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HOSTILE ENVIRONMENTS AND THE RELIGIOUS EMPLOYEE

Theresa M. Beiner and John M. A. DiPippa***

I. INTRODUCTION

This article tackles a rarely discussed subject: harassment of religious employees in the workplace. Curious about the manner in which courts were addressing such claims, we examined harassment cases under both Title VII of the Civil Rights Act of 1964¹ and parallel state laws involving religious employees. What we found was that religious employees are often treated less favorably than nonreligious employees in the workplace. In this article, we argue for a "true" application of the totality of the circumstances test that the courts have adopted for other types of harassment under Title VII² to place religion on an equal footing with other protected statuses and to assure that the rights of religious employees are protected fully.

Title VII protects employees from discrimination based on race, sex, religion, national origin and color.³ Religion is also protected under the United States Constitution's free exercise and establishment clauses.⁴ Yet, claims of religious harassment based on a hostile work environment appear easier to prove when an employee is seeking to enforce Title VII against an employer or co-worker motivated by religious beliefs⁵ than when a religious employee seeks to invoke the Act's protection against a secular nonreligious employer. Given the specific protection of religion under the free exercise clause and in Title VII itself, this result is curious.

As an example, let's examine the case of Christine L. Wilson.⁶ Wilson, a devout Roman Catholic, wore a graphic anti-abortion button to work because she took a vow to be a "living witness" against abortion.⁷ Wilson's button caused some commotion at work. As the court explained, "[e]mployees

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1. 42 U.S.C. § 2000e (1988).

2. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (quoting the standard of the EEOC, set out in 29 C.F.R. §1604.11(b) (1985)).

3. 42 U.S.C. § 2000e-2(a)(1) (1988).

4. U.S. Const. amend. I.

5. This statement is not true for non-secular religious employers, such as churches and other church-affiliated institutions, which have special protection under Title VII. See *infra* notes 85 and 93 and accompanying text.

6. *Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995).

7. *Id.* at 1338.

gathered to talk about the button. U.S. West [her employer] identified the button as a 'time robbing' problem."⁸ Indeed, some employees even threatened to walk off the job because of the button, although this never actually occurred. Her employer requested that she either (1) wear the button only at her cubicle, (2) cover the button at work, or (3) wear a different button that was less graphic.⁹ Believing this would compromise her ability to be a "living witness," Wilson refused. The situation escalated, and some of Wilson's co-workers complained that her supervisor was guilty of harassment "for not resolving the button issue to their satisfaction."¹⁰ Eventually, Wilson was fired for missing work unexcused for three days after her employer sent her home for wearing the button.¹¹

Wilson brought a religious discrimination claim under Title VII, arguing that the three alternatives her employer gave to accommodate her religious belief were inadequate. The district court held against Wilson, finding that covering the button while at work was a reasonable accommodation in part because "Wilson's vow did not require her to be a living witness."¹² Noting that "Title VII does not require an employer to allow an employee to impose his religious views on others,"¹³ the Eighth Circuit upheld Wilson's termination in the face of her Title VII challenge.

Contrast this with the case of Kimberly Turic.¹⁴ Turic became pregnant while working as a busperson and room service attendant at the defendant's hotel. Turic discussed with her co-workers the possibility of having an abortion.¹⁵ After that, "news of plaintiff's consideration of abortion spread like wildfire, until 10-15 members of the restaurant staff were openly discussing it."¹⁶ Because the staff was mostly Christian, Turic's consideration of an abortion caused an "uproar."¹⁷ Believing that a good deal of this uproar was caused by discussions initiated by Turic herself, her supervisors asked her to cease discussing her contemplated abortion at work or they would terminate her.¹⁸ Eventually, the employer fired Turic for not keeping full the complementary coffee urns in the hotel lobby. Although during her termination interview Turic raised the abortion controversy as the real basis for her

8. *Id.* at 1339.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 1340.

13. *Id.* at 1342.

14. *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6th Cir. 1996), *reh'g denied*.

15. *Turic v. Holland Hospitality, Inc.*, 849 F. Supp. 544 (W.D. Mich. 1994).

16. *Id.* at 546.

17. *Id.*

18. *Id.* at 547.

termination, her employer denied this and instead stated that her termination was based on her failure to adequately perform her job.¹⁹

Extending the Pregnancy Discrimination Act to this case, both the district court and court of appeals held that Turic's employer had violated Title VII in terminating her. While Turic alleged both sex and religious discrimination as bases for her termination, the court ultimately decided that this was a case of sex discrimination only. Turic argued that her termination amounted to religious discrimination, because she was terminated "to protect the religious sensibilities of the staff," and because her co-workers' "religion was impermissibly forced upon her."²⁰ In holding that the employer was guilty of sex discrimination under Title VII the court reasoned:

[p]laintiff was held accountable, and was penalized, for her colleagues' reaction to her and her choice. In the context of race or religion, the illegality of this should be obvious—an African-American or Muslim employee could not be held responsible for "causing" turmoil which flows from his or her presence. The same is true of a woman considering abortion.

Ultimately, I conclude that plaintiff was not fired because she was the source of gossip (the words, or the conversation itself), but because she was the source of controversy. Her supervisors and colleagues were not just reacting to her words, they were reacting to her status. Whether it shared its employees' prejudices or not, defendant acted on them to eliminate the person who did not fit in, the person whose mere presence upset her colleagues.²¹

While the district court did not hold in Turic's favor on her religious discrimination claim, it ruled against her in part because "plaintiff virtually ignored this claim in her presentation of proof at trial."²²

The same sort of uproar was created by both plaintiffs in both cases—controversy concerning abortion—but there was a different result in each case. Indeed, after examining the result in *Wilson*, it appears that the court's comments in *Turic* were incorrect: a religious employee can "be held responsible for 'causing' turmoil which flows from his or her presence." But should a religious employee be held responsible? How can we account for two such differing results in two cases dealing with employees who raise a commotion at the workplace based on their alleged religious beliefs (or lack thereof)? Perhaps it is the difference in the underlying theory that ultimately

19. *Id.* at 548.

20. *Id.* at 551.

21. *Id.* at 556.

22. *Id.* at 556. The religion claim apparently was not taken up on appeal. *Turic*, 85 F.3d at 1211.

prevailed in the *Turic* case—sex discrimination as opposed to religious discrimination as alleged in *Wilson*. Maybe courts give sex discrimination cases a higher priority than religious discrimination cases.²³ Perhaps it is due to Turic's employer's failure to invoke the commotion she caused by her discussion of personal business at work as a basis for her termination. Yet, Turic's supervisors did note that they believed she had not obeyed their command to stop talking about the abortion at the time of her termination. However, unlike the employer in *Wilson*, this actually was used against the employer in *Turic*.²⁴

A more likely possibility is the courts' preference for religious claims by nonreligious employees over those of religious employees. By nonreligious employees, we refer to those employees who are motivated not by the religious tenets or beliefs of an organized religion or belief system akin to an organized religion, but instead are motivated by their lack of an organized religious belief or reaction to the beliefs of those identified with such a religion. The courts' preference for the claims of the nonreligious appears in part motivated by the lack of credibility they accord the beliefs of the religious, especially those involved in non-mainstream religions. Indeed, the court in *Wilson* did not believe that Wilson's religious beliefs mandated her acting as a "living witness."²⁵

This article will discuss hostile environment law and the different approaches the courts have taken to the claims of religious employees versus those of nonreligious employees. In addition, the article will discuss the various types of hostile environment claims that are brought by religious employees. Specifically, three types of fact patterns are described and assessed. First, we will discuss situations involving employees who request accommodation in the context of alleged harassment by a religious employee. This would encompass cases exemplified by that of Christine Wilson—those involving religious employees who create a commotion at work, harassing co-workers, and are subjected to an adverse employment action because of it. Second, we will discuss straightforward religiously hostile environment cases involving religious epithets and related actions directed at religious employees. We also will describe and develop a way to adequately address the "pure" hostile environment case—those involving environments that are not outwardly

23. See Terry Morehead Dworkin and Ellen R. Pierce, *Is Religious Harassment "More Equal?"*, 26 SETON HALL L. REV. 44 (1995) (arguing that religious entities have tried to gain an elevated status for religious discrimination cases over sex discrimination cases); David L. Gregory, *Religious Harassment in the Workplace: An Analysis of the EEOC's Proposed Guidelines*, 56 MONT. L. REV. 119 (1995) (arguing that religious discrimination cases should be given a higher priority because they have first amendment free exercise clause implications).

24. *Turic*, 849 F. Supp. at 555-56.

25. *Wilson*, 58 F.3d at 1341.

hostile to religion, but are hostile to a particular employee due to that employee's religious beliefs. Finally, we will address the First Amendment implications of these various approaches. Our intent is to develop a way to adequately address in a coherent manner the particular problems associated with hostile environments and religious employees.

II. TITLE VII AND RELIGIOUS DISCRIMINATION CLAIMS

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, national origin, or sex by qualified employers²⁶ in the "terms, conditions, or privileges of employment."²⁷ In terms of religious discrimination, the Act also requires an employer to "reasonably accommodate" an employee's religious practice unless to do so would cause the employer "undue hardship."²⁸

What the term "religion" means for purposes of Title VII is not all that clear.²⁹ Although Title VII refers to religion as encompassing "all aspects of religious observance and practice, as well as belief,"³⁰ the Supreme Court has not elaborated on this definition. It has, however, discussed religion in other contexts. Some courts have adopted the Supreme Court's First Amendment notion of religion, equating religion with any belief that is "sincere and meaningful" and "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."³¹ Using this definition, courts and the EEOC have extended Title VII to apply to the rights of atheists as well as other nonreligious employees.³² For purposes of this article, we acknowledge that courts have interpreted Title VII to encompass a variety of belief systems. However, we use the term "religious employee" as described earlier in this

26. It specifically applies to employers of fifteen or more employees. 42 U.S.C. § 2000e(b) (1988).

27. 42 U.S.C. § 2000e-2(a)(1) (1988).

28. 42 U.S.C. § 2000e(j) (1994).

29. See Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 748-53 (1996); Laura S. Underkuffler, "Discrimination" on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment, 30 WM. & MARY L. REV. 581, 600-03 (1989).

30. 42 U.S.C. § 2000e-2(a)(1) (1988).

31. Jamar, *supra* note 29, at 750. See, e.g., *United States v. Seeger*, 380 U.S. 163, 165-66 (1965); *Kent v. Johnson*, 821 F.2d 1220, 1224-25 (6th Cir. 1987); *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 454 n.12 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046; *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978); *Slater v. King Soopers, Inc.*, 809 F. Supp. 809, 810 (D. Colo. 1992). See also Jamar, *supra* note 29, at 748-753 (discussing what religion is for purposes of Title VII).

32. See, e.g., 29 C.F.R. § 1605 (1985); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620-21 (9th Cir. 1988).

article not to refer to those who practice no particular religion, but those who in fact consider themselves part of a religious group.

Religious discrimination cases, like employment discrimination cases based on other protected statuses, come in a variety of forms, several of which will not be discussed in depth in this article.³³ Plaintiffs bring religious discrimination claims in the form of disparate treatment claims. In these cases, the employer has discriminated against an employee in some term, condition or privilege of employment based on his or her religion. For example, an employer who fails to promote an employee based on that employee's religious beliefs has discriminated based on religion in treating a religious employee differently than other nonreligious employees.³⁴ The disparate impact theory used in Title VII cases likewise applies to religion cases.³⁵ Under this theory, a facially neutral employment practice can be challenged if it has an adverse impact on a particular group based on religion. Although there are few cases of this variety involving religion,³⁶ the concept does apply to religion claims.³⁷

In addition, unlike other forms of discrimination, an employee can sue her employer for failure to accommodate her religious beliefs. An employee also

33. For a more thorough discussion of the various theories of discrimination applicable to Title VII in the context of religious discrimination, see Jamar, *supra* note 29, at 730-45. In particular, Professor Jamar argues that disparate impact claims are often resolved by accommodating the employee's religious beliefs. Jamar, *supra* note 29, at 793-94. For example, if an employer requires employees to work Saturdays, this will have a disparate impact on employees who must take Saturday off for religious reasons. By requesting and receiving an accommodation, the employee's needs are met and the employer will avoid a disparate impact claim. Jamar, *supra* note 29, at 793-94.

34. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), is usually cited as the case setting out the burden shifting analysis needed in a disparate treatment case. Essentially, it requires that the employee raise a prima facie case of discrimination based on a showing that (1) he or she is a member of a protected class, (2) was qualified for the position at issue (in the context of promotions and hiring), (3) did not get the requested position, and (4) the position remained open or a person from outside the protected class received the position. This test has different permutations depending on the unlawful employment action at issue. See, e.g., *id.* at 802 n.13; *Hampton v. Conso Prod.*, 808 F. Supp. 1227, 1236 (D.S.C. 1992). After the employee raises a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. *McDonnell-Douglas*, 411 U.S. at 802. Finally, the employee has the final chance to show that the employer's articulated reasons were actually a pretext for discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

35. Disparate impact was described by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). At least one commentator has questioned the efficacy of disparate impact in the religious discrimination context. See Jamar, *supra* note 29, at 746.

36. A search on the WESTLAW legal database revealed only thirteen cases using this theory in a religion context.

37. See, e.g., *Vitug v. Multistate Tax Comm'n*, 88 F.3d 506 (7th Cir. 1996); *Mann v. Frank*, 7 F.3d 1365, 1370 (8th Cir. 1993); *Soria v. Ozinga Bros., Inc.*, 704 F.2d 990 (7th Cir. 1983).

may sue because he or she is harassed due to his or her religious beliefs. Harassment is technically a form of disparate treatment, because it entails a difference in the terms, conditions, or privileges of employment based on the employee's religion.³⁸ However, it is a distinct enough theory to be treated separately for purposes of analysis. This article will deal with these two latter situations, for a certain class of cases—those involving a religious employee who is harassed or seeks accommodation in a secular work environment. Accommodation claims, although theoretically different than hostile environment claims, are addressed in this article because harassing incidents can lead up to an employee's request for accommodation or an adverse employment action against a religious employee.

A. Hostile Environment Law Generally

Discrimination in the "terms, conditions, or privileges of employment" includes employer actions that harass an employee based on a protected status.³⁹ There are two forms of harassment actionable under Title VII. The first is quid pro quo harassment, in which an employer conditions employment or a term, condition or privilege thereof on an employee's protected status.⁴⁰ It is possible to have a quid pro quo claim in the context of religious harassment. For example, a quid pro quo claim would encompass failing to promote an employee because she refuses to join her employer's religion. However, these types of claims generally are brought as straightforward disparate treatment claims, because the employer's actions usually result in some sort of adverse treatment of the religious employee.⁴¹ The second type of harassment is hostile work environment harassment in which the workplace is permeated

38. Title VII also forbids an employee "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2) (1988). Because harassment is considered discrimination in "terms, conditions, or privileges of employment," this aspect of Title VII will not be directly addressed in this article. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (phrase "terms, conditions, or privileges of employment" "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women.'").

39. *Meritor Sav. Bank*, 477 U.S. at 63.

40. In the context of sexual harassment, this refers to conditioning a term, condition, or privilege of employment on the employee's engaging in sexual conduct with the employer or its agent. 29 C.F.R. § 1604.11(a) (1985). Title VII explicitly defines an employer to include "any agent of" an employer. 42 U.S.C. § 2000e(b) (1988).

41. See *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985), *cert. denied*, 490 U.S. 1064 (1989) (employee terminated for disagreeing with employer's religious beliefs).

with an atmosphere that reflects negatively on a particular group protected under Title VII.

First recognized in the context of race cases,⁴² hostile environment law has expanded into the areas of harassment based on sex,⁴³ national origin,⁴⁴ and religion.⁴⁵ The major Supreme Court pronouncements on hostile environment law have come in the sexual harassment context. In *Meritor Savings Bank v. Vinson*,⁴⁶ the Supreme Court explicitly extended hostile environment law to cases involving sexual harassment. In doing so, it defined the parameters of hostile environment claims generally. The Court explained that "the phrase 'terms, conditions, or privileges of employment' evinces a congressional intent " 'to strike at the entire spectrum of disparate treatment of men and women' in employment."⁴⁷ Relying on EEOC Guidelines defining "sexual harassment" to include "conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment,"⁴⁸ and two lower court decisions that initially recognized hostile environment claims, the Court officially extended Title VII to sexual harassment.⁴⁹

The Court concluded that harassment need not have an economic component in order to be actionable. Instead, if the harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment,'" the employer has violated Title VII.⁵⁰ To decide whether an environment satisfies this standard, the trier of fact must examine "'the totality of [the] circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'"⁵¹ Not every instance of an ethnic, sexual or religious slur is actionable,

42. See, e.g., *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

43. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1985).

44. See, e.g., *Amimokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1130-32 (4th Cir. 1995).

45. See, e.g., *Compston v. Borden, Inc.*, 424 F. Supp. 15 (S.D. Ohio 1976). The Court in *Compston* was the first to recognize a religious harassment claim. See Dworkin and Pierce, *supra* note 23, at 49.

46. 477 U.S. 57 (1986).

47. *Id.* at 64 (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

48. *Id.* at 65 (quoting 29 C.F.R. §1604.11(a)(3) (1985)).

49. *Id.* at 65-66. Those two cases were *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), and *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982).

50. *Meritor Sav. Bank*, 477 U.S. at 67.

51. *Id.* at 69 (citations omitted).

however.⁵² Instead, the "sufficiently severe or pervasive" language⁵³ has caused courts to hold that occasional ethnic slurs, for example, are not actionable as harassment under Title VII.⁵⁴

In addition, the Supreme Court explained that the alleged harassment also must be "unwelcome."⁵⁵ Although the courts often include this as an element of a racial harassment claim,⁵⁶ commentators have concluded that the unwelcome nature of the harassment is presumed where it is based on racial grounds.⁵⁷ This makes sense; it is hard to imagine a situation in which a person would welcome harassment based on his or her race. While commentators have criticized the requirement in the sexual harassment context,⁵⁸ the unwelcomeness requirement was apparently designed to distinguish between acceptable and unacceptable actions and comments in male/female interpersonal relations.⁵⁹

Logically, religious harassment appears to be more akin to racial harassment insofar as it is difficult to contemplate a situation in which a person would wish to be harassed based on religion. This assumption works well in classic types of hostile environment cases, i.e., those in which religious epithets or other harassing behavior is specifically directed at the plaintiff because of his or her religion. However, there are situations in which the decision of whether there is harassment will depend on a welcomeness determination. For example, if two co-workers engage in a consensual discussion about their respective religious beliefs on the job, this would not constitute religious harassment. Indeed, employees should be able to discuss their varying belief systems without any repercussions. If, however, one of those employees

52. See *id.* at 67.

53. *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

54. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Hopkins v. Baltimore Gas and Elec. Co.*, 77 F.3d 745, 753 (4th Cir. 1996); *Starrett v. Wadley*, 876 F.2d 808, 820 (10th Cir. 1989); *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), *quoted with approval in Meritor Sav. Bank*, 477 U.S. at 67.

55. *Meritor Sav. Bank*, 477 U.S. at 68, *citing* 29 C.F.R. § 1604.11(a) (1985).

56. See, e.g., *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1271 (7th Cir. 1991); *Brumback v. Callas Contractors, Inc.*, 913 F. Supp. 929, 939 (D. Md. 1995); *Booth v. North Carolina Dept. of Env't, Health & Natural Resources*, 899 F. Supp. 1457, 1463 (E.D.N.C. 1995); *Bivins v. Jeffers Vet Supply*, 873 F. Supp. 1500, 1507 (M.D. Ala. 1994).

57. Anne C. Levy, *The United States Supreme Court Opinion in Harris v. Forklift Systems: "Full of Sound and Fury Signifying Nothing,"* 43 U. KAN. L. REV. 275, 295 n.149 (1995); Shannon McAuliffe, Note, *Speak No Evil: The First Amendment Offers No Protection for Sexual Harassers*, 29 SUFFOLK U. L. REV. 233, 242 n.46 (1995); Miranda Oshige, *What's Sex Got To Do With It?* 47 STAN. L. REV. 565, 579-80 (1995); Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C.L. REV. 499, 505 n.40, 529 n.187 (1994).

58. See, e.g., Oshige, *supra* note 57, at 579-80.

59. See *Meritor Sav. Bank*, 474 U.S. at 68-69.

begins to feel uncomfortable because of what she perceives to be the extreme nature of her co-worker's pronouncements on issues related to religion, the situation might rise to the level of harassment. It seems reasonable to require the offended co-worker to make clear that the discussions have become unwelcome. Simply requesting the offensive co-worker to stop discussing his religious beliefs should be sufficient.

