
**RELIGIOUS ACCOMMODATION
IN THE WORKPLACE:**

PRAYING FOR BALANCE

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I. INTRODUCTION.

Disputes between employers and employees over religious observances in the workplace are becoming increasingly familiar. Lawsuits claiming workplace religious discrimination were relatively rare for many years. Now these claims are on the rise, up 30% in the last six years¹.

The types of religious observances for which employees seek accommodation are numerous and diverse. For example, an employee may be a Sabbatarian who requires Saturday or Sundays off; an employee may require time off to observe an occasional religious holiday. Additionally, an employee's religion may require certain clothing or appearance that conflicts with an employer's dress code, or the employee may simply wish to conduct devotional services at work. The employee's religion may also prohibit the use of his social security number or his involvement in labor organizations.

Whatever the request, employers are finding themselves under pressure to accommodate an employee's religious belief. This outline will focus on when an employer must accommodate a religious belief or expression and when an employer satisfies its duty, if any, to accommodate.

II. STATUTORY PROHIBITIONS.

Federal and state law both prohibit discrimination on the basis of religion.

A. Federal Law.²

1. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 ("TITLE VII") provides that it "shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...religion."³

2. EXECUTIVE ORDER 11246 requires all companies that contract with the federal government to refrain from discrimination on the basis of religion and requires language to that effect be included in all federal contracts.

¹See Gary T. Pakulski, "Time Off for Sabbath is Becoming a Common Dispute at the Office," *The Grand Rapids Press*, February 21, 1998 at B2 (discussing increase in number of religious discrimination complaints).

²Under bills pending in both the U.S. Senate and the House of Representatives employers will have a far greater obligation to accommodate current federal law. Each bill is titled The Workplace Religious Freedom Act of 1997. Under this law, even a bonafide seniority system will not be a defense to a failure to accommodate claim. In addition, an undue hardship would be defined as action requiring significant difficulty or expense. The Workplace Religious Freedom Act of 1997, 592 § (a)(2) and HR 2948 § (a)(3).

³42 USC § 2000e-2(a).

3. FIRST AMENDMENT ESTABLISHMENT/FREE EXERCISE CLAUSE provides “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.....”

B. State Law.

The Elliott-Larsen Civil Rights Act prohibits discrimination on the basis of race, color, national origin, sex, age, height, weight, marital status and **religion**.⁴

III. WHAT IS THE EMPLOYER’S DUTY TO ACCOMMODATE?

A. Introduction.

Title VII includes a statutory requirement in its definition of religion that the employer “reasonably accommodate” an employee’s religious practices, even when these might somehow impact an employee’s ability to do the job.⁵

As a general rule, employers have an obligation under Title VII to reasonably accommodate the religious practices of their employees unless the accommodation imposes an undue hardship upon the employer’s business.⁶ This simplistic formulation is not always easy to understand or apply. Among the most central questions an employer must answer are:

- What is a religious practice?
- What is an employee’s responsibility with respect to reasonable accommodation?
- When must an employer accommodate?
- What must an employer do to accommodate?
- What is undue hardship?

Each of these questions relate to the elements a plaintiff has to prove to establish the employer’s failure to accommodate.

To establish a prima facie case for failure to accommodate, the employee (or prospective employee) must show: (1) that he holds a sincere religious belief that conflicts with an employment requirement; (2) that he has informed his employer of the conflict, and

⁴MCL § 31.2101 *et seq.*

⁵29 CFR § 1605.2 (1998).

⁶29 CFR § 1605.2.



(3) that he was discharged or disciplined for failing to comply with the conflicting requirement.⁷

Once the employee has established a prima facie case, the burden shifts to the employer to show that it could not reasonably accommodate the conflict without undue hardship. Whether the employer's attempt was reasonable is determined case by case.⁸ If the employer fails to eliminate the employee's religious conflict, the burden remains on the employer to establish that it is unable to reasonably accommodate the employee's belief without incurring undue hardship.⁹

Although the Michigan Elliott-Larsen Act expressly prohibits religious discrimination, it does not expressly require reasonable accommodation. The Michigan supreme court or appellate courts have not interpreted the Elliott Larsen Act to require reasonable accommodation. However, Michigan courts sometimes look to Title VII to provide guidance in interpreting the Elliott-Larsen Act. As a result, Title VII provides the only requirement of reasonable accommodation in Michigan.

B. Sincerely Held Religious Belief.

Judicial definitions of religious belief are expansive.

In *Welsh v United States*,¹⁰ the U.S. Supreme Court defined a religious belief as any sincere and meaningful belief that occupies a place in the life of its possessor, parallel to that filled by God in many religions.

