Defining Religious Discrimination In Employment: Has Reasonable Accommodation Survived *Hardison*?

Because the primary purpose of the Civil Rights Act of 1964[1] was the elimination of racial discrimination,[2] not surprisingly the Act's legislative history left unclear the congressional intent of also including religion as an illegal ground for employment discrimination under Title VII.[3] After 1964, the Equal Employment Opportunity Commission (EEOC)[4] and the courts struggled to interpret Title VII's prohibition of religious discrimination.[5] In 1972, Congress amended Title VII to explicitly protect religious conduct, as well as beliefs, provided the employer might "reasonably accommodate" the conduct without "undue hardship" to his business.[6] In *Trans World Airlines, Inc. v. Hardison*,[7] however, the United States Supreme Court held that Title VII did not require an employer to accommodate employee Sabbatarian practices conflicting with the provisions of a bona fide seniority system. The Court interpreted the amended Title VII's "accommodation" provision narrowly, holding, under a reverse religious discrimination rationale, that employers need not accommodate religious employees if the accommodation would discriminate against other employees.[8] Regrettably, lower courts have oversimplified and inconsistently interpreted *Hardison*,

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C. (1976)).

2. *See generally* Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 599-602 (1971). "[T]he entire Civil Rights Act was written with an eye toward the elimination of the 'glaring . . . discrimination against Negroes which exists throughout our nation.'" *Id.* at 599-600 (citing H.R. REP. No. 914, 88th Cong., 1st Sess. 18 (1963)).

3. *See* Edwards & Kaplan, *supra* note 2, at 600. After an examination of the House debates on the Civil Rights Act of 1964, these commentators state: "open debates on the Committee of the Whole House for consideration of H.R. 7152 . . . brought out that the Committee on the Judiciary received very little, if any, evidence of religious discrimination." *Id.* at 601 n.10. Title VII of the Civil Rights Act of 1964 is codified at 42 U.S.C. §§ 2000e to e-17 (1976).

4. Congress created the Equal Employment Opportunity Commission as part of Title VII. 42 U.S.C. § 2000e-4(a) (1976).

5. *See* text accompanying notes 8-20 *infra*.

6. "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (1976).

7. 432 U.S. 63 (1977).

8. *See* text accompanying notes 53-57 *infra*.

once again confusing the measure of employers' duty in religious discrimination cases.

Although Title VII of the Civil Rights Act of 1964 prohibits religious discrimination in employment,[9] it originally defined neither "religion" nor "religious discrimination."[10] Attempting to define these terms, the EEOC issued religious discrimination guidelines[11] that specifically require employers "to make reason-

---

9. Title VII provides, in pertinent part:

> **(a) Employer practices**
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> . . . .
>
> **(c) Labor organization practices**
>
> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2(a), (c) (1976).

10. Title VII does define discrimination generally, *see id.* at § 2000e-2(a)(2), (c)(2), but does not have a separate definition giving any special meaning to the term "religious discrimination."

11. The EEOC issued guidelines on religious discrimination on two occasions. The 1966 guidelines provide, in pertinent part:

> (a) (1) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular workweek. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year.
>
> (2) The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate to the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.
>
> (3) However, the Commission believes that an employer is free under Title VII to establish a normal workweek (including paid holidays) generally applica-

able accommodations to the religious needs of employees and prospective employees" unless the accommodation would cause undue hardship to the employer's business.[12] The use of the broad phrase "religious needs" indicates the EEOC interpreted the Act as protecting not only religious beliefs, but also religiously based conduct. Additionally, the EEOC omitted a statement in an earlier set of guidelines that allowed employers to establish work schedules regardless of the effect on employees' "religious needs."[13] This change indicates that an employer could not rebut a charge of discrimination by mere proof of equal treatment.

A 1971 United States Supreme Court decision, however, reduced the EEOC guidelines' broad protection of religious employees. In *Dewey v. Reynolds Metals Co.*,[14] the Court affirmed with-

---

ble to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday. Likewise, an employer who closes his business on Christmas or Good Friday is not thereby obligated to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur.

EEOC Guidelines on Discrimination Because of Religion, 31 Fed. Reg. 8370 (1966) (revised 1967). The EEOC replaced these guidelines in 1967 by guidelines reading as follows:

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1978).

12. EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1(b) (1978). The guidelines also placed the burden of proof on the issue of undue hardship on the employer. *Id.* § 1605.1(c).

13. EEOC Guidelines on Discrimination Because of Religion, 31 Fed. Reg. 8370 § (a)(3) (1966) (revised 1967). *See* note 11 *supra*.

14. 402 U.S. 689 (1971).

out opinion a Sixth Circuit decision questioning the EEOC's interpretation of Title VII.[15] The Court of Appeals held that although Title VII prohibited employers from discriminating because of religion,[16] it did not require employers to make special concessions to their employees' religious beliefs.[17] The court said that the EEOC's accommodation requirement was inconsistent with Congress' intent to prohibit only intentional discrimination.[18] Thus, the mere failure to accommodate an employee's "religious needs" was not illegal religious discrimination.[19]

Responding directly to *Dewey*,[20] Congress passed section 701(j) of the 1972 amendments to Title VII providing that " '[r]eligion' 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."[21] Coupled with Title VII's prohibition of employment discrimination because of religion,[22] section 701(j)'s definition of "religion" overrode *Dewey* by equating, under some circumstances, failure to accommodate religious conduct[23] with illegal religious discrimination. Under the amended Title VII, before concluding that an

---

15. Dewey v. Reynolds Metals Co., 429 F.2d 324, 331 n.1 (6th Cir.), *rehearing denied*, 429 F.2d 334, 334 (6th Cir. 1970), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971). Following the court of appeals's decision in *Dewey*, another court questioned the EEOC's guidelines. Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972) (the court of appeals reversed after Congress amended Title VII).

16. 429 F.2d at 328.

17. Dewey v. Reynolds Metals Co., 429 F.2d 334, 334 (6th Cir.), *denying rehearing to* 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971).

18. *Id.*

19. "The fundamental error of Dewey and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accomodate each of the varying religious beliefs and practices of his employees." *Id.* at 335.

20. "The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in Dewey v. Reynolds Metals Company . . . ." 118 CONG. REC. 7564 (1972) (remarks of Rep. Perkins), *reprinted in* SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1845 (Comm. Print) [hereinafter cited as LEGISLATIVE HISTORY].

21. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j) (1976)).

22. 42 U.S.C. § 2000e-2(a) (1976). *See* note 9 *supra*.

23. Section 701(j) contrasts beliefs with observances and practices, making no distinction between the latter two concepts. This comment will assume religious "practices" or "observances" refers to any conduct based on religious beliefs.

employer has engaged in illegal religious discrimination, a court must complete a three-step process of finding that 1) the employee's conduct or belief is religious in nature, 2) the employer can accommodate the employee's conduct without undue hardship in accord with the statutory definition of religion, and 3) the employer discriminated against the employee because of the employee's religion.

Although section 701(j) indicates Congress considered both conduct and beliefs as forms of protected religion, it gives no guidance to courts making the preliminary decision of whether a given belief or action is religious.[24] In determining this question for purposes of Title VII, courts[25] have sought guidance from cases defining "religion" as the term is used in the free exercise clause of the first amendment.[26] Although courts have required a belief be sincerely held and of a theological character to qualify for first amendment protection,[27] courts interpret both requirements broadly[28] and seldom find beliefs or conduct nonreligious, if

---

24. Congress added § 701(j) to the Equal Employment Opportunity Act of 1972 during floor debates in the Senate. The section's brief legislative history deals almost entirely with the question of Sabbath observances, which the debators assumed were "religious." Senator Randolph, the proponent of § 701(j), made only one reference to the scope of the term "religion," stating:

> The term "religion" as used in the Civil Rights Act of 1964 encompasses, as I understand it, the same concepts as are included in the first amendment—not merely belief, but also conduct; the freedom to believe, and also the freedom to act.
>
> I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments.

118 CONG. REC. 705 (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 713.

25. *See, e.g.*, Redmond v. GAF Corp., 574 F.2d 897 (7th Cir. 1978) (refused to give the term "religion" a narrower meaning in Title VII than the Supreme Court has given it in the first amendment); McDaniel v. Essex Int'l, Inc., 571 F.2d 338, 340 (6th Cir. 1978) (implied that Title VII protects at least those religious practices the Constitution protects); Brown v. Pena, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977) (implied that anything not protected as religion by the Constitution could not be protected as such by Title VII). *See generally* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1075 (1978).

26. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

27. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972); United States v. Seeger, 380 U.S. 163, 165-66 (1965); Stevens v. Berger, 428 F. Supp. 896, 899 (E.D.N.Y. 1977).

28. In ascertaining whether a belief is sincerely held, courts, to avoid becoming embroiled in purely theological debates, will not consider whether the belief is consistent, logical, true, or acceptable to others. United States v. Seeger, 380 U.S. 163, 184-85 (1965); United States v. Ballard, 322 U.S. 78, 86 (1944); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940). As stated by Justice Douglas:

claimed as such by an employee.[29]

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean they can be made suspect before the law.

United States v. Ballard, 322 U.S. at 86-87. The Supreme Court later stated this same idea more strongly, declaring "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." Fowler v. Rhode Island, 345 U.S. 67, 70 (1953). Two commentators have summarized the Supreme Court's religion analysis with an appropriate metaphor: "In short, since religion is based on a sometimes irrational faith, consistency of belief cannot serve as a litmus paper test of conviction or hypocrisy. The sincerity of one's religious beliefs simply cannot be measured by mere mortals." Edwards & Kaplan, *supra* note 2, at 616.

In determining whether a belief is theological, the courts do not require belief in a supreme being. Torcaso v. Watkins, 367 U.S. 488, 495 (1961). "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Id.* at 495 n.11 (dictum). *See* Note, *supra* note 25, at 1063. Title VII prohibits discrimination not only against certain religious beliefs, but also in favor of certain beliefs, or in favor of religion over nonreligion. Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975). In that case the court held Title VII protected an atheist employee against being required to attend staff meetings beginning with a prayer. *Id.* at 141-43.

The term "theological" is used only to exclude as nonreligious those beliefs grounded on mere policy, pragmatism, or expediency. Welsh v. United States, 398 U.S. 333, 342-43 (1970).

29. Since passage of the 1972 amendment, courts have found six different practices to be religious conduct under Title VII, though in some cases the reasonable accommodation standard excluded that conduct from protection.

Most of the cases have involved a refusal to work on a Sabbath or Holy Day, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); Rohr v. Western Elec. Co., 567 F.2d 829 (8th Cir. 1977); Jordan v. North Carolina Nat'l Bank, 565 F.2d 72 (4th Cir. 1977); Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978); Cummins v. Parker Seal Co., 561 F.2d 658 (6th Cir. 1977); Ward v. Allegheny Ludlum Steel Corp., 560 F.2d 579 (3rd Cir. 1977); Huston v. Local 93, UAW, 559 F.2d 477 (8th Cir. 1977); United States v. City of Albuquerque, 545 F.2d 110 (10th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977); Williams v. Southern Union Gas Co., 529 F.2d 483 (10th Cir.), *cert. denied*, 429 U.S. 959 (1976); Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975); Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975), *cert. denied*, 429 U.S. 964 (1976); Johnson v. United States Postal Serv., 497 F.2d 128 (5th Cir. 1974); Wren v. T.I.M.E.-D.C., Inc., 453 F. Supp. 582 (E.D. Mo. 1978); Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382 (D. Neb. 1974); Olin Corp. v. Fair Employment Practices Comm'n, 67 Ill. 2d 466, 367 N.E.2d 1267 (1977); Kentucky Comm'n on Human Rights v. Commonwealth, 564 S.W.2d 38 (Ky. 1978).

The second most common cases have involved employees refusing to join or pay dues to a labor union, Burns v. Southern Pac. Transp. Co., 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3464 (U.S. Jan. 8, 1979) (No. 78-706); Anderson v. General Dynamics, 589 F.2d 397 (9th Cir. 1978); McDaniel v. Essex Int'l, Inc., 571 F.2d 338 (6th Cir. 1978); Cooper v. General Dynamics, 533 F.2d 163 (5th Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); Yott v. North Am. Rockwell Corp., 501 F.2d 398 (9th Cir. 1974); Nottelson v. A.O. Smith Corp., 423 F. Supp. 1345 (E.D. Wis. 1976); Wondzell v. Alaska Wood Prods., Inc., 583 P.2d 860 (Alaska 1978); Bald v. RCA Alascom, 569 P.2d 1328 (Alaska 1977).

