Religious Discrimination and Title VII's Reasonable Accommodations Rule: *Trans World Airlines, Inc. v. Hardison*

INTRODUCTION

In *Trans World Airlines, Inc. v. Hardison*[1] the United States Supreme Court for the first time determined the extent to which an employer must accommodate the religious practices of an employee in order to comply with Title VII's[2] proscription against religious discrimination. Prior to the Supreme Court's decision, lower federal courts had reached different results when interpreting the scope of the 1972 amendment[3] to Title VII, which requires an employer to make reasonable accommodation of an employee's religious needs absent undue hardship to the employer's business.

The Supreme Court held in *Hardison* that Congress did not intend that an employer bear more than a *de minimis* cost to accommodate the religious needs of its employees. In particular, the Court held that the reasonable accommodations rule does not require an employer to abridge a collective bargaining agreement, lose efficiency in plant operation or pay overtime wages in order to accommodate the religious beliefs of its employees. The Court felt compelled to reach this result because it reasoned that any other interpretation would have given special treatment to the employee who practiced a minority faith, and thus would have discriminated against those employees who did not practice such a faith.

This Case Comment will trace the legislative history of the reasonable accommodations rule and discuss the confusing pre-*Hardison* case law that attempted to define and apply the rule. It will then evaluate the Court's reasoning in *Hardison* in light of that legislative history and prior case law. Finally, it will show that an interpretation of the reasonable accommodation rule that requires an employer to bear more than *de minimis* costs in accommodating the religious beliefs of its employees comports with the first amendment's establishment clause,[4] an important issue skirted by the Court in *Hardison.*

I. LEGISLATIVE HISTORY OF THE REASONABLE ACCOMMODATIONS RULE AND PRE-*Hardison* CASE LAW CONCERNING THE RULE

A. *The Birth and Development of the Reasonable Accommodations Rule*

1. 432 U.S. 63 (1977).
2. 42 U.S.C. §§ 2000e to 2000e-15 (1964), *as amended* 42 U.S.C. § 20003-20017 (Supp. V 1975).
3. 42 U.S.C. § 2000e (Supp. V 1975).
4. U.S. CONST. amend. I, which states in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . "

Title VII of the 1964 Civil Rights Act proscribes discrimination in employment against an individual because of "race, color, religion, sex, or national origin."[5] In the original version of Title VII, the language pertaining to religious discrimination was broad and unclear. In fact the terms "religion" and "discrimination" were not defined in the statute. The Equal Employment Opportunity Commission (EEOC), the agency responsible for the administration of Title VII, issued guidelines designed to clarify the meaning of the statute. Its initial guidelines in 1966 indicated that the employee had no right to demand that the employer accommodate the employee's religious needs.[6] A year later, however, the EEOC reversed its thinking and issued new guidelines recognizing "an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations could be made without undue hardship on the conduct of the employer's business."[7] The EEOC did not attempt to define "reasonable accommodation" or "undue hardship" but rather left definition to its review "of each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people."[8]

The difficulties encountered in interpreting Title VII and the guidelines were demonstrated in *Dewey v. Reynolds Metals Co.*,[9] a 1970 decision that presented the first challenge to the reasonable accommodations rule. In *Dewey* an employee, who was discharged because he, for

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5. 42 U.S.C. § 2000e-2 (1970) provides in part:
It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex or national origin . . . .

6. *See* Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 614-19 (1971).

7. 29 C.F.R. § 1605.1 (1977) provides that:
Observation of the Sabbath and other religious holidays. (a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, to not work on such days.
(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a) (1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.
(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

8. *Id.*

9. 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

religious reasons, refused to work on Sundays,[10] alleged that his discharge was in violation of Title VII. The employer defended by asserting that it had merely acted in compliance with its collective bargaining agreement with the United Automobile and Agriculture Workers of America. A provision of the agreement required all Reynolds' employees "to perform all straight time and overtime work required of them by the company except when an employee [had] a substantial and justifiable reason for not working . . . ."[11] An increase in customer orders necessitated Sunday overtime work, which was assigned on the basis of seniority.[12] It was stipulated that Dewey was permitted to find a substitute worker, a procedure that was available for absences of all types. Dewey, however, refused to obtain a replacement because in his opinion that, too, would violate the tenets of his religion.

The trial court applied the 1967 EEOC reasonable accommodations guidelines and found that the company had violated Title VII by failing to reasonably accommodate Dewey's religious needs.[13] The Court of Appeals for the Sixth Circuit reversed on the grounds that the 1967 guidelines were not in effect at the time of Dewey's discharge and that the 1966 guidelines did not impose on an employer the duty to accommodate an employee's religious needs. The court, however, stated that "even if the 1967 regulations are applied, we think that Reynolds complied with [the reasonable accommodations rule] . . . by making a reasonable accommodation to the religious needs of its employees when it permitted Dewey, by the replacement system, to observe Sunday as his Sabbath."[14]

The court went on to cast doubt on the validity of the 1967 guidelines: "As we have pointed out, the gravamen of an offense under the statute is *only* discrimination. The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted."[15] The Sixth Circuit held that, because failure to accommodate an employee's religious needs is "entirely different" from discrimination, to equate the two was "fundamental error."[16] The court concluded that Title VII only prohibits intentional discrimination and not managerial decisions that evenhandedly apply a uniform rule to all employees, even if the rule has a detrimental impact on an individual

10. The term Sabbatarian is used by the writer to describe people who observe a particular day as a Sabbath and who, according to the tenets of their faith, believe the Sabbath is a day of rest upon which no work may be done. This belief is based upon a Bible passage that states: "Six days shalt thou labour, and do all thy work; but the seventh day is a Sabbath unto the Lord thy God, in it thou shalt not do any manner of work . . . ." *Exodus* 20:9-10.

11. 429 F.2d 324, 328 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

12. *Id.* at 327.

13. Dewey v. Reynolds Metals Co., 300 F. Supp. 709, 711 (W.D. Mich. 1969), *rev'd*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

14. Dewey v. Reynolds Metals Co., 429 F.2d 324, 331 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

15. *Id.* at 331 n.1 (emphasis in original).

16. *Id.* at 335 (Weick, J., on petition for rehearing).

employee.[17] The Sixth Circuit's decision was affirmed without opinion by an equally divided Supreme Court,[18] and accordingly is not "entitled to precedential weight."[19]

In response to the *Dewey* decision, Congress in 1972 amended Title VII to incorporate the 1967 EEOC guidelines.[20] The legislative discussion of the amendment, which consists solely of Senator Randolph's comments, indicates that Congress, through its unanimous approval of the amendment, intended that citizens working in the private sector be protected against religious discrimination by private employers in the same way that the Constitution provides protection against government action that abridges religious freedom.[21] While the protection afforded by the Constitution is not altogether clear,[22] Congress may have been thinking of *Sherbert v. Verner*.[23] In *Sherbert* the United States Supreme Court struck down a state statute that had been interpreted to deny unemployment benefits to those who were unavailable to perform Saturday work because of their religious beliefs. The Court reasoned that to disqualify from unemployment benefits a Seventh Day Adventist, who in keeping with the tenets of her religion, refused to work on Saturday "effectively penalize[d] the free exercise of her constitutional liberties."[24] The Court further declared: "For [i]f the purpose or effect of a law is to

17. *Id.* at 328.

18. 402 U.S. 689 (1971).

19. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 73 n.8 (1977) (*quoting* Neil v. Biggers, 409 U.S. 188, 192 (1972)).

