Louisiana Law Review

Volume 46 | Number 6
July 1986

Sabbath Observance and the Workplace: Religion Clause Analysis and Title VII's Reasonable Accomodation Rule

Clare Zerangue

SABBATH OBSERVANCE AND THE WORKPLACE: RELIGION CLAUSE ANALYSIS AND TITLE VII'S REASONABLE ACCOMMODATION RULE

Donald E. Thornton was employed by a Connecticut retail store owned by Caldor, Inc. Following the state legislature's revision of the Sunday closing laws, Caldor required Thornton to work one out of every four Sundays—Thornton's Sabbath. After complying with this requirement for two years, Thornton informed his superiors that he would no longer work on Sunday. The company offered him a choice of transferring to a Massachusetts store that did not require Sunday work and retaining his supervisory position, or remaining at the Connecticut store at a lower salary in a nonsupervisory position which would not require him to work on Sunday. After rejecting these alternatives, Thornton was subsequently demoted to a clerical position in the Connecticut store. He resigned two days after this demotion.[1]

Thornton protested Caldor's actions by filing a grievance with the Connecticut State Board of Mediation and Arbitration, alleging that the company had violated a Connecticut state law which provided: "No person who states that a particular day of week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal."[2] The Board sustained the grievance and ordered the company to reinstate Thornton. The Connecticut trial court affirmed this decision, concluding that the statute did not offend the establishment clause of the first amendment, buth the Connecticut Supreme Court reversed. Upholding the state supreme court's decision, the United States Supreme Court held that the statute, by providing Sabbath observers with an absolute and unqualified right not to work on their chosen Sabbath, violated the establishment clause.[3]

Prior to *Thornton*, the Supreme Court created considerable confusion as to the future of religion clause analysis with its decisions in *Marsh v. Chambers*[4] and *Lynch v. Donnelly*.[5] The Court's desire, in light of

---

1. Thornton v. Caldor, Inc., 105 S. Ct. 2914, 2914-16 (1985).

2. Conn. Gen. Stat. Ann. § 53-303e(b) (West 1985).

3. *Thorton*, 105 S. Ct. at 2916-18 (1985).

4. 463 U.S. 783, 103 S. Ct. 3330 (1983). *Marsh*, decided in the 1982-83 term, held that the Nebraska legislature's chaplaincy practice did not violate the establishment clause. In doing so, the Court did not use traditional establishment clause analysis.

5. 465 U.S. 668, 104 S. Ct. 1355 (1984). *Lynch*, decided in the 1983-84 term, held that a local government did not violate the establishment clause by owning and displaying a creche in its annual Christmas display.

these cases, to clarify its position on religious issues was evident in its docketing of cases for the 1984-85 term.[6] *Thornton* was among several notable first amendment cases decided during this term, and its importance is two-fold. First, it makes clear that, despite the recent tendency of the Court in some cases to de-emphasize traditional establishment clause analysis,[7] it does not intend to abandon the *Lemon* test.[8] In addition, *Thornton*, along with the other religion clause cases decided in the 1984-85 term, has helped clarify the position taken in *Marsh* and *Lynch* in the development of religion clause analysis. In particular, *Thornton* has shed light on the constitutionally permissible scope of religious accommodations in our society as well as in the workplace. Secondly, *Thornton* clarifies lower federal court decisions and gives guidance to those courts in interpreting the provisions of Title VII which impose on employers the obligation to make reasonable accommodations for employees' religious practices.[9] This clarification is especially important because the Court has never ruled on the constitutionality of the Title VII religious accommodation provision. In its interpretation of the Connecticut statute, the Court's discussion of religious accommodation in the workplace is its most substantial commentary on the subject since its 1977 decision in *Trans World Airlines, Inc. v. Hardison.*[10]

Religious Accomodations Prior to Thornton

An understanding of the free exercise and establishment clauses[11] and the tests that have developed in applying them is essential in understanding why the Court held the Connecticut Sabbath law unconstitutional. This understanding is also important to comprehend the role of the religion clauses in defining and limiting the scope of an employer's Title VII obligation to reasonably accommodate employees' religious practices. A review of the jurisprudence reveals four kinds of constitutionally acceptable accommodations: (1) exemptions under the free exercise clause, granted after a balancing of the conflicting interests of

6. Comment, Thornton v. Caldor: Will the Supreme Court Put the Squeeze on Lemon?, 12 Journal of Leg. 96, 100 (1985).

7. Note, Lynch v. Donnelly: Our Christmas Will Be Merry Still, 36 Mercer L. Rev. 409, 420 (1983-84).

8. *Thornton*, 105 S. Ct. at 2917. "To pass constitutional muster under *Lemon* a statute must not only have a secular purpose and not foster excessive entanglement of government with religion, its primary effect must not advance or inhibit religion."

9. 42 U.S.C. 2000e-2, 2000e(j) (1982).

10. 432 U.S. 63, 97 S. Ct. 2264 (1977).

11. U.S. Const. amend. I: *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;* or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (emphasis added).

the individual and of the government; (2) laws upheld under the establishment clause because they confer only incidental benefits to religion; (3) traditional and historical practices with religious elements, which have been upheld under establishment clause challenges; and (4) statutes, upheld under the establishment clause test, which were passed as a response to statutory mandates that unintentionally resulted in an adverse effect on the free exercise of religion. A close examination of these categories and the traditional establishment clause criteria will demonstrate why the statute in *Thornton* failed to pass constitutional muster.

Balancing Interests: The Free Exercise Cases

The first type of constitutional religious accommodation involves only the free exercise clause. In *Cantwell v. Connecticut*,[12] the Court declared that state legislatures, as well as Congress, could not enact laws which would unreasonably deprive an individual of the fundamental right of religious liberty guaranteed by the first amendment.[13] When a fundamental right is at issue, the critical question is what level of scrutiny the Court will apply. Depending on the facts of the case before it, the Court has found itself in different positions on the scale of judicial scrutiny in the area of religious liberty.

In *Braunfeld v. Brown*,[14] the majority of the Court rejected a free exercise challenge to Sunday closing laws raised by orthodox Jewish merchants. The majority made an important distinction between laws designed to promote the general welfare which directly prohibit a religious practice, and laws such as the Sunday closing statutes at issue which made the practice of religion more burdensome and expensive.[15] Chief Justice Warren's opinion left unclear the test to be applied[16] when legislation did not directly prohibit a religious practice, but only resulted in an indirect burden on the exercise of religion. His language, nevertheless, did reveal a reluctance to apply both strict scrutiny and the most deferential rational basis test.[17] Yet, just two years later in *Sherbert*

---

12. 310 U.S. 296, 60 S. Ct. 900 (1940). In *Cantwell*, the Court held that state laws prohibiting the free exercise of religion were forbidden by the fourteenth amendment.

13. Id. at 296, 303, 60 S. Ct. at 900, 903 (1940).

14. 366 U.S. 599, 81 S. Ct. 1144 (1961).

