



Case Western Reserve Law Review

Volume 70 | Issue 2

Article 11

2019

Retaliation and Requesting Religious Accommodation

Charles A. Sullivan

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Charles A. Sullivan, *Retaliation and Requesting Religious Accommodation*, 70 Case W. Rsrv. L. Rev. 381 (2019)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol70/iss2/11>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

RETALIATION AND REQUESTING RELIGIOUS ACCOMMODATION

Charles A. Sullivan[†]

ABSTRACT

A recent Eighth Circuit Court of Appeals decision on an issue of first impression suggests that requests for reasonable accommodations of religious practices or observances are generally not protected conduct within the scope of § 704, Title VII's antiretaliation provision. The court reasoned that such a request does not fall within that provision's "opposition" clause because it did not "oppose" anything the employee could have reasonably believed was discriminatory.

This counterintuitive holding suggests to employees that accommodation requests are perilous, and thus threatens Title VII's goal of requiring employers to reasonably accommodate believers. It is true that Supreme Court precedent protects an employee when the employer must grant his or her accommodation because it is reasonable and does not cause an undue hardship on the employer. In such cases, retaliating against the employee is viewed as core religious discrimination, which is prohibited under § 703, and so there is no need to invoke § 704.

But what if the accommodation is not legally required under Title VII? That is a very common scenario given the Supreme Court's longstanding and extraordinarily narrow reading of the duty of accommodation under the statute. And if the Eighth Circuit's view were to be generally adopted, employers would seem to be largely free not merely to deny the request but also to take adverse employment actions against those foolish enough to make one.

This Article analyzes the complicated interaction between § 703's accommodation command and § 704's retaliation prohibition. In the process, it rejects the "no harm, no foul" argument sometimes made: that denying employment to or firing a worker who seeks an "unreasonable accommodation" is not actionable because the worker will not perform the job requirements in any event. Such a view is predicated on the false notion that employees can seek accommodations only when they are faced with the choice between their religion and their job. In many cases, believers seek accommodations when their religion encourages (or discourages) but does not mandate (or prohibit) the conduct in question, a point that is often unappreciated.

The Article concludes that the Eighth Circuit was wrong in its reading of § 704 as applied to requests for accommodation. Further, it

[†] Professor of Law, Seton Hall Law School. B.A. Siena College, 1965; LL.B. Harvard Law School, 1968. My thanks to Kamille E. Perry, Seton Hall class of 2021, for superb research assistance.

argues that, regardless of the correct reading of that provision, taking adverse action against a worker whose accommodation request was legitimately denied may violate § 703’s prohibition of status discrimination, a question not answered by the Eighth Circuit.

CONTENTS

INTRODUCTION	382
I. THE DUTY NOT TO DISCRIMINATE ON THE BASIS OF RELIGION.....	389
II. THE GRUDGING DUTY OF RELIGIOUS ACCOMMODATION	394
III. TITLE VII’S PROHIBITION OF RETALIATION.....	400
IV. SECTION 703 TO THE RESCUE?.....	407
CONCLUSION.....	416

INTRODUCTION

Long before the Americans with Disabilities Act¹ (“ADA”) required employers to accommodate disabilities, Title VII created exactly that duty for religion.² As amended in 1972,³ § 701(j) defined *religion* (an undefined protected category in the original 1964 enactment) to “includ[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate [such] religious observance or practice without undue hardship on the conduct of the employer’s business.”⁴ Almost twenty

-
1. 42 U.S.C. § 12112(b)(5) (2012).
 2. Rather than being framed as a separate duty, the reasonable-accommodation requirement was “incorporated into the statute, somewhat awkwardly, in the definition of religion.” *See* *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986).
 3. Equal Employment Opportunity Act of 1964, Pub. L. No. 92-261, 86 Stat. 103 (1972).
 4. 42 U.S.C. § 2000e(j) (2012); *see also* 29 C.F.R. § 1605.2 (2018). The amendment was largely a response to the Supreme Court affirming the Sixth Circuit’s rejection of an Equal Employment Opportunity Commission (“EEOC”) regulation requiring a religious-accommodation duty under Title VII. *See* *Dewey v. Reynolds Metals Co.*, 300 F. Supp. 709, 714 (W.D. Mich. 1969), *rev’d*, 429 F.2d 324, 334 (6th Cir. 1970), *aff’d by an equally divided court*, 402 U.S. 689 (1971) (per curiam). The section’s legislative history demonstrates a desire on the part of its Senate sponsor, Senator Jennings Randolph (himself a Seventh-Day Baptist), to reduce the incidences of believers’ forced choices between faith and employment. *See* Roberto L. Corrada, *Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases*, 77 U. CIN. L. REV. 1411, 1427–31 (2009); Peter Zablotsky, *After the Fall: The Employer’s Duty to Accommodate Employee Religious Practices*

years later, the ADA imposed a similar duty by prohibiting discrimination on the basis of disability and defining discrimination to include failing to make reasonable accommodations for qualified individuals with a disability.⁵

Title VII's duty of accommodation, however, has been far less robust than its ADA analog,⁶ and certainly less robust than its statutory language suggests. Indeed, in *Trans World Airlines, Inc. v. Hardison*,⁷ the Court read the "undue hardship" exception to largely swallow the accommodation rule.⁸ The case involved a Saturday Sabbatarian who asked that a shift schedule requiring Saturday work be modified to accommodate his beliefs.⁹ He proposed a number of alternatives, but the Court found each to involve an "undue hardship" under a remarkably deferential definition: "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is

Under Title VII after Ansonia Board of Education v. Philbrook, 50 U. PITT. L. REV. 513, 534 n.70 (1989).

5. The Act defines *discrimination* to include:

(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

42 U.S.C § 12112(b)(5) (2012).

6. See Nicole Buonocore Porter, *A New Look at the ADA's Undue Hardship Defense*, 84 MO. L. REV. 121, 126 (2019). Professor Porter reports that the ADA's legislative history contains explicit language rejecting the standard in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). Porter, *supra*, at 126 n.36. For example, the Senate Report states:

The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison*, 432 U.S. 63 (1977) are not applicable to this legislation. In *Hardison*, the Supreme Court concluded that under [T]itle VII of the Civil Rights Act of 1964 an employer need not accommodate persons with religious beliefs if the accommodation would require more than a *de minimis* cost for the employer.

S. REP. NO. 101-116, at 36 (1989); see also H.R. REP. NO. 101-485, pt. 4, at 46 (1990).

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

8. See *infra* Part II.

9. *Hardison*, 432 U.S. at 67–68.

an undue hardship.”¹⁰ While this Article explores the Court’s reasons for such an antitextual reading,¹¹ *Hardison*’s restrictive approach to religious accommodations continues to govern Title VII cases.¹² Nevertheless, Title VII’s duty is not without teeth. A number of decisions have held in the employee’s favor.¹³ Indeed, a recent case made headlines when a jury awarded a hotel dishwasher twenty-one million dollars in damages for being required to work on Sundays.¹⁴ Although statutory caps will prevent most of that from ever being collected,¹⁵ the verdict sends a message to employers to take requests for accommodation seriously.

Yet at roughly the same time the media was relaying that news, employers were receiving another, more nuanced message from the judiciary that seemed to free employers to retaliate against workers seeking accommodations. In *EEOC v. North Memorial Health Care*,¹⁶ a

10. *Id.* at 84.

11. *See infra* notes 82–86 and accompanying text.

12. Four justices, concurring in a recent denial of certiorari, hinted at a willingness to revisit *Hardison*. *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (noting that, in *Hardison*, “the Court opined that Title VII’s prohibition of discrimination on the basis of religion does not require an employer to make any accommodation that imposes more than a *de minimis* burden. In this case, however, we have not been asked to revisit [that] decision[.]”). A petition for certiorari raising that exact issue is pending in *Patterson v. Walgreen Co.*, 727 F. App’x 581 (11th Cir. 2018), *petition for cert. filed*, No. 18-349, Sept. 17, 2018; and, of course, four justices are sufficient to grant it. *See* Patterson v. Walgreen Co., SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/patterson-v-walgreen-co/> [<https://perma.cc/6QV4-Y9GE>] (last visited Dec. 17, 2019).

13. *See infra* notes 91–93 and accompanying text.

