Fordham Law Review

Volume 53 | Issue 4 Article 5

1985

Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since Trains World Airlines v. Hardison

Sara L. Silbiger

HEAVEN CAN WAIT: JUDICIAL INTERPRETATION OF TITLE VII's RELIGIOUS ACCOMMODATION REQUIREMENT SINCE *TRANS WORLD AIRLINES V. HARDISON*

INTRODUCTION

The Civil Rights Act of 1964 (Act),[1] a sweeping legislative program designed to protect the personal and political rights of the nation's minority groups,[2] imposes on all employers an obligation reasonably to accommodate the religious needs of their employees.[3] As originally enacted, the statute simply prohibited the employer from discriminating against current or prospective employees on the basis of religion with respect to the terms and conditions of employment.[4] In 1972, the Act was amended to include section 2000e(j),[5] which imposed the religious accommodation obligations.[6] That section requires accommodation of employee religious observance except when "undue hardship on the conduct of the employer's business" will result.[7] However, neither the Act nor the courts interpreting it have provided a consistent delineation of the limits of an employer's statutory duty to accommodate.[8] As a result,

1. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C. §§ 2000a-2000h (1982)).

2. *See* Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241, 246 (1964); H.R. Rep. No. 914, 88th Cong. 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391, 2393-94. The groups protected by the Act are not the same in each title. Broadest protection is found in Title VII, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. *See* 42 U.S.C. §2000e-2(a) (1982). Although the original bill was designed to protect minorities, the bill's opponents added women to Title VII's coverage as a strategy to alienate its supporters. *See* 110 Cong. Rec. 2577-84 (1964) (House debate); Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 441-42 (1966).

3. *See* 42 U.S.C. § 2000e(j) (1982).

4. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a) (1982)). The Act makes it a proscribed practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1982). The Act also proscribes discriminatory employment practices by employment agencies, *id.* § 2000e-2(b), and labor organizations, *id.* § 2000e-2(c).

5. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103, 103 (codified at 42 U.S.C. § 2000e(j) (1982)).

6. 42 U.S.C. § 2000e(j) (1982).

7. *See id.*

8. *See id.* The accommodation requirement arises from the Act's extension of an employer's antidiscrimination obligation with respect to "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.*; *see*

employees may feel inhibited in the exercise of their constitutionally protected religious rights, while employers are given little guidance in their efforts to accommodate them.[9]

The Supreme Court interpreted the accommodation requirement in 1977 in *Trans World Airlines* v. *Hardison*,[10] but in the subsequent decisions no uniformity has yet emerged. An examination of the cases since 1977 suggests that courts typically use one of three different models of interest balancing to analyze the varied factual contexts in which religious accommodation issues are presented. One model balances the interests of the individual religious observer against those of the group in which he works.[11] A second balances constitutional concerns of free exercise of religion against the first amendment's vigorous prohibition of the establishment of religion.[12] The third model balances the religious interests of the employee against the business interests of the employer.[13]

This Note highlights the inconsistencies that have accompanied the interpretation of Section 2000e(j)'s accommodation requirement. Part I examines the language and legislative history of the accommodation requirement and the Supreme Court's treatment of it. Part II analyzes the ideological underpinnings and statutory basis of the courts' different interpretative models and reviews their effectiveness as standards for judicial decisions and practical application. This Note concludes that of the three, only the model that balances religious against business interests is both true to the language of the statute and amenable to consistent application in a variety of factual contexts.

I. SCOPE AND INTERPRETATION OF THE DUTY TO ACCOMMODATE

A. *Language and Legislative History of Section 2000e(j)*

The 1972 amendment to the Civil Rights Act of 1964 defined religion to include religious observance as well as adherence and by its terms cre-

Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 450 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981); Brown v. General Motors Corp., 601 F.2d 956, 958 (8th Cir. 1979); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 400 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); McCormick v. Board of Educ., 32 Empl. Prac. Dec. (CCH) ¶ 33,883, at 31,232 (N.D. Ill. 1983).

9. *See* 1 W. Connolly, Jr., A Practical Guide to Equal Employment Opportunity 197 (1975); Comment, *Religious Discrimination in Employment—The Undoing of Title VII's Reasonable Accommodation Standard*, 44 Brooklyn L. Rev. 598, 620 (1978) [hereinafter cited as *Reasonable Accommodation Standard*]. In view of the inconsistencies found in the case law, see *infra* notes 77-81 and accompanying text, it is surprising that discussions of the accommodation obligation oriented to the practioner-employer describe it as more definite than it actually is. *See, e.g.*, K. Sovereign, Personnel Law 112 (1984); Hill, *Reasonable Accommodation and Religious Discrimination under Title VII: A Practitioner's Guide*, 34 Arb. J., Dec. 1979, at 19, 25.

10. 432 U.S. 63 (1977).

11. See *infra* note 86.

12. See *infra* note 87.

13. See *infra* note 88.

ated a duty to accommodate that observance.[14] The reach of the statute's "reasonable accommodation" requirement, however, is limited by the proviso that such accommodation need not go so far as to impose an undue hardship on the conduct of the employer's business.[15] Nevertheless, the language clearly contemplates that accommodation may result in some hardship to the employer.[16] "Undue hardship" arguably comprehends more hardship than simply that which is necessary to bring about accommodation at all.[17] At the very least it is "something greater than hardship."[18] The ambiguity of this standard has produced substantial disagreement among the courts regarding the precise degree of hardship attaching to the employer's accommodation obligation under the Act.[19] Standing alone, the statute's language has proved insufficient to aid courts in interpreting and applying the statute.[20]

In the absence of a plain meaning, evidence of congressional intent gleaned from legislative history is a persuasive guidepost for statutory interpretation.[21] The history of section 2000e(j), however, is not illumi-

14. *See* 42 U.S.C. § 2000e(j) (1982). The reasonable accommodation language of the statute is taken from the Equal Employment Opportunity Commission guidelines that were in effect at the time the section was enacted. *See* 29 C.F.R. § 1605.1(b) (1968) (current version at 29 C.F.R. § 1605.2(c) (1984)). In an earlier version of the regulation, the language had a different emphasis, with the word "reasonable" modifying not the employer's accommodation but the employee's religious need. *Compare* 29 C.F.R. § 1605.1(a)(2) (1967) ("obligation on the part of the employer to accommodate to the reasonable religious needs of employees"), *superseded by* 29 C.F.R. § 1605.1(b) (1968) (current version at 29 C.F.R. § 1605.2(c) (1984)) *with* 29 C.F.R. § 1605.1(b) (1968) ("obligation on the part of the employer to make reasonable accommodations to the religious needs of employees") (current version at 29 C.F.R. § 1605.2(c) (1984)). *See* 3 A. Larson & L. Larson, Employment Discrimination § 92.10, at 19-16 to -17 (1984).

15. *See* 42 U.S.C. § 2000e(j) (1982).

16. The term "undue hardship" also appears in the regulations establishing employers' obligations reasonably to accommodate the physical and mental limitations of handicapped employees under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982). *See* 41 C.F.R. § 60-741.6(d) (1984). It is clear from other requirements of these regulations, however, that accommodation under this Act may demand considerable expense without constituting "undue hardship." *See* 41 C.F.R. § 60-741.6 (1984).

17. *See* Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 402 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

18. *Id.*; *see* Cummins v. Parker Seal Co., 516 F.2d 544, 551 (6th Cir. 1975), *aff'd mem. by an equally divided Court*, 429 U.S. 65 (1976) (per curiam), *vacated on other grounds*, 433 U.S. 903 (1977).

19. The disagreement is often explained in both cases and commentary as a function of the varied factual contexts in which the accommodation issue arises. *See* Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 400 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979). There is no doubt that what constitutes reasonableness and undue hardship will vary under the circumstances of each case. The disagreement extends beyond this, however, because courts do not approach the varied factual contexts with a consistent analytical framework. See *infra* notes 82-88 and accompanying text.

20. *See* TWA v. Hardison, 432 U.S. 63, 75 (1977) ("the reach of [the accommodation] obligation has never been spelled out by Congress").

21. *See* 2A N. Singer, Sutherland Statutory Construction §§ 48.01-.03 (C. Sands rev. 4th ed. 1984); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 538-44 (1947).

nating.[22] Introduced principally to strengthen and redefine the powers of the Equal Employment Opportunity Commission (EEOC),[23] the 1972 bill contained the religious accommodation language of section 2000e(j),[24] which was originally introduced as a floor amendment. The stated purpose of the amendment was to protect sabbath observers whose employers fail to adjust work schedules to fit their needs.[25] Although the sanctity of an employee's religious observance as well as belief is arguably guaranteed both by the 1964 Act[26] and, for public employees, by the Constitution,[27] the amendment's sponsor contended that the courts did not consistently extend those protections.[28] The amendment was therefore passed to reaffirm more explicitly that duty to accommodate and, in so doing, to resolve inconsistencies among the courts charged with safeguarding it.[29]

Notwithstanding Congress' relatively clear expression of purpose, the legislative history is generally unhelpful in ascertaining the *extent* of the obligation being created.[30] In the course of debate, certain situations were invented and identified as meeting the undue hardship exception to

22. Because § 2000e(j) was introduced as a floor amendment to a bill not primarily concerned with religious discrimination, *see* 118 Cong. Rec. 705-06 (1972), there are no committee reports and little floor debate discussing it, *see* TWA v. Hardison, 432 U.S. 63, 74 & n.9 (1977).

