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Civil Rights-Religious Discrimination in Employment- Title VII of the Civil Rights Act Requires Reasonable Accommodation of Employee Religious Beliefs by Employer Despite Conflicting Lawful Agency Shop Provision-Cooper v. General Dynamics

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CASE NOTES

Civil Rights—RELIGIOUS DISCRIMINATION IN EMPLOYMENT—TITLE VII OF THE CIVIL RIGHTS ACT REQUIRES REASONABLE ACCOMMODATION OF EMPLOYEE RELIGIOUS BELIEF BY EMPLOYER DESPITE CONFLICTING LAWFUL AGENCY SHOP PROVISION—*Cooper v. General Dynamics*, 533 F.2d 163 (5th Cir. 1976), *petition for cert. filed sub nom. Machinists & Aerospace Workers v. Hopkins*, 45 U.S.L.W. 3314 (U.S. Oct. 18, 1976) (No. 76-537).

In 1972, General Dynamics and the International Association of Machinists and Aerospace Workers, AFL-CIO, Local No. 776 (the union), incorporated an agency shop provision into their collective bargaining agreement.[1] Plaintiff employees, all Seventh-day Adventists, objected on religious grounds to the requirement of financially supporting the union.[2] Under threat of discharge for their refusal to pay union dues, they brought an action against their employer and the union for injunctive relief. Plaintiffs contended that General Dynamics and the union had discriminated against them because of their religion in violation of title VII of the Civil Rights Act of 1964 (title VII).[3] The defendants took the position that the agency shop provision contained in the collective bargaining agreement was authorized under the

1. An "agency shop" is a union security agreement that does not obligate an employee to become a member of a labor union or to participate in any union activities but only requires that he pay an agency fee, usually the equivalent of union dues, in return for the collective bargaining services that the union renders on behalf of the employees. Cooper v. General Dynamics, 378 F. Supp. 1258 n.1 (N.D. Tex. 1974), *rev'd*, 533 F.2d 163 (5th Cir. 1976), *petition for cert. filed sub nom.* Machinists & Aerospace Workers v. Hopkins, 45 U.S.L.W. 3314 (U.S. Oct. 18, 1976) (No. 76-537). "Union shops" and "closed shops" are other types of union security agreements.

2. 378 F. Supp. at 1260. The Seventh-day Adventists, while in sympathy with the basic goals of organized labor, such as proper wages, proper hours, and proper working conditions, place great value upon personal liberty of conscience, believing that no person could enjoy or exercise freedom of conscience when bound to membership in any labor union involving men of various convictions being associated together and mutually required to adhere to policies, comply with decisions, and abide by restrictions that may be contrary to individual conscience. It is well known that occasions arise when, failing to obtain these objectives through the peaceful processes of negotiation, mediation, and arbitration, measures of coercion are restored to, taking the form of boycotts, strikes, picketings, and similar methods of enforcing their demands. Being under the scriptural injunction as Christians that "the servant of the Lord must not strive," and that he is to "do violence to no man," Seventh-day Adventists believe sincerely they must stand apart from a relationship that requires participation in such procedures. Gray v. Gulf, M. & O.R.R., 429 F.2d 1064, 1066 n.4 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).

3. 42 U.S.C. §§ 2000e-2000e-17 (1970 & Supp. V 1975).

National Labor Relations Act (NLRA)[4] and therefore could be lawfully enforced notwithstanding the plaintiffs' religious beliefs.[5]

The United States District Court for the Northern District of Texas entered judgment for the defendants, finding that although plaintiffs were sincere in their religious convictions and committed to their church's opposition to membership in, or support of, labor unions, such beliefs were "specious." In the court's view, there was "no conflict between the plaintiffs' religious beliefs and the union security agreement."[6]

The United States Court of Appeals for the Fifth Circuit reversed the lower court and found that plaintiffs' beliefs were protected under section 701(j) of the Civil Rights Act of 1964.[7] The case was remanded for a determination of whether the plaintiffs' religious beliefs could be reasonably accommodated by the employer and the union without undue hardship to either.[8]

I. Background

A. History of the Conflict

The conflict between the free exercise of religion and labor's right to organize and establish union security provisions originated soon after Congress amended the Railway Labor Act in 1951.[9] The constitutionality of the Railway Labor Act provision that authorized union shops[10] was quickly challenged[11] in *Otten*

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4. National Labor Relations Act § 8(a) (3), 29 U.S.C. § 158(a) (3) (1970).

5. Brief for Appellees, Machinists District Lodge 776 at 9-29; Brief for Appellee, General Dynamics at 4-5.

6. 378 F. Supp. at 1262.

7. 533 F.2d at 167-69. "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Civil Rights Act of 1964 § 701(j), 42 U.S.C. § 2000e(j) (Supp. V 1975).

8. 533 F.2d at 165.