14. Janelle Griffith, *Hotel Dishwasher Awarded \$21 Million After Boss Made Her Work on Sundays*, NBC NEWS (Jan. 17, 2019, 9:13 AM), <https://www.nbcnews.com/news/us-news/hotel-dishwasher-awarded-21-million-after-boss-made-her-work-n959401> [<https://perma.cc/C96X-R4N2>].

15. Title VII originally did not authorize the recovery of damages; rather it provided only for equitable relief, including backpay. *See* 42 U.S.C. § 1981a (2012) (authorizing damages in disparate treatment Title VII cases after the Civil Rights Act of 1991); *see also id.* § 1981a(c) (including the right to a jury trial when damages are sought in disparate treatment Title VII cases). Although § 1981a describes compensatory damages broadly—i.e., as “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses”—it caps both compensatory and punitive damages at between \$50,000 and \$300,000, depending on the employer’s size. *Id.* § 1981a(b)(3). Those caps are not applicable to Title VII equitable relief, such as “backpay, interest on backpay, or any other type of relief authorized under section 706(g).” *Id.* § 1981a(b)(2).

16. 908 F.3d 1098 (8th Cir. 2018).

divided panel of the Eighth Circuit considered whether a request for a religious accommodation was protected under § 704(a)'s prohibition of retaliation for "opposing" discrimination.¹⁷ The majority rejected the claim that such requests are generally protected activity, essentially because such requests do not "oppose" anything.¹⁸ Therefore, the hospital had not retaliated when it rescinded a conditional employment offer after concluding it could not grant a requested accommodation.¹⁹

Of course, the employer could have been correct or incorrect in its conclusion that it need not accommodate in the circumstances. If it were wrong, that is, if the requested accommodation was "reasonable" and not an "undue hardship," the employer would have violated § 703(a)'s bar on discrimination on the basis of religion²⁰ and there would be no need for a retaliation claim. If it were right, however, no § 703 status-discrimination claim would lie, but a retaliation claim under § 704 might be plausible, *North Memorial* notwithstanding. At first glance, this seems odd: if the applicant would not have worked without accommodation, she is being turned down for inability to perform the job, not for requesting accommodation. But that assumes that accommodations are sought only by those whose religion bars them from working without them, which both oversimplifies religious beliefs and misreads the statute. In *North Memorial* itself, the applicant had indicated she would have worked without the requested accommodation.²¹ In such situations, a retaliation claim may be critical to furthering Congress's accommodation requirement.

To understand the problem, it is critical to appreciate that the typical way an employer learns of the need for an accommodation is by the employee requesting one (which is generally also true for ADA accommodations).²² Nor is this unreasonable since inquiring into an

17. *Id.* at 1102. This was the first circuit court to address the question at length. Six years before *North Memorial*, the Seventh Circuit had assumed that requesting a religious accommodation is protected from retaliation. *See Porter v. City of Chicago*, 700 F.3d 944, 957 (7th Cir. 2012). Several district courts take the same stance as the Seventh Circuit. *See e.g.*, *Lewis v. N.Y.C. Transit Auth.*, 12 F. Supp. 3d 418, 449 (E.D.N.Y. 2014).

18. *North Memorial*, 908 F.3d at 1103.

19. *See infra* notes 94–108 and accompanying text.

20. *See infra* notes 45–49 and accompanying text.

21. *North Memorial*, 908 F.3d at 1100.

22. U.S. Equal Emp. Opportunity Comm'n Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. § 1630.9, at 421 (2018) (stating that it is generally "the responsibility of the individual with a disability to inform the employer that an accommodation is needed"). Such a default rule makes sense in light of the statute's explicit bar on inquiry into disabilities. *See Kobus v. Coll. of Saint Scholastica, Inc.*, 608 F.3d 1034, 1038–39 (8th Cir. 2010) (affirming that an employee who did not reveal his treatment for depression and whose limitations

employee's religious beliefs violates current privacy norms and raises the potential for discrimination claims, should an adverse action follow. Further, there are myriad religions with differing beliefs and practices²³ and different observances even among those who nominally share a particular faith.²⁴ Accordingly, to trigger any duty, the employee must normally alert her employer of her desire for an accommodation because her belief or observance conflicts with a workplace requirement.²⁵

Given the centrality of such requests to the statutory scheme, it is scarcely surprising that requests for accommodation have been routinely held to be protected conduct under the ADA.²⁶ One paragraph of the relevant ADA antiretaliation provision tracks the language of Title VII,²⁷ and most courts have read it to protect requests for accom-

were not apparent at work had no failure-to-accommodate claim when he was fired for excessive absenteeism resulting from the depression).

Yet because the ADA addresses accommodating "known" disabilities, 42 U.S.C. § 12112(b)(5) (2012), there are a few cases suggesting employers should act even absent an employee's request when the employer otherwise "knows" about the difficulty the disabled employee faces. *See, e.g.*, *EEOC v. Convergys Customer Mgmt. Grp., Inc.*, 491 F.3d 790, 795–96 (8th Cir. 2007) (holding that a wheelchair-bound employee is not required to request specific accommodations to trigger employer duty). The EEOC's interpretive guidance also notes that "[i]f an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation." 29 C.F.R. app § 1630.9, at 421 (2018). This seems to permit, but not require, an inquiry, thus leaving the ball squarely in the worker's court.

23. *See* Dallan F. Flake, *Interactive Religious Accommodation*, 71 ALA. L. REV. 67, 71–72 (2019).
24. *See, e.g.*, *Pielech v. Massasoit Greyhound, Inc.*, 668 N.E.2d 1298 (Mass. 1996) (regarding a conflict between particular Catholics' beliefs and official Catholic Church dogma).
25. Accordingly, courts frequently spoke in these terms about plaintiff's prima facie, failure-to-accommodate case. *See, e.g.*, *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1996) ("In order to establish a prima facie case of religious discrimination, a plaintiff must show that the observance or practice conflicting with an employment requirement is religious in nature, that she called the religious observance or practice to her employer's attention, and that the religious observance or practice was the basis for her discharge or other discriminatory treatment."). The status of a failure-to-accommodate case is discussed in Part I *infra*.
26. *See infra* note 37.
27. 42 U.S.C. § 12203(a) (2012) ("No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.").

modation, despite the textual obstacle *North Memorial* raised.²⁸ But the issue of whether requests are protected conduct may be less important under the ADA than under Title VII since another paragraph of the ADA bars coercing, intimidating, threatening, or *interfering* with the exercises of ADA rights,²⁹ a provision which has no parallel in Title VII. It seems likely that retaliation for requesting an accommodation would interfere with the employee's ADA right to such an accommodation.³⁰

And there lies the problem. Section 704(a) of Title VII bars employer retaliation against an employee or applicant either “[1] because he has opposed any practice made an unlawful employment practice by this subchapter, or [(2)] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”³¹

According to *North Memorial*, that language does not embrace an applicant who is denied a job because she requested an accommodation for her religious observance.³² First, the individual in question had not filed a charge with the Equal Employment Opportunity Commission (“EEOC”) or otherwise fallen within the “participation” clause of the paragraph. Second, her request could not be viewed as “opposition” to any employment practice that was either illegal under Title VII or reasonably perceived to be illegal. Thus, a plain textual reading of the statute meant that employers are free to retaliate against those who request religious accommodations.³³

28. See *infra* notes 126–132 and accompanying text.

29. 42 U.S.C. § 12203(b) (2012) (“It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.”).

30. See *Willis v. Career Educ. Corp.*, No. 12 C 07662, 2015 WL 3859191, at *8 (N.D. Ill. June 19, 2015) (noting that although defendant's argument that requesting accommodation is not protected conduct under § 12203(a) “might be technically correct,” § 12203(b) protects such requests); see also *Kirkeberg v. Canadian Pac. Ry.*, 619 F.3d 898, 907 (8th Cir. 2010) (questioning how the ADA rule can be squared with the text of § 12203(a)).

31. 42 U.S.C. § 2000e-3(a) (2012).

32. *EEOC v. N. Mem'l Health Care*, 908 F.3d 1098, 1103 (8th Cir. 2018).

33. Given the “interference” clause in the ADA, a textual argument against protecting disability-accommodation requests is more difficult to make out but not impossible: It could be claimed that, while a discharge for seeking such an accommodation would be “interference,” it would not interfere with “any right granted or protected by this chapter” unless the individual actually was due an accommodation; otherwise, it would not interfere with “any right granted or protected by this chapter.” See 42 U.S.C. § 12203(b) (2012).