23. *See* H.R. Rep. No. 238, 92d Cong., 1st Sess. 1 (1971); S. Rep. No. 415, 92d Cong., 1st Sess. 1 (1971); 117 Cong. Rec. 31,718 (1971) (statement of Sen. Williams).

24. 118 Cong. Rec. 705 (1972) (statement of Sen. Randolph).

25. *Id.*

26. *Id.*

27. *See id. But see* Isaac v. Butler's Shoe Corp., 511 F. Supp. 108, 112 (N.D. Ga. 1980) (no free exercise protection arises in absence of legislative action). The Constitution prohibits the passage of laws by Congress that would inhibit the free exercise of religion. *See* U.S. Const. amend. I. The Supreme Court has, through the due process clause of the fourteenth amendment, extended this prohibition to the acts of state governments. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 210 (1948); L. Tribe, American Constitutional Law § 14-2, at 813-14 (1978).

28. *See* 118 Cong. Rec. 705-06 (1972) (statement of Sen. Randolph).

29. *Id.* A Conference Report also noted the goal of resolving conflicts between the courts and the Equal Employment Opportunity Commission (EEOC). *See* 118 Cong. Rec. 7167 (1972). A number of cases had refused to acknowledge that either the 1964 Act or the first amendment required the accommodation of religious practices. *See, e.g.*, Dewey v. Reynolds Metals Co., 429 F.2d 324, 335 (6th Cir. 1970) (failure to accommodate is not discrimination), *aff'd mem. by an equally divided Court*, 402 U.S. 689 (1971) (per curiam); Linscott v. Millers Falls Co., 316 F. Supp. 1369, 1372 (D. Mass. 1970) (no accommodation required where union dues payment was supported by compelling government interest), *aff'd*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971); Kettell v. Johnson & Johnson, 337 F. Supp. 892, 895 (E.D. Ark. 1972) (EEOC guidelines requiring accommodation exceed the mandate of the Civil Rights Act).

30. *See* TWA v. Hardison, 432 U.S. 63, 74 & n.9 (1977); 3 A. Larson & L. Larson, *supra* note 14, § 92.10, at 19-17; Note, *Religious Discrimination and Title VII's Reasonable Accommodations Rule:* Trans World Airlines, Inc. v. Hardison, 39 Ohio St. L.J. 639, 643-44 (1978) [hereinafter cited as *Religious Discrimination*]; Comment, *Union Security Clauses and Religious Discrimination in Employment*, 6 N. Ky. L. Rev. 155, 160 & n.36 (1979).

the reasonable accommodation rule,[31] but no attempt was made to draft practical guidelines that would permit consistent interpretation of that exception. The legislative record, however, does include the text of then-existing EEOC guidelines on accommodation which influenced the drafting of section 2000e(j),[32] as well as the texts of two court decisions.[33] Although presumably intended to be instructive, the two cases offer little aid: Even the Supreme Court, in its own quest for legislative guidance, noted that "[t]he significance of the legislative references to prior case law is unclear."[34] Nor have the courts relied on the included EEOC guidelines to clarify the section's terms.[35] At most, the record supports the assertion that Congress intended to clarify its definition of religion to include and protect religious conduct[36] and to impose some limits on the employers' obligation to avoid discrimination based on such conduct.[37] The extent of those limits is no clearer in the legislative record than on the face of the statute itself.[38]

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31. *See* 118 Cong. Rec. 706 (1972) (remarks of Sen. Randolph). For example, Sen. Randolph, the amendment's sponsor, assured Sen. Williams that a resort owner whose business is conducted primarily on weekends would not be required to hire an employee whose religious observance precluded working on Saturday or Sunday. *See id.*

32. The Congressional Record indiscriminately includes every EEOC regulation with no indication as to which ones were intended to be instructive or supportive of the religious accommodation amendment. *See id.* at 714-30.

33. The first case, Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd mem. by an equally divided Court*, 402 U.S. 689 (1971) (per curiam), distinguished between discrimination and failure to accommodate religious observances and held for the defendant. *Id.* at 335. The second, Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972), made a similar distinction, *id.* at 591, and went so far as to declare that "it would be unreasonable and impractical to require the complex American business structure to prove why it cannot gear itself to the 'varied religious practices of the American people'." *Id.* at 588-89. *Riley* was subsequently reversed in light of the intervening passage of § 2000e(j), which the Fifth Circuit found to be a validation of the pre-existing regulations. *See Riley*, 464 F.2d at 1116-17.

34. TWA v. Hardison, 432 U.S. 63, 74 n.9 (1977).

35. *See* B. Schlei & P. Grossman, Employment Discrimination Law 238 & n.101 (2d ed. 1983) (noting that some EEOC requirements exceed case law requirements). Prior to the *Hardison* case courts did turn to the EEOC regulations for guidance. *See, e.g.*, Reid v. Memphis Publishing Co., 521 F.2d 512, 518 (6th Cir. 1975), *cert. denied*, 429 U.S. 964 (1976); Johnson v. United States Postal Serv., 497 F.2d 128, 130 (5th Cir. 1974) (per curiam); Riley v. Bendix Corp., 464 F.2d 1113, 1116 (5th Cir. 1972).

36. *See* 118 Cong. Rec. 705 (1972) (statement of Sen. Randolph introducing the accommodation amendment). Sen. Randolph observed:"the term 'religion' as used in the Civil Rights Act of 1964 encompasses, as I understand it, . . . not merely belief, but also conduct; the freedom to believe, and also the freedom to act." *Id.*; *see also* 3 A. Larson & L. Larson, *supra* note 14, § 92.10 at 19-16 to -18 (discussing legislative intent); B. Schlei & P. Grossman, *supra* note 35, at 211 (the amendment establishes a duty but not its scope).

37. *See* TWA v. Hardison, 432 U.S. 63, 74 (1977); 118 Cong. Rec. 706 (1972) (statement of Sen. Williams); B. Schlei & P. Grossman, *supra* note 35, at 211.

38. *See* TWA v. Hardison, 432 U.S. 63, 74 n.9 (1977); 3 A. Larson & L. Larson, *supra* note 14, § 92.10, at 19-17.

B. *Judicial Construction*

If Congress in 1972 intended to resolve the inconsistencies in judicial interpretation of the anti-discrimination requirement imposed by the 1964 Act, it has failed.[39] The Supreme Court itself had been equally divided on the accommodation issue, once before[40] and once after[41] the passage of the 1972 amendments. Several circuits were also internally divided.[42] In a situation ripe for resolution, the Supreme Court reconsidered the "undue hardship" standard in 1977 in *Trans World Airlines v. Hardison*.[43]

The Supreme Court used as its vehicle for interpreting the religious accommodation requirement a classic sabbath observer case complicated by the existence of a collective bargaining agreement governing work shift assignments.[44] Hardison, a member of the Worldwide Church of God, attempted to change work assignments in order to avoid working on his sabbath, but he was thwarted by a shift-bidding system based primarily on seniority.[45] Hardison at one time had had sufficient seniority to obtain his desired shift assignments,[46] but relinquished it upon moving to a new building in order to obtain daytime employment.[47] His employer, Trans World Airlines (TWA), authorized the union to seek appropriate shift assignments for Hardison. TWA, however, could not grant them unilaterally because of its superior obligation to the union under a collective bargaining agreement[48] and because of the union's un-

39. *See* TWA v. Hardison, 432 U.S. 63, 75 n.10 (1977). This inconsistency in interpretation is evident in sabbath observer cases. *Compare* Williams v. Southern Union Gas Co., 529 F.2d 483, 489 (10th Cir.) (no violation in failure to accommodate), *cert. denied*, 429 U.S. 959 (1976) *and* Reid v. Memphis Publishing Co., 521 F.2d 512, 521 (6th Cir. 1975) (same), *cert. denied*, 429 U.S. 964 (1976) *and* Johnson v. United States Postal Serv., 497 F.2d 128, 130 (5th Cir. 1974) (per curiam) (same) *with* Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 522 (6th Cir. 1975) (accommodation required) *and* Riley v. Bendix Corp., 464 F.2d 1113, 1118 (5th Cir. 1972) (same).

40. *See* Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd mem. by an equally divided Court*, 402 U.S. 689 (1971) (per curiam).

41. *See* Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd mem. by an equally divided Court*, 429 U.S. 65 (1976) (per curiam), *vacated on other grounds*, 433 U.S. 903 (1977).

42. The Fifth and Sixth Circuits found no duty to accommodate in factual contexts similar to those in which, on other occasions, the same Fifth and Sixth Circuits found that the failure to accommodate constituted a violation. *See* TWA v. Hardison, 432 U.S. 63, 75 n.10 (1977). See *supra* note 39.

43. 432 U.S. 63 (1977).