The United States Equal Employment Opportunity Commission ("EEOC") defines religious practices even more broadly, defining it to include morals or ethical beliefs as to what is right or wrong which are sincerely held with the strength of traditional religious views.¹¹

⁷*Cooper v Oak Rubber Co*, 15 F3d 1375, 1378 (CA6 1994).

⁸*Id.*

⁹*Id.*

¹⁰*Welsh v United States*, 398 US 333 (1970); *United States v Seeger* 380 US 163 (1965).

¹¹29 CFR §1605.1. Although EEOC guidelines have less authority than administrative regulations, compliance with EEOC guidelines is helpful for an employer seeking to prevail with the EEOC to avoid litigation.

1. EMPLOYER MAY NOT QUESTION THE MANDATES OF THE RELIGIOUS PRACTICE.

The employer cannot question whether an employee's practices are mandated by the religious doctrine the employee espouses.¹² Although employers may be permitted to challenge the sincerity of an employee's religious practices, it is difficult to do. There is a minimal burden on the employee to prove the sincerity of his/her beliefs or practices and the employer must demonstrate that the employee's claim of religious practice or belief is fraudulent.¹³

2. NO REQUIREMENT THAT THE BELIEF BE ASSOCIATED WITH THE CHURCH.

Although an employee's sincerity of belief may be evaluated in light of a religion's size and history,¹⁴ there is no requirement that an employee belong to a particular religious organization in order for the employee's religious belief to be considered sincerely held.

The fact that no religious group espouses such a belief or that the religious group to which the employee claims to belong may not accept the belief does not preclude the alleged belief from constituting a religious belief for purposes of the law. Under this definition, even atheism is deemed a religious belief.

In *Lambert v Condor Manufacturing*¹⁵ an employee refused to work where other employees displayed photographs of nude women. The employer contended that this objection related to plaintiff's "personal moral belief",¹⁶ and plaintiff was not entitled to Title VII protection. Dismissing the employer's contention, the Eastern District of Michigan found that this was an issue of fact. In doing so, the court adopted a test used in first amendment litigation: Does the employee have a sincere belief that his religion prevented him from doing such work?¹⁷ Quoting the

¹²See e.g., *EEOC v READS, Inc*, 759 F Supp 1150 (ED Pa 1991)(holding Muslim's insistence on wearing headcovering at work protected even though it was not required by her faith).

¹³*Philbrook v Ansonia Board of Education*, 757 F2d 476 (CA2 1985) *rev'd and remanded on other grounds*, 479 US 60 (1986); *International Society for Krishna v Barber*, 650 F2d 430, 441 (CA2 1981).

¹⁴*Wisconsin v Yoder*, 406 US 205, 92 S Ct 1526 (1972). Size and history of a religion are not dispositive on whether an employee holds a sincere religious belief.

¹⁵768 F Supp 600 (ED Mich 1991).

¹⁶*Id.* at 602.

¹⁷*Id.* at 602 quoting *Frazer v Illinois Department of Employment Security*, 489 US 829, 109 SCt 1514, 1517, 1989 citing *Thomas v Review Board of Indiana Employment Security Div*, 450 US 707, 101 SCt 1425

U.S. Supreme Court, the court stated: “never did we suggest that unless a claimant belongs to a sect that forbids what his religion requires that his belief, no matter how sincere, must be deemed a purely personal preference rather than a religious belief.”

3. NO REQUIREMENT THAT THE EMPLOYEE ADHERE TO ALL BELIEFS OF THE RELIGION.

For a belief to be sincerely held, it is not necessary for an employee to adhere to all the tenets of the faith. In *Shpargel v Stage and Co*,¹⁸ plaintiff was terminated for refusing to work overtime to prepare deli trays on the day before Yom Kippur. The employer argued that plaintiff did not possess a sincerely held religious belief in Judaism because he did not recognize all of the Jewish holidays and had previously worked overtime to prepare trays for Yom Kippur. The court disagreed holding: “[I]t is not necessary that this court find Plaintiff to be devout in his observance of all aspects of Judaism.”¹⁹

4. THE EMPLOYEE NEED NOT HAVE ESPOUSED THE BELIEF PREVIOUSLY.

The fact that an employee did not previously hold to a belief or practice does not preclude a finding that the employee now holds a sincere religious belief requiring or forbidding certain conduct.²⁰ In *Smith v Pyro Mining Company*, the Sixth Circuit Court of Appeals held that the district court erred in finding that an employee’s religious beliefs were not sincere when the employee, who had worked previously on the Sabbath and had not previously objected to doing so, subsequently objected to current Sabbath work. The court explained that the employee’s faith and commitment to her religion could have grown during that time.²¹

5. WHAT DOES NOT CONSTITUTE A SINCERE RELIGIOUS BELIEF?

Although the legal definition of religion is extremely broad, it is clear that cultural, social and political beliefs are not protected as sincerely held religious

(1981)

¹⁸914 F Supp 1468 (ED Mich 1996).