In other situations, whether an employee believes the discussion to be unwelcome will be less clear. The amount and quality of the discourse should have an effect on analyzing whether a reasonable person would find the conduct harassing. Does it take repeated exposure to a proselytizing employee after a request that he or she not do so to form a harassing situation? Does the employee who feels harassed need to make it clear that such proselytizing offends his or her religious (or nonreligious) beliefs? A notion of welcomeness should enter into the hostile environment determination in order to accord the proselytizing employee's religious beliefs equal weight and the weight they should be given under Title VII. Indeed, at least one court has acknowledged and used the concept of welcomeness in the religious harassment context.⁶⁰ Exactly how harassment law will work in these situations has yet to be fully developed by the courts.⁶¹

How to determine when to hold the employer liable for acts of harassment by its workers was left a bit up in the air by the Court in *Meritor*. The Court of Appeals that initially decided that *Meritor* held the employer strictly liable for the hostile environment created by the supervisor in that case.⁶² The District Court, on the other hand, held that the employer was not liable because it had no notice of the alleged harassment.⁶³ Eschewing both these standards, the Court refused to adopt a definite standard in the case of supervisor harassment.⁶⁴ Instead, the Court advised courts "to look to agency principles for guidance in this area."⁶⁵ The Court itself acknowledged that agency principles did not necessarily fit perfectly in every situation. This has resulted in a variety of standards being adopted in cases involving supervisor harassment,⁶⁶ although most courts have adopted a "knew or should have known" standard in cases of co-worker harassment.⁶⁷ Commentators have argued that

60. *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d 351, 353-54 (Or. 1995).

61. See generally Gregory, *supra* note 23, at 135-37 (describing the distinction commentators have made between various harassing and non-harassing situations).

62. 477 U.S. at 69-70.

63. *Id.* at 69.

64. *Id.* at 72.

65. *Id.*

66. Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions, or Privileges of Employment Under Title VII?* 37 B.C. L. REV. 643, 682-685 (1996)

67. David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability for*

many courts have adopted what is essentially a "knew or should have known" standard in the supervisor harassment context as well.⁶⁸ It is noteworthy that an effective complaint system can often operate to shield an employer from liability under Title VII in situations in which the employee refuses to take advantage of that system⁶⁹ or in situations in which the employer takes effective remedial action that ends the harassment after the employee notifies the employer under such a system.⁷⁰

In *Harris v. Forklift Systems, Inc.*,⁷¹ the Supreme Court further refined the standard set out in *Meritor*. Acknowledging that *Meritor* "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury,"⁷² the Court reiterated that whether an environment is hostile in violation of Title VII is determined by looking at the totality of the circumstances.⁷³ The Court in *Harris* identified several specific factors to consider in making this determination: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."⁷⁴

Employers for Sexual Harassment Committed by Their Supervisors, 81 CORNELL L. REV. 66, 103-06 (1995) (describing cases involving co-worker harassment); see also 29 C.F.R. § 1604.11(d) (1996) (adopting this standard).

68. Oppenheimer, *supra* note 67, at 132-36; J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 282-83 (1995).

69. See *Meritor*, 477 U.S. at 72-73 (leaving this possibility open); see, e.g., *Kotcher v. Rosa and Sullivan Appliance Center*, 957 F.2d 59, 63 (2d Cir. 1992) (requiring plaintiff to prove "that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it").

70. See, e.g., *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992) (employer response adequate to avoid liability where harasser was confronted and fired); *Caleshu v. Merrill Lynch*, 737 F. Supp. 1070 (E.D. Mo. 1990), *aff'd*, 985 F.2d 564 (8th Cir. 1991) (asking harasser to stop and moving victim away constituted sufficient remedial measures to avoid liability).

71. 510 U.S. 17 (1993). *Harris* has been used to attack a broad range of employment practices. See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1485-86 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994); *Marshall v. Nelson Elec.*, 766 F. Supp. 1018, 1038 (N.D. Okla. 1991); see also *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (stating that this language "evinces a Congressional intention to define discrimination in the broadest possible terms").

72. *Harris*, 510 U.S. at 21.

73. *Id.* at 22.

74. *Id.* Some courts have creatively ignored the totality of the circumstances standard. For example, in *Gross v. Burggraf Const. Co.*, while giving lip service to the standard, the court went through each individual instance of alleged harassing behavior, discounting them based on various reasons. 53 F.3d 1531 (10th Cir. 1995). The court never truly looked at them from the totality of the circumstances and granted summary judgment in the defendant's favor. *Id.*

Harris added an additional gloss to the standard set out in *Meritor*. To determine if conduct is harassing, the fact finder must look at the situation both objectively and subjectively:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.⁷⁵

Lower courts have interpreted this case to require both an objective and subjective standard of harassment.⁷⁶ The objective standard entails looking at whether a reasonable person would find the situation harassing. In the context of sex discrimination, some courts have used a "reasonable woman" standard in situations in which the alleged victim was a woman.⁷⁷

It is unclear whether a "reasonable religious person" standard will be adopted in the religious discrimination context. Part of the problem is defining who this person is. Should the factfinder look at it from the perspective of the average person who is a member of the same religious group as the plaintiff?⁷⁸ In its proposed guidelines, the EEOC adopted the perspective of "persons of the alleged victim's . . . religion" to make this determination.⁷⁹ This standard

75. *Harris*, 510 U.S. at 21.

76. See, e.g., *Burns v. MacGregor Elec. Indus.*, 989 F.2d 959 (8th Cir. 1993); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990).

77. See, e.g., *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987); *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1515 (D. Me. 1991). For further discussion of this standard, see Deborah B. Goldberg, Note, *The Road to Equality: The Application of the Reasonable Woman Standard in Sexual Harassment Cases*, 2 CARDOZO WOMEN'S L.J. 195 (1995); Jeremy D. Pasternak, Comment, *Sexual Harassment and Expertise: The Admissibility of Expert Witness Testimony in Cases Utilizing the Reasonable Woman Standard*, 35 SANTA CLARA L. REV. 651 (1995); Liesa L. Bernardin, Note, *Does the Reasonable Woman Standard Exist and Does She Have a Place in Hostile Environment Sexual Harassment Claims Under Title VII After Harris*, 46 FLA. L. REV. 291 (1994); Sharon J. Bittner, Note, *The Reasonable Woman Standard After Harris v. Forklift Systems, Inc.: The Debate Rages On*, 16 WOMEN'S RTS. L. REP. 127 (1994); Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?* 20 WAKE FOREST L. REV. 619 (1993); Kim L. Kim, *The "Reasonable Woman" Standard in Sexual Harassment Cases*, 81 ILL. B.J. 404 (1993); Robert S. Adler and Ellen R. Pierce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773 (1993); Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law--Will It Really Make a Difference?* 26 IND. L. REV. 227 (1993).

78. See *infra* notes 79 to 81 and accompanying text.

79. Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266, 268-69 (1993). For criticism of this standard, see Dean J. Schaner and Melissa M. Erlemeier, *When Faith and Work Collide: Defining*

would be difficult to apply where an individual had developed their own unique set of religious beliefs not shared in common with some defined "group." The standard was never adopted.⁸⁰ Another option is using the perspective of the generally religious person. Using this perspective, Courts might ask whether a person holding a particular belief would find the conduct harassing.

The subjective standard is much easier to handle. It requires the plaintiff to show that he or she actually found the particular environment harassing.⁸¹ The subjective standard protects religious minorities more completely, because of its focus on the particular individual rather than some hypothetical reasonable person. How these standards interplay with hostile environment law as developed in the religion context is unclear.

B. How does Religious Discrimination Fit into Title VII?

While many cases and a large amount of scholarly research have been devoted to the subjects of racial harassment⁸² and sexual harassment⁸³ in the workplace, very few cases and scholars have engaged in discussion about religious harassment of religious employees.⁸⁴ This might be in part because

Standards for Religious Harassment in the Workplace, 21 EMPL. REL. L. J. 7, 23 (1995). For a discussion of the history of these guidelines, see Jamar, *supra* note 29, at 739-40; Dworkin & Pierce, *supra* note 23, at 45-47.

80. See *infra* notes 389-395 and accompanying text.

81. See, e.g., Burns, 989 F.2d at 965.

82. See, e.g., Stephen L. Carter, *Racial Harassment as Discrimination: A Cautious Endorsement of the Anti-Oppression Principle*, 1991 U. CHI. LEGAL F. 13 (1991); Martha Chamallas, *Feminist Construction of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Cases*, TEX. J. WOMEN & L. 95 (1992); Peter E. Millspaugh, *When Self-Organization Includes Racial Harassment: Must the NLRA Yield to Title VII?*, GEO. MASON U. CIV. RTS. L.J. 1 (1991); Helen J. Moore, *Patterson v. McLean Credit Union: Racial Discrimination by Private Actors and Racial Harassment Under Section 1981*, 20 GOLDEN GATE U. L. REV. 617 (1990); Todd A. Richardson, *Have Victims of Racial Harassment Been Taken to the Bank*, 69 NEB. L. REV. 906 (1990).

83. See, e.g., CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); Robert J. Aalberts & Lorne Seidman, *Seeking A "Safe Harbor": The Viability of Summary Judgment in Post-Harris Sexual Harassment Litigation*, 20 S. ILL. U. L.J. 223 (1996); Barry A. Hartstein, *Weeks v. Baker & McKenzie: A Potential "Blueprint" for Sexual Harassment Litigation*, 20 EMPL. REL. L. J. 657 (1995); Barry S. Roberts & Richard A. Mann, *Sexual Harassment in the Workplace: A Primer*, 29 AKRON L. REV. 269 (1996); Marren Roy, *Employer Liability in the Wake of Harris v. Forklift Systems, Inc.*, 48 SMU L. REV. 263 (1994).

84. Of course, there are exceptions. See David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27 (1992); Schaner & Erlemeier, *supra* note 79; Kevin B. Flynn, *Religious Harassment Under Title VII: Incentive for a Religion Free Workplace or a Protection for Religious Liberty*, 22 OHIO N.U. L. REV. 501 (1995). Many have, however, discussed the particular anomalies that are endemic to religious discrimination, such as exceptions for religious employers. See *infra* notes 92 and

there are fewer religious discrimination claims filed.⁸⁵ In fact, there are fewer charges made based on religious harassment than based on any other type of Title VII protected class.⁸⁶ One reason for this may be that it simply is more difficult to make out a claim based on religious harassment (at least in the context where the employee is religious), than it is based on sex or race. Already commentators (and to a certain extent the courts) have acknowledged that it is easier to make out a race claim than it is to make out a sex claim.⁸⁷ Yet, there is no analytical reason why the two claims should be treated differently. While some commentators have distinguished religion claims because they are based on "chosen" beliefs as opposed to innate characteristics such as race or sex,⁸⁸ Title VII makes no such distinction. One obvious distinction, however, is that you generally cannot tell a person's religion by looking at him or her (unless the person is wearing a symbol of his or her religion or is in religious clothing), whereas you often can tell a person's race

100 and accompanying text.

85. The EEOC publishes annual reports concerning the number of discrimination charges filed. There are fewer religious discrimination charges filed than any other type of discrimination, except for discrimination based on "color," many of which are most likely encompassed in race cases. EEOC ANN. REP. 17 (1990) (1.8% of charges filed with the EEOC were religion claims; 46.7% were race claims; 11.6% were national origin claims; 28.5% were sex claims; 12.1% were retaliation claims; .8% were color claims); EEOC COMBINED ANN. REP. 1991 and 1992 29, 31 (1992) (for 1991, 1.8% of charges filed were religion claims, 43.1% were race claims, 10.1% were national origin claims, 12.4% were retaliation claims, 27.3% were sex claims, and .5% were color claims; for 1992, 1.9% of charges filed were religion claims, 40.3% were race claims, 9.9% national origin claims, 14.4% retaliation claims, 29.8% were sex claims, and .5% were color claims); EEOC ANN. REP. 1993 22 (1993) (1.6% of charges filed in 1993 were religion claims, 36% were race claims, 8.4% were national origin claims, 14.4% were retaliation claims, 27.2% were sex claims, and .5% were color claims); EEOC ANN. REP. (1994) 36 (1.7 of the charges filed in 1994 were based on religion, 34.8% were based on race, 8.1% were based on national origin, 15.8% were based on retaliation, 28.4% were based on sex, and .6% were based on "other").

86. For example, in 1990, there were 206 charges of religious harassment, whereas there were 3,359 charges of racial harassment, 1,403 charges of national origin harassment, and 2,251 charges of sexual harassment. EEOC FISCAL YEAR 1990 REP. 17 (1990). In 1994, there were 365 charges of religious harassment, 4,855 charges of racial harassment, 1,530 charges of national origin harassment, and 3,978 charges of sexual harassment. EEOC ANN. REP. 36 (1994). The number of harassment claims brought based on religion in fiscal year 1994 were 365 of 1,546 charges made involving 2,504 separate issues of discrimination. There were also six charges brought alleging exclusion based on religion and fifty-three based on intimidation. One hundred and forty-eight claims involved requests for accommodation. EEOC ANN. REP. 36 (1994).

87. Rachel E. Lutner, *Employer Liability for Sexual Harassment: The Mores of Agency Principles and Respondent Superior*, 1993 U. ILL. L. REV. 589, 621 (1993); Maria M. Carrillo, *Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41, 81 (1992/1993). See also *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 627 (Keith, J., dissenting).

88. Jamar, *supra* note 29, at 727.

or sex by looking at the person. This adds a potential defense to religion-based claims. The employer may claim that it did not know the employee's religion. This accounts for the burden on employees in accommodation cases to inform the employer of the religious conflict with work duties.⁸⁹

Another possible reason for the relative scarcity of religious claims is the inability of plaintiffs and their lawyers to conceptualize their problems in religious terms. For example, in *Lambert v. Condor Manufacturing Inc.*, the plaintiff acknowledged harassment because of his religious beliefs but only claimed sexual harassment.⁹⁰ In addition, the increasing acceptance of secularization of the workplace may result in fewer employees believing they have rights that protect their religious beliefs.⁹¹

Professor David L. Gregory has argued that Title VII and similar employee-oriented legislation have failed to protect the religious employee adequately.⁹² He marks the Supreme Court's development of reasonable accommodation law in the 1970's as the beginning of what he characterizes as the "contemporary Supreme Court's debilitation of employees' Title VII protection against unlawful discrimination on the basis of religion."⁹³ He also sees the Court's decision in *Employment Division v. Smith*⁹⁴ as further limiting the rights of religious employees.⁹⁵ Yet, he does not attempt to make a case using other theories available under Title VII.

C. Some Insight From Religious Employer Cases

Religious harassment can come from two types of religious employers: employers who have an official relationship with an organized religion and employers who do not have an "official" relationship with an organized religion, but rather, due to the owner's religious beliefs, religion is a subject that is brought up in some form at work. There are several exceptions to Title VII that apply to organized religions, such as churches, synagogues, and other

89. See, e.g., *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir., Dec. 4, 1996).

90. 786 F. Supp. 600 (E.D. Mich. 1991). See *infra* notes 323 to 327 and accompanying text.

91. See Underkuffler, *supra* note 29.

92. Gregory, *supra* note 23; See Schaner & Erlemeier, *supra* note 79.

93. Gregory, *supra* note 23, at 30.

94. 494 U.S. 872 (1990).

95. The effects of *Smith* have arguably been ameliorated by the Religious Freedom Restoration Act, which reinstates the compelling governmental interest in cases where a neutral law affects the practice of an individual's religion. 42 U.S.C. §§ 2000bb-2000bb-4 (1988). The Constitutionality of this Act has been called into question and shortly should be determined by the Supreme Court. See *Flores v. City of Boerne, Tex.*, 73 F.3d 1352 (5th Cir.), *cert. granted*, 117 S. Ct. 293 (1996).

organizations of a religious nature. These exceptions are somewhat controversial, as evidenced by the discussion by commentators regarding their propriety.⁹⁶ For purposes of this article, it is interesting to examine the situation of what Jamar calls the "secular religious employer," or the employer who, although not a religious group in the traditional sense or affiliated with such a group, wishes to run a business consistent with certain religious beliefs.

Commentators have already established that there is a difference in cases involving religious employers. These cases are somewhat analogous; they involve the clash of claims between differing religious viewpoints, but instead of a religious employee harassing another employee they involve a religious employer harassing an employee. In cases involving religious employers in which the employee is either nonreligious or of a different religion, the courts are quick to find that the employer has discriminated based on religion.⁹⁷ These cases are different from employee/employee harassment cases, because the employer does not have the same rights under Title VII that an employee does. The employer, however, does have the same First Amendment right to the free exercise of his or her religion. In this respect, the employer's interests (if the employer is an individual) are the same as those of the religious employee.

Thomas Brierton makes an interesting argument that "[t]he courts have been excessively sensitive to employee accommodations when the employer is religious and have failed to tolerate the religious employer who believes in operating his business according to religious values."⁹⁸ His position is supported by the views of other commentators.⁹⁹ As he explains: "When the

96. Robert J. Araujo, S.J., "*The Harvest is Plentiful, But the Laborers Few*": *Hiring Practices and Religiously Affiliated Universities*, 30 U. RICH. L. REV. 713 (1996); Joanne C. Brant, "*Our Shield Belongs to the Lord*": *Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275 (1994); G. Sidney Buchanan, *The Power of Government to Regulate Class Discrimination by Religious Entities: A Study in Conflicting Values*, 43 EMORY L.J. 1189 (1994); Whitney Ellenby, *Divinity vs. Discrimination: Curtailing the Divine Reach of Church Authority*, 26 GOLDEN GATE U. L. REV. 369 (1996); Scott Klundt, *Permitting Religious Employers to Discriminate on the Basis of Religion: Application to For-Profit Activities*, 1988 B.Y.U. L. REV. 22 (1988); Ralph D. Mawdsley, *Religious Educational Institutions: Limitations and Liabilities under ADEA and Title VII*, 89 EDUC. L. REP. 19 (1994); Duane E. Okamoto, *Religious Discrimination and the Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375 (1987); Karen M. Crupi, Comment, *The Relationship Between Title VII and the First Amendment Religion Clauses: The Unconstitutional Schism of Corporation of the Presiding Bishop v. Amos*, 53 ALB. L. REV. 421 (1989); Scott D. McClure, Note, *Religious Preferences in Employment Decisions: How Far May Religious Organizations Go?*, 1990 DUKE L.J. 587 (1990).

97. Thomas D. Brierton, *An Unjustified Hostility Toward Religion in the Workplace*, 34 CATH. LAW. 289 (1991); Jamar, *supra* note 29, at 806; Underkuffler, *supra* note 29, at 588.

98. Brierton, *supra* note 97, at 290.

99. See, e.g., Jamar, *supra* note 29, at 804-25; Underkuffler, *supra* note 29, at 588.

conflict involves a non-religious employer, the courts tend to emphasize the hardship placed upon the employer, allowing the employer to dictate how the employee should be accommodated. However, when the conflict involves the religious employer the courts are excessively sensitive to the employee's religious needs."¹⁰⁰ Brierton builds his argument around four cases in which Title VII or similar state laws were used as a "sword" by nonreligious employees against their religiously motivated employers.¹⁰¹ Ranging in nature from an employer who hired based on religious values contained in the Bible¹⁰² to an employer who required a receptionist to answer the phone for the three days prior to Christmas with the greeting "Merry Christmas,"¹⁰³ the courts in the cases Brierton cites held that the employer had discriminated against the employee based on religion. Brierton argues that such cases have chilled employer religious freedom in the workplace.¹⁰⁴ He argues that an expansive definition of what constitutes "religion" is in part responsible for the use of Title VII in such a manner.¹⁰⁵

While Brierton's examples do not involve claims of harassment alone,¹⁰⁶ they do suggest a preference for accommodating a nonreligious employee's beliefs or the beliefs of the employee who disagrees with the beliefs of his or her religious employer. For example, in *Kentucky Comm'n on Human Rights v. Lesco Mfg. and Design Co.*,¹⁰⁷ the Kentucky Court of Appeals held the employer constructively discharged a receptionist by requiring her to answer the phone for three days during the Christmas season with the greeting "Merry

100. Brierton, *supra* note 97, at 294; see also Jamar, *supra* note 29, at 792-93, 804-818.

101. Brierton, *supra* note 97, at 294-97; Jamar, *supra* note 29, at 806-825. Underkuffler uses three of these cases. See Underkuffler, *supra* note 29, at 584-87.

102. Brierton, *supra* note 97 at 295-96; *State v. Sports and Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), *appeal dismissed for lack of juris.*, 478 U.S. 1015 (1986).

103. Brierton, *supra* note 97, at 296; *Kentucky Comm'n on Human Rights v. Lesco Mfg. and Design Co.*, 736 S.W.2d 361 (Ky. Ct. App. 1987).