15. Id. at 605, 81 S. Ct. at 1147.

16. Note, General Laws, Neutral Principles and the Free Exercise Clause, 33 Vanderbilt L. Rev. 149, 155 (1980).

17. *Braunfeld*, 366 U.S. at 606, 607, 81 S. Ct. at 1147, 1148.

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature . . . . Of course to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification.

v. Verner,[18] Justice Brennan, examining a state law which imposed only an "indirect" burden on religious freedom, applied strict scrutiny to the legislation, stating that any incidental burden on the free exercise of appellant's religion could only be justified by a "compelling state interest."[19] In *Wisconsin v. Yoder*,[20] the Court retreated from this compelling state interest standard by requiring a "state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[21] Legislation adversely affecting free exercise has even been upheld upon a showing of a rational basis. The Court viewed the incidental, indirect burden on free exercise so slight as to be almost nonexistent in *Johnson v. Robison*.[22] In that case, the Court used the rational basis test to hold that a provision of the Veteran's Readjustment Act of 1966, which denied benefits to conscientious objectors who performed alternative civilian service, did not violate the First Amendment.

The degree of the burden imposed on the fundamental right, whether direct or indirect,[23] determines which standard the court will use. Along this spectrum, the most frequently occurring situation with which the Court has been faced involves state or federal laws, generally applicable to all citizens or to certain classes of people, which indirectly interfere with the practice of an individual's religion. Such is the result when the state's interest in protecting the individual becomes more comprehensive and its concerns overlap with religious concerns. The means by which the state chooses to benefit its citizens may conflict with the religious practices of the individual.[24] The Court resolves these conflicts by balancing the competing interests.[25] This balancing approach is best exemplified by *Yoder*, where the Court refused to accept the "sweeping claim" that the state's interest in a system of compulsory education was so compelling as to prevail over the religious practices of the Amish. It was the Court's duty to examine the interests of the state and the possible impediment to those interests if the state granted an exemption to the Amish.[26] *Yoder* makes it clear that in balancing the competing interests, the state must be pursuing a legitimate goal by the least

---

18. 374 U.S. 398, 83 S. Ct. 1790 (1963). Appellant in *Sherbert* was denied state unemployment compensation because she would not work on Saturday, the Sabbath Day of her faith. The Court held that the state could not constitutionally apply the unemployment compensation law so as to constrain a worker to abandon her religious convictions respecting her Sabbath.

19. Id. at 403, 83 S. Ct. at 1793.

20. 406 U.S. 205, 92 S. Ct. 1526 (1972).

21. Id. at 214, 92 S. Ct. at 1532; see also Note, supra note 16, at 159.

22. 415 U.S. 361, 94 S. Ct. 1160 (1974).

23. *Braunfeld*, 366 U.S. at 606, 607, 81 S. Ct. at 1147, 1148.

24. McGowan v. Maryland, 366 U.S. 420, 461-62, 81 S. Ct. 1101, 1154 (1961) (Frankfurter, J., concurring).

25. Note, supra note 16, at 170.

26. *Yoder*, 406 U.S. at 221, 92 S. Ct. at 1536 (1972).

restrictive means. The state also has the burden of proving that granting an exception in a particular case would substantially frustrate the achievement of its goal.

Where the Court grants an exemption, the state may achieve its constitutional objectives, while the individual is not coerced into violating his beliefs in order to obtain the benefits and privileges to which he would be entitled but for those beliefs. The exemption provides in essence an absolute privilege to the individual and may have the effect of preferring religiously motivated actions over non-religious ones. Nevertheless, free exercise analysis and values require the exemption in the face of unintentional, unjustified state-imposed burdens on religious beliefs and practices.[27] Religious classifications resulting from exemptions are not only permitted, but at times are even required by the free exercise clause:[28] "In this zone of *required* accommodation, the theory is that only an illusory and hostile neutrality would be achieved by pursuing a religion-blind constitutional idea."[29] This notion of balancing the competing interests and the required accommodations, exemplified by free exercise cases, is important in understanding why the Court reached its decision in *Thornton*, even though that decision was considered under the establishment clause test. In the employment context, instead of neutral legislation which indirectly burdens religious freedom, it is the effect of neutral employer work policies that may make it more difficult or impossible for an employee to practice his religion. Statutes requiring religious accommodations by employers unless such accomodations would result in undue hardship[30] call for a balancing of all the interests involved in determining whether an accommodation can be made. Though employers are under no constitutional duty to protect religious rights of employees, this process of balancing the interests in the workplace is analogous to balancing state and individual interests in free exercise cases to determine whether an accommodation should be made. It was the absence of balancing that made the Connecticut statute in *Thornton* unacceptable to the Court. The law simply gave the employee a paramount right to his Sabbath day off, without taking into account the rights of employers and other employees.[31]

Incidental Benefits to Religion

The second type of constitutional religious accommodation recognized by the Court involves the separate establishment clause analysis

27. In *Sherbert*, 374 U.S at 409, 83 S. Ct. at 1797, Justice Brennan asserted that exemptions granted under free exercise analysis do not violate the establishment clause.

28. L. Tribe, American Constitutional Law § 14-4 (1978).

29. Id. at 821.

30. See, e.g., 42 U.S.C. 2000e(j) (1982).

31. *Thornton*, 105 S. Ct. at 2914, 2916-18.

developed since *Everson v. Board of Education*.[32] An understanding of the development of this test is essential to understanding religious accommodation and the *Thornton* decision.

The historical background of the first amendment religion clauses is used as a guide to interpreting them. This is especially true in regard to the establishment clause. Although there is evidence that at its inception the establishment clause might not have been intended to prohibit aid to all religions, the accepted view today is that disestablishment principles prohibit a preference for religion over non-religion.[33] This conclusion results in a tension between the free exercise and establishment clauses. If there were not some notion of accommodation of religion in establishment clause analysis, the Court would be violating free exercise. Yet, too much accommodation of religious freedom by government may violate establishment clause principles. Chief Justice Burger summarized the Court's precarious position in *Walz v. Tax Commission*, when he wrote: "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."[34]

Free exercise analysis is triggered by laws which indirectly *burden* religious practices. When laws which are passed for the general welfare indirectly *confer benefits* on a religious basis, the Court employs establishment clause analysis. Cases under the establishment clause have generally arisen in the context of financial assistance and public services provided to religious schools and institutions. In this context, the Court will not automatically strike down a law just because the secular effects that the government seeks to achieve also aid a religious institution.[35] Since the Court has never adopted a theory of strict neutrality,[36] it views such effects as incidental to the uniform application of laws passed for the public welfare.[37] These cases help identify the "zone of permissible accommodation" that the free exercise clause carves out of the estab-

32. 330 U.S. 1, 67 S. Ct. 504 (1947). In *Everson* the Court held that state laws respecting an establishment of religion were forbidden by the Fourteenth Amendment. Under the facts of the case, the Court found that transportation reimbursement to parents of parochial school students as a part of a program to reimburse all parents of school children was constitutional under the establishment clause.