¹⁹*Id.* at 1474.

²⁰*Cooper v Oak Rubber Company*, 15 F3d 1375 (CA6 1994); *Smith v Pyro Mining Company*, 827 F2d 1081 (CA6 1987).

²¹827 F2d 1081 (CA6 1987); *see also Swartzentruber v Gunite Corp*, No. 3:99CV04, 56RM (ND Ind 00) (May 22, 2000).

beliefs. For example, courts have held that the beliefs of the Ku Klux Klan are, at most, political and social views, not entitled to protection as religious beliefs.²²

In *Wessling v Kroger Company*,²³ the Eastern District of Michigan held that participation in a voluntary activity in a religious setting does not necessarily stem from a sincere religious belief. In that case, an employee requested time off on Christmas Eve to assist with arrangements with a children's play and mass. As a catechism teacher, the employee sought permission to leave work early to greet the children and to assist in setting up and decorating the church. The district court held that this was not religious observance because the activity was purely voluntary. The court noted that the activities were social in nature and that helping at the church was a family obligation, not a religious one.²⁴

Similarly, an employee's belief is not sincere if he acts in a manner inconsistent with that belief. In *Dobkin v District of Columbia*,²⁵ the District of Columbia Circuit held that a member of the Jewish faith who worked on Saturdays could not claim religious discrimination by being compelled to appear in court on the Sabbath.²⁶

C. The Notice Requirement; What Constitutes Sufficient Notice?

An employer is obligated to reasonably accommodate an employee's religious practice once it is put on notice by the employee that the practice conflicts with an employment requirement.²⁷ The employee's obligation to provide notice relieves the employer from the burden of anticipating religious conflicts between its employment requirements and the practices of its employees.

The employee's notice requirement is rather simple. The employee need only convey enough information for the employer to understand the conflict between the employment requirement and the employee's religious practices.²⁸ It is imperative that the employer

²²See, e.g., *Slater v King Snoopers, Inc*, 809 F Supp 809 (D Colo 1992).

²³554 F Supp 548 (EDMich 1982)

²⁴*Id.* at 552.

²⁵194 A2d 657 (DC Cir 1963).

²⁶*Id.* at 659.

²⁷See 29 CFR § 1605.2 (c).

²⁸See *Heller v Ebb Auto Co*, 8 F3d 1433 (CA9 1993).

understands that it is a religious practice at issue. A failure to link the practice to religion (or adequately explain the link) obviates the employer's obligation to accommodate.²⁹

D. Reasonable Accommodation.

Once it is determined that the employee has a sincere religious belief and has provided the employer notice of a conflict between the employee's job requirement and his/her religious belief, then the employer must make a reasonable accommodation of the employee's religious belief. In *Ansonia Board of Education v Philbrook*,³⁰ a collective bargaining agreement allowed teachers three days annual leave for mandatory religious observances. These did not count against accumulated personal leave days. The teachers were also allowed to take three days off per year for personal business. Once the three days of religious leave were taken, personal leave could not be taken for religious activities. Plaintiff argued that he should be entitled to take the three days of personal leave for religious observance or should be allowed to pay the cost of a substitute teacher and receive full pay for the days that he was absent. The court held that the school board's policy requiring plaintiff to take unpaid leave for holy day observance that exceeded the amount allowed by the collective bargaining agreement was generally reasonable.³¹ The court ruled "[a]n employer has met his obligation under [42 USC 2000(e)(j)] when it demonstrates that it has offered a reasonable accommodation to the employee."³²

1. THE EMPLOYER DOES NOT HAVE TO PROVIDE THE REQUESTED ACCOMMODATION.

The employer does not have to provide the specific accommodation requested, if any, by the employee (nor need it provide the best accommodation). Nor does the employer have to consider the alternative the employee suggests. The employer is only required to provide a reasonable accommodation.³³ Therefore, if

²⁹See *Tiano v Diller Department Store*, 139 F3d 679 (CA9 1998); *McGlothin v Jackson Mun Separate School District*, 829 F Supp 853 (SD Miss 1992).

³⁰A high school teacher sued when the school district failed to accommodate his request to be excused from work for six designated holy days per year.