20. The legislative history of the amendment reveals congressional approval of the guidelines pertaining to religious discrimination that had been previously adopted by the EEOC:

> Section 701(j) - This subsection, which is new, defines "religion" to include all aspects of religious observance, practice and belief, so as to require employers to make reasonable accommodations for employees whose "religion" may include observances, practices, and beliefs such as Sabbath observance, which differ from the employer's or potential employer's requirements regarding standards, schedules, or other business-related employment conditions. . . .
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> The purpose of this subsection is to provide the statutory basis for the EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey v. Reynolds Metals Company*.

118 CONG. REC. 7564 (1972).

21. 118 CONG. REC. 705 (1972) (remarks of Sen. Randolph):

> I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments. Unfortunately, the courts have, in a sense, come down on both sides of the issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.
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> This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. I think it is needed not only because court decisions have clouded the matter with some uncertainty; I think this is an appropriate time for the Senate and hopefully the Congress of the United States to go back, as it were, to what the Founding Fathers intended. The complexity of our industrial life, the transition of our whole area of employment, of course are matters that were not always understood by those who led our Nation in earlier days.

22. *See* Section III *infra*.

23. 374 U.S. 398 (1963).

24. *Id.* at 406.

impede the observance of one or all religions or to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[25]

The theoretical foundation for congressional authorization to expand the scope of Title VII's ban on religious discrimination was *Griggs v. Duke Power Co.*,[26] in which the Supreme Court held that conditioning employment on nonjob related test scores violated Title VII, as its effect was to discriminate against Negroes. *Dewey*'s holding that failure to accommodate an employee's religious needs is not synonymous with intent to discriminate, and that Title VII only prohibits acts motivated by an intent to discriminate, was impliedly overruled by *Griggs*. The Supreme Court in Griggs held that intent to discriminate is not a prerequisite to finding a Title VII violation. A rule neutral on its face can be discriminatory within the meaning of Title VII if it is discriminatory in effect: "[G]ood intent or absence of discriminatory intent does not redeem employment procedures . . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[27] Consequently, a company rule neutral on its face yet discriminatory in its effect upon a person's religious beliefs would be discriminatory within the meaning of Title VII. Thus, the discussion in *Griggs* coupled with the legislative history of Title VII appears to indicate an intention that Title VII outlaws employment practices that have the effect of discriminating against an individual employee's religious beliefs.

B. *Court Interpretations of the Reasonable Accommodations Rule Prior to* Trans World Airlines, Inc. v. Hardison

While the 1972 amendment to Title VII codified the EEOC's reasonable accommodations rule, it did nothing to further define it. The courts were left with the task of applying the reasonable accommodation standard and determining the situations in which an accommodation would place an undue hardship upon an employer's business. In accord with the approach taken by the EEOC,[28] courts have decided such Title VII issues on a case-by-case basis. While it was clear that the employer had a duty to make some attempt to accommodate an employee's religious needs,[29] the

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25. *Id.* at 404 (*quoting* Braufeld v. Brown, 366 U.S. 599, 607 (1961)).

26. 401 U.S. 424 (1971).

27. *Id.* at 432. Further support for this conclusion is found in the Court's determination that: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. The discussion of the business necessity test by the Court in *Griggs* extended to prohibited forms of discrimination other than race: "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.*

28. *See* note 8 and accompanying text *supra*.

29. *See* Johnson v. United States Postal Serv., 497 F.2d 128, 130 (5th Cir. 1974); Shaffield v.

amount of proof or the extent of the required accommodation was far from clear. The only time the issue of undue hardship came before the Supreme Court prior to *Hardison* was in *Cummins v. Parker Seal Co.*[30] In *Cummins*, the court added little to the understanding of the provision, stating only that "undue hardship is something greater than hardship."[31] The lower federal courts have grappled with the meaning of undue hardship and have reached differing results.

Courts have generally rejected defenses based upon intangible losses incurred in accommodating an employee's religious needs. The fact that accommodation is bothersome, disruptive or inconvenient has been held insufficient to rise to the level of undue hardship.[32] Fellow employees' objections to and complaints about accommodating the religious needs of another employee do not constitute undue hardship unless such complaints are so severe that "chaotic personnel problems" result.[33]

Similarly, the necessity of changing a company policy to accommodate an employee's religious practices has not generally been held sufficient to constitute undue hardship. For example, in *Young v. Southwestern Savings & Loan Association,*[34] plaintiff resigned when she was told she must attend meetings that opened with a prayer. The employee, an avowed atheist, found this practice repugnant. In this situation the court required the employer to adjust the "prayer" policy because it acted to discriminate against a particular employee's religious[35] convictions.

An employer may prove undue hardship, however, by demonstrating that the particular practice that discriminates against an employee's religious beliefs is mandated by business necessity.[36] In *Claybaugh v. Pacific Northwest Bell Telephone Co.,*[37] the court perceived the necessity of balancing the employee's right to reasonable accommodation of his/her religious needs against the employer's right to avoid undue hardship:

> The requirement upon an employer to make a reasonable accommodation to the religious needs of an employee is not unbending. However, an employer cannot sustain its burden of showing undue hardship without first

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Northrop Worldwide Aircraft Serv., 373 F. Supp. 937, 944 (M.D. Ala. 1974); Claybaugh v. Pacific Nw. Bell Tel. Co., 355 F. Supp. 1, 5 (D. Or. 1973); Daniels v. Pacific Nw. Bell Tel. Co., 7 FAIR EMPL. PRAC. CAS. (CCH) 1323, 1324 (D. Or. 1972).

30. 516 F.2d 544 (6th Cir. 1975), *aff'd mem. by an equally divided Court*, 429 U.S. 65 (1976), *rev'd on rehearing*, 433 U.S. 903 (1977).

31. *Id.* 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).

32. Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975).

33. Cummins v. Parker Seal Co., 516 F.2d 544, 550 (6th Cir. 1975), *aff'd mem. by an equally divided Court*, 429 U.S. 65 (1976), *rev'd on rehearing*, 433 U.S. 903 (1977).

34. 509 F.2d 140 (5th Cir. 1975).

35. Included in the term "religious" belief is what might be considered by some as "nonreligious" belief, *e.g.*, atheism. *Id.* at 143.

36. Grigg's v. Duke Power Co., 401 U.S. 424 (1971) which held: "The touchstone is business necessity. If an employment practice which operates to exclude Negros cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.

showing that it made an accommodation as an attempted remedy. As the degree of business hardship increases, the quantity of conduct which will satisfy the reasonable accommodation requirement decreases. The balancing of reasonableness and hardship is what I believe Chief Justice Burger [in *Griggs*] was referring to as the "business necessity" which would qualify as a legitimate reason for discharging an employee.[38]

Two elements that would seem to enter the balancing process are the financial and personnel resources of the employer. If the employer is a large, successful corporation, undue hardship may be more difficult to prove because of the employer's ability to reassign employees or incur additional expense.[39] Employers with fewer employees, however, have less flexibility to modify work schedules and have successfully utilized their inflexibility to lessen the extent of the accommodation required of them. In *Johnson v. United States Postal Service,*[40] for example, a small post office branch that employed only five clerks—two full-time, two part-time and one temporary—was sued by Johnson, a part-time employee who, for religious reasons, refused to work on Saturdays and was discharged. The court upheld Johnson's discharge, reasoning that the employer employed so few people that it would suffer undue hardship if required to employ a part-time employee who was not truly flexible.[41]

The need to preserve public safety is also persuasive as undue hardship. In *Dixon v. Omaha Public Power District,*[42] the difficulty of obtaining a substitute for a highly trained lineman to correct high-voltage power line malfunctions was found to constitute undue hardship because to substitute an untrained employee could endanger the lives of workers and threaten vital power supplies. Similarly, the absence of a fireman from a department with strict staff limitations was found to constitute undue hardship because it would increase the risk of harm to the lives and property of citizens and firemen.[43]

The existence of a collective bargaining agreement or union contract has sometimes been the basis for the employer's assertion that it does not have the contractual flexibility to accommodate the employee's religious needs. Frequently bargaining agreements provide for work allocations on the basis of a uniformly applied seniority system that established objective criteria for determining layoffs, promotion, shifts and certain advantages.[44] When accommodation of religious belief is not expressly incorpo-

37. 355 F. Supp. 1 (D. Or. 1973).