An important qualification is necessary here. As discussed below, refusing to hire an applicant because of the need to make a required accommodation (that is, a reasonable accommodation that is not an undue hardship) would violate Title VII's prohibition of religious discrimination in § 703.³⁴ Thus, it will make little difference whether an applicant has a claim under § 703 or § 704 when an employer refuses to hire a person because it would be required to accommodate her.

However, where the request for accommodation could be legally denied, § 703 is arguably not implicated, and *North Memorial* suggests the employer is largely free to retaliate against the applicant or employee under § 704.³⁵ And, given the weak version of the duty to accommodate under Title VII, that is far more likely to be true under that statute than under the ADA.³⁶ In short, *North Memorial* poses a serious disincentive to employees seeking religious accommodations.

This Article proceeds as follows. Part I describes the duty not to discriminate on the basis of religion under Title VII as developed by the Supreme Court most recently in *EEOC v. Abercrombie and Fitch Stores, Inc.*³⁷ Part II explores the *North Memorial* holding that requests for accommodation are not generally protected conduct. Finally, Part III takes a fresh look at the problem. It concludes that, whether or not *North Memorial* is correct on the § 704 issue it decided, a correct reading of Title VII would make illegal a refusal to hire because of a request for an accommodation.

34. And, as discussed, the ADA expressly so provides. *See* 42 U.S.C. § 12112(b)(5) (2012).

35. One might argue that the employer should not be allowed to effectively pretermit any accommodation analysis even under § 703. Even if, after the fact, it does not appear that any duty has been breached, it may be that the employer should be required to explore possible accommodations, especially given that there may be some adjustments that the employee can make. *See* Flake, *supra* note 23, at 71 (urging recognition of an interactive process for religious-accommodation claims under Title VII).

However, not only have the courts not generally required an interactive process under Title VII, but even under the ADA they have generally refused to hold employers liable for simply failing to engage in the interactive process required under the ADA unless there is a showing that a reasonable accommodation was available. *E.g.*, *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 97, 99–100 (2d Cir. 2009) (finding that because the plaintiff “provided no evidence that there existed any potential accommodation that would have allowed her to continue to work,” the employer’s failure to engage in interactive process was not a violation); *see also* 29 C.F.R. § 1630.2(o)(3) (2018).

36. *See supra* notes 6–13 and accompanying text.

37. 135 S. Ct. 2028 (2015).

I. THE DUTY NOT TO DISCRIMINATE ON THE BASIS OF RELIGION

For most of its history, Title VII's prohibition of religious discrimination was generally understood to give rise to two separate theories of liability.³⁸ The first, discrimination simpliciter, was essentially disparate treatment on the basis of religion, which tracked similar claims for race or sex discrimination.³⁹ These cases were typically pursued under the *McDonnell Douglas Corp. v. Green* litigation structure,⁴⁰ but are presumably also analyzed under the "motivating factor" standard after the 1991 Civil Rights Act amendments.⁴¹ In either case, the typical question is whether the employee or applicant suffered an adverse employment action motivated at least in part by the plaintiff's religious beliefs and practices.⁴² As in the vast majority of individual disparate-treatment cases, the central question is almost always whether the challenged adverse action was taken because of religion or for some other reason.⁴³ More favorable treatment of comparators is often a critical element of proof.⁴⁴

The second theory of liability was failure to accommodate. In these cases, the applicant or employee is denied a requested accommodation.⁴⁵ In this setting, there is no inquiry into the employer's intent; the only issue, typically, is whether there is a reasonable accommodation available and, if so, whether it would nevertheless have been an undue

-
38. See Corrada, *supra* note 4, at 1412–13 (“[M]ost judges, lawyers, legal academics, and law students come to understand that most, if not all, religious discrimination claims are divided into either discrimination/bias cases or accommodation cases. To determine the result in any given religious discrimination case, one must simply choose the appropriate case category (discrimination or accommodation) and then follow the required analytical path.”) (footnotes omitted).
39. See, e.g., *Chaplin v. Du Pont Advance Fiber Sys.*, 293 F. Supp. 2d 622, 629 (E.D. Va. 2003).
40. 411 U.S. 792 (1973). The litigation structure of such cases is a familiar one designed to determine whether the adverse employment action at issue was the result of employer bias or a legitimate nondiscriminatory reason. *Id.* at 802. See generally CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 14–24 (2017).
41. See *infra* note 150 and accompanying text.
42. See, e.g., *Ali v. Alamo Rent-A-Car, Inc.*, 8 F. App'x 156, 159 (4th Cir. 2001).
43. See, e.g., Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 198–99 (2009).
44. *Id.* at 198.
45. See Corrada, *supra* note 4, at 1413–14.

hardship to require the employer to provide it.⁴⁶ More favored comparators were largely unnecessary (although accommodating others might be relevant to the proposed accommodation's reasonableness and undercut a claim of undue hardship). Indeed, it is the plaintiff who asks to be preferred to other workers in the sense of being exempted from normal workplace rules for religious reasons.⁴⁷

This bifurcated litigation structure not only made some sense, given the different proof paths taken by the two distinct claims, but it was essentially the structure under the ADA.⁴⁸ Regardless, the distinction was questioned by the Supreme Court's decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*⁴⁹ Justice Scalia delivered the opinion of the Court, and he started by positing that Title VII "prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship."⁵⁰ The precise question before the Court was "whether this prohibition applies only where an applicant has informed the employer of his need for an accommodation."⁵¹ The Court held that it did not.

There, Samantha Elauf applied for a sales job at an Abercrombie & Fitch store. Elauf is a practicing Muslim and she wore her headscarf to her job interview.⁵² The store's assistant manager thought Elauf was qualified for the job, but she was concerned that Elauf's headscarf

-
46. Some claims also involve issues about whether the request was religiously motivated to begin with, *e.g.*, *Friedman v. S. Cal. Permanente Med. Grp.*, 125 Cal. Rptr. 2d 663 (Cal. Ct. App. 2002) (holding that veganism is a secular philosophy, not a religion); whether the requesting employee was sincere, *see infra* note 161; or whether the religion required the accommodation, *see infra* note 157.
47. *See, e.g.*, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360–61 (3rd Cir. 1999).
48. *See* 42 U.S.C. § 12112(b) (2012); *see also, e.g.*, *Hunt v. Monro Muffler Brake, Inc.*, 769 F. App'x 253, 258 (6th Cir. 2019) ("To establish a prima facie case of failure to accommodate, a plaintiff must show that: (1) he is disabled within the meaning of the ADA; (2) he is otherwise qualified for the position, with or without reasonable accommodation; (3) his employer knew or had reason to know about his disability; (4) he requested an accommodation; and (5) the employer failed to provide the necessary accommodation.").
49. 135 S. Ct. 2028 (2015).
50. *Id.* at 2031. Notice that this framing does not address the question of whether an employer violates the statute when it refuses to hire an individual whose religious practices it is not required to accommodate. *See infra* note 144 and accompanying text.
51. *Abercrombie*, 135 S. Ct. at 2031.
52. *Id.*

conflicted with the store's dress code.⁵³ Ultimately concluding that it did, the district manager refused to hire Elauf. She had never mentioned her faith and she did not request any accommodation related to her religion; nor did the manager confirm with Elauf that she wore the headscarf for religious reasons.⁵⁴

The Court rejected Abercrombie's contention that a showing of disparate treatment required the employer to have "actual knowledge" of an applicant's need for an accommodation.⁵⁵ "Instead, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision."⁵⁶ That was because Title VII bars failure-to-hire because of an applicant's religion, and religion includes religious practice. Thus, Abercrombie refused to hire Elauf because of her religious practices, and that was true regardless of Abercrombie's actual knowledge of those practices: "[A]n employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed."⁵⁷ Stated even more clearly: "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."⁵⁸

53. *Id.*

54. *Id.*

55. *Id.* at 2032.

56. *Id.*

57. *Id.* at 2033.