³¹On the other hand, the court stated that unpaid leave is not a reasonable accommodation "when paid leave is provided for all purposes except religious ones."

³²The court reasoned:

"[W]here the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end."

³³*Ansonia*, 479 US at 68-69.

there are several potential accommodations available, the employer may choose the one that poses the least hardship on its business.

2. THE EEOC APPROACH.

In contrast to the courts, the EEOC will consider the alternatives for accommodation considered by the employer or union; and the alternative actually offered to the employee.³⁴ In addition, the EEOC has stated that the employer or union must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

3. DIALOGUE IS NECESSARY.

Implicit in the requirement of reasonable accommodation is the notion that the employer and employee engage in a discussion concerning any accommodation which the employee suggests or the employer proposes. The burden of engaging in the dialogue is placed on the employer. Courts do not favor solutions mandated by employers without the benefit of dialogue.³⁵ However, once the employer has suggested a possible accommodation, the employee must also cooperate in reaching an acceptable solution.³⁶ For example, where the employee has bidding and seniority rights that will allow or enable him/her to seek other positions at the plant the employee must do so.³⁷

4. SPECIFIC AREAS OF ACCOMMODATION.

Most accommodation cases involve requests for rearrangement of work schedules or time off for religious observances. Every accommodation request, however, requires specific analysis. Employers should take the time and energy to work with an employee's co-workers and supervisors in order to develop an appropriate accommodation. It is better for an employer to invest its resources at the time an accommodation request is made rather than spend a great deal of time and energy (and money) defending a charge of religious discrimination later.

a. The Easy Cases: Clothing, Hair, Holidays, and Union Membership.

1. PERSONAL APPEARANCE (CLOTHING & HAIR).

³⁴29 CFR § 1605.2(c)(2)(ii).

³⁵*Heller, supra; Opuku-Boateng v California*, 95 F3d 1461 (CA9 1996) cert den 117 SCt 1819 (1997).

³⁶*Equal Employment Opportunity Commission v Chrysler*, 652 F Supp 1523 (ND Ohio 1987).

³⁷*Id.*



A major area of concern for many employers is how far they must go to accommodate a religious employee's dress or personal appearance. Head coverings, robes, beards, face paints, religious insignias and symbols and other outward tokens of faith may deviate not only from an employer's dress codes, but also from co-workers' expectations. Religious beliefs that dictate specific dress or grooming practices are, however, entitled to reasonable accommodation. For example, the Sikh religion prescribes the cutting or shaving of any body hair. Permitting such an employee to have facial hair may be required as a reasonable accommodation.³⁸

Accommodation of dress practices, may not be necessary under special circumstances, such as active duty in the U.S. military,³⁹ teaching in public schools,⁴⁰ or in cases where safety is a consideration.⁴¹ As a general rule, if the grooming or dress rule is justified by legitimate evidence that safety or health will be compromised, the employer need not accommodate the employee. For example, an employer does not have to allow robes or long skirts in a plant where loose garments might be caught in heavy machinery. A employer also does not have to accommodate untrimmed beards, flowing hair and head dresses if they are incompatible with the work place environment, as in a restaurant or hospital. However, if the grooming or dress rule is the result of a mere desire for professional appearance, employers usually must offer the employee a reasonable accommodation.

2. HOLIDAYS/TIME-OFF.

Unless undue hardship can be shown, an employer usually must provide an employee time off for observance of religious holidays or for observance of religious practices. Disputes often arise over how time off for such observances is paid or unpaid leave,

³⁸*Bhatia v Chevron USA, Inc*, 734 F2d 1382 (CA9 1984).

³⁹*Goldman v Weinberger*, 475 US 503 (1986) (holding U.S. military is not required to accommodate religious dress practices that it believes would detract from uniformity).

⁴⁰*Cooper v Eugene School District No4, OreSupCt, No S.32472 and S.32469 (July 29, 1986)* (holding teachers may lawfully be prohibited from wearing religious dress while teaching in public school).

⁴¹*Bhatia*, 734 F2d 1382 (upholding transfer of Sikh machinist who refused to shave off his beard for religious reasoning where machinist at the plant where required to wear respirators because they were exposed to toxic fumes and beard interfered with fit of the respirator).

overtime work. An employer may always allow an employee unpaid leave time off to observe religious holidays.⁴² The employer, however, is not obligated to approve employee requests to work overtime to build up extra vacation leave to make up for days missed for religious observances.⁴³

3. SABBATH.

Employers are often asked to accommodate employees who refuse to work on their Sabbath. Generally, if the employee's job requires regular Sabbath work or is vital to an employer's production, an employer may be able to make a substantial showing of undue hardship.