38. *Id.* at 6.

39. *Id.* at 5.

40. 497 F.2d 128 (5th Cir. 1974). Title VII also prohibits discrimination in federal government employment, including the United States Postal Service. 42 U.S.C. § 2000e-17 (Supp. V 1975).

41. 497 F.2d 128, 130 (5th Cir. 1974).

42. 385 F. Supp. 1382 (D. Neb. 1974).

43. United States v. Albuquerque, 10 FAIR EMPL. PRAC. CAS. (CCH) 771 (D. N. M. 1975).

44. Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1603 (1969).

rated into the labor contract the employer who nevertheless accommodates employees' religious practices that conflict with criteria of the collective bargaining agreement may be in violation of that agreement.[45] *Drum v. Ware,*[46] one of the few cases dealing specifically with this issue, implied that the union contract was paramount to the employer's duty to accommodate an employee's religious needs. More typically, in *Claybaugh v. Pacific Northwest Bell Telephone Co.,*[47] reliance upon its contract with the union was not a defense to the employer's failure to attempt an accommodation of the employee's religious needs. The employer asserted that it could not accommodate a Seventh Day Adventist who required every Friday night off to observe his Sabbath because to do so would violate the union contract, which required the employer to balance its work schedules in accordance with regular and premium wage scales. The court held that the employer was under a duty to provide temporary accommodation until the possibility of a permanent remedy could be investigated.[48]

The court in *Shaffield v. Northrop Worldwide Aircraft Services*[49] found that the provisions of a collective bargaining agreement might limit the employer's duty to accommodate an employee's religious needs. The particular agreement, however, did not have such a limiting effect because seniority was not the only criterion the employer could use for according employees preferential treatment.[50] In addition, the court stated that "even if the company were so bound [by the bargaining agreement], it may well be that the company's burden includes seeking union consent to some form of variance."[51] In sum, the lower courts had not found adherence to a collective bargaining agreement a good defense to an employer's failure to accommodate an employee's religious needs.

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45. While it seems unlikely that an employer would be held liable in damages to a union for contravening a collective bargaining agreement in order to accommodate an employee's religious needs, the issue has not come before the courts. The employer might, however, suffer litigation costs in suits with the union to determine whether Title VII required the contravention of the collective bargaining agreement and these costs might be considered undue hardship. These suits would diminish as the case law established what accommodations Title VII does in fact require. That the employer might suffer the loss of union good will is not persuasive, as the courts have uniformly held that intangible losses are not undue hardship. *See* text accompanying notes 33-34 *supra.*

46. 7 FAIR EMPL. PRAC. CASE. (CCH) 269 (W.D.N.C. 1974).

47. 355 F. Supp. 1 (D. Ore. 1973).

48. *Id.* at 5.

49. 373 F. Supp. 937 (M.D. Ala. 1974). This conclusion relies on the seniority system provision of Title VII itself. *See* note 52 and accompanying text *infra.*

50. The provision of the collective bargaining agreement in issue stated:

> The company agrees to the principle that shift and odd work week preference for available jobs should be given to senior employees in each classification. It is recognized, however, that it is impossible to operate the plant efficiently with all the senior employees in a particular classification on any shift, and that classification seniority cannot be the sole determining factor in making shift assignments.

Id. at 942.

50. *Id.*

51. *Id.*

The question of conflict between a seniority system and the employer's duty to accommodate the religious needs of its employees is further complicated by a provision of Title VII itself. The provision states that discriminatory conduct otherwise prohibited by the Act is permissible if done "pursuant to a bona fide seniority . . . system."[52]

Thus, the lower courts' interpretations of the reasonable accommodations rule were inconsistent and sometimes confusing. With the law in this unsettled state the Court granted certiorari to determine whether Trans World Airlines, Inc. (TWA) had met its duty under Title VII to reasonably accommodate the religious practices of one of its employees.

II. THE SUPREME COURT'S DECISION IN *Trans World Airlines, Inc. v. Hardison*

A. *The Facts*

Plaintiff Hardison was hired by TWA in 1967 as a clerk in the Stores Department of TWA's maintenance and overhaul base in Kansas City, Missouri. The Department's importance to the Airline required that it operate twenty-four hours a day, every day of the year. In the event of a scheduled employee's absence, another employee was required to work an additional shift or a supervisor was transferred from another area, even though work in the supervisor's original area suffered. All employees, including Hardison, were subject to a collective bargaining agreement that contained provisions relating to shift preferences, days off, and vacations.[53] The system for dealing with employees' work schedule preferences was based on seniority. Employees with the most tenure had first choice for job and shift assignments; employees with less seniority had to work the

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52. 42 U.S.C. § 2000e-2(h) (1970) provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or 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.

Although prior to *Hardison* lower courts had seldom considered the argument that Title VII itself authorizes an employer to refuse to accommodate an employee's religious beliefs if that refusal is a result of a bona fide seniority system, the Supreme Court used this provision of Title VII to buttress its decision in *Hardison*. This is consistent with the Supreme Court's decisions in United States v. International Bhd. of Teamsters, 431 U.S. 324 (1977) and United Air Lines v. Evans, 431 U.S. 553 (1977) which established that a bona fide seniority system is protected even though that system might perpetuate the effects of pre-Act or post-Act discrimination. 431 U.S. 324, at 348 n.30. Following *Hardison* the Fifth Circuit Court of Appeals rendered two decisions consistent with the *Hardison* holding: Southbridge Plastics Div. v. Local 759, Int'l Union of United Rubber Workers of Am., 556 F.2d 761 (5th Cir. 1977); Charlier v. S.C. Johnson & Sons, Inc., 556 F.2d 761 (5th Cir. 1977).

53. The union contract provided in part:

> The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignments, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.
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> Except as hereafter provided in this pararaph, seniority shall apply in selection of shifts and days off within a classification within a department . . . .

432 U.S. at 67 n.1.

assignments that had not already been chosen. The company recognized that weekend assignments were the least preferred and therefore reduced its work force to a minimum during this time period.

After approximately one year of employment with TWA, Hardison embraced the tenets of the Worldwide Church of God. This religion proscribes work from sunset on Friday to sunset on Saturday as well as on certain specified but nontraditional holidays. Prior to this time, Hardison had worked Friday evenings and Saturdays when scheduled. Hardison discussed his religious beliefs with his supervisor, who agreed to attempt to arrange work schedules so that Hardison would not be asked to work during his Sabbath. Such an arrangement was not necessary at that time, however, as Hardison voluntarily transferred to the 11:00 p.m. to 7:00 a.m. shift, and thus was not required to work from 7:00 a.m. Friday to 11:00 p.m. Sunday. After working this shift for approximately two months, Hardison voluntarily transferred from Building 1 to Building 2 where he could work the day shift Monday through Friday.[54] The two buildings had separate seniority lists; thus, as a result of the transfer, Hardison lost the seniority that he had gained in Building 1.