44. *Id.* at 67 & n.1. This fact pattern appears in a number of cases. *See, e.g.*, Turpen v. Missouri-Kan.-Tex. R.R., 736 F.2d 1022, 1024-25 (5th Cir. 1984); Brown v. General Motors Corp., 601 F.2d 956, 958 & n.2 (8th Cir. 1979); Wren v. T.I.M.E.-D.C., Inc., 595 F.2d 441, 443-44 (8th Cir. 1979); Rohr v. Western Elec. Co., 567 F.2d 829, 830 (8th Cir. 1977) (per curiam); Huston v. Local 93, UAW, 559 F.2d 477, 478-79 (8th Cir. 1977); Kendall v. United Air Lines, 494 F. Supp. 1380, 1381-82 (N.D. Ill. 1980).

45. TWA v. Hardison, 432 U.S. at 67-68.

46. *Id.* at 68.

47. *See id.*

48. *Id.* at 79.

willingness to tamper with the seniority system.[49] Hardison was thus discharged for his refusal to work on Saturdays.[50]

The Supreme Court agreed with TWA that accommodation was inappropriate under the facts.[51] While skirting the question of section 2000e(j)'s constitutionality,[52] the Court found that TWA had made reasonable efforts to accommodate Hardison's religious needs;[53] any additional attempts at accommodation would have jeopardized its overall labor scheme[54] and as such would have inflicted undue hardship within the meaning of the statute.[55]

The Court focused initially on the tension between a seniority system incorporated within a collective bargaining agreement and the statutory requirement of reasonable accommodation.[56] It concluded that seniority was an untouchable area that does not have to yield to religious accommodation unless it has been deliberately used to violate the anti-discrimination provisions of the statute.[57] The seniority-based shift-bidding system itself was viewed as a form of accommodation in that it provided orderly opportunities for a choice of shifts.[58] More importantly, seniority was inextricably entwined with collective bargaining,[59] which is a right lying "at the core of our national labor policy."[60] Seniority, therefore, is not to be subordinated to other policies "[w]ithout a clear and express indication from Congress."[61]

The Court then considered the language of section 2000e(j) itself. Concerned that the Act's religious accommodation requirement in effect

49. *Id.* at 68, 79.

50. *Id.* at 69.

51. *See id.* at 77, 83-84. The Supreme Court interpreted the facts selectively to support its position on undue hardship. For example, it viewed Hardison's job as "essential," and Hardison himself as a critical employee. *Id.* at 68. Looking at the same record, however, the Eighth Circuit estimated that some 200 persons might have been equally able to perform the required tasks. Hardison v. TWA, 527 F.2d 33, 40 (8th Cir. 1975), *rev'd*, 432 U.S. 63 (1977).

52. *See* TWA v. Hardison, 432 U.S. at 70.

53. *See id.* at 77.

54. *See id.* at 79.

55. *See id.* at 84.

56. *See id.* at 79-83.

57. *See id.* at 79.

58. *See id.* at 80-81.

59. *See id.* at 79.

60. *Id.*

61. *Id.* In fact, Congress has specifically indicated that seniority systems would take priority should they come into conflict with anti-discrimination requirements:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different . . . terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. 2000e-2(h) (1982).

perpetrated reverse discrimination against nonobservers,[62] the Court took a rather broad view of what constituted undue hardship.[63] In an oft-quoted phrase, the Court said:

> It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.[64]

Rejecting the accommodation alternatives proposed by the court of appeals,[65] the Supreme Court arrived at the second major proposition of the *Hardison* case: Any cost in efficiency or wage expenditures that is more than de minimis constitutes undue hardship.[66] This was illustrated in the Court's analysis of the decision below,[67] which had taken the view that Hardison could have been accommodated without undue hardship and without violation of the seniority rules.[68] That decision had proposed several possible ways to accomplish this end: TWA could have allowed Hardison to work a four day week,[69] it could have replaced him with a supervisor or qualified person from another department,[70] or it could have given another employee premium pay to work the Saturday shift.[71] TWA might also have arranged a swap between Hardison and a fellow employee either for the entire shift or for the sabbath days in issue.[72] The Supreme Court disagreed:

> By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious

62. TWA v. Hardison, 432 U.S. at 80-81; *see Religious Discrimination*, *supra* note 30, at 639.

63. Ingram & Domph, *An Employer's Duty to Accommodate the Religious Beliefs and Practices of an Employee*, 87 Dick. L. Rev. 21, 49 (1982).

64. TWA v. Hardison, 432 U.S. at 81; *see* Brener v. Diagnostic Center Hosp., 671 F.2d 141, 146 (5th Cir. 1982) (quoting TWA v. Hardison, 432 U.S. at 81); Rohr v. Western Elec. Co., 567 F.2d 829, 830 (8th Cir. 1977) (per curiam) (same); Huston v. Local 93, UAW, 559 F.2d 477, 480-81 (8th Cir. 1977) (same); Murphy v. Edge Memorial Hosp., 550 F. Supp. 1185, 1189 (M.D. Ala. 1982) (same).

65. TWA v. Hardison, 432 U.S. at 77.

66. *See id.* at 84.

67. *See id.*

68. *See* Hardison v. TWA, 527 F.2d 33, 39 (8th Cir. 1975), *rev'd*, 432 U.S. 63 (1977).

69. *Id.*

70. *Id.* at 40.

71. *Id.*

72. *Id.* at 41.

beliefs.[73]

The two principles enunciated by the Court in its interpretation of the religious accommodation requirement in the *Hardison* case—the priority of seniority over accommodation and the definition of undue hardship as more than de minimis cost—place only the narrowest of obligations upon employers.[74] Moreover, the Court's concern with reverse discrimination[75] suggests a spirit of statutory application that would protect, and might even justify, only minimal efforts by the employer to accommodate his employee's religious observance in situations in which other kinds of religious accommodation are required.[76]

Of the two principal holdings of *Hardison*, only one has carried a clear message to the circuits: the dominance of seniority over religious accommodation. Therefore, although lower courts may no longer require employers to make involuntary shift assignments or other accommodations that violate seniority practices,[77] they remain free to interpret section 2000e(j)'s undue hardship standard to require an alternative mode of accommodation that does not threaten seniority.[78] In the cases in which no seniority issue arises, several courts have in fact given only superficial obeisance to the Supreme Court's "more than de minimis cost" hardship doctrine, while actually creating more demanding standards for defendants.[79] Thus, far from resolving the lower courts' confusion as to the

73. TWA v. Hardison, 432 U.S. at 84-85.

74. *See* 3 A. Larson & L. Larson, *supra* note 14, § 92.23, at 19-24, § 92.25, at 19-27; B. Schlei & P. Grossman, *supra* note 35, at 235; Hill, *supra* note 9, at 25-26; *Reasonable Accommodation Standard, supra* note 9, at 620-21; Note, *Religious Discrimination in the Workplace: A Comparison of* Thomas v. Review Board *and Title VII Cases*, 33 Syracuse L. Rev. 843, 870, 875 (1982).

75. *See* B. Schlei & P. Grossman, *supra* note 35, at 226, 235; *Religious Discrimination*, *supra* note 30, at 639.

76. This narrow spirit is illustrated in a case in which the employer's accommodation required no actual financial cost, but more than de minimis hardship was found. *See* Howard v. Haverty Furniture Cos., 615 F.2d 203, 206 (5th Cir. 1980) (lost efficiency produces more than de minimis cost). *But see* Wangsness v. Watertown School Dist., 541 F. Supp. 332, 338 (D.S.D. 1982) (cost of teacher's request for religious time off despite employer's allegations of hardship to students and other staff is less than de minimis).

77. *See, e.g.*, Turpen v. Missouri-Kan.-Tex. R.R., 736 F.2d 1022, 1028 (5th Cir. 1984); Wren v. T.I.M.E.-D.C., Inc., 595 F.2d 441, 445 (8th Cir. 1979); Rohr v. Western Elec. Co., 567 F.2d 829, 830 (8th Cir. 1977) (per curiam); Huston v. Local 93, UAW, 559 F.2d 477, 480-81 (8th Cir. 1977); *see also* Brown v. General Motors Corp., 601 F.2d 956, 962 (8th Cir. 1979) (because seniority not threatened, employer should accommodate).

78. The EEOC has suggested a variety of accommodation techniques that may deal with seniority-based shift assignment situations without a breach of seniority agreements. See *infra* notes 155-58 and accompanying text.

79. This is best illustrated by the union dues cases in which the "more than de minimis cost" doctrine has been regularly stretched. In these cases, union security provisions of collective bargaining agreements are at issue. Such provisions require all employees to pay dues to the union or be dismissed by the employer. Seventh Day Adventists object to dues payment on religious grounds. Several courts have held that it is reasonable accommodation and not undue hardship for unions to forgo dues payment for these employees. *See, e.g.*, McDaniel v. Essex Int'l, Inc., 696 F.2d 34, 38 (6th Cir. 1982); Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243-44 (9th Cir.), *cert. denied*, 454

meaning of section 2000e(j)'s accommodation requirement, the Supreme Court's language in *Hardison* has been the foundation for highly divergent applications of the statute. One court, for example, found that an employer's unsuccessful one and a half hour effort to reschedule a workshift constituted reasonable accommodation and that more than this would entail undue hardship.[80] In contrast, a court in another circuit denied a hardship claim, despite the employer's history of accommodating the plaintiff, when the employer finally discharged the employee who, in order to observe a religious holiday, had abandoned her duties instructing mentally handicapped children.[81]

II. THREE JUDICIAL APPROACHES TO THE ACCOMMODATION REQUIREMENT

Despite these differences in the interpretation of section 2000e(j), some patterns may be discerned. For example, employee demands for an accommodation that would pose health and safety hazards to the employee[82] or would require the employer to violate a valid state law[83] or regulation[84] will not be enforced. Other patterns of interpretation, however, seem to reflect important differences in how the courts handle accommodation cases.