9. Pub. L. No. 914, ch. 1220, 64 Stat. 1238 (1951).

10. The union shop provision of the Railway Labor Act provides:

> Notwithstanding any other provisions of this chapter, . . . any carrier or carriers . . . and a labor organization or labor organizations duly designated and authorized to represent employees . . . shall be permitted—
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> (a) to make agreements, requiring, as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class . . . .
>
> (b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, or

v. Baltimore & Ohio Railroad,[12] where a railroad employee brought an action to enjoin the railroad from discharging him on grounds of his refusal to join the union because of his religious beliefs.[13] Affirming the denial of injunction relief, Judge Learned Hand, writing for the United States Court of Appeals for the Second Circuit, recognized that conflict between religious principles and labor policies was inevitable. Although not explicit in the opinion, it appears that Judge Hand found that giving unions additional bargaining power by means of the union shop outweighed the need to protect plaintiff's conscientious "idiosyncrasies."[14]

The Supreme Court later reiterated the validity of the Railway Labor Act's union shop provision in *Railway Employee's Department AFL v. Hanson.*[15] There, the Court recognized that the aim of the legislation requiring uniform union membership was to enhance peaceful labor relations and to require a fair sharing of the costs of collective bargaining by those who benefited therefrom.[16] In balancing the burden upon dissenting employees' constitutional rights of freedom of association and due process against the benefits accruing through the union shop, the Court stated that "[i]ndustrial peace along the arteries of commerce" justified the legislation.[17]

In *International Association of Machinists v. Street,*[18] however, the Supreme Court took a significant step toward recognizing individual employee rights by holding that the provision of the Railway Labor Act making payment of union dues and

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> any periodic dues, initiation fees, and assessments . . . uniformly required as a condition of acquiring or retaining membership . . . .

Railway Labor Act § 2 Eleventh, 45 U.S.C. § 152 Eleventh (1970).

11. *See* Note, *The "Free Exercise" Clause of the First Amendment to the United States Constitution is No Defense to a Union Shop Agreement Allowed Under the Railway Labor Act,* 8 HOUS. L. REV. 387 (1970).

12. 205 F.2d 58 (2d Cir. 1953).

13. *Id.*

14. Judge Hand stated:

> The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life . . . .

Id. at 61 (footnote omitted); *accord,* Wicks v. Southern Pac. Co., 231 F.2d 130 (9th Cir.), *cert. denied,* 351 U.S. 946 (1956).

15. 351 U.S. 225 (1956).

16. *Id.* at 231; *see* 96 CONG. REC. 16,279 (1950) (remarks of Sen. Hill).

17. 351 U.S. at 233.

18. 367 U.S. 740 (1961).

fees mandatory was not absolute. Street, a union member, brought an action in Georgia state court alleging that the money he was compelled to pay to the union in order to retain his job was being used in substantial part to finance the political campaigns of candidates whom he opposed for federal and state offices and "to promote the propagation of political and economic doctrines, concepts and ideologies with which he disagreed."[19] The Supreme Court found that the mandatory union dues and fees provision of the Railway Labor Act did not authorize the union to make such use of the funds exacted from employees.[20] While the Court upheld the mandatory dues requirement, it prohibited the union from spending an employee's involuntary contributions for political causes that he opposed.[21]

Subsequent cases of alleged religious discrimination[22] generally followed the Supreme Court's holding in *Hanson*[23] that the requirement of financial support of the collective bargaining agency by all who received the benefits was within the power of Congress and did not violate the first amendment.[24] In *Sherbert v. Verner*,[25] however, the Supreme Court determined that in instances of first amendment infringement only a compelling state interest could justify an "incidental burden" on the free exercise of religion.[26] The Sabbatarian appellant in *Sherbert*, after having been discharged for her refusal to work on Saturdays and having rejected other jobs requiring Saturday work, was deemed ineligible for unemployment compensation by the South Carolina Employment Security Commission because she failed to accept "suitable work when offered."[27] The Court found that the appellant's ineligibility for benefits stemmed directly from the practice of her religion and that she was 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."[28] Finding an absence of any compelling state interest to justify such a choice, the Court held

19. *Id.* at 744.
20. *Id.* at 768-70.
21. *Id.*
22. *See, e.g.*, Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971).
23. 351 U.S. 225 (1956).
24. *Id.* at 238.
25. 374 U.S. 398 (1963).
26. *Id.* at 403.
27. *Id.* at 399-401.
28. *Id.* at 404.

the infringement of her first amendment right to the free exercise of religion to be unlawful.[29]

B. The Conflict Under the Civil Rights Act of 1964

In an effort to eliminate discrimination in employment, Congress enacted title VII of the Civil Rights Act of 1964.[30] Title VII, along with Equal Employment Opportunity Commission[31] (EEOC) Regulations issued in 1966 and 1967 requiring an employer to make a reasonable effort to accomodate his employees' religious beliefs,[32] evidenced increased governmental concern for individual employee rights. In contrast, congressional authorization of the union shop in the private employment sector, as evidenced in the NLRA,[33] exhibited strong congressional support for the principle of solidarity among union members.[34] Cases involving conflicting religious and labor interests brought after passage of the EEOC Regulations and the NLRA failed to resolve the

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29. *Id.* at 406-10. The Court stated that "in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.'" *Id.* at 406 (footnote omitted).