104. Brierton, *supra* note 97, at 297.

105. Brierton, *supra* note 97, at 297-300.

106. By "harassment alone" we mean harassment unaccompanied by other alteration in a term, condition, or privilege of employment, such as the employee's being fired or demoted. While some of the behavior in the cases discussed by Brierton could be considered harassment, all involved some distinct adverse employment action. See *Young v. Southwestern Sav. and Loan Ass'n*, 507 F.2d 140 (5th Cir. 1975) (employee constructively discharged for failure to attend monthly meeting which began with short religious talk and prayer); *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985) (employee terminated for disagreeing with employer's religious advisor), *cert. denied*, 490 U.S. 1064 (1989); *State v. Sports and Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985) (employer asked questions regarding church attendance, reading of Bible, prayer, and belief in God during interview for employment); *Kentucky Comm'n on Human Rights v. Lesco Mfg. and Design Co.*, 736 S.W.2d 361 (Ky. Ct. App. 1987) (employee fired or quit for refusing to answer phone with "Merry Christmas" greeting).

107. 736 S.W.2d 361.

Christmas, Lesco.” The employee, who was a Jehovah’s Witness, complained about the requirement and subsequently quit or was fired (this fact was disputed) because the employer insisted she use it. Yet the fact pattern is not perfect, from Brierton’s perspective, because the employee was a member of an organized religion that has definite beliefs about Christmas. In this respect, the case presents a clash between two different sets of religious values rather than a clash between a religious employer and a nonreligious employee

Looking at this fact pattern from the perspective of a nonreligious employer and a religious employee, if a fundamentalist Christian employee was told not to answer the phone with the “Merry Christmas” greeting after being observed doing so by management, it is doubtful that it would be constructive discharge when the employee quit because of this admonition.¹⁰⁸ Certainly, such a request by an employer would not be considered harassment, but instead a sporadic incident that would not qualify as harassment.¹⁰⁹ Further, this is not the type of request that would probably merit accommodation, because it is likely not fundamental to the plaintiff’s religious beliefs or practices.¹¹⁰ This distinguishes our hypothetical fact pattern from *Lesco*. Therefore, it is likely the religious employee would not win his or her claim. Just how hostile environment law is applied in cases of religious employees is the primary focus of the remainder of this article.

III. HOSTILE ENVIRONMENT LAW AND THE RELIGIOUS EMPLOYEE

After reviewing the case law involving claims of religious harassment, this article identifies three categories of claims that involve allegations of a hostile environment. First we discuss employees who cause a commotion at work because of their religious beliefs. These claims often involve requests for accommodation, and therefore we will discuss accommodation law more thoroughly. Although normally it is the other employees who consider the conduct of the religious employee “harassing,” this category sheds light on the difficulties that harassment poses in the religion context. Second is an examination of the most straight-forward type of hostile environment claim: those involving an employee who has religious epithets directed at him or her because of religious affiliation or belief. Finally, this section will examine situations involving “pure” hostile environment cases that do not necessarily involve a clear intent on the part of the employer to discriminate based on

108. See, e.g., *Wilson*, 58 F.3d 1337.

109. See, e.g., *Koelsch v. Beltone Elec. Corp.*, 46 F.3d 705, 708 (7th Cir. 1995).

110. In this respect, the plaintiff in *Lesco* had a more compelling case. The acknowledgment of Christmas created a clash with the employee’s religious beliefs. *Lesco*, 736 S.W.2d at 362.

religion. This includes situations in which an employee feels harassed based on his or her religious beliefs due to the conduct of coworkers that is not religious in nature. For example, the posting of sexually explicit material in the workplace may be harassing to an employee because of his or her religiously founded belief in the sacredness of marriage. By looking at the various ways religion-based hostile environment claims manifest themselves in the workplace, we hope to find a coherent way to approach hostile environment claims that gives due respect for the rights of religious and nonreligious employees as well as the needs of their employers.

A. Accommodating Employee's Religious Beliefs and Harassment Law

Unlike other forms of discrimination protected under Title VII,¹¹¹ religion is accorded additional protection: an employer must reasonably accommodate an employee's religious beliefs.¹¹² This accommodation provision has not always operated to protect religion, however, but instead has in some instances curtailed religious practices in the workplace.

It initially is not clear how religious accommodation law might interplay with issues of religious harassment and religious employees. Indeed, in a later portion of this article, it is argued that it might not be appropriate in this context. Nevertheless, requests for accommodation arise in the context of harassment claims quite frequently, whether the court expressly addresses the issue or not. Normally, in these cases it is not the religious employee who argues harassment. Instead, a nonreligious employee trying to stop the religiously motivated acts of his or her co-worker alleges harassment.¹¹³ For example, an employee who proselytizes at work because her religion requires her to do so might cause a nonreligious employee some discomfort on the job, resulting in a request by that nonreligious employee for either an "accommodation" of her beliefs (although her beliefs might not be traditionally "religious" in character) or an allegation that she is being harassed by the religious employee. Her accommodation (or the employer's curbing of the harassment) would entail curtailing the actions of the proselytizing employee. When asked to stop, the proselytizing employee might respond with her own

111. The Americans with Disabilities Act likewise requires accommodation of persons protected by that legislation. *See* 42 U.S.C. §§ 12111(9) & 12112(b)(5) (1988).

112. 42 U.S.C. § 2000 e(j) (1994). This requirement was added in a 1972 amendment to Title VII. Specifically, the Act states that "[t]he 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." *Id.*

113. This also arises, as was described earlier, in the context of religious secular employers. *See supra* notes 96 to 105 and accompanying text.

request for accommodation. Her request will involve an accommodation that allows her to proselytize on the job, at least at certain times and in certain places.¹¹⁴

This type of counter-accommodation request rarely happens.¹¹⁵ In fact, we could find no case in which the religious employee actually pled harassment in this context. This is not surprising. It is not really a case of harassment for the religious employee, but instead it puts the employer in the position of having to choose between two employees' religious (or nonreligious) belief systems in an effort to determine which is entitled to accommodation. In cases in which the employer takes an adverse action against a religious employee who refuses to stop his or her religious practices, the claims are characterized as straightforward disparate treatment claims and sometimes have an accommodation component. A review of the Supreme Court's decision in the accommodation area as well as decisions of lower courts evaluating similar fact patterns should help determine how the courts and employers can deal with these difficult situations.

1. *Background on Religious Accommodation Law*

An employer must accommodate an employee's religious beliefs or practices unless to do so would cause the employer undue hardship.¹¹⁶ The Supreme Court has interpreted the phrase "undue hardship" in two prominent accommodation cases, *Ansonia Board of Education v. Philbrook*¹¹⁷ and *Trans World Airlines, Inc. v. Hardison*.¹¹⁸ In *Hardison*, the first of the cases, an employee of TWA asked not to work on Saturday, because that was his Sabbath. TWA employees were parties to a collective bargaining agreement between their union and their employer. That collective bargaining agreement set up a seniority system that made it difficult to accommodate Hardison's religion. The particular portion of TWA operations he worked for was open twenty-four hours per day, seven days per week. His job was "essential and on weekends he was the only available person on his shift to perform it."¹¹⁹ Because of Hardison's low position on the seniority list, it became impossible to find an employee willing to swap shifts with him. Eventually, he was discharged for refusal to work on Saturdays.¹²⁰ After reviewing the legislative

114. See, e.g., *Kelly v. Municipal Court*, 852 F. Supp. 724 (S.D. Ind. 1994) (plaintiff permitted to read Bible in non-public areas).

115. See *Wilson*, 58 F.3d at 1342 (an example of this type of situation).

116. 42 U.S.C. § 2000e(j) (1994).

117. 479 U.S. 60 (1986).

118. 432 U.S. 63 (1977).

119. *Id.* at 68.

120. *Id.* at 69.

history of the amendment to Title VII that included the accommodation language and lower courts' opinions in this area, the Court concluded that the nature of the accommodation obligation had "never been spelled out by Congress or by EEOC guidelines."¹²¹ Therefore, the Court sought to give meaning to the requirement.

The Court addressed three possible accommodations for Hardison: (1) allowing Hardison to work four days per week, and have a supervisor from another department cover his position when necessary; (2) use personnel who ordinarily would not work on Saturday and offer them overtime pay; or (3) arrange a swap, which would violate the collective bargaining agreement.¹²² While TWA agreed to the third option, the union refused to authorize a swap that violated the seniority system set up by the collective bargaining agreement.¹²³ While acknowledging that "neither a collective-bargaining contract nor a seniority system may be employed to violate the statute [Title VII]," the Court still concluded that "the duty to accommodate [did not] require[] TWA to take steps inconsistent with the otherwise valid agreement."¹²⁴ The Court based this determination, in part, on the existence of an express exception in Title VII for bona fide seniority systems.¹²⁵

Concluding that TWA had met its obligation to accommodate Hardison and that all the alternatives suggested would involve an undue hardship to the company, the Court stated the general rule that governs accommodation cases:

To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship. Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.¹²⁶

Thus, when an accommodation results in more than a "*de minimis*" cost to an employer, it is not the type of accommodation required under Title VII.

As this quote suggests, throughout its decision the Court emphasized that accommodating Hardison would involve discrimination against nonreligious employees.¹²⁷ While the Court did not reach whether the accommodation provision violated the first amendment, instead holding that TWA had not discriminated under Title VII, its emphasis on discrimination to nonreligious

121. *Id.* at 75.

122. *Id.* at 76, 78-79.

123. *Id.* at 79.

124. *Id.*

125. *Id.* at 81-82.

126. *Id.* at 84.

127. *Id.* at 81, 84, 85.

employees begs the question. If religion is somehow different because it is protected by the free exercise clause, why not discriminate against nonreligious employees where Congress has expressly given religious beliefs special status? By requiring that religion be accommodated under Title VII, wasn't Congress (and the Constitution) authorizing at least some minimal "discrimination?"

The Court's decision in the next case addressing the accommodation issue does not shed light on the first amendment implications. In *Ansonia Board of Education v. Philbrook*, a plaintiff school teacher needed to observe six religious holidays that fell during the school year.¹²⁸ The collective bargaining agreement that governed his employment provided for three days off for religious observance. Philbrook requested that the school district give him the three additional days off by using one of two methods: (1) let him use paid personal leave that was also provided for under the collective bargaining agreement or (2) allow him to pay for a substitute, but do not dock his pay for the missed days.¹²⁹ In the past, the district allowed Philbrook to take unpaid leave.

Refusing to set out what a prima facie case of discrimination would look like in this context, the Court did quote the Second Circuit's formulation, which is similar to the prima facie case used in other circuits.¹³⁰ In order to raise a prima facie case in the accommodation context, the employee must show that: "(1) he or she [the employee] has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; [and] (3) he or she was disciplined for failure to comply with the conflicting employment requirement."¹³¹ It is noteworthy that the plaintiff need not be actually penalized for his religious observance, but instead the threat of discharge or some other adverse employment action is enough.¹³² Some claims are brought in the context of constructive discharge because the employer allegedly refused to offer a reasonable accommodation to the employee.¹³³

128. 479 U.S. 60, 62-63 (1986).

129. *Id.* at 64-65.

130. *Id.* at 65-66. See also *EEOC v. Townley Eng'g and Mfg. Co.*, 859 F.2d 610, 614 n.5 (9th Cir. 1988); *Turpen v. Missouri-Kansas-Texas R.R.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979); *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979) (all using similar prima facie cases).

131. *Philbrook*, 479 U.S. at 65-66 (quoting 757 F.2d 476, 481 (1985) (quoting *Turpen v. Missouri-Kan.-Tex. R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984)); see also *Jenkins v. Louisiana*, 874 F.2d 992, 995 (5th Cir. 1989) (setting out similar standard).

132. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614 n.5 (9th Cir. 1988); *Rodriguez v. City of Chicago*, 1996 WL 22964, *2-*3 (N. D. Ill. 1996).

133. See, e.g., *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 405 (1978); *Young v. Southwest Sav. & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975); *EEOC v. J.C. Penney Co.*,

The first of these elements, the bona fide nature of the employee's religious beliefs, leaves little for the courts to determine. Because this involves difficult questions about the nature of religious beliefs and practices, the courts have concluded that they may neither determine what the tenets of a particular religion are, nor "decide whether a particular practice is or is not required by the tenets of the religion."¹³⁴ However, this admonition, finding its basis in the Supreme Court's holding in *Fowler v. Rhode Island*,¹³⁵ does not extend to determining whether an employee's religious beliefs are sincerely held. This finding sometimes masquerades as a finding on the nature of the employee's beliefs.¹³⁶

The courts have interpreted the notice element as requiring the employee to describe the nature of the religious observation and why the particular employment practice conflicts with their observation.¹³⁷ These courts reason that an employer cannot know how to accommodate an employee's religious beliefs without knowing the nature of the belief and the conflict.¹³⁸ In addition, if the employer is not aware of the conflict, its action in not accommodating the employee can hardly rise to the level of intentional discrimination that is envisioned by Title VII.¹³⁹ Some courts have not required explicit notice, so long as the employer was "aware of the potential for conflict."¹⁴⁰ The Ninth Circuit in particular has detailed the type of notice that is necessary:

A sensible approach would require only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements

Any greater notice requirement would permit an employer to delve into the religious practices of an employee in order to determine whether religion mandates the employee's adherence. If courts may not make such an inquiry, then neither should employers.¹⁴¹

753 F. Supp. 192 (N.D. Miss. 1990).

134. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993) (quoting *Richmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978); see *Vetter v. Farmland Indus., Inc.*, 884 F. Supp. 1287, 1306 (N.D. Iowa 1995).

135. 345 U.S. 67 (1953). The Court in *Fowler* stated that "it is no business of courts to say . . . what is a religious practice or activity. . . ." *Id.* at 70.

136. *Wilson*, 58 F.3d at 1341; see *infra* notes 158 to 163 and accompanying text.

137. See, e.g., *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978); *Cary v. Carmichael*, 908 F. Supp. 1334, 1343 (E.D. Va. 1995).

138. *Cary*, 908 F. Supp. at 1344.

139. *Id.*

140. See, e.g., *Brown v. Polk County, Iowa*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc).

141. *Heller*, 8 F.3d at 1439 (citations omitted).

Seizing on language in *Philbrook*, some courts have carried the notice concept into an affirmative "duty to cooperate" on the part of the religious employee.¹⁴² Other courts have required the employer to make the first suggestion of an accommodation before enforcing the employee's duty to cooperate.¹⁴³

After the employee raises a *prima facie* case, courts using this analysis then shift the burden to the employer to show that it made "good faith efforts to accommodate [the employee's] religious beliefs and, if those efforts were unsuccessful, to demonstrate that [the employer was] unable reasonably to accommodate [the employee's] beliefs without undue hardship."¹⁴⁴ This sometimes is translated into a two step analysis, involving determinations as to (1) whether accommodation is possible and (2) whether the accommodation is reasonable.¹⁴⁵ An accommodation is not reasonable if it causes undue hardship to the employer. In the case of an employer who refuses to offer a reasonable accommodation, the employer "may only prevail if it shows that no accommodation could have been made without undue hardship."¹⁴⁶

The Court in *Philbrook* directly addressed the issue of whether the employer must accept an employee's requested accommodation unless the employer shows undue hardship.¹⁴⁷ Although the Court ultimately remanded the case for consideration of how, precisely, the various forms of leave were administered, it concluded that the employer is under no obligation to accept an employee's proffered accommodation unless it can show that the requested accommodation would cause an undue hardship. Instead, so long as the employer gives at least one reasonable accommodation, it meets its burden under Title VII's accommodation provision.¹⁴⁸ In cases like *Philbrook*, in which the employer would arguably violate a collective bargaining agreement to accommodate the employee's religion, the courts have generally found undue hardship.¹⁴⁹

Commentators have criticized the holding in *Philbrook* as limiting the already paltry relief available to employees who seek religious accommodation. As one commentator has noted:

142. See *Cary*, 908 F. Supp. at 1347; *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982).

143. *EEOC v. Ithaca Indus.*, 849 F.2d 116, 118 (4th Cir. 1988); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1488 (10th Cir. 1989).

144. *Anderson*, 589 F.2d at 401.

145. See *Mann v. Frank*, 7 F.3d 1365, 1368-70 (8th Cir. 1993); *Vetter*, 884 F. Supp. at 1308.

146. *Toledo*, 892 F.2d at 1490, quoted in *Cary*, 908 F. Supp. 1349.

147. 479 U.S. at 68.

148. *Id.*

149. See, e.g., *Mann*, 7 F.3d at 1369-70; *Cary*, 908 F. Supp. at 1350-53.

Given the favorable interpretation of "undue hardship" provided to employers in *Hardison*, one might logically question the Philbrook Court's unwillingness to require employers to accept employee proposed accommodations unless such employers can show that these formulations would impose "undue hardships." Such an approach would have provided workers with a greater degree of religious freedom, and it is doubtful that such a construction would have created establishment clause difficulties.¹⁵⁰

In spite of the low level of accommodation required of employers,¹⁵¹ it remains the standard courts apply today. However, some courts have lessened its impact by requiring the purported hardship to be concrete, rather than speculative. Thus, the employer's cost of accommodation "must mean present undue hardship, as distinguished from anticipated or multiplied hardship."¹⁵²

The Supreme Court cases described above involve straightforward issues of accommodation of a religious employee. The employee needs a day off for a religious observance, and the employer decides whether or not to grant it, considering the relevant legal standard. The cases involving the combination of harassment and accommodation present a much more difficult scenario where the "de minimis" cost standard quite likely is not always appropriate, because it often will result in no meaningful accommodation for the religious employee.

2. *Application of Accommodation Law to Religious Employees who "Harass" Co-workers*

Two themes come out of the cases involving employees who engage in religious activities on the job that annoy or harass co-workers. One is that the courts are reluctant to give way to the religious employee's practices in the face

150. Charles B. Craver, *The 1986-1987 Supreme Court Labor and Employment Law Term: The Expanding Focus on Individual Rights and Preemption*, 3 LAB. LAW. 755, 773 (1987); see also Gregory, *supra* note 23 (criticizing both *Philbrook* and *Hardison*).

151. Several commentators have argued for a higher standard. See, e.g., Jamar, *supra* note 29, at 800-801 (arguing that the Americans with Disabilities Act concept of "reasonable accommodation" may be more appropriate); David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27 (1992) (arguing that the undue hardship standard under Title VII is too weak to protect employee's free exercise rights). Professor Jamar argues that courts should require employers to show that the accommodation is truly an "undue hardship," "not a mere convenience." Jamar, *supra* note 29, at 802.

152. *Cook*, 981 F.2d at 339 (quoting *Brown v. General Motors Corp.*, 601 F.2d 956, 962 (8th Cir. 1979)); see also *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406-07 (9th Cir. 1978) (rejecting as hypothetical purported hardships due to accommodation), *cert. denied*, 439 U.S. 1072 (1979).

of resulting time robbing. Second, employers are increasingly trying to secularize the workplace by taking action against religious employees even before a co-worker complains. This reaction by employers may be easy to explain; the fear of a claim by a religious employee may be less than the fear of one by a nonreligious employee. The employer's assessment in this regard may well be justified; the religious employee has a lesser chance of succeeding on his or her claim.

One of the more interesting cases involving a conflict between the needs of a religious employee and her co-workers is the *Wilson* case, which was briefly described in the introduction to this article. Wilson was a Roman Catholic who took a vow to wear an anti-abortion button "until there was an end to abortion or until [she] could no longer fight the fight."¹⁵³ The button caused a commotion at her workplace, resulting in a purported forty percent decline in productivity.¹⁵⁴ Wilson argued that her employer should accommodate her religious belief. Her co-workers, on the other hand, alleged that her wearing of the button amounted to harassment and charged Wilson's boss in particular with harassing behavior based on his failure to stop Wilson from doing so.¹⁵⁵ Her employer offered her three accommodations: (1) Wilson could wear the button in her cubicle; (2) she could wear the button but cover it while at work; or (3) she could wear a different button that did not have a photograph of a fetus on it.¹⁵⁶ Wilson rejected these accommodations. The trial court held that Wilson's religious beliefs did not require her to be a living witness in this manner and further that her employer had offered her a reasonable accommodation in allowing her to wear the button covered up.¹⁵⁷

The court of appeals upheld the trial court's decision. The most interesting part of its decision is the acceptance of the trial court's decision as to Wilson's belief that she must be a living witness. The parties had stipulated that Wilson's beliefs were sincerely held.¹⁵⁸ The court, however, reasoned that this stipulation did not "cover the details of her religious vow."¹⁵⁹ While the testimony at trial revealed that Wilson did not always mention the living witness component of her vow in explaining its nature, it is not clear, under the law, that this should have played any part in the court's decision. The Supreme Court itself has stated that it is "no business of courts to say . . . what is a religious practice or activity."¹⁶⁰ In light of this admonition, federal courts do

153. *Wilson*, 58 F.3d at 1339.

