *Hellinger v. Eckerd Corp.*, for example, the court held that an applicant's reference to a need for accommodation served as sufficient notification. 67 F. Supp. 2d 1359, 1363–64 (S.D. Fla. 1999). In *Hellinger*, the pharmacist candidate failed to inform the employer during the interview and on his application form that his Orthodox Jewish faith precluded him from selling condoms and that, as a result, he would need an accommodation. *Id.* at 1361. The employer learned of the need when the hiring manager consulted one of Hellinger's references and decided against hiring the pharmacist based on the reference. *Id.* at 1363. In denying the employer's motion for summary judgment, the court explained that the employer was not relieved of the obligation to accommodate since the employer received notice, even if not from the plaintiff:

> It would be hyper-technical, based on the facts of this case, to require notice of the Plaintiff's religious beliefs to come only from the Plaintiff. The notice requirement is meant in part to allow the company an opportunity to attempt to reasonably accommodate the Plaintiff's beliefs. The Defendant was not deprived of the opportunity to attempt to accommodate the Plaintiff's beliefs merely because the notice did not come from the Plaintiff.

*Id.* at 1363–64. The district court also cautioned that its ruling "does not place the burden of inquiry on the employer." *Id.* at 1364.

174. *Abercrombie I*, 798 F. Supp. 2d 1272, 1286 (N.D. Okla. 2011), rev'd on other grounds, 731 F.3d 1106 (10th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014).

175. *Id.*

dation for that practice."[176] Therefore, the court found that Abercrombie did not have notice of the need for accommodation.[177]

Case law also emphasizes that employees should seek accommodation at the management level with the human resources unit, rather than through a local manager.[178] Otherwise, employees who experience a change in management may need to renotify their employers of the need for accommodation.[179]

Finally, an employee must notify the employer in advance of the need for a religious accommodation. In *Johnson v. Angelica Uniform Group, Inc.*, an employee missed twelve days of work to observe the Holy Days established by the Worldwide Church of God and was subsequently fired.[180] The Eighth Circuit upheld the district court's ruling that the employee had failed to establish a prima facie case because she had not informed the employer in advance of her need for accommodation.[181]

iii. Discipline for Failure to Comply

In an adverse employment action, courts look for negative consequences similar to those that occur in other types of discrimination cases.[182] For example, a plaintiff might provide the court with evidence that he was "discharged or disciplined as a result of his failure to comply with an employer demand which conflicted with his religious beliefs."[183] However, a demotion that does not result in a salary reduction may legitimately accommodate the employee's

176. *Abercrombie II*, 731 F.3d 1106, 1122 (10th Cir. 2013) (emphasis added), *cert. granted*, 135 S. Ct. 44 (2014).

177. *Id.* at 1128–31.

178. *See, e.g.*, Johnson v. AutoZone, Inc., 768 F. Supp. 2d 1124, 1129 (N.D. Ala. 2011).

179. For example, in *Miller v. Safeway, Inc.*, a native Alaskan wore his hair long because of his spiritual beliefs. 102 P.3d 282, 285 (Alaska 2004). Although long hair violated the store's grooming policy for males, Miller received an accommodation from the local store manager who had hired him. *Id.* When Safeway purchased the chain for which Miller worked, his local accommodation continued only for another eighteen months. *Id.* at 286. When Safeway slated Miller for a transfer to a different store, it informed him that he would need to cut his hair or face termination. *Id.* In this case, if Miller had sought the accommodation at the organizational level, a record of his need for accommodation would have better protected him during the transition in the store ownership. The court granted Safeway summary judgment because of Miller's failure to give notice of a need for religious accommodation during the ownership transition. *Id.* at 292–93.

180. 762 F.2d 671, 672 (8th Cir. 1985).

181. *Id.* at 673.

182. *See, e.g.*, Lake v. B.F. Goodrich Co., 837 F.2d 449, 450 (11th Cir. 1988) (finding that employee was fired for failure to report to work for a weekend shift).

183. Wilshin v. Allstate Ins. Co., 212 F. Supp. 2d 1360, 1373 (M.D. Ga. 2002).

religious practice.[184] Courts have also found an employee's requested transfer that resulted in a religious conflict as excusing the employer's need to accommodate.[185] Additionally, a "failure to promote with continued accommodation" was not sufficiently adverse to constitute a Title VII violation.[186]

b. The Employer's Response Under Section 701(j)

After the employee successfully makes the prima facie case, the burden shifts to the employer. Circuit courts require employers to show: (1) proof that the employer attempted a reasonable accommodation, or (2) a demonstration that accommodation constituted an undue hardship.[187] They split on how to assign these burdens, however. The First, Third, and Fourth Circuits treat reasonable accommodation and undue hardship as two distinct defenses to a charge of religious discrimination.[188] In contrast, most of the other circuits view the employer's burden as a two-part process, including presentation of evidence of an attempt to accommodate and evidence of an undue burden.[189] The Ninth Circuit follows this pro-

184. Mathewson v. Fla. Game & Fresh Water Fish Comm'n, 693 F. Supp. 1044, 1050 (M.D. Fla. 1988), *aff'd*, 871 F.2d 123 (11th Cir. 1989) (finding an accommodation for an employee offered a demotion without a salary reduction to enable him to avoid working on Saturdays).

185. *See, e.g.*, Irvin v. Aubrey, 92 S.W.3d 87, 90 (Ky. Ct. App. 2001).

186. Johnson v. AutoZone, Inc., 768 F. Supp. 2d 1124, 1139 (N.D. Ala. 2011).

187. *See infra* notes 188–91.

188. *See, e.g.*, EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 312 (4th Cir. 2008) (explaining that the employer's burden "is a two-prong inquiry," and employer "must demonstrate *either* (1) that it provided the plaintiff with a reasonable accommodation for his or her religious observances *or* (2) that such accommodation was not provided because it would have caused an undue hardship"); EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R., 279 F.3d 49, 55 (1st Cir. 2002) (holding that after the plaintiff has established his prima facie case "the burden shifts to the union to show that it made a reasonable accommodation of the religious practice or show that any accommodation would result in undue hardship."); United States v. Bd. of Educ., 911 F.2d 882, 887 (3d Cir. 1990) (finding that there are two defenses, accommodation and undue hardship).

189. Harrell v. Donahue, 638 F.3d 975, 979 (8th Cir. 2011) ("Title VII requires an employer to reasonably accommodate the religious beliefs of its employees unless the employer can demonstrate that doing so would impose an undue hardship."); Morrissette-Brown v. Mobile Infirmary Med. Ctr., 506 F.3d 1317, 1321 (11th Cir. 2007) (stating that "the burden shifts to the defendant to 'demonstrate[ ] 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'") (citations omitted); Virts v. Consol. Freightways Corp. of Del., 285 F.3d 508, 516 (6th Cir. 2002) ("Once the plaintiff has established a *prima facie* case, the burden shifts to the defendant employer to

cess, but adds a condition that the employer negotiate with the employee.[190] The Ninth Circuit also permits a demonstration of good faith efforts as part of a showing of reasonable accommodation.[191]

i. Employee Responsibility for Accommodation

Some courts place the burden on the employee to suggest a reasonable accommodation to the employer. For example, in *Yott v. North American Rockwell Corp.*, a California district court stated, "The plaintiff has the burden of proving that he has offered to the employer an accommodation which is acceptable to him."[192] The Seventh Circuit specifically rejected this approach in *Redmond v. GAF Corp.*, reasoning, "While we feel plaintiff should be free, even encouraged, to suggest to his employer possible ways of accommodating his religious needs, we see nothing in the statute to support the position that this is part of plaintiff's burden of proof."[193]

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show that it could not reasonably accommodate the employee without undue hardship."); Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) (explaining that after an employee establishes his prima facie case, "the burden then shifts to the employer to show it could not accommodate the employees' religious beliefs without undue hardship"); Weber v. Roadway Express, Inc., 199 F.3d 270, 273 (5th Cir. 2000) (stating that the burden shifts to the employer to demonstrate that it was unable to accommodate the employee's beliefs without undue hardship); Baz v. Walters, 782 F.2d 701, 706 (7th Cir. 1986) (holding that the employer's burden is "to demonstrate that he cannot accommodate the plaintiff's religious practice without undue hardship to his business"); Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1486 (10th Cir. 1989) (citations omitted) ("Once a plaintiff has made out a prima facie case, 'the burden shifts to the employer to show that it was unable reasonably to accommodate the plaintiff's religious needs without undue hardship.'").

190. *See* Opuku-Boateng v. California, 95 F.3d 1461, 1467 (9th Cir. 1996) (quoting Heller v. EBB Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993)) (internal quotation marks omitted) (stating that after the employee establishes a prima facie case, "the burden shifts to the employer to show that it negotiate[d] with the employee in an effort reasonably to accommodate the employee's religious beliefs"). The *Opuku-Boateng* court also held that if the negotiations fail to eliminate the religious conflict, "the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do so." *Id.*

191. Anderson v. Gen. Dynamics Convair Aerospace Div., 589 F.2d 397, 401 (9th Cir. 1978) (concluding that the burden was on the employer and the union "to prove that they made good faith efforts to accommodate Anderson's religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship").

192. 428 F. Supp. 763, 769 (C.D. Cal. 1977), *aff'd*, 602 F.2d 904 (9th Cir. 1979).

193. 574 F.2d 897, 901 (7th Cir. 1978).

ii. Vague Terms: Reasonable Accommodation and Undue Hardship

The employer's burden to accommodate, through an employee's proposal or otherwise, attracts additional litigation because of vague terms in the statute. When Congress amended Title VII in 1972, it mandated an employer "reasonably accommodate" the "religious observance or practice" of employees or prospective employees, as long as that effort to accommodate does not create an "undue hardship on the conduct of the employer's business."[194] The amended definitions section, however, failed to specify what Congress meant by "reasonably accommodate" and "undue hardship."[195] Courts in each circuit have interpreted and explored the terms uniquely.[196] One judge suggested that whether an accommo-

194. Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e(j) (2012)).

195. *See id.*; *see also* Beadle v. Hillsborough Cnty. Sheriff's Dep't, 29 F.3d 589, 592 (11th Cir. 1994) ("The phrases 'reasonably accommodate' and 'undue hardship' are not defined within the language of Title VII."); Am. Postal Workers Union, S.F. Local v. Postmaster Gen., 781 F.2d 772, 775 (9th Cir. 1986) ("The 'reach' of the [accommodation] obligation has simply never been spelled out by Congress or the EEOC.").

196. *See, e.g.*, *Beadle*, 29 F.3d at 592 (finding that definitions of reasonable accommodation and undue hardship are "unclear under the statute and must be determined on a case-by-case basis"); Smith v. Pyro Mining Co., 827 F.2d 1081, 1085 (6th Cir. 1987) ("The reasonableness . . . must be determined on a case-by-case basis; what may be a reasonable accommodation for one employee may not be reasonable for another."); Williams v. S. Union Gas Co., 529 F.2d 483, 489 (10th Cir. 1976) ("The phrases 'reasonably accommodate' and 'undue hardship' are relative terms and cannot be given any hard and fast meaning."); Maroko v. Werner Enters., Inc., 778 F. Supp. 2d 993, 1003 (D. Minn. 2011) (quoting Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1033 (8th Cir. 2008)) (noting that the "Eighth Circuit has counseled that the reasonableness of a proposed accommodation often 'is a question for the jury because it turns on fact-intensive issues such as work demands [and] the strength and nature of the employee's religious conviction' "). In *Trans World Airlines, Inc. v. Hardison*, the Court determined:

> Cases decided by the Courts of Appeals since the enactment of the 1972 amendments to Title VII similarly provide us with little guidance as to the scope of the employer's obligation. In circumstances where an employer has declined to take steps that would burden some employees in order to permit another employee or prospective employee to observe his Sabbath, the Fifth, Sixth, and Tenth Circuits have found no violation for failure to accommodate.