Even if the employee's conduct qualifies as "religion" under the broad first amendment test, the "reasonable accommodation-undue hardship" standard may exclude such conduct from Title VII protection. Although section 701(j) initially offers protection for "all aspects of religious observance and practice, as well as belief," it specifically excludes all conduct the employer cannot reasonably accommodate without undue hardship to his business.[30] Literally, the statute says any conduct an employer "is unable to reasonably accommodate" is not religion. Actually, the nature of the employer's business cannot change the nature of the employee's conduct. The statute, however, can and does define the limits of Title VII's protection of religious conduct in terms of the effect protecting such conduct would have on the employer.

To illustrate the difference between the literal and actual effect of section 701(j), consider two employees, a bookkeeper and an assembly line worker. Both employees have joined a new religion requiring them to stand, without working, in prayerful silence for five minute intervals at several prescribed times throughout the day. Such a practice is clearly theological and, assuming the existence of evidence that the employees sincerely believe this requirement, the conduct would qualify as religious conduct under Title VII. The employer could accommodate the bookkeeper simply by tolerating his religious actions and such accommodation probably would not cause any hardship to the employer's business.[31] Thus, Title VII protects the bookkeeper's

---

The four other practices found to be religious conduct are refusal by an atheist to attend a staff meeting begun with a prayer, Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975), wearing a beard, Eastern Greyhound Lines Div., Inc. v. New York State Div. of Human Rights, 27 N.Y.2d 279, 265 N.E.2d 745, 317 N.Y.S.2d 322 (1970) (decided prior to 1972 amendment to Title VII), attending Bible studies, Redmond v. GAF Corp., 574 F.2d 897 (7th Cir. 1978), and attending ministers' meetings, Weitennaut v. Goodyear Tire & Rubber Co., 381 F. Supp. 1284 (D. Vt. 1974).

The only Title VII case where a court has refused to recognize a belief as religious is Brown v. Pena, 441 F. Supp. 1382 (S.D. Fla. 1977). In that case, the court held that the plaintiff's "personal religious creed," that "Kozy Kitten Cat Food" contributed to his well-being by increasing his energy, to be a mere personal preference beyond the parameters of the concept of religion as protected by Title VII. *Id.* at 1383-84.

30. One might interpret § 701(j) as imposing two requirements on any proposed accommodation: the accommodation must be reasonable and must not cause undue hardship to the employer's business. Congress, however, apparently intended § 701(j) to contain only one requirement. During debates, the Senate analyzed hypothetical accommodation cases, using undue hardship as the only test for whether § 701(j) would require a given accommodation. 118 CONG. REC. 706 (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 714-15. One may view reasonableness and undue hardship as merely flip sides of the same coin: an accommodation is reasonable if it does not cause undue hardship to the employer's business and unreasonable if it does.

31. This assumes, of course, that the bookkeeper works in a basically independent

conduct. Yet assuming that the employer could accommodate the assembly line worker only by operating the production line in conformity with the prayer schedule, and that this would cause undue hardship to the employer's business in the form of lost production, then this same conduct is excluded from Title VII protection. Although Title VII does not protect the assembly line worker, his conduct is still as religiously based as the bookkeeper's. Because of the context in which the religious conduct takes place, however, Title VII protects the bookkeeper, but not the assembly line worker, against discrimination based on that conduct.

Even if an employee's conduct fits the first amendment definition of religion and is not excluded from Title VII protection by section 701(j)'s "reasonable accommodation" standard, to win a claim of religious discrimination the plaintiff must prove the employer discriminated because of religion. Courts recognize two forms of discrimination under Title VII, disparate treatment and disparate impact.[32] Claims of disparate treatment, resulting when an employer treats an employee, or prospective employee, adversely because of a protected characteristic, rarely have been raised in Title VII religious discrimination cases.[33] Almost all

---

manner, so five minutes lost at one time can be made up at another without loss in productivity.

32. Several commentators have identified and labeled various forms of discrimination. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976) (four forms: disparate treatment, present effects of past discrimination, adverse impact, and reasonable accommodation); Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 66-75 (1972) (three forms: malicious, intentional, and unintentional discrimination); Edwards & Kaplan, *supra* note 2, at 619 (three forms: intentional discrimination, discrimination by effect, and discrimination under the reasonable accommodation-undue hardship standard). All the suggested categories, however, are either other names for, or explainable in terms of, disparate treatment or impact.

33. One reason for this conspicuous lack of reported cases of disparate treatment on the basis of religion may be that those employers likely to discriminate on the basis of religion fall within one of the three exemptions from Title VII coverage. Generally, Title VII applies to any employer "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b) (1976).

Two of the exemptions to this general coverage apply only to religious discrimination. Section 703(e)(2) permits schools, colleges, universities, or other educational institutions:

> [T]o hire and employ employees of a particular religion if [the institution] is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religious corporation, association, or society, or if the curriculum of such [institution] is directed toward the propagation of a particular religion.

42 U.S.C. § 2000e-2(e)(2) (1976). Section 702, as amended in 1972, provides an even broader exemption:

claims of religious discrimination under Title VII have involved disparate impact, which occurs when an employer's business practice, neutral on its face, adversely affects employees observing a particular religious faith.[34] An employer can defend against a claim of disparate impact discrimination by showing the challenged business practice is a business necessity.[35] The business necessity defense, however, will seldom prevent a court from finding illegal religious discrimination. Before reaching the question of discrimination, the court, in applying Title VII's "reasonable accommodation-undue hardship" standard, must first conclude that the employer could modify the business practice in question without undue hardship. The court probably would not consider this same business practice a business necessity.[36] Consequently,

---

> This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1 (1976). The third exemption applicable to sex, national origin, and religious discrimination, is commonly referred to as the BFOQ (bona fide occupational qualification) exemption and is in § 703(e)(1):

> Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the operation of that particular business or enterprise . . . .

42 U.S.C. § 2000e-2(e)(1) (1976). *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 32, at 218-19.

Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976), is the only reported Title VII religious discrimination case in which the employer treated an employee adversely because of the employee's religion. In that case the court held verbal abuse of a Jewish employee was illegal discrimination under Title VII.