33. J. Nowak, D. Rotunda, J. Young, Constitutional Law, Ch. 19, § 11 (2d. ed. 1983).

34. 397 U.S. 664, 668-69, 90 S. Ct. 1409, 1411 (1970).

35. L. Tribe, supra note 28, at 839.

36. Id. at 821. See also *Walz*, 397 U.S. at 669, 90 S. Ct. at 1412, where Chief Justice Burger describes the Court's position as one of "benevolent neutrality."

37. Note, Is Title VII's Reasonable Accomodations Requirement A Law Respecting An Establishment of Religion?, 51 Notre Dame Law. 481, 487 (1976).

lishment clause.[38] These permissible accommodations, unlike required accommodations, do not result in a preference for religion, but merely allow religious people and institutions the same treatment and benefits accorded to others under the law.

The Court has developed a three-part establishment clause test, referred to as the *Lemon* test, as it was most clearly defined in *Lemon v. Kurtzman*.[39] Two prongs of the test were cited from *Board of Education v. Allen*:[40] "The test may be stated as follows: what are the purpose and primary effect of the enactment? . . . to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[41]

Everson and *Allen* exemplify the kind of accommodation of religion permissible under the establishment clause. In both cases, the primary purpose of the laws was secular in that the state was seeking to promote the educational opportunities of all children. While reimbursement for bus transportation and the loaning of textbooks obviously released other funds that could be available for religious purposes, the state legislatures had set up general programs to help all parents, regardless of their religion. To exclude parents and children from these programs because of their religion would not be consistent with the purpose of the first amendment.[42] Thus, any indirect benefits conferred on a religious basis or to a religious institution were viewed as incidental. The Court equated these incidental benefits to the benefits of public police and fire protection, sewage facilities, streets and sidewalks enjoyed by religious schools, but which do not rise to the level of support of religious institutions so as to be a prohibited establishment of religion.[43]

In contrast to these two cases, the Court in *Lemon* held that salary supplements to non-public elementary school teachers in the form of direct payments to church schools and funds for instructional materials in secular subjects, violated the establishment clause. The programs at issue had the same secular educational *purpose* as those in *Allen* and *Everson*; however, the Court determined that the funds for direct salary supplements and instructional materials had the *effect* of aiding and

38. L. Tribe, supra note 28, at 823.

39. 403 U.S. 602, 91 S. Ct. 2105 (1971).

40. 392 U.S. 236, 88 S. Ct. 1923 (1968). In *Allen*, the Court upheld the inclusion of religious schools in the New York textbook-loaning program which benefitted elementary and secondary schools.

41. Id. at 243, 88 S. Ct. at 1926.

42. Id. at 224, 88 S. Ct. at 1926 (1968). In reaching its conclusion in *Allen*, the Court asserted that the books and funds did not benefit the parochial schools, but rather the parents and children.

43. Id. at 224, 88 S. Ct. at 1926.

promoting religion in a manner that was more than incidental. This conclusion resulted from the Court's view that in sectarian elementary and secondary schools, the religious beliefs and practices permeate every aspect of the institution. Almost any aid to these schools beyond the types approved in *Allen* and *Everson* will result in the use of public funds to substantially promote religion and religious institutions. The problem with permeation of religious beliefs in an institution—the difficulty in severing the secular and sectarian aspects of a religious institution—gives rise to the third part of the *Lemon* test: a statute or government policy must not foster "an excessive government entanglement with religion."[44] It could be argued that the aid would not have the effect of promoting religion as long as the state closely monitored the program. But, the Court found that the comprehensive, continuing state surveillance required to ensure religion was not promoted would result in excessive entanglement between Church and State.[45]

Traditional and Historical Practices With Religious Elements

The third form of permissible accommodation of religion that has been recognized by the Court involves certain long-standing, traditional religious practices carried out by state action, which the Court has held do not violate the establishment clause. One prominent case referred to these practices as part of the "fabric of our national life."[46] It is in this area of permissible, traditional accommodations of religion that the Court has de-emphasized and even chosen not to apply in one instance, the three-part *Lemon* test.

Nebraska's long practice of beginning each legislative session with a prayer by a state-paid chaplain was upheld by the Supreme Court in *Marsh v. Chambers*.[47] Interpreting the law under the establishment clause, the Court abandoned the *Lemon* criteria. Chief Justice Burger stated that opening sessions of the legislature and other public bodies with prayer was deeply rooted in the history and tradition of America. The Court found that Nebraska's practice, which was more than one

---

44. Note, Establishment Clause Analysis of Legislative and Administrative Aid to Religion, 74 Colum. L. Rev. 1175, 1187 (1974).

45. *Lemon*, 403 U.S. at 619, 91 S. Ct. at 2114 (1971). See also Tilton v. Richardson, 403 U.S. 672, 91 S. Ct. 2091 (1971), where the absence of religious permeation and problems of severability led the Court to uphold various forms of substantial financial aid to church-related institutions of higher learning. Chief Justice Burger's opinion in *Tilton* expressed the view espoused in subsequent cases, that such institutions are characterized by a high degree of academic freedom and their predominant mission is to provide students with a secular education. Any benefits in this context are also viewed as incidental.

46. *Walz*, 397 U.S. at 676-77, 90 S. Ct. at 1415.

47. *Marsh*, 463 U.S. 783, 103 S. Ct. 3330.

hundred years old and consistent with almost two centuries of national practice, was a permissible accommodation. It posed no more of a threat to the establishment clause than the provision for transportation reimbursement in *Everson*.[48]

Though in *Lynch v. Donnelly*[49] the Court applied the *Lemon* test, it de-emphasized the importance of the criteria and focused instead on the goal of accommodation.[50] The Court found that a local government did not violate the establishment clause by owning and displaying a creche in its annual Christmas display. The effects of the Nativity display were equated to those incidental effects found in permissible accommodations previously upheld under the Tax-Clause tax exemptions for church property, funds for textbooks, transportation for students and building funds for sectarian universities.[51] In her concurring opinion in *Wallace v. Jaffree*, Justice O'Connor cited an observation made by Justice Holmes in *Jackson v. Rosenbaum Co.* which, though made in another context, adequately summarizes the reason for the Court's permitting government accommodations of religion based on the place of traditional activities in our society: "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."[52]

The Court's use of the *Lemon* test in *Thornton* and other religion clause cases in the 1984-85 term makes it clear that *Marsh* and *Lynch* did not signal the demise of traditional establishment clause analysis. These two cases more clearly defined another category of permissible accommodations that the free exercise clause carves out of the establishment clause.[53] The results in *Marsh* and *Lynch* indicate that similar long-standing, traditional religious practices sanctioned or carried out by the government will likely be upheld against an establishment clause challenge. Subsequent cases involving religious issues, including *Thornton*, have helped to clarify the proper place and role of *Marsh* and *Lynch* in the development of religion clause analysis.