The cases reveal three distinct approaches to accommodation. Each approach implicitly or explicitly embraces a different set of interests that the court will balance in reaching its decision. A court typically will emphasize particular facts to the exclusion of others, depending upon which approach it takes.[85] It may be posited, therefore, that the wide

U.S. 1098 (1981); Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 451 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 885 (9th Cir. 1980); Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 402 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979). The applicability of § 2000e(j) to unions has been clearly established. *See, e.g.*, Lutcher v. Musicians Union Local 47, 633 F.2d 880, 884 (9th Cir. 1980); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d at 400; 3 A. Larson & L. Larson, *supra* note 14, § 92.34, at 19-51 to -53.

80. *See* Turpen v. Missouri-Kan.-Tex. R.R., 736 F.2d 1022, 1025, 1028 (5th Cir. 1984).

81. *See* Edwards v. School Bd., 483 F. Supp. 620, 623-24, 627 (W.D. Va. 1980), *vacated on other grounds*, 658 F.2d 951 (4th Cir. 1981).

82. *See* Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1384 (9th Cir. 1984).

83. *See id.*

84. *See* EEOC v. Sambo's of Ga., Inc., 530 F. Supp. 86, 90 (N.D. Ga. 1981).

85. For example, a court that is implicitly concerned with balancing individual interests versus those of the majority will dwell upon those facts that demonstrate how cooperative the parties have been in their efforts to reach an accommodation. *See, e.g.*, Pinsker v. Joint Dist. No. 28J, 735 F.2d 388, 390 (10th Cir. 1984) (court looked to employer's past lenience in administering its leave policies vis-a-vis employee's religious holidays in deciding that no further accommodation was required); Howard v. Haverty Furniture Cos., 615 F.2d 203, 205 (5th Cir. 1980) (court looked to fact that employer had been generally accommodating in the past and that plaintiff had inconvenienced co-workers); Jordan v. North Carolina Nat'l Bank, 565 F.2d 72, 76 (4th Cir. 1977) (court looked

variety of outcomes in religious accommodation cases is a function not of the diverse fact patterns of the cases, but rather of the individual court's theoretical assumptions about the interests to be balanced.

One set of interests found in accommodation cases encompasses those of the individual against those of the group, usually the employee's coworkers or the employing organization.[86] The second set of interests emphasized by some courts derives from constitutional considerations, balancing free exercise and the establishment of religion.[87] Finally, the third set of interests dominating the logic of some courts frames the issue as one between business interests and religion.[88] The following sections will discuss each set of interests and its consequences for the resolution of religious accommodation cases.

A. *The Individual versus the Group*

Unlike other anti-discrimination provisions of Title VII that attempt

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at plaintiff's unwillingness to compromise in deciding no accommodation was necessary); EEOC v. Picoma Indus., 495 F. Supp. 1, 3 (S.D. Ohio 1978) (court looked to "flexibility already shown" by employer in finding no accommodation required), *aff'd mem.*, 627 F.2d 1090 (6th Cir. 1980). Where a court is balancing business versus religious interests, however, it will ignore facts relevant to the relative cooperativeness of the parties and instead focus on facts relevant to the costs of accommodation. *See, e.g.*, Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243-44 (9th Cir.) (existence of surplus in union treasury precludes finding of undue hardship for lost dues), *cert. denied*, 454 U.S. 1098 (1981); Brown v. General Motors Corp., 601 F.2d 956, 960-61 (8th Cir. 1979) (court seeks documentation of actual harm to defendant rather than speculative projection); Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978) (same), *cert. denied*, 439 U.S. 1072 (1979); Wangsness v. Watertown School Dist., 541 F. Supp. 332, 337 (D.S.D. 1982) (court looks at "actual experience of defendant school district during [employee's religious] absence"); Kendall v. United Air Lines, 494 F. Supp. 1380, 1390 (N.D. Ill. 1980) (undue hardship turns on cost of retraining pilot who sought extended leave); Haring v. Blumenthal, 471 F. Supp. 1172, 1182 (D.D.C. 1979) (court requires focus on present rather than cumulative or speculative hardship), *cert. denied*, 452 U.S. 939 (1981).

86. *See, e.g.*, Brener v. Diagnostic Center Hosp., 671 F.2d 141, 146-47 (5th Cir. 1982); Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978); EEOC v. Picoma Indus., 495 F. Supp. 1, 3 (S.D. Ohio 1978), *aff'd mem.*, 627 F.2d 1090 (6th Cir. 1980).

87. *See, e.g.*, TWA v. Hardison, 432 U.S. 63, 69 n.4, 70 (1977); Turpen v. Missouri-Kan.-Tex. R.R., 736 F.2d 1022, 1026 (5th Cir. 1984); *see also* Wren v. T.I.M.E.-D.C., Inc., 595 F.2d 441, 445 (8th Cir. 1979) (strict application of *Hardison*); Rohr v. Western Elec. Co., 567 F.2d 829, 830 (8th Cir. 1977) (per curiam) (same).

88. *See, e.g.*, Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243-44 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); Brown v. General Motors Corp., 601 F.2d 956, 960-61 (8th Cir. 1979); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 402 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); Redmond v. GAF Corp., 574 F.2d 897, 903-04 (7th Cir. 1978); McCormick v. Board of Educ., 32 Empl. Prac. Dec. (CCH) ¶ 33,883, at 31,232 (N.D. Ill. 1983); Niederhuber v. Camden County Voc. & Tech. School Dist. Bd. of Educ., 495 F. Supp. 273, 280 (D.N.J. 1980), *aff'd*, 671 F.2d 496 (3d Cir. 1981); Willey v. Maben Mfg. Co., 21 Fair Empl. Prac. Cas. (BNA) 750, 752 (N.D. Miss. 1979).

to treat all employees equally,[89] the religious accommodation requirement actively pits an individual against a group: The individual employee defines his religious accommodation needs and section 2000e(j) calls upon his employer to accommodate them.[90] By requiring accommodation, section 2000e(j) assumes that the ordinary work practices of the employer and his other workers are incompatible with the religious practices of the party requesting accommodation.[91] Otherwise, the employee would not need accommodation.[92] The employer, therefore, is ordered by law to help perpetuate rather than reconcile the religious differences between the accommodation seeker and others in the workplace.[93]

Courts that approach religious accommodation within the framework of the individual against the group typically base their decisions more on societal notions of how much latitude the group must cede to the nonconformist than on the actual demands of the statute. Frequently this approach results in a bias in favor of the group and the employer.[94] One type of case that exemplifies this approach is that in which a court considers the reasonableness of the desired accommodation in terms of its effect on the group[95] or in terms of the employer's past efforts to accommodate the needs of the group as a whole.[96] Under this view, courts have

89. *See generally* B. Schlei & P. Grossman, *supra* note 35, at 13-22 (Title VII generally requires employers to refrain from disparate treatment).

90. *See* 42 U.S.C. 2000e(j) (1982); Boothby & Nixon, *Religious Accommodation: An Often Delicate Task*, 57 Notre Dame Law. 797, 801 (1982); Note, *The Constitutionality of an Employer's Duty to Accommodate Religious Beliefs and Practices*, 56 Chi.[-]Kent L. Rev. 635, 636-37, 647 (1980) [hereinafter cited as *Constitutionality of Employer's Duty*].

91. *See* 118 Cong. Rec. 7166, 7167 (1972) (Conference Report), *reprinted in* Sen. Comm. on Labor & Pub. Welfare, Subcomm. on Labor, Legislative History of the Equal Employment Opportunity Act of 1972, at 1844 (1972); 118 Cong. Rec. 705-06 (1972) (statement of Sen. Randolph).

92. TWA v. Hardison, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting).

93. Sen. Randolph, the provision's sponsor, specifically noted his concern that certain minority religions were losing adherents as a result of employment accommodation problems. *See* 118 Cong. Rec. 705 (1972) (statement of Sen. Randolph).

94. *See, e.g.*, Pinsker v. Joint Dist. No. 28J, 735 F.2d 388 (10th Cir. 1984); Brener v. Diagnostic Center Hosp., 671 F.2d 141 (5th Cir. 1982); Beam v. General Motors Corp., 21 Fair Empl. Prac. Cas. (BNA) 85 (N.D. Ohio 1979); Jordan v. North Carolina Nat'l Bank, 565 F.2d 72 (4th Cir. 1977); Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978); Murphy v. Edge Memorial Hosp., 550 F. Supp. 1185 (M.D. Ala. 1982); Wessling v. Kroger Co., 554 F. Supp. 548 (E.D. Mich. 1982).