154. *Id.*

155. *Id.* at 1340.

156. *Id.* at 1339.

157. *Id.* at 1340.

158. *Id.*

159. *Id.* at 1341.

160. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953).

not involve themselves in determinations as to the propriety of a plaintiff's religious beliefs in this context.¹⁶¹ The courts cannot determine the tenets of a particular religion or whether a particular religious practice is or is not required by that religion.¹⁶² Instead, courts may only decide whether an employee sincerely holds that particular religious belief. Yet, there was a stipulation in this case that Wilson did sincerely hold this religious belief. Under these circumstances, there should have been nothing left for the court to determine as to the particular belief in question. The only issue left would have been whether the employer's accommodation was adequate under the circumstances of the case.

In part, the Eighth Circuit seemed to be hemmed in by (or at least relied upon) the standard of review applied to fact finding: clearly erroneous. It repeats and alludes to this standard throughout its analysis of the lower court's decision.¹⁶³ Yet, invocation of the standard seems disingenuous. Instead, it seems like the court does not value Wilson's belief, because it deviates from what "normal" Roman Catholics would do in her situation. Although the court obviously does not come right out and say this, it notes certain facts that suggest this is what it is doing. For example, it notes that Wilson's supervisors are both Roman Catholics who oppose abortion.¹⁶⁴ While this shows that they are sympathetic to Wilson's position, it also suggests a comparison group of Catholics who are not as extreme as Wilson as a potential benchmark of normalcy in this context. This difference from the norm is reflected in the characterization of Wilson's requested accommodation as requiring her employer to "allow Wilson to impose her beliefs as she chooses."¹⁶⁵ That was not Wilson's position at all; instead she was simply trying to exercise her religion consistent with her belief system, and, indeed offered several accommodations of her own that were intended to minimize the commotion her button caused. The court's analysis reads more like an evaluation of the way Wilson chooses to exercise her religion. The court is beyond its capabilities in making this determination and should not have considered the quality of her belief in deciding her case.

The Eighth Circuit's disdain for Wilson's religious beliefs becomes clearer in looking at its analysis of the reasonable accommodation aspect of her claim. Wilson argued that her religious practice was not the cause of disruption in the workplace, but instead it was her co-workers' reactions that caused the

161. See *Heller*, 8 F.3d at 1438.

162. See *id.*

163. *Wilson*, 58 F.3d at 1341.

164. *Id.* at 1339.

165. *Id.* at 1341.

problem.¹⁶⁶ In response to this characterization, the court states that “to simply instruct Wilson’s co-workers that they must accept Wilson’s insistence on wearing a particular depiction of a fetus as part of her religious beliefs is antithetical to the concept of reasonable accommodation.”¹⁶⁷ The court’s analysis might be correct if the other employees opposed Wilson’s practice based on their own religious beliefs. However, there is no evidence to suggest that, and, indeed the evidence suggests that other employees actually were sympathetic to her viewpoint, although intolerant to the manner in which she chose to express it.¹⁶⁸ This suggests that even reasonable people who hold Wilson’s belief do not choose to act on this belief in such an extreme way. Once again, the court suggests that Wilson is just out of line.¹⁶⁹ This is the type of circumstance, however, in which we want the courts to protect a religious belief. It is no challenge to protect a mainstream religious viewpoint; these views are rarely challenged. Instead, Title VII and the free exercise clause itself are designed to protect non-mainstream views.¹⁷⁰

On what basis, then, does a co-worker’s discomfort trump another co-worker’s right to exercise their religion on the job? Certainly, the employer’s time robbing concerns must play some part in this analysis. It is obvious that it was costing Wilson’s employer a significant amount in lost productivity. Wilson suggested three accommodations that were intended to ameliorate the problem: “(1) instruct Wilson’s co-workers to ignore the button; (2) separate Wilson’s work station from her co-workers; or (3) transfer Wilson to another division.”¹⁷¹ Because the court determined that one of the employer’s proffered accommodations (the ability to wear the button covered up on the job) was sufficient, it did not reach the issue of whether Wilson’s proposed accommodations would or would not cause an undue hardship.¹⁷² However, Wilson’s proposed accommodations were appropriate and consistent with Title VII law generally. Perhaps this is why the court avoided ruling on Wilson’s proposals..

The most interesting accommodation requested by Wilson was her request that co-workers be instructed to ignore the button. While the time robbing

166. *Id.*

167. *Id.*

168. *Id.* The court specifically noted that “many employees who opposed Wilson’s button shared Wilson’s religion and view on abortion.” *Id.*

169. This is not to say that the courts should not or cannot find that a particular plaintiff is out of line. For example, in *Dalisay v. Neville Lewis & Assoc.*, 66 Fair Empl. Prac. Cas. (BNA) 1246 (S.D.N.Y. Sept. 1, 1994), the plaintiff alleged that a California-based televangelist was sending “messages through the air waves encouraging people to violate her civil rights.” The court granted summary judgment for the defendants.

170. This is supported by the legislative history of the amendment that added the accommodation provision to Title VII. See 118 CONG. REC. 705 (1972).

171. *Wilson*, 58 F.3d at 1342.

172. *Id.*

associated with this accommodation might have caused more than a de minimis burden, the use of such an accommodation would have been consistent with caselaw developed under Title VII in other contexts. In this respect, the de minimis burden is at odds with rules developed in the context of other forms of discrimination under Title VII. For example, in race and sex discrimination cases, the courts do not permit employers to refuse to hire an employee based on sex or race for a particular job because of customer preference.¹⁷³ This could have a significant burden on the employer—and clearly more than a de minimis one. It could result in the loss of valuable customers. Yet, courts have consistently found such arguments unpersuasive as establishing both business necessity analyses and bona fide occupational qualification defenses to Title VII.¹⁷⁴ The reason for this is obvious. It would result in permitting an employer to give effect to the stereotyping and bigotry of its customers as to who is capable of doing certain jobs.

Some courts have extended this idea to co-worker preferences.¹⁷⁵ The extension is logical. Anti-discrimination laws are designed, in part, to increase the employment opportunities of groups that have been segregated in the workplace. The purposes of antidiscrimination laws would not be furthered by allowing continued segregation based on co-worker preference. The court in *Cain v. Hyatt* put it well:

To permit an employer to circumvent the dictates of the antidiscrimination statute by declaring an individual unfit because the prejudices of its

173. *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 799 (8th Cir. 1993) (customer preference for unbearded men did not rise to the level of a sufficient business justification for no beard policy that had disparate impact on African-American males); *Rucker v. Higher Educ. AIDS Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981); *EEOC v. St. Anne's Hosp. of Chicago*, 664 F.2d 128, 133 (7th Cir. 1981); *Diaz v. Pan Am. World Airlines*, 442 F.2d 385, 389 (5th Cir. 1971) (sex discrimination not a BFOQ based on customer preference), *cert. denied*, 404 U.S. 950 (1971); *see also* 29 C.F.R. § 1604.2(a)(iii) (denying BFOQ status in sex discrimination cases in which "[t]he refusal to hire an individual [is based on] the preferences of coworkers, the employer, clients or customers . . .").

174. *See, e.g., Bradley*, 7 F.3d 795; *Rucker*, 669 F.2d 1179; *Fernandez*, 653 F.2d 1273, *St. Anne's Hosp.*, 664 F.2d 128; *Diaz*, 442 F.2d 385. The business necessity defense is available in disparate impact cases. 42 U.S.C. § 2000e-2(k)(1)(a). BFOQs are available for all forms of discrimination except discrimination based on race and color. 42 U.S.C. § 2000e-2(e) (1988).

175. *See, e.g., Cain v. Hyatt*, 734 F. Supp. 671, 680 (E.D. Pa. 1990) (quoting *Jansen v. Food Circus Supermarkets*, 110 N.J. 363, 373 (1988)) (in the context of AIDS discrimination under the Americans with Disabilities Act). The lack of case law in this area is most likely due to the obvious nature of such a claim. If a woman caused a commotion on the job because she is, for example, the first woman firefighter, the courts certainly would not allow the fire department to justify her termination using this type of time-robbing analysis. It has been raised in the context of AIDS discrimination because of the public misperception of the contagious nature of the disease, and the resulting argument that such a commotion on the part of co-workers is somehow justified.

employees commanded it to do so would be "totally anomalous" . . . for the purpose of the Act [in this case, the ADA] is to eradicate the harm that ubiquitous stereotyping perpetuates.¹⁷⁶

While the analysis in the ADA context is a bit different (focusing instead on stereotyping as to job capabilities based on disability), the underlying rationale should also support religious claims. The point of antidiscrimination laws is to open up employment opportunities for individuals in spite of differences. Allowing co-workers to stifle the religious beliefs of others (often resulting in the termination or constructive discharge of the religious employee) is antithetical to these principles, and results in a burden being placed on religious employees because of their religion. The outcome of a lawsuit based on religious discrimination should not depend on the personal preferences of co-workers anymore than it would on the personal preferences of customers. The courts burden the employer with time robbing in other Title VII contexts. Why not in this one?

The obvious response to why religion cases are harder for plaintiffs to maintain and why the Supreme Court has set the accommodation level at the de minimis standard is because to do more would violate the Establishment Clause.¹⁷⁷ Unlike other protected classes, religion has this specific constitutional limitation.¹⁷⁸ In this respect, the Establishment Clause is in some tension with the Free Exercise Clause. The courts—including Justice O'Connor in a concurring opinion—have already suggested that the accommodation of religion (at least as currently formulated) in Title VII does not violate the Establishment Clause.¹⁷⁹

Commentators have been debating the interplay of the Free Exercise Clause, Establishment Clause, and the theory of accommodation of religion for quite some time now.¹⁸⁰ Although the opinions of these commentators range

176. 734 F. Supp. at 681 (citations omitted).

177. It is noteworthy that the Court in *Philbrook* did not note this as the basis for its decision, and indeed never even addressed the Establishment Clause. *Ansonia Bd. Of Educ. v. Philbrook*, 479 U.S. 60 (1986). Justice Marshall, in his dissent in *Hardison*, suggested that something more than a de minimis standard would not violate the Establishment Clause. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 90 (1977) (Marshall, J., dissenting).

178. Although the courts could run into equal protection problems by favoring certain classes over others.

179. See *Thornton v. Caldor Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring); *Protos v. Volkswagon of Am., Inc.*, 797 F.2d 129, 135 (3d Cir.1986), cert. denied, 479 U.S. 972 (1986), and cases cited therein.

180. See, e.g., Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992); William Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992); Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988).

from strongly in favor of accommodation of religion because it is constitutionally mandated,¹⁸¹ to strongly against it because it is unconstitutional,¹⁸² the debate regarding the extent the courts and Congress can or must require accommodation of religious practices should not detain us too long here.¹⁸³

Given that the courts have upheld the constitutionality of religious accommodations in the Title VII context,¹⁸⁴ the real question is how far can the courts go in permitting accommodations. It seems apparent that Congress meant to go farther than a mere "de minimis" standard.¹⁸⁵ We believe that the courts could interpret the accommodation requirement more broadly than the de minimis standard without the accommodation resulting in an unconstitutional establishment of religion. Exactly how far the accommodation requirement should extend is a difficult question that must be addressed in each individual context in which an employee requests accommodation. There are, of course, limitations. If the accommodation of an employee's religious practices results in harassment of other employees based on these employees' religious beliefs, the accommodation principle has gone too far.¹⁸⁶ However, if the accommodation of an employee's religious beliefs results in some initial time-robbing and associated costs to the employer,¹⁸⁷ it should not violate the Constitution. Instead, it is consistent with the courts' interpretations in the context of other protected statuses to allow for a bit of time robbing in order to further the principles of equality that underly the statute.

In his analysis of Title VII law and the religious secular employer,¹⁸⁸ Steven D. Jamar sets out an approach to employment discrimination law that seeks to encompass both the rights of religiously motivated employers and their

181. See, e.g., McConnell, *supra* note 180.

182. See, e.g., Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); Tushnet, *supra* note 180.

183. An in-depth analysis of this issue is well beyond the scope of this article.

184. See, e.g., Protos v. Volkswagon of Am., Inc., 797 F.2d 129 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986).

185. See *Hardison*, 432 U.S. at 88-90 (Marshall, J., dissenting). Indeed, the legislation was particularly aimed at Sabbatarians. See 118 CONG. REC. 705 (1972). Yet, the Supreme Court has consistently held against their right to have a specific day off for religious observation. See *supra* notes 116 to 129 and accompanying text.

186. It is interesting to note that Wilson's co-workers apparently did not claim harassment any protected status recognized under Title VII. *Wilson*, 58 F.3d at 1339. The employees were simply offended by Wilson's abortion button. *Id.* They were not (and the court made pains to point out) offended because it violated some religious belief of their own or offended them based on some other protected status. *Id.* at 1341. There is no general right to be free from being offended in the workplace. It must be linked to some protected status. In this regard, their claims of harassment were not encompassed by Title VII.

187. This could result in more than a de minimis cost to the employer.

188. Jamar, *supra* note 29.

nonreligious employees. Jamar argues that such cases should not be decided based on hard and fast "rules," but instead on principles that can be balanced and influence the outcome of the decision.¹⁸⁹ The principles he suggests using in the context of a religious secular employer and a nonreligious employee are accommodation, equality, neutrality, tolerance, and inclusion. His principles could likewise be applied in the context of a collision between religious employees and their nonreligious co-workers. Although Jamar proposes that the courts use his principles to guide their decisions in religious secular employer cases, the concepts themselves help in understanding how to handle co-worker tensions based on religion. The concept that applies most vividly to co-worker disputes is tolerance. If co-workers were tolerant of the religious beliefs of their fellow workers, we would see less commotion created by what are considered "extreme" religious viewpoints. In such situations, the reasons for Christine Wilson's termination would disappear. Her co-workers would respect her religious belief—even though it might conflict with their own beliefs or offend them for some other reason—and allow her to wear her abortion button without causing a significant disruption.

An example of co-worker tolerance comes out of *Smith v. Universal Services, Inc.*¹⁹⁰ In *Smith*, the plaintiff sang religious hymns on the job.¹⁹¹ He also discussed tenets of his religion with his co-workers when they raised it.¹⁹² Several co-workers testified that they had heard the plaintiff hum hymns on the job or discuss his religion on the job, but that it did not bother them.¹⁹³ Instead, the singing apparently bothered one of his supervisors, who requested that Smith stop singing and preaching.¹⁹⁴ Although Smith's termination was ultimately upheld because he did not perform his job well, the case reflects a fact pattern of religious tolerance by employees that is truly admirable. It also reflects the attitude of the employer's supervisor that religion has no place in the workplace.

The concept of tolerance was discussed obliquely in another Eighth Circuit accommodation case, *Brown v. Polk County, Iowa*.¹⁹⁵ The plaintiff in *Brown* was a born-again Christian who was the director of information services for Polk County, Iowa, and supervised fifty employees. Brown engaged in certain religiously-oriented activities in the workplace. Specifically, he conducted prayer sessions at the beginning of the workday with several other

189. Jamar, *supra* note 29, at 780-789.

190. 454 F.2d 154 (5th Cir. 1972).

191. *Id.* at 155-6.

192. *Smith v. Universal Serv., Inc.*, 360 F. Supp. 441 (E.D. La. 1972).

193. *Id.* at 443-44.

194. *Id.* at 444. The supervisor apparently complained that it upset the other men, although no other men so testified. *Id.*

195. 61 F.3d 650 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1042 (1996).

employees. He quoted Bible passages at a meeting of employees. He also kept a Bible on the desk in his office.¹⁹⁶ Finally, he allowed prayers in his office during department meetings and at one time directed a secretary to type some Bible study notes for him.¹⁹⁷ In response to these activities, the county administrator asked Brown to “cease any activities that could be considered to be religious proselytizing, witnessing, or counseling.”¹⁹⁸ In addition, the reprimand “directed Mr. Brown to ‘insure a work environment that is free of the types of activities . . . described.’”¹⁹⁹

Given the serious consideration that courts give the claims of nonreligious employees confronted by secular religious employers,²⁰⁰ it is not all that surprising that, in an abundance of caution, an employer might have this response to the actions of a supervisor. Eventually, Brown was fired for his religious activities and other work related errors. He filed claims under Title VII and other civil rights statutes, alleging racial and religious discrimination. He also alleged that his First Amendment right to the free exercise of religion had been violated because his employer was a governmental entity. The trial court held against Mr. Brown, and a panel of the Eighth Circuit initially upheld this decision. It was eventually reviewed by an en banc panel of that court.

The Eighth Circuit considered whether the employer could have accommodated these religious practices. The employer did not offer any accommodation to Brown’s religion, and therefore the court could consider any possible accommodation that would not cause an undue burden. It concluded that two of the activities—having the secretary type Bible study notes and prayer sessions before the start of the workday—were not covered activities under Title VII. First, the Court concluded that typing notes was not a religious activity mandated by Brown’s religious beliefs. In somewhat conclusory reasoning, the Court reasoned that Title VII does not require an employer to open its premises for use before the workday begins.

The court did conclude, however, that the comments during department meetings as well as the prayers at the beginning of meetings in his office did not amount to an undue burden on the employer’s business.²⁰¹ The employer argued that the prayers and Bible references would cause “eventual polarization between born-again Christian employees and other employees,” along with creating a perception that Brown favored Christian employees.²⁰² The County

196. *Id.* at 652-53.

197. *Id.* at 655.

198. *Id.* at 652.

199. *Id.* at 653.

200. *See supra* notes 97-107 and accompanying text.

201. *Brown*, 61 F.3d at 656.

202. *Id.*

presented no direct testimony from Brown's employees indicating that this was of concern to them. The court concluded that such instances were not sufficiently "real," and were too "hypothetical" to meet the undue hardship standard.²⁰³ Further, there was no showing as to an "actual disruption" of the workplace due to Brown's religious activities.²⁰⁴ On this basis, the court concluded that there was no undue hardship in accommodating these religious practices.²⁰⁵

In *Brown*, the court still was open to actual proof of disruption as presenting an undue burden. While many courts require this proof,²⁰⁶ "[e]ven proof that employees would grumble about a particular accommodation is not enough to establish undue hardship."²⁰⁷ As the Supreme Court itself has noted: "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."²⁰⁸ Given this language, perhaps Wilson's mistake was in characterizing her case as a request for accommodation instead of a straightforward religious discrimination case. The low burden applicable to religious accommodation cases may make it easier for an employee to prevail in a regular disparate treatment situation. For example, if Wilson could have avoided characterizing her claim as one for accommodation, she certainly could have raised a *prima facie* case of discrimination based on her religion. She was fired because she wore a button based on her religious beliefs. The burden would then shift to her employer to show a legitimate, nondiscriminatory reason for its treatment of Wilson. In this case, the employer's reason would likely be the time robbing caused by Wilson's wearing the abortion button. As we have seen above, courts have not upheld such a legitimate nondiscriminatory reason in the context of other forms of discrimination.²⁰⁹ It is ironic that the accommodation provision would lead to such a result, when it is clear that Congress intended it to provide further protection to religious employees.²¹⁰

203. *Id.* at 657 (citations omitted).

204. *Id.*

205. *Id.*

206. *See, e.g., Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406-07 (1978), *cert. denied*, 439 U.S. 1072 (1979); *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978), *reh'g denied* (1979) ("[u]ndue hardship" cannot be proven "by assumptions nor by opinions based on hypothetical facts").

207. *Anderson*, 589 F.2d at 402.

208. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 775 (1975) (quoting *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971)).

209. *See supra* notes 173 to 176 and accompanying text.

210. Although the Supreme Court has stated that Congress' purpose in enacting the accommodation section is somewhat unclear, *see Hardison*, 432 U.S. 63, 71-74 & n.9, the legislative history supports a broader interpretation. *See id.* at 88-90 (Marshall, J., dissenting).