Statutorily Mandated Accomodation

The fourth area where the Court has determined that the free exercise clause permits an accommodation of religion, involves statutes whose

48. Id. at 786, 791, 103 S. Ct. at 1363.

49. *Lynch*, 465 U.S. 668, 104 S. Ct. 1355.

50. Note, supra note 7.

51. 465 U.S. 668, 681-82, 104 S. Ct. 1355, 1363 (1984).

52. Wallace v. Jaffree, 105 S. Ct. 2479, 2503 (1985), Justice O'Connor's concurring opinion citing an observation made by Justice Holmes in Jackman v. Rosenbaum Co., 260 U.S. 22, 31, 43 S.Ct. 9, 9-10 (1922).

53. L. Tribe, supra note 28, at 823. See *Walz*, 397 U.S. 676-78, 90 S. Ct. at 1415-16.

specific purpose is to grant an exemption or accommodation on a religious basis. Justice O'Connor's concurrence in *Wallace v. Jaffree* suggested that the challenge posed by cases involving these statutes was to define the proper establishment clause limits on voluntary efforts to facilitate the free exercise of religion.[54] The only laws promoting free exercise that could be upheld under this analysis would be those that lift a direct or indirect burden on the free exercise of religion that has been imposed by the government.[55] In essence, the statute would be valid only if the government were acting to alleviate some burden on religious freedom that resulted from prior state action. A review of the jurisprudence reveals the validity of O'Connor's conclusions. Two leading Supreme Court cases, *Zorach v. Clausen*[56] and *Gillette v. United States*,[57] involved statutes promoting free exercise of religion that were passed in response to state and federal actions which made the individual practice of religion more arduous. The remaining cases involving legislative efforts to promote free exercise of religion held the statutes invalid under the *Lemon* analysis, for lack of a secular purpose and for having the impermissible effect of giving state endorsement to religion and religious practices.[58] None of these statutes sought to lift burdens on religious practice imposed by prior state action. Instead, the laws

---

54. *Wallace*, 105 S. Ct. 2479, 2504-05.

55. Id.

56. 343 U.S. 306, 72 S. Ct. 679 (1952). In *Zorach*, the Court upheld the constitutionality of a New York City release time program, which permitted its public schools to release students during the school day for religious instruction or devotion, as a permissible accommodation of state compulsory education laws. The city realized that the failure to provide excused absences for religious purposes would likely make it more difficult for students to receive religious instruction or to fulfill religious duties to attend services. The law merely placed absences for illness and family emergencies, therefore, a student was not penalized for such absences and was not forced to choose between school and religious obligations.

57. 401 U.S. 437, 91 S. Ct. 828 (1971). In *Gillette*, the Court upheld against an establishment clause challenge, the constitutionality of a provision of the Military Selective Service Act of 1967 which exempted any person from the draft who was conscientiously opposed to war by reason of religious training and belief. In addition to the national defense concerns, the deferral statute granting the exemption was a reaction to the oppressive effects on a person's beliefs as a result of mandatory military service.

58. Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261 (1962) (holding the requirement by the New York Board of Regents that a nondenominational prayer be recited in all public schools at the beginning of the school day to be unconstitutional under the establishment clause); Abington School District v. Schempp. 374 U.S. 203, 83 S. Ct. 1560 (1963) (holding a requirement that schools begin each day with Bible readings to be unconstitutional under the establishment clause); Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266 (1968) (holding the Arkansas anti-evolution statute of 1928 to be unconstitutional under the establishment clause); Wallace v. Jaffree, 105 S. Ct. 2479 (1985) (holding unconstitutional under the establishment clause the Alabama statute authorizing a daily period of silence in public schools for meditation or voluntary prayer).

reflected a legislative policy to promote the welfare of the community by promoting religious values. But what has been illustrated by free exercise exemption cases also holds true for statutes challenged under the establishment clause. The exemptions and statutes are characterized as required and permissible accommodations only because they are a reaction to previously imposed government burdens on the free exercise of religion. Thus, in the absence of any state-imposed burdens on religious activities, the statutes cannot be upheld as constitutional accommodations of religion.[59]

Religious Accomodations and Thornton

In its free exercise and establishment clause decisions, the Court has upheld different forms of religious accomodation in limited circumstances. This limited application grew out of the tension between the two religion clauses.[60] The Court's task has been a delicate one. In its analysis the Court has attempted to reach results that did not unreasonably force a person to choose between his religious and state obligations, that did not deny benefits to anyone because of their religion, and that did not deny the traditional role of religion in our society. The Court was at all times restrained by establishment clause principles and its previous decision that the religion clauses protect religion as well as non-religion.

In view of the Court's assertions that it will not be bound to one test in establishment clause cases and of its recent accommodation of historical or traditional activities,[61] this comment will examine the Connecticut statute involved in *Thornton*, with respect to the four types of religious accommodation accepted by the Court, and the three-part *Lemon* test.

The statute, which stated that no person who asserted that a day of the week was his Sabbath could be required by his employer to work on that day, must be classified in the fourth category of religious accommodation. This is the category of cases arising under the establishment clause, in which the government attempts to promote free exercise of religion by statute. As a statute promoting free exercise, it can be upheld only if it was enacted in response to some previous action by the Connecticut legislature that burdened the religious freedom of individuals. The statute in *Thornton* did not represent such a response. The legislature had not previously passed any law that operated to restrict

---

59. *Wallace*, 105 S. Ct. at 2505.

60. See supra text accompanying notes 33 and 34.

61. See *Lynch*, 104 S. Ct. at 1362-64 where the Court restated that it will not be bound to one test and also emphasized the country's long history of "accommodation" of religion and even cited *Zorach* for the proposition that the constitution affirmatively mandates accommodation.

a person's right to observe his Sabbath. Rather than a reaction to any state-imposed burden on free exercise, granting a Sabbath observer this absolute privilege was an attempt to negate the effects of neutral work schedules and policies of private employers. Therefore, the law conferring such a privilege on Sabbath observers could not be upheld as a constitutionally permissible accommodation of religion.

The Court's analysis of the Connecticut law relied solely on the *Lemon* test.[62] The Court found that the statute went beyond any incidental or remote effect of advancing religion and had the impermissible effect of advancing a particular religious practice—Sabbath observance.[63] Because a law must pass all parts of the test to be constitutionally valid, failure to meet the effect prong was sufficient to invalidate the statute.