34. For example, a business practice of assigning work schedules on the basis of seniority may have an adverse effect on Sabbatarians who will not work on Saturdays. *See* text accompanying notes 38-40 *infra*. Also, a business practice against hiring anyone with a beard precludes hiring male Orthodox Muslims, whose religion forbids shaving. Eastern Greyhound Lines Div., Inc. v. New York State Div. of Human Rights, 27 N.Y.2d 279, 265 N.E.2d 745, 317 N.Y.S.2d 322 (1970). To obtain relief under Title VII, any employee not discriminated against directly for his beliefs, but discriminated against indirectly through an employer's business practice inhibiting him from practicing his beliefs, must rely on the disparate impact theory of discrimination.

35. For an analysis of the early development of the business necessity defense, see Blumrosen, *supra* note 32, at 81-89.

36. Courts occasionally have implied the business necessity defense and the undue hardship standard are actually the same test. " '[R]easonable accommodation' and 'undue hardship' can be derived from the 'business necessity' test of Griggs v. Duke Power Co., 401 U.S. 424 . . . . (1971), for these verbal formulations are really exemplary of the statute's general purpose of preventing unreasonable discrimination in employment." Wondzell v. Alaska Wood Prods., Inc., 583 P.2d 860, 864 n.4 (Alaska 1978); *see, e.g.*, Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972).

the business necessity defense will rarely defeat claims of religious discrimination, leaving the issue of whether accommodating the employee will cause the employer "undue hardship" as the only difficult hurdle in most cases.

The United States Supreme Court, in *Trans World Airlines, Inc. v. Hardison,*[37] interpreted the reasonable accommodation requirement of section 701(j) narrowly, holding that the employer, Trans World Airlines (TWA), did not have to accommodate the Sabbath practices of its employee, Hardison.[38] Hardison, a member of the Worldwide Church of God, refused to work on his church's Sabbath, from sunset Friday to sunset Saturday. TWA and the union representing Hardison had negotiated a collective bargaining agreement with a seniority system provision requiring TWA to give first choice for shift assignments based on departmental seniority.[39] Although accommodated at his first department, Hardison transferred to a different department where he had insufficient seniority to obtain a work schedule consistent with his religious practice. In accordance with company procedure, TWA fired Hardison after he missed work on several Saturdays. The Court held TWA had not violated Title VII's prohibition against religious discrimination because any accommodation of Hardison's religious practice would have caused undue hardship to TWA's business.[40] The Court considered and rejected three possible ways TWA could have accommodated Hardison: "swapping" shifts between Hardison and another employee with greater seniority, running the department short-handed one day a week, or filling in Hardison's Sabbath day hours with other personnel.[41]

The first possible accommodation, swapping shifts, would have violated the seniority system provision in the collective bargaining agreement.[42] Basing its decision on Title VII's special

37. 432 U.S. 63 (1977).

38. The Court had twice before heard religious discrimination cases. In both cases, however, the Court divided evenly, affirming the court of appeals decison without opinion, and thus, without setting a precedent. Cummins v. Parker Seal Co., 429 U.S. 65 (1976) (per curiam) (affirming a judgment for the employee), *vacated per curiam,* 433 U.S. 903 (1977) (remanded for reconsideration in light of *Hardison*); Dewey v. Reynolds Metals Co., 402 U.S. 689 (per curiam) (affirming a judgment for the employer).

39. 432 U.S. at 80.

40. *Id.* at 77.

41. *Id.* at 76-77. The court of appeals had suggested these alternatives, holding that all three were reasonable and that any one of them would have satisfied TWA's obligation under Title VII without undue hardship. Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 39-42 (8th Cir. 1975), *rev'd,* 432 U.S. 63 (1977).

42. 432 U.S. at 78-79.

deference to seniority systems, the Court held Title VII did not require TWA "to carve out a special exception to its seniority system in order to help Hardison to meet his religious obligations."[43] In reaching this conclusion, the Court followed its earlier interpretation of another section of Title VII, section 703(h), which provides that, absent proof of intentional discrimination, an employer may treat employees differently pursuant to a bona fide seniority system.[44] In *International Brotherhood of Teamsters v. United States*,[45] the Court held "the unmistakable purpose of section 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII."[46] The *Hardison* Court concluded that, even if the system has some discriminatory consequences, it would not be an unlawful employment practice unless the employer or union had established the system with a discriminatory purpose.[47]

The Court offered several other rationales to support its decision that section 701(j) did not require an employer to modify a seniority system. The Court stated that seniority systems were themselves significant accommodations of the religious and secular needs of all employees because such systems provide a neutral method of determining which employees would have to work on days they preferred to have off.[48] Additionally, the Court held that Title VII neither requires an employer to breach an otherwise valid agreement[49] nor deprives other employees of their contract rights.[50] The Court, using a reverse religious discrimination analysis,[51] reasoned that Title VII prohibits discrimination against

---

43. *Id.* at 83.

44. Section 703(h) provides, in pertinent part:

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

42 U.S.C. § 2000e-2(h) (1976).

45. 431 U.S. 324 (1977).

46. *Id.* at 352.

47. 432 U.S. at 82.

48. *Id.* at 78.

49. *Id.* at 79.

50. *Id.* at 80.

51. Currently, the leading reverse discrimination case is University of Cal. Regents v. Bakke, 438 U.S. 265 (1978). Under an equal protection analysis the Court permitted a medical school to consider race as one factor in its admissions program, *id.* at 272 (Powell, J.); *id.* at 326 (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring in this

majorities as well as minorities, and, therefore, an employer cannot deny some employees shift and job preferences just to accommodate other employees' religious needs.[52]

The Court elaborated on this reverse religious discrimination rationale in disposing of the second and third possible methods of accommodation, neither of which required modification of the seniority system. Rejecting the possibility of running the department short-handed or of filling in with other personnel during Hardison's Sabbath shift,[53] the Court found both alternatives would increase TWA's expenses and held that any accommodation costing more than a *de minimis* amount constitutes "undue hardship."[54] The Court reasoned that requiring TWA to incur costs by giving Hardison Saturdays off would benefit Hardison because of his religion and thus discriminate against other employees of different religious faiths.[55] The Court stated that because the purpose of Title VII was to eliminate discrimination in employment, it would not construe section 701(j) as requiring employers to discriminate against some employees merely to enable others to observe their religious practices.[56]

---

conclusion), but forbade the use of benign racial quotas, *id.* at 271 (Powell, J.); *id.* at 421 (Burger, C.J., Stewart, J., Rehnquist, J., and Stevens, J., concurring in this conclusion under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976)). Because much of the Court's analysis related specifically to the history of racial, rather than religious discrimination; because the interests involved in a medical school's admissions program differ substantially from the interests in eliminating discrimination in employment; and generally, because of the divergent views expressed by the Court in six separate opinions, *Bakke* sheds little light on Title VII religious discrimination in employment cases.