58. *Id.* Justice Alito concurred in the result, disagreeing with the majority largely on the question of whether an employer's knowledge of the religious nature of the applicant's observance was an element of the offense:

I would hold that an employer cannot be held liable for taking an adverse action because of an employee's religious practice unless the employer knows that the employee engages in the practice for a religious reason. If § 2000e-2(a)(1) really "does not impose a knowledge requirement," it would be irrelevant in this case whether Abercrombie had any inkling that Elauf is a Muslim or that she wore the headscarf for a religious reason. That would be very strange.

Id. at 2035 (Alito, J., concurring). However, plaintiff need not show that the employer took the adverse action because of the religious nature of the practice. *Id.* at 2036. An employer risked liability if it declined to hire anyone who refused to work on Saturday when the applicant's refusal "was known by the employer to be based on religion." *Id.* In such a case, the applicant was "rejected because of a religious practice." *Id.*

Justice Alito then rejected the majority's statement that the plaintiff has the burden to prove a failure to accommodate. He argued that position "blatantly contradicts the language of the statutes," *id.*, which require the employer to "demonstrate[] that he is unable to reasonably accommodate

The majority apparently rejected any separate Title VII claim for a failure to accommodate under § 703: subsections (1) and (2), “often referred to as the ‘disparate treatment’ (or ‘intentional discrimination’) provision and the ‘disparate impact’ provision, are the only causes of action under Title VII.”⁵⁹ Rather, such claims must be folded into the normal analysis. The notion that there is no distinctive claim for a failure to accommodate was reinforced by Justice Thomas’s separate opinion, which noted that “[t]he Court today rightly puts to rest the notion that Title VII creates a freestanding religious-accommodation claim.”⁶⁰

Justice Scalia, however, also stressed the difference between religious discrimination claims and those based on other protected classes. While disparate treatment on any prohibited ground is barred,⁶¹ only religious practices must be accommodated:

[T]he statute [does not] limit disparate-treatment claims to only those employer policies that treat religious practices less favorably than similar secular practices. . . . Title VII does not demand mere neutrality with regard to religious practices—that they be

to [the] employee’s or prospective employee’s religious . . . practice . . . without undue hardship on the conduct of the employer’s business,” *id.* (emphasis omitted) (second alteration in original) (quoting 42 U.S.C. § 2000e(j) (2012)).

59. *Id.* at 2032 (majority opinion).

60. *Id.* at 2041 (Thomas, J., concurring in part and dissenting in part). Justice Thomas’s opinion, however, faulted the majority for “creat[ing] in its stead an entirely new form of liability: the disparate-treatment-based-on-equal-treatment claim.” *Id.* (alteration in original). Justice Thomas reasoned that disparate treatment under Title VII required an intent to treat individuals differently on the basis of a protected class. *Id.* at 2039. When all are treated the same, there can be no discrimination. *Id.* The reasonable accommodation language of § 701(j) merely required an employer to accommodate religious workers if it accommodated other workers, thus violating the equal treatment command:

I do not dispute that a refusal to accommodate can, in some circumstances, constitute intentional discrimination. If an employer declines to accommodate a particular religious practice, yet accommodates a similar secular (or other denominational) practice, then that may be proof that he has “treated a particular person less favorably than others because of [a religious practice].”

Id. (alteration in original) (quoting *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)).

61. *Id.* at 2033–34 (majority opinion) (“[R]eligious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated.”). The sentence is odd since religion is the only protected characteristic that “must be accommodated.” *See id.*; 42 U.S.C. § 2000e(j) (2012).

treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not “to fail or refuse to hire or discharge any individual . . . because of such individual’s” “religious observance and practice.”⁶²

By way of example, Scalia noted that, while employers are “surely entitled” to regulate the headwear of their workers, a refusal to hire an applicant who requires an accommodation to that policy may not be permissible: “Title VII requires otherwise-neutral policies to give way to the need for an accommodation.”⁶³

Thus, there may be only one individual disparate treatment claim under the statute, but it is subject to different proof where religion is concerned. A male claiming sex discrimination would have no disparate treatment claim if subject to a neutral headgear rule that he opposed as inconsistent with his gender.⁶⁴

The significance of the rejection of a separate claim for a failure to accommodate while continuing to recognize a greater duty than would be true for other protected characteristics is unclear. It may be that the Court did not mean to repudiate the circuit court authority that established different proof structures for plain vanilla discrimination claims and failure-to-accommodate claims. After all, a complaint seeking relief for a failure to hire because, say, the plaintiff is Jewish (a discrimination simpliciter claim) will be litigated considerably differently than a complaint seeking relief for a similar plaintiff who was denied an accommodation so she could observe Shabbos.⁶⁵ In the former, the central dispute is likely to be whether the employer discriminated on the ground of religion or some alternative “legitimate nondiscriminatory reason,” while in the latter, the central dispute is likely to be whether allowing the employee time off from work from sundown Friday to sundown Saturday is reasonable and not an undue hardship in light of the employer’s business interests and possible need for replacement workers. While *Abercrombie* indicated that the two claims merge when a job is denied in order to avoid an accommodation,

62. *Id.* at 2034 (quoting 42 U.S.C. § 2000e-2(a)(1) (2012)).

63. *Id.* This language is in some tension with the narrow scope that *Trans World Airlines, Inc. v. Hardison* accorded the duty of accommodation. *See* 432 U.S. 63, 79, 81 (1976). The *Abercrombie* majority failed to even cite *Hardison*. *See generally Abercrombie*, 135 S. Ct. 2028.

64. *See, e.g.*, Allison T. Steinle, Note, *Appearance and Grooming Standards as Sex Discrimination in the Workplace*, 56 CATH. U. L. REV. 261, 277–78 (2006).

65. *Krizhner v. PurePOWER Techs., LLC*, No. CA 3:12-1802-MBS, 2013 WL 5332686, at *4, *10 (D.S.C. Sept. 23, 2013) (granting summary judgment for the employer on plaintiff’s claim that the employer failed to accommodate his desire to observe Shabbat), *aff’d*, 566 F. App’x 239 (4th Cir. 2014).

examples of cases involving one or the other kind of violation are not far to seek.⁶⁶

Most obviously, some plain vanilla discrimination cases rise from sheer animus towards certain religions, apparently unconnected with any need to accommodate religious practices.⁶⁷ Many of the religious harassment claims by Muslims in the last few years seem to be of that variety: the problem is not with making adjustments in work schedules to accommodate their religious observances but rather with resentments about the mere presence of Muslims in the workplace.⁶⁸

In short, the litigation for alleged violations of Title VII's prohibition of religious discrimination is almost certain to take different paths depending on the conduct at issue, the Supreme Court notwithstanding.⁶⁹

II. THE GRUDGING DUTY OF RELIGIOUS ACCOMMODATION

Relatively soon after § 701(j) was added to the statute, the Supreme Court addressed the accommodation duty in an opinion that narrowly constrained that section's reach. *Trans World Airlines, Inc.*

-
66. For an example of an accommodation claim, see *EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 117–18 (4th Cir. 1988); for an example of a denied-accommodation claim, see *Rodriguez v. City of Chicago*, 975 F. Supp. 1055, 1057–58 (N.D. Ill. 1997), *aff'd*, 156 F.3d 771 (7th Cir. 1998).
67. See, e.g., *Johnson v. Spencer Press of Me., Inc.*, 364 F.3d 368, 373–74 (1st Cir. 2004) (discussing defendant's inappropriate, lewd, and derogatory comments regarding the plaintiff's religion and inability to work overtime on Sundays).
68. See, e.g., *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 311 (4th Cir. 2008) (holding that the severe and pervasive harassment of Muslim plaintiff, which included “a steady stream of demeaning comments and degrading actions” (including “religiously charged epithets” such as “Taliban” and “towel head”), was actionable religious harassment). Disentangling the religious objection from what might be viewed as national origin or even racial discrimination is sometimes difficult given current geopolitical realities. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208 (4th Cir. 2016); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987) (discrimination against an employee based on his Arab ancestry is race discrimination under 42 U.S.C. § 1981 (2012)).
69. See generally Bruce N. Cameron & Blaine L. Hutchison, *Thinking Slow About Abercrombie v. Fitch: Straightening Out the Judicial Confusion in the Lower Courts*, 46 PEPP. L. REV. 471, app. I at 483, 505–07 (2019) (identifying a number of cases that continue to use the “the former prima facie” formulation for accommodation claims); *id.* at app. II, at 508–09 (reporting decisions that modify that test to account for *Abercrombie*'s elimination of any request-for-accommodation requirement). The authors argue for an application of the *McDonnell Douglas* standard. *Id.* at 494, app. II at 508.