Most of the brief opinion focused on the problems that would result from granting employees an absolute right to refuse to work on their Sabbath. The Court's concern about the results in the workplace of giving Sabbath observers and religious rights priority over all other individual rights and interests led to the invalidation of the statute by a vote of 8-1.[64] The majority expressed the view that the Connecticut law would impose an absolute duty on employees and employers to conform their business practices to the particular religious practice of Sabbath observance.[65] The Chief Justice, writing for the majority, illustrated the disruptive effect that granting such an unqualified right would have in the workplace. He focused on the absence of exceptions in the law for special circumstances, such as those involving school teachers, as well as of provisions allowing for consideration of the interest of other employees. Additionally, the statute at issue provided no relief for an employer if a high number of his employees requested the same Sabbath, or if giving an employee his Sabbath day off resulted in a substantial economic burden for the employer.[66] It is evident that the Court's chief concern was not over Connecticut's promotion of the practice of Sabbath observance, but over the disruptive effect this law would have had in industry and commerce, and the law's mandating that decisions concerning work schedules and policies be controlled by the religious needs of employees. These far reaching effects negated any asserted secular purpose for the Connecticut statute.

It is notable, however, that the Court did little to advance the understanding of establishment clause principles and traditional analysis. The Court merely stated the appropriate test and only nominally applied

---

62. *Thorton*, 105 S. Ct. at 2917.
63. Id.
64. Only Justice Rehnquist dissented, but he did not write a dissenting opinion.
65. *Thornton*, 105 S. Ct. at 2918.
66. Id.

one of the criteria. The most enlightening aspect of *Thornton* in terms of religion clause analysis was the majority's use of Judge Learned Hand's statement of the fundamental principle of the religion clauses: "[T]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."[67]

The decision in *Thornton* is enlightening as to the constitutionally permissible scope of religious accommodations in our society. The decision also reaffirmed the Court's continued use of the traditional establishment clause test. Nevertheless, the Court should have discussed all of the aspects of the test and applied the relevant facts of the case to each of the criteria. This application, along with a more thorough discussion of prior establishment clause cases would have furthered the understanding of the modern Court's interpretation of religious issues at a time when there is some uncertainty about the nature and continued use of traditional tests.[68]

Thornton's Effect on Title VII's Reasonable Accommodation Provision

The situation which most frequently occurs under the Title VII provision of reasonable accommodation of employees' religious practices involves Sabbath observance. The problem arises when facially-neutral job requirements, schedules and policies have the effect of making it impossible for an employee to observe his Sabbath. In *Thornton*, the Connecticut statute provided that no employer could require an employee to work on a day of the week observed as his Sabbath, and no employer could dismiss an employee for refusing to work on his Sabbath. Therefore, the Court's reasoning in *Thornton* sheds light on the constitutionality of the Title VII reasonable accommodation provision and the extent of the employer's duty of accommodation in the vast majority of the cases that arise in the lower federal courts.

Legislative History of Title VII Religious Accommodation Provisions

In 1964, Congress enacted Title VII of the Civil Rights Act which prohibited discrimination in employment based on race, color, religion, sex, or national origin. Though Title VII originally prohibited discrimination based on religion, Congress did not define the term "religion."[69] Guidelines issued in 1966 by the Equal Employment Opportunity Com-

67. Id. (citing Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (2d Cir. 1953)).
68. See text accompanying supra note 61 and supra notes 4, 54.
69. B.Schlei and P. Grossman, Employment Discrimination Law 206 (2d. ed. 1982).

mission (EEOC) provided that the employer had an obligation under the statute to accommodate religious needs "where such accommodations can be made without serious inconvenience to the conduct of business."[70] Accommodation was needed to mitigate the effect of neutral employer policies upon employees with sincere religious beliefs about Sabbath work and observance. This idea was consistent with the EEOC's general rule that neutral policies violated Title VII if they adversely affected protected groups.[71] In 1967, the EEOC issued new guidelines which defined the employer's duty: "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."[72] The new guidelines also placed the burden on the employer to prove that a particular accommodation would produce an undue hardship.[73]

The 1967 guidelines were tested in *Dewey v. Reynolds Metals Co.*,[74] where the plaintiff refused to work on Sunday or to seek a replacement to cover his absence. The sixth circuit held that it was unreasonable to consider as discriminatory the refusal of employers, whose policies applied uniformly to all employees, to make accommodations for the small number affected by their policies.[75] The court required the plaintiff to show a conscious intent on the part of the employer to discriminate against him. Because most acts of discrimination do not occur as a result of intentional conduct on the part of the employer, but result from an unwillingness of the employer to adjust his policies when he could do so without undue hardship, this burden was a difficult one.[76]

In 1972, Congress responded to *Dewey* by enacting 42 U.S.C. 2000e(j), which imposed the affirmative duty of reasonable accommodation now found in Title VII.[77] Failure to accommodate an employee's religious beliefs, absent proof of undue hardship, was made an unlawful em-

---

70. 29 C.F.R. 1605.l(a)(2) (1966).

71. B. Schlei and P. Grossman, supra note 69, at 210.

72. 29 C.F.R. 1605.1(b) (1980).

73. B. Schlei and P. Grossman, supra note 69, at 210.

74. 429 F.2d 324 (6th Cir. 1970), aff'd mem. by an equally divided court, 402 U.S. 689, 91 S. Ct. 2186 (1971).

75. Comment, Religious Observance and Discrimination in Employment, 22 Syracuse L. Rev. 1019, 1206 (1971).

76. Id. at 1030.

77. 42 U.S.C. 2000e(j) (1982) states: "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." (2000e(j) was also prompted by Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849 (1971), which held that benign employment policies can violate Title VII if they are discriminatory in effect.)

ployment practice. Once an employee made out a prima facie case, the burden was on the employer to prove an accommodation would cause undue hardship. Congress's action in 1972 strengthened Title VII's prohibition against disparate treatment on the basis of religion. The addition of this affirmative duty was logical in light of the fact that, without such a duty, an employee fired because his religious practices did not coincide with the employer's uniform work rules would have the heavy burden of proving the intent of the employer to discriminate. The difficulty of proof and the lack of an affirmative duty in the statute gave employers little incentive to make accommodations. In view of the 1972 amendment, employers must examine whether their policies and practices produce discriminatory effects and whether their legitimate business interests may be accomplished by a policy with a less adverse impact on a protected class. Specifically, in the case of adverse effects of work policies on Sabbath observers, the employers must search in good faith for alternative ways to attain their business goals, which allow the employee to fulfill his religious obligations.[78] The legislative history of Title VII's reasonable accommodation provision makes it clear that Congress wanted to proscribe not only intentional discrimination, but also employer practices which lack a business justification and which have the effect of discriminating on a religious basis.[79]

Constitutionality of Title VII's Reasonable Accommodation Provision

The United States Supreme Court has never addressed the constitutionality of the Title VII reasonable accommodation provision either on its face or as applied. Arguably, the provision and the guidelines, by requiring a private employer to accommodate employee religious practices, are laws respecting an establishment of religion and therefore violate the first amendment.[80]

In *Dewey*, the sixth circuit stated that the duty to accommodate employee religious practices unless undue hardship can be shown, even with a statutory basis, "would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment."[81]

Lower federal courts have discussed the constitutionality of the reasonable accommodation provision. One of the most thorough dis-

78. Boothby and Nixon, Religious Accommodation: An Often Delicate Task, 57 Notre Dame Law. 797, 803 (1982).

79. Note, Civil Rights—Religious Discrimination in Employment—Title VII Standards of "Reasonable Accommodation" and "Undue Hardship" Are Constitutional, But Recent Cases Illustrate Judicial Overzealousness in Enforcement, 54 Texas L. Rev. 616, 627 (1976).