In *Benefield v Food Giant*, the Eleventh Circuit affirmed summary judgment for an employer, holding that a grocery store did not discriminate against an employee by demoting him and decreasing his hours because he couldn't work on Saturdays, the store's busiest day. The employer argued that it could not keep the employee on as a produce manager or schedule him for 40 hours of work between Monday and Friday without the undue hardship of added labor costs and possible dissent from other employees. The employer made a reasonable accommodation for the worker's beliefs by permitting him to be absent on Saturdays and by giving him as many hours of work as were available, consistent with the store's scheduling requirements.

However, to the extent an employer can accommodate the employee's religious belief without any undue hardship the employer should do so, by allowing swaps with co-workers or posting notices on boards asking employees to take the shift. If an employee requires every Saturday off and it will cause no more than minimal disruption, the employer should accommodate the employee's religious accommodation, particularly if the employee's job is easily learned and the employer would not have had to pay higher wages to fill the position.⁴⁴

⁴²*Pinker v Joint District No 28J*, 735 F2d 388 (CA10 1984).

⁴³*Getz v Pennsylvania Dept of Public Welfare*, 802 F2d 72 (CA3 1986).

⁴⁴*Protos v Volkswagen of America*, 797 F2d 129 (CA3 1986) (holding an auto manufacturer violated Title VII's ban on religious bias by firing an assembly line worker who refused all Saturday work for religious reasons and stating that the company could have accommodated the employee's religious beliefs with no more than minimal cost pointing out that the company regularly maintained a crew of roving relief

An offer of an unpaid leave of absence or a transfer to a lesser paying position may also constitute a reasonable accommodation in certain circumstances. In *Eversly v M Bank Dallas*,⁴⁵ the court found that an employer offered a reasonable accommodation to an employee's objection to working Sundays by offering a transfer to a lower paying position and by trying to find other employees to switch shifts.⁴⁶

4. UNION MEMBERSHIP/DUES.

If religious beliefs prohibit union membership, but not financial support of the Union, the employee may be required to pay to the Union the equivalent of the dues and fees uniformly required of union members, but may not be required to join the Union.⁴⁷ If a religious belief prohibits financial support of the Union, the employee may be required to make a non-religious charitable contribution in lieu of dues.⁴⁸

b. The Difficult Cases: Religious Symbols, Speech and Proselytizing.

The more challenging religious discrimination cases for both employers and the courts are those where an employee's workplace expression of a religious belief annoys or offends or distracts other employees. In such cases, the potential for workplace disruption and loss of efficient work time may be high.

1. RELIGIOUS SPEECH.

In *Wilson v US West Communications, Inc.*,⁴⁹ the Eight Circuit held that an employee whose personal religious vows required her to wear a button depicting an anti-abortion message could be made to

operators).

⁴⁵843 F2d 172, 176 (CA5 1988).

⁴⁶See also *Draper v United States Pipe and Foundry Company*, 527 F2d 515, 519-520 (CA 6 1975) (suggesting that a transfer affecting an employee may be a reasonable accommodation as a last resort where there is no work available in the employee's current job classification).

⁴⁷*NLRB v Hershey Foods Corp*, 513 F2d 1083 (CA9 1975).

⁴⁸29 USC § 169.

⁴⁹58 F3d 1337 (CA8 1995).

cover the button during work time after numerous workplace disruptions and co-worker complaints. The court reasoned that, since the employee's beliefs merely required her to wear the button rather than to actually display its image, she could be asked to cover it.⁵⁰

2. PROSELYTIZING AND SPEECH.

Employees occasionally assert their right to discuss their religious beliefs at work. Unless significant proof exists that such speech disrupts the business, takes time away from work, or creates a hostile work place for other employees, the employer should permit the speech.⁵¹

While courts have encountered few cases involving allegations of outright proselytization in the work place, such cases are coming before the courts with greater frequency.⁵² These cases usually involve situations where one employee accuses a co-worker of (religious) harassment. In such situations, the employer may be caught in the middle and, without clear guidelines, will be uncertain how to resolve the conflict.

Both the employee engaged in the alleged harassment and the employee being targeted may ask for reasonable accommodation from the employer since the religious practices of both are at stake. In such a situation, an employer clearly has the right to limit conduct that interferes with work, but an employer's ban of any discussion relating to religion in the work place may run afoul of Title VII, not to mention other possible statutes. Unless the employer requires silence of its employees with respect to any non-work related issue, it cannot allow employees to talk about sports, lifestyle issues, clothing, or other issues while at the same time banning any discussion of religion.