Kaiser Aluminum & Chem. Corp. v. Weber, 47 U.S.L.W. 3401-02 (U.S. Dec. 4, 1978) (Nos. 78-432, 78-435, 78-436), *granting cert. to* 563 F.2d 216 (5th Cir. 1977), however, may provide some clarification of *Hardison*'s reverse discrimination analysis. One issue before the Court in *Weber* is whether Title VII's prohibition against discrimination precludes incorporation into a collective bargaining agreement of a voluntary affirmative action plan, reserving fifty percent of the positions in a craft training program for black applicants, absent a prior judicial finding of past discrimination. 47 U.S.L.W. 3401 (No. 78-432). Thus, like *Hardison*, *Weber* involves Title VII and a collective bargaining agreement. The Court's decision later this term, however, will probably be closely tied to an extension of *Bakke*'s discussion of the need to remedy the effects of our country's long history of racial discrimination. *See* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 225-26 (5th Cir. 1977). Because Title VII's accommodation provision is not intended as a remedy for past religious discrimination, but as an extension of the first amendment's protection of religious freedom, *see* note 25 *supra*, an historical racial discrimination analysis in *Weber* will, again, be of limited value in religious discrimination cases.

52. 432 U.S. at 81.

53. *Id.* at 84.

54. *Id.*

55. *Id.*

56. *Id.* at 84-85. The Court had elaborated in this same analysis when rejecting the first suggested accommodation:

Hardison's analysis indicates the Court considered a broad applicaton of the accommodation requirement equivalent to requiring employers to engage in illegal reverse religious discrimination. Although the Court couched its analysis in terms of applying the words "undue hardship" to the specific controversy before it, the interpretation given section 701(j) goes beyond merely questioning the "reasonableness" of, or the "undue hardship" a given accommodation causes. The Court's reverse religious discrimination rationale is a general limitation on Title VII's accommodation provision. This narrow interpretation of an employer's duty of accommodation provides religious employees less protection than originally intended by Congress[57] but remains within the scope of interpretation the words "reasonable accommodation" and "undue hardship" allow. Additionally, the Court's narrow interpretation may have saved the accommodation requirement from being declared violative of the first amendment's prohibition against any law "respecting an establishment of religion."[58]

> Title VII does not contemplate . . . unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities. . . . It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

Id. at 81.

57. Congress intended § 701(j) to change the law after *Dewey*, *see* note 21 and accompanying text *supra*, but the *Hardison* Court's interpretation of that statute returns the law of religious discrimination, in practical effect, to nearly the same position as prior to the passage of § 701(j). The basic concern of *Dewey* and *Hardison* was that special concessions to certain employees' religious beliefs would violate Title VII's fundamental prohibition against religious discrimination.

58. If the Court had given the accommodation requirement a broader interpretation, it would have needed to reach a decision on the constitutionality of that requirement. 432 U.S. at 69-70 n.4. Two courts and several commentators have concluded that the reasonable accommodation requirement represents a priority of religious over secular interests and therefore violates the establishment clause of the first amendment. Gavin v. Peoples Natural Gas Co., 18 Fair Empl. Prac. Cas. 1431 (W.D. Pa. Jan. 23, 1979); Yott v. North Am. Rockwell Corp., 428 F. Supp. 763 (C.D. Cal. 1977); Comment, *Religious Discrimination in Employment—the Undoing of Title VII's Reasonable Accommodation Standard*, 44 BROOKLYN L. REV. 598, 606-10 (1978); Note, *Title VII and Religious Discrimination, Is Any Accommodation Reasonable Under the Constitution?*, 9 LOY. CHI. L.J. 413 (1978); Note, *Is Title VII's Reasonable Accommodations Requirement a Law "Respecting an Establishment of Religion"?*, 51 NOTRE DAME LAW. 481 (1976); Comment, *Up Against the Accommodation Rule*, 45 U. MO. KANSAS CITY L. REV. 56 (1976); 30 VAND. L. REV. 1059 (1977); 62 VA. L. REV. 237 (1976). *Contra*, Hardison v. Trans World Airlines, Inc., 527 F.

Lower courts, however, have failed to grasp the essence of *Hardison*'s reverse religious discrimination rationale and, consequently, they have misinterpreted the case in three different factual settings. In other cases involving seniority systems preventing employees from observing their Sabbath or Holy Day practices, courts have reached the conclusion *Hardison* requires, but have oversimplified the Supreme Court's analysis.[59] In union security cases, union contracts requiring all employees to join or pay dues to the union within a specified period of time after beginning employment, prevented employees from following their religion's rule against joining or supporting unions.[60] In these cases, courts have unfortunately found *Hardison* inapplicable, but nevertheless have reached results consistent with an application of the Court's reverse religious discrimination rationale. Finally, courts confronting religious discrimination in a few non-union cases, in which neither contractual obligations nor seniority systems prevented employers from accommodating employees' religious conduct, have reached variant results based on different interpretations of *Hardison*.[61]

In seniority system cases, courts have inexpediently applied a restricted form of the *Hardison* rationale. In two cases, the Eighth Circuit decided against the employee solely because of a seniority system.[62] On facts virtually identical to those in *Hardison*, the court, relying on *Hardison*, held that Title VII does

---

2d 33, 43-44 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 63 (1977); Cummins v. Parker Seal Co., 516 F.2d 544, 551-54 (6th Cir. 1975), *vacated*, 433 U.S. 903 (1977) (remanded for further consideration in light of *Hardison*); Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172, 179-80 (W.D.N.C. 1975), *rev'd on other grounds*, 565 F.2d 72 (4th Cir. 1977); Note, *Establishment Clause Neutrality and the Reasonable Accommodation Requirement*, 4 HASTINGS CONST. L.Q. 901 (1977); Comment, *Title VII—Sabbath Observer Discrimination—Reasonable Accommodation—Undue Hardship Standard—Establishment Clause—Reid v. Memphis Publishing Co.*, 22 N.Y.L. SCH. L. REV. 143, 151-58 (1976).