80. B. Schlei and P. Grossman, supra note 69, at 212.

81. *Dewey*, 429 F.2d at 334.

cussions of this issue is found in *Cummins v. Parker Seal Co.*[82] This case involved a plant shift supervisor, Cummins, who was obligated to work Saturdays. When Cummins joined the World Wide Church of God, which forbids work on the Sabbath from Friday sundown, he refused to work on Saturdays. He was fired because of complaints from other supervisors who were forced to work for him. The sixth circuit reversed the district court and found that Cummins was the victim of religious discrimination.

The court held that the reasonable accommodation rule did not violate the establishment clause of the first amendment, and, in so holding, analyzed the provision in terms of the *Lemon* purpose, effect and entanglement test.[83] In the court's view, 2000e(j) had an adequate secular purpose of preventing discrimination in employment by strengthening the prohibition against religious discrimination originally included in Title VII.[84] Secondly, the primary effect of the reasonable accommodation rule was neither to advance nor inhibit religion. Conceding that some religious institutions might derive incidental benefits from the law, the court found such benefits permissible in light of the Supreme Court's mandate that a law was not necessarily unconstitutional just because it conferred incidental or indirect benefits upon religious institutions.[85] The majority viewed the primary effect as one inhibiting discrimination and not one advancing religion.[86] Finally, the court found that 2000e(j) would not cause excessive entanglement of government with religion. The employer contended that in determining whether a reasonable accommodation could be made, EEOC investigators would be forced to evaluate the beliefs of religious sects in order to determine when an employee's practices were truly religious and therefore protected under Title VII. The court reasoned that, if the issue arose, it would involve no more entanglement than occurs in deciding whether a church qualifies for a property tax exemption.[87] In the court's opinion, its position was supported by Supreme Court cases upholding Sunday closing laws.[88]

---

82. 516 F.2d 544 (6th Cir. 1975), aff'd by an equally divided court, 429 U.S. 65, 97 S. Ct. 342 (1976), vacated and remanded 433 U.S. 903, 97 S. Ct. 2965 (1977).

83. 516 F.2d at 551-52, citing Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955 (1973).

84. 516 F.2d at 552.

85. Id. at 553, citing *Nyquist*, 413 U.S. at 771-72, 93 S. Ct. at 2955.

86. 516 F.2d at 553.

87. Id. at 554. See *Walz*, 397 U.S. 664, 674-76, 90 S. Ct. 1409, 1414-15 (1970).

88. See *Braunfeld*, 366 U.S. 599, 81 S. Ct. 1144 (1961) and *McGowan*, 366 U.S. 420, 81 S. Ct. 1101 (1961). In these cases the United States Supreme Court asserted that the laws in question had evolved from their religious origin and developed a secular character, so that the present purpose and effect of Sunday closing laws was not to aid

Circuit Judge Celebrezze dissented in *Cummins*, stating that by granting preferences to employees on the basis of religion, the federal government had breached the wall between church and state. Under the provision, an employee could be exempted from Saturday work for religious reasons, but other employees were not given the same treatment if they did not choose to work on Saturdays for valid secular reasons. Accordingly, in his opinion, the reasonable accommodation rule did not pass the purpose and effect test of establishment clause analysis. Even though Congress had acted with the valid secular purpose of preventing discrimination in employment, the impact of the rule negated this secular purpose. Rather than sustaining the existing prohibition against religious discrimination, the reasonable accommodation rule mandated religious discrimination, which was inconsistent with the basic purpose of Title VII.[89] According to Judge Celebrezze, the employer, in his discretion, could decide to accommodate his employees' religious practice, but when the federal government required such accommodation, it breached the neutrality principle at the heart of the first amendment.[90] When Congress mandated unequal treatment on a religious basis, it blurred the separation of church and state and undermined the first amendment principles of voluntarism and separatism.[91]

As noted, the Supreme Court has never directly confronted the question of the constitutionality of 2000e(j). Nevertheless, *Thornton* offers guidance in ascertaining how the Supreme Court might decide the issue. The eight Justices who joined in the majority opinion in *Thornton* found the Connecticut statute granting Sabbath observers an absolute right not to work on their Sabbath to be unreasonable, because it did not allow for consideration of any reasonable accommodation proposals made by the employer.[92] The law also required that respect of Sabbath observance automatically prevail over all secular interests in the workplace.[93] With this reasoning, the majority alluded to the Title VII provision, which only requires reasonable accommodation. Title VII does not require that Sabbath observers *automatically* be given the day off. Unlike the Connecticut statute, 2000e(j) calls for a balancing process

---

religion but to set aside a uniform day of rest for the public welfare. In the view of the majority of the Sixth Circuit in *Cummins*, Sunday closing laws forced businesses to shut down on Sundays, thus accommodating the religious needs of the majority Christian population. Since 2000e(j) mandates only reasonable accommodation without undue hardship, it constitutes much less interference with the employer's rights than does a law requiring an employer to close his business.

89. *Cummins*, 516 F.2d 544, 556 (Celebreeze, J., dissenting).

90. Id. at 558-59.

91. Note, The Constitutionality of An Employer's Duty to Accommodate Religious Beliefs and Practices, 56 Chi. Kent L. Rev. 635, 668-69 (1980).

92. *Thornton*, 105 S. Ct. at 2918.

93. Id.

which takes into account all of the factors found missing in *Thornton*[94] which involve consideration of the rights and interests of employers and other employees. The Court determined that the Connecticut law violated fundamental principles of the religion clauses by granting unyielding weight in favor of Sabbath observers over all other interests.[95] It follows that the reasonable accommodation rule, by weighing the interests of Sabbath observer, employer, and other employees, would be more in line with first amendment principles developed under establishment clause analysis.