Nonetheless, the employer may establish and enforce a legitimate non-discriminatory policy that requires employees to limit the discussion of non-work related issues.

⁵⁰The court, however, did not address the result if the employee's beliefs required her to display the actual image.

⁵¹*See, e.g., Brown v Polk County, Iowa*, 61 F3d 650 (CA8 1995).

⁵²In such situations, members of many religious faiths believe they have a duty to spread their religious message to others and they take advantage of the opportunities found in the work place to carry out the mission.

c. Distinguishing Between Pervasive Preaching And Passing Comments.

If an employer reacts too harshly to isolated religious comments, it risks being accused of disparate treatment. Employers should apply similar standards for determining whether religious statements have crossed the line into religious harassment that they would for determining whether statements regarding sexual issues have crossed the line and become sexual harassment. In other words, an employer, in this area, should apply the criteria set forth by the Supreme Court in the sexual harassment case of *Harris v Forklift Systems*.⁵³

In that case, the Supreme Court decided that to determine whether or not sexually oriented statements are severe or pervasive enough to constitute harassment and are creating a hostile working environment, an employer should look at the frequency of the conduct, the severity of the conduct, whether the conduct was physically threatening or humiliating, and whether the conduct unreasonably interfered with work performance.⁵⁴ Using these criteria for religiously oriented statements should help employers decide whether or not the speech or conduct which has been objected to requires any discipline and, if so, what type of discipline should be imposed.

d. Proselytization By An Employer.

When an employer attempts to impose religious views on employees, it is likely a court (or jury) will find the employer's conduct imposes adverse employment affect upon the employees and is likely to be found a hostile work environment. In *Venters v City of Delphi*,⁵⁵ the plaintiff was lectured by his supervisor repeatedly about religion. The supervisor told the employee that she was a sinner, and that she should commit suicide rather than continue life as a sinner. The court held that a reasonable person would have found the work environment hostile.⁵⁶

e. Proselytization By An Employee.

Proselytization has been held to be an appropriate basis for termination and discipline when it negatively impacts the work environment

⁵³510 US 517 (1993).

⁵⁴*Id.* at 21.

⁵⁵123 F3d 956 (CA7 1997).

⁵⁶*See also Blalock v Metals Trades, Inc*, 775 F2d 703 (CA6 1985).

or negatively interferes in the personal lives and beliefs of co-workers. It is also held to be conduct which an employer need not accommodate.⁵⁷

E. When Accommodation Is Impossible.

There will, of course, be times when, after due consideration, an employer determines that it cannot accommodate an employee's religious needs. Such an impasse can occur when the employee rejects the employer's suggested accommodation, and no other reasonable solution can be found. It may also occur when the employee is the only person able to perform a particular task at a certain location, and any accommodation will result in long-term losses in operating efficiency or in ongoing increased costs.

When a solution cannot be found because an employee rejects the employer's suggested accommodation, the employer must be prepared to show that the accommodation was reasonable. If an employer acts reasonably-by carefully reviewing the situation and offering a realistic solution-an employee's rejection of the suggested solution does not create any additional obligation on the employer.

In a situation where the employer determines that no reasonable accommodation exists, the employer must be prepared to show that each possible accommodation would be an undue hardship because each would cause a greater than a minimal increase in costs or result in significant loss of operating efficiency.

F. Undue Hardship.

In *Trans World Airlines, Inc v Hardison*⁵⁸ the Supreme Court interpreted undue hardship to be any accommodation that imposes "more than a de minimis cost." In that case, the plaintiff worked as an employee in a vital maintenance department of Trans World Airlines ("TWA"). The department had a bona fide seniority system in place for the purpose of shift bidding.⁵⁹ The employee was a member of the Worldwide Church of God, a church that observes the Sabbath from sundown Friday to sundown Saturday.⁶⁰ The conflict arose after the employee was transferred to a different building where he was too low on the seniority list to bid for a shift that would not conflict with his observance of the Sabbath.⁶¹ After failing to reach an acceptable solution, TWA discharged the employee for refusing to

⁵⁷*Wilson v US West Communications*, 58 F3d 1337 (CA8 1995); *Chalmers v Tulon Company of Richmond* 101 F3d 1012 (CA4 1996), cert den 118 SCt 58 (1997).

⁵⁸432 US 63, 97 S Ct 2264 (1997).

⁵⁹432 US at 67.

⁶⁰*Id.* at 67.