95. *See, e.g.*, Brener v. Diagnostic Center Hosp., 671 F.2d 141, 143 (5th Cir. 1982) (considering complaints of co-workers); Howard v. Haverty Furniture Cos., 615 F.2d 203, 206 (5th Cir. 1980) (considering additional burden on co-workers when plaintiff is absent); Murphy v. Edge Memorial Hosp., 550 F. Supp. 1185, 1187 (M.D. Ala. 1982) (considering co-workers' complaints that plaintiff's sabbath requirements unfairly burden them); McGinnis v. United States Postal Serv., 512 F. Supp. 517, 523-24 (N.D. Cal. 1980) (considering whether plaintiff's referral of draft registrants to other post office windows overburdens co-workers).

96. *See* Pinsker v. Joint Dist. No. 28J, 735 F.2d 388, 391 (10th Cir. 1984) (employer's generally applicable leave policies sufficiently accommodate range of employee observances); Brener v. Diagnostic Center Hosp., 671 F.2d 141, 145 (5th Cir. 1982) (generally applicable bare weekend staffing and rotating shift scheduling considered adequate ac-

found an accommodation to be undue hardship in part because it elicits objections from the plaintiff's co-workers.[97] These courts elevate the concerns of grumbling colleagues above those of the aggrieved employee.[98]

Another variant of the individual-versus-group model is found in cases in which the court judges the reasonableness of the desired accommodation on the basis of the employer's generally applicable employment practices rather than on the basis of his efforts to accommodate the particular employee.[99] Although it was not central to its major holdings, the Supreme Court used this approach in *Hardison* when it found that TWA's seniority-based shift-bidding practices and low weekend staffing were themselves accommodations[100] and, as such, were preferable to any accommodation specific to Hardison that other workers might regard as unfair.[101] Other cases taking this approach have found adequate accommodation when employers provided flexible personnel policies allowing employee shift selection,[102] voluntary assignment swapping[103] or personal days off,[104] even though the availability of these practices had not in fact protected the plaintiff from discrimination.[105]

The tension between the individual and the group is also apparent in cases in which the court places special emphasis on the tone of the employer/employee relationship prior to the event that precipitated the litigation. In these cases, the court invariably bases its decision on the relative cooperativeness of the parties,[106] not only on the reasonableness

commodation); Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir. 1977) (no adjustment required when employer's practices are already flexible), *cert. denied*, 434 U.S. 1039 (1978); Murphy v. Edge Memorial Hosp., 550 F. Supp. 1185, 1192 (M.D. Ala. 1982) (no special accommodation required under employer's neutral scheduling system); Beam v. General Motors Corp., 21 Fair Empl. Prac. Cas. (BNA) 85, 88 (N.D. Ohio 1979) (same).

97. *See* Brener v. Diagnostic Center Hosp., 671 F.2d 141, 147 (5th Cir. 1982) (accommodation that lowers morale of co-workers not required); Murphy v. Edge Memorial Hosp., 550 F. Supp. 1185, 1187, 1191 (M.D. Ala. 1982) (accommodation that elicited co-worker complaints was unacceptable). *But see* Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978) (grumbling of co-workers insufficient to show hardship), *cert. denied*, 439 U.S. 1072 (1979).

98. The Second Circuit, in another context, pointed out the logical flaw inherent in yielding to the grumbling co-worker: "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971).

99. See *supra* note 96.

100. *See* TWA v. Hardison, 432 U.S. 63, 78 (1977).

101. *Id.* at 80-81.

102. *See* Brener v. Diagnostic Center Hosp., 671 F.2d 141, 145 (5th Cir. 1982).

103. *See id.*

104. *See* Pinsker v. Joint Dist. No. 28J, 735 F.2d 388, 390-91 (10th Cir. 1984) (availability of personal days adequately accommodates plaintiff's religious needs); Chrysler Corp. v. Mann, 561 F.2d 1282, 1286 (8th Cir. 1977) (plaintiff could have used five personal days for religious purposes), *cert. denied*, 434 U.S. 1039 (1978).

105. See *supra* notes 102-04.

106. *See, e.g.*, Brener v. Diagnostic Center Hosp., 671 F.2d 141, 145-46 (5th Cir. 1982) (employee unreasonably uncooperative in light of employer's past efforts to accommo-

of the employer's accommodation.[107] Courts that apply the societal fairness standard will find adequate accommodation when an employer has tried to accommodate the employee's religious observance, but the employee has rejected the proffered accommodation as insufficient.[108] These courts construe the law as imposing on the employee an obligation to be reasonable and cooperative in proposing and accepting various alternative accommodations.

This insistence on employee compromise as a predicate for religious accommodation misconceives the intent of section 2000e(j).[109] A court's sensitivity to the objections of grumbling workers or its consideration of the employer's past efforts at accommodation may sound a democratic theme, but such concerns have no place in religious accommodation cases.[110] The Civil Rights Act was clearly drafted to protect the discrete and at times unpopular rights of the individual against the potentially oppressive will of the majority;[111] section 2000e(j) is but one expression of this purpose. To reason, as some courts do, that section 2000e(j) can be interpreted by balancing the interests of the individual and the group

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date); Howard v. Haverty Furniture Cos., 615 F.2d 203, 205 (5th Cir. 1980) (same); Chrysler Corp. v. Mann, 561 F.2d 1282, 1286 (8th Cir. 1977) (plaintiff remiss in rejecting employer's proffered "clemency"), *cert. denied*, 434 U.S. 1039 (1978); Smith v. United Refining Co., 21 Fair Empl. Prac. Cas. (BNA) 1481, 1484-85 (W.D. Pa. 1980) (employee's offers of cooperation insufficient in light of employer's needs); McGinnis v. United States Postal Serv., 512 F. Supp. 517, 523 (N.D. Cal. 1980) (employer uncooperative although plaintiff met her obligation by informing employer of need for accommodation); EEOC v. Picoma Indus., 495 F. Supp. 1, 3 (S.D. Ohio 1978) ("in light of the flexibility already shown" by employer further accommodation would be undue hardship), *aff'd mem.*, 627 F.2d 1090 (6th Cir. 1980). *But see* Redmond v. GAF Corp., 574 F.2d 897, 901 (7th Cir. 1978) (plaintiff does not have to demonstrate prior cooperation to seek employer accommodation); *see also* Edwards v. School Bd., 483 F. Supp. 620, 623, 627 (W.D. Va. 1980) (finds for plaintiff despite years of prior cooperation by employer), *vacated on other grounds*, 658 F.2d 951 (4th Cir. 1981).

107. See *supra* note 106.

108. *See, e.g.*, Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1383 (9th Cir. 1984) (Sikh plaintiff rejected employer's offer to find him job that did not require him to shave his beard); Brener v. Diagostic Center Hosp., 671 F.2d 141, 144 (5th Cir. 1982) (plaintiff absented himself for religious holidays when employer-offered swap failed to materialize); Howard v. Haverty Furniture Cos., 615 F.2d 203, 205 (5th Cir. 1980) (plaintiff rejected employer's offer of part-time employment); Chrysler Corp. v. Mann, 561 F.2d 1282, 1286 (8th Cir. 1977) (plaintiff refused to use contractual personal days and rejected subsequent proffered settlement), *cert. denied*, 434 U.S. 1039 (1978); Murphy v. Edge Memorial Hosp., 550 F. Supp. 1185, 1187 (M.D. Ala. 1982) (plaintiff failed to compromise despite several meetings arranged by hospital); EEOC v. Picoma Indus., 495 F. Supp 1, 2 (S.D. Ohio 1978) (plaintiff rejected offer of unpaid time off), *aff'd mem.*, 627 F.2d 1090 (6th Cir. 1980); *see also* Jordan v. North Carolina Nat'l Bank, 565 F.2d 72, 76 (4th Cir. 1977) (job seeker's insistence upon guarantee of Saturdays free found unreasonable and "beyond accommodation").

109. *See* Redmond v. GAF Corp., 574 F.2d 897, 901-02 (7th Cir. 1978). Neither the statute, 42 U.S.C. § 2000e(j) (1982), nor the legislative history, 118 Cong. Rec. 705-06 (1972), discusses or creates employee obligations.

110. *See* Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

111. See *supra* note 2.

is, in effect, to rewrite the statute. Congress has already struck the balance between the individual and the group, with the individual at all times triumphant except when undue hardship might result.[112]

The individual/group approach not only rewrites the law, but it does so in a manner that, in practical application, is clumsy and uninstructive. Faced with an array of facts, courts using this approach grope unpredictably for those particular facts that support their own conceptions of fairness.[113] This highly fact-oriented, case-by-case analysis, however, lacks standards that might guide potential parties in understanding their rights and duties or in presenting their cases in court.[114] This approach, although intended to achieve fairness in specific cases, is in truth merely a screen to camouflage the courts' unwillingness to develop a more rigorous or predictable rule of decision.[115]

B. *Free Exercise versus Establishment*

From a careful reading of *Hardison* and its progeny, one may adduce a second interpretative approach used by some courts to resolve religious accommodation issues. This approach, an unspoken but thinly veiled factor in the Supreme Court's *Hardison* opinion, attempts to strike a balance between the free exercise and establishment of religion provisions of the first amendment.[116] As the legislative history reveals, section 2000e(j) was intended to reaffirm the first amendment guarantee of free

112. *See* Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 400-01 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

113. *Compare* Jordan v. North Carolina Nat'l Bank, 565 F.2d 72, 77 (4th Cir. 1977) (Winter, J., dissenting) (court considers only fact of plaintiff's unwillingness to accept Saturday assignments, ignoring facts regarding defendant's failure to attempt accommodation) *with* Wangsness v. Watertown School Dist., 541 F. Supp. 332, 337-39 (D.S.D. 1982) (detailed consideration of effect of employee's religious absence on employer, coworkers and quality of service).