The problem began when an employee who normally worked Saturdays went on vacation and Hardison was asked to replace him on the Saturday assignment. Realizing that the vacation schedule would create a problem with Hardison's observance of the Sabbath, Hardison's supervisor arranged a meeting with himself, Hardison, and the union steward. Three options were suggested and rejected. First, TWA suggested that Hardison trade jobs or shifts with another employee to avoid working on the Sabbath. The union would not agree to a trade unless it was made pursuant to the collective bargaining agreement, which required the shift sought by Hardison to be put up for bids and awarded to the most senior employee bidding for it. Since there were no jobs open for bid, and since Hardison had insufficient seniority to bid for a shift having Saturdays off, the suggestion was unacceptable.

Hardison then suggested that he work and be paid for only four days per week, taking Saturdays off without pay. The union did not object to this solution but the company rejected it because the work of the Stores Department in which Hardison was employed was essential and every job within that department had to be filled. To bring in an employee or supervisor from another area would have left the other area understaffed, and to employ someone not regularly assigned to work Saturdays would have required TWA to pay between one-and-one-half and double the usual rate of wages.

As a third suggestion, Hardison offered to work six days per week at no additional pay if TWA would also agree not to schedule Hardison for work on his Sabbath. This suggestion was rejected by the union as a

54. Hardison had married in the interim and felt that day work would be preferable.

violation of the "forty hour work clause," which required that any work beyond the standard forty hours per week be compensated by overtime pay and be subject to seniority rights.[55]

Thus, no accommodation was reached and Hardison did not report to work on the two Saturdays that he was expected to replace the vacationing employee. Soon after, Hardison transferred to the twilight shift, which required him to work from 3:30 p.m. to 11:00 p.m. In keeping with his religious beliefs, however, he left work at sundown on Friday evening. After a hearing, Hardison was discharged for refusing to work during his assigned shift. Hardison filed suit for injunctive relief against TWA and the union[56] in district court. He charged that both TWA and the union had violated Title VII by discriminating against him because of his religious beliefs. Hardison's claim of religious discrimination was based on the 1967 EEOC guidelines that require employers "to make reasonable accommodation to the religious needs of employees" whenever such accommodation would not work an "undue hardship,"[57] and on analogous language adopted by Congress in the 1972 amendments to Title VII.[58]

The district court, while upholding the constitutionality of the 1972 amendment and EEOC guidelines as applied to this case, found that TWA and the union had fulfilled their obligations to accommodate Hardison's religious beliefs.[59] The court reasoned that although the EEOC guideline referred only to the employer's duty to accommodate, the provision should be interpreted to apply to unions as well as to employers. In this case, however, the union's duty to accommodate Hardison's religious beliefs did not require it to ignore its seniority system. The court buttressed its opinion by referring to the seniority provisions of Title VII, which permit different treatment of employees if based upon a bona fide seniority system.[60] It decided that "[t]he seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited."[61] Thus, the union had met its duty to reasonably accommodate Hardison's religious practices.

The district court also held that TWA took appropriate action to

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55. Brief for Petitioner Trans World Airlines, Inc. at 13; Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

56. As required, Hardison had exhausted his administrative remedies prior to bringing suit. These remedies are prescribed in 43 U.S.C. § 2000e-5 (1970).

57. 29 C.F.R. § 1605.1 (1977).

58. At the time of Hardison's discharge, the EEOC guideline was in effect but the 1972 amendments to Title VII had not yet been passed. The Court noted that while an EEOC guideline that varies from prior EEOC policy is not ordinarily entitled to great weight, the guideline is entitled to sufficient deference to be accepted as a defensible construction of the pre-1972 statute when, as here, Congress had codified that construction. The Court, therefore, did not consider whether the 1972 amendments must be applied retroactively. 432 U.S. at 76 n.11.

59. Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877 (W.D. Mo. 1974).

60. 42 U.S.C. § 2000e-2(h) (1970), *quoted* at note 52 *supra.*

61. 375 F. Supp. at 883.

accommodate Hardison by holding several meetings in an attempt to find a solution, aggreeing to accommodate Hardison's religious holiday observances, and authorizing the union steward to find someone willing to trade shifts. To replace Hardison with another employee would have entailed the payment of premium wages or would have left other work areas without adequate coverage, either of which would have been an undue hardship on TWA. The court further ruled that it would have been an undue hardship for TWA to have changed Hardison's shift in violation of the collective bargaining agreement.

The Court of Appeals for the Eighth Circuit reversed the judgment for TWA.[62] It held that Title VII and the applicable regulations did not violate the establishment clause of the first amendment, and that TWA had not satisfied its duty to reasonably accommodate Hardison's religious beliefs. The court found that there were several possible accommodations within the constraints of the collective bargaining agreement that could have been offered to Hardison.[63] The court of appeals found it unnecessary to decide whether reasonable accommodation included, when necessary, the violation of seniority provisions of a collective bargaining agreement, because as it viewed the facts, TWA had not sought, and therefore the union had not refused, a possible variance from the collective bargaining agreement. The United States Supreme Court reversed the conclusions of the Eighth Circuit without reaching the constitutional questions.

B. *The Supreme Court's Reasoning*

The Court identified the issue in *Hardison* as "the extent of the employer's obligation under Title VII to accommodate an employee whose religious beliefs prohibit him from working on Saturdays."[64] It disagreed with the court of appeals "in all relevant respects" and found that "TWA had made reasonable efforts to accommodate"[65] Hardison's religious needs. In the Court's view, each of the alternatives suggested by the Eighth Circuit would have constituted undue hardship on the employer.

The Court agreed with the district court that TWA had made reasonable accommodation of Hardison's religious beliefs because TWA held several meetings in an attempt to find a solution to the problem, accommodated Hardison's observance of nontraditional religious holidays, and authorized the union steward to seek an exchange of shifts with another employee. The Court concluded that TWA had done all that

62. Hardison v. Trans World Airlines, Inc. 527 F.2d 33 (8th Cir. 1975). Because the district court's findings with respect to the union were not questioned on appeal, the Eighth Circuit affirmed the judgment in favor of the union without ruling on the substantive merits.

63. TWA could have permitted Hardison to work a four day week, filled his position with another employee or arranged an exchange between Hardison and another employee. The court simply disagreed with the district court's rejection of these options. *Id.* at 40-42.

64. Trans World Airlines, Inc. v. Hardison, 432 U.S. 64, 66 (1977).

65. *Id.* at 77.

could reasonably be expected within the bounds of the collective bargaining agreement to accommodate Hardison.[66]

The Court next held that TWA was under no duty to arrange an exchange of shifts that would contravene the union contract, stating that absent "a clear and express indication from Congress, . . . an agreed-upon seniority system [does not have to] give way when necessary to accommodate religious observance."[67] The Court reasoned that the seniority system represented a neutral way of allocating the nonpreferred week-end work. If TWA abandoned this scheme and gave Hardison Saturdays off, it would deprive other employees of their agreed-upon work preference primarily because they did not adhere to a religion that observed Saturday as the Sabbath. The Court made it clear that, "Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities."[68] The Court elaborated:

> 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.[69]

The Court buttressed this interpretation by citing to section 703(h) of Title VII, which immunizes certain otherwise prohibited differential treatment from Title VII attack when the differential treatment is "pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."[70] Thus, the Court concluded that "absent a discriminatory purpose the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."[71] Since the seniority system evidenced no discriminatory intent, the Court reasoned that TWA did not engage in an unlawful employment practice when it followed the dictates of its seniority system.

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66. Quoting from the district court's finding and the record, the Supreme Court pointed out the Court of Appeals' error in finding that TWA had not suggested to the union the possibility of a variance from the seniority system. Accordingly, the Supreme Court found that TWA agreed to a variance but the union had not. Unfortunately, however, the Court found it unnecessary to pursue the extent of the union's duty to accommodate an employee's religious beliefs. The Eighth Circuit's opinion could be read to require the union to waive or vary its collective bargaining agreement to accommodate religious practices. Since the Supreme Court found that TWA had made reasonable accommodation without seeking a variance of the collective bargaining agreement, it did not address this issue.