30. Ch. 352, tit. VII, 78 Stat. 253 (codified in scattered sections of 42 U.S.C.).

31. The Equal Employment Opportunity Commission was created by the 1964 Civil Rights Act, 42 U.S.C. § 2000e-4 (1970 & Supp. V 1975) to deal with problems of discrimination in employment and to assist in enforcement of the provisions of title VII. Title VII gives one the opportunity to obtain a legal resolution of his rights when the requirements of his religion conflict with those of his job. 42 U.S.C. §§ 2000e-2, -5 (1970 & Supp. V 1975).

32. The 1967 EEOC Guidelines on Discrimination Because of Religion provide, *inter alia:*

> (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 accomodations 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 and employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accomodations to the religious needs of the employee unreasonable.

29 C.F.R. § 1605.1 (1975). Confusion about the scope of the accomodation requirement exists in part due to the apparent limitation to Sabbath work situations. Indeed, the title of the regulation section is "Observance of the Sabbath and other religious holidays." *Id.*

33. National Labor Relations Act § 8(a) (3), 29 U.S.C. § 158 (a) (3) (1970).

34. The union shop provision of the NLRA provides: "Nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . ." *Id.*

conflict satisfactorily and resulted primarily in increased confusion.

In *Linscott v. Millers Falls Co.*,[35] for example, the United States Court of Appeals for the First Circuit balanced the governmental interest in requiring a fair sharing of collective bargaining expenses against plaintiff's religious beliefs, upon which his refusal to pay union initiation fees and dues was based,[36] and determined that plaintiff's religious beliefs had to yield to the congressionally approved concept of the union shop.[37] The court's cursory treatment of plaintiff's arguments, however, resulted in a judgment based on the bare conclusion that the individual's interest seemed "less substantial" than the union's interest.[38]

Subsequent religious discrimination cases based on alleged violations of the first amendment have failed to resolve the conflict, since the courts have generally refused to consider the EEOC regulations that required the employer to make efforts to accommodate an employee's religious beliefs.[39] The refusal of the courts to apply EEOC regulations may have been a result of Railway Labor Act decisions almost unanimously considering union interests to outweigh whatever restrictions were placed on religious beliefs.[40]

Two federal district court decisions, however, have departed from the general trend of ignoring the EEOC accommodation requirement. In *Jackson v. Veri Fresh Poultry, Inc.*[41] and *Dewey v. Reynolds Metals Co.*,[42] the courts applied the EEOC accommodation regulations and found that the plaintiffs in each instance had been subjected to unlawful discharge because of their religious beliefs.

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35. 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971).

36. *Id.* at 17.

37. *Id.* at 18. The panel stated: "[I]n weighing the burden which falls upon the plaintiff if she would avoid offending her religious convictions, as against the affront which sustaining her position would offer to the Congressionally supported principal of the union shop, it is plaintiff who must suffer." *Id.*

38. *Id.*; *see* 6 SUFFOLK U.L. REV. 291, 297-98 (1972).

39. *See, e.g.*, Hammond v. United Papermakers & Paperworkers Union, 462 F.2d 174 (6th Cir.), *cert. denied*, 409 U.S. 1028 (1972); Gray v. Gulf, M. & O.R.R., 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971); Comment, *The "Free Exercise" Clause of the First Amendment to the United States Constitition is No Defense to a Union Shop Agreement Allowed Under the Railway Labor Act*, 8 HOUS. L. REV. 387 (1970); Comment, *Religious Observances and Discrimination in Employment*, 22 SYRACUSE L. REV. 1019, 1030 (1971).

40. *See* notes 9-17 and accompanying text *supra*.

41. 304 F. Supp. 1276 (E.D. La. 1969).

42. 300 F. Supp. 709 (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).

C. *Effect of the Equal Employment Opportunity Act of 1972*

In 1972 Congress officially enacted the Equal Employment Opportunity Act (EEOA)[43] in an effort to strengthen the antidiscrimination provisions of title VII.[44] While the House of Representatives did not raise the matter of religious discrimination, the Senate offered two amendments,[45] one of which was West Virginia Senator Jennings Randolph's definition of religion.[46] Although the Senator proposed his amendment to protect Sabbatarian employees who had been discharged for their refusal to work on Saturdays, the broad language of the amendment suggests that Senator Randolph may have intended the application to cover other religious beliefs.[47] Following the Senator's remarks, he included in the record the texts of two federal court decisions.[48] Each decision rejected a Sabbatarian plaintiff's claim that the employer was in violation of the Civil Rights Act of 1964 because the employer had failed to accommodate the plaintiff's religious practice. Both courts also rejected the 1967 EEOC regulations requiring an employer to accommodate employees' religious beliefs.[49] The courts argued that Congress did not intend that reasonable accommodations be required, and therefore failure to do so was not contrary to the Act.[50] It is clear that Senator Ran-

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43. Pub. L. No. 92-261, 86 Stat. 103 (1972).

44. Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 824-25 (1972).

45. *Id.* at 858-61.

46. Senator Randolph offered the following as an amendment to the EEOA: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or propective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 118 CONG. REC. 705-06 (1972) (remarks of Sen. Randolph). The amendment is codified at 42 U.S.C. § 2000e(j) (Supp. V 1975).

47. 118 CONG. REC. 705-06 (1972).

48. *Id.* at 706-14. The cases to which Senator Randolph referred were Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971), and Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972).

49. Dewey v. Reynolds Metal Co., 429 F.2d 324, 328-31 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971); Riley v. Bendix Corp., 330 F. Supp. 583, 588-89 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972).

50. Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971); Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972). *See generally* Note, *Is Title VII's Reasonable Accomodations Requirement a Law "Respecting an Establishment of Religion"?*, 51 NOTRE DAME LAW. 481, 485-86 (1976).

The Randolph amendment's reasonable accomodation requirement has been challenged as violative of the establishment clause of the first amendment with disparate results. The United States Court of Appeals for the Sixth Circuit in Cummins v. Parker

dolph proposed his amendment precisely to show that Congress intended to place on employers the responsibility of accommodating employee religious beliefs.[51]

The passage of the amendment had a marked effect upon the courts. For instance, in *Riley v. Bendix Corp.*,[52] the United States Court of Appeals for the Fifth Circuit held that the 1972 amendment fully validated the 1967 EEOC regulations, and since the defendant employer had not demonstrated inability to accommodate Riley's religious practice without undue hardship to his business, Riley's discharge was unlawful under title VII.[53]

In subsequent cases the decisions generally centered on the scope of the accommodation requirement and the interpretation of what consituted undue hardship to the employer's business. In many cases the courts found that there had been little or no effort made to accommodate the employees' religious beliefs and practices.[54] Some courts focused on whether a transfer to another job was reasonable accommodation.[55] Others found that to require accommodation would have caused undue hardship to the employer's business.[56] The United States Court of Appeals for the

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Seal Co., 516 F.2d 544 (1975), *aff'd by an equally divided court*, 97 S. Ct. 342 (1976), found that the amendment had a valid secular purpose and that its effect was to inhibit discrimination, not advance religion. *Id.* at 553. On the other hand, the United States District Court for the Central District of California recently held that the amendment was a "law respecting the establishment of religion" and therefore invalid under the first amendment. Yott v. North Am. Rockwell Corp., 45 U.S.L.W. 2367 (Feb. 8, 1977).

51. *See* Note, *Is Title VII's Reasonable Accomodations Requirement a Law "Respecting an Establishment of Religion"?*, 51 NOTRE DAME LAW. 481, 485-86 (1976).

52. 464 F.2d 1113 (5th Cir. 1972).

53. *Id.* at 1116-18.

54. *See, e.g.*, Weitkenaut v. Goodyear Tire & Rubber Co., 381 F. Supp. 1284 (D. Vt. 1974); Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937 (M.D. Ala. 1974); Claybaugh v. Pacific Nw. Bell Tel. Co., 335 F. Supp. 1 (D. Ore. 1973); Liberty Trucking Co. v. Wisconsin Dep't of Indus., Labor & Human Relations, 10 Empl. Prac. Dec. 6258 (Wis. Cir. Ct. Sept. 24, 1975).

55. *See, e.g.*, Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1976); Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382 (D. Neb. 1974); Ward v. Allegheny Ludlum Steel Corp., 10 Empl. Prac. Dec. 5332 (W.D. Pa. July 1, 1975); Drum v. Ware, 7 Empl. Prac. Dec. 7161 (W.D.N.C. Mar. 8, 1974).

56. "Undue hardship" has been found primarily in two categories of cases: (1) where an employer has a small number of employees, making scheduling changes impossible; *e.g.*, Johnson v. U.S. Postal Serv., 364 F. Supp. 37 (N.D. Fla. 1973), *aff'd*, 497 F.2d 128 (5th Cir. 1974); and (2) in job situations characterized as unique. *E.g.*, Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382 (D. Neb. 1974); Hardison v. Trans World Airlines, 375 F. Supp. 877 (W.D. Mo. 1974), *aff'd in part, rev'd in part*, 527 F.2d 33 (8th Cir. 1975), *cert. granted*, 97 S. Ct. 381 (1976); Kettel v. Johnson & Johnson, 337 F. Supp. 892 (E.D. Ark. 1972). *See* 62 VA. L. REV. 237 (1976). *But see*, Reid v. Memphis Publ. Co., 369 F. Supp. 684 (W.D. Tenn. 1973), *aff'd*, 521 F.2d 512 (6th Cir. 1975), *cert. denied*, 97 S.Ct. 394 (1976); Scott v. Southern Cal. Gas Co., 8 Empl. Prac. Dec. 5076 (C.D. Cal. June 15, 1973).