B. Religious Slurs as Religious Harassment

The first case to recognize a religious harassment claim was *Compton v. Borden, Inc.*²¹¹ In this case, the plaintiff was subjected to frequent anti-Semitic comments after his supervisor discovered that he was Jewish.²¹² The district court found that the supervisor "harassed plaintiff by using numerous derogatory epithets and by engaging in a patterned course of conduct designed to make his working environment a miserable one."²¹³ The court concluded that: "[W]hen a person vested with managerial responsibilities embarks upon a course of conduct calculated to demean an employee before his fellows because of the employee's professed religious views, such activity will necessarily have the effect of altering the conditions of his employment."²¹⁴

The court held that the employer discriminated against the plaintiff because of his religion and national ancestry.²¹⁵ Nevertheless, the court awarded only nominal damages.²¹⁶

Compton's significance lay in the court's recognition that religious harassment could be severe enough to alter the terms and conditions of a person's employment. Indeed, the court concluded that the supervisor wanted to make the environment "miserable." Compton's co-worker testified that "it was like working under a microscope . . . I was afraid to do anything too much

211. 424 F. Supp. 157 (S.D. Ohio 1976). In *Slamon v. Westinghouse Elec. Corp.*, 386 F. Supp. 174 (E.D. Pa. 1974), an employee claimed that he had been subject to repeated anti-Catholic slurs by his supervisor. The supervisor denied the harassment and the employee was unable to corroborate his claim. *Id.*

212. According to the opinion, Compton and his supervisor "got along famously" until Compton casually mentioned that he was Jewish. At that point the supervisor "began to refer to Compton, in the presence of his fellow workers, as 'the Jew-boy,' 'the kike,' the Christ-killer,' 'the damn Jew,'" and the 'God-damn Jew.'" In addition, the supervisor began to criticize Compton's work which he had previously found acceptable. *Compton*, 424 F. Supp. at 158.

213. *Id.* at 160.

214. *Id.* at 160-161.

215. *Id.* at 161. Interestingly, the defendants attacked Compton's claim that he was Jewish. Compton testified that he was not and never had been a practicing Jew. The court noted that his "grasp of the fundamental tenets of Judaism is a rather poor one." *Id.* Compton recalled that, as a child, his maternal grandmother told him that his paternal grandmother was Jewish. The court noted that 42 U.S.C. §2000 e (j) defined religion to include "all aspects of religious observance and practice, as well as belief." The evidence clearly established that Compton's religious harassment claim was not a sham; rather, the supervisor's harassment was because of Compton's Jewish heritage. *Compton*, 424 F. Supp. at 161.

216. *Compton*, 424 F. Supp. at 162. Compton was not able to connect his discharge to the harassment. Thus, he was not entitled to either reinstatement or back pay. *Id.* The law did not allow compensatory damages to be awarded, although the court indicated that Compton had suffered mental anguish and humiliation. *Id.* at 162. The court awarded \$50 in nominal damages and attorney's fees. *Id.* at 162-63. For more on viability of harassment claims connected to some other form of discriminatory conduct, see Beiner, *supra* note 66, at 656-63.

unless I checked with him and then get a smart answer, and if I didn't get it, there was just no escape. That's the way we were harassed."²¹⁷

In another early case recognizing religious harassment, a federal district court held that repeated offensive and demeaning religious slurs created a hostile work environment. In *Weiss v. United States*,²¹⁸ the employee claimed that he was the constant target of religious slurs from co-workers and from his supervisor.²¹⁹ "[D]emeaning and offensive religious slurs . . . necessarily [have] the effect of altering the conditions of . . . employment within the meaning of Title VII."²²⁰ According to the court: "[c]ontinuous abusive language, whether racist, sexist, or religious in form, can often pollute a healthy working environment by making an employee feel uncomfortable or unwanted in his surroundings. In more extreme cases such as this one, it can even severely affect the employee's emotional and psychological stability."²²¹ Weiss showed that the constant explicit religious harassment continued until he complained. After that time, however, his supervisor made unreasonable and inappropriate demands on him.²²²

The court concluded that Weiss' eventual dismissal for poor job performance was a pretext disguising the underlying religious discrimination.²²³ An employer cannot rely on sub-par work performance when the employer is responsible for the creation of a hostile work environment.²²⁴ Once an employer is put on notice about religious harassment, the employer must do more than simply declare that harassment is officially prohibited. The employer bears an especially heavy burden when supervisory personnel acquiesce and participate in the harassment.²²⁵

217. *Compton*, 424 F. Supp. at 159.

218. 595 F. Supp. 1050 (E.D. Va. 1984).

219. *Id.* at 1053. The slurs included "such taunts as 'resident Jew,' 'Jew faggot,' 'rich Jew,' 'Christ killer,' 'nail him to the cross,' and 'you killed Christ, Wally, so you'll have to hang from the cross.'" *Id.* at 1053. Just as in *Compton*, the supervisor's harassment began after the employee told him that he was Jewish. *Id.*

220. *Id.* at 1056 (citations omitted).

221. *Id.* Weiss showed that the harassment caused him to develop a variety of emotional and physical problems including bleeding hands, headaches, and nausea which affected his job performance. *Id.* at 1055.

222. *Id.* at 1054-55. For example, the supervisor criticized Weiss' work in front of other workers, revoked prior approval to present a symposium paper, kept tabs on Weiss's work with an eye toward building a record against him, and suddenly gave a lower appraisal of Weiss's work, blaming Weiss for delays beyond his control, failing to give Weiss the necessary assistance to complete projects on time, and "by glaring at Weiss and generally treating him with a hostile attitude." *Id.* at 1054.

223. *Id.* at 1056.

224. *Id.* at 1057 (citations omitted).

225. *Id.* Weiss showed that his employer took no action after he complained of the initial abuse and the subsequent retaliation. Moreover, they relied exclusively on the harasser's representations about Weiss's job performance in deciding to fire Weiss. *Id.* On the other

More recently, a state court refused to find an employer liable for a hostile religious environment when it took prompt and repeated action against a supervisor who used religious slurs. In *Vaughn v. AG Processing, Inc.*,²²⁶ the plaintiff showed that he was subjected to repeated anti-Catholic slurs.²²⁷ The Iowa Supreme court recognized the existence of a religious hostile environment claim.²²⁸ They ruled against the plaintiff on the ultimate liability issue, however.²²⁹

Unlike *Weiss*, the employer took prompt action to discipline the offending employee and to remedy the harassment.²³⁰ Also, unlike *Weiss*, the employer did not discharge the employee. Instead, the employee walked off the job and refused to report to work if he had to work under his supervisor.²³¹ Moreover, the employer made the supervisor apologize, promised that the supervisor's behavior would improve, and three times offered to rehire Vaughn over the course of almost two months.²³²

hand, the employer disciplined Weiss's co-worker for calling Weiss "the laziest motherfucker in the office" during a branch meeting. *Id.* at 1053. Nevertheless, Weiss believed that the hostile work environment led to this outburst. This became the "traumatizing event which triggered an obsessive, and perhaps vindictive reaction" toward the supervisor and this co-worker. *Id.*

226. 459 N.W. 2d 627 (Iowa 1990).

227. *Id.* at 631. The abuse started after the employee asked for some time off to attend church services. Thereafter, the supervisor "called him a 'goddamn stupid fuckin' Catholic' and referred to another employee as '[a]nother dumb Catholic.'" The supervisor also claimed that he had never seen a Catholic "that had any fuckin' brains." In addition, the supervisor made comments about the birth rates of Catholics. *Id.*

228. "We therefore find no reason why . . . [anti-harassment] protection should not similarly apply to victims of religious discrimination." *Id.* at 632.

229. *Id.* at 635.

230. For example, the employer investigated the supervisor's behavior, placed a written reprimand in his file, verbally reprimanded him, continued to monitor his behavior, and offered him an opportunity for professional counseling. *Id.* at 634-635.

231. *Id.* at 631.

232. *Id.* It is not clear from the record if and when the employer terminated Vaughn. Vaughn filed for unemployment on July 3, two weeks after walking off the job. The employer also offered Vaughn a chance to return to his job on August 5. Vaughn filed his discrimination complaint on September 29. *Id.*

These are easy and non-controversial cases.²³³ If Title VII and other anti-discrimination laws did not protect Jewish employees from being called "kikes" or Catholics from abusive comments, they would fail to meet even the most minimal expectations of their supporters.²³⁴ In this respect these cases resemble cases in which racial minorities have made out claims of harassment on the basis of racial epithets.²³⁵ They are also easy and non-controversial because it does not take a great leap of legal imagination nor a large stretch of existing precedent to conceptualize the claim. Courts have no trouble importing the standards from racial and sexual harassment cases to religious harassment cases.²³⁶ Moreover, the application of these standards are easy to understand. There is little practical or conceptual difference between subjecting a person to repeated racial epithets or repeated religious epithets. Both "pollute a healthy working environment by making an employee feel uncomfortable and unwanted in his surroundings."²³⁷

233. See also *McHugh v. University of Vermont*, 966 F. 2d 67 (2d Cir. 1992) (anti-Catholic remarks sufficient to establish claim for religious harassment); *Amin v. Quad/Graphics, Inc.*, 929 F. Supp. 73 (N.D.N.Y. 1996) (religious harassment of Muslim employee also related to racial and national origin harassment); *Baron v. Grainger, Inc.*, 944 F. Supp. 689 (N.D. Ill. 1996) (occasional anti-Semitic remarks and stereotypical comments sufficient to establish a prima facie case of religious discrimination); *Goldberg v. Philadelphia*, 1994 U.S. Dist. LEXIS 8969 (E.D. Pa. 1994) (anti-Semitic comments would have detrimentally affected a reasonable Jewish person); *Yudovich v. Stone*, 839 F. Supp. 382 (E.D. Va. 1993) (anti-Semitic comments and offensive symbols); *Smallzman v. Sea Breeze, Inc.*, 1993 WL 15904 (D. Md. 1993) (anti-Semitic comments); *Turner v. Barr*, 806 F. Supp. 1025 (D. D.C. 1992) (anti-Semitic comments); *Imperial Diner v. State Human Rights Appeal Bd.*, 417 N.E.2d 525 (N.Y. 1980) (single anti-Semitic tirade sufficient to find discrimination); *But see Shabat v. Blue Cross Blue Shield*, 925 F. Supp. 977 (W.D.N.Y. 1996) (no hostile environment created because anti-Semitic comments not pervasive); *Rosen v. Baller*, 1995 WL 264169 (E.D.N.Y. 1995) (supervisor's born-again Christianity by itself did not create hostile environment absent slurs); *Thomason v. Prudential Ins. Co.*, 866 F. Supp. 1329 (D. Kan. 1994) (occasional religious slurs not sufficient to allow recovery under state law for tort of outrage); *Reichman v. Bureau of Affirmative Action*, 536 F. Supp. 1149 (M.D. Pa. 1982) (political comments about Israel and Jewish organizations did not amount to religious harassment).

234. See, e.g., *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

235. See, e.g., *Lenoir v. Roll Coater, Inc.*, 13 F.3d 1130 (7th Cir. 1994); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668 (7th Cir. 1993); *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982).

236. See, e.g., *Compton v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976); see also *Meritor Sav. Bank v. Vinson*, 477 U.S. at 65-66; *Cobb v. Anheuser Busch, Inc.*, 793 F. Supp. 1457 (E.D. Mo. 1990).

237. *Weiss*, 509 F. Supp. at 1056. Cf. *Imperial Diner v. State Human Rights Appeal Bd.*, 417 N.E.2d 525 (N.Y. 1980), where the court held that one religious tirade directed at the employee was sufficiently harmful.

C. Religious Expression as Religious Harassment

Courts have also found a religious hostile environment in cases where the employer²³⁸ used the workplace to engage in religious discussion, proclamation, or proselytization.²³⁹ In *Brown Transport Corp. v. Commonwealth of Pennsylvania*,²⁴⁰ the court found religious harassment when an employer failed to remove certain religious material from the workplace. In this case the employer placed Christian Bible verses on employee paychecks.²⁴¹ A Jewish employee complained about these verses and also about the religious content of some articles in the company newsletter. The verses and articles

238. Although there is a good deal of discussion about the employer's potential liability when an employee engages in harassing religious conduct on the job, we have found only one case where liability for a hostile environment was imposed. See *Sapp's Realty, Or. Comm'r of Bureau of Labor and Indus.*, Case No. 11-83 (January 31, 1985) (employer liable when it failed to take action against co-worker who constantly proselytized). Employers and courts, however, assume that the employer will be liable in such cases. See, e.g., *Chalmers v. Tulon Co. of Richmond*, 1996 WL 692127, at *10 (4th Cir. Va. Dec. 4, 1996) (acknowledging that an employer who allowed an employee to send religious letters to a co-worker might be liable for religious harassment); *Wilson v. U.S. West*, 58 F.3d at 1342 ("Title VII does not require an employer to allow an employee to impose . . . religious views on others."); *Peck v. Sony Music Corp.*, 68 Fair Empl. Prac. Cas. (BNA) (S.D.N.Y. Aug. 25, 1995) (trier of fact could find religiously hostile workplace due to instances of proselytization whether harasser was supervisor or co-worker).

239. In addition to the cases discussed *infra*, see *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1988) (holding employer violated Title VII by firing employee after religious disagreement) *cert. denied*, 490 U.S. 1064 (1989); *Young v. Southwestern Sav. & Loan Ass'n.*, 507 F.2d 140 (5th Cir. 1975) (finding mandatory devotional service violates Title VII); *Kentucky Comm'n on Human Rights v. Lesco Mfg. and Design Co.*, 736 S.W. 2d 361 (Ky. Ct. App. 1987) (finding employer failed to reasonably accommodate an employee who refused on religious grounds to use a Christmas greeting when answering phone); Commission Decision, No. 72-1114, EEOC Decisions ¶ 6347 (1972) (finding a hostile environment existed when supervisor attempted to convert co-workers on the job). For a discussion of these cases, see Thomas D. Brierton, *supra* note 97.

240. 578 A.2d 555 (Pa. 1990).

241. The case does not indicate what these verses said or of what the newsletter articles consisted.

continued.²⁴² Eventually, the company fired the employee who thereafter sued for retaliatory discharge and religious harassment.²⁴³

The Pennsylvania Commonwealth Court held for the employee on both his discharge and his harassment claim.²⁴⁴ The court noted that the religious material caused the employee "to question his job security and led him to believe that a [Brown Transport Company] employee needed to be Christian to be promoted into upper management."²⁴⁵ Therefore, the employer's conditions of employment constituted religious harassment of the employee.²⁴⁶

In *State v. Sports & Health Club, Inc.*,²⁴⁷ the Minnesota Supreme Court found religious discrimination when the employer expressly based workplace policies on religious principles. The employer, a health club, interviewed prospective employees on their religious beliefs,²⁴⁸ only promoted born-again Christians,²⁴⁹ based its workplace rules on its interpretation of the Bible,²⁵⁰ held Bible studies at the workplace (some mandatory and some voluntary),²⁵¹ and

242. 578 S.2d at 542-50. Sofer, the complainant, was hired in 1981. The company began printing bible verses on paychecks in June 1983. Sofer immediately complained and asked that the verses be removed from his paycheck. *Id.* at 557-58. He renewed his request four months later. *Id.* at 558. In January 1984, the company re-instituted a company newsletter that had been discontinued in 1970. The newsletter contained articles that Sofer perceived as religious and he complained to management about them. *Brown Transp. Co.*, 578 A.2d at 558. The newsletter continued and similar articles appeared in March, April, and May. *Id.* at 561. Sofer was abruptly fired in June for poor and inconsistent job performance in spite of consistently superior job evaluations, including one two months before his termination. *Id.* at 560. The only negative information in his file was a memorandum which appeared after he complained about the Bible verses. The memorandum characterized Sofer as the "mouse that roars" and suggested that this trait would stunt his career. *Id.* The Pennsylvania Human Relations Commission concluded that this referred to the action that resulted in Sofer's termination. *Id.* at 560-61.

243. *Id.* at 558.

244. *Brown Transp. Co.*, 578 A.2d at 562.

245. *Id.*

246. *Id.* But see *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d 351 (Or. 1995), in which the court found a hostile environment because of the employer's religious proselytization but refused to impose liability in the absence of actual knowledge that the activity was harmful to the employee or an intention to do so.

247. 370 N.W.2d 844 (Minn. 1985), *dismissed for lack of juris.*, 478 U.S. 1015 (1986).

248. Prospective employees were asked (1) whether or not they read the Bible and attended church, (2) questions about their marital status, (3) whether or not they engaged in pre-marital or extra-marital sex, (4) and questions about their specific religious beliefs such as whether or not they believed in God, heaven, hell, etc. *Id.* at 847.

249. The company admitted that only born-again Christians could become managers or assistant managers because of their belief that the Bible did not allow them to work with unbelievers. *Id.* This policy was also related to the mandatory Bible studies. See *infra* note 251.

250. The court described these as "rigid workplace rules based on the Bible (requiring a high degree of discipline and submissiveness), 'backbiting,' and 'non-joyful' attitude[s] on the part of the employee[s]," and a "teachable spirit" and "disciplined lifestyle." *Id.*

251. Bible studies were a "substantial part" of weekly managers' meetings. Voluntary Bible studies were held for the rest of the sales staff. *Id.*

based hiring and firing decisions on whether the employees "are not offended by the owners' faith, are not antagonistic toward the Christian gospel, and will comply with management's work rules in a cheerful and obedient spirit."²⁵²

Although noting that the employer's beliefs were legitimate, the court nevertheless held that their actions constituted discrimination on the basis of religion.²⁵³ According to the court:

Sports and Health, in some instances, went far beyond legally permissible bounds in questioning applicants and employees. The evidence clearly substantiates the findings of the hearing examiner that questioning concerning religious beliefs, practices, and concerning marital status permeated the employment process and were the true reasons for the actions taken by Sports and Health.²⁵⁴

The court also upheld a finding that the club did not provide an open public accommodation on the basis of a complaint that a customer canceled her membership because she was offended by the religious literature on display.²⁵⁵

Finally, in *EEOC v. Townley Engineering & Manufacturing Co.*,²⁵⁶ the Ninth Circuit Court of Appeals held that an employer was required to excuse an atheist employee from attendance at mandatory workplace prayer services. The employers covenanted with God that their business would be "a Christian, faith-operated business."²⁵⁷ They insisted that they were "unable to separate

252. *Id.* at 848. These policies prohibited unmarried cohabitation with persons of the opposite sex, young, single women working without their father's consent or married women working without their husband's consent, hiring people with strong commitments to non-Christian religions, and employing "fornicators and homosexuals." *Id.* at 847.

253. *Id.* at 850.

254. *Id.*

255. *Id.* at 849. One of the complainants claimed that she canceled her membership because the religious literature on display in the club offended her. The club's legal troubles continued. See *State v. Sports & Health Club, Inc.*, 392 N.W. 2d 329 (Minn. Ct. App. 1986), in which the court upheld a finding of contempt when the club handed out a statement of their religiously based beliefs to each prospective employee.

256. 859 F.2d 610 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). See also *Young v. Southwestern Sav. & Loan Ass'n.*, 509 F. 2d 140 (5th Cir. 1975) (ruling mandatory attendance at devotional service violated Title VII). Compare *Kolodziej v. Smith*, 588 N.E.2d 634 (Mass. 1992) (finding religiously based motivational seminars not religious exercise and forced attendance not religious discrimination); *Hiatt v. Walker Chev. Co.*, 837 P.2d 618 (Wash. 1992) (finding attendance at religiously offensive seminar not job requirement); *Beasley v. Health Care Serv. Corp.*, 940 F. 2d 1085 (7th Cir. 1991) (ruling no religious harassment when employer required business to be religiously devout employee's first priority) and *Bellini v. University of St. Thomas*, 1994 WL 425166 (Minn. App. 1994) (mandatory attendance at Roman Catholic mass not religious harassment absent actual or constructive knowledge of employee's objections); Commission Decision No. 91-1, 1991 WL 77565 (EEOC 1991) (finding employer failed to accommodate employees' claims that training course put on by religious organization conflicted with their own religious beliefs).

257. *Townley*, 859 F.2d at 612. A covenant has a religious significance that sets it apart

God from any portion of their daily lives, including their activities at the Townley company."²⁵⁸

The employee attended the services for a brief period of time before he asked to be excused.²⁵⁹ Management refused, telling him that he could sleep or read the newspaper during the service. Several months later, the employee filed a complaint with the EEOC. He left the company two months later, claiming that he was constructively discharged.²⁶⁰

The court found that Townley discriminated against the employee by failing to accommodate his request to be excused from attendance at the devotional services. The court rejected Townley's claim that an accommodation would create an undue spiritual hardship. Rather, the court concluded that Title VII

posits a gain-seeking employer exclusively concerned with preserving and promoting its economic efficiency. . . . It follows that Townley's attempt to link the alleged spiritual hardship to the conduct of the business must fail. It is not enough to argue that Townley was founded to 'share with all of its employees the spiritual aspects of the company'. . . and that the proposed accommodation would have a "chilling effect" on that purpose. To "chill" its purpose is irrelevant if it has no effect on its economic well-being.²⁶¹

At first glance, these cases present little concern. They appear to be examples of employers imposing their religious views on their employees. Indeed, *Sports and Health Club* can be characterized as an example of the worst kind of discrimination: intolerant exclusion of people from the workplace because of their beliefs. There is a disturbing undercurrent in these cases that should cause us to be more circumspect in our reading of them.