67. *Id.* at 79.

68. *Id.* at 81.

69. *Id.*

70. 42 U.S.C. § 2000e-2(h) (1970), *quoted* at note 52 *supra.*

71. 432 U.S. at 82.

The Supreme Court also rejected potential solutions that, unlike shift trading, arguably would not have violated the collective bargaining agreement. First, Hardison could have been allowed to work a four-day week with a supervisor or other worker from another department filling in for him on his Sabbath. Second, TWA could have replaced Hardison on Saturday by paying premium wages to another employee. The Supreme Court concluded that both solutions would have constituted an undue hardship for TWA, either because of the lost efficiency resulting from under-staffing other departments, or because of higher wage costs.

The Supreme Court declared that "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."[72] The Court asserted that, like the "abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion."[73] The Court asserted that because the overriding purpose of Title VII is to eliminate discrimination in employment, it would not, in the absence of clear statutory language or legislative history to the contrary, "construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."[74]

C. *A Critique of the Court's Reasoning*

The Supreme Court's decision in *Hardison* is distressing for several reasons. First, the Court seems to contradict the language of the reasonable accommodations rule and the legislative history concerning the reach of the rule to Sabbatarians. Second, the decision may discourage accommodation of religious beliefs, since accommodation virtually always imposes costs greater than *de minimis*. Last, the decision appears to permit a collective bargaining agreement to determine the extent of the accommodation required of the employer.[75]

The language of the reasonable accommodations rule itself indicates that the employer's duty to reasonably accommodate an employee's religious needs is not terminated when more than *de minimis* expenditure is necessary to achieve the accommodation. Congress adopted a requirement of reasonable accommodation unless *undue* hardship, not mere hardship, would result. The Court in *Hardison* equated "undue hard-

72. *Id.* at 84.

73. *Id.*

74. *Id.* at 85.

75. Recent cases on the closely related topic of religious refusal to pay union dues have had conflicting results. Two cases held that the employer must accommodate to the point of undue hardship. McDaniel v. Essex Intern, Inc., 571 F.2d 338 (6th Cir. 1978); Cooper v. General Dynamics Convair Aerospace Div., 533 F.2d 163 (5th Cir. 1976). One case held that reasonable accommodation was unconstitutional in light of the establishment clause. Yott v. North Am. Rockwell Corp., 428 F. Supp. 763 (C.D. Cal. 1977).

ship" with "more than a *de minimis* cost." This position is questionable given the simple English usage of the words.[76] Moreover, it is inconsistent with the Sixth Circuit's statement in *Cummins v. Parker Seal Co.*, affirmed by the Court, that "undue hardship is something greater than hardship."[77] Perhaps an explanation for the *Hardison* Court's choice of this interpretation of the statute was its desire to avoid deciding the potential establishment clause question that the dissent thought would arise if an employer was required to bear more than a *de minimis* cost in accommodating an employee's religious beliefs.[78]

In holding that TWA had reasonably accommodated Hardison's religious beliefs and that other alternatives would have resulted in undue hardship, the Supreme Court appears to have disregarded the legislative history of the 1972 amendment to Title VII. That history contemplates unequal treatment of employees on the basis of their religion by rearranging work schedules to allow Sabbatarians time off from work to observe their Sabbath. In response to the Court's holding in *Dewey v. Reynolds Metals Co.*[79] that an employer had no duty to accommodate an employee's religious beliefs because to do so would "discriminate against . . . other employees" and "constitute unequal administration of the collective bargaining agreement,"[80] Senator Randolph introduced an amendment "to make clear that Title VII requires religious accommodation even though unequal treatment would result."[81] His purpose for proposing the amendment was to protect Saturday Sabbatarians from employers who refuse to hire or to "continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days."[82]

Congress recognized that accommodating employees' religious practices would result in unequal treatment; therefore, for the Court to say, as in *Hardison,* that such an accommodation results in unequal treatment begs the question. The Court in *Hardison* declined to hold that Title VII authorizes unequal treatment without support from clear statutory language or legislative history.[83] Yet Senator Randolph's remarks in proposing the 1972 amendment to Title VII, uncontradicted in subsequent debates, certainly support the proposition that Congress intended to

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76. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 92 n.6 (1977) (Marshall, J., dissenting). Black's Law Dictionary defines undue as "more than necessary; not proper; illegal . . . ." BLACK'S LAW DICTIONARY 1697 (4th ed. 1951).

77. 516 F.2d 544, 551 (6th Cir. 1975), *aff'd by an equally divided Court*, 429 U.S. 65 (1976), *rev'd on rehearing*, 433 U.S. 903 (1977).

78. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 89 (1977) (Marshall, J., dissenting). This point is discussed more fully at Section III *infra.*

79. 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971).

80. *Id.* at 330.

81. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 89 (1977) (Marshall, J., dissenting).

82. 118 CONG. REC. 705 (1972).

83. 432 U.S. at 79.

permit unequal treatment for the benefit of Sabbatarian employees. The *Hardison* Court ignored this legislative history, which clearly indicates that unequal treatment of employees, including rearranging work schedules to permit Sabbatarians to observe their Sabbath, is contemplated by Title VII.

The Court's decision appears largely to nullify the reasonable accommodations rule. Congress obviously intended that some accommodations of employee's religious beliefs be made, even if the employer incurs a degree of hardship in doing so. Yet as the Court reads the rule, no accommodations will be made since virtually every accommodation of the religious practices of its employees would result in more than a *de minimis* cost, as defined by the Court. An examination of the facts of *Hardison* will indicate the narrow scope of the accommodation required of employers.

The *Hardison* decision indicates that both the temporary payment of overtime wages to a substitute employee and the efficiency loss of having an employee from another area replace the Sabbatarian on the Sabbath are examples of costs that are more than *de minimis*. The factual basis for the Court's determination of more than *de minimis* cost is questionable. Although the district court found lost efficiency and payment of premium wages to be an undue burden, the dissenters in the Supreme Court asserted that "the record is devoid of any evidence documenting the extent of the efficiency loss . . . and while the stipulations make clear what overtime would have cost, the price is far from staggering: $150 for three months . . . ."[84] The amount would have been even less for the two weeks that Hardison was to replace the vacationing employee. If the Court viewed the accommodation as permanent rather than temporary, it is not clear either from the Court's opinion or from the facts of the case. Thus, the holding of *Hardison* seems to be that the temporary payment of wages and temporary efficiency loss of substituting an employee from another area are more than *de minimis* in cost and therefore an undue hardship. From these examples, it would appear that only the most minor accommodations are required.

The Supreme Court's holding appears to permit a collective bargaining agreement to play a critical role in the application of the reasonable accommodations rule.[85] Although the *Hardison* Court, quoting *Franks v. Bowman Transportation Co., Inc.*,[86] agreed "that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute,"[87] it went on to state that "we do not

84. *Id.* at 92 (Marshall, J., dissenting).

85. *See* note 45 *supra*.

86. 424 U.S. 747 (1976). *See* not 52 *supra*.

87. 432 U.S. at 79 (*quoting* Franks v. Bowman Transp., Inc., 424 U.S. 747, 778 (1976)).

believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement."[88]

It is unlikely that Congress in enacting the 1972 amendment to Title VII intended collective bargaining agreements to be controlling of the duty to reasonably accommodate an employee's religious needs. Congress was aware that, since most working people observe Sunday as the Sabbath, Saturday Sabbatarians are at a disadvantage.[89] It can be assumed that when Congress enacted the reasonable accommodations rule it was aware that collective bargaining agreements existed and that the legislation would affect employment relationships. In fact, the reasonable accommodations rule was proposed, at least in part, because of the Court's adverse ruling in *Dewey*, which involved the adverse impact of a collective bargaining agreement on the accommodation of a Saturday Sabbatarian who refused to work on his Sabbath. Thus, it seems likely that Congress intended the 1972 amendment to Title VII to alter prior case law that had allowed collective bargaining agreements to determine the extent of an employer's duty to accommodate its employees' religious beliefs.