Sixth Circuit, however, recently intimated that only "chaotic personnel problems" could constitute business hardship sufficient to relieve an employer of his accommodation duty.[57]

Despite the recent spate of cases that have begun to define the parameters of the accommodation requirement, uncertainty remains in instances where employers have claimed that a union contract would be violated by a requirement to accommodate the religious beliefs of employees.[58] Initially the EEOC admitted that discharging an employee for refusing to pay union dues was not prohibited under federal law even though the employee's conduct was based on sincerely held religious beliefs.[59] In a 1974 decision, however, the EEOC reversed its position,[60] which it clarified in a 1975 report:

> An employer must make reasonable accommodations for employees whose religion may include observances, practices and beliefs, . . . which differ from the employer's requirements concerning standards, schedules, or other business-related employment conditions. . . .
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> . . . .
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> *A contract between an employer and a union will not serve as a defense by the union to charges of unlawful discrimination.* This is true whether the contract specifically provides for an unlawful practice or omits any procedure for processing grievances against an unlawful practice. *If an employer . . . is required under law . . . to revise its union contract in order to comply with the law . . . then the union involved is expected to cooperate in the revision.*[61]

It is thus clear that the EEOC does not recognize union-employer contractual agreements as valid defenses to a charge of religious discrimination brought under title VII.

The United States' Court of Appeals for the Ninth Circuit recently addressed a situation where a plaintiff Seventh-day Adventist refused to join a union or to pay any dues or their equiva-

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57. Cummins v. Parker Seal Co., 516 F.2d 544, 550 (6th Cir. 1975), *aff'd by an equally divided court*, 97 S. Ct. 342 (1976). *See* 54 TEX. L. REV. 616 (1976).

58. *See, e.g.*, Hardison v. Trans World Airlines, 375 F. Supp. 877 (W.D. Mo. 1974), *aff'd in part, rev'd in part*, 527 F.2d 33 (8th Cir. 1975), *cert. granted*, 97 S. Ct. 381 (1976); Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937 (M.D. Ala. 1974); 54 TEX. L. REV. 616, 621 (1976).

59. *See* [1976] 1 EMPL. PRAC. GUIDE (CCH) ¶ 237.

60. EEOC Dec. No. 74-107 (Apr. 2, 1974), [1974] 2 EMPL. PRAC. GUIDE (CCH) ¶ 6430.

61. 81 LABOR LAW REPORT ¶¶ 215.2, 335 (1975), GUIDEBOOK TO FAIR EMPLOYMENT PRACTICES (1975) (emphasis added).

lent to the union because of his religious beliefs.[62] Although the court remanded the case for a determination of whether the employer and union could accommodate plaintiff's religious needs, it instructed the lower court that the employee's discrimination claim should fail if a "suggested accommodation would impose undue hardship on the Union or on the employer's business."[63] The court seemed to imply that if any proposed accomodation of the appellant's religious beliefs would work an undue hardship on the employer and the union, the employee could be fired.[64]

D. The Health Care Institution Act of 1974

In 1974 Congress legislated an absolute exemption to the union security agreement provision of the NLRA. Employees of health care institutions who have bona fide religious objections to joining or financially supporting any labor organization may, in lieu of periodic dues and fees, pay equal sums to a nonreligious charitable fund.[65] In this legislation Congress went beyond the Randolph amendment[66] to provide an absolute exemption to union membership or support that is not subject to the undue hardship qualification of the amendment.

It is clear that union security agreements can be valid and that first amendment rights may yield to such an agreement.[67] However, the Supreme Court's admission in *International Association of Machinists v. Street*[68] that the union shop requirements

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62. Yott v. North Am. Rockwell Corp., 501 F.2d 398 (9th Cir. 1974).

63. *Id.* at 403.

64. *Id.*; *see* Note, *Religious Discrimination in Employment: The 1972 Amendment—A Perspective*, 3 FORDHAM URB. L.J. 327, 343-44 (1975).

65. The health care institution exemption provides:

> Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organizations as a condition of employment; except that such an employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund . . . chosen by such an employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee.

29 U.S.C. § 169 (Supp. V 1975).

66. Civil Rights Act of 1964, § 701(j), 42 U.S.C. § 2000e(j) (Supp. V 1975). *See* notes 43-47 and accompany text *supra*.

67. *See* notes 9-38 and accompanying text *supra*; [1976] 1 EMPL. PRAC. GUIDE (CCH) ¶ 237.

68. 367 U.S. 740 (1961).

are not absolutely protected and the subsequent legislation of the Civil Rights Act, the Equal Employment Opportunity Act, and the Health Care Institution Act all evidence growing judicial and legislative concern for individual religious freedom in the employment sector.

II. INSTANT CASE

The United States Court of Appeals for the Fifth Circuit in the instant case had to examine the scope of the civil rights legislation to determine if relief from the union shop provision was appropriate. The prime issue was whether the Randolph amendment, section 701(j) of the Civil Rights Act,[69] exempted the plaintiffs from the union financial support requirement within the agency shop agreement.