432 U.S. 63, 75 n.10 (1977); *see also S. Union Gas Co.*, 529 F.2d at 488–89 (finding no issue of law and no violation because employer did not normally require plaintiff to work on his Sabbath); Reid v. Memphis Publ'g Co., 521 F.2d 512, 528 (6th Cir. 1975) (finding no evidence that accommodation of employee's religious practice of not working on Saturdays would not have been an undue hardship for the employer); Johnson v. U.S. Postal Serv., 497 F.2d 128 (5th Cir. 1974) (ruling that further accommodation in a small post office would have posed an undue hardship for the Postal Service). *But see* Draper v. U.S. Pipe & Foundry Co., 527 F.2d

dation is reasonable is "difficult to boil down to a set formula. Instead, the determination of reasonableness is quintessentially a fact-bound inquiry that depends on the unique circumstances of each case."[197]

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515, 520–21 (6th Cir. 1975) (finding no undue hardship where an accommodation would cause other workers to become disgruntled); Cummins v. Parker Seal Co., 516 F.2d 544, 550 (6th Cir. 1975) (holding that mild, infrequent complaints by coworkers would not have amounted to an undue hardship in accommodation), *aff'd*, 429 U.S. 65 (1976), *vacated*, 433 U.S. 903 (1977); Riley v. Bendix Corp., 464 F.2d 1113, 1118 (5th Cir. 1972) (finding no evidence of undue hardship). One might explain these apparent intracircuit conflicts by the differing facts of each case, but neither the Fifth nor the Sixth Circuit has suggested a theory of decision to justify the differing results that they have reached.

197. Haliye v. Celestica Corp., 717 F. Supp. 2d 873, 881 (D. Minn. 2010).

A number of cases focus on whether shift swapping between employees constitutes a reasonable accommodation. Courts have expressed concern that if they force a shift swap in the spirit of accommodation for one employee, they could inadvertently create an accommodation issue for the employer and another employee. *See, e.g.*, Lee v. ABF Freight Sys., Inc., 22 F.3d 1019, 1023 (10th Cir. 1994) (citing *Hardison*, 432 U.S. at 81) (finding that an employer need not deny the shift or job preferences of some employees to accommodate the religious needs of others). Additionally, some caution against requiring one employee to rely on the "goodwill" of other employees in order to satisfy a religious need. *See, e.g.*, N. Shore Univ. Hosp. v. State Human Rights Appeal Bd., 439 N.Y.S.2d 408, 409 (App. Div. 1981) (alteration in original) (quoting State Div. of Human Rights v. Genesee Hosp. 418 N.Y.S.2d 687, 694 (App. Div. 1979)) (holding that an employer has an affirmative duty to assist its employee because the employee "'should not [be] forced to rely upon the good will of her coworkers or her powers of persuasion, else be relegated to choosing between her religious beliefs and her employment").

If the employer does offer shift swapping as a potential solution, the employer must actively assist the employee in finding someone with whom to swap. *See, e.g.*, Miller v. Drennon, 59 Fair Empl. Prac. Cas. (BNA) 192 (4th Cir. 1992) (holding that the shift swapping accommodation was as reasonable as those upheld in other circuits); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141 (5th Cir. 1982) (ruling that hospital's policy of allowing pharmacists to trade shifts was a reasonable accommodation); EEOC v. Aldi, Inc., No. CIV.A. 06-01210, 2008 WL 859249, at *11 (W.D. Pa. Mar. 28, 2008) (finding that where courts had accepted shift swapping as an appropriate accommodation, employers had taken additional action beyond the existing scheduling procedure); Kenner v. Domtar Indus., Inc., No. 04-CV-4021, 2006 WL 522468, at *4 (W.D. Ark. Mar. 3, 2006) (citing Rice v. U.S.F. Holland, Inc., 410 F. Supp. 2d 1301, 1312 (N.D. Ga. 2005)) (stating that the "employer could not rely on existence of a shift-swap policy when employer took no effort in response to employee's notification of the conflict").

The Ninth, Tenth, and Eleventh Circuits have found shift swapping to be a reasonable accommodation. *See, e.g.*, Hudson v. W. Airlines, Inc., 851 F.2d 261, 266 (9th Cir. 1988) (holding that a collective bargaining agreement provided employee with "reasonable accommodations to eliminate her religious conflicts" by allowing employee to trade shifts with coworkers); United States v. City of Albuquerque, 545 F.2d 110, 113–14 (10th Cir. 1976) (affirming the district court's holding that trading shifts was a reasonable accommodation); *Beadle*, 29 F.3d at

The Supreme Court first weighed in on the issue of what might constitute a reasonable accommodation in *Ansonia Board of Education v. Philbrook*.[198] *Ansonia* concerned a high school teacher who had decided to join the Worldwide Church of God, which required that he miss six days of school in observance of Holy Days.[199] The collective bargaining agreement (CBA) that governed the school's leave policy allowed for only three days of leave for religious observance.[200] Philbrook and the school board favored different accommodations: Philbrook requested that the school board permit him to use personal business leave for religious observance or that he pay a substitute and receive his full pay for the days off.[201] However, the board wanted Philbrook to take unpaid leave when he exhausted his religious leave allowance.[202]

The Supreme Court held that Title VII required only that the employer provide the employee with an accommodation, not that it be without cost to the employee or that it be the accommodation that the employee preferred.[203] The Court explained, "Neither the terms nor the legislative history of § 701(j) supports the Court of Appeals' 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."[204] The Court cautioned, "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 such hardship."[205] While an employer might require the employee to take a day of unpaid leave for a religious obser-

593 (holding that a neutral rotating shift system and shift swaps within the system represent reasonable accommodations).

198. 479 U.S. 60, 66 (1986).

199. *Id.* at 62.

200. *Id.* at 63–64.

201. *Id.* at 64–65.

202. *Id.* at 70.

203. *Id.* (holding that it was reasonable for employee to take a day of unpaid leave). However, at least one court determined that an employer could encounter more difficulty crafting an accommodation if the employee's belief system dictated that a religious violation resulted when anyone worked on the holy day. *See* EEOC v. J.P. Stevens & Co., Inc., 740 F. Supp. 1135, 1138 (M.D.N.C. 1990) (explaining that accommodation failed because employees refused to request that someone else commit what they considered to be a sin).

204. *Ansonia*, 479 U.S. at 61 (finding that an employer meets its legal obligation under section 701(j) when it offers a reasonable accommodation. Section 701(j) does not require that the employer prove that each of the employee's alternative accommodations would result in undue hardship).

205. *Id.*

vance, commented the Court, an employer has not offered a "reasonable accommodation when paid leave is provided for all purposes *except* religious ones."[206]

*Ansonia* prompted two partial dissents. Justice Marshall wrote that a denial of pay constituted an adverse action rather than an accommodation.[207] For Marshall, further attempts at accommodation were required because the board's solution forced Philbrook "to choose between following his religious precepts with a partial forfeiture of salary and violating these precepts for work with full pay."[208] In stark contrast, Justice Stevens reasoned that no accommodation was necessary because Philbrook suffered an adverse consequence only because he took a day off of work, not because the school interfered with his religious practice.[209]

*Ansonia* provides some guidance to courts, employers, and employees regarding what constitutes a reasonable accommodation. However, accommodation cases tend to be relatively fact specific. Therefore, one should exercise caution in generalizing beyond the facts of a specific case. An Eighth Circuit district court used *Ansonia* as a signal that "it is not unreasonable to ask an employee to take unpaid leave while attempting to place him in another position."[210] However, the court noted that a mere possibility that an acceptable position might open up would not suffice as an accommodation.[211]

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206. *Id.* at 71.

207. *Id.* at 74 (Marshall, J. dissenting) ("A forced reduction in compensation based on an employee's religious beliefs can be as much a violation of Title VII as a refusal to hire or grant a promotion.").

208. *Id.*

209. *Id.* at 81 (Stevens, J. dissenting). Stevens wrote:

> Every employee who takes a day off from work for an unauthorized purpose suffers the same inconvenience as Philbrook; each loses a day of pay and must make up the work associated with that day. The obligation to perform the work carries over, not because the employee has exercised his religion in the one case or satisfied a secular business need in another, but for the generic and shared reason that the employee was not paid for a day on which he was hired to do work. Since no statutory conflict between Philbrook's religion and his work duties occurred, the duty to accommodate his religious practices never arose.

*Id.* This reasoning appears consistent with Harlan's discussion of *Braunfeld v. Brown* in *Sherbert* and Rehnquist's subsequent discussion of *Braunfeld* in *Thomas*. Thomas v. Review Bd., 450 U.S. 707, 722–23 (1981) (Rehnquist, J., dissenting); Sherbert v. Verner, 374, U.S. 398, 421 (1963) (Harlan, J., dissenting).

210. Maroko v. Werner Enters., Inc., 778 F. Supp. 2d 993, 1002–03 (D. Minn. 2011) (citing *Ansonia*, 479 U.S. at 70).

211. *Id.* at 1003 (disapproving that the plaintiff's employment would have been terminated if a position did not become available during the time of the leave).

Similarly, in *American Postal Workers Union, San Francisco Local v. Postmaster General*, the Ninth Circuit held that an acceptable accommodation is one that "reasonably preserves the affected employee's employment status."[212] Additionally, the employer must update and adjust accommodations as work conditions change. For example, the Sixth Circuit held in *EEOC v. Arlington Transit Mix, Inc.,* that an employer could not rely on a prior accommodation to satisfy the employer's obligations under Title VII after the employee's schedule changed.[213]

iii. Vague Terms: Union Member Employees

Litigation over the meaning of reasonable accommodation and undue hardship has forced employers to navigate between employee accommodation and the obligations to honor CBAs and to deal fairly with unions, as mandated by the National Labor Relations Act.[214] The Supreme Court established priorities between competing interests and clarified the meaning of terms in *Trans World Airlines, Inc. v. Hardison*.[215]

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212. 781 F.2d 772, 776–77 (9th Cir. 1986).

213. 957 F.2d 219, 222 (6th Cir. 1991) (finding that once the new schedule was implemented, the company should have made a reasonable attempt to accommodate the employee's sincere religious needs).

214. *See* 29 U.S.C. §§ 1511–69 (2012).

215. 432 U.S. 63, 79 (1977). *But see* Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971), *superseded by statute*, Pub. L. No. 92-261, 86 Stat. 103, *as recognized in* Smith v. Pyro Mining Co., 827 F.2d 1081 (6th Cir. 1987).

In, *Dewey*, a Title VII case filed prior to the 1972 section 701(j) amendments, an equally divided Supreme Court affirmed the Sixth Circuit's holding that an employer need not disrupt the schedules of other employees to accommodate the plaintiff's religious practices. *Id.* The Sixth Circuit held, "The reason for Dewey's discharge was not discrimination on account of his religion; it was because he violated the provisions of the collective bargaining agreement entered into by his union with his employer, which provisions were applicable equally to all employees." *Id.* at 330–31. The court expressed concern that its allowing Dewey to change his schedule for a religious reason "could create chaotic personnel problems and lead to grievances and additional arbitrations." *Id.* The court continued, "The fundamental error of Dewey and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees." *Id.* at 335.

Other cases that comment on *Dewey* call its currency into question. For example, in *Michigan Department of Civil Rights* ex rel. *Parks v. General Motors Corp., Fisher Body Division*, the Michigan Supreme Court found:

> *Dewey*, it must be observed, was decided before the 1972 amendment to Title VII defined "religion" to include religious observances and practices and imposed a reasonable accommodation duty on the employer. *Dewey* also pre-

Hardison, who joined the Worldwide Church of God after he began at TWA, worked in a division that operated twenty-four hours a day, seven days a week.[216] Hardison informed his supervisor of his need to observe the church's Sabbath, from sundown on Friday to sundown on Saturday.[217] His supervisor attempted to accommodate him and was initially successful in doing so.[218] However, when Hardison transferred to a different area, he lacked sufficient seniority for TWA to schedule him around his Sabbath on a regular basis.[219]

The *Hardison* decision serves a two-fold purpose. First, the Court reviewed the Sixth Circuit's position in *Dewey v. Reynolds Metals Co.* regarding the importance of collective bargaining agreements.[220] The Court stated, "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."[221] This *Hardison* quote confirms the primacy of CBAs and union seniority.

Second, the Court established the "de minimis" standard as a way for employers to judge whether the cost of a particular accommodation constituted an undue hardship:

> 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*.[222]

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ceded the United States Supreme Court decision in *Griggs v. Duke Power Co.*, which spoke of Title VII as proscribing "not only overt discrimination, but also practices that are fair in form, but discriminatory in operation". Further, the affirmance by an equally divided Supreme Court entitles *Dewey* to no precedential weight and its several alternative rationales, according to the Supreme Court, make its impact "inconclusive."