Justice O'Connor and Justice Marshall joined in a concurring opinion in *Thornton* in which they specifically mentioned the religious accommodation provision of Title VII. The justices did not read the majority opinion to suggest that 2000e(j) was invalid.[96] The concurrence did not discuss the effect or entanglement issues, but briefly considered the requirement of a valid, secular purpose. Justice O'Connor concluded that the provision, as part of Title VII, attempted to lift a burden on religious practice imposed by private employers and manifested the secular purpose of guaranteeing employment opportunity to all in a pluralistic society.[97] In her opinion, the law was an anti-discrimination law and not an endorsement of religion or religious practices. Justices O'Connor and Marshall asserted that by calling for reasonable rather than absolute accommodation, Title VII's requirement would be valid under the establishment clause.[98]

In addition to the arguments set forth by the majority in *Cummins* and the concurrence in *Thornton*, other factors lead to the conclusion that 2000e(j) would survive an establishment clause test. The general anti-discriminatory purpose of the law has already been noted and prior jurisprudence has shown that the Court finds a valid, secular purpose in almost all cases.[99] In terms of primary effect, the focus of the provision is accommodation. Accommodation is viewed as a neutral principle,[100] and, as such, consistent with the Court's efforts to maintain a position of neutrality in view of the tension between the two religion clauses. The statute calls for a balancing process, with the ultimate decision reached according to the facts of each case. Therefore, once it is determined that the employer can make an accommodation without undue hardship, any benefits to religion are incidental, just as other consti-

94. See supra test accompanying notes 64-66, and *Thornton*, 105 S. Ct. at 2918.
95. *Thorton*, 105 S. Ct. at 2918.
96. Id. at 2919 (O'Conner, J., concurring).
97. Id.
98. Id.
99. For cases where a secular purpose has not been found, see supra note 58.
100. J. Nowak, D. Rotunda, J. Young, Constitutional Law, Ch. 19, § II (2d. ed. 1983).

tutionally required and permissible accommodations.[101] Since decisions must be made on the facts of each situation with a balancing of the various interests, 2000e(j), on its face and as applied, does not promote religion over non-religion. If the Court determines that an accommodation is required, it is implicit in this factual determination that the accommodation is a reasonable burden on the employer and other employees, and that the accommodation ordered for the Sabbath observer will not be at the expense of other valid secular concerns.

The Constitutionally Permissible Scope of an Employer's Duty of Reasonable Accommodation

Determining whether a reasonable accommodation without undue hardship is possible in a particular case involves a balancing test similar to the one used in free exercise exemption cases. Statutes and uniform work rules can unintentionally make the practice of one's religion more difficult. It is possible that a person may be forced to choose between his job and his religious convictions. In the process of balancing the competing interests and policies, the courts seek an accommodation that will substantially satisfy all parties and prevent the individual from having to make such a choice.

In Title VII cases, it is the effect of neutral employment policies and the needs and rights of employers and employees, rather than legitimate state goals manifested in laws for the general welfare, that creates problems for the Sabbath observer. Unlike exemption cases, the balancing of interests and granting of accommodations in the employment context is more difficult than granting an exemption from legislation. A private employer is under no constitutional duty to protect first amendment rights. In the workplace, a broad accommodation could directly affect many people and be potentially disruptive of business and other employee's rights. Business needs, like state goals, can be compelling; yet, if an alternative exists, which would allow an employer and other employees to achieve their interests without impairing the rights of the Sabbath observer, and that alternative is not pursued, Title VII's prohibition against religious discrimination has been violated.[102]

In order to establish a prima facie case of religious discrimination, a plaintiff must plead and prove that (1) he has a bona fide belief that compliance with an employment requirement is contrary to his religious faith; (2) he informed his employer about the conflict; and (3) he was discharged because of his refusal to comply with the employment re-

101. Note, supra note 79, at 629.
102. Note, supra note 16, at 160.

quirement.[103] Once the plaintiff has established the prima facie case, the burden shifts to the employer to show that available accommodations will cause undue hardship. If the court finds that the employer has proved undue hardship, the employer does not have to allow any adjustments of work policies.

To define and apply the reasonable accommodation rule, a definition of undue hardship was necessary. The Supreme Court gave its first pronouncement on the extent of reasonable accommodation and the definition of undue hardship in *Hardison*.[104] Hardison worked in a department of TWA which operated 24 hours a day, 365 days a year. He was subject to a seniority system contained in a collective bargaining agreement under which the most senior employees had first choice for job and shift assignments. Hardison joined the World Wide Church of God and informed his manager that he could no longer work from sunset on Friday until sunset on Saturday in observance of his Sabbath. The manager agreed that the union steward should try to seek a job swap or change of days off for Hardison. The problem was temporarily solved when he transferred to the night shift, but reappeared when Hardison transferred to another building where he did not have enough seniority to bid for shifts that would allow him to have his Sabbath off.[105] In rejecting the available alternative as reasonable, the Court concluded that the extent of an employer's duty of reasonable accommodation required the employer to incur no more than "de minimis" cost.[106] The Court viewed the following suggested accommodations as constituting more than a de minimis cost: leaving the position vacant when it was critical to airline operations; filling in with another employee when it would leave another important operation understaffed; paying premium overtime wages or requiring violation of the seniority provisions of the collective bargaining agreement.[107]

Violating the seniority system to relieve Hardison of Saturday work and forcing a more senior employee to replace him would have deprived the more senior employee of his contractual rights under the collective bargaining agreement.[108] The Court explained:

> 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

---

103. See Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 401 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); Brown v. General Motors Corp., 601 F.2d 956, 959 (8th Cir. 1979).

104. 432 U.S. 63, 97 S. Ct. 2264 (1977).

105. Id. at 68, 97 S. Ct. at 2269.

106. Id. at 84, 97 S. Ct. at 2277.

107. Id. at 76-77, 97 S. Ct. at 2273.

108. Id. at 80, 97 S. Ct. at 2275.

> 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.[109]

The majority made it clear that there would be no broad interpretation of the employer's duty by stating: "[W]e will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."[110] *Hardison* dictates that establishment clause concerns, the needs of business to establish uniform work rules, the rights of other employees and the importance of collective bargaining for industrial and economic stability, outweigh free exercise rights in cases involving collective bargaining agreements.[111] The Court viewed seniority systems and other neutral employment policies as the most equitable way to allocate privileges and duties among employees.[112] If such systems are set up on an impartial basis, any accommodation of an employee's religious practices must be made within the existing system.

The outcome in *Hardison* severely limited the extent of the accommodation required under 2000e(j). The Court was in the uncomfortable position of having to choose between narrowly construing the rule and mandating religious preference. The majority chose narrow construction since requiring religious preferences would have raised serious constitutional questions.[113] The decision, therefore, was required by the establishment clause in addition to the paramount policy of achieving industrial stability through collective bargaining.

Lower federal courts have continued to follow *Hardison* and do not interpret the reasonable accommodation provision to require an employer to violate the contractual rights of other employees under a valid collective bargaining agreement.[114] The existence of such an agreement does not mean that an accommodation is automatically denied; there may be other alternatives the employer could pursue which would not require violation of the union contract and would require only de minimis cost.[115]

---

109. Id. at 81, 97 S. Ct. at 2275.

110. Id. at 85, 97 S. Ct. at 2277.

111. Id. at 84-85, 97 S. Ct. at 2277. See also Comment, Transworld Airlines, Inc. v. Hardison: A Limitation on the Employer's Duty to Accomodate the Religious Practices of His Employees, 1977 Utah L. Rev. 835, 844-45.

112. *Hardison*, 432 U.S. at 80-81, 97 S. Ct. at 2274-75.