59. *See* Rohr v. Western Elec. Co., 567 F.2d 829 (8th Cir. 1977); Ward v. Allegheny Ludlum Steel Corp., 560 F.2d 579 (3d Cir. 1977); Huston v. Local 93, UAW, 559 F.2d 477 (8th Cir. 1977); Wren v. T.I.M.E.-D.C., Inc., 453 F. Supp. 582 (E.D. Mo. 1978).

60. *See* Burns v. Southern Pac. Transp. Co., 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3464 (U.S. Jan. 8, 1979) (No. 78-706); Anderson v. General Dynamics, 589 F.2d 397 (9th Cir. 1978); McDaniel v. Essex Int'l, Inc., 571 F.2d 338 (6th Cir. 1978).

61. *See* Redmond v. GAF Corp., 574 F.2d 897 (7th Cir. 1978); Jordan v. North Carolina Nat'l Bank, 565 F.2d 72 (4th Cir. 1977); Cummins v. Parker Seal Co., 561 F.2d 658 (6th Cir. 1977) (per curiam). *Cf.* Brown v. Pena, 441 F. Supp. 1382 (S.D. Fla. 1977) (The court, dismissing an action based on an employee's belief that eating cat food improved his well-being, held the belief was not protected as religion under Title VII and, therefore, never addressed the accommodation issue.).

62. Rohr v. Western Elec. Co., 567 F.2d 829 (8th Cir. 1977); Huston v. Local 93, UAW, 559 F.2d 477 (8th Cir. 1977).

not require an employer or a union to accommodate the religious needs of an employee if such accommodation would deprive other employees of their contractual rights.[63] The court, however, did not explore the possibility of other accommodations the seniority system did not prohibit, as the *Hardison* Court had done.[64] In another case, the Third Circuit used a somewhat fuller analysis, indicating that under *Hardison* the mere presence of a seniority system does not obviate the accommodation requirement.[65] The court recognized some accommodations may leave seniority rights unaffected, and suggested employers must implement such accommodations unless their cost is more than a *de minimis* amount.[66] Even here, however, the court did not refer to *Hardison*'s underlying analysis of accommodation as reverse religious discrimination.[67]

Courts should apply the full depth of the *Hardison* analysis, even though such an analysis would allow the courts to reach the same result they have in most seniority system-Sabbath observance cases.[68] By deciding religious discrimination cases based on the rules, but not the underlying principle of *Hardison,* courts have reduced the reasonable accommodation standard to a confused conglomeration of apparently unrelated concerns: the existence of a seniority system, the cost of accommodation, and the contractual basis for the questioned business practice. Only if courts understand that the common thread of the Supreme Court's analysis was whether accommodation would benefit one employee at the expense of other employees will the reasonable accommodation standard remain a coherent means to resolve future claims of religious discrimination.

Union dues cases, the second group of religious discrimination cases decided since *Hardison,* have involved situations where an employer and a union have included a union security clause

63. Rohr v. Western Elec. Co., 567 F.2d 829, 830 (8th Cir. 1977); Huston v. Local 93, UAW, 559 F.2d 477, 480 (8th Cir. 1977).

64. After stating in a footnote that "[i]t is clear from the language of § 701(j) that Congress intended to [require] some form of accommodation," Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 n.9 (1977), the rest of the Court's opinion explains when accommodation is, in fact, not required. *See* text accompanying notes 41-59 *supra.*

65. Ward v. Allegheny Ludlum Steel Corp., 560 F.2d 579 (3d Cir. 1977).

66. *Id.* at 583.

67. *Id.*

68. Usually, § 701(j) will not require an employer, using a bona fide seniority system to assign work schedules, to accommodate employee Sabbath practices. The reason for this, under *Hardison,* however, is not only the existence of a seniority system, but also that any accommodation not violating the system will cost the employer more than a *de minimus* amount, or will discriminate against nonaccommodated employees.

within a comprehensive collective bargaining agreement. Such clauses establish either a union shop, requiring employees to join the union within a specified period of time after employment, or an agency shop, requiring employees not joining the union to pay an amount equivalent to union dues to the union.[69] The union security clause creates an immediate problem for employees with religious beliefs against joining or contributing to the support of unions.[70] Lower courts have needlessly and improperly concluded *Hardison* does not apply to union dues cases. *Hardison*'s statutory and reverse religious discrimination analyses were written in broad language that should not be summarily restricted in the Sabbath observance-seniority system conflict before that Court.[71] Although the broad language of *Hardison* requires the Court's rationale be applied in union dues cases, it does not necessarily follow that lower courts must reach the same conclusion as *Hardison*. Applying *Hardison*'s reverse religious discrimination rationale, however, would require a more thorough factual determination on how accommodating religious employees seeking exemption from the union security clause would affect other employees.

In *McDaniel v. Essex International, Inc.*,[72] the Sixth Circuit virtually ignored *Hardison* and decided that despite the Taft-Hartley Act,[73] Title VII requires employers to breach a union security clause if necessary to accommodate the employee.[74] Taft-Hartley prohibits employers or unions from discriminating against employees for the purpose of encouraging or discouraging union membership but specifically permits discrimination for

69. "Closed shops," requiring parties to be union members before obtaining employment, were outlawed by the Taft-Hartley Act. 29 U.S.C. § 158 (a)(3), (b)(2)(1976); 23 WAYNE L. REV. 1171, 1172-73 (1977).

70. Seventh-Day Adventists have this belief based on the principle that "a church member must love his neighbor as himself and that since a church member's employer is his neighbor he cannot join in such activities of a labor union such as strikes and picketing without violating the commandment to love his neighbor." Cooper v. General Dynamics, 378 F. Supp. 1258, 1260 (N.D. Tex. 1974), *rev'd*, 553 F.2d 163 (5th Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

71. Apart from the broad language of *Hardison*, the similarity between the seniority system and union dues cases would require a Supreme Court pronouncement in either area be given serious consideration in deciding cases in the other. In both types of cases there exists a collective bargaining agreement, containing a clause which requires the employer to make a decision which adversely affects employment status of individuals with particular religious beliefs.