In reversing the lower court's decision for the defendants,[70] the court initially recognized that it was error for the district court to have evaluated the logic or validity of appellants' religious beliefs or practices.[71] Judges Gee and Brown rejected the arguments for a narrow interpretation of the statute requiring accommodation of religious beliefs. They looked to the express language of the provision and found that "all forms and aspects of religion, however eccentric,[72] are protected except those that cannot be, in practice and with honest effort, reconciled with a businesslike operation."[73] The court reviewed the history of the provisions[74] and regulations[75] barring religious discrimination in

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69. 42 U.S.C. § 2000e(j) (Supp. V 1975). *See* notes 43-47 and accompanying text *supra.*

70. Cooper v. General Dynamics, 378 F. Supp. 1258 (N.D. Tex. 1974), *rev'd,* 533 F.2d 163 (5th Cir. 1976), *petition for cert. filed sub nom.* Machinists & Aerospace Workers v. Hopkins, 45 U.S.L.W. 3314 (U.S. Oct. 18, 1976) (No. 76-537).

71. 533 F.2d at 166 n.4. Courts are not free to evaluate the logic or validity of religious beliefs. United States v. Seeger, 380 U.S. 163, 184-85 (1965).

72. This language may well represent the kind of judicial overzealousness that has been criticized. *E.g.,* 54 TEX. L. REV. 616, 616 (1976).

73. 533 F.2d at 168-69.

74. The Civil Rights Act of 1964 states in pertinent 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 or employment, because of such individual's . . . religion . . . ; 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 . . . religion . . . .
>
> (b) It shall be unlawful employment practice for an employment agency to fail or refuse

employment and concluded that the broad language of the Randolph amendment resulted in a duty of accommodation.

The union argued that section 701(j) on its face only applied to employers. Further, it was intended to apply only to Sabbath worship, and could not be viewed as an exemption to the union shop provision under section 8(a)(3) of the NLRA, due to that section's "supremacy" clause:

> Nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . .[76]

The union also argued that when Congress intended to provide such an exemption, it did so by a narrow amendment to the NLRA itself—the health care institution exemption.[77]

The majority examined the proviso of section 8(a)(3) and determined that it was not a "supremacy" clause, as argued by the union, but rather was intended to function within the NLRA itself.[78] The majority viewed Congress' recent passage of the

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to refer for employment, or otherwise to discriminate against, any individual because of his . . . religion . . . or to classify or refer for employment any individual on the basis of his . . . religion . . . .

(c) It shall be an unlawful employment practice for a labor organization (1) . . . to discriminate against any individual because of his . . . religion . . . (2) to limit, segregate, or classify its membership, or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's . . . religion . . . or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2(a)-(c) (1970 & Supp. V 1975).

75. The EEOC Religious Discrimination Guidelines provide in pertinent part:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by § 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. . . .
>
> (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.

29 C.F.R. § 1605.1 (1975).

76. National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970).

77. 29 U.S.C. § 169 (Supp. V 1975). *See* notes 65-66 and accompanying text *supra*.

78. 533 F.2d at 169. Section 7 of the National Labor Relations Act gives employees the right to engage in concerted activity or to refrain from engaging in such activity, except

health care institution exemption,[79] without undertaking to amend section 8(a)(3) as a condition precedent, as indicating that Congress did not intend for the proviso to be a true "supremacy" clause that "for all time lifts section 8(a)(3) above the general level of the United States Code to a position comparable to the Constitution. . . ."[80]

The panel differed, however, as to the scope of the accommodation duty and whether the duty should be placed on the union as well as the employer.[81] Judge Brown, in a special concurrng opinion, joined with Judge Rives in holding that upon remand the lower court had to determine whether the union as well as the employer was faced with undue hardship by virture of the accommodation requirement.[82]

While agreeing with Judge Brown on the undue hardship issue, Judge Rives dissented from the majority's extension of the accommodation duty to include an exemption from paying union dues under the agency shop agreement. He opined that the legislative history of the Randolph amendment[83] did not evidence any intention of amending the union shop provision to exempt employees with religious objections from joining a labor organization or paying a dues equivalence. Since Congress had repeatedly rejected efforts to provide exceptions to the union security provision for employees with conflicting religious convictions,[84] and yet unanimously approved section 701(j) as an amendment to the

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"to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)." The proviso to section 8(a)(3) of the NLRA carves out an exception to section 8(a)(1), (2), and (3) of the NLRA by allowing an employer and a union to contract to discriminate in regard to union activity and terms and conditions of employment. Without the proviso to section 8(a)(3), a union security provision in a collective bargaining agreement would, on its face, violate section 8(a)(1) by interfering with, restraining, or coercing employees; would violate section 8(a)(2) prohibiting an employer from "contributing financial or other support" to a union; and would violate section 8(a)(3) because it is discrimination in regard to the "tenure of employment." Without the proviso the union would be restraining or coercing employees in violation of section 8(b)(1)(A) and would also be causing an employer to discriminate in violation of section 8(b)(2). Brief for Appellants at 18-19.

79. 29 U.S.C. § 169 (Supp. V 1975).