114. See *supra* note 9 and accompanying text.

115. When § 2000e(j) was first introduced on the floor of the Senate, the colleagues of the amendment's sponsor, Senator Randolph, sought and received reassurance that the rights of parties would be determined in a flexible—i.e., case-by-case—manner. *See* 118 Cong. Rec. 706 (1972) (remarks of Sen. Dominick and Sen. Randolph). Courts and commentators have continued to insist that only a case-by-case approach is possible. *See* Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 400 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); Redmond v. GAF Corp., 574 F.2d 897, 902 (7th Cir. 1978); Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978); United States v. City of Albuquerque, 545 F.2d 110, 111 (10th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977); Williams v. Southern Union Gas Co., 529 F.2d 483, 489 (10th Cir.), *cert. denied*, 429 U.S. 959 (1976); Boothby & Nixon, *supra* note 90, at 804.

116. *See* TWA v. Hardison, 432 U.S. 63, 69 n.4, 70 (1977); *id.* at 89, 90 (Marshall, J., dissenting); Ingram & Domph, *supra* note 63, at 50; Wheeler, *Establishment Clause Neutrality and the Reasonable Accommodation Requirement*, 4 Hastings Const. L. Q. 901, 931 (1977); *Constitutionality of Employer's Duty*, *supra* note 90, at 645. Congress was aware of the first amendment balance when it considered the accommodation requirement and was satisfied that the requirement did not threaten that balance. *See* 118 Cong. Rec. 706 (1972) (remarks of Sen. Williams). Nevertheless, it has been a continuing struggle for courts "to find a neutral course between the two Religion Clauses, both of which

exercise of religion.[117] To accomplish this, however, it calls for the special treatment of religious observers. This entitlement based on religious belief arguably amounts to the establishment of religion.[118] The Supreme Court in *Hardison* implied that the accommodation requirement of section 2000e(j) could reach the level of establishment if the accommodation demanded by the statute was sufficiently costly.[119] By holding, however, that accommodation exceeding de minimis cost is an undue hardship and therefore not required by the statute, the Court avoided decision on the constitutional problem.[120]

Since *Hardison*, some lower courts have actually held the accommodation provision to be unconstitutional;[121] others accept the section's validity but construe "undue hardship" with an unspoken solicitude for the establishment clause, thus minimizing the employer's accommodation requirement.[122] When the court is highly sensitive to establishment

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are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

117. *See* 118 Cong. Rec. 705-06 (1972) (remarks of Sen. Randolph).

118. *See* Cummins v. Parker Seal Co., 516 F.2d 544, 555-59 (6th Cir. 1975) (Celebrezze, J., dissenting), *aff'd mem. by an equally divided Court*, 429 U.S. 65 (1976) (per curiam), *vacated on other grounds*, 433 U.S. 903 (1977) (vacated in light of *Hardison*); Dewey v. Reynolds Metals Co., 429 F.2d 324, 334-35 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971) (per curiam); Isaac v. Butler's Shoe Corp., 511 F. Supp. 108, 112 (N.D. Ga. 1980); 1 W. Connolly, Jr., *supra* note 9, at 207-10: Frantz, *Religious Discrimination in Employment: An Examination of the Employer's Duty to Accommodate*, 1979 Det. C.L. Rev. 205, 214-15; *Constitutionality of an Employer's Duty*, *supra* note 90, at 647-69; 30 Vand. L. Rev. 1059, 1071-74 (1977). *But see* Wheeler, *supra* note 116, at 928-33 (absolute religious neutrality is not necessary to satisfy establishment clause).

119. *See* TWA v. Hardison, 432 U.S. 63, 70 (1977).

120. Wheeler, *supra* note 116, at 928.

121. *See* Isaac v. Butler's Shoe Corp., 511 F. Supp. 108, 112 (N.D. Ga. 1980); Anderson v. General Dynamics Convair Aerospace Div., 489 F. Supp. 782, 789 (S.D. Cal. 1980), *rev'd*, 648 F.2d 1247, 1248 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); Gavin v. Peoples Natural Gas Co., 464 F. Supp 622, 632 (W.D. Pa. 1979), *vacated on other grounds*, 613 F.2d 482 (3d Cir. 1980); Yott v. North Am. Rockwell Corp., 428 F. Supp. 763, 767 (C.D. Cal. 1977), *aff'd on other grounds*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980). A number of courts, however, have specifically found the provision to be constitutional. *See, e.g.*, McDaniel v. Essex Int'l, Inc., 696 F.2d 34, 37 (6th Cir. 1982); Anderson v. General Dynamics Convair Aerospace Div., 648 F.2d 1247, 1248 (9th Cir. 1981); Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1244-46 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 454-55 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981). The Supreme Court is currently considering the constitutionality of a Connecticut statute prohibiting employers from requiring employees to work on their sabbath days or dismissing them for failure to do so. *See* Caldor, Inc. v. Thornton, 191 Conn. 336, 464 A.2d 785 (1983), *cert. granted*, 104 S. Ct. 1438 (1984). A full discussion of the constitutionality of the accommodation requirement is beyond the scope of this Note.

122. *See, e.g.*, Turpen v. Missouri-Kan.-Tex. R.R., 736 F.2d 1022, 1026, 1028 (5th Cir. 1984) ("[C]ourts must balance the prohibitions of the Establishment Clause of state-mandated favoritism in employment on the basis of religion . . . against Congress' intent in § [2000e(j)] to correct discrimination on the basis of religion."); Wren v. T.I.M.E.-D.C. Inc., 595 F.2d 441, 445 (8th Cir. 1979) (employing back-up drivers at additional cost to relieve plaintiff of sabbath shift is more than de minimis cost); Rohr v. Western Elec. Co.,

problems, it will adhere literally to the Supreme Court's notion of de minimis cost: Any cost, even to a very large employer, is likely to be deemed to be an undue hardship.[123]

This implicit tension between religious accommodation and the establishment clause is also seen in cases in which accommodation of the plaintiff is deemed tantamount to discrimination against co-workers.[124] Although courts espousing this view do not directly consider whether accommodation equals establishment,[125] their opinions nevertheless demonstrate a concern that the power of the law is being used to assist religion,[126] as when the law requires employers to accommodate those who seek Saturdays off for religious purposes but not those who seek the same free time for strongly held but secular reasons.[127]

Courts that adhere to the establishment model are, in effect, declining to enforce the statute while falling short of invalidating it.[128] As Justice

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567 F.2d 829, 830 (8th Cir. 1977) (per curiam) (rejecting accommodations proposed by employee that did not violate seniority and did not necessitate significant extra pecuniary costs); Murphy v. Edge Memorial Hosp., 550 F. Supp. 1185, 1187, 1189 (M.D. Ala. 1982) (certain costs in the form of overtime pay and loss of efficiency not required of employer under *Hardison*).

123. *See* TWA v. Hardison, 432 U.S. 63, 84 (1977) (no reference to actual costs); Turpen v. Missouri-Kan.-Tex. R.R., 736 F.2d 1022, 1026 (5th Cir. 1984) (supervisor's one-and-a-half-hour attempt to arrange accommodation met defendant's burden of demonstrating undue hardship in light of *Hardison*); Yott v. North Am. Rockwell Corp., 602 F.2d 904, 908 (9th Cir. 1979) (requested accommodation—transfer to nonunion job—would require some training and preferential treatment and thus met standard for undue hardship), *cert. denied*, 445 U.S. 928 (1980); Rohr v. Western Elec. Co., 567 F.2d 829, 830 (8th Cir. 1977) (per curiam) (without reference to size of defendant corporation, court applied *Hardison* to find all alternatives posed by plaintiff to be undue hardship).

124. *See* Brener v. Diagnostic Center Hosp., 671 F.2d 141, 147 (5th Cir. 1982) (proposed alternative accommodation constitutes imposition on co-workers "because they do not adhere to the same religion as Brener"); Howard v. Haverty Furniture Cos., 615 F.2d 203, 206 (5th Cir. 1980) (although no dollar costs were incurred, requirement that other employees had to perform plaintiff's job in his absence constitutes undue hardship under *Hardison*); Rohr v. Western Elec. Co., 567 F.2d 829, 830 (8th Cir. 1977) (per curiam) (union's position that proposed four day work week threatened employee morale justified defendant's claim of undue hardship under *Hardison*); Murphy v. Edge Memorial Hosp., 550 F. Supp. 1185, 1189, 1192 (M.D. Ala. 1982) (accommodating employee's sabbath observance, given employer's small staff, would deprive other nurses of benefits of "neutral scheduling system").

125. See *supra* note 122. The court in Turpen v. Missouri-Kan.-Tex. R.R., 736 F.2d 1022 (5th Cir. 1984), is an exception. *See id.* at 1026.