*v. Hardison*⁷⁰ involved a Sabbatarian who asked his employer to modify a shift schedule that would otherwise require him to work on Saturdays. Doctrine under the ADA separates the question of whether an accommodation is reasonable to begin with from the question of whether it is an undue hardship and assigns the burdens of persuasion separately on the two issues.⁷¹ The Supreme Court has since carried this bifurcation over to § 701(j).⁷² *Hardison*, however, did not clearly differentiate between the two concepts although it spoke most clearly in terms of undue hardship.⁷³ In any event, the Court had no difficulty holding that the various proposed accommodations were not required.

The first issue the Court addressed was whether Trans World Airlines (“TWA”) was required to violate a governing collective bargaining agreement in order to accommodate Hardison’s inability to work on Saturday.⁷⁴ It held no,⁷⁵ a decision consistent with the Court’s later holding to the same effect under the ADA in *US Airways, Inc. v. Barnett*,⁷⁶ which viewed such a step as unreasonable in the first place, and, therefore, it never reached the undue-hardship question.⁷⁷ *Hard-*

70. 432 U.S. 63 (1977).

71. In *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the Court approved the lower courts’ burden-shifting framework under which plaintiffs have the burden of showing an accommodation that “seems reasonable on its face, *i.e.*, ordinarily or in the run of cases. . . . Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.” *See id.* at 401–02.

72. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 n.2 (“The concurrence mysteriously concludes that it is not the plaintiff’s burden to prove failure to accommodate. But of course that *is* the plaintiff’s burden, if failure to hire ‘because of’ the plaintiff’s ‘religious practice’ is the gravamen of the complaint. . . . ‘The clause that begins with the word ‘unless,’ as the concurrence describes it, has no function except to place upon the employer the burden of establishing an ‘undue hardship’ defense.”) (citations omitted) (quoting *id.* at 2036 (Alito, J., concurring)); *cf. id.* at 2036 (Alito, J., concurring) (“The clause that begins with the term ‘unless’ unmistakably sets out an employer defense. If an employer chooses to assert that defense, it bears both the burden of production and the burden of persuasion. A plaintiff, on the other hand, must prove the elements set out prior to the ‘unless’ clause, but that portion of the rule makes no mention of accommodation.”).

73. *See generally Hardison*, 432 U.S. 63.

74. *Id.* at 67–68, 75–76.

75. *Id.* at 79–81.

76. 535 U.S. 391 (2002). The ADA lacks Title VII’s exception for bona fide seniority systems, which the *Hardison* Court cited as supporting its conclusion. *See Hardison*, 432 U.S. at 81–82.

77. *See Barnett*, 535 U.S. at 401–02, 406.

ison was not so precise in its analysis, but it left no doubt that employers are not required to provide accommodations that violate collective bargaining agreements.⁷⁸

While some workarounds might have accommodated Hardison while leaving the collective bargaining agreement intact, the Court concluded that each of the plaintiff's alternatives amounted to an "undue hardship" under an astonishingly deferential definition: "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."⁷⁹ While it is not surprising that requiring TWA to pay workers premium rates to fill-in for Hardison violated that test, the Court went further to strongly suggest that any favoring of Hardison's religious needs over coworkers with strong but nonreligious shift preferences was itself impermissible:

Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities. . . . 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.⁸⁰

The Court continued:

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. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.⁸¹

78. *See Hardison*, 432 U.S. at 79, 83 & n.14.

79. *Id.* at 84.

80. *Id.* at 81.

81. *Id.* at 84–85. The Court summarized:

This decision, rendered over Justice Marshall's dissent, which Justice Brennan joined,⁸² went far to restrict the duty of reasonable accommodation.⁸³ Although one might wonder whether *Abercrombie's* studied avoidance of limitations on the duty to accommodate signaled some doubt on the question,⁸⁴ *Hardison* remains an extraordinarily grudging interpretation of the statute.

The Court's antitextual reading seems to have resulted from the tension it identified between the plain language of § 701(j) and the statute's overall equal-treatment goal,⁸⁵ although it could easily have found the duty of accommodation to be an explicit exception to the statute's more general nondiscrimination command. This led some commentators to argue that *Hardison's* strained interpretation was driven by Establishment Clause concerns should Congress be held to have imposed a too-robust duty to accommodate.⁸⁶ The constitutional

[T]he paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.

Id. at 85.

82. *Id.* at 85–87 (Marshall, J., dissenting) (“The Court holds, in essence, that although the EEOC regulations and the Act state that an employer must make reasonable adjustments in his work demands to take account of religious observances, the regulation and Act do not really mean what they say. An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a matter of law today’s result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise.”).
83. *See id.* at 81 (majority opinion) (explaining that reasonable accommodations should not go so far as to deny an employer certain rights); *see also* *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986) (“We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation. By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation.”).
84. *See infra* note 148.
85. *See* *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031–34 (2015).
86. Some legislation favoring religion or particular religions has been held to violate the Establishment Clause. Perhaps most on point is the Court’s decision in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), which

question⁸⁷ may be of more than academic interest given developments that may portend a revision of *Hardison*.⁸⁸ In the meantime, however, *Hardison*'s restrictive approach to religious accommodations continues

struck down a Connecticut statute that prohibited employers from requiring an employee to work on his Sabbath. *See id.* at 710–11. That statute, however, was not limited to “reasonable” accommodations: it required accommodation by the employer regardless of the burden imposed. *See id.* at 709–10. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), the Court described the statute in *Caldor* as effectively having given “the force of law to an employee’s designation of his Sabbath day and required accommodation by the employer regardless of the burden that constituted for the employer or other employees.” *Id.* at 337 n.15. *Amos* held that Title VII’s exemption of certain religious employers from Title VII’s prohibition of discrimination on account of religion, even if not required by the Free Exercise Clause, did not violate the Establishment Clause. *See id.* at 334–35.

Some commentators have explained *Hardison* as an effort by the Court to avoid the issue it later faced in *Caldor*. *See* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 6–7 (1996) (“Apparently to avoid constitutional questions under the Establishment Clause, the Supreme Court interpreted the duty of reasonable accommodation narrowly.”). *But see* Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 402 n.373 (1997) (“[T]he Supreme Court in *Hardison* never offered the Establishment Clause as a rationale for its decision.”). Perhaps relevant to this debate is the fact that the *Hardison* dissenters went out of their way to explain how the canon of avoidance did not justify the majority’s decision. *See Hardison*, 432 U.S. at 89–90 (Marshall, J., dissenting) (“The Court’s interpretation of the statute, by effectively nullifying it, has the singular advantage of making consideration of petitioners’ constitutional challenge unnecessary. The Court does not even rationalize its construction on this ground, however, nor could it, since ‘resort to an alternative construction to avoid deciding a constitutional question is appropriate only when such a course is “fairly possible” or when the statute provides a “fair alternative” construction.’”) (quoting *Swain v. Pressley*, 430 U.S. 372, 378 n.11 (1977)).

87. Constitutional limits on what accommodation duties the government might demand remain unclear; they may vary depending on the setting. The government itself seems relatively free to accommodate free of Establishment Clause concerns. *See Amos*, 483 U.S. at 329–30; *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 439 (2006) (upholding a preliminary injunction against the federal government’s enforcement of the Controlled Substances Act on religious-freedom grounds when the sacramental use of hoasca was thereby burdened). In the context of private employers, however, *Caldor* is as close as the Court has come to deciding when a government-mandated accommodation is permitted.

88. *See supra* note 12 for possible developments in this regard.

to govern Title VII cases.⁸⁹ That means that many cases hold that a proposed accommodation is not required because it would pose an undue hardship for the employer.⁹⁰

89. See Laura E. Watson, Note, *(Un)Reasonable Religious Accommodation: The Argument for an Essential Functions Provision Under Title VII*, 90 S. CAL. L. REV. 47, 57–59 (2016).