To augment its decision that TWA need not abridge its collective bargaining agreement in order to accommodate Hardison's religious belief, the Court pointed to the exception given seniority systems in Title VII itself. Under section 703(h), conduct otherwise prohibited under Title VII is permissible if done "pursuant to a bona fide seniority . . . system."[90] This argument, however, is not persuasive because of the 1972 amendments, which instituted the reasonable accommodations rule, followed section 703(h) by two years; the later statute takes precedence over the earlier.[91]

By enacting the reasonable accommodations rule, Congress intended to place Sabbatarians on an equal footing with the majority whose employment typically does not interfere with the free exercise of their religious rights. If, however, no flexibility exists in the application of a collective bargaining agreement, then there can be no accommodation of the religious needs of Sabbatarians, and they will therefore remain disadvantaged. If Saturday work inevitably falls to the employee with lowest seniority, such seniority provisions will effectively preclude the employer from ever hiring Seventh Day Adventists, Orthodox Jews, members of the Worldwide Church of God, and any others whose religious beliefs proscribe work from sundown on Friday until sundown on Saturday. In the words of the Eighth Circuit, "It is no answer to such a

88. *Id.*

89. *See* Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961); Two Guys from Harrison-Allenton, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

90. 42 U.S.C. § 2000e-2(h) (1970), *quoted at* note 52 *supra.*

91. F. MCCAFFREY, STATUTORY CONSTRUCTION (1953).

person, or to the statute itself, that if he compromises his religious beliefs for a time he may develop enough seniority to practice them again."[92]

Resolving the competing interests at stake in the context of religious discrimination in employment is a difficult task. And it may well be that no better solution can be reached than attempting, on a case-by-case basis, a balancing of the employee's interest in freely exercising his or her religious beliefs against the employer's interest in avoiding economic hardships. But to the extent that the Supreme Court is inclined to choose a point, however indeterminate, beyond which that balance may not be struck, it is regrettable that the Court has chosen the point of *de minimis* costs. As a matter of policy and of law, the employer should be required to bear more than *de minimis* costs, if necessary, to achieve a reasonable accommodation of an employee's religious beliefs.

On the one hand, the exercise of religion is one of the fundamental liberties Americans enjoy. On the other, the employment relationship is one of the most important parts of any working American's life. For the great majority of people who are Sunday worshippers, these two important aspects of life do not conflict, for Sunday is the "working man's" as well as "religious man's" day off. But for employees who are not Sunday worshippers, the two do conflict, and the choice between religion and employment—a choice most people never face—must be made. As a matter of fairness, then, to such employees, accommodating their religious beliefs does no more than grant them the same privileges enjoyed by others. It is true that others may be inconvenienced to some extent by the accommodation, but the inconvenience that results if the accommodation is made would seem to be most often, if not always, outweighed by the hardship on the employee seeking accommodation if the accommodation is not made.

III. TITLE VII'S REASONABLE ACCOMMODATIONS RULE AND THE CONSTITUTION'S ESTABLISHMENT CLAUSE

Some courts[93] have questioned the validity of the reasonable accommodations rule under the establishment clause of the first amendment, but most have upheld its constitutionality.[94] The Supreme Court has not addressed the issue although given the opportunity to do so in both *Cummins v. Parker Seal Co.*[95] and *Hardison.* In light of a rule of statutory construction that requires the Court to avoid giving a statute an

92. Hardison v. Trans World Airlines, Inc., 527 F.2d 33 at 41 n.12, *rev'd*, 432 U.S. 63 (1977).

93. *See* Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975); Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971).

94. *See* Draper v. United States Pipe & Foundy Cro., 527 F.2d 515 (6th Cir. 1975); 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); Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972); Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172 (W.D.N.C. 1975); Claybaugh v. Pacific Nw. Bell Tel. Co., 355 F. Supp. 1 (D. Or. 1973).

95. 516 F.2d 544 (6th Cir. 1975), *aff'd mem. by an equally divided Court*, 429 U.S. 65 (1976), *rev'd on rehearing*, 433 U.S. 903 (1977).

interpretation that raises constitutional questions,[96] it might be argued that the Court narrowly construed the reasonable accommodations rule in *Hardison* in order to save the rule from the proscription of the establishment clause.[97] But the Court, in reading its decision, used much the same rationale as it used in *Dewey v. Reynolds Metals Co.*[98] when faced with a similar fact pattern. Because Congress enacted the 1972 amendment to Title VII to change the result of case law in general and *Dewey* in particular, it may respond similarly to the decision in *Hardison.* Thus, the constitutional issue must be faced. The following discussion will suggest that Congress can pass legislation that is both constitutional and protective of Sabbatarian rights.

The first amendment states in part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."[99] Ascertaining the proper relationship between the establishment clause and the free exercise clause, which at times seem to conflict with each other,[100] has raised numerous problems. Government must sometimes accommodate religious interests to comply with its duty, expressed in the free exercise clause, not to prohibit the free exercise of religion.[101] The issue has often been raised regarding how much accommodation is permitted consistent with the establishment clause.[102] Thus the Court has decided on a case-by-case basis which laws result in the "establishment" of religion.

While the Court in *Hardison* chose not to determine the constitutionality of the reasonable accommodations rule, the dissent, in a brief discussion, asserted that:

> [T]he constitutionality of the statute is not placed in serious doubt simply because it sometimes requires an exemption from a work rule. Indeed, this Court has repeatedly found no Establishment Clause problems in exempting religious observers from state-imposed duties, even when the exemption was in no way compelled by the Free Exercise Clause.[103]

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96. United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971).

97. It is difficult to understand, however, how the *de minimis* requirement avoids an establishment clause issue. *See* Section III *infra.*

98. 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971). Both cases state that to accommodate the religious needs of one employee results in unequal treatment of other employees. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 81 (1977); Dewey v. Reynolds Metals Co., 429 F.2d at 330, *aff'd by an equally divided Court*, 402 U.S. 689 (1971).

Further, both cases assert that there is nothing discriminatory in a collective bargaining agreement that assigns week-end work without regard for religion. Trans World Airlines, Inc., v. Hardison, 432 U.S. 63, 80 (1977); Dewey v. Reynolds Metals Co., 429 F.2d at 329 (1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971).

99. U.S. CONST. amend. I.

100. Waltz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970): "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."

101. *See* Zorach v. Clauson, 343 U.S. 306, 312 (1952).

102. *See* Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1176 (1974).

103. 432 U.S. 63, 90 (Marshall, J., dissenting).