126. Brener v. Diagnostic Center Hosp., 671 F.2d 141, 146 (5th Cir. 1982) ("It would be anomalous to conclude that . . . Congress meant that an employer must [disfavor] some employees . . . in order to accommodate or prefer the religious needs of others . . . .") (quoting TWA v. Hardison, 432 U.S. 63, 81 (1977)); Rohr v. Western Elec. Co., 567 F.2d 829, 830 (8th Cir. 1977) (per curiam) (same); Murphy v. Edge Memorial Hosp., 550 F. Supp. 1185, 1189 (M.D. Ala. 1982) (same).

127. *See* Murphy v. Edge Memorial Hosp., 550 F. Supp. 1185, 1187 (M.D. Ala. 1982).

128. By making the standard of "undue hardship" extremely easy to meet, a court in effect negates the duty to accommodate. The Ninth Circuit makes this clear when it says, "a standard less difficult to satisfy than the 'de minimis' standard for demonstrating undue hardship expressed in *Hardison* is difficult to imagine." Yott v. North Am. Rockwell Corp., 602 F.2d 904, 909 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

Marshall observed in his dissent to the holding in *Hardison*:

> The Court holds, in essence, that although the EEOC regulations and the Act state that an employer must make reasonable adjustments in his work demands to take account of religious observances, the regulations and the Act do not really mean what they say.[129]

Therefore, courts that endeavor to find a middle ground between free exercise and establishment in accommodation cases rewrite the language of Congress. By refusing to look at the consequences that accommodation actually has on the employer, they necessarily divest section 2000e(j) of its impact[130] and remove its capacity to respond flexibly to changing factual situations. Under this model, the statutorily mandated inquiry into whether the accommodation desired in the particular case is unreasonable is all but abandoned: Any burden at all on the employer is regarded as "undue."[131]

To interpret the intent of the statute so restrictively in order to avoid a confrontation with the first amendment seems cowardly. If the courts are trying to preserve the accommodation provision from the stamp of unconstitutionality, their victory is Pyrrhic because their circumlocution in fact saps the provision's strength.[132] On the other hand, if they are deliberately attempting to vitiate the intent of the statute, they should do so candidly by finding it to be unconstitutional so that employees are not misled into false hopes of accommodation. In any case, this evasion cannot be accepted as a reasonable solution to the problem of assuring religious freedom.

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129. TWA v. Hardison, 432 U.S. 63, 86-87 (1977) (Marshall, J., dissenting).

130. *See id.* (Marshall, J., dissenting); *see also* Wheeler, *supra* note 116, at 933 ("Court's construction seems to leave reasonable accommodation more a rule of preference than a requirement."); *Constitutionality of Employer's Duty*, *supra* note 90, at 645 (*Hardison* severely limits scope of employer's duty to accommodate).

131. *See* Turpen v. Missouri-Kan.-Tex. R.R., 736 F.2d 1022, 1027, 1028 (5th Cir. 1984) (railroad employer is found to be unduly burdened by spending mere one-and-a-half hours attempting to accommodate plaintiff's schedule); Yott v. North Am. Rockwell Corp., 602 F.2d 904, 908 (9th Cir. 1979) (any training costs incurred by major corporation in attempt to accommodate plaintiff are undue hardship); Rohr v. Western Elec. Co., 567 F.2d 829, 830 (8th Cir. 1977) (per curiam) (although defendant is a large corporation, all accommodation alternatives suggested by plaintiff are more than de minimis and therefore undue hardship). Justice Marshall's dissent in *Hardison* demonstrates the majority's inattention to the factual costs of accommodation to TWA in the determination of undue hardship. *See* TWA v. Hardison, 432 U.S. 63, 92 & n.6 (1977) (Marshall, J., dissenting). Larson and Larson urge a completely nonquantitative interpretation of the de minimis standard. *See* 3 A. Larson & L. Larson, *supra* note 14, § 92.23, at 19-24. This view would disallow *any* cost to the employer without regard for the size of the employer and the number of employees to be accommodated. *See id.* While the burden of proof imposed on defendants by *Hardison* was low, the Larson interpretation may go too far. The *Hardison* Court did allude to a quantitative and possibly flexible standard. In one footnote it used the term "substantial" in place of "more than de minimis." *See* 432 U.S. 63, 83 n.14 (1977). In another, it referred to the relevance of TWA's size and the likelihood that such a company may have many employees requiring accommodation. *Id.* at 84 n.15.

132. *See* Ingram & Domph, *supra* note 63, at 49-51. See *supra* note 130.

C. *Religious Interests versus Business Interests*

A third concept that courts use to evaluate the religious accommodation duties of employers balances the religious interests of the employee against the business interests of the employer. This is the only model that is true to the actual language of section 2000e(j).[133] Moreover, this model represents the best approach to achieving consistency in accommodation cases because it provides a flexible but predictable framework for analyzing a wide variety of accommodation problems.[134]

Under this model, the individual's statutory right to exercise religion freely is balanced against the employer's statutory right to be free of accommodation requirements that unduly burden its business.[135] The weight of the religious interest is necessarily constant[136] and presumed to be substantial; it does not vary according to the reasonableness of the observer's needs.[137] By contrast, the weight of the business interest is

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133. See *supra* note 8.

134. In these cases the reasonableness of defendant's accommodations is determined as a matter of fact, not law, and is therefore subject to a "delicate balancing." *See* McCormick v. Board of Educ., 32 Empl. Prac. Dec. (CCH) ¶ 33,883, at 31,232 (N.D. Ill. 1983). Reasonable accommodation and undue hardship are to be treated as relative, not fixed, terms. "Each case involving such a determination necessarily depends upon its own facts and circumstances, and comes down to a determination of 'reasonableness' under the unique circumstances of the individual employer-employee relationship." Redmond v. GAF Corp., 574 F.2d 897, 902-03 (7th Cir. 1978); *see* Minkus v. Metropolitan Sanitary Dist., 600 F.2d 80, 81 (7th Cir. 1979); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 400 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

The flexibility provided by the balancing of facts is in counterpoint to the stability that is founded on selection of the *type* of facts to be balanced. In the business/religion cases the relevant facts bear directly on costs to the employer and the employer's relative capacity to bear them. See *infra* notes 138, 141.

135. *See* Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1241 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 452 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981); Brown v. General Motors Corp., 601 F.2d 956, 958 (8th Cir. 1979); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 400 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); Wangsness v. Watertown School Dist., 541 F. Supp. 332, 336 (D.S.D. 1982); Niederhuber v. Camden County Voc. & Tech. School Dist. Bd. of Educ., 495 F. Supp. 273, 278-79 (D.N.J. 1980), *aff'd mem.*, 671 F.2d 496 (3d Cir. 1981).

136. The weight of the religious interest must be treated as constant in order to avoid judicial involvement in determinations of what "is or is not required by the tenets of the religion." Redmond v. GAF Corp., 574 F.2d 897, 900 (7th Cir. 1978). Were courts regularly to undertake an assessment of the genuineness of a plaintiff's assertion that a particular practice was religious in nature, "the statute and its administration [would entail] excessive government entanglement with religion," Gavin v. Peoples Natural Gas Co., 464 F. Supp. 622, 630 (W.D. Pa. 1979) (quoting Meek v. Pittenger, 421 U.S. 349, 358 (1975)), *vacated on other grounds*, 613 F.2d 482 (3d Cir. 1980), and hence raise issues of unconstitutionality under the test of Lemon v. Kurtzman, 403 U.S. 602 (1971). *See generally* 3 A. Larson & L. Larson, *supra* note 14, §§ 91.10-.17, at 19-2 to -13 (discussing what constitutes a religion or religious belief); B. Schlei & P. Grossman, *supra* note 35, at 206-10 (same); Ingram & Domph, *supra* note 63, at 25-32 (same). For an interesting examination of the "excessive entanglement" test of *Lemon v. Kurtzman*, see Note, *Political Entanglement as an Independent Test of Constitutionality Under the Establishment Clause*, 52 Fordham L. Rev. 1209 (1984).

137. Some courts have based their decisions at least in part on the genuineness of

highly fact specific, representing a measure of the actual amount of hardship the employer will sustain in accommodating his employee's religious practices.[138]

The courts that employ this model use a two step analysis to measure business interests.[139] The first step considers the proven financial cost of accommodation to the employer.[140] The second step appraises the rea-

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plaintiff's claim for protection despite the entanglement dangers of doing so. *See, e.g.*, Howard v. Haverty Furniture Cos., 615 F.2d 203, 205 (5th Cir. 1980) (religious observance did not require that plaintiff, rather than a substitute, preside over funeral, or that he do so at a time that conflicted with business needs of his employer); Wessling v. Kroger Co., 554 F. Supp. 548, 552 (E.D. Mich. 1982) (assisting in preparations for church play was voluntary and social and did not require religious accommodation); McGinnis v. United States Postal Serv., 512 F. Supp. 517, 519-20 (N.D. Cal. 1980) (plaintiff's refusal to process draft registrations deemed a sincerely and deeply held religious conviction); Brown v. Pena, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977) ("plaintiff's belief in pet food does not qualify legally as a religion"), *aff'd mem.*, 589 F.2d 1113 (5th Cir. 1979). *But see* Haring v. Blumenthal, 471 F. Supp. 1172, 1179-80 (D.D.C. 1979) (court did not question appropriateness of protecting IRS employee's refusal to handle applications for tax exempt status from persons or groups advocating abortion), *cert. denied*, 452 U.S. 939 (1981).