These cases seem to conclude that religion has no place in the workplace. Professor Laura Underkuffler argues that "[w]hat is striking about [cases like these] is their underlying assumption that the implementation of religious

from an ordinary contract. A covenant "establishes a new relationship, a promise of an exchange of powers, and the attendant rights and duties that follow the contract." THE CATHOLIC ENCYCLOPEDIA 140 (1987). The relationship between Yahweh and the Israelites is covenantal; that is, Yahweh makes and remakes a series of covenants with the Israelites that indicate Yahweh's enduring faithfulness as well as the Israelites enduring obligations to Yahweh.

258. *Townley*, 859 F.2d at 612. The company also included a religious tract in every piece of outgoing mail and financially supported church and missionary work. *Id.*

259. Pelvas, the complainant, was hired in 1979, but devotional services did not begin at the plant until April 1984. Pelvas complained two months later. *Id.*

260. *Id.* Pelvas filed his complaint in October 1984 and left the company in December of that same year. The EEOC filed an action against the company in July 1986. *Id.*

261. *Townley*, 859 F.2d at 616.

policies, practices, or values by the employer is inherently discriminatory."²⁶² There is almost no analysis of what the underlying discrimination is in these cases. Instead, the court assumes discrimination, believing that: "1. That individual decision-making can be "religiously neutral," or free of religious influence. 2. That absent statutory or constitutional exemption, the implementation of religious beliefs, policies, or practices by the employer in the workplace is discrimination on the basis of religion and should be prohibited."²⁶³

The complainant in *Brown*, for example, stated his opinion that "religion should not be part of business affairs."²⁶⁴ He went on to say that he would have been offended even if his own religion had been featured on the paychecks and in the newsletter.²⁶⁵ In *Sports and Health Club*, the hearing examiner declared that the "essence" of the employer's business was not "discipleship" but "the operation of an exercise emporium."²⁶⁶ In both *Sports & Health Club* and *Townley*, the courts rejected the claim that these companies were religious corporations. The Minnesota court drew a distinct line between private belief and secular commerce.²⁶⁷ The Ninth Circuit looked at the product that the company produced to conclude that the defendant was "primarily secular."²⁶⁸ Finally, the cases were prosecuted as though the employer "was simply one more racist bigot."²⁶⁹ Indeed, the state characterized Sport and Health Club's actions as extreme bigotry.²⁷⁰

These factors illustrate how religion is seen as a stranger or an intruder into the workplace. The baseline logic is circular: if the business is "secular," then it can't be religious and if it is religious, it can't be secular. The result is

262. Underkuffler, *supra* note 29, at 588.

263. Underkuffler, *supra* note 29, at 588.

264. *Brown Transp. Corp.*, 578 A.2d at 561.

265. *Id.*

266. *Sports & Health Club*, 370 N.W.2d at 859 (Petersen, J., dissenting).

267. In *Sports & Health Club*, the court stated the company "is a Minnesota business corporation engaged in business for profit. By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs." *Id.* at 853.

268. The court noted that "[o]n the secular side, the company is for profit. It produces mining equipment, an admittedly secular product. It is not affiliated with or supported by a church. Its articles of incorporation do not mention any religious purpose." *EEOC v. Townley*, 859 F.2d at 619. When weighed against the religious practices of the owners of the company, the court had "no difficulty in holding that these characteristics indicate that Townley is primarily secular." *Id.*

269. *Townley*, 859 F.2d at 624 (Noonan, J. dissenting).

270. *Sports & Health Club*, 370 N.W.2d at 852 n.15. The majority disagreed that "[i]t is questionable whether the characterization of appellant's actions as bigotry is appropriate. . . . In each instance, appellants relied on commands found in the New Testament of the Bible, which, if not followed, they claim, would condemn them to perdition." *Id.*

not neutral, however. It makes a sharp distinction between the secular and the sacred that is itself a theological judgment and that many workers are not willing or able to make.

Vigorous dissents in two cases pursued these themes. In *Townley*, Judge John Noonan noted that the majority declared accommodation a “transcendent principle.” This was an especially ironic designation in this case because “[t]ranscendent principles are those that rise above the here and now” and “link human beings to shared goods of the spirit and their transtemporal destiny.”²⁷¹ To Noonan, the danger is that secularism becomes the ultimate theological judgment in these cases. “Secular men and women take secular values seriously. Men and women of the world believe that the world’s business is important.”²⁷² When courts weigh religious freedom against other claims, the “result should not be foreordained by Congress choosing a secular value as overriding.”²⁷³ Moreover, drawing a sharp line between secular and religious activity is a “species of theology. The theological position is that human beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time.”²⁷⁴

When a governmental agency decides that a business is primarily secular in spite of the sincerely held religious beliefs of the owners, the agency makes “a theological judgment - a theological judgment fairly characterized as reflecting either a secularism skeptical of God’s existence and power or a species of deism that radically isolates God from the world that believers believe God created and animates and directs.”²⁷⁵

In *Sports and Health Club*, dissenting Judge Peterson criticized the administrative agency for substituting their business judgment for that of the company. He went on to say the following:

The examiner, at the same time, decrees a dichotomy between Owens’ beliefs and practices, divorces the sacred from the secular, does not distinguish praying on one’s knees on Sunday from preying on other persons in the marketplace on Monday, and perceives no significant difference between the commitment of conviction and the detachment of a possibly more casual Sabbath ceremony or community convention.²⁷⁶

The “problem” is religion, or at least those people who take it seriously.²⁷⁷ People who cannot make the sharp distinction between the religious and the

271. *Townley*, 859 F.2d at 623 (Noonan, J. dissenting).

272. *Id.* at 624.

273. *Id.*

274. *Id.* at 625.

275. *Id.* at 625.

276. *Sports & Health Club*, 370 N.W.2d at 859 (Peterson, J., dissenting).

277. *Id.* at 860, quoting Dr. Peter J. Gomes.

secular and who are willing to take religious commands seriously in the workplace, present "a disquieting challenge to the larger social and governmental order."²⁷⁸ This fear manifests itself as "a latent spirit of indifference, if not hostility, to deeply held religious beliefs."²⁷⁹ Thus, religious expression is characterized as "extreme bigotry" or "harassment" or "discrimination."²⁸⁰

The reluctance of courts to allow religious secular employers to create a religious workplace environment exacerbates the situation of religiously devout employees. It bottles up the religious energy of some employees.²⁸¹ It places religious employees in a "Catch 22" situation. If employers are prohibited from making any expression of their religious beliefs in the workplace, then workers are prevented from making employment choices on the basis of religious compatibility.²⁸² If they enter the "secular" marketplace, they will be prohibited from "too much" religion on the job. At the same time, they are expected to endure a workplace that quite possibly confronts them with activities that will offend their core religious sensibilities. If they are not able to ask the employer to take reasonable remedial measures to fix the most egregious problems, we have effectively shut religion out of the workplace.

D. Offensive Conduct or Displays as Religious Harassment

In a third category of cases workers complain about workplace activity that is not itself religious but which is either directed at an employee because of his religious beliefs or offends the employee's beliefs. Religious discrimination cases are rare.²⁸³ Cases in which offensive conduct or offensive displays constitute religious harassment are even more rare.²⁸⁴

In *Finnemore v. Bangor Hydro-Electric Co.*,²⁸⁵ the Maine Supreme Judicial Court reversed the trial court's order finding against the employee.

278. Underkuffler, *supra* note 29, at 609.

279. *Sports & Health Club*, 370 N.W.2d at 875 (Peterson, J., dissenting).

280. *See, e.g., Sports & Health Club*, 370 N.W.2d at 852 n.15.

281. *Cf. Frederick Mark Gedicks, Some Political Implications of Religious Belief*, 4 N.D. J. OF LAW, ETHICS & PUB. POL'Y. 419, 432 (1990) (postulating that imposition of secularism might alienate religious believers prompting marginalization or revolt).

282. *Cf. Sports & Health Club*, 370 N. W. 2d at 871 (Peterson, J., dissenting).

283. *See supra* notes 85-86.

284. In *Beasley v. Health Care Serv. Corp.*, 940 F.2d 1085 (7th Cir. 1991), the religiously devout plaintiff showed that she had been called a "religious hypocrite," "Bible Bertha," and a "religious nut." *Id.* at 1086. In addition, she was instructed not to harass employees on religious subjects in spite of the lack of evidence that she had ever done so. Although the lower court found that these instances did not amount to harassment, the court of appeals did not reach the issue. *Id.* at 1088-89. The court found it unnecessary to consider the question of harassment because it concluded that her discharge was for good cause. *Id.* at 1089.

285. 645 A.2d 15 (Me. 1994).

During work breaks, the employees regularly made sexually explicit comments about their wives.²⁸⁶ Finnemore, a “fundamentalist Christian,” complained to them that their comments offended his religion.²⁸⁷ Instead of stopping, they began to make Finnemore’s wife the target of their explicit comments. He complained to management and repeated his complaints to his co-workers.²⁸⁸ Management took no action and his co-workers’ conduct continued.²⁸⁹ After receiving sexually explicit letters through the company mail system, he once again complained to management, who again took no action.²⁹⁰ About a month later he applied for a transfer to another department. He received the transfer but would have had to remain in his current position for an additional three months.²⁹¹ He resigned because of the verbal harassment and the delay in the transfer.²⁹²

The trial court granted the company’s motion for summary judgement because “the co-workers’ comments were not religious in nature.”²⁹³ The Supreme Court of Maine reversed. Maine law expressly created a claim for religious hostile environment, mirroring the now familiar language for sexual harassment.²⁹⁴ The court noted that no federal cases had dealt with sexually explicit comments as the basis for a religious harassment claim in the absence of overt religious slurs.²⁹⁵ Because Maine law required that the comments be “of a religious nature,” the court applied a “but for” test: “whether it occurred because of an individual’s religious beliefs or would not have occurred but for the individual’s religion.”²⁹⁶ Because there was a genuine issue of fact on this

286. *Id.* at 16.

287. Finnemore said: “How can you guys talk like this . . . it’s offensive to my religion.” *Id.*

288. *Id.* According to the court, Finnemore “repeatedly told his co-workers that he objected to their remarks because his relationship with his wife was both private and sacred.” *Id.*

289. *Id.* at 16.

290. *Id.* at 15.

291. *Id.*

292. *Id.* at 16.

293. *Id.* at 16 n.2.

294. The Maine Human Rights Commission defined religious harassment on the basis of religion as “[u]nwelcome comments, jokes, acts or other verbal or physical conduct of a religious nature” when “such conduct has the purpose or effect of substantially interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” *Id.* at 17 (citing Maine Human Rights Comm’n. Emp. Reg. 3.10 (G) (1)).

295. *Id.* The court cited *Weiss, Compton, Vaughn, and Turner v. Barr*, 811 F. Supp. 1 (D.D.C. 1993) (ruling joke about holocaust and offensive stereotypical comments constitute religious harassment), and *Reichman v. Bureau of Affirmative Action*, 536 F. Supp. 1149 (M.D. Pa. 1982) (finding that statements on Middle East issues did not constitute religious harassment).

296. *Finnemore*, 645 A.2d at 17. *Cf.* *Taylor v. National Group Co.*, 729 F. Supp. 575, 577 (N.D. Ohio) (finding no evidence of religious discrimination where employer distributed a book purportedly endorsing “Secular Humanism” to new employees).

question, the court reversed the trial court's summary judgment in favor of the employer.²⁹⁷

Other courts and lawyers have struggled to conceptualize these claims as religious harassment.²⁹⁸ In *Golden v. G.B. Goldman Paper Company*,²⁹⁹ the employee claimed that he was the target of workplace harassment. Co-workers fondled and rubbed their genitals around him because they knew, as a religious person, he found such activity offensive.³⁰⁰ In spite of his complaints, the employer took no remedial action.³⁰¹ Eventually, the employee transferred to another division within the company at a lower rate of pay.³⁰²

Incredibly, the plaintiff did not plead religious harassment. Instead, he claimed sexual harassment.³⁰³ The district court dismissed this claim, noting that "the defendant's employees harassed the plaintiff using sexual gestures but they harassed him because of his religious beliefs."³⁰⁴ Because this harassment was "unrelated to the disparate treatment of men and women," the plaintiff did not state a claim upon which relief could be granted.³⁰⁵ Rubbing salt into the wound, the court quoted the complaint: the defendant's employees behaved the way they did "knowing that plaintiff, being a highly religious and moral man, found such sexual conduct highly offensive, unwelcome, and obnoxious."³⁰⁶

Here was a clear case where the employee's work environment was poisoned by conduct directed at him because of his religion.³⁰⁷ Although there were no ugly religious slurs, the conduct created an environment no less offensive than if slurs had occurred. If Golden had been a women, liability is

297. *Finnemore*, 645 A.2d at 17.

298. *See, e.g.*, *Kelly v. Municipal Courts of Marion County*, 97 F.3d 902, 918 (7th Cir. 1996), in which an employee was harassed because of his religious beliefs about pre-marital sex. Nevertheless, he "failed to advance a coherent legal framework" for this claim, vacillating between an Equal Protection theory and a vague Religion Clause theory. *Id.* Accordingly, the Seventh circuit affirmed the district court's adverse judgment.

299. 1991 WL 157385 (E.D. Pa. Aug. 8, 1991).

300. *Id.*

301. *Id.* Golden complained to his supervisor and pursued a formal grievance. *Id.* at *1.

302. *Id.*

303. *See also* *White v. Dial Corp*, 882 F. Supp. 701, 708 (E.D. Ill. 1994), *aff'd* by 52 F.3d 329 (7th Cir. 1995) (where female plaintiff failed to show that religious objections to foul language established sexual harassment claim).

304. *Golden*, 1991 WL 15738, at *2.

305. *Id.*

306. *Id.*

307. *Cf.* *Kelley v. Municipal Courts of Marion County*, 97 F.3d 902 (7th Cir. 1996), where the plaintiff failed to coherently plead his claim in a case similar to *Finnemore* and *Golden*.

obvious.³⁰⁸ It should not take a great leap of legal imagination to apply the standards from gender and race cases to the facts of *Golden*.³⁰⁹

Plaintiffs like Mr. Golden suffer the same harm as that of employees harassed because of race and gender.³¹⁰ He was subjected to job conditions different than other employees. His job horizons were limited because he had to choose between earning a living or leaving his faith. For those employees who are not able to quit their jobs to pursue more compatible workplaces, they must spend most of their waking hours in an environment that violates their sacred and core identities.

Courts may have trouble taking non-mainstream religious claims seriously. In *Juzwick v. Frank*,³¹¹ the court granted summary judgment for the employer on a religious hostile environment claim. The employee, who worked at McDonald's, complained when music with misogynistic, violent, and sexually explicit lyrics was played over the store sound system.³¹² Juzwick claimed that the music offended his religious beliefs. The district court found that the plaintiff failed to show that anyone played the music with the intent to harass him: "[t]here is nothing to link the playing of the offensive music . . . to [Juzwick's] allegations that management intended to [discriminate against him] because of his religion."³¹³

The court muddled the analysis of his religious claim, finding that the music was not played with the intent to discriminate against the plaintiff's religion even though in race and gender cases intent is not a required element of the claim.³¹⁴ The court conflated the issue of the employer's response with

308. See, e.g., *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), cert. denied, 115 S. Ct. 733 (1995); *Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 965 (8th Cir. 1993); Cf. *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538-39 (10th Cir. 1995).

309. Frequently religious harassment is intermingled with race or national origin discrimination. See *Weiss*, 595 F. Supp. 1050 (E.D. Va. 1984) (national origin); *Turner*, 806 F. Supp. 1025 (D.D.C. 1992) (race). In *Rasheed v. Chrysler Corp.*, 517 N.W.2d 19 (Mich. 1994), the Muslim plaintiff proved religious discrimination in a case involving harassment with racial, religious, and national origin overtones. The trial court dismissed his religious harassment claim, however.

310. See generally CATHERINE A. MACKINNON, *supra* note 83, at 57.; CELIA MORRIS, BEARING WITNESS: SEXUAL HARASSMENT AND BEYOND (1994).

311. No. 93-1082, 1994 U.S. Dist. LEXIS 19416 (W.D. Pa. 1994).

312. The plaintiff specifically complained about playing music by the Rap group, 2 LIVE CREW. Their 1989 release, AS NASTY AS THEY WANNA BE, uses the word "fuck" over 200 times, uses over 100 explicit references to male and female genitalia, contains over 80 descriptions of oral sex, and uses the word "bitch" over 150 times. JAMES DAVISON HUNTER, CULTURE WARS 232 (1991). The group was involved in a highly publicized obscenity trial. See *Luke Records, Inc. v. Navarro*, 960 F. 2d 134 (11th Cir. 1992) (reversing obscenity conviction), cert. denied, 506 U.S. 1022 (1992).

313. *Juzwick v. Frank*, No. 93-1082, 1994 U.S. Dist. LEXIS 19416 at *10 (W.D. Pa. 1994).

314. See *supra* notes 39 to 81 and accompanying text. Cf. *Harris v. Forklift Sys., Inc.*, 510

the employee's cause of action. If the employer makes a reasonable response or if the harassment is not pervasive, then the employer is not liable. Indeed in *Juzwick*, a dispute existed as to whether or not the infrequent playing of the music was pervasive and whether or not the employer was responsible for the music.³¹⁵

Instead of pursuing this analysis the court impatiently dismissed the plaintiff's claim. The court pointed out, for no apparent reason, that *Juzwick* ran a religious publishing business that published primarily his own writings.³¹⁶ *Juzwick* believed that pornography "was the root cause of many of the nation's evils."³¹⁷ In a revealing footnote, the court seemed to mock these views noting that they "transcend[ed] those of most anti-pornographers."³¹⁸ One takes from this case the impression that the court felt that real men, or perhaps more aptly, real Christians, would not complain about such innocuous things as the music played in McDonald's.³¹⁹

The problem is not limited to religious harassment cases. Some courts discount harassment claims by suggesting that claimants are overly sensitive or that Title VII was not meant to change longstanding "innocent" behavior.³²⁰ The confrontation has been intense along gender lines because of the

U.S. 17 (1993) (finding a hostile environment exists if employee perceives or can perceive it to be hostile); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 925 n.3 (5th Cir. 1982) ("[I]t is not necessary to show intent in a case challenging a discriminatory working environment."). **Race:** *See, e.g., Newton v. Department of the Air Force*, 85 F.3d 595, 599 (Fed. Cir. 1996) ("The existence of specific discriminatory intent *vel non* is, in short, not an element of a 'hostile work environment' claim."); *Rogers v. EEOC*, 454 F.2d 234, 239 (5th Cir. 1971) ("[T]he thrust of Title VII's proscriptions is aimed at the consequences or effect of an employment practice and not at the employer's motivation.") *cert. denied*, 406 U.S. 957 (1972); **Sex:** *See e.g., King v. Frazier*, 77 F. 3d 1361, 1363 (Fed. Cir. 1996) (using intent improperly interjected mens rea from criminal law into sexual harassment law) *cert. denied*, 117 S. Ct. 62 (1996); *Bundy v. Jackson*, 641 F. 2d 934-35 (D.C. Cir. 1981) ("[S]exual stereotyping . . . may be benign in intent . . . yet it violates Title VII.").

315. *Juzwick*, No. 93-1082, 1994 U.S. Dist. LEXIS 19416 at *11.

316. *Id.* at * 3.

317. *Id.*

318. The court pointed out that the plaintiff believed that "the Washington Monument and the Statue of Liberty are demonic sexual symbols which were erected to corrupt the American people." *Id.* at *3 n.2.

319. *Cf. EEOC v. Townley*, 859 F.2d 610, 624 (9th Cir. 1988) (warning about the trouble mainstream judges might have deciding cases involving non-mainstream religious claims), *cert. denied*, 489 U.S. 1077 (1989) (Noonan, J., dissenting).

320. *See Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1537-38 (10th Cir. 1995). There, the court declared that in the "real world of construction work, profanity and vulgarity are not perceived as hostile or abusive." Instead, such language is considered "normal human behavior." *Id.* *See also Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984), *aff'd* 805 F.2d 611 (6th Cir. 1986) (Title VII not designed to "bring about a magical transformation in the social mores of American workers"), *cert. denied*, 481 U.S. 1041 (1987).

significantly different ways men and women may view the same behavior.³²¹ The potential for similar conflict exists in religious harassment claims. Suppose Vaughn's co-workers had just spoken "roughly" but not with a religious bias, or suppose that, as in the *Jacksonville Shipyards*³²² case, religiously devout male workers had objected to nude pictures? Should anti-discrimination law recognize a cause of action for these types of religious hostile environment claims?