317 N.W.2d 16, 24 (Mich. 1982) (citation omitted).

216. 432 U.S. at 66–67.

217. *Id.* at 67–68.

218. *Id.*

219. *Id.* at 68.

220. *Id.* at 73.

221. *Id.* at 79. The Court continued, "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." *Id.*

222. *Hardison*, 432 U.S. at 84 (emphasis added). The Court continued:

> 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

Here, the Court sought to put all employees on equal footing, regardless of their religious practices. Additionally, the Court's interest in preserving the integrity of the CBA and protecting union employers from additional grievances justified the de minimis standard to resolve the differences between the competing needs of employees, employers, and the union. This standard appears to present quite a hurdle, therefore, to employees.

Application of the *Hardison* de minimis analysis involves consideration of a variety of factors. Such factors may include: (1) whether the employees are union members with an applicable CBA, (2) whether the accommodation would force the employer to assume additional payroll costs, (3) whether the accommodation would affect the employer's marketing brand or employee appearance, and (4) whether the accommodation might affect employee safety.

State and federal courts consistently find that employers need not disturb a negotiated CBA to accommodate an employee's religious practices.[223] In fact, courts often point to a neutral seniority

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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.

*Id.* at 84–85.

Justice Marshall dissented. He expressed concern especially for the potential erosion of tolerance for minority faiths: "Particularly troublesome has been the plight of adherents to minority faiths who do not observe the holy days on which most businesses are closed—Sundays, Christmas, and Easter—but who need time off for their own days of religious observance." *Id.* at 85 (Marshall, J. dissenting). Marshall also spoke to the more general social effect:

> Today's decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices. . . . An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a matter of law today's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise.

*Id.* at 86–87.

223. *See, e.g.*, Stolley v. Lockheed Martin Aeronautics Co., 228 F. App'x 379, 382 (5th Cir. 2007) (holding that the employer was not required to disrupt seniority system when the union was unwilling to waive provision in the CBA); Haliye v. Celestica Corp., 717 F. Supp. 2d 873, 879 (D. Minn. 2010) ("This is not to say that there are no bright-line rules for determining whether a given accommodation is

system as itself an accommodation of employee needs.[224] This reasoning has its limitations, however. In one example, when one enterprising employer tried to use the seniority system at one of its unionized work locations to deny time off to an employee at a non-unionized site, a court declined to find evidence of an accommodation.[225]

Some judges express skepticism over a union seniority system as an accommodation because Title VII's employer obligations do not apply to unions.[226] Union representatives are therefore free to

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reasonable. For example, an employer is not required to deprive other employees of their contractual rights in order to accommodate an employee's religious needs."); *see also* Lee v. ABF Freight Sys., Inc., 22 F.3d 1019, 1023 (10th Cir. 1994) (citing *Hardison*, 432 U.S. at 79 (majority opinion)) (holding that "Title VII [does not] require an employer to violate a valid labor agreement to accommodate an employee"); Wren v. T.I.M.E.-D.C., Inc., 595 F.2d 441, 445 (8th Cir. 1979) (deciding that the employer was not required to depart from a seniority system to accommodate a religious need); Boomsma v. Greyhound Food Mgmt., Inc., 639 F. Supp. 1449, 1454 (W.D. Mich. 1986) (noting the neutrality of a scheduling system "particularly where such system is mandated by a collective bargaining agreement and operates through a seniority system"); N.Y.C. Transit Auth. v. Exec. Dep't, Div. of Human Rights, 627 N.Y.S.2d 360, 362 (App. Div. 1995), *aff'd as modified*, 674 N.E.2d 305 (N.Y. 1996) ("The courts are not free to downgrade the importance of union seniority rights.").

224. *See, e.g.*, EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 315 (4th Cir. 2008). Relying on *Hardison*, the Fourth Circuit court reasoned:

> Firestone's use of a seniority-based bidding system for working shifts "itself represent[s] a significant accommodation to the needs, both religious and secular, of all of [its] employees." This is because a "seniority system represents a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off." When Jozwiakowski first reviewed Wise's request, he examined whether Wise could change shifts or positions. Unfortunately for Wise, Jozwiakowski could not grant such a move because Wise's preferred shift (7:00 a.m. to 3:00 p.m.) was occupied by employees with more seniority. As the district court noted, however, "[t]he fact that Wise does not currently benefit from the seniority system does not negate the reasonableness of the accommodation."

*Id.* (citation omitted).

225. N.Y. & Mass. Motor Serv., Inc. v. Mass. Comm'n Against Discrimination, 517 N.E.2d 1270, 1275 (Mass. 1988).

226. *See, e.g.*, N.Y.C. Transit Auth. v. Exec. Dep't, Div. of Human Rights, 627 N.Y.S.2d 360, 364 (App. Div. 1995) (Rubin, J., concurring). In *New York City Transit Authority*, a concurring opinion emphasized:

> My objection to the more or less automatic exemption of union seniority systems from civil rights statutes is that current State and Federal standards impose no obligation on the employer *and union* to accommodate an employee's religious beliefs, even where, as here, the employer is a quasi-public agency that derives a substantial portion of its operating revenue from public funding. . . . By requiring no effort at accommodation on the part of the employee

insist on the implementation of the CBA without fear of statutory repercussions. The concurrence in *New York City Transit Authority v. Executive Department, Division of Human Rights* points out that the union did so insist, even though accommodation would have been fairly easy because of the sheer number of employees.[227] The law incentivizes union and employer enforcement of the seniority structure guaranteed by a CBA much more than it does a religious accommodation for a single employee.[228]

Courts routinely find that employer-borne accommodation costs, whether they result from an increase in salary or a decrease in production due to a missing worker, are not de minimis.[229] For example in *United States v. City of Albuquerque*, the court held, "Title VII does not require an employer . . . to bear the financial burden of an employee's religious convictions."[230] However, the EEOC reminds

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union, the law invites intolerable discriminatory consequences through rigid adherence to contractual provisions.

*Id.* (citations omitted).

227. *Id.* Concerning the organization that employed over 33,000 workers, the concurrence expressed skepticism that "the accommodation of the occasional Sabbath observer would require another employee to forego the comfort of home and the company of offspring." *Id.* The concurrence added, "It is clear from the record that the Transport Workers Union insisted on rigid adherence to the terms of its collective bargaining agreement and ultimately frustrated any attempt by the employer to permit its employee to take Saturdays off." *Id.*

228. *Id.* at 361 (majority opinion) (noting that the employer "declined" to contest issue with union).

229. *See, e.g.*, Lee v. ABF Freight Sys., Inc., 22 F.3d 1019, 1023 (10th Cir. 1994) (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)) ("The cost of hiring an additional worker or the loss of production that results from not replacing a worker who is unavailable due to a religious conflict can amount to undue hardship."); Mann v. Frank, 7 F.3d 1365, 1370 (8th Cir. 1993) (quoting *Hardison*, 432 U.S. at 84) ("'Any cost in efficiency or wage expenditures that is more than de minimis constitutes undue hardship.'"); EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291JLR, 2005 WL 2090677, at *4 (W.D. Wash. Aug. 29, 2005) (citing Balint v. Carson City, Nev., 180 F.3d 1047, 1055 (9th Cir.1999)) (finding an undue hardship in "additional costs arising from lost efficiency or higher wages"); Hellinger v. Eckerd Corp., 67 F. Supp. 2d 1359, 1364–65 (S.D. Fla. 1999) (holding that precedent supported employer's argument that hiring additional pharmacy staff would be more than a de minimis cost); Favero v. Huntsville Indep. Sch. Dist., 939 F. Supp. 1281, 1291 (S.D. Tex. 1996) (holding that "courts have repeatedly held that paying additional wages to accomplish an accommodation is an undue burden"), *aff'd*, 110 F.3d 793 (5th Cir. 1997).

230. 423 F. Supp. 591, 601 (D.N.M. 1975), *aff'd*, 545 F.2d 110 (10th Cir. 1976).

employers that they are always free to take on the additional costs to accommodate the needs of an employee.[231]

Courts also face conflicts over how an employee expresses religious beliefs through his or her appearance.[232] In one often-cited case, *Cloutier v. Costco Wholesale Corp.*, an employee who had joined the Church of Body Modification pierced various parts of her body, including her face.[233] Local managers objected to the piercings as a violation of Costco's dress code and asked her to remove or cover them; Cloutier objected.[234] Holding in favor of Costco, the First Circuit validated the retailer's right to cultivate a "neat, clean and professional image."[235] Similarly, in *EEOC v. Sambo's of Georgia, Inc.*, a Georgia district court upheld an employer's enforcement of grooming standards, commenting in dicta that even if those standards are "nothing more than an appeal to customer preference . . . it is not the law that customer preference is an insufficient justification as a matter of law."[236]

Employers also tend to prevail when religious dress or appearance preferences conflict with safety requirements.[237] For example,

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231. *Best Practices for Eradicating Religious Discrimination in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last updated July 23, 2008) (stating that "employers may of course choose voluntarily to incur whatever additional operational or financial costs they deem appropriate to accommodate an employee's religious need for scheduling flexibility").

232. *See* Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 136 (1st Cir. 2004). Courts considering Title VII religious discrimination claims have also upheld dress code policies that, like Costco's, are designed to appeal to customer preference or to promote a professional public image. *E.g.*, Hussein v. The Waldorf-Astoria, 134 F. Supp. 2d 591, 599 (S.D.N.Y. 2001) ("Some courts have found that clean-shavenness is a bona fide occupational qualification in certain businesses and, in those situations, as long as the employer's grooming requirement is not directed at a religion, enforcing the policy is not an unlawful discriminatory practice."), *aff'd*, 31 F. App'x 740 (2d Cir. 2002). The majority of religious discrimination cases in this arena appear to involve policies regulating facial hair. *See, e.g.*, EEOC v. Sambo's of Ga., Inc., 530 F. Supp. 86, 90–91 (N.D. Ga. 1981) (holding that exempting a Sikh job applicant whose religious practice required that he wear a beard from a restaurant's no-facial-hair policy would constitute undue hardship); *cf.* Woods v. Safeway Stores, Inc., 420 F. Supp. 35, 43 (E.D. Va. 1976) (upholding an employer's no-beard policy against a claim of racial discrimination, finding that it served a legitimate business interest in maintaining an image of cleanliness to attract and retain customers), *aff'd*, 579 F.2d 43 (4th Cir. 1978).

233. 390 F.3d at 128–29.

234. *Id.*

235. *Id.* at 136.

236. 530 F. Supp. at 91.

237. *See, e.g.*, EEOC v. Kelly Services, Inc., 598 F.3d 1022, 1031–32 (8th Cir. 2010) (holding that a printer's refusal to hire a Muslim wearing a hijab constituted

the Fifth Circuit held that a female applicant's request to wear skirts while working as a stocker at Sears would have constituted a safety hazard and de facto an undue hardship for the retailer.[238]

In defending an accommodation action, an employer may point to the need to maintain harmony in the workplace, especially when an accommodation would require a coworker to take a less desirable schedule or to complete a larger share of the workload. However, courts typically require that coworker complaints amount to more than a general inconvenience or constitute more than "mere grumbling."[239]

When holding that a particular circumstance constitutes an undue hardship, courts often require actual evidence of the hardship rather than speculation about negative consequences.[240] However,

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a legitimate safety concern and was not a pretext for discrimination); Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1383–84 (9th Cir. 1984) (upholding the suspension of a Sikh employee who refused to shave after a new policy required employees to be clean-shaven so that respirator masks fit properly); McCarter v. Harris County, Tex., No. Civ. A. H-04-4159, 2006 WL 1281087, at *5–6 (S.D. Tex. May 5, 2006) (finding that the accommodation of allowing an employee to wear a skirt or dress when such attire increased job performance safety risks imposed an undue hardship on the employer).

238. Johnson v. Sears Roebuck & Co., 66 F. App'x 523 (5th Cir. 2003).

239. *See, e.g.*, Burns v. S. Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978) (citing Anderson v. Gen. Dynamics Convair Aerospace Div., 589 F.2d at 402 (9th Cir. 1978)) (holding that undue hardship requires more than grumbling or unhappiness; it requires an "imposition on co-workers or disruption of the work routine").