90. See, e.g., *Yeager v. First Energy Generation Corp.*, 777 F.3d 362, 362–63 (6th Cir. 2015) (per curiam) (holding that an employer need not accommodate an employee’s religious beliefs by violating a federal statute); *Tagore v. United States*, 735 F.3d 324, 329–30 (5th Cir. 2013) (concluding that no accommodation—such as working from home or being assigned elsewhere—was required for a Sikh who was fired because she could not enter her IRS workplace as the length of her kirpan violated federal office security rules); *EEOC v. GEO Grp., Inc.*, 616 F.3d 265 (3d Cir. 2010) (holding that a prison need not accommodate female Muslim guards’ religious-based desire to wear khimars when the prison’s policy against headgear was justified by security concerns); *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004) (holding that an employer was not required to accommodate plaintiff’s religious beliefs as a member of the Church of Body Modification by allowing her to wear her facial jewelry because doing so would be an undue hardship in terms of the employer’s public image, even though there were no complaints and other employees’ piercings went unnoticed); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606–07 (9th Cir. 2004) (reasoning that it would be an undue hardship to either permit plaintiff to post anti-gay scriptural passages that demeaned co-workers or to exclude sexual orientation from the employer’s workplace diversity program).

Similarly, when employers offer some accommodation, courts have typically found them to be reasonable, thus pretermittting any exploration of whether another accommodation would be better suited to the employee’s requests. See, e.g., *Telfair v. Fed. Express Corp.*, 567 F. App’x 681 (11th Cir. 2014) (holding that employer’s offer to transfer employees to lower-paid positions was a reasonable accommodation when reassigning them to a different shift would have required them to work on their Sabbath); *Sánchez-Rodríguez v. AT&T Mobility P.R., Inc.*, 673 F.3d 1, 12–13 (1st Cir. 2012) (concluding that, taken together, the employer’s offer of a different position, allowing plaintiff to swap shifts, and refraining from disciplining him for absenteeism satisfied the employer’s statutory obligations).

Where an employee’s preferred accommodation collides with a collective bargaining agreement, courts typically find for the employer. See, e.g., *Virts v. Consol. Freightways Corp. of Del.*, 285 F.3d 508 (6th Cir. 2002) (holding that it was an undue hardship for trucking company to accommodate a Christian truck driver who refused to make overnight runs with female drivers because that accommodation would require the employer to violate a collective bargaining agreement under which drivers are dispatched in the order of seniority). Even where a collective bargaining agreement does not control, courts have been reluctant to require accommodations that burden co-workers. See, e.g., *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495 (5th Cir. 2001) (concluding that it was an undue hardship to accommodate counselor’s religious beliefs by

Nevertheless, Title VII's duty is not without teeth. A number of decisions have held in the employee's favor, typically when relatively minor accommodations address the religious concern, such as permitting shift swaps⁹¹ or short-term absences.⁹² This is particularly true when the proposed accommodation does not require any infringement on co-workers' interests.⁹³

III. TITLE VII'S PROHIBITION OF RETALIATION

As discussed above, § 704 of Title VII bars employer retaliation against an employee or applicant for both "opposing" unlawful employment practices and "participating" in proceedings under the statute.⁹⁴ The reach of this provision was at issue in *EEOC v. North Memorial Health Care*,⁹⁵ in which the Eighth Circuit held that this language does

assigning to other counselors her patients who wished help involving homosexual or extramarital relations).

Abercrombie's effect on these decisions is another question. As we saw, that opinion stressed that Title VII demands more than "mere neutrality" with regard to religious practices and it used as an example an employer favoring a religious worker by exempting her from a neutral rule barring headwear. *See supra* note 62 and accompanying text; *see also Abercrombie*, 135 S. Ct. at 2034. *Abercrombie*, however, did not address or even cite *Hardison*.

91. Permitting voluntary shift swaps is often a reasonable accommodation. *See Sánchez-Rodríguez*, 673 F.3d at 12–13 (1st Cir. 2012); *Patterson v. Walgreen Co.*, 727 F. App'x 581 (11th Cir. 2018), *petition for cert. filed*, No. 18-349, Sept. 14, 2018. However, the extent to which such an offer actually accommodates the religious worker depends on the availability of volunteers and the employer's response when a shift cannot be negotiated. *See generally* Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 TEX. REV. L. & POLS. 107 (2015).
92. *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1576–77, 1583 (7th Cir. 1997) (holding that employer violated its accommodation duty by not rescheduling Jewish workers for Yom Kippur); *see also Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 455–56 (7th Cir. 2013) (concluding that employer failed to show that allowing worker to take several weeks of unpaid leave would have caused it an undue hardship when there was high turnover of workers).
93. *See Kaminer, supra* note 91, 141–43.
94. 42 U.S.C. § 2000e-3(a) (2012) ("It shall be an unlawful employment practice for any employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.").
95. 908 F.3d 1098 (8th Cir. 2018).

not categorically reach an applicant who is denied a job because she requested an accommodation for her religious observance.⁹⁶

The case began with an application for a hospital's residency program by Emily Sure-Ondara, a Seventh Day Adventist.⁹⁷ She received what the court described as a "conditional offer of employment"⁹⁸ as a nurse, after which she first raised her "need [for] Friday nights off for Sabbath rest," telling the hospital that "I don't work Fridays."⁹⁹ After some back-and-forth between Sure-Ondara and the hospital, the hospital ultimately denied her accommodation request.¹⁰⁰ It insisted that work on alternate weekends was required by the governing collective bargaining agreement; Sure-Ondara responded that she needed the job and "would 'make it work' by finding a substitute for her Friday night shift or come in herself in an emergency or life-or-death situation."¹⁰¹ Ultimately, however, the hospital rescinded its job offer because it concluded that Sure-Ondara would not be able to swap shifts (Friday nights being unpopular) and "she would only show up for what she considered emergencies."¹⁰² Although there was some unsuccessful effort by the hospital to find her another position, Sure-Ondara filed a charge of discrimination with the EEOC, which ultimately brought suit on her behalf.¹⁰³

Although there was a plausible argument that North Memorial had violated § 703 by denying Sure-Ondara employment on the basis of her religion,¹⁰⁴ the Commission sued only on the basis of § 704, claiming

96. *Id.* at 1102.

97. *Id.* at 1099.

98. *Id.*

99. *Id.* The court's opinion seems to fault Sure-Ondara for not raising the issue earlier in the process. *See id.* ("Despite learning that a registered nurse working night shifts in the CACE Unit was required to work eight-hour shifts every other weekend—terms and conditions established by North Memorial's collective bargaining agreement with the Minnesota Nurses Association—Sure-Ondara did not disclose that her religion would prevent her from working from sundown on Fridays to sundown on Saturdays."). The relevance of that is not clear, and few attorneys would advise an applicant about either the need or wisdom of raising accommodation issues before the employer has made its initial hiring decision.

100. *See id.* at 1100.

101. *Id.*

102. *Id.*

103. *Id.*

104. The hospital ultimately rescinded its offer because of the applicant's need for an accommodation, which fits squarely within the *Abercrombie* formulation. *Id.* at 1100–01. This case, however, deals with a situation not explicitly raised in *Abercrombie*: an employer who was not required to accommodate. Even granting this, the hospital's action could be char-

that the hospital engaged in unlawful retaliation.¹⁰⁵ Because any adverse employment action against Sure-Ondara preceded her “participation” in a Title VII proceeding by virtue of filing a charge, only the “opposition” clause of the section was at issue, and the majority found that her request for an accommodation was not protected.¹⁰⁶ In doing so, the court did not question that the nurse’s request for “a religious accommodation was based on a good faith, objectively reasonable belief that she was entitled to the requested accommodation.”¹⁰⁷ Nevertheless, she did not “oppose” any unlawful practice, and her request was, therefore, not protected.¹⁰⁸

The majority recognized that the Supreme Court in *Crawford v. Metropolitan Government of Nashville and Davidson County*¹⁰⁹ had held that the term *oppose* “carries its ordinary meaning,” and that any communication to the employer that conveys a belief that the employer has engaged in discrimination “virtually always constitutes opposition to the activity.”¹¹⁰ *Crawford* also held that merely answering questions in an internal investigation of sexual harassment could be opposition conduct.¹¹¹ Thus, the Court interpreted *oppose* very broadly. Nevertheless, the *North Memorial* majority found that the EEOC claim foundered due to the fact that a request for accommodation does not necessarily oppose any discrimination:

Sure-Ondara did not complain that North Memorial unlawfully *refused to accommodate*. She *requested* an accommodation, and

acterized as discriminating against Sure-Ondara on the basis of her religion since, although she requested an accommodation, she also indicated that she would work without one, which seems to bring us back to *Abercrombie*. See *id.* at 1099–1100. Her charge had asserted such a violation, but why the EEOC did not pursue this claim in its suit on her behalf isn’t clear. See *id.* at 1100.