72. 571 F.2d 338 (6th Cir. 1978).

73. Labor Management Relations Act, 1947, 29 U.S.C. §§ 141-197 (1976).

74. 571 F.2d at 343.

failure to pay union dues.[75] The Sixth Circuit reasoned that since the passage of Title VII, the nation's highest policy priority has been the elimination of discriminatory employment practices.[76] The court further unpersuasively stated that section 701(j) requires a "balancing between the religious needs of the individual and the legitimate business needs of an employer,"[77] and that this "same balancing applies to the needs of a union, at least where a claim of discrimination arises from the enforcement of terms of a collective bargaining agreement."[78] The court apparently inferred this balancing requirement from the language in section 701(j) requiring consideration of any "undue hardship on the conduct of the employer's business." In making this inference, the court improperly relied on *Hardison* as support for the proposition that section 701(j) requires employers to make "some effort" to accommodate employees' religious needs.[79] Although the *Hardison* Court did state, early in its opinion, that section 701(j) requires some effort at accommodation,[80] the Court neither intended nor treated the requirement as an absolute standard.[81] The Sixth Circuit erred, then, in relying on the general rule that an employer must make some effort at accommodation, without also applying the remainder of the Supreme Court's analysis which carved exceptions into that general rule.

The Ninth Circuit, in two cases, has followed *McDaniel*'s erroneous decision not to extend the *Hardison* analysis of seniority systems to union security clauses.[82] In both cases, the Ninth Circuit relied on *Hardison* only to support a requirement that the employer make some effort at accommodation. In neither case, however, did the court attempt to reconcile the fact that the *Hardison* Court had not required accommodation. The Ninth Circuit concluded that Title VII required an employer to accommodate religious beliefs against paying union dues unless either the

75. 29 U.S.C. § 158 (a)(3), (b)(2) (1976).

76. 571 F.2d at 343. *But cf.* Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975) (*Held:* Although national labor policy accords the highest priority to nondiscriminatory employment practices, this priority does not give racial minority employees the right to bypass the union, as their exclusive bargaining representative, to negotiate employment discrimination issues with the employer.).

77. 571 F.2d at 344.

78. *Id.*

79. *Id.* at 342.

80. 432 U.S. at 74 n.9.

81. *See* text accompanying notes 41-59 *supra.*

82. Burns v. Southern Pac. Transp. Co., 589 F.2d 403 (9th Cir. 1978), *cert. denied,* 47 U.S.L.W. 3464 (U.S. Jan. 8, 1979) (No. 78-706); Anderson v. General Dynamics, 589 F.2d 397 (9th Cir. 1978).

employer or the union had actual proof that allowing an exception to the union security clause would cause undue hardship to the employer's business.[83] Although the Ninth Circuit was correct as far as it went, the court should have followed through with its analysis by considering how accommodation would affect other employees.

To apply *Hardison* in union dues cases, as the Sixth and Ninth Circuits should have done, the Supreme Court's reasoning can be reduced to two components: the analysis of section 703(h)'s special protection of seniority systems and the more general reverse religious discrimination analysis. Although section 703(h) of Title VII says nothing about union security provisions, Taft-Hartley's provisions that an employer may discriminate for failure to pay union dues, and that no federal statute shall preclude union security agreements,[84] may provide a rationale for giving union security clauses the same special treatment section 703(h) gives seniority systems. Resolution of the apparent conflict between section 701(j)'s accommodation provision and Taft-Hartley's protection of union security agreements must begin with an examination of congressional intent regarding the two provisions.

Legislative history is, at best, inconclusive with regard to whether Congress intended section 701(j) to require employers to accommodate employees with religious beliefs against joining or paying dues to a union. Congress considered a similar issue when passing the 1974 Health Care Amendment to the Wagner Act.[85] That amendment extended the jurisdiction of Taft-Hartley to

---

83. Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 406-07 (9th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3464 (U.S. Jan. 8, 1979) (No. 78-706); Anderson v. General Dynamics, 589 F.2d 397, 402 (9th Cir. 1978).

84. It shall be an unfair labor practice for an employer—

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . *Provided further*, That no employer shall justify discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

29 U.S.C. § 158(a)(3) (1976).

85. Health Services, Health Statistics and Medical Libraries Act of 1974, Pub. L. No. 93-353, 88 Stat. 101-205 (codified in scattered sections of 42 U.S.C. §§ 242-280 (1976)).

nonprofit hospitals but provided an exemption for health care employees with religious beliefs against the payment of union dues.[86] Under this amendment, employers must allow such employees to pay an amount equivalent to union dues to one of three charities designated in the union collective bargaining contract.[87] One may interpret the passage of this amendment in two ways. Congress may have intended that this exemption apply only to the newly covered health care employees, in recognition of the large number of hospitals operated and largely staffed by Seventh Day Adventists, who will not pay union dues.[88] Alternatively, Congress' adoption of the health care amendment, without changing Taft-Hartley's provision that no statute should preclude union security agreements, may indicate Congress only intended Taft-Hartley to override statutes in existence at the date of enactment.[89] Either interpretaton of the Wagner Act amendment is reasonable. An examination of the legislative history of the 1974 amendment to the Wagner Act and the 1972 amendment to Title VII indicates Congress never considered whether section 701(j) requires all employers to accommodate employees with religious objections to paying union dues.[90] Because of the incon-

---

86. Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund exempt from taxation under section 501 (c)(3) of Title 26, chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee.

42 U.S.C. § 169 (1976). *See* 23 WAYNE L. REV. 1171, 1177-78 (1977).

87. 29 U.S.C. § 169 (1976).

88. The Seventh-Day Adventist Churches operate 49 hospitals and nursing homes in this country. Should organization take place in those hospitals, it would appear that many of the employees would have to quit their jobs, rather than join or financially support a labor organization. Accordingly, to protect them as well as others working in other health care institutions, we propose exemption from union membership and financial support for those who are of and adhere to teachings of a bona fide religion which has historically held conscientious objections to joining or financially supporting labor organizations.

HOUSE COMM. ON EDUCATION AND LABOR, COVERAGE OF NONPROFIT HOSPITALS UNDER THE NATIONAL LABOR RELATIONS ACT, H.R. REP. No. 1051, 93d Cong., 2d Sess. 18 (1974).