In *Cummins v. Parker Seal Co.*, the court explained:

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

516 F.2d 54, 550 (6th Cir. 1975) (citing EEOC Decision No. 72-0606, 4 Fair Empl. Prac. Cas. (BNA) 311 (1971)), *aff'd*, 429 U.S. 65 (1976) (per curiam), *vacated*, 433 U.S. 903 (1977).

240. *See, e.g.*, Smith v. Pyro Mining Co., 827 F.2d 1081, 1086 (6th Cir. 1987) (finding that "[a]n employer must . . . present evidence of undue hardship; it cannot rely merely on speculation"); *Anderson*, 589 F.2d at 402 (concluding that "[u]ndue hardship cannot be proved by assumptions nor by opinions based on

in an unpublished opinion from the Sixth Circuit, the court stated that the employer need not prove unequivocally that the accommodation will result in an undue hardship.[241] The court reasoned, "Surely Congress did not intend that an employer must actually undertake an accommodation that will inevitably cause undue hardship."[242] Affirming the district court's summary judgment for the employer, the appellate court indicated that the office was too small for the employer to allow all the plaintiff's requested leave when she had already exhausted more than her accumulated time.[243] The employer need not implement a particular accommodation in order to judge its effectiveness or cost.[244]

In *Cloutier v. Costco Wholesale Corp.*, the employee claimed that her appearance had not prompted any complaints of which she was aware.[245] The First Circuit acknowledged sister courts' similar hesitancy to rule on hypothetical hardships.[246] However, it still affirmed summary judgment for the employer.[247] The court reasoned that

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hypothetical facts"); *Abercrombie I*, 798 F. Supp. 2d 1272, 1287 (N.D. Okla. 2011) (ruling that the employer should have attempted "to collect or analyze data to corroborate his opinion" using the data from similar accommodations that had been granted), rev'd on other grounds, 731 F.3d 1106 (10th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014); EEOC v. Aldi, Inc., No. CIV.A. 06-01210, 2008 WL 859249, at *15–16 (W.D. Pa. Mar. 28, 2008) (chastising employer for presenting only hypothetical generalizations of potential costs to support its claim of undue hardship); EEOC v. Alamo Rent-A-Car LLC, 432 F. Supp. 2d 1006, 1015 (D. Ariz. 2006) ("Alamo fails to support its assertion of undue burden with anything other than speculation, which is not a basis to establish a genuine material fact.").

In *Draper v. U.S. Pipe & Foundry Co.*, the court stated, "[W]e are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted." 527 F.2d 515, 520 (6th Cir. 1975).

241. DePriest v. Dep't of Human Servs., No. 86-5920, 1987 WL 44454 (6th Cir. Oct. 1, 1987) (per curiam).

242. *Id.*, at *4.

243. *Id.*, at *1, *4 (citing *Draper*, 527 F.2d at 520).

244. *See id. But see* EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291JLR, 2005 WL 2090677, at *5 (W.D. Wash. Aug. 29, 2005). The *Red Robin* court took issue with the employer's argument that it had presented "concrete evidence" in the form of a company profile and customer study: "Red Robin fails to present any evidence that visible tattoos are inconsistent with these goals (to present a family-oriented and kid-friendly image) generally, or that its customers specifically share this perception." *Id.* Instead, the court stated, the employer must present "evidence of 'actual imposition on co-workers or disruption of the work routine' to demonstrate undue hardship." *Id.* (citation omitted).

245. 390 F.3d 126, 135 (1st Cir. 2004).

246. *Id.*

247. *Id.* at 138.

the employee's desired accommodation "would be an undue hardship because it would adversely affect the employer's public image. Costco has made a determination that facial piercings, aside from earrings, detract from the 'neat, clean and professional image' that it aims to cultivate. Such a business determination is within its discretion."[248]

Annual EEOC charges by Muslims of workplace religious discrimination or failure to accommodate increased by 237% between 2001 and 2012.[249] These charges accounted for 20% of the total religion-based charges filed with the EEOC in 2012.[250] Accommodation requests by Muslims typically focus on appearance, such as clearance to wear a beard or a headscarf.[251] Anecdotal evidence in several case histories indicates that Muslims tend to be unsuccessful in pursuing religious accommodation requests.[252] This phenomenon deserves further research.

In *EEOC v. GEO Group, Inc.*, a private prison denied three Muslim employees a variation from the uniform policy to allow them to wear headscarves.[253] Ruling for the employer prison, the Third Circuit cited safety concerns presented by the headscarves: the inability to identity the wearer adequately and the possibility that prisoners would use the headscarves to choke the female employees during a riot.[254] The court wrote that "prison is not a summer camp" and that the employer was entitled to take measures designed to prevent these dangers.[255]

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248. *Id.* at 136.

249. *Religion-Based Charges Filed from 10/01/2000 Through 3/31/2011?Showing Percentage Filed on the Basis of Religion-Muslim*, *supra* note 4. In 2012 there were 784 Muslim religion-based charges filed, up from 330 in 2001. *Id.*

250. *Id.*

251. See, *e.g.*, Webb v. City of Philadelphia, 562 F.3d 256, 258 (3d Cir. 2009) (describing how a female Muslim police officer requested the right to wear a hijab or headscarf); E. Greyhound Lines Div. of Greyhound Lines, Inc. v. N.Y. State Div. of Human Rights, 311 N.Y.S.2d 465 (App. Div.) (noting that the plaintiff wanted an accommodation to wear a beard), *aff'd*, 265 N.E.2d 745 (N.Y. 1970).

252. *See, e.g.*, *Webb*, 562 F.3d at 260–61 (finding that a uniform dress code was important in establishing trust with the community as well as authority); *E. Greyhound Lines*, 311 N.Y.S.2d at 465 (ruling that the complaint should have been dismissed and leaving decisions concerning dress code policy to the employer). For a thorough discussion of related issues, see Sadia Aslam, Note, *Hijab in the Workplace: Why Title VII Does Not Adequately Protect Employees from Discrimination on the Basis of Religious Dress and Appearance*, 80 UMKC L. REV. 221 (2011).

253. 616 F.3d 265, 269 (3d Cir. 2010).

254. *Id.* at 273–74.

255. *Id.* at 274–75 ("Even assuming khimars present only a small threat of the asserted dangers, they do present a threat which is something that GEO is entitled to attempt to prevent.").

In his dissent, Judge Tashima focused on safety risks that might constitute more than a de minimis cost for the employer.[256] In doing so, he chastised the majority for applying the wrong legal standard.[257] He also argued that GEO Group should have demonstrated that the headscarves presented a real, not just hypothetical, safety issue.[258] He suggested, "An employer cannot evade liability for religious discrimination by merely asserting that it has a legitimate business interest, no matter how important, for refusing to accommodate an employee's religious practice."[259] *GEO Group* highlights a tension involving safety concerns. Those court decisions that require actual evidence of undue hardship allow for potential safety risks. Those that grant the employers latitude to enforce dress codes and safety protocols allow for possible employer abuse of the discretionary latitude.

### 2. Religious Discrimination

In addition to the mandate of religious accommodation, Title VII proscribes religious discrimination evident in an adverse employment action or in a hostile work environment.[260] The elements of a prima facie case of religious discrimination track those for other areas of discrimination law, such as racial or sexual harassment.[261]

To establish a prima facie case of religious discrimination based on an adverse employment action under Title VII, the claimant must demonstrate: (1) that she was a member of a protected class because of her religion, (2) that she experienced an adverse employment action, (3) that she was qualified for the job or performing to legitimate expectations, and (4) that she was replaced by a person outside of the protected class or that she was treated

256. *Id.* at 286–89 (Tashima, J., dissenting).

257. *Id.* at 285.

258. *Id.* at 287.

259. *GEO Grp., Inc.*, 616 F.3d at 285.

260. 42 U.S.C. § 2000e-2 (2012).

261. *Compare* EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 313–14 (4th Cir. 2008) (explaining that the prima facie case in a religious harassment case includes proof "that the harassment was (1) unwelcome, (2) because of religion, (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere, and (4) imputable to the employer"), *with* JENNIFER ANN DROBAC, SEXUAL HARASSMENT LAW: HISTORY, CASES, AND THEORY 71 (2005) (summarizing that a sexual harassment case requires that the plaintiff show "1. Membership in a protected class; 2. Unwelcome sexual harassment; 3. Based on sex; 4. That affects the terms, conditions or privileges of employment; 5. Respondeat Superior").

differently than similarly situated employees.[262] To meet the requirements of the second prong, the employee must experience a "materially adverse employment action," which courts define as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[263]

To prove a discriminatorily hostile or abusive work environment, the plaintiff must show that "the harassment was (1) unwelcome, (2) because of religion, (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere, and (4) imputable to the employer."[264] Typically, the plaintiff must prove that discriminatory statements made in the workplace were more than stray remarks and that the remarks played a part in whatever action was taken against the employee.[265]

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262. *See, e.g.*, Fischer v. Forestwood Co., Inc., 525 F.3d 972, 985 (10th Cir. 2008); Tepper v. Potter, 505 F.3d 508, 515 (6th Cir. 2007); Vetter v. Farmland Indus., Inc., 884 F. Supp. 1287, 1302 (N.D. Iowa 1995) (listing additional element that plaintiff "was performing his or her job at a level that met the employer's legitimate expectations").

263. *Tepper*, 505 F.3d at 515 (citations omitted).

264. *Sunbelt Rentals*, 521 F.3d at 313.

265. *Id.* at 316 (describing how the plaintiff was subjected to derogatory terms, such as "Taliban" and "towel head" on a regular basis, which was enough to establish an initial claim); *see also* MackMuhammad v. Cagle's, Inc., 379 F. App'x 801, 805–06 (11th Cir. 2010) (holding that Muslim employee was not subjected to religious harassment when manager referred to him as "Bin Laden" or "Muhammad-man" over company radio and intercom, and where supervisors asked him about his religion and made comments about his religious dietary restrictions, because such comments were at most insensitive and rude, and did not rise to the level of severe and pervasive harassment); Richardson v. Dougherty Cnty., Ga., 185 F. App'x 785, 790–91 (11th Cir. 2006) (rejecting Title VII hostile work environment claim where supervisor referred to plaintiff more than fifty times as "preacher man" and made comments about his religion and request for accommodation, where such conduct was not objectively severe or pervasive); Jones v. United Space Alliance, LLC, 170 F. App'x 52, 53, 56 (11th Cir. 2006) (dismissing hostile environment claim because complained-of conduct was not objectively severe or pervasive where manager made derogatory remarks based on plaintiff's religion, coworker removed flyer advertising plaintiff's church events, manager told him to remove lanyard with name "Jesus" on it, manager told him not to leave his Bible on his desk, and he was asked to turn down religious music played at work); Johnson v. AutoZone, Inc., 768 F. Supp. 2d 1124, 1153 (N.D. Ala. 2011) ("Plaintiff's allegations are simply not enough, and courts in this circuit have consistently dismissed religious hostile work environment claims for similar infirmities of proof."); Wheeles v. Nelson's Elec. Motor Servs., 559 F. Supp. 2d 1260, 1272 (M.D. Ala. 2008) (dismissing religious harassment claim where plaintiff failed to satisfy "severe or pervasive" requirement and complained-of conduct was nothing more than "slightly insulting").

Two cases in particular highlight the procedural and substantive application of antidiscrimination law. In *Jenkins v. New York City Transit Authority*, the defendant challenged the Title VII claim, arguing an absence of actionable religious disparate impact.[266] The New York district court rejected this defense, noting that courts often dismiss disparate impact religious claims for "lack of evidence, rather than failure to state a claim."[267] In *Gadling-Cole v. West Chester University*, the plaintiff believed that homosexuality was a sin and claimed to have faced workplace harassment because of this belief.[268] A Pennsylvania district court found credence to plaintiff's religious discrimination claims and that sufficient facts supported the pleadings.[269] The court distinguished the instant case from cases involving sexual orientation harassment, not currently entitled to protection under Title VII.[270]

This distinction between religious discrimination and sexual orientation discrimination is important because Congress may soon extend Title VII to provide protection against discrimination based on sexual orientation.[271] At some point, a court might have to resolve two opposing claims of harassment or discrimination, arising out of a single set of facts. One employee might claim that she has been the victim of harassment because of religious beliefs while another might allege harassment because of sexual orientation. How a court will resolve such competing claims is difficult to predict but

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266. 646 F. Supp. 2d 464, 471 (S.D.N.Y. 2009).