⁶¹*Id.* at 68.



report for his Saturday shift.⁶² The employee filed suit charging TWA with religious discrimination in violation of Title VII.⁶³

The Court of Appeal for the Eighth Circuit found two of the accommodations to be reasonable: “TWA would suffer no undue hardship if it were required to replace the employee either with supervisory personnel or with qualified personnel from other departments. Alternatively, TWA could have replaced the employee on his Saturday shift with other available employees through the payment of premium wages.”

The U.S. Supreme Court, reversed the Eighth Circuit and rejected the accommodations: both of these alternatives would involve costs to TWA, either in the form of lost efficiency and other jobs or higher wages. To require TWA to bare more than the de minimis cost in order to give holidays and Saturdays off would be undue hardship.⁶⁴

Hardship does not, however, give employers the ability to reject every reasonable accommodation. Undue hardship must not be speculative. For example, potential morale problems or discontent among employees in the workforce as a result of the accommodation at issue, does not constitute an undue hardship.⁶⁵

1. VIOLATIONS OF COLLECTIVE BARGAINING AGREEMENTS.

Hardison and the EEOC guidelines make collective bargaining agreements a strong basis for an undue hardship finding, particularly, if the accommodation at issue violates seniority rights under the Agreement.⁶⁶ The court has held that reasonable accommodation does not require abandoning a bonafide seniority system,⁶⁷ but an employer should attempt to accommodate an employee to the extent feasible within that system.⁶⁸ Some courts, however, have held that a failure by the

⁶²*Id.* at 69.

⁶³*Id.* at 79.

⁶⁴Justice Marshall, in dissent, noted the trifling extent of the efficiency loss discussed by the court: one hundred fifty dollars total in overtime costs.

⁶⁵*Opuku-Boateng v State of California*, 95 F3d 1461, 1473-74 (CA9 1996) *cert den* 520 U.S. 1228, 117 S Ct 1819 (1997).

⁶⁶*See* 29 CFR § 1605.2(e)(2).

⁶⁷432 US at 62.

⁶⁸*Balint v Carson City*, 180 F3d 1047, 1050-53 (CA9 1999) (holding that *Hardison* cannot be simply read for the proposition that the mere existence of a seniority system negates the duty to accommodate and also noting that employers also need not violate their seniority systems to make accommodations but are required to attempt accommodations that are consistent with their seniority systems and that impose no more

employer to make a good faith attempt to obtain cooperation from the Union, via a waiver or some other method, precludes an undue hardship finding.⁶⁹

2. ADVERSE EFFECT ON CO-WORKERS.

If an employer can prove that other employees suffer actual adverse effects as a result of any accommodation, courts are more likely to accept arguments of undue hardship. Examples of adverse effects include 1) the assignment of a co-worker to do more dangerous work, 2) the removal of a co-worker's vacation time, and 3) the change of a otherwise neutral shift location, or 4) the requirement that a co-worker switch from a permanent shift.

3. BREAKING THE LAW: STATUTORY COMPLIANCE CAUSING UNDUE HARDSHIP.

In contrast to an employer's defense that economic factors cause undue hardship, the employer may claim undue hardship when an accommodation would result in violation of the statute or regulation. Typically, as in *Hardison*, an employer may invoke the seniority provisions of a collective bargaining agreement, which are enforced by federal labor laws.

4. WORKPLACE SAFETY.

Employers normally must have a strong factual record to show that an accommodation actually impairs the safe functioning of the employee or of others. In *Toledo v Noble-Sysco, Inc.*,⁷⁰ the Tenth Circuit rejected an employer's argument that a Native American's religious use of peyote impaired an employee's safe functioning as a truck driver. The court found that, because the potential employee was not ingesting peyote while driving, was using it for religious reasons, and could be provided with a day after the peyote's ingestion to allow its affects to dissipate, the employer's refusal to hire the employee was not justified based on undue hardship.

5. EEOC GUIDELINES: SIZE MATTERS.

According to the EEOC guidelines, de minimis cost is considered in relation to the size and operating costs of the employer and the number of individuals who

than de minimis cost).

⁶⁹See, e.g., *EEOC v Hacienda Hotel*, 881 F2d 1504 (CA9 1989); *Drazewski v Waukegan Development Center*, 651 F Supp 754 (ND Ill 1986).