Thus, the dissent found it unlikely that an establishment clause problem is created when the government requires an employer to accommodate the religious needs of its employees by excusing them from otherwise uniformly applied work rules because no such problem is caused by "practitioners from obligations owed the State."[104]

In *Sherbert v. Verner*[105] the Court invalidated a state law denying unemployment benefits to a Saturday Sabbatarian because, in keeping with the tenets of her religion, she refused to accept employment requiring Saturday work. The Court held that the state could not force a sincere Saturday Sabbatarian "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[106] Although the basic holding was founded on the free exercise clause, the Court went on to state that:

> In holding as we do, plainly we are not fostering the "establishment" of the Seventh-Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which is the object of the Establishment Clause to forestall.[107]

There are other indications that the reasonable accommodations rule is not violative of the establishment clause. For example, Justice Harlan dissented in *Sherbert* because the majority decision would require the state to *"single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated."[108] Yet he believed that the state, if it chose to do so, could create an exception for Saturday Sabbatarians without violating the establishment clause. "The constitutional obligation of 'neutrality,' " according to the dissent, "is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation."[109] Second, the Court in upholding the constitutionality of Sunday closing

104. *Id.* at 91 (Marshall, J., dissenting). Contrary to Justice Marshall's assertion, the Court's "repeated" determinations that release from obligations imposed by the state poses no constitutional problems were reached in the context of reconciling the establishment clause with the free exercise clause; that is, the *failure* to grant a release from state-imposed obligation raised free exercise problems. The constitutionality of the reasonable accommodations rule, however, does not present a parallel issue, for no one, as yet, argues that the government's *failure* to require accommodation of religious beliefs in the private sector implicates the free exercise clause. Nonetheless, the case law referred to by Justice Marshall is illustrative of the Court's approach to alleged violations of the establishment clause, and will be useful in understanding the constitutional issues raised by the reasonable accommodations rule.

105. 374 U.S. 398 (1963).

106. *Id.* at 404.

107. *Id.* at 409.

108. *Id.* at 422 (Harlan, J., dissenting).

109. *Id.*

laws has noted that a number of states by statute exempt Saturday Sabbatarians from the application of the closing laws. The Court has stated this "may well be the wiser solution to the problem"[110] thus implying that there would be no "establishment" problem. Third, the Court has exempted Amish children from attending school beyond the eighth grade because, according to the Amish belief, attendance would threaten their salvation. "Accommodating the religious beliefs of the Amish," the Court stated, does not "support, favor, advance, or assist the Amish," but rather "allow[s] their centuries-old religious society . . . to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose."[111]

Additionally, the Court has upheld against attacks under the establishment clause, laws that unquestionably require some people to adjust their conduct to accommodate the religious beliefs of another. Two examples are the selective service law, which excepted conscientious objectors,[112] and a state law forbidding on Sunday certain activities within a set distance from a place of worship.[113]

The Supreme Court has not addressed the issue of whether the reasonable accommodations rule is violative of the establishment clause, but in *Cummins v. Parker Seal Co.*,[114] the Sixth Circuit extensively discussed the first amendment issues presented by the reasonable accommodations rule and found the rule constitutional. Cummins, after joining the Worldwide Church of God, which proscribes work from sundown on Friday to sundown on Saturday, refused to work on Saturday. For approximately one year, the company accommodated his religious needs, but when a fellow employee complained, the company again required Cummins to work on his Sabbath. Cummins, following the tenets of his religion, refused to comply and was subsequently dismissed. The Court of Appeals for the Sixth Circuit held for Cummins under Title VII, finding that the employer had not fulfilled its duty to make reasonable accommodations of the religious needs of its employees.[115] Over a strong dissent, the court rejected the argument that the reasonable accommodations rule was unconstitutional as an establishment of religion. The majority held that the reasonable accommodations rule passed constitutional muster under the tripartite test set forth in *Committee for Public Education v. Nyquist*,[116] while the dissent, relying on the same test, found that the accommodations rule did not. For this reason, an analysis of *Cummins*

110. Braunfield v. Brown, 366 U.S. 599, 608 (1961).

111. Wisconsin v. Yoder, 406 U.S. 205, 234-35 n.22 (1972).

112. Selective Draft Law Cases, 245 U.S. 366, 389-90 (1918).

113. Gallagher v. Crown Kosher Super Markets, 366 U.S. 617, 627 (1961).

114. 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided Court*, 429 U.S. 65 (1976), *rev'd on rehearing*, 433 U.S. 903 (1977).

115. 516 F.2d at 550.

116. 413 U.S. 756 (1973).

reveals the two schools of thought about whether the accommodations rule violates the establishment clause.

In *Nyquist* the Supreme Court established that "to pass muster under the Establishment Clause, the law in question first, must reflect a clearly secular purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion . . . ."[117] The majority in *Cummins* found that the reasonable accommodations rule, like Title VII as a whole, reflected a secular purpose. The purpose of the reasonable accommodations rule was to prevent discrimination in employment and, in particular "to put teeth in the existing prohibition of religious discrimination."[118] The dissent, in contrast, stated that "[r]ather than 'putting teeth' into the Act, [the rule] mandates religious discrimination, thus departing from the Act's basic purpose."[119]

It seems fairly clear that the reasonable accommodations rule does reflect a secular purpose. The purpose of Title VII was to remove "artificial barriers" to employment when they worked to invidiously discriminate on the basis of race, religion or other impermissible classifications.[120] Under the reasonable accommodations rule, the duty to accommodate an employee's religious beliefs is not absolute but terminates when reasonable accommodation is not attainable short of an undue hardship, thus indicating a purpose to eliminate reasonably avoidable hardships on religious practices, rather than to actively support or finance certain religions irrespective of cost. Senator Randolph, the amendment's sponsor, stated the purpose to be "to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the Courts apparently have not resolved."[121] As noted earlier, the issue he was addressing was the plight of Saturday Sabbatarians, whose religious beliefs require them to abstain from work on the Sabbath.

Admittedly, these words and others[122] could be construed as evidencing a lack of secular intent. Nonetheless, the Court should find that the amendment has a secular purpose because the Court in the past has stressed the presumption of constitutionality. In Sunday closing law cases, the Court has held that the purpose of the law is to provide for a uniform day of rest, ignoring the historical connection between Sunday

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117. 413 U.S. at 773 (citations omitted).

118. 516 F.2d at 552.

119. *Id.* at 556 (Celebrezze, J., dissenting).

120. Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).

121. 118 CONG. REC. 705 (1972) (remarks of Sen. Randolph).

122. *Id.* at 705:

My own pastor in this area, Rev. Delmar Van Horne, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people and understandably so, with reference to a possible inability of employers on some occasions to adjust to work schedules to fit the requirements of the faith of some of their workers.

closing laws and religious practices.[123] The following programs were held to have a secular purpose and thus survived constitutional attack: inclusion of church-related colleges under the Higher Education Facilities Act of 1963,[124] aid to church-related colleges,[125] and tax exempt status for houses of worship.[126] Although held to be unconstitutional on other grounds, several programs that aided parochial schools were found to have secular purposes.[127] In fact only a law requiring Bible reading in public schools[128] and a law banning the teaching of evolution in public schools[129] were invalidated because of an impermissible legislative purpose. Both of these cases concerned the fostering of a particular religious belief. Such is not the case with the reasonable accommodations rule because it merely requires that an employer accommodate religious needs, dictated by *any* religion, to the point of undue hardship. Furthermore, even if Senator Randolph's purposes were not uniformly secular, his overriding purpose seemed to be the elimination of discrimination in employment that forces an employee to abandon "one of the precepts of" their "religion in order to accept work . . . ."[130]

Applying the second *Nyquist* standard, the majority in *Cummins* found that the rule of accommodation has a primary effect that neither advances nor inhibits religion but rather "guarantees job security . . . ."[131] The dissent found that the effect of the rule is to discriminate between those who practice a religion and those who do not. Additionally, the rule discriminates between those who practice a Sabbatarian religion and those who do not.[132]

The primary effect of the reasonable accommodations rule is to preserve and protect the employment opportunities of religious observers unless the employer suffers undue hardship. The accommodation requirement may incidentally benefit religion by allowing working men and women to follow their creeds but it is clear that "not every law that confers an 'indirect,' 'remote' or 'incidental benefit' upon religious institutions is, for that reason alone, constitutionally invalid."[133] Indeed, in some instances the general welfare of society demands regulation of conduct also

123. Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); Braunfield v. Brown, 366 U.S. 599 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

124. Tilton v. Richardson, 403 U.S. 672 (1971).

125. Hunt v. McNair, 413 U.S. 734 (1973).

126. Waltz v. Tax Comm'n, 297 U.S. 664 (1970).

127. Meek v. Pittinger, 421 U. S. 349 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).

128. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

129. Epperson v. Arkansas, 393 U.S. 97 (1968).

130. Sherbert v. Verner, 374 U.S. 398, 404 (1963).

131. 516 F.2d at 553.