267. *Id.* (citing Barrow v. Greenville Indep. Sch. Dist., 480 F.3d 377, 382–83 (5th Cir. 2007), Soria v. Ozinga Bros., Inc., 704 F.2d 990, 994–97 (7th Cir. 1983), and Tucker v. Reno, 205 F. Supp. 2d 1169, 1174–75 (D. Or. 2002)). The *Jenkins* court explained:

> [T]his court granted an employer's motion to dismiss a disparate impact claim based on religious discrimination, but did so because the plaintiff had failed to meet the elements required to state a disparate impact claim. These cases leave open the possibility that a disparate impact claim based on religious discrimination can be stated if it is properly pleaded. The defendants' argument that a disparate impact claim based on religious discrimination does not exist is therefore without merit.

*Id.* (citation omitted).

268. 868 F. Supp. 2d 390 (E.D. Pa. 2012).

269. *Id.*

270. *Id.* at 396.

271. The Employment Non-Discrimination Act (ENDA) would prohibit employment discrimination on the basis of sexual orientation or gender identity under federal law. *See* Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013). As with Title VII, ENDA would exempt private employers with fewer than fifteen employees, religious institutions, and private membership clubs. *See id.* §§ 3a(5), 6. This exemption for religious employers includes any "religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1 (2012).

courts will want to avoid an Establishment Clause violation by preferring one religious adherent over another or over a non-believer.

### *C. "Refusal" or "Conscience" Laws*

Since the Supreme Court's *Roe v. Wade* decision,[272] many states have enacted "refusal laws" that allow healthcare providers to refuse to participate in pregnancy termination or sterilization procedures that violate or are inconsistent with their religious beliefs.[273] Immediately following *Roe* in 1973, Congress passed an amendment to the Public Health Service Act (PHSA), known as the "Church Amendment."[274] The Church Amendment safeguards federally funded healthcare providers from a requirement that they participate in abortion procedures when personnel raise moral or religious objections.[275] The Church Amendment further proscribes hospitals from mandating the performance of pregnancy termination as a condition of employment.[276] Laws that followed added to protections for religious adherents and their employer organizations.[277] Originally, these laws focused on abortion but more recently have been expanded to protect pharmacists who refuse to dispense emergency contraception and to fill contraception prescriptions.[278]

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272. 410 U.S. 113 (1973).

273. *See* Rachel Benson Gold, *Conscience Makes a Comeback in the Age of Managed Care*, THE GUTTMACHER REP. ON PUB. POL'Y, Feb. 1998, 1, 1, *available at* http://www.guttmacher.org/pubs/tgr/01/1/gr010101.html; *see also* Erin Whitcomb, *A Most Fundamental Freedom of Choice: An International Review of Conscientious Objection to Elective Abortion*, 24 ST. JOHN'S J. C.R. & ECON. DEV. 771 (2010).

274. Pub. L. No. 93-45, § 401, 87 Stat. 91, 95 (1973) (codified as amended at 42 U.S.C. § 300a-7 (2012)). Frank Church was the bill's sponsor and the amendment carries his name. Maureen Kramlich, *The Abortion Debate Thirty Years Later: From Choice to Coercion*, 31 FORDHAM URB. L. J. 783, 789 (2004); *see also* Whitcomb, *supra* note 273, at 784.

275. *See* 42 U.S.C. § 300a-7(b).

276. *Id.* § 300a-7(c)(1)(A) (barring hospital discrimination "in the employment, promotion or termination of employment of any physician or health care personnel" who performed or assisted or refused to perform or assist in the lawful sterilization or abortion procedures for moral or religious reasons); *see also* Whitcomb, *supra* note 273, at 785.

277. *E.g.*, Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 508(d)(1), 118 Stat. 2809, 3163 (2004) (enacting the Hyde-Weldon Conscience Protection Amendment, which closed loopholes associated with the PHSA).

278. *See, e.g.*, ARK. CODE ANN. § 20-16-304(4) (West 2014) (permitting physician and pharmacist refusal to dispense contraceptives); IDAHO CODE ANN. § 18-611(2) (West 2014) ("No health care professional shall be required to provide any health care service that violates his or her conscience.").

Laws that protect religious adherents who refuse to provide medical and pharmaceutical services clearly disadvantage women and families who seek access to such services. Government involvement on either side arguably raises First Amendment Establishment Clause and Free Exercise Clause issues, in addition to Fourteenth Amendment Equal Protection and Substantive Due Process concerns that are beyond the scope of this Article. The 2010 passage of the Patient Protection and Affordable Care Act (PPACA),[279] colloquially known as Obamacare, only heightens the tension of this debate. In that legislation, Congress mandated that employers with fifty or more employees provide a minimal level of healthcare coverage for women.[280] Health Resources and Services Administration (HRSA) guidelines provided that plans must include coverage for all Food and Drug Administration approved contraceptive methods, sterilization procedures, and associated counseling.[281] A narrow exception for religious exemption resulted in more litigation[282] and leads to Part II of this Article, concerning not only not-for-profit religious employers, but also for-profit, private, corporate employers.

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279. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

280. 42 U.S.C. § 300gg-13(a) (2012). The statute provides:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—
>
> (1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force; . . .
>
> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

*Id.*; *see also* Rose Shingledecker, Note, *No Good Deed: The Impropriety of the Religious Accommodation of Contraceptive Coverage Requirements in the Patient Protection and Affordable Care Act*, 47 IND. L. REV. 301 (2014).

281. *Women's Preventive Services Guidelines*, HEALTH RESOURCES & SERVICES ADMIN. (last visited Oct. 1, 2014), http://www.hrsa.gov/womensguidelines/.

282. *See, e.g.*, Univ. of Notre Dame v. Sebelius, No. 3:12CV253, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012) (dismissing complaint by Catholic university that HRSA guidelines promulgated pursuant to the PPACA violated Establishment and Free Exercise Clauses); *see also* Shingledecker, *supra* note 280, at 307 n.51.

## II.
## EXCEPTIONS TO ANTIDISCRIMINATION LEGISLATION AVAILABLE TO NOT-FOR-PROFIT RELIGIOUS EMPLOYERS AND FOR-PROFIT, PRIVATE, CORPORATE EMPLOYERS

The Free Exercise and Establishment Clauses of the First Amendment limit court oversight of employees of religious institutions. Under the First Amendment, religious employers may build a workforce of co-religionists, as well as discharge ministerial employees, a term that is broadly defined, for any reason the religious employer chooses. Additionally, Title VII, and sections 702 and 703 in particular, provide exceptions from its anti-discrimination policies for religious organizations.[283]

To explain these constitutional limits and religious employer exemptions, Part II of this Article analyzes three aspects of government oversight of religious, nonprofit employers. First, Part II.A examines whether an organization qualifies as a religious employer. Second, Part II.B reviews the First Amendment's Freedom of Association Clause and a religious employer's right to hire co-religionists. Third, Part II.C considers the ministerial exception and briefly re-

283. Section 702 specifies:

> This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1(a) (2012). Section 703 adds:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning 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, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

42 U.S.C. § 2000e-2(e) (2012).

views the Supreme Court's confirmation of that exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[284]

### *A. Religious Employers*

In order to limit government intrusion into its internal human resources processes, an organization must first prove its religious character. A number of court cases have explored whether an organization is essentially a religious institution and the associated burden of proof.[285] However, these cases have not produced a comprehensive national standard. Moreover, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[286] discussed in Part II.C.1, offers little clear guidance on the point.

In a recent case concerning employer qualification for religious exemption from Title VII, *Spencer v. World Vision, Inc.*, three Ninth Circuit judges sitting on a three-judge panel identified three different tests, none of which received a majority endorsement.[287] World Vision is a self-described Christian humanitarian organization that addresses the root causes of poverty and injustice.[288] When World Vision hired Sylvia Spencer and two other "employees," it required that they submit personal statements about their "relationship with Jesus Christ," as well as comply with the organization's "Statement of Faith, Core Values, and Mission Statement."[289] When "World Vision discovered that the Employees denied the deity of Jesus Christ and disavowed the doctrine of the Trinity," it terminated them.[290] All three filed suit in the Western District of Washington, alleging that World Vision had violated Title VII.[291] The district court granted summary judgment to World Vision, reasoning that World Vision was a religious employer under the framework set forth in *LeBoon v. Lancaster Jewish Community Center Ass'n*.[292]

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284. 132 S. Ct. 694 (2012).

285. *See, e.g.*, Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011) (per curiam); EEOC v. Kamehameha Schs./Bishop Estate, 990 F.2d 458, 460 (9th Cir. 1993); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988).

286. 132 S. Ct. at 694.

287. 633 F.3d at 723. For further discussion of the *Spencer* decision, as well as the qualifications to be considered a religious employer, see Brandon S. Boulter, Note, *Goldilocks and the Three-Judge Panel:* Spencer v. World Vision, Inc. *and the Religious Organization Exemption of Title VII*, 2011 BYU L. Rev. 33 (2011).

288. *Spencer*, 633 F.3d at 725.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 725–26 (discussing LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217 (3d Cir. 2007)). For a further discussion of *LeBoon*, see *infra* notes 329–45 and accompanying text.

The employees appealed and the Ninth Circuit reviewed the case de novo to determine whether World Vision was a religious organization and, therefore, entitled to an exemption from Title VII.[293]

Judge O'Scannlain's *Spencer* concurrence suggested inquiry as to whether the institution: "1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), 2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and 3) holds itself out to the public as religious."[294]

Judge Kleinfeld found O'Scannlain's test too inclusive.[295] Kleinfeld similarly concurred in *Spencer* to offer his own reformulation of what the test should be.[296] He first advised asking whether an entity is organized for a religious purpose.[297] Additionally, Kleinfeld proposed asking whether the entity "is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts."[298] Not only did Judge Kleinfeld add a fourth requirement to Judge O'Scannlain's test, he also modified Judge O'Scannlain's first requirement so as not to mandate incorporation or other formal organizational form.

Judge Berzon, who dissented in *Spencer*, relied on two earlier Ninth Circuit decisions[299]: *EEOC v. Townley Engineering & Manufacturing Co.*[300] and *EEOC v. Kamehameha Schools/Bishop Estate*.[301] These decisions provided the basis for informal EEOC discussion of the "definition of an employer that qualifies as a religious organization."[302] Moreover, their facts help to demonstrate how far jurisprudence has evolved in the twenty-five years preceding the Court's *Hobby Lobby* decision.[303]

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293. *Spencer*, 633 F.3d at 726.

294. *Id.* at 734 (O'Scannlain, J., concurring).

295. *Id.* at 742 (Kleinfeld, J., concurring).

296. *Id.* at 742–48.

297. *Id.* at 748.

298. *Id.*

299. *Spencer*, 633 F.3d at 749–50 (Berzon, J., dissenting).

300. 859 F.2d 610, 618 (9th Cir. 1988).

301. 990 F.2d 458, 460 (9th Cir. 1993).

302. Letter from Reed L. Russell, Legal Counsel, EEOC, to Kevin Cummings, Branch Chief, Bus. & Trade Servs., Dep't of Homeland Sec. (Dec. 28, 2007), *available at* http://www.eeoc.gov/eeoc/foia/letters/2007/religious_organization_exception_dec_28_2007.html.

303. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

Townley Manufacturing Company was a closely held corporation founded by Jake and Helen Townley, who were born again Christians.[304] Helen Townley "made a covenant with God that their business 'would be a Christian, faith-operated business.'"[305] Therefore, the Townleys mandated employee attendance at weekly devotional services at their Florida plant.[306] In 1979, the company hired Louis Pelvas, an atheist, to work at its Arizona plant that had no devotional services until April 1984.[307] Pelvas asked to be excused from the services in June 1984 but his supervisor denied this request.[308] In October 1984, Pelvas filed a religious discrimination charge with the EEOC, and the EEOC brought suit.[309] Ultimately, the Ninth Circuit affirmed the district court's decision that found a violation of Title VII.[310] The Ninth Circuit held that Townley's requirement that an objecting employee attend the devotional services "cannot be reconciled with Title VII's prohibition against religious discrimination" and "that Congress did not intend section 702's exemption for religious corporations to shield corporations such at Townley."[311] However, the court did recognize that the Townleys, as individuals, have "rights under the Free Exercise Clause that Title VII cannot infringe."[312]

In holding that Townley Engineering was not entitled to an exception, as a religious organization, from the worker protections of Title VII, the court referenced the related legislative history.[313] The court concluded, "All [in Congress] assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm."[314] The court noted that Townley Engineering was a secular organization that produced mining equipment.[315] The court explained "that the beliefs of the owners and operators of a corpo-

304. *Townley*, 859 F.2d at 611–12.
305. *Id.* at 612.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. 859 F.2d at 613.
311. *Id.*
312. *Id.*
313. *Id.* at 617–18.
314. *Id.* at 618.
315. *Id.* at 619.

ration are simply not enough in themselves to make the corporation 'religious' within the meaning of section 702."[316]

In *Kamehameha,* Bernice Pauahi Bishop, a member of the Hawaiian royal family, used a charitable trust to found The Kamehameha Schools.[317] The founding documents directed that all teachers be Protestants.[318] Carole Edgerton, who was not Protestant, applied for a position as a substitute French teacher and was told of the religious requirement.[319] She subsequently filed a religious discrimination charge with the EEOC.[320] The Kamehameha Schools sought an exemption to requirements of Title VII as a religious educational institution.[321] A district court held in favor of the Schools and granted the exemption.[322] On appeal, the Ninth Circuit Court overturned the decision.[323] In considering the exemption, it weighed several factors, including the purpose of the Schools and who owned them.[324] It concluded that "the Schools are essentially a secular institution operating within a historical tradition that includes Protestantism, and the Schools' purpose and character is primarily secular, not primarily religious."[325]

In his dissent in *Spencer*, Judge Berzon relied on *Townley* and *Kamehameha* to argue for a two-part analysis to determine whether

316. 859 F.2d at 619. Later in Part II.A this Article compares the *Townley* facts to the court's recent *Hobby Lobby* decision. *See infra* notes 351–52 and accompanying text. Important to that comparison is the Ninth Circuit's emphasis that Townley Engineering's articles of incorporation did not mention any religious purpose. 859 F.2d at 619.

317. EEOC v. Kamehameha Sch./Bishop Estate, 990 F.2d 458, 459 (9th Cir. 1993).

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Kamehameha*, 990 F.2d at 460.

324. *Id.* at 461. The Ninth Circuit weighed the following factors in determining whether the Kamehameha Schools were entitled to the exemption for a religious institution: (1) Ownership and Affiliation. Schools were not controlled by or affiliated with any particular sect; (2) Purpose. Schools instructed students in developing their own moral code rather than following those of a particular religion; (3) Faculty. Only three out of two hundred and fifty teachers had religious duties and none were required to maintain active membership in a church; (4) Student Body. Fewer than one-third of on-campus students were Protestant; (5) Student Activities. Student activities were varied and not of an overtly religious character, but did include prayers at times; (6) Curriculum. Core courses were taught from a secular doctrine and the schools did not instruct students in a Protestant doctrine. *Id.* at 461–64.

325. *Id.* at 463–64.

the employer was a religious entity and entitled to the exemption.[326] Quoting *Townley*, he reasoned, "First, '[a]ll significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious.'"[327] Quoting *Kamehameha*, he noted, "Second, '[w]e construe the statutory exemption[ ] narrowly,' with the understanding that 'only those institutions with extremely close ties to organized religion [are] covered.'"[328] Thus, the per curiam *Spencer* opinion arguably undermined *Townley* and *Kamehameha* without clearly establishing a new test.

*LeBoon v. Lancaster Jewish Community Center Ass'n*,[329] a case noted in Judge O'Scannlain's *Spencer* concurrence,[330] was also mentioned in the EEOC informal definition of a religious organization.[331] The Lancaster Jewish Community Center Association (LJCC) was a non-profit organization charged with the mission to "enhance and promote Jewish life, identity, and continuity."[332] To fulfill its mission, the LJCC undertook a variety of activities, including the operation of a summer camp and preschool, the publication of a newspaper, and the promotion of events to celebrate Jewish holidays.[333] The main sources of its income included the Lancaster Jewish Federation, the United Way, membership dues (membership was open to adherents of other religions), program fees, rents, and donations.[334] Linda LeBoon, an evangelical Christian, worked for nearly four years as a bookkeeper for the LJCC until she was terminated in 2002.[335] Two other employees had been terminated shortly before LeBoon for what she believed to be discriminatory reasons.[336] At the time LeBoon was terminated, the organization was in financial distress and the interim Executive Director believed that another employee could assume LeBoon's duties.[337]

326. Spencer v. World Vision, Inc., 633 F.3d 723, 749–55 (9th Cir. 2011) (Berzon, J., dissenting).

327. *Id.* at 750 (alteration in original) (quoting EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988)).

328. *Id.* (alterations in original) (quoting EEOC v. Kamehameha Schs./Bishop Estate, 990 F.2d 458, 460 (9th Cir. 1993)).

329. 503 F.3d 217 (3d Cir. 2007).

330. 633 F.3d at 727, 730, 734 (O'Scannlain, J., concurring).

331. Letter from Reed L. Russell to Kevin Cummings, *supra* note 302, at n.3.

332. *LeBoon*, 503 F.3d at 221.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 221–22.

337. *Id.* at 222.

After her termination, LeBoon "filed suit in federal court alleging religious discrimination, retaliation, and wrongful discharge in violation of Pennsylvania's public policy."[338] LeBoon believed that she was fired either because she was a Christian or in retaliation for complaining about the firings of other employees.[339] A magistrate judge granted LJCC's motion for summary judgment, finding that LJCC was a religious employer and exempt from Title VII's prohibition against religious discrimination in employment.[340] LeBoon filed a motion for reconsideration based on a "manifest error of fact regarding the percentage of the LJCC's funding that came from the Lancaster Jewish Federation Campaign."[341] The LJCC conceded the error and the original order was vacated.[342] On rehearing the magistrate judge again held that the LJCC was a "religious organization exempted from the religious discrimination provisions of Title VII."[343]

Ultimately, the Third Circuit relied on nine factors in determining whether an organization was sufficiently religious to qualify for exemption:

> (1) [W]hether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.[344]

The Third Circuit affirmed the lower court decisions and held that LJCC was a religious organization entitled to the exemption.[345]

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338. 503 F.3d at 222.
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.*
343. *Id.*
344. *LeBoon*, 503 F.3d at 226 (citing Killinger v. Samford Univ., 113 F.3d 196 (11th Cir. 1997), EEOC v. Kamehameha Schs./Bishop Estate, 990 F.2d 458 (9th Cir. 1993); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988), and EEOC v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980)).
345. *Id.* at 226–31.

Two other decisions, *Fike v. United Methodist Children's Home of Virginia, Inc.*[346] and *Silo v. CHW Medical Foundation*,[347] arrived at seemingly contradictory determinations regarding the extent to which an entity must reflect the principles of its founding organization in order to be considered a religious organization. In *Fike*, the court held that the United Methodist Children's Home, operating as a Christian home for orphans, demonstrated too little religious affiliation in its day-to-day activities for the court to consider it a religious employer, exempt from Title VII.[348] However, in *Silo*, a Catholic hospital's operation was consistent with the church's founding mission of "healing and providing services to the sick and poor in the Catholic moral tradition."[349] The court exempted the hospital employer, even though the hospital "does not have a chaplaincy or chapel, does not sponsor or conduct religious services, prayer groups or Bible studies on its premises and does not publicly place or display Bibles, crucifixes or any other religious symbols."[350]

Although *Burwell v. Hobby Lobby Stores, Inc.* dealt with whether a private, for-profit *corporation* qualified as a *person* for the application of the RFRA,[351] it seemingly raises the question of whether such a corporation might also qualify as a religious employer. *Hobby Lobby* arguably strengthens the autonomy of religious, for-profit, corporate employers in relation to their employees against governmental interference. Therefore, one might wonder if cases such as *Townley* shed light on *Hobby Lobby*'s broader implications. Are "secular" employers that incorporate religion into the activities of the workplace more likely to qualify for the exemption post *Hobby Lobby*?

*Hobby Lobby* does not mention *Townley*, *Kamehameha*, or *LeBoon*. Because Hobby Lobby's owners asserted *their own* RFRA rights via the corporate entity against the government and the PPACA, the Court did not address whether Hobby Lobby *stores* were a religious employer.[352] Therefore, *Hobby Lobby* should have little influence on the application of Title VII to private, for-profit corporations. However, wonders never cease.

This collection of cases concerning qualification for exemption on the basis of religious character highlights the fractured and varied approaches to claims by religious adherents. Litigants antici-

346. 709 F.2d 284 (4th Cir. 1983).
347. 45 P.3d 1162 (Cal. 2002).
348. 709 F.2d at 290.
349. 45 P.3d at 1164.
350. *Id.*
351. 134 S. Ct. 2751 (2014).
352. *Id.* at 2765–66.

pating such an issue in the future need to pay close attention to the continuing evolution of the law on this matter in their respective jurisdictions.

### *B. The Right to Hire Co-Religionists/Freedom of Association*

Once an organization establishes itself as a religious one, it may use shared religious values as the basis for hiring decisions.[353] In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, Mayson worked as a building engineer at the Deseret Gymnasium for sixteen years.[354] The gymnasium was a "nonprofit facility, open to the public" and operated by The Church of Jesus Christ of Latter-day Saints.[355] The Church fired Mayson 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."[356] Mayson and a group of similarly situated employees filed suit, alleging the violation Title VII and other protections.[357]

The Supreme Court held that a religious employer may select only those applicants who share its religious philosophy, even for non-religious purposes, to advance its overall religious mission.[358] The Court also evaluated whether its ruling regarding the Title VII claim might work to promote the establishment of religion, in violation of the First Amendment.[359] Using the *Lemon* test, the Court concluded, "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' under *Lemon*, it must be fair to say the

353. *See* 42 U.S.C. § 2000e-2(e)(2) (2012) (allowing for the hire of coreligionists when a bona fide occupational requirement exists); *supra* note 324 (analyzing the Kamehameha Schools and whether they could hire Protestant teachers); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000). Although not a case that focused on paid employment, *Dale* held that religious organizations are free to affiliate with only those persons who share similar philosophical viewpoints. *Dale*, 530 U.S. at 656. The Court also rejected the argument that state public accommodation laws require groups to accept undesired members. *Id.* at 659. The Court noted that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648.

354. 483 U.S. 327, 330 (1987).

355. *Id.*

356. *Id.*

357. *Id.* at 331.

358. *Id.* at 339 (holding that religious exemption to Title VII's prohibition against religious discrimination in employment for secular nonprofit activities of a religious organization did not violate Establishment Clause).

359. *Id.* at 335.

*government itself* must have advanced religion through its own activities and influence."[360] Arguably, *Amos* gives employers qualifying under the religious exception of Title VII great latitude in their personnel decisions.

In *Little v. Wuerl*, the Third Circuit directly endorsed a religious institution's right to hire only coreligionists.[361] The *Wuerl* court upheld the dismissal of a Protestant teacher after she remarried, an act that the St. Mary Magdalene Parish alleged violated Catholic doctrine.[362] The court explained that the Title VII exemption applied "whether or not every individual plays a direct role in the organization's 'religious activities.'"[363] The court "conclude[d] that the permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."[364] The court held that "it does not violate Title VII's prohibition of religious discrimination for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious principles."[365]

### *C. The Ministerial Exception*

In 1972, before section 702 of Title VII created an exemption for employees of religious entities,[366] the Fifth Circuit considered Title VII's application to these workers.[367] With *McClure,* that court established a ministerial exception.[368] The court clarified that religious institutions had a right to govern themselves through their chosen ministers.[369] Mrs. Billie McClure qualified as such a minister.[370]

McClure had entered the Salvation Army's training program in 1965 and had served the Salvation Army in a number of roles, including her final role as a secretary in the Public Relations Depart-

360. *Amos*, 483 U.S. at 337 (emphasis in original) (citing Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

361. 929 F.2d 944 (3d Cir. 1991).

362. *Id.* at 946.

363. *Id.* at 951.

364. *Id.*

365. *Id.*

366. 42 U.S.C. § 2000e-1(a) (2012).

367. *See* McClure v. Salvation Army (*McClure II*), 460 F.2d 553 (5th Cir. 1972).