⁷⁰892 F2d 1481 (CA10 1981), *cert den*, 495 US 948 (1990).



will, in fact, need a particular accommodation.⁷¹ Indeed, the EEOC contends that a refusal to accommodate is justified only where the employer can demonstrate that “an undue hardship would, in fact, result from each method of accommodation.”⁷² In any case, courts are skeptical of hypothetical hardships that employers think might be caused by an accommodation that has never been made.⁷³

6. PRODUCTION OR KNOWLEDGE LOSSES.

Courts have found production losses to be sufficient grounds for undue hardship.⁷⁴ In addition, if an employee has a unique skill or knowledge that cannot be easily replaced, the employer has a strong argument for undue hardship.⁷⁵

7. ADMINISTRATIVE COSTS/INFREQUENT PAYMENT OF PREMIUM WAGES.

The payment of premium wages or any loss of efficiency does not constitute undue hardship. The EEOC will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing reasonable accommodation.⁷⁶ Likewise, the EEOC will presume that payment of administrative costs (for rearranging schedules, recording substitutions for payroll purposes) are de minimis costs.⁷⁷ However, there is no requirement that the employer hire a replacement worker,⁷⁸ compel co-workers to work overtime⁷⁹ or risk the safety of others.⁸⁰

⁷¹29 CFR §1605.2(e)(1).

⁷²29 CFR §1605.2(e)(1).

⁷³*Draper v United States Pipe and Foundry Co*, 527 F2d 515, 520 (CA6 1975).

⁷⁴See *EEOC v Carib Hilton International*, 597 F Supp 1007 (DPR 1984), *aff'd* 821 F2d 74 (CA1 1987); *Cooper v Oak Rubber Co*, 15 F3d 1375 (CA6 1994).

⁷⁵*Smith v United Refining Co*, 21 FEP 1481, 1484 (WD Pa 1980).

⁷⁶29 CFR § 1605.2(e)(1).

⁷⁷*Id.*

⁷⁸*Cooper*, 15 F3d 1375.

⁷⁹*Hardison*, 432 US 81.

⁸⁰The Sixth Circuit has noted that requiring electricians to work, say, 16 hours per day on dangerous equipment if proven to accommodate plaintiff's time off may create safety problems. “[W]e note that safety

G. Practical Solutions.

Most employers run afoul of Title VII's religious accommodation requirement because they fail to make any effort toward accommodation at all. In an effort to avoid litigation and minimize liability an employer should:

- (1) consider all of an employee's suggestions;
- (2) document the reasons for rejection of any suggested accommodation;
- (3) allow work assignment swaps between employees;
- (4) consider adopting flexible use of work hours, leaves and breaks;
- (5) consider transferring employees to assignments or locations in which the religious practice can be accommodated; and
- (6) seek replacements through employee newsletters, company bulletin boards, and e-mail.⁸¹

In the case of proselytizing, an employer should not discipline an employee merely because a co-worker has come to the personnel office to complain. Any employer should:

1. Ask the co-worker who is registering the objection to make a written complaint, detailing exactly what the offending employee has done and when the conduct occurred.
2. Gather information from other employees of relevance; and
3. Afford the employee who has been accused of offensive conduct an opportunity to address the concerns of his co-workers.

H. Commonly Asked Questions and Answers:

Q: What type of religious discrimination is prohibited by law?

A: An employer is prohibited from basing employment decisions such as hiring, assignment and firing on the basis of religion. It must also make affirmative attempts to reasonably accommodate an employee's religious practices, unless such accommodation would cause the employer an undue hardship. For example, an employer must accommodate an employee's request for days off to observe religious holidays unless such a request imposes an undue hardship on the operations of an employer.

considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer's business." *Draper*, 52 F2d at 521.

⁸¹Although none of these are required under *Philbrook* and *Hardison*, they, however, will be helpful in avoiding litigation or complaint to the EEOC.



Q: Is an employer required to give an employee unlimited time off or different work schedules simply because the employee may hold a particular belief?

A: No. Although the employer must attempt to accommodate requests, an employer need not grant such requests if doing so will impose an undue hardship on the employer. For example, if an employee seeks five days off a year for a particular religious activity, such a request would likely not impose an undue hardship. On the other hand, if an employee insists on having every Saturday off, but granting that request will conflict with a collective bargaining agreement or otherwise create significant disruption of the work force, the employer need not accommodate such a request.

Q: Exactly what must an employer do to accommodate an employee's religious beliefs?

A: To reasonably accommodate an employee's religious practices, an employer must first examine what actions can be taken to alleviate the conflict that exists between an employee's religious practices and any work rules. If a solution can be found that will not cause an employer undue hardship, the employer must implement the solution. Undue hardship generally occurs when an accommodation of the employee's religious practices caused the employer to incur greater than minimal costs.

Q: What can happen to an employer if it does not accommodate an employee's religious beliefs?

A: If the court determines that a reasonable accommodation existed that did not cause the employer undue hardship, then the court could order the damages generally available for discrimination claims which include return to the job, back pay, compensatory or punitive damages, attorneys fees and costs.