80. 533 F.2d at 169.

81. Judge Gee argued that the literal language of the statute required only employers to accommodate the reasonable religious beliefs of employees unless undue hardship was proved. Judges Brown and Rives, however, formed a majority on this issue and determined that upon remand, the union should be included with the employer in resolving the undue hardship and accommodation issues. *Id.* at 170-71, 175.

82. *Id.*

83. 118 CONG. REC. 705-731 (1972).

84. Yott v. North Am. Rockwell Corp., 501 F.2d 398, 400 n.4 (9th Cir. 1974).

1964 Civil Rights Act,[85] the dissent reasoned that Congress could not have intended for that section to apply to a refusal on religious grounds to support labor unions.[86]Judge Rives agreed with the union that when Congress extended coverage of the NLRA to employees of nonprofit hospitals, an express provision amending section 8(a)(3) was adopted.[87] He reasoned that if the 1972 amendment to title VII[88] required employers to accommodate employees' religious convictions against labor unions in all circumstances, there was no need for Congress to have provided the exemption within the Health Care Institution Act of 1974. Under this reasoning, since Congress expressly passed the exemption, it must not have believed that title VII already provided a possible exemption to the agency shop provision of the NLRA for religious beliefs.[89]

III. Analysis

The principal conflict between the majority and dissent in the instant case was whether the broad language of the Randolph amendment protected appellants' refusal to support the union financially when the refusal was based on religious gounds.[90] In attempting to resolve the conflict, the majority and dissent addressed several issues: the congressional intent of the Randolph amendment; the significance of the proviso to section 8(a)(3) of the NLRA; and the impact of the health care institution exemption on section 8(a)(3). Analysis of the treatment of these arguments suggests that the majority reached a correct resolution.

A. Congressional Intent of the Randolph Amendment

Although Judge Rives' dissent was based on the thesis that Congress did not intend for section 701(j) to exempt employees with opposing religious beliefs from union support, the legislative history of the Randolph amendment yields little insight into what Congress intended as the scope of the act.[91] While Congress had

85. 118 Cong. Rec. 731 (1972).

86. 533 F.2d at 175-77.

87. 29 U.S.C. § 169 (Supp. V 1975). *See* notes 65-66 and accompanying text *supra*.

88. Civil Rights Act of 1964, § 701(j), 42 U.S.C. § 2000e(j) (Supp. V 1975).

89. 533 F.2d at 176.

90. *Id.*

91. The legislative history reveals only that Senator Randolph intended for the amendment to at least protect Sabbatarian employees from being discharged for their

repeatedly rejected efforts to provide exceptions to union support in order to accommodate religious principles,[92] it unanimously approved the Randolph amendment, which stated that an effort had to be made to accommodate employees' religious beliefs and that *all* forms of religious beliefs, practices, and observances were protected.[93]

In light of such attitudes, it is apparent that Congress did not foresee the potential conflict between the amendment and union security agreements. Judge Rives was correct in stating that the legislative history of the amendment does not evidence any indication of amending the union shop provision of the NLRA to exempt employees with conflicting religious beliefs. Such a conclusion stems naturally from the fact that Congress was not considering the amendment's application to the NLRA union shop provision. The legislative history only reveals that the amendment was meant to require employers to accommodate employees' religious beliefs and practices, at least as they related to Sabbath observance. There is no indication that Congress considered refusals for religious reasons to pay union dues. The abbreviated legislative history does not preclude the possibility that Senator Randolph and others may have intended for the amendment to protect religious beliefs and practices beyond Sabbath worship. Several reasons support the application of the statute to religious practices other than Sabbath worship. Certainly the language of the amendment is broad enough to include such beliefs and practices.[94] In addition, there does not appear to be any valid reason for courts to protect only Sabbatarianism and not protect other beliefs that are equally important to an individual's free exercise of religion.[95] Finally, when faced with infringements of first amendment religious beliefs and practices, courts ought to extend protection—especially where the statutory language is broad enough to do so.

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refusal to work on Saturdays. 118 CONG. REC. 705-31 (1972) (remarks of Sen. Randolph). The only other indication of congressional intent is within the broad language of the amendment itself, protecting "all aspects of religious observances and practice, as well as belief . . . ." Civil Rights Act of 1964, § 701(j), 42 U.S.C. § 2000e(j) (Supp. V 1975).

92. *See* Note 84 and accompanying text *supra*.

93. Civil Rights Act of 1964, § 701(j), 42 U.S.C. § 2000e(j) (Supp. V 1975).

94. The language of the amendment expressly states that "The term 'religion' includes all aspects of religious observances and practice, as well as belief . . . ." 42 U.S.C. § 2000e(j) (Supp. V 1975). The amendment was unanimously approved. 118 CONG. REC. 731 (1972).

95. *See* note 2 *supra*.