368. *Id.*

369. *Id.*

370. McClure v. Salvation Army (*McClure I*), 323 F. Supp. 1100, 1106–07 (N.D. Ga. 1971), *aff'd*, 460 F.2d 553 (5th Cir. 1972).

ment.[371] She had considered her role with the Salvation Army to be religious in nature, even when she was not performing religious duties.[372] After the Salvation Army terminated her employment, McClure filed discrimination charges with the EEOC alleging that she had "received less salary and fewer benefits than that accorded similarly situated male officers, [and] that she had been discharged because of her complaints to her superiors and the Equal Employment Opportunity Commission [EEOC] with regard to these practices."[373]

In deciding *McClure*, the Fifth Circuit stressed the primacy of the relationship between ministers and churches; it explained that ministers are the "lifeblood" and "chief instrument" of the church.[374] The court's decision also referenced past Supreme Court decisions that recognized a "wall of separation" between church and State and that churches had the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[375]

In addressing the facts before it, the Fifth Circuit explained that application of Title VII would (without an implied free exercise exception) "cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern."[376] The court concluded that "Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister" and, therefore, that it lacked jurisdiction to decide McClure's claim.[377] The Fifth Circuit's 1972 *McClure* reasoning foreshadowed that of the Supreme Court nearly forty years later.

1. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*

Since the Fifth Circuit's *McClure* decision, each of the federal circuits has similarly found a ministerial exception.[378] However, the

371. *Id.* at 1103.
372. *Id.* at 1104.
373. *McClure II*, 460 F.2d at 555.
374. *Id.* at 558–59.
375. *Id.* at 558, 560.
376. *Id.* at 560.
377. *Id.* at 560–61.
378. *See, e.g.*, Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1246 (10th Cir. 2010); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007), *abrogated by* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012); Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698 (7th Cir. 2003); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d

Supreme Court did not confirm any such exception until 2011 when it decided *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[379] *Hosanna-Tabor* involved a retaliation suit by a "called" teacher, Cheryl Perich, against a Lutheran school.[380] Hosanna-Tabor hired Perich as a lay teacher in 1999.[381] After Perich completed the necessary training, Hosanna-Tabor asked Perich to become a "called" teacher or a commissioned minister and she accepted.[382] During her employment with the school, Perich taught both secular and religious topics.[383]

Following a narcolepsy diagnosis, Perich took a disability leave at the beginning of the 2004–05 school year.[384] She received medical clearance to return to work on February 22, 2005 and went to the school, fully aware that it had already hired a lay teacher to replace her.[385] The church congregation had already voted to release Perich from her calling.[386] It offered to pay a portion of her health insurance premiums if she agreed to resign, which she refused to do.[387] The school's principal asked her to leave, but Perich refused until she was given written documentation that she had reported to work.[388] The school later terminated Perich for "insubordination and disruptive behavior" as well as for damaging her relationship with the school by threatening to take legal action.[389]

In *Hosanna-Tabor*, the Court held that the ministerial exception prevented court intervention in a ministerial employment decision.[390] The Court so ruled even though the termination and related discrimination claim were ostensibly unrelated to matters of

1299, 1302 (11th Cir. 2000); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999); DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360 (8th Cir. 1991); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1577 (1st Cir. 1989); Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1168–69 (4th Cir. 1985).

379. 132 S. Ct. 694 (2012). For a more in-depth analysis of *Hosanna-Tabor*, see *The Supreme Court, 2011 Term—Leading Cases*, 126 HARV. L. REV. 176 (2012).

380. 132 S. Ct. at 699–701.

381. *Id.* at 700.

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. *Hosanna-Tabor*, 132 S. Ct. at 700.

387. *Id.*

388. *Id.*

389. *Id.* Perich initially filed a charge with the EEOC under the Americans with Disabilities Act (ADA). *Id.* at 701 (citing Pub. L. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101–12213 (2012))).

390. *Id.* at 710.

church religious doctrine.[391] Having confirmed the viability of a ministerial exception, the *Hosanna-Tabor* Court determined that a "called" teacher, such as Perich, was a minister for Hosanna-Tabor.[392] The Court explained, "Perich [had] accepted the call and received a 'diploma of vocation' designating her a commissioned minister."[393] The EEOC and Perich claimed, "Hosanna-Tabor's asserted religious reason for firing Perich—that she violated the Synod's commitment to internal dispute resolution—was pretextual."[394] The Court responded that the "purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church's alone."[395]

In reaching its conclusion, the *Hosanna-Tabor* Court had to distinguish *Smith*, the 1990 peyote-unemployment benefits case.[396] Recall that in *Smith*, the Court had held, "The right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[397] Arguably, the ADA is a law of neutral application.[398] Therefore, the right of free exercise would not have relieved Hosanna-Tabor of the obligation to comply with the ADA's dictates, including its non-retaliation provisions. The *Hosanna-Tabor* Court found *Smith* inapposite.[399] Writing for a unanimous Court, Justice Roberts explained:

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391. *Id.* at 710.

392. 132 S. Ct. at 707–08.

393. *Id.* at 700. Other factors influenced the Court's determination that Perich functioned as a minister. For example, she satisfied specific academic requirements, including eight theology courses, in order to "pass an oral examination by a faculty committee." *Id.* at 699. Perich "also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school wide chapel service. Perich led the chapel service herself about twice a year." *Id.* at 700.

394. *Id.* at 709.

395. *Id.*

396. *Id.* at 707–08 (distinguishing Smith v. Emp't Div., Dep't of Human Res., 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014)).

397. 494 U.S. at 879.

398. *See* Pub. L. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101–12213 (2012)).

399. 132 S. Ct. at 707.

> It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an *individual's* ingestion of peyote. *Smith* involved government regulation of only *outward physical acts*. The present case, in contrast, concerns government interference with an *internal church decision that affects the faith and mission of the church itself*. The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.[400]

The Court provided no guidance on how to distinguish "outward physical acts" from the act of employment termination that it considered "an internal church decision."[401] One might speculate that the difference is one of practical significance for the independence of viable institutional churches. More particularly, institutional churches may vary dramatically as to whom they recognize as a "minister"; some churches favor hierarchy and formal role differentiation, while others may count all of their adult members as "ministers."[402]

Commentators take a variety of perspectives on *Hosanna-Tabor*'s treatment of *Smith*. Professor Michael McConnell suggests that *Hosanna-Tabor* marks "a shift in Religion Clauses jurisprudence from a focus on individual believers to a focus on the autonomy of organized religious institutions."[403] Another review of the decision

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400. *Id.* (emphasis added).

401. *See id.*

402. *Compare, e.g.*, *id.* at 707 ("[T]o be eligible to become a commissioned [Evangelical Lutheran] minister, [candidate] had to complete eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher."), *with* THE BOOK OF COMMON PRAYER 855 (Church Publ'g Inc., N.Y. 2007) (1549) (defining "ministers of the [Episcopal] Church" to include "lay persons, bishops, priests, and deacons").

403. Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J.L. & PUB. POL'Y 821, 835–36 (2012). Professor McConnell added:

> [With *Hosanna-Tabor*,] the Free Exercise Clause provides far greater protection to the "faith and mission" of religious institutions than to individual acts of religious exercise . . . . Perhaps it is a coincidence, but this shift in emphasis corresponds very roughly to the old divide between individualistic Protestantism and institutional Catholicism and might be the first evident fruit of the new Catholic majority on the Court.

*Id.* at 836. Other observers might not attribute the shift in emphasis to the new Catholic majority. However Justice Brennan, a Catholic, displayed great interest in protecting individual religious conscience. *See generally*, KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA (1993).

notes "an untenable distinction between the facts of *Hosanna-Tabor* and *Smith*—a distinction that may have the unfortunate side effect of implying a new and ambiguous exception to *Smith*'s free exercise holding."[404] A third view, taken by Professor Douglas Laycock, emphasizes *Smith*'s refusal to "'lend [the Court's] power to one or the other side in controversies over religious authority'" or dogma.[405] He explains that the Court's cursory handling of *Smith* is consistent with *Smith*'s holding that it offered no precedential value in cases regarding religious authority.[406] In another review, Elliot Williams contrasted *Hosanna-Tabor* with the Court's holding in *Christian Legal Society v. Martinez*.[407] The *Martinez* Court had held that the First Amendment did not shield a religious student organization from compliance with a law school's nondiscrimination policy.[408] Therefore, the Christian Legal Society had to extend voting rights and positions of authority to all comers or lose monetary and advertising benefits made available to student organizations.[409] Williams concludes that *Hosanna-Tabor* "significantly alters contemporary Free Exercise doctrine."[410] He proposed that "*Hosanna-Tabor* limited *Smith* and revitalized a category of behavior protected under the Free Exercise Clause of the First Amendment—'decision[s] that affect[ ] the faith and mission of the church itself.'"[411] No doubt, the lower courts will use a variety of perspectives regarding the relevance of *Smith* to interpret *Hosanna-Tabor*.

Concerning which employees qualify for the ministerial exception, Chief Justice Roberts noted that the Court's *Hosanna-Tabor*

404. *The Supreme Court, 2011 Term—Leading Cases*, 126 HARV. L. REV. 176, 182 (2012).

405. Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 854 (2012) (quoting Smith v. Emp't Div., Dep't of Human Res., 494 U.S. 872, 877 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014)) (discussing the application of *Smith* to the Court's ministerial exception arguments in *Hosanna-Tabor*).

406. *Id.* at 854–55.

407. Elliott Williams, *Resurrecting Free Exercise in* Hosanna-Tabor Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012)*, 36 HARV. J.L. & PUB. POL'Y 391, 401 (2013) (citing Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010)) (finding no constitutional violation when the law school mandated that that the school's officially recognized, religiously affiliated student group follow the school's "all-comers" nondiscrimination policy).

408. 561 U.S. at 667.

409. Williams, *supra* note 407.

410. *Id.* at 402.

411. *Id.* (quoting Hosanna-Tabor Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012)).

opinion was limited to its facts.[412] The Court explained, "We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude . . . that the exception covers Perich, given all the circumstances of her employment."[413] The Court then reviewed those circumstances, including her training, titles, promotion within the church, perceptions concerning her status (both hers and the church's), and her religiously focused duties.[414] The Court considered both formal and functional factors.[415]

In concluding that the ministerial exception, an affirmative defense, barred Perich's retaliation action, the Court further limited its holding.[416] The Court stated, "We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise."[417]

### 2. Qualifying Ministers

The *Hosanna-Tabor* concurrences emphasized that the Court did not adopt a bright line rule for when the ministerial exception applies nor did it provide a guiding definition of "minister." Justice Thomas wrote, "Judicial attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some."[418]

Justice Alito, joined by Justice Kagan, cautioned against using formal title and ordination status as triggers for the exception's application.[419] He emphasized a functional approach, suggesting, "These [qualifying employees] include those who serve in positions of leadership, those who perform important functions in worship

412. 132 S. Ct. at 710 ("The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit.").

413. *Id.* at 707.

414. *Id.* at 707–08.

415. *Id.*

416. *Id.* at 709 n.4, 710.

417. *Id.* at 710.

418. *Hosanna-Tabor*, 132 S. Ct. at 711 (Thomas, J., concurring). Justice Thomas reasoned that because "Hosanna-Tabor sincerely considered Perich [to be] a minister," her suit was "properly barred by the ministerial exception." *Id.*

419. *Id.* at 714 (Alito, J., concurring).

services, and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation."[420] He distinguished "a purely secular teacher [who] would not qualify for the 'ministerial' exception."[421] He explained, "[T]he constitutional protection of religious teachers is not somehow diminished when they take on secular functions in addition to their religious ones."[422] He concluded that Perich's qualification as a minister "rests not on respondent's ordination status or her formal title, but rather on her functional status as the type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees."[423]

Because the *Hosanna-Tabor* majority offered no definition for minister, lower courts will continue to operate as they have done historically on this matter. Numerous state and federal circuit courts agree that a religious organization need not have designated the employee as a "minister" in order for the employee to qualify under the ministerial exception; the employee need only be distinctively involved in the religious mission of the organization.[424] Thus, the lower courts have historically taken a more functional approach, similar to the one described by Justice Alito.[425] These lower courts have found that positions ranging from choir director to press secretary qualify under the ministerial exception.[426]

A few circuit courts have established tests to help determine if an employee qualifies under the ministerial exception.[427] In the

420. *Id.* at 712.