The only case to deal with this question is *Lambert v. Condor Manufacturing Inc.*³²³ The plaintiff objected to working in an area adorned with pictures of naked women.³²⁴ He complained and asked that the pictures be removed. When they remained, he refused to work in the area where the pictures were located.³²⁵ Instead of removing the pictures, the employer offered to transfer Lambert to another shift.³²⁶ The court found that Lambert made out the elements of a religious discrimination claim.³²⁷

Current harassment law should be extended to instances of religious harassment like the above.³²⁸ Cases like *Finnemore* provide the best model. They do not relegate religion to a lesser realm of protection; they respect the important role religion plays in many workers' lives. Nevertheless, applying conventional harassment law does not tip the scales completely in favor of the

321. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (men may view sexual conduct in a vacuum without appreciation for women's legitimate fears); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988) (comments about woman's figure may be acceptable to some men but offensive to some women). See generally Nancy J. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1207-08 (1990) (men may view some sexual harassment as "harmless social interaction to which only overly-sensitive women would object").

322. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991) (citing twenty-nine separate instances of pornographic pictures posted throughout the workplace as partial basis for finding hostile environment).

323. 768 F. Supp. 600 (E.D. Mich. 1991).

324. *Id.* at 601. The case reveals little about the physical layout of the work area. There is one indication that the plaintiff worked on machinery and that the pictures were located on or near the machines. *Id.* at 602.

325. *Id.* at 602. The parties disagreed on these issues, however. The defendant challenged the sincerity of the plaintiff's beliefs, and denied that the plaintiff ever informed the employer of his religious objections to the pictures. *Id.*

326. *Id.* at 603.

327. *Id.* at 604. The court also rejected the employers' First Amendment defense to the removal of the pictures. Unfortunately, the court incorrectly concluded that the First Amendment did not apply because Lambert worked for a private company. The court failed to distinguish the right of a private employer to restrict speech and a coercive judicial order allowing a private party to restrict speech. See Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1798 (1991).

328. For a discussion of some of the same cases from the perspective of advising employers that reach a similar conclusion, see Dean J. Schaner and Melissa M. Erlemeier, *supra note 79*, at 7.

complaining worker. The employee must show “severe” or “pervasive” religious harassment.³²⁹ Single instances generally do not rise to the level of harassment.³³⁰ Employers are allowed the flexibility to make “reasonable” responses to the harassment complaint,³³¹ and other employees are put on notice that their conduct offends someone’s religious beliefs.

E. The Problem with Accommodation in Hostile Environment Cases

Most of the *Lambert* opinion dealt with whether the offer to transfer amounted to a reasonable accommodation. The accommodation question centered around whether the employer must remove the pornographic pictures or need only offer to remove Lambert. Phrased in this way, an accommodation requirement seems out of place. Perhaps the accommodation requirement may not apply to hostile environment claims.³³² The accommodation section seems to contemplate the employee asking the employer for “special” treatment or for an exemption because of his religion.³³³ The typical accommodation case involves an employee who asks to be exempted from work on his Sabbath or holy day.³³⁴ In these cases, the employee asks for a waiver of a workplace rule of general applicability.³³⁵

329. See e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (finding conduct must be severe or pervasive); *Paulsen v. Guidant Corp.*, 1996 WL 745280 (Minn. App. 1996) (isolated comments did not establish harassment); *Ellis v. Walmart Stores, Inc.*, 1996 WL 774770 (M.D. Ala. 1996) (single remark not sufficient to create hostile environment); *Rosen v. Baker*, 1995 WL 264169, at *7 (E.D.N.Y. 1995) (using the *Harris* standard to deny a claim of a religious hostile environment); *Sarin v. Raytheon*, 905 F. Supp. 49 (D. Mass. 1995) (finding employer’s prompt response legally sufficient to shield it from liability); *Kantar v. Baldwin Cooke Co.*, 1995 W.L. 692022 (N.D. Ill. 1995) (ruling handful of comments over two years not severe or pervasive enough to establish hostile environment).

330. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (finding single offensive comment does not alter a condition of employment).

331. See, e.g., *Meritor*, 477 U.S. at 70-71; *Vaughn v. AG Processing, Inc.*, 459 N.W.2d 627, 634 (Iowa 1990).

332. One commentator has suggested that the failure to reasonably accommodate a person with a disability would be a factor to consider in assessing a claim for workplace harassment based on disability. Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans with Disabilities Act*, 15 CARDOZO L. REV. 1475 (1994).

333. 42 U.S.C. § 2000e (j) (1994).

334. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) *cert. denied*, 501 U.S. 1218 (1991); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Protos v. Volkswagen of Am. Inc.*, 797 F.2d 129 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986).

335. Frank Ravitch argues that the accommodation requirement of the Americans with Disabilities Act is unique because it is “required to enable the employee to perform his or her job. The accommodation of religious observances by an employer does not enable that employee to perform the job; it simply acknowledges that employees have a right observe their religious beliefs without being discriminated against. . . .” Ravitch, *supra* note 332, at 1509

In a hostile environment case, however, the employee is not asking for anything special. Instead, the employee is asking for what everyone is entitled to: a workplace free from hostility on the basis of race, color, sex, national origin, and religion. There is no general rule to waive. The employer, in a race or gender case, must make a reasonable response to the harassment claim.³³⁶ It would not be reasonable to transfer a woman or a racial minority away from the harassment if it alters a term or condition of employment.³³⁷

Accommodation is never an issue in the religious slur cases. In *Turner v. Barr*,³³⁸ for example, the employee was subjected to offensive religious comments. The plaintiff showed a pattern of religiously hostile comments and activities typified by a tasteless joke about the Holocaust and repeated comments about Jews and money.³³⁹ The accommodation question never arose. The court treated the claim as though the plaintiff was subject to overt discrimination and not as though he was asking for an exception to a workplace rule.

Accommodation also makes little sense when applied to hostile religious environment claims. The harm in these cases comes from the fear, intimidation, and psychological distress suffered by the plaintiffs. The victim of the discrimination bears the burden while the perpetrators are allowed to continue their misconduct. Title VII's goal is to eliminate discrimination in the workplace. This necessarily requires workplaces that are hostile environments to change.³⁴⁰ It would be anomalous to allow religiously hostile workplaces to continue while Title VII eliminates other forms of hostile environments.

IV. RELIGIOUS DISCRIMINATION IN THE MODERN ERA

In the end, the question is whether or not the elimination of religious discrimination is as important to the law and society as the elimination of racial or sexual discrimination. Contemporary culture tends to forget America's

n.161. The difference may be in the eye of the beholder, however. The religiously devout worker may be as incapable of working in an atmosphere that he or she regards as objectively sinful as the disabled worker may be incapable of working without an accommodation.

336. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (ruling employer must investigate and take appropriate action); *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983) (finding employer's remedy must be reasonably calculated to end harassment).

337. See *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) (finding transfer an inadequate remedy for sexual harassment when it "reduces the victim's wages or other remuneration, increases the disamenities of work, or impairs her prospects for promotion or makes the victim worse off").

338. 806 F. Supp. 1025 (D.D.C. 1992).

339. *Id.* at 1028.

340. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1988).

history of religious bigotry.³⁴¹ For example, anti-Jewish and anti-Catholic sentiment animated political parties³⁴² and social movements.³⁴³ For years many jobs were off limits to members of these faiths.

Today, we have realigned our religious loyalties as people relate less to the traditional denominations. Divisions remain but they are created more by a person's particular moral vision than their denomination.³⁴⁴ Ecumenical cooperation and the diffusion of knowledge have broken down many of the barriers between the major faiths. Instead of clear divisions based on the major religions,³⁴⁵ religious conflict occurs among people divided by different beliefs about authority, revelation, and individualism. These beliefs take expression as "polarizing impulses or tendencies."³⁴⁶ The most likely religious problems today will involve conflicts between these two camps, even if the combatants are from the same religion.

On one side are the "progressives" who have made more peace with modern culture. On the other side are the traditionalists or the "orthodox"³⁴⁷ who are not as secure and happy with modern America. They hold different conclusions about the nature of moral rules, the authority of scripture, and the role of religion in their life.³⁴⁸ They will hold different conclusions on matters of faith and social policy. They will probably have different opinions about what their religion allows and what it forbids.

The traditionalist sees religion as a set of objective truths and divinely ordained rules. When an aspect of the social world conflicts with these truths, the world must conform to the truth.³⁴⁹ On the other hand, a progressive sees

341. See JOHN HIGHAM, *STRANGERS IN A STRANGE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* (2d ed. 1988). See also U.S. Commission on Civil Rights, Clearinghouse Pub. 80, *Religion In the Constitution: A Delicate Balance* (Sept. 1983).

342. HIGHAM, *supra* note 341, at 28; Commission on Civil Rights, *supra* note 341, at 16 (describing the brief life and death of the "Know-Nothings").

343. JAMES D. HUNTER, *CULTURE WARS* 37 (1991); U.S. Comm'n on Civil Rights, *supra* note 341, at 15-16 (discussing the activities of groups like the American Protective Association and the Ku Klux Klan, which engaged in anti-Catholic and anti-Jewish activities well into the twentieth century).

344. HUNTER, *supra* note 343, at 42-43.

345. We refer to the historically predominant religions in the United States: Protestantism, Roman Catholicism, and Judaism. See HUNTER, *supra* note 343, at 39.

346. HUNTER, *supra* note 343, at 43. It is important to note that most people do not subscribe without reservation to these moral visions. Rather, they tend to occupy a vast middle spectrum, perhaps leaning one way or another. Nevertheless, they are influenced by the articulation of the more extreme visions in public discourse. *Id.*

347. Orthodox is used to denote an affiliation with traditional religious views. It is not meant to refer only to those Christians who belong to the various Eastern Orthodox traditions. HUNTER, *supra* note 343, at 43-44.

348. HUNTER, *supra* note 343, at 43-46.

349. Hunter describes the "Orthodox" vision as:

the commitment . . . to an external, definable, and transcendent authority. Such

religion as a process of slowly unfolding revelation that is historically and culturally conditioned. When a conflict exists between the world and religion, it is quite possibly the religion that will change. Truth is subject to the ongoing mediation of experience.³⁵⁰

In this environment, it is likely that the traditionalist will object to some aspect of the environment. The plaintiff who is offended by pornographic pictures or sexual taunts could be any denomination. The taunts themselves may not be motivated by denominational bias and may be hurled by members of the plaintiff's own denomination.³⁵¹ These employees suffer as much as the plaintiff who is subjected to overt religious slurs. If we fail to provide them with an avenue for resolving these disputes, we will trivialize their concerns and disenfranchise them. We will send a message that their religious beliefs are unimportant and that the law is not concerned with their well-being. We will be denying that the beliefs perhaps constituting their very person are not worthy of consideration in either the workplace or in the courtroom.

Shutting religion out of the workplace is not consistent with our traditional principles of tolerance and inclusion. Professor Steven Jamar has argued for a conceptualization of anti-discrimination law that includes these goals among others. Jamar argues for a Dworkinian accommodation of religion in the workplace where cases "should not be decided by relatively rigid application of formulaic rules. Instead, they should be decided through carefully nuanced consideration of the seemingly imprecise principle of accommodation tempered by and informed by the principles and ideals of tolerance, equality, neutrality, and inclusion."³⁵²

Although Jamar's proposal applies to religious secular employers, its recitation of the relevant principles applies to this discussion of the religious employee. Religious employees are whipsawed by the demands of the secular workplace and the demands of their consciences. As Jamar points out, courts

objective and transcendent authority defines, at least in the abstract, a consistent, unchangeable measure of value, purpose, goodness, and identity, both personal and collective. It tells us what is good, what is true, how we should live, and who we are.

HUNTER, *supra* note 343, at 44.

350. Hunter defines the progressive moral vision as: a spirit of rationalism and subjectivism. Progressivist moral ideals tend, that is, to derive from and embody [these characteristics.] From this standpoint, truth tends to be viewed as a process, as a reality that is ever unfolding. . . ." [There may be a] "strong tendency to translate the moral ideals of a religious tradition so that they conform to and legitimate the contemporary *Zeitgeist*."

HUNTER, *supra* note 343, at 44.

351. *Cf.* Wilson v. U.S. West Communications, 58 F.3d 1337, 1339, 1341 (8th Cir. 1995), where the court noted that Wilson's supervisors and many of her co-workers were Roman Catholic like Wilson.

352. Jamar, *supra* note 29, at 720.

have found it easy to side with the nonreligious employee against both the religious employer or employee.³⁵³ Principles like accommodation, toleration, inclusion, and equality are all ignored when the employee has no option to choose a religiously compatible workplace or to remedy a religiously hostile one.

V. RELIGIOUS HARASSMENT AND FREE SPEECH

We have argued that plaintiff's lawyers should raise more religious harassment claims and courts should be more sensitive to them. We have suggested that the court's reluctance to allow religious business environments should lead to a broader application of religious hostile environment principles. Remedial orders in religious hostile environment cases may be very broad. For example, in *Turner v. Barr*, the court's order prevented any and all religiously offensive jokes.³⁵⁴ Similarly, in *Lambert*, the presumptive remedy would be to prohibit the display of all pictures of naked women.

Commentators have raised significant free speech questions in sexual harassment cases involving remedies like the ones proposed above.³⁵⁵

353. Jamar, *supra* note 29, at 720.

354. *Turner*, 806 F. Supp. 1025, 1030 (D.D.C. 1992). *Cf.* *Imperial Diner v. State Human Rts. Appeal Bd.* 417 N.E.2d 525 (N.Y. 1980) (finding single incident sufficient to constitute religious discrimination).

355. *See, e.g.,* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); *see also* Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990); Nadine Strossen, *Regulating Workplace Harassment and Upholding the First Amendment - Avoiding a Collision*, 37 VILL. L. REV. 757 (1992); Jeffrey A. Steele, *Fighting the Devil With A Double-Edged Sword: Is the Speech Invoked Hostile Work Environment Hostile to O'Brien*, 72 U. DET. L. REV. 83 (1994); Wayne L. Robbins, *When Two Liberal Values Collide in an Era of 'Political Correctness': First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims*, 47 BAYLOR L. REV. 789 (1995); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992). Professor Volokh is most closely identified with this position. *See* Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?* 85 GEO. L.J. 627 (1997); Eugene Volokh, *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*, 17 BERKELEY J. EMP. & LAB. L. 305 (1996) [hereinafter Volokh, *Thinking Ahead*]; Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995). *But see, e.g.,* Deborah Epstein, *Free Speech at Work: Verbal Harassment As Gender-Based Discrimination, (Mis)Treatment*, 85 GEO. L.J. 649 (1997); Mary Becker, *How Free is Speech at Work?*, 29 U.C. DAVIS L. REV. 815 (1996); Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality In the Workplace? Running the Gauntlet of Hostile Environment Speech*, 84 GEO. L.J. 399 (1996); Charles R. Callerus, *Title VII and Free Speech: The First Amendment is Not Hostile to a Content Neutral Hostile Environment Theory*, 1996 UTAH L. REV. 227 (1996); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and The First Amendment: No Collision In Sight*, 47 RUTGERS L. REV. 461 (1995); Richard Fallon, *Sexual Harassment Content Neutrality and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT.

Professor Eugene Volokh argues that none of the broadest anti-harassment orders can be justified by current First Amendment law or extensions of existing principles.³⁵⁶ Moreover, the threat of liability squelches even more speech by encouraging employers to enact “no tolerance” anti-harassment policies.³⁵⁷ Thus, even if such extensions could be made, it would be bad First Amendment policy to do so.

Volokh suggests the creation of a new, limited First Amendment category for workplace harassment. For Volokh, the First Amendment should distinguish between directed harassment and undirected speech. Directed harassment is “speech aimed at a particular employee because of her race, sex, religion, or national origin.”³⁵⁸ General speech is undirected, i.e., it is “speech between other employees that is overheard by the offended employee, or printed material intended to communicate to the other employees in general”³⁵⁹ The Free Speech Clause fully protects undirected speech but allows prohibition of directed harassment.

Thus, Volokh would (presumably) agree with the outcome in *Finnemore*, in which the court found a cause of action for religious harassment when co-workers directed sexually explicit remarks at the complainant.³⁶⁰ On the other hand, Volokh would (presumably) disagree with the result in *Lambert*, in which the court found a religious harassment claim because of workplace displays of pornographic pictures.³⁶¹

REV. 1; Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375; Amy Horton, Comment, *Of Supervisory Centerfolds and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403 (1991); Peggy E. Bruggman, *Beyond Pinups: Workplace Restrictions on the Private Consumption of Pornography*, 23 HASTINGS CONST. L.Q. 271 (1995).

356. Volokh, Comment, *supra* note 355, at 1819. Volokh considers and rejects the arguments that workplace harassment orders can be justified under time, place, and manner, captive audience, and workplace speech doctrines. *Id.* at 1820-43.

357. Volokh, Comment, *supra* note 355, at 1809- 1810 (companies fearing liability enact harsh speech codes and employees fearing discipline avoid controversial topics); Volokh, *Thinking Ahead*, *supra* note 355, at 310 (“[t]o be safe, [an employer] has to prohibit any individual statement that might contribute to a hostile environment”).

358. Volokh, Comment, *supra* note 355, at 1846. *See also*, Volokh, *Thinking Ahead*, *supra* note 355, at 311 (“I think one-to-one speech- statements made only to the offended party - can be restricted When the only listener is one who doesn’t want to hear, the speech can be restrained without interfering with the speaker’s ability to reach other, willing, listeners”).

359. Volokh, Comment, *supra* note 355, at 1846. *See also* Volokh, *Thinking Ahead*, *supra* note 355, at 311. (“One-to-many communication - posters, newsletters, conversations in the lunchroom involving willing (or at least potentially willing) listeners - is, in my view, fully protected by the Free Speech Clause from government imposed restrictions such as those imposed by workplace harassment law.”).

360. *See supra* notes 293-297 and accompanying text.

361. *See supra* notes 313-316 and accompanying text. Unlike some commentators, Volokh admits that some workplaces can be restricted without violating the First Amendment. *Compare* Browne, *supra* note 355 with Volokh, Comment, *supra* note 355. Volokh also makes

A complete discussion of the free speech issue is beyond the scope of this article. We will briefly address potential First Amendment concerns in pornography cases for two reasons. First, there is a developing body of law finding pornographic displays sexual harassment that provides the baseline for whether or not such displays also constitute religious harassment. Second, Volokh's free speech arguments seem to break down when considering religious objections to workplace pornography.

Professor Volokh argues that suppression of pornography as part of a hostile work environment remedy is necessarily content or viewpoint based.³⁶² Workplace pornography is considered sexual harassment by courts, according to Volokh, because either (1) it makes men think of women in "the wrong way, or (2) it sends a message particularly offensive to women."³⁶³ The former violates the first amendment because it is "thought control in its most literal sense. Even the strongest of state interests in equality cannot justify suppressing speech because it makes people think women are inferior."³⁶⁴ The latter violates the First Amendment because it intrudes into political speech—the core of the first amendment.³⁶⁵ Finally, even if some justification for suppressing workplace pornography could be posited, drawing an acceptably narrow order would be nearly impossible. The order would have to distinguish between pornography and "legitimate art:" a task easier said than done.³⁶⁶ At the same time, it also would have to distinguish between an employer's interest

clear his distaste for workplace harassment in *Freedom of Speech and Workplace Harassment*, *supra* note 355 at 1807-09, where he describes the "harrowing abuse" that occurred in some cases. Except for these "egregious cases," Volokh does not distinguish between the standards for Title VII liability and the standards for reviewing remedial orders. Volokh, *How Harassment Law Restricts Free Speech*, *supra* note 355, 564 n.4. More precisely, Volokh's position is that current free speech case law does not support the notion that "the standard for restricting protected speech differs depending on the presence of past misconduct." Volokh, *How Harassment Law Restricts Free Speech*, *supra* note 355, at 564, 565. Thus, we assume that because *Lambert* appears to be "one-to-many" speech, Volokh would not find the employer liable for religious harassment. In *Finnemore*, we assume that because the speech is "one-to-one," Volokh would find the employer liable if the proper conditions were met. Volokh would (presumably) be concerned if a court entered an overly broad order. See Volokh, *Thinking Ahead*, *supra* note 355 at 307, in which Volokh refers to *Turner v. Barr*, in which the court's order prohibited "any racial, religious, ethnic, or other remarks or slurs contrary to their fellow employees' religious beliefs."

362. Volokh, Comment, *supra* note 355, at 1858-59.

363. Volokh, Comment, *supra* note 355, at 1858-59.

364. Volokh, Comment, *supra* note 355, at 1858.

365. Volokh, Comment, *supra* note 355, at 1859.

366. Volokh, Comment, *supra* note 355, at 1859-60. Volokh states that the *Robinson* court's order would have prevented an employee from "putting a calender of Renaissance nudes on his wall, or a suggestive picture of his wife on his desk (even if the picture involves no nudity)." Volokh, Comment, *supra* note 355, at 1860. See also Volokh, *Thinking Ahead*, *supra* note 355, at 309.

in using or selling non-obscene pornographic materials and "impermissible" hostile environments.³⁶⁷ Volokh does not find harassment law up to the task.