89. *See* 23 WAYNE L. REV. 1171, 1180 (1977).

90. *See* SENATE COMM. ON LABOR AND PUBLIC WELFARE, COVERAGE OF NON-PROFIT HOSPITALS UNDER THE NATIONAL LABOR RELATIONS ACT, S. REP. No. 766, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 3946; H.R. REP. No. 1051, 93d

clusiveness of congressional intent on the applicability of section 701(j)'s accommodation requirement to union security clause cases, the ultimate resolution of the issue turns on an application of the second component of the *Hardison* analysis, the reverse religious discrimination rationale.

Under *Hardison,* if accommodating employees with a religious objection to paying union dues would neither adversely affect other employees nor cause undue hardship to the employer, then section 701(j) requires employers to make that accommodation. For example, the employer could grant religious employees an exemption to the union security provision, conditioned on the employees paying an amount equivalent to union dues into a special fund from which the union could contribute to charities. This conditional exemption would not be illegal reverse religious discrimination because the exemption would neither give religious employees an advantage nor cause the employer undue hardship. The religious employee would not profit from an exemption to the union security clause because he would still have to pay an amount equivalent to union dues. Although the employee would still receive the benefits of union representation,[91] he would not be eligible for any insurance or pension benefits that come only with union membership. The religious employees' exemption would not harm the other employees' positions unless the employer granted exemptions for a substantial number of employees, thus requiring increased dues for regular union members. The adverse affect on other employees through increased union dues would be reduced, moreover, if unions used contributions made from the special fund to offset the charitable contributions generally made by most unions.[92] In the event of such a dues increase, however, accommodating religious employees could result in discrimination against other employees and, therefore, under *Hardison,* Title VII would not require the accommodation.

The oversimplification and misapplication of *Hardison* in recent seniority system and union dues cases has also caused difficulty for courts applying the reasonable accommodation standard in cases not involving unions. In the two nonunion cases

---

Cong., 2d Sess. (1974); S. CON. REP. No. 988, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 3959; 118 CONG. REC. 705 (1974), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 711-78.

91. The collective bargaining process would provide all employees such advantages as higher salaries and better working conditions.

92. Comment, *Religious Observations and Discrimination in Employment,* 22 SYRACUSE L. REV. 1019, 1043 (1971); 23 WAYNE L. REV. 1171, 1184 (1977).

decided since *Hardison*, courts have reached opposite results based on different interpretations of that case.[93] In *Jordan v. North Carolina National Bank*,[94] the Fourth Circuit held that an employer need not guarantee a prospective employee work-free Saturdays to accommodate her Sabbath practices. Without citing any specific support from *Hardison* or elsewhere, the court reasoned that the bank would have to give a no Saturday work guarantee to all its employees if it gave such a guarantee to the plaintiff.[95] The court then concluded such a guarantee would entail extra expense, which would constitute undue hardship under *Hardison*.[96] Contrary to the court's analysis, however, *Hardison* would allow the bank to guarantee no Saturday work just for religious employees. *Hardison* does not proscribe special treatment because of religion unless such special treatment gives an advantage to religious employees at the expense of the rights of other employees. Thus, the proper test for the bank's duty of accommodation would be whether giving religious employees Saturdays off would adversely affect other employees or cost the bank more than a *de minimis* amount, not whether giving all employees Saturdays off would cost more than a *de minimis* amount.

In contrast with *Jordan*, the Seventh Circuit, in *Redmond v. GAF Corp.*,[97] properly held that an employer had violated Title VII by firing an employee who would not work overtime on Saturdays because he attended a Bible study class. The court reasoned that after an employee makes out a prima facie case of religious discrimination,[98] the employer had the burden of showing that he had either made a reasonable effort to accommodate the employee or that he could not accommodate the religious practice

93. A third nonunion case, Cummins v. Parker Seal Co., 561 F.2d 658 (6th Cir. 1977) (per curiam), affirmed a district court judgment for the employer in a case involving Sabbath practices. Although the court stated *Hardison* required affirmance of the trial court's decision, the court of appeals neither cited to a particular portion of *Hardison* nor gave any analysis to support its reliance on that case. Therefore the question is not conducive to critical analysis.

94. 565 F.2d 72 (4th Cir. 1977).

95. *Id.* at 76.

96. *Id.*

97. 574 F.2d 897 (7th Cir. 1978).

98. To make out a prima facie case of religious discrimination, the plaintiff must inform the employer of his religious practice and of the need for accommodation, but is under no duty to offer the employer acceptable accommodation or to attempt to accommodate himself. *Id.* at 901-02. *Contra*, Yott v. North Am. Rockwell Corp., 428 F. Supp. 736, 769 (C.D. Cal. 1976); Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978).

because of undue hardship to his business.[99] This conclusion is a correct application of the *Hardison* Court's analysis of section 701(j). Under *Hardison,* no effort at accommodation is necessary, if and only if the employer shows that every possible method of accommodation would cause undue hardship either directly, by unduly interfering with the operation of the business, or indirectly, by causing reverse religious discrimination.

In all three types of religious discrimination cases arising since *Hardison,* then, courts have oversimplified that decision, missing completely the essence of the Supreme Court's analysis. The underlying rationale of *Hardison* was that Title VII does not require accommodation interfering with other employees' contract rights or benefiting religious employees over nonreligious employees. In applying this rationale, the Court specifically held that modifying a contractual seniority system and incurring more than a *de minimis* cost for the benefit of a religious employee were accommodations Title VII did not require. Lower courts, however, have focused on various other aspects of the *Hardison* opinion with the result that section 701(j)'s reasonable accommodation standard, though clearly defined in *Hardison,* has become confused through misapplication. Courts have oversimplified *Hardison,* applying it in a conclusory, incomplete fashion in seniority system cases and dismissing it without adequately distinguishing it in union dues cases. A continued misreading of *Hardison* will frustrate future applications of the reasonable accommodation standard. Although more complete application of the Court's reverse religious discrimination rationale may not provide as extensive protection for religious employees as Congress originally intended, the rationale is flexible enough for the courts to fashion equitable remedies and, more importantly, consistent enough to help employers determine their obligations to religious employees.

Randall J. Borkowski

99. 574 F.2d at 903.