138. In all accommodation cases the plaintiff must first establish a prima facie case of discrimination, whereupon the burden of proof shifts to the defendant to demonstrate that accommodation would constitute an undue hardship. *See, e.g.*, Brown v. General Motors Corp., 601 F.2d 956, 959-60 (8th Cir. 1979); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 401 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); Redmond v. GAF Corp., 574 F.2d 897, 901 (7th Cir. 1978); Wessling v. Kroger Co., 554 F. Supp. 548, 552 (E.D. Mich. 1982).

In cases that follow the business/religion model, the defendant's burden must be met by facts rather than assertions. *See, e.g.*, Brown v. General Motors Corp., 601 F.2d 956, 960 (8th Cir. 1979) (analysis of actual facts, not mere theoretical possibilities, supports conclusion that accommodation imposed no actual cost on defendant); Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978) (actual dollar loss to union is analyzed and considered to be de minimis), *cert. denied*, 439 U.S. 1072 (1979); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 402 (9th Cir. 1978) (defendant failed to carry its burden of proof where no evidence of hardship was offered), *cert. denied*, 442 U.S. 921 (1979); Redmond v. GAF Corp., 574 F.2d 897, 903 (7th Cir. 1978) (defendant has not met his burden of proof where it introduces no evidence showing "inconvenience" to justify its failure to accommodate plaintiff); McCormick v. Board of Educ., 32 Empl. Prac. Dec. (CCH) ¶ 33,883, at 31,232 (N.D. Ill. 1983) (delicate balancing of religious and employer interests requires fully developed factual record); Kendall v. United Air Lines, 494 F. Supp. 1380, 1391 (N.D. Ill. 1981) (court analyzes several alternative accommodations and finds that the cost of one would not be unduly burdensome); Niederhuber v. Camden County Voc. & Tech. School Dist. Bd. of Educ., 495 F. Supp. 273, 279-80 (D.N.J. 1980) (defendant cannot prevail where each of the allegations of hardship, cost, unavailability of substitute personnel, quality of service and cumulative impact is unsupported), *aff'd mem.*, 671 F.2d 496 (3d Cir. 1981).

139. Courts have not actually articulated the intention of proceeding through a two-step analysis, although such an analysis may be deduced from their decisions. The EEOC is more explicit in its regulations. *See* 29 C.F.R. § 1605.2(e) (1984) (indicating that when employer has asserted its defense of undue hardship as more than de minimus cost, Commission will evaluate such cost in relation to various facts and circumstances). See *infra* notes 161-62.

140. *See, e.g.*, Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 452 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981); Brown v. General Motors Corp., 601 F.2d 956, 959 (8th Cir. 1979); Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

sonableness of the accommodation or the harshness of the costs in light of a loosely articulated judgment of the defendant's ability to bear those costs.[141] Moreover, at neither step may an employer escape his section 2000e(j) obligation by advancing merely speculative or hypothetical costs of accommodation.[142]

The best rationale for this approach was articulated by the Ninth Circuit in *Brown v. General Motors Corp*:[143]

> "Unless the statutory mandate . . . is to be rendered meaningless, it must be held to provide that until facts or circumstances arise from which it may be concluded that there can no longer be an accommodation without undue hardship, the employee's religious practices are required to be tolerated."[144]

A factual documentation of costs thus becomes the foundation for an assessment of reasonableness and undue hardship.

The Ninth Circuit clearly established the business/religion approach in the case of *Burns v. Southern Pacific Transportation Co.*[145] There the court upheld the plaintiff's religious objection to a mandatory union dues payment called for by the company's collective bargaining agreement.[146] Rejecting speculation about possible future costs of accommodation, the court first looked at the actual dollar loss to the union's treasury of nineteen dollars per month.[147] It then sought evidence of the degree to which this cost might impose hardship.[148] In light of testimony by a union officer that "the loss wouldn't affect us at all,"[149] the court con-

141. *See, e.g.*, Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243-44 (9th Cir.) (in light of district court finding that union surplus exceeded cost of dues lost by accommodation, no allegations of hardship could be sustained), *cert. denied*, 454 U.S. 1098 (1981); Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 452 (7th Cir.) (loss of employee's union dues represented .02% of union's budget and was therefore not more than de minimis), *cert. denied*, 454 U.S. 1046 (1981); Minkus v. Metropolitan Sanitary Dist., 600 F.2d 80, 82-83 (7th Cir. 1979) (defendant's allegations of hardship in administering exam on nonsabbath day are found deficient in light of similar employers' ability to accommodate); Wangsness v. Watertown School Dist., 541 F. Supp. 332, 337-39 (D.S.D. 1982) (actual disruption to school resulting from plaintiff's absence was not harmful to students or co-workers); Willey v. Maben Mfg. Co., 21 Fair Empl. Prac. Cas. (BNA) 750, 751 (N.D. Miss. 1979) (cost of accommodation, had it been granted, was not undue hardship because defendant had accommodated other employees).

142. *See* Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); Brown v. General Motors Corp., 601 F.2d 956, 960 (8th Cir. 1979); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 402 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); Niederhuber v. Camden County Voc. & Tech. School Dist. Bd. of Educ., 495 F. Supp. 273, 280 (D.N.J. 1980), *aff'd mem.*, 671 F.2d 496 (3d Cir. 1981); Haring v. Blumenthal, 471 F. Supp. 1172, 1181-82 (D.D.C. 1979), *cert. denied*, 452 U.S. 939 (1981).

143. 601 F.2d 956 (8th Cir. 1979).

144. *Id.* at 961 (quoting Haring v. Blumenthal, 471 F. Supp. 1172, 1182 (D.D.C. 1979)) (ellipsis added).

145. 589 F.2d 403 (9th Cir. 1978).

146. *See id.* at 407.

147. *See id.*

148. *See id.*

149. *Id.*

cluded that the accommodation did not rise to *Hardison*'s "more than *de minimis*" standard in terms of either direct financial cost[150] or indirect administrative inconvenience[151] and thus did not constitute undue hardship.[152]

The analysis of concrete costs as a basis for the determination of undue hardship is an approach readily transferable to the variety of factual contexts typically presented in accommodation cases.[153] The EEOC has promulgated guidelines that could be helpful in applying the business/religion model.[154] For example, when a plaintiff seeks days free for sabbath or religious holiday observance, the EEOC has developed a list of alternative techniques by which he may be accommodated,[155] such as swaps,[156] flexible scheduling[157] and lateral transfer.[158] Courts applying the business/religion model could use these alternatives and require employers, as part of their burden of proof, to establish the costs of each as a basis for determining whether any accommodation is possible.

Once the concrete costs that an employer would incur by accommodating the plaintiff have been proven, a court applying the business interests model must next consider whether and to what degree such costs engender hardship on the conduct of the employer's business.[159] This determination will necessarily entail a considerable degree of discretion on the part of a court that has acknowledged in advance that not all costs constitute undue hardship.[160] Again, the EEOC has promulgated procedures that may aid courts in the use of this discretion.[161] The EEOC considers "the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation."[162] It presumes that payment of premium wages either sporadically or as an interim measure while a permanent accommodation is being sought does not constitute undue hardship.[163] It also assumes that administrative costs of accommodation such as those for rearranging schedules and recording changes are not more than de minimis.[164]

The EEOC and the courts that measure de minimis hardship according to what the employer can easily absorb correctly refrain from creat-

150. *See id.*
151. *See id.*
152. *See id.*
153. *See id.*
154. *See* 29 C.F.R. § 1605 (1984).
155. *See id.* § 1605.2(d).
156. *See id.* § 1605.2(d)(1)(i).
157. *See id.* § 1605.2(d)(1)(ii).
158. *See id.* § 1605.2(d)(1)(iii).
159. See *supra* note 141.
160. This acknowledgment is, of course, at the heart of the business/religion model. See *supra* notes 133-42 and accompanying text.
161. *See* 29 C.F.R. § 1605.2(e) (1984).
162. *Id.* at § 1605.2(e)(1).
163. *See id.*
164. *See id.*

ing a rigid quantitative threshold for undue hardship. Moreover, by introducing some relativity into the concept, they escape the more extreme results of *Hardison*'s concern with establishment, namely the conclusion that any spending is undue.

CONCLUSION

The three models that various courts have imposed on religious accommodation cases are by no means equally supportable either as accurate interpretations of the language of the Civil Rights Act or as predictable standards of decision. The model that pits the individual against the group replaces the language of the statute with the court's notion of democratic fairness, and in doing so gives little guidance to litigants or courts as to the relative importance of the facts presented in a given case. The free exercise/establishment model, on the other hand, provides a standard that is far too predictable, with the result that almost any spending outweighs the religious interest and is interpreted to be undue hardship. Such an approach eviscerates the statute it purportedly seeks to apply. Only the scale that balances religious interests against business interests is both true to the language of the law and predictable in application. It gives a clear preference to the religious accommodation interest, as the statute requires, but shows an employer the steps he may take to establish a hardship exception. The scale is sufficiently adaptable to allow its application in all kinds of accommodation cases. Equally important, it is sufficiently consistent to provide the guidance to which parties are entitled in an orderly and comprehensible system of law.

Sara L. Silbiger