132. *Id.* at 558 (Celebrezze, J., dissenting).

133. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 771 (1973).

proscribed by religion: murder, polygamy, adultery, and so forth. The government must be neutral, but the first amendment does not require it to be hostile:

> As the secular effect requirement has developed, the premise of government neutrality in religious matters has been held to imply that, while no law may be passed whose primary effect is to aid a particular religion or even religion in general, a law may not be struck down simply because the secular effects government seeks to produce . . . happen to be realized in a religious context . . . .[134]

Although the historical correctness has been questioned,[135] the Supreme Court in *Waltz v. Tax Commission*[136] stated: "[F]or the men who wrote the religion clauses . . . the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[137] Clearly the reasonable accommodations rule requires no sponsorship or financial support, the "primary evil" at which the establishment clause was aimed,[138] or active involvement of the government in religion. Interestingly, the most significant cases dealing with the effect of a statute or government policy concern financial aid to education. If awarding state funds to church-related institutions of higher education,[139] and loaning textbooks and providing testing, guidance and other services to parochial schools[140] do not have the primary effect of benefiting religion, then it follows that requiring an employer to accommodate the religious needs of its employees, short of undue hardship, does not primarily benefit religion.

Nor is the effect of reasonable accommodation to impermissibly grant preferential treatment to individuals on the basis of religion. All aspects of religious observance are protected by Title VII, including the rights of the nonreligious. Indeed, the reasonable accommodations rule *requires* that all religious and "anti-religious" beliefs be equally protected from discrimination in employment. Title VII does not favor any one view. Just as an employer must accommodate religious beliefs of a "believer" so must it accommodate the religious beliefs of a "nonbeliever."[141]

Judging the applicability of the third part of the *Nyquist* test, the majority in *Cummins* found that the reasonable accommodations rule avoided excessive governmental entanglement with religion because "the courts will have to determine simply whether the employer ha[d] made a reasonable accommodation and whether an undue hardship [would]

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134. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 839 (1978).
135. *Id.* at 819.
136. 397 U.S. 664 (1970).
137. *Id.* at 668.
138. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
139. Roemer v. Board of Pub. Works of Md., 426 U.S. 736 (1976).
140. Wolman v. Walter, 433 U.S. 229 (1977).
141. *See* Young v. Southwestern Sav. & Loan Ass'n, 509 F. 2d 140 (5th Cir. 1975).

result. These issues [would] be considered in the labor relations context, and their resolution certainly does not necessitate any government entanglement with religion."[142] Reasonable accommodation involves no "excessive entanglement" or government in religion. The freedom to practice one's religion is not absolute;[143] thus, government does involve itself in some regulation impinging on religious interests and some entanglement of government with religion results. The inquiry required for reasonable accommodation, however, is essentially the same as that required in *Sherbert*.[144] The courts will simply have to make pragmatic determinations of reasonableness and undue hardship to insure compliance with the law. In fact, contact between government and religious organizations would only occur in the courtroom, if at all. The sincerity of belief will seldom be in issue[145] but even if it is, the Court has on several occasions had to determine the sincerity of a believer.[146] Thus the reasonable accommodations rule involves no excessive entanglement of government in religion.

The primary purpose of the reasonable accommodations rule is to guarantee equal employment opportunity to religious observers. It fosters job security by assuring that employers accommodate employees' religious beliefs unless the accommodation would produce undue hardship. Finally, there is no more entanglement than has already been held permissible in *Sherbert*. The reasonable accommodations rule, therefore, meets all requirements of the *Nyquist* test. Employment is critically important to most people. It is difficult to accept that the Constitution forbids protection of a Sabbatarian who would otherwise be forced to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[147]

IV. CONCLUSION

In *Hardison*, the United States Supreme Court has dealt a decisive blow to this nation's policy of hospitality to diverse religious beliefs. The Court has held that under Title VII an employer need make no accommodation to the religious needs of its employees if it would result in more than a *de minimis* cost to the employer's business. Thus, the employer is

142. 516 F.2d at 553-54. Because the rule failed under the first two *Nyquist* standards, the dissent found it unnecessary to consider the question of excessive entanglement. *Id.* at 556 (Celebrezze, J., dissenting).

143. Prince v. Massachusetts, 321 U.S. 158 (1944); Reynolds v. United States, 98 U.S. 187 (1878).

144. *See* text accompanying notes 105-09 *supra*.

145. Cummins v. Parker Seal Co., 516 F.2d 554 (6th Cir. 1975), *aff'd mem. by an equally divided Court*, 429 U.S. 65 (1976), *rev'd on rehearing*, 433 U.S. 903 (1977); Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975).

146. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

147. Sherbert v. Verner, 374 U.S. 398, 404 (1963).

compelled to make only the most minor accommodations of an employee's religious needs.

This decision is regrettable. First, the language of the reasonable accommodations rule itself indicates that more than *de minimis* cost is required before the employer is absolved of its duty to accommodate. The rule uses the term undue hardship. Undue hardship and "more than a *de minimis*" cost are not equivalent measurements, yet the Court in this case has made them equal. Second, the Court ignored the legislative history of the 1972 amendment to Title VII which indicated congressional intent that Sabbatarians be allowed to observe their Sabbath without sacrificing their jobs. Third, by stating that an employer need not contravene a collective bargaining agreement to accommodate an employee's religious needs, the Court's holding permits a collective bargaining agreement to define the extent of the employer's duty to make such accommodations.

Although the Court did not address the issue, it appears that accommodation of a Sabbatarian's need to observe the Sabbath would pass constitutional muster. The purpose of the reasonable accommodations rule, like Title VII as a whole, was to prevent discrimination in employment. Its primary effect is neither to advance nor inhibit religion but rather to protect job security. Nor does the rule excessively entangle government in religion; courts deciding cases that concern the rule would have only to determine whether an undue hardship would result. The reasonable accommodations rule, therefore, meets all the requirements of the *Nyquist* test.

This nation has prided itself on its receptivity to individual beliefs and practices. Religious freedom has been given high priority and respect since the nation's inception. By enacting the reasonable accommodations rule, Congress intended to insure that Saturday Sabbatarians could faithfully practice their religion free from employment discrimination. The *Hardison* decision effectively precludes accommodation of Saturday Sabbatarians if it would entail temporary payment of overtime wages to another employee, lost efficiency in the business operation, or violation of a collective bargaining agreement.[148] Since this result appears to conflict with congressional intent, perhaps Congress will take the initiative and, consistent with the first amendment, directly overrule *Hardison*.

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148. Indeed, since *Hardison*, 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) was vacated and remanded, 433 U.S. 903 (1977) and the following cases have addressed the issue and either found undue hardship or remanded for determination in light of *Hardison*: Jordon v. North Carolina Nat'l Bank, 565 F.2d 72 (4th Cir. 1977); Ward v. Allegheny Ludlum Steel Corp., 560 F.2d 579 (3rd Cir. 1977); Huston v. Local 93, U.A.W., 559 F.2d 477 (8th Cir. 1977); Olin Corp. v. Fair Employment Prac. Comm'n, 67 Ill. 2d 466, 367 N.E.2d 1267 (1977).