105. The agency sought remedies for Sure-Ondara, “including injunctive relief and backpay, compensatory, and punitive damages,” *id.* at 1100, which raises its own questions. If Sure-Ondara was actually unwilling to perform the position’s duties without an accommodation that would be found unreasonable or an undue hardship, it is not clear why she should receive backpay, much less instatement (the default form of injunctive relief in Title VII cases). On the other hand, if she were willing to work even absent an accommodation, why did not the EEOC also file suit based on § 703?

106. See *id.* at 1101, 1103.

107. *Id.* at 1103.

108. *Id.*

109. 555 U.S. 271 (2009).

110. *Id.* at 276.

111. *Id.* at 273.

it is undisputed on this record that North Memorial's *non-discriminatory* practice was to consider such requests on a case-by-case basis. After she made the request and no mutually acceptable accommodation was reached, Sure-Ondara's Title VII remedy as an unsuccessful job applicant was a disparate treatment claim under [§ 703-2(a)] for failure to reasonably accommodate.¹¹²

The court concluded that, “[c]onsistent with the plain meaning of the word ‘oppose,’ the initial request for a religious accommodation simply does not ‘implicitly’ constitute opposition to the ultimate denial of the requested accommodation.”¹¹³ It also noted that, prior to *Abercrombie*, the EEOC had argued that Title VII created a cause of action for a failure to accommodate, a theory that the Supreme Court rejected in that case.¹¹⁴ Accordingly, the court reasoned that *Abercrombie* “precludes allowing the EEOC to repackage its rejected interpretation of unlawful discrimination under [§ 703] as an unlawful opposition-clause retaliation claim under [§ 704].”¹¹⁵

The majority recognized that a request for accommodation under the ADA was protected activity under that statute, but it nevertheless distinguished that statutory setting in a somewhat confusing passage. It first noted that an ADA plaintiff must make a request for accommodation,¹¹⁶ but whether such a request is a precondition to a § 703 suit under Title VII is an “open question after *Abercrombie & Fitch*.”¹¹⁷ Nevertheless, the court viewed Title VII’s “express reference to religious accommodation . . . as evidencing Congress’ intent to protect requests for religious accommodation. But the fact that such a request is ‘protected activity’ does not mean it is always ‘oppositional’ activity.”¹¹⁸ Apparently, sometimes it is and sometimes it isn’t.

Trying to explain this distinction, the majority posited a hypothetical employee who was fired for opposing a “foolish or ignorant” policy of not accommodating religious practices.¹¹⁹ Such a person would

112. *North Memorial*, 908 F.3d at 1102.

113. *Id.*

114. *Id.*

115. *Id.*

116. *See supra* notes 94–108.

117. *North Memorial*, 908 F.3d at 1103. Why the court thought that is not so clear since *Elauf* had not requested an accommodation and the Supreme Court found the employer to have violated the statute by not hiring her. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031, 2034 (2015).

118. *North Memorial*, 908 F.3d at 1103.

119. *Id.*

be protected. That would also be true, “if an employee or applicant in good faith requested a religious accommodation, and if the employer denied the accommodation on the ground that it was not in fact based on a religious practice *and* fired or refused to hire the employee or applicant because she made the request.”¹²⁰ The court did not explain why it matters, given that the adverse action is the same (the applicant is not hired) whether the employer is retaliating because it does not believe that the request was based on religion as opposed to whether it believes the request cannot be reasonably accommodated without an undue hardship.¹²¹

So far, whatever the merits of the majority’s opinion, it was defensible as a textualist application of § 704. In the last paragraph of the opinion, however, the court lost its way. The EEOC had accused the hospital of unlawful retaliation in rescinding its conditional offer of employment. The majority viewed this as “sophistry” since Sure-Ondara “had the same right to religious accommodation as a job applicant under § 2000e(j) with or without a conditional job offer. Thus, rescinding that offer was not an adverse employment action.”¹²² This is head-scratching since denying a job is the quintessential adverse employment action, and rescission of a job offer is the effective denial of a job.

But the majority seemed to mean only that the denial, however adverse, was not actionable: it noted evidence adduced by North Memorial that it was “not feasible to hire an untrained Advanced Beginner into a team providing Hospice and Palliative Care to elderly patients if the applicant will not work the collectively bargained schedule.”¹²³ Thus there could be no violation of § 703 because “[t]here is no duty to accommodate an applicant or employee by hiring or transferring her into a position when she is unwilling or unable to perform one of its essential job functions.”¹²⁴ The point of the discussion seemed to be that Sure-Ondara had suffered no legal wrong since she wouldn’t have been hired in any event¹²⁵: No harm, no foul.

Circuit Judge Grasz dissented. In light of the “Supreme Court’s broad interpretation” of § 704 in *Crawford* and “the near-universal consensus of circuit courts of appeals interpreting almost identical

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* The majority cited an ADA case, *Faidley v. United Parcel Serv. of Am., Inc.*, 889 F.3d 933, 941 (8th Cir. 2018) (en banc), for that unobjectionable proposition.

125. *See North Memorial*, 908 F.3d at 1103–04. The relationship between § 703 and § 704 claims is revisited in Part IV *infra*.

statutory language” in the ADA,¹²⁶ he would have found a request for accommodation to be protected “opposition.” He began by noting that the word *oppose* could have both narrow and broad meanings but that the Court in *Crawford* had opted for “an expansive view of the opposition clause, such that an individual does not need to directly or overtly communicate opposition to an unlawful employment practice—conduct or communication that reveals opposition, even implicitly, is enough.”¹²⁷ Key to the dissent were the following sentences: “Common sense dictates that requesting a religious accommodation in most circumstances communicates support for the grant of the request and opposition to its denial. In other words, the request itself conveys opposition to the employer’s failure to accommodate the applicant’s (or employee’s) religion.”¹²⁸

As for the ADA authority, the dissent noted that the Eighth Circuit (like almost all other circuits) had found requests for disability accommodations to be protected activity,¹²⁹ and that “[u]nder general principles of statutory interpretation, statutes *in pari materia* are to be interpreted consistently and identical statutory language in related statutes is to be given the same meaning unless context dictates otherwise.”¹³⁰ Further, Eighth Circuit authority had stated that “[r]etaliation claims under the ADA are analyzed identically to those brought under Title VII.”¹³¹ Although the dissent did not extensively discuss the ADA authority, it included a laundry list of ADA circuit-court decisions that all relied on the portion of that statute with substantially identical language to Title VII rather than the ADA’s broader “interference” clause.¹³²

Having resolved the legal question in favor of protecting accommodation requests as “opposition,” the dissent had little difficulty finding that the EEOC’s claim should survive summary judgment.¹³³

126. *Id.* at 1104 (Grasz, J., dissenting).

127. *Id.*

128. *Id.* at 1105. Supplementing this argument was the policy concern against encouraging those requesting an accommodation to be more assertive in doing so. *See id.* (“Moreover, adopting too high a standard for opposition could have the unintended effect of forcing requesters to take a confrontational approach in order to be afforded Title VII’s protections against retaliation.”).

129. *Id.* at 1104.

130. *Id.* (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 170–73, 252–55 (2012)).

131. *Id.* (quoting *Cossette v. Minn. Power & Light*, 188 F.3d 964, 972 (8th Cir. 1999)).

132. *See id.* at 1105 & n.5.

133. *Id.* at 1106–07.

The hospital's withdrawal of its job offer was conceded to be materially adverse,¹³⁴ and the hospital's supposed nonretaliatory reason¹³⁵ could not be credited on summary judgment.