113. Note, supra note 91, at 647.

114. See Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977); Cross v. Bailar, 477 F. Supp. 748 (D. Ore. 1979); Turpen v. Missouri-Texas-Kansas R. R., 736 F.2d 1022 (5th Cir. 1984); Huston v. Local No. 93 UAW, 559 F.2d 477 (8th Cir. 1977); Rohr v. Western Electric Co., 567 F.2d 829 (8th Cir. 1977); Wren v. T.I.M.E., 59 F.2d 441 (8th Cir. 1979); Brown v. General Motors Corp., 601 F.2d 956 (8th Cir. 1979); Kendall v. United Airlines, Inc., 494 F. Supp. 1380 (N.D. Ill. 1980).

115. *Hardison*, 432 U.S. at 80, 97 S. Ct. at 2275.

Nevertheless, the Sabbath observer who requests an accommodation should be aware that if the only available alternative requires violating the collective bargaining agreement, his request will be denied and any suit filed challenging the decision will be futile.

Even absent a collective bargaining agreement, courts do not require employers to grant significant "privileges" in the name of accommodating the religious needs of employees. The Supreme Court's ruling that employers are not required to incur any more than de minimis costs means that an accommodation will be made within the existing system rather than in derogation of it. Moreover, the courts will not impose duties on an employer which either require more than de minimis costs in wages and efficiency or coerce other employees in a manner tantamount to reverse discrimination.[116]

In *Murphy v. Edge Memorial Hospital*,[117] a licensed practical nurse (LPN) who belonged to the World Wide Church of God interviewed for a position, during which she explained her religious views to the supervisors. The employer stated that the hospital would attempt to accommodate her religious beliefs, which it was able to do for about five months. In response to a great number of complaints from other employees, Murphy was scheduled to work on some Fridays, but some consideration was still given to her Sabbath. After the supervisor informed her that she would continue to be scheduled for Friday work, plaintiff began calling in sick or refusing the shift. When it became clear after several meetings that Murphy would not work on Fridays, the hospital fired her.[118] The issue presented to the court was whether the hospital could have reasonably accommodated Murphy's religious practice without incurring undue hardship.[119] The district court, following *Hardison*, found that the hospital relied on a neutral scheduling system, under which each staff person was required to work an average of three weekends out of four, and that there was a shortage of dependable, part-time LPN's. By allowing Murphy to have every Friday off, the hospital could not meet its average staffing needs on the weekends. Scheduling Murphy to work on Saturday forced other LPN's to split their free weekends and required the hiring of another full-time LPN. The costs of such accommodations were clearly more than de minimis. The court also concluded that the plaintiff could not be accommodated within the existing framework, because such an accommodation would deprive other employees of the benefits of the neutral scheduling system.[120]

---

116. Id; see also B. Schlei and P. Grossman, supra note 69, at 236.
117. 550 F. Supp. 1185 (M.D. Ala. 1982).
118. Id. at 1187.
119. Id. at 1188.
120. Id. at 1192.

Another recent case that illustrates the lower federal courts' application of *Hardison* in situations not involving a collective bargaining agreement is *Brener v. Diagnostic Center Hospital*.[121] Brener, a hospital staff pharmacist, informed the director shortly after beginning work that his faith prohibited his working on his Sabbath—sunset Friday to sunset Saturday. The director ordered schedule changes to accommodate the plaintiff. After reviewing employee complaints, the supervisor told Brener that he would have to arrange his own exchanges. Brener did not attempt to work within the flexible scheduling system to arrange an exchange. According to the court, his suggested alternatives of hiring a substitute, using the supervisor in his place, or leaving the spot open, all resulted in more than a de minimis cost to the hospital.[122] In addition, the court refused to require deprivation of other employees' shift preferences to accommodate his Sabbath observance.[123]

As illustrated by *Murphy* and *Brener*, the principles of *Hardison* have been extended by lower federal courts to situations that do not involve collective bargaining agreements. When a neutral scheduling system comparable to seniority systems in labor-union contracts is employed, the religious observer must be accommodated within that system, thus avoiding the deprivation of other employees' rights and benefits. Monetary and efficiency costs which are greater than de minimis will not be imposed on the employer and other employees.

Conclusion

In view of the Supreme Court's establishment and free exercise clause decisions, the *Hardison* decision and subsequent federal court reasonable accommodation cases, the outcome in *Thornton* was predictable. By its decision in *Thornton* the court made it clear that it would not extend the scope of an employer's duty to accommodate beyond a de minimis level,[124] or read 2000e(j) to require reverse discrimination in order to accommodate an employee's religious practices. Any attempt to expand the extent of an employer's duty to accommodate an employee's religious beliefs beyond the limits of the decided cases would come close to an absolute guarantee[125] that an employee's religious rights would have priority over all other rights in the workplace. Such a result was attempted by the Connecticut statute in *Thornton*. The

121. 671 F.2d 141 (5th Cir. 1982).

122. Id. at 146.

123. *Hardison*, 432 U.S. at 76-77, 97 S. Ct. at 2273.

124. Id. at 81, 85, 97 S. Ct. at 2275, 2277.

125. Jordan v. North Carolina National Bank, 565 F.2d 72 (4th Cir. 1977) (employee's demand for absolute guarantee that she would not have to work on Saturday found to be unreasonable, and an accommodation the employer was not required to make).

Supreme Court invalidated that statute, just as it has refused to broadly construe the reasonable accommodation rule.

The weight of establishment clause concerns, business needs, rights of employees and the integrity of collective bargaining agreements have resulted in very limited accommodations of employee religious practices. Any accommodation must be accomplished without the denial of employer's and other employees' rights and within the neutral system set up to allocate employee hours, duties and privileges.

In a dissent in *Hardison*, Justice Marshall explained why he did not view a breach of a collective bargaining agreement to accommodate the religious needs of the employee or to give religion priority in the workplace, to be a violation of the establishment clause:

> If the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer.[126]

The majority of the courts and legislatures[127] have recognized that employment situations are distinguishable from accommodations of religion that are permitted in the form of exemptions from state and federal laws. There must be a different approach to accommodation of religion in the workplace. The rights and interests of employers, unions and other employees are significantly affected by the duty which Title VII imposes. By pronouncing that the Connecticut statute went so far as to violate the establishment clause, the Court indicated how far an employer must actually go to carry out Title VII's requirement of reasonable accommodation. *Thornton* was an affirmation that the Congress and the courts cannot broadly interpret the statutory duty beyond *Hardison* without violating establishment clause principles.

Clare Zerangue

---

126. *Hardison*, 432 U.S. at 91, 97 S. Ct. at 2280 (Marshall, J., dissenting).

127. The majority of state legislatures have passed laws requiring "reasonable accommodation" of employee religious practices similar to the Title VII requirement. Subsequent to the Connecticut Supreme Court's determination of unconstitutionality, the Connecticut legislature enacted a similar law, Conn. Gen. Stat. § 46 (a)-51(18) (1984). See 12 Journal of Leg. 96, 100, 103 (1985).