B. Effect of the Health Care Institution Act of 1974

Judges Gee and Brown properly found that the proviso to section 8(a)(3) was not a "supremacy" clause but instead served a necessary function within the NLRA itself. Indeed, a close examination reveals that without the proviso to section 8(a)(3), a union security provision in a collective bargaining agreement would, on its face, violate at least six other sections of the NLRA.[96]

The majority and dissent differed on whether or not Congress specifically amended section 8(a)(3) of the NLRA by enacting the health care institution exemption.[97] When Congress extended coverage of the NLRA to employees of nonprofit hospitals, it is clear, as the dissent points out, that the NLRA was amended.[98] In his dissenting opinion, Judge Rives reasoned that the health care institution exception to the NLRA was superfluous if the Randolph amendment already required an accommodation of an employee's religious convictions opposing union support. Since the exemption was passed, the dissent argued, Congress must not have believed that an exemtption already existed under titleVII.

Such a conclusion, however, does not follow as logically as Judge Rives suggests. The accommodation requirement under title VII is not absolute but rather may be avoided if an employer or union[99] is able to prove that the accommodation causes undue hardship on the conduct of the business. In contrast, the exemption passed by Congress for employees of nonprofit hospitals is absolute. Regardless of whether undue hardship on the conduct of the business is shown, the employees may not be forced to join or financially support the union. The fact that Congress did not mention the 1972 Randolph amendment follows logically from the realization that Congress was not interested in a qualified exemption but rather in an absolute one. Of importance is the fact that the reason Congress was interested in such a blanket exemption from union support was "to protect the beliefs of Seventh Day Adventists operating forty-seven hospitals and nursing homes

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96. *See* note 78 *supra*.

97. 533 F.2d at 169, 176.

98. 533 F.2d at 176. The NLRA was amended by the Health Care Institution Act of 1972, Pub. L. No. 93-360, § 3, 88 Stat. 395-97 (1974).

99. Although the amendment on its face only requires the employer to accommodate his employees' religious beliefs and practices, courts both in Yott v. North Am. Rockwell Corp., 501 F.2d 398 (9th Cir. 1974), and in the instant case have included the union with the employer in the determination of the accommodation and undue hardship issues.

across the country."[100] In view of congressional concern manifested for the religious principles of a large group, it is not unreasonable to infer a similar concern, on a qualified basis, for individuals such as the appellants in the instant case.

C. Mandatory Dues and Undue Hardship

It is understandable that unions generally are not pleased with exceptions to their membership requirements; such exceptions may weaken their bargaining position. On the other hand, religious freedom is expressly protected by the first amendment.

In *Yott v. North American Rockwell Corp.*,[101] the United States Court of Appeals for the Ninth Circuit held that the union and employer had a duty to accommodate the appellant's religious opposition to union financial support.[102] The court intimated, however, that allowing the plaintiff not to pay union dues would meet the test of undue hardship.[103] Thus, the Ninth Circuit's decision merely paid lip service to the accommodation requirement. The court essentially determined that a de minimus inconvenience to a union and employer outweighed an individual's bona fide religious beliefs.

The appellants in the instant case placed a union dues equivalence in trust to be given to a nonreligious charity.[104] This arrangement is similar to that required by Congress under the health care institution exemption.[105] Other employers and unions have similarly permitted employees whose religious objections barred their payment of money to a union to pay an equivalent amount to a charitable organization.[106] In fact, the AFL-CIO officially recommended such a policy to its unions and affiliates in 1965.[107] Under such an arrangement, appellants do not get a "free

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100. Brief for Appellants at 28 (quoting Daily Labor Report No. 106 of the Bureau of National Affairs (May 31, 1974)).

101. 501 F.2d 398 (9th Cir. 1974).

102. *Id.*

103. *Id.* at 403.

104. Brief for Appellants at 7, 8.

105. Health Care Institution Act of 1974, 29 U.S.C. § 169 (Supp. V 1975).

106. Brief for Appellants at 27; *see* Comment, *Religious Observances and Discrimination in Employment*, 22 SYRACUSE L. REV. 1019, 1042-43 (1971).

107. The AFL-CIO urged its union and affiliates to: "(1) Immediately adopt procedures for respecting sincere personal religious convictions as to union membership and activities; and (2) Undertake to insure that this policy is fully and sympathetically implemented by all local unions." Statement of the AFL-CIO Executive Council On Union Membership and Religious Objections, Sept. 20, 1965 (quoted in Brief for Appellants at 23).

ride," and certainly no other employee would be tempted to use claimed religious objections to mask any desire to avoid payment of dues and fees to the union. In light of congressional approval of such a program in the health care institution exemption, and union and judicial approval in other areas, it does not appear that such an arrangement would work an undue hardship on the employer or union.

There can be no question that the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, and the Health Care Institution Act of 1974 all evidence increasing concern for individual religious rights in the employment field. The health care institution exemption especially has extensive ramifications for future instances of refusals for religious reasons to support unions. It represents a sensible compromise between the strong policies supporting both union security provisions and religious freedom. In light of this legislation, the court's application of the Randolph amendment to safeguard appellants' religious beliefs in the instant case is a reasonable extension of congressionally approved protection.