Religious objections to workplace pornography do not track with Volokh's first amendment analysis. We believe that religious concerns are sufficiently important to allow orders banning the general display of pornography in the appropriate case.³⁶⁸ Moreover, we believe that current harassment law and current free exercise law provide limiting principles that will help prevent the evisceration of more general free speech principles.³⁶⁹

First of all, the complaint in *Lambert* is not based on either thought control or the message of pornography. A religious employee may see the pornography as an occasion of sin, his sin. Continued exposure to this information offers the employee a constant temptation to violate religious commands. The employee does not have readily available technical means to prevent exposure to the offending materials nor is the exposure fleeting.³⁷⁰ Instead, he must, day after day, report to an offensive and sinful environment. In this sense, his complaint is not about the effect pornography may have on others; it is about the effect that it is having on him.

Second, the directed-undirected distinction collapses when the employee complains but the material remains visible. Volokh argues that the reason directed speech can be prohibited is because any prohibition only "prevent[s] people from communicating their opinions to coworkers who do not want to listen."³⁷¹ Although the opportunity to persuade someone to accept the speaker's point of view is an important First Amendment value, little is gained by insulting an unwilling listener. Nevertheless, insults themselves may have First Amendment value in an open forum but, as Volokh points out, "[t]he workplace is different; freedom from insult in the workplace is more important to an employee's ability to earn a living than freedom from insult on the street."³⁷²

367. Volokh, Comment, *supra* note 355, at 1861 (female employees in an adult book store cannot complain that the materials create a hostile environment). *Cf. Sports and Health Club*, 370 N.W.2d at 844 (1985) (Peterson, J., dissenting).

368. This is not to say that religious concerns are more important, either Constitutionally or socially, than racial or sexual concerns in similar cases. We take no position on that issue because a full exposition is beyond the scope of this article. Rather, we seek to respond to Volokh's suggestion that proponents of speech-restrictive remedies show "[w]hy this speech deserves to be unprotected but why at the same time the Free Speech Clause should continue to protect other sorts of speech." Volokh, *Thinking Ahead*, *supra* note 355, at 313.

369. Volokh calls for a "discernible [and] defensible boundar[y]." Volokh, *Thinking Ahead*, *supra* note 355, at 313.

370. *See, e.g., Sable Communications Inc. v. F.C.C.*, 492 U.S. 115, 128 (1992); *Cohen v. California*, 403 U.S. 15 (1971).

371. Volokh, Comment, *supra* note 355, at 1863.

372. Volokh, Comment, *supra* note 355, at 1863.

When an employee complains that pornographic material offends his or her religious beliefs, the employee is making a general request: help me avoid sin by removing material from those areas within my view. The religious employee is saying that he or she does not intend to view the material and does not intend to be persuaded that it is acceptable. For the worker who views daily life as sacramental, the very presence of the pictures is almost sacrilegious. It demeans the place where God is made manifest.³⁷³

Under these circumstances, refusing to remove the material is the equivalent of a direct insult. Continued display of the material has little purpose at this point except to offend the complaining employee. If an employee complains to his co-workers to no avail, and to his employer to no avail, the continuing display of the offensive materials is no longer intended to communicate to workers in general. It is now aimed at the "squeamishness" of the complaining employee.

In *Finnemore*, the complainant first asked his co-workers to refrain from their vulgar conversations in his presence. Instead of complying, they began to include comments about Finnemore's wife. In the same fashion, continued display of pornographic material after a religiously motivated complaint changes the nature of the communication. It communicates the same message that the directed taunts in *Finnemore* carried. It is not a matter of mere discomfort; for the religious person it could very well be a matter of spiritual life and death. Here, as Volokh suggests, the workplace makes a difference. The loss of income and acceptable employment outweighs the slight harm to the expressive interests of co-workers.

One must remember that the proper remedy in a pornography case is to prohibit the display of pornography to *unwilling* recipients. We believe this requires a more contextual analysis for each remedy.³⁷⁴ The Supreme Court has suggested some general standards.³⁷⁵ We believe that these must be

373. See MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* (1959) (all life can be sanctified). For a general discussion of this theology from a Roman Catholic perspective, see BERNARD COOKE, *SACRAMENTS & SPIRITUALITY* (1989) and ROGER HAIGHT, *THE EXPERIENCE AND LANGUAGE OF GRACE* 119-160 (1979) (discussing theologian Karl Rahner and also Liberation Theology). See also THOMAS O'MEARA, *THE THEOLOGY OF MINISTRY* 159 (1983) (discussing the circumstances under which ordinary work may be considered ministry). But see HARVEY COX, *THE SECULAR CITY* (1965) (theologian author argues in favor of the "dereligionization" of the workplace and that its increasing secularization opens new opportunities). For a discussion of the workplace from the perspective of Creation Theology see MATTHEW FOX, *THE REINVENTION OF WORK* (1994).

374. Cf. *Meritor*, 477 U.S. at 69 (totality of the circumstances test required for hostile environment cases based on sex). Cf. Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701 (1995) (consider full context without unduly emphasizing one factor).

375. *Harris*, 510 U.S. at 22. Factors to consider may include "the frequency of the

contextualized to take into account the workplace itself: e.g., how big is the work area? Are the employees free to move around or are they fixed in one location all day? Do employees have personal, private areas, or do they all share a common lunchroom? In short, the remedy should be limited to the scope of the violation.³⁷⁶ Moreover, there should be no prohibition on purely private possession and display.³⁷⁷ Thus, an employee who wanted to post pictures on the inside of his private locker should be able to do so. If other employees complain, a sensitive accommodation of their complaints could include moving to a different locker, presumably making space for compatible "speakers" to have lockers nearby. The religious employee can control the occasion for sin by this action, but this is not true when the material is pervasively available on bulletin boards, shared work spaces, or newsletters.

There are also strong policy reasons to support the claim that religious objections to pornography outweigh Free Speech Clause objections. First, religious liberty has a constitutional pedigree.³⁷⁸ The exact intent of the Framers is controverted.³⁷⁹ Nevertheless, whatever their exact intentions, the religion clauses protect "religious liberty."³⁸⁰ The Framers feared that a religious

discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." In the kinds of religious harassment cases under discussion here, the ultimate question may be whether workplace pornography "unreasonably" interferes with job performance. The answer will depend on a sensitive inquiry into the actual workplace.

376. See, e.g., *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309 (5th Cir. 1987) (remedies must be proportionate to the seriousness of the offense); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (school desegregation remedy limited to the scope of the constitutional violation).

377. Cf. *Johnson v. County of L.A. Fire Dept.*, 865 F. Supp. 1430 (C.D. Cal. 1994) (finding harassment policy invalid as applied to private possession reading a consensual sharing of sexually oriented magazines). But see *Bruggman*, *supra* note 355, arguing that even private possession should be barred because of the harm caused by pornography).

378. For the history of the Religion Clauses see generally ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1988); DANIEL L. DREISBACH, *REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT* (1987); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (2d ed. Rev. 1994); LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* (rev. ed. 1967).

379. Historians have been engaged in small arms fire for years. Compare CORD, *supra* note 378, at 15 (Framers intended to prohibit the establishment of a national religion and safeguard freedom of conscience) with LEVY, *supra* note 378, at 111 (Framers intended to deprive Congress of all power to legislate on the subject of religion). See generally THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986). Although James Madison is invoked by both parties in this debate, his motivations and importance are also matters of debate. See GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 88 (1987) (Madison introduced Bill of Rights for his political survival) and *Everson v. Board of Educ.*, 330 U.S. 1, 39 (1947) (Rutledge, J., dissenting) (Madison's thoughts "essential" to understanding First Amendment).

380. JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY* 11 (1995) ("core value" of religion

“establishment” would stifle religious life and, at the same time, lead to official tyranny.³⁸¹ They wanted to create a wide path for religious practice and belief. Thus, the Establishment Clause prohibited government involvement in the institutional church and vice versa while the Free Exercise Clause preserved individual religious practice.

Second, religion is an aspect of self-expression. Religious adherents may see the world in a different way and feel compelled to act on that different view.³⁸² This may lead religious employees to complain about practices they used to tolerate or to become more assertive in sharing their “good news” with fellow employees. More than simply putting ideas in the marketplace of ideas, this new behavior for the religious employee may mirror a spiritual reality that finds expression in the workplace.³⁸³

Third, religion is constitutive of a person’s identity. Religion and religious practices form a part of the personal identity of an individual.³⁸⁴ They help define how that person relates to others, to the world, to the community, and to themselves.³⁸⁵ They orient the person morally, socially, and perhaps politically.³⁸⁶ A religious identity is fundamental and radical; it roots a person in a reality that is both immanent and transcendent.³⁸⁷ Thus, it is important to

clauses is religious liberty: “the freedom to pursue (or not to choose) a religious faith”).

381. See LEVY, *supra* note 378, at 105 (First Amendment intended to limit congressional power) and CORD, *supra* note 378, at 8 (Framers wanted to protect freedom of conscience).

382. See, *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d at 353 (employer felt a duty to evangelize); Daniel O. Conkle, *Does the United States Need An Establishment Clause*, 42 DEPAUL L. REV. 339, 344 (1992).

383. A complete discussion of the theology that underlies this point is beyond the scope of this article. Although a number of modern theologians are associated with this position, this article has been most influenced by Karl Rahner and Karl Barth. For a discussion of Barthian theology in the context of the law, see MILNER S. BALL, *THE WORD AND THE LAW* (1993).

384. Gedicks, *supra* note 281, at 427-432 (religious belief is holistic and compelling).

385. Conkle, *supra* note 382, at 344 (“Religion speaks the truth, both inwardly and outwardly. It tells believers who they are and where they stand.”).

386. JAMES D. HUNTER points out that a moral vision concerns the:

fundamental assumptions that guide our perceptions of the world. These assumptions provide answers to questions about the nature of reality. . . . They are also the assumptions that define the foundations of knowledge. . . . These assumptions act as a lens that highlights certain aspects of experience as important or unimportant, relevant or irrelevant, good or bad, and right and wrong. These unspoken assumptions are the basic standards by which we make moral judgments and decisions.

HUNTER, *supra* note 343, at 119. See generally ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

387. See, e.g., MILNER S. BALL, *supra* note 383, at 98; HAIGHT, *supra* note 373, at 128; Stanley Hauerwas and Michael Baxter, *The Kingship of Christ: Why Freedom of Belief is not Enough*, 42 DEPAUL L. REV. 107 (1992).

accommodate religious beliefs because to fail to do so attacks an individual's core identity.³⁸⁸

Therefore, religious objections to workplace pornography might be justifiable in the face of free speech challenges. In short, remedying a religious objection to workplace pornography is viewpoint neutral. Moreover, continued display of pornography is the equivalent of a direct attack on the employee. Finally, there are strong policy reasons that support the extension of harassment law to these cases: (1) religious freedom is an original constitutional value; (2) religious practice and belief are aspects of self-expression; and (3) religion is constitutive of a person's core identity.

There remains another significant problem, however. If, as we have argued, courts are suspicious of religion, then why should we trust them to make "correct" decisions on matters of sacred importance? After all, the same court system that decided *Lambert* also decided *Wilson*. This suspicion led to the downfall of the EEOC's proposed harassment guidelines in 1993.³⁸⁹ The EEOC proposed a unified set of harassment guidelines. The Commission issued the guidelines to "emphasize that harassment on any of the bases covered by the Federal anti-discrimination statutes is unlawful." The guidelines simply purported to apply the extant body of sexual and racial harassment law to the other protected statuses, including religion.³⁹⁰ The guidelines defined harassment as:

[V]erbal or physical conduct that denigrates or shows hostility, or aversion toward an individual because of his/her . . . religion . . . or that of his/her relatives, friends, or associates, and that: (i) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (ii) has the purpose of effect of unreasonably interfering with an individual's work performance; or (iii) otherwise adversely affects an individual's employment opportunities. (2) Harassing conduct includes but is not limited to, the following: (i) epithets, slurs, negative stereotyping, or threatening, intimidating, or hostile acts, that relate to . . . religion . . . , and (ii) written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of . . . religion and that is placed on walls, bulletin boards, or elsewhere on the employer's premises, or circulated in the workplace.³⁹¹

388. Gedicks, *supra* note 281, at 430 ("A religious believer's inability to live her life consistent with her ultimate concern - her deepest and most compelling reality - puts in question the meaning of her life, and undermines her very existence.").

389. EEOC Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266 (Oct. 1, 1993).

390. *Id.* at 51,266-67.

391. *Id.* at 51,269.

Although the guidelines purported to restate existing law, many people feared that they were an expansion of the law that would threaten religious liberty. Religious advocates swamped the EEOC with over 100,000 comments, more than the EEOC had ever received.³⁹² Commentators criticized almost every aspect of the guidelines.³⁹³ Underlying their complaints, however, was the fear that the guidelines would be used to squelch religious expression in the workplace.³⁹⁴ Eventually, Congress got involved and forced the EEOC to withdraw the guidelines.³⁹⁵

The guideline's demise did not change the current state of the law, however. The lessons learned from that debacle are instructive. It is important to both protect religious expression and prevent religious harassment. Courts cannot look for categorical rules that will establish whether harassment has occurred.³⁹⁶ Rather the law must take into account a wider range of factors in order to determine if the harassment has occurred and, if so, whether it was serious enough to be actionable.

One commentator, Betty L. Dunkum, drawing on the criticisms of the proposed guidelines, has proposed a set of factors for the EEOC to consider when redrawing the guidelines. These factors are useful for courts to consider as well.³⁹⁷ Dunkum proposes that "[p]assive religious speech in and of itself" should not create a hostile work environment.³⁹⁸ Instead, she recommends a multi-factored approach.³⁹⁹ Such an approach, while not infallible, should

392. See Jay W. Waks & Christopher R. Brewster, *Proposed EEOC Guidelines on "Religious Harassment" Provoked a Firestorm of Criticism, Causing the Agency to Pull Back for Now*, NAT'L L.J., Sept. 12, 1994, at B5.

393. Betty L. Dunkum, *Where to Draw the Line: Handling Religious Harassment Issues in the Wake of the Failed EEOC Guidelines*, 71 NOTRE DAME L. REV. 953 (1996); Gregory, *supra* note 23; Lora N. Reed, Student Article, *Is the EEOC Out of Line? Proposed Guidelines on Religious Harassment*, 1 SYRACUSE J. LEGIS & POL'Y 203 (1995).

394. *But see* Dworkin and Pierce, *supra* note 23 (criticizing proposed guidelines for allowing too much religious expression).

395. In June 1994, the Senate unanimously approved a resolution that urged the EEOC to remove religion from the proposed guidelines. Dunkum, *supra* note 393, at 956. Subsequently, both the House and the Senate passed measures that would have required the EEOC to withdraw the guidelines. Dunkum, *supra* note 393, at 956. Finally, Congress appropriated significantly less for the agency than had been requested, apparently in retaliation for the proposed guidelines. Dunkum, *supra* note 393, at 956-957. In September, the EEOC commissioners unanimously agreed to withdraw the guidelines. Dunkum, *supra* note 393, at 957.

396. There may be a brighter line about religious symbols, however. Courts should be certain to avoid imposing liability simply because another employee wears a religious symbol. The guidelines did not address this issue and their silence may have been the single most important factor leading to their downfall.

397. Dunkum, *supra* note 393, at 987-988.

398. Dunkum, *supra* note 393, at 988. Passive religious speech includes religious displays and jewelry as well as religious based conversations. Dunkum, *supra* note 393, at 987.

399. Dunkum, *supra* note 393, at 988. The factors Dunkum suggests taking into account

allow courts to more effectively address the concerns of both religious employees and their employers.

In the end, the question may come down to whether one is a realist or a formalist as to free speech questions. As Professor Volokh points out, these two approaches to first amendment questions come with "excellent credentials and many learned followers."⁴⁰⁰ One can either prefer a balancing test that takes into account the multiple factors and interests present in each case or one can prefer formal, categorical rules.⁴⁰¹ Because the composition and ideology of courts change, formalism, for Volokh, helps "cabin judicial discretion."⁴⁰² But one need not go to either extreme. Our approach, which requires courts to consider a variety of factors, takes into account the reality of the modern workplace. The factors are objective enough to cabin most judges but flexible enough to give discretion. Given that courts will be deciding these claims, we prefer an approach that more fully attempts to balance equality and liberty, speech and religion.

VI. CONCLUSION

Hostile environment law presents a viable way to attack religious discrimination in the workplace. By examining cases involving claims of harassment and religious employees, we have endeavored to determine how the courts are handling these claims and how their approach to them can be improved from the perspective of both the employer and the employee. As currently applied by the courts, this area of the law has not provided adequate protection to religious employees. The involvement of First Amendment, Free Exercise, and Establishment Clauses in these claims has further perplexed the courts, resulting in anomalous decisions that lessen the right to work in a non-discriminatory atmosphere for members of minority religions. Indeed, the

include:

[R]eligious speech that rises to the level of epithets, taunts, or slurs. Such speech can be directed toward a person, regarding the religion of his/her friends, relatives, or associates; conduct that is physically threatening or humiliating; speech or conduct that causes psychological harm; religious speech that creates an implicit quid pro quo; the suppression of different religious views; compelled participation in religious or anti-religious activity; a request by an employee that posters, artwork, or slogans with religious overtones be removed from public spaces in the workplace that is not honored. (Posters, calendars, artwork and slogans can be kept on personal bulletin boards, in personal offices); [and] continued sharing or invitations to an employee who has made clear he/she does not want to continue conversations or participate in an activity.

400. Volokh, *How Harassment Law Restricts Free Speech*, *supra* note 355, at 575

401. Volokh, *How Harassment Law Restricts Free Speech*, *supra* note 355, at 575-76.

402. Volokh, *How Harassment Law Restricts Free Speech*, *supra* note 355, at 576.

courts seem unable to handle these claims adequately and frequently misapply standards in a manner that confounds the purposes of Title VII.

After looking at and evaluating harassment claims in a variety of circumstances, we suggest a not so novel resolution of the problems encountered by the courts deciding these cases. An application of a true totality of the circumstances standard, including a welcomeness determination when appropriate, to religious harassment claims should resolve many of the problems encountered by the courts in this area. While this is the current standard applicable to harassment law generally, the courts have been careless in applying this standard to religion claims. The courts must analyze these claims in a more rigorous manner. Often they side with the nonreligious employer or employee in a context in which it is unclear how they are applying the standards for determining religious discrimination or harassment. The courts need to look closely at whose rights are at issue and how the alleged wrongful conduct interferes with religious practices or discriminates based on religion. Coupling this close look with more sensitivity for the rights of employees who have strict or minority religious beliefs should result in cases being decided in a manner that gives due regard to both the religious employee as well as employers and co-workers. Several developments occurred while this article was going to press.⁴⁰³

403. On July 31, 1997, Senators Coats and Kerry introduced the "Workplace Religious Freedom Act of 1997." (S. 1124). The bill would amend Title VII's definition of "undue hardship" and more precisely define when an employer has failed to make a reasonable accommodation.

On August 14, 1997, President Clinton issued "Guidelines on Religious Exercise and Religious Expression in the Federal Workplace." (1997 WL 475412 White House) These guidelines establish that federal agencies "shall not discriminate against employees on the basis of religion, require religious participation or non-participation as a condition of employment, or permit religious harassment." They provide examples of prohibited and permitted conduct, drawn largely from the cases discussed in this article. The guidelines also model the definition of religious harassment on sexual and racial harassment. The guidelines prohibit "a hostile environment, or religious harassment, in the form of religiously discriminatory intimidation, or pervasive or severe religious ridicule or insult." They counsel a "totality of the circumstances" approach. In addition, they specifically prohibit harassment directed at an employee because of that employee's religious beliefs and, as an example, use the facts from *Finnemore v. Bangor Hydro-Electric Co.*, 645 A.2d 15 (Maine 1994).

On August 19, 1997, the Seventh Circuit handed down a decision in *Venters v. City of Delphi*, ___ F. 3d ___, 1997 WL 471341 (7th Cir. 1997). The court held that an employee can make out a prima facie case of religiously motivated discharge and workplace harassment without first requesting an accommodation for her religious beliefs, as suggested in this article. An employee need only show that "her perceived religious shortcomings played a motivating role in her discharge." In addition, the court noted that religious harassment fits within the conventional framework for analyzing other harassment claims under Title VII. The court went on to adopt the *Harris* totality of the circumstances test. Although the case involved a religious supervisor, the court's analytical approach generally followed the approach suggested in this article.