421. *Id.* at 715.

422. *Id.*

423. *Id.* at 716.

424. *See, e.g.*, Coulee Catholic Sch. v. Labor and Indus. Review Comm'n, 768 N.W.2d 868, 892 (Wis. 2009) (holding that the role of teacher was closely linked to a religious organization's mission and qualified for a religious exception to the state's employment discrimination statutes).

425. *See, e.g.*, *id.*

426. *See* Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 704 (7th Cir. 2003) (finding that plaintiff in her role as press secretary served as a liaison between the Church and the community to which it directed its message and for which she served an integral role in shaping); Starkman v. Evans, 198 F.3d 173, 176 (5th Cir. 1999) (holding that religious music plays a highly important role in the spiritual mission of the church and that job specifications required choir director to be educated in religion and serve as a spiritual leader).

427. *See, e.g.*, Alcazar v. Corp. of the Catholic Archbishop of Seattle, 627 F.3d 1288, 1291 (9th Cir. 2010) (discussing tests adopted by other circuits and stating that the Ninth Circuit had declined to adopt one).

The circuit courts have not adopted a uniform general test for making the determination that an employee qualifies under the ministerial exception. Some

Fifth Circuit, where the exception originated before statutory codification, the court recommends three factors.[428] The first factor focuses on whether an employer made employment decisions related to the position at issue using primarily religious criteria.[429] The second factor involves whether "the plaintiff was qualified and authorized to perform the ceremonies of the Church."[430] In the third factor, the court considers whether the plaintiff " 'engaged in activities traditionally considered ecclesiastical or religious,' . . . including whether the plaintiff 'attends to the religious needs of the faithful.' "[431]

Other courts use different criteria. The Fourth Circuit adopted a primary duties test, which centers on whether the primary duties of the aggrieved employee advanced the mission of the religious institution.[432] Building on the primary duties test, a Wisconsin state court developed a test based on mission functionality.[433] This test analyzes "how important or closely linked the employee's work is to the fundamental mission of that organization."[434]

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courts utilize the "primary duties" test, which asks whether the employee's primary duties are religious in nature. *See, e.g.*, Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1243–44 (10th Cir. 2010); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996); Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1168–69 (4th Cir. 1985). Others appear to use a version of the "primary duties" test, though without expressly adopting it. *See, e.g.*, Petruska v. Gannon Univ., 462 F.3d 294, 304 n.6, 307 n.10 (3d Cir. 2006); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 362–63 (8th Cir. 1991). At least one court has opted for a multi-factored consideration. *Starkman*, 198 F.3d at 175–77; *see also* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1039–41 (7th Cir. 2006) (discussing several issues relevant to a multi-factored analysis).

428. *See Starkman*, 198 F.3d at 176. *But see Hosanna-Tabor*, 132 S. Ct. at 714 (Alito, J., concurring) ("The Fourth Circuit was the first to use the term 'ministerial exception' . . . .").

429. *Starkman*, 198 F.3d at 176.

430. *Id.*

431. *Id.* (quoting EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277, 284 (5th Cir. 1981) and EEOC v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980)).

432. *See Rayburn*, 772 F.2d at 1169 (citing Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUMBIA L. REV. 1514, 1545 (1979)). The *Rayburn* court held, "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.' " *Id.*

433. Coulee Catholic Sch. v. Labor and Indus. Review Comm'n, 768 N.W.2d 868 (Wis. 2009).

434. *Id.* at 882–83.

### 3. Limits on the Ministerial Exception

While numerous religious organizations have used the ministerial exception to defend themselves against discrimination suits brought by current and former employees, the defense is not absolute.[435] In *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, the Fourth Circuit concluded, "The ministerial exception does not insulate wholesale the religious employer from the operation of federal antidiscrimination statutes."[436] In *Petruska v. Gannon University*, the Third Circuit "agree[d] with the implied findings of [its] sister circuits that Congress would prefer a tailored exception to Title VII than a complete invalidation of the statute."[437]

### 4. Sexual Harassment, Tort, and Breach of Contract Claims Against Religious Employers

Investigations of sexual harassment claims made against ministers remain the one Title VII issue from which lower courts routinely decline to shield churches. In *Bollard v. California Province of the Society of Jesus*, the Ninth Circuit held that a novice priest could pursue a sexual harassment charge against the church.[438] The *Bollard* court reasoned that free exercise rationales offered no support for an exception to Title VII.[439] The court stated, "The Jesuits do not offer a religious justification for the harassment Bollard alleges; indeed, they condemn it as inconsistent with their values and beliefs."[440] Given that determination, the court foresaw no danger that a sexual harassment action would permit the secular court to interfere in judgments "on questions of religious faith or doctrine."[441] Additionally, the court concluded, "The Jesuits' disavowal

435. *See, e.g.*, *Starkman*, 198 F.3d 173 (deciding a case involving an ADA claim); Combs v. Cent. Tex. Annual Conference of United Methodist Church, 173 F.3d 343, 345 (5th Cir. 1999) (ruling in a Title VII action); DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993) (resolving a defense against an ADEA claim); Ogugua v. Archdiocese of Omaha, No. 8:07CV471, 2008 WL 4717121, at *5 (D. Neb. Oct. 22, 2008) (footnotes omitted) ("This Court recognizes that religious employers, such as [the defendants], are free to discriminate on the basis of race, color, religion, sex, national origin, age, physical disability, and any other basis, with respect to the terms and conditions of employment of spiritual employees performing spiritual duties. A court cannot interfere in such decisions without becoming entangled in matters of religion in violation of the First Amendment's Establishment Clause.").

436. 213 F.3d 795, 801 (4th Cir. 2000).

437. 462 F.3d 294, 305–06 n.8 (3d Cir. 2006).

438. 196 F.3d 940, 950 (9th Cir. 1999).

439. *Id.* at 947.

440. *Id.*

441. *Id.*

of the harassment also reassures us that application of Title VII in this context will have no significant impact on their religious beliefs or doctrines."[442] Instead of applying the ministerial exception, however, the court applied the *Sherbert* balancing test to evaluate whether Title VII's application would constitute an impermissible violation of the Free Exercise Clause.[443]

In a more recent sexual harassment case, *Elvig v. Calvin Presbyterian Church*, the Ninth Circuit allowed a plaintiff to proceed with her claims.[444] The court reasoned that because Elvig had "stated narrower and thus viable sexual harassment and retaliation claims that do not implicate protected employment decisions" she could proceed with her claims without implicating the ministerial exception.[445]

This limitation on the exception is not exclusive to the Ninth Circuit. Another 2004 case, *Dolquist v. Heartland Presbytery*, relied on *Bollard* and the Ninth Circuit's reasoning to find that "the First Amendment does not preclude plaintiff from stating a claim for sexual harassment."[446] In *Dolquist*, the Kansas federal district court confirmed that "two state courts [New Jersey and Minnesota] have held that the First Amendment does not preclude ministers from suing for sexual harassment."[447]

Various circuits have also held churches accountable for breach of contract claims arising between the church and its ministerial staff. In *Rayburn v. General Conference of Seventh-day Adventists*, the Fourth Circuit reminded the parties that "churches are not—and should not be—above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts."[448] The court added, "Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions."[449] Similarly, the D.C. Circuit in *Minker v. Baltimore Annual Conference of United Methodist Church* held that the plaintiff could proceed with a claim of breach of contract based on oral promises related to his employment opportunities within the church.[450]

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442. *Id.*
443. *Id.* at 948.
444. 375 F.3d 951, 953 (9th Cir. 2004).
445. *Id.*
446. 342 F. Supp. 2d 996, 1007 (D. Kan. 2004).
447. *Id.* at 1006 (citing McKelvey v. Pierce, 800 A.2d 840 (N.J. 2002) and Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991)).
448. 772 F.2d 1164, 1171 (4th Cir. 1985).
449. *Id.*
450. 894 F.2d 1354, 1359 (D.C. Cir. 1990).

The *Hosanna-Tabor* Court's disinclination to address the application of the ministerial exception in circumstances such as these only invites future appeals for the Court's resolution.[451] The *Hosanna-Tabor* Court admonished that the purpose of the ministerial exception is not only to protect terminations justified exclusively for religious reasons.[452] Therefore, one can imagine a breach of contract case that could implicate a "minister."[453] One may wonder whether even Title VII sexual harassment claims will survive in future cases against religious institutions.

### 5. The Future of the Ministerial Exception

Supreme Court approval of the ministerial exception leaves many open questions. Included among those questions are how courts will further apply the ministerial exception to Title VII and other antidiscrimination claims and which religious employees will be covered by the exception. Current interpretations of the exception give qualifying religious organizations a wide berth in making employment decisions. Any constriction of this latitude is more likely to come from congressional amendments to Title VII or other similar legislation than from courts.

## CONCLUSION

Fewer Americans proclaim themselves affiliated with a particular religious organization today than they did historically.[454] According to a 2012 Pew poll, "One-fifth of the U.S. public—and a third of adults under 30—are religiously unaffiliated today, the highest percentages ever in Pew Research Center polling."[455] A 2012 Gallup poll confirmed, "In particular, the percentage of Americans who do not have a specific religious identity has increased, while the percentage who identify as Protestant or some

451. *See supra* Part II.C.2.

452. Hosanna-Tabor Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 709 (2012).

453. *See supra* notes 448–50 and accompanying text.

454. *See "Nones" on the Rise: One in Five Adults Have No Religious Affiliation*, Pew Research Ctr. (Oct. 9, 2012), http://www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx.

455. *Id.* For more information about religious affiliations in the United States, see the recently launched Digital Atlas of Am. Religion, http://religionatlas.org (last visited Oct. 8, 2014). A chart on this site indicates that at least 46% of Americans affiliate with some type of religion. *Largest Denominational Family per State: Rank Order, 2010*, Digital Atlas of Am. Religion, http://religionatlas.org/?page_id=44 (last visited Oct. 8, 2014).

other non-Catholic Christian religion has decreased."[456] However, the Gallup poll also noted, "Sixty-nine percent of American adults are very or moderately religious, based on self-reports of the importance of religion in their daily lives and attendance at religious services."[457] Thus, legal protection for religious workers, whether specifically affiliated or not, continues to serve a valuable function.

Protections for religious adherents and employers appear to remain strong in the United States. For example Stanford Law School just launched its Religious Liberty Clinic.[458] The *Hosanna-Tabor* case reconfirms the Court's commitment to the free exercise of religion, including that of religious organizations.[459] *Hobby Lobby* heralds the advent of religious protections from governmental interference for private, for-profit corporations as *persons* under the RFRA.[460] However, when compared to other recent Supreme Court decisions, the *Hosanna-Tabor* and *Hobby Lobby* cases may also suggest more jurisprudential respect for corporate, organizational mission and independence than for religious free exercise.[461] How the balance of rights between individual religious adherents, between religious corporations and the government, and between religious institutions and employees, will evolve in the future remains unclear. Recent cases suggest, however, that courts remain committed to the separation of church and state in the context of employment.

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456. Frank Newport, *Seven in 10 Americans Are Very or Moderately Religious*, GALLUP (Dec. 4, 2012), http://www.gallup.com/poll/159050/seven-americans-moderately-religious.aspx.

457. *Id.* For a more general and fascinating discussion of modern trends, see ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 132 (2012).

458. Leslie A. Gordon, *Does a Prisoner Have a Right to a Mohel? Stanford's New Clinic Takes on Religious Liberties Cases*, A.B.A. J., May 2013, at 12, 12.

459. Hosanna-Tabor Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

460. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

461. *Compare* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (finding that corporate political spending is a form of speech protected under the First Amendment), *with Hosanna-Tabor*, 132 S. Ct. 694 (finding that how religious groups select (or dismiss) their own members is protected by the Free Exercise Clause of the First Amendment). One analyst recently noted:

> In the eight years since Chief Justice Roberts joined the court, it has allowed corporations to spend freely in elections in the Citizens United case, has shielded them from class actions and human rights suits, and has made arbitration the favored way to resolve many disputes. Business groups say the Roberts court's decisions have helped combat frivolous lawsuits, while plaintiffs' lawyers say the rulings have destroyed legitimate claims for harm from faulty products, discriminatory practices and fraud.

Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES, May 5, 2013, at B1.