The dissent concluded by noting that it shared the majority's "apparent concern that Title VII not be read so that meritless discrimination claims based on a failure to accommodate may simply be repackaged and resurrected as retaliation claims."¹³⁶ By "meritless," the majority was apparently referring to claims where the law required no accommodation.¹³⁷ In other words, the dissent recognized that a permissible failure to accommodate should not be converted into an actionable claim of retaliation but because of Title VII's causation requirement, not its opposition requirement:

In my view . . . it is the causation element that properly does the work of weeding out such claims, not the opposition requirement. Where an employer, after denying an accommodation request that it is not legally obligated to grant, refuses to hire an applicant because the applicant cannot or will not perform the job without accommodation, the employer can show the legitimacy of the action by evidence that the inability to perform the job was the cause of the employer's adverse action, rather than retaliation for making the accommodation request.¹³⁸

Unlike merely repackaged claims, the claim before the court should survive "because there is evidence of retaliation, namely the evidence that Sure-Ondara told North Memorial she would work the job even without the accommodation and would show up for work if she could not find a replacement."¹³⁹ In this setting, the hospital's withdrawal of

134. *Id.* at 1106. Not every act of retaliation is proscribed by the statute; rather, the retaliatory action must be sufficiently "adverse" to be actionable, which means it must be serious enough to deter a reasonable employee from engaging in protected conduct. *See Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006) ("[T]he employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.").

135. North Memorial claimed that it revoked the conditional job offer "because it was legitimately and sincerely concerned that, if hired, Sure-Ondara could not be counted on to work her designated shifts." *North Memorial*, 908 F.3d at 1106 (Grasz, J., dissenting).

136. *Id.*

137. *Id.* at 1106–07.

138. *Id.*

139. *Id.* at 1107.

its job offer rendered it “reasonable for a fact-finder to infer that it did so because she had requested an accommodation.”¹⁴⁰

IV. SECTION 703 TO THE RESCUE?

Although the case generated an amicus brief on behalf of a number of organizations supporting religious liberty,¹⁴¹ the significance of *North Memorial*, even should the majority’s interpretation be generally adopted, is unclear. That is because § 703 might well provide substantial protection. If there is no corresponding § 703 claim, however, *North Memorial* would effectively immunize employers from liability should they retaliate against an employee or applicant for merely requesting a non-legally required accommodation, thus opening a gaping hole in the statute. To see this, imagine that the person seeking an accommodation is a present employee, and the employer fires him for making the request. Under the *North Memorial* majority’s analysis, the employer would be liable only if it were obligated to accommodate, and only under § 703.¹⁴² But the vulnerability to retaliation in this setting might discourage even requests that could be reasonably accommodated, thus undercutting a major thrust of the statute. The majority’s limited examples of extreme instances when a retaliation claim will nevertheless lie¹⁴³ do little assuage that concern.

But perhaps § 703 provides a solution essentially mooting the holding in *North Memorial* (which, recall, addressed only § 704). Certainly, even if requests for accommodation are not protected, an employee whose request should have been granted will have a claim

140. *Id.*

141. An amicus brief was filed on behalf of the General Conference of Seventh-day Adventists, Union of Orthodox Jewish Congregations of America, Mid-American Union Conference of Seventh-day Adventists, Christian Legal Society, Minnesota Catholic Conference, American Civil Liberties Union, American Jewish Community, and the ACLU of Minnesota. Amicus Brief of the Gen. Conference of Seventh-day Adventists et al. at 17, *North Memorial*, 908 F.3d 1098 (8th Cir. 2018) (No. 17-2926).

142. *North Memorial*, 908 F.3d at 1103.

143. *See supra* notes 119–120 and accompanying text.

under § 703, which makes the absence of a § 704 claim irrelevant for such workers.¹⁴⁴ This is the clear message of *Abercrombie*.¹⁴⁵

The obvious response is that, given the grudging scope of the Title VII accommodation duty, many, maybe most, requests can be legally rejected by employers. But does that mean there is no liability under § 703 when an applicant who requests an accommodation is legally denied one?

The answer is no. While an employer need not provide an accommodation that is an undue hardship, it cannot refuse to offer employment to an applicant who requests an accommodation. This is the purport of *Abercrombie*, but it also makes sense in terms of believer autonomy: the applicant should have a choice to accept the job without accommodation if she so chooses. Note that, under this analysis, *North Memorial's* holding is largely irrelevant: while a request for accommodation may or may not be a violation of § 704, denial of a job to someone who requests an accommodation violates § 703 when that is the basis of the denial. To avoid a violation, the employer must offer the job sans accommodation (assuming it would otherwise have done so), leaving it to the applicant to decide whether to accept unaccommodated employment.

This is certainly consistent with the language of *Abercrombie*, which declared that “[a]n employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.”¹⁴⁶ This passage is written broadly enough to embrace the situation where Elauf, the plaintiff in *Abercrombie*, could be legally denied her (supposed) accommodation request because it would be an undue hardship. And this reading does not leave the statute without meaning: Elauf might have chosen not to ask for an accommodation or might have chosen to work even if one were (legally) refused; *Abercrombie & Fitch’s* action preempted her choice.

144. The amicus brief, however, pointed out that in the ADA context, the First and Third Circuits had noted the possibility of gaming the system: “if seeking an accommodation were *not* protected activity, an employer could temporarily grant an accommodation, then quickly fire the employee.” Amicus Brief, *supra* note 141, at 17 (citing *Shellenberger v. Summit Bancorp*, 318 F.3d 183, 191 (3d Cir. 2003); *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 16 (1st Cir. 1997)). There would, arguably, then be no discrimination claim for failure to accommodate and no retaliation claim.

The persuasiveness of this argument, however, is doubtful. In both the disability and the religion contexts, an employee’s discharge could easily be viewed as being related to her protected characteristic. Indeed, it fits perfectly into *Abercrombie’s* description of a § 703 claim arising when an employer acts because it must accommodate a religious practice. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015).

145. See *Abercrombie*, 135 S. Ct. at 2031.

146. *Id.* at 2033.

As for believer autonomy, Elauf was denied both the chance that the accommodation she (may have) sought would be required by Title VII and the option to work without being accommodated if granting it would have been an undue hardship. As for Sure-Ondara, the plaintiff in *North Memorial*, she was denied the job she apparently needed, and one which her religious convictions apparently permitted her to perform.¹⁴⁷

In response, it might be argued that the *Abercrombie* Court did not specifically address whether an employer would violate § 703 by refusing to hire someone when: (1) the applicant's religion effectively disabled her from performing the job in question; and (2) the statute did not require the requested accommodation.¹⁴⁸ And, at least where the applicant would not accept the position if she was not accommodated, the employer's refusal to hire inflicts no tangible harm. That is true but it misses the point. First, it shifts the employment decision from the applicant to the employer, which is inconsistent with *Abercrombie*.¹⁴⁹ Second, Title VII's "motivating factor" liability also reaches situations where there is no but-for causation because the employer establishes that it would have reached the same decision in

147. See *infra* note 161 and accompanying text.

148. The majority's failure to expressly deal with this possibility might be traced to an apparently innocuous footnote in the opinion: "For brevity's sake, we will in the balance of this opinion usually omit reference to the § 2000e(j) 'undue hardship' defense to the accommodation requirement, discussing the requirement as though it is absolute." *Abercrombie*, 135 S. Ct. at 2032 n.1.

149. See *id.* at 2032.

any event.¹⁵⁰ That seems to capture precisely the situation above.¹⁵¹ In other words, the employer may be able to show that the religious observer would not have taken the job because she would have refused to perform it without the accommodation, thus establishing the same result in any event. But the employer would nevertheless have violated § 703's motivating-factor test by withholding an offer because of the applicant's religion.

The oddity in this analysis is that it seems to provide meaningful protection only for those who request an accommodation that they do not "need," in the sense that they are willing to work even if the accommodation is denied. Some might even argue that this scenario casts doubt on the applicant's sincerity in requesting the accommodation to begin with.¹⁵²

That would be a mistake. Requesting an accommodation that is not absolutely necessary, in the sense that the applicant's beliefs do not prevent her from taking the job if not accommodated, is apparently not

150. Section 703(m), added by the 1991 Civil Rights Act, provides:

[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Pub. L. No. 102-166, sec. 107(a), § 703(m), 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e-2(m) (2012)). Although liability attaches when a motivating factor operates, Congress simultaneously amended the statute to provide a limited affirmative defense: should defendant carry a burden of persuasion that it would have reached the same decision even had the illicit "motivating factor" not been present, the plaintiff's remedies are severely restricted. *Id.* sec. 107(b)(3), § 706(g)(2)(B), 105 Stat. 1071, 1075-76 (codified as amended at 42 U.S.C. § 2000e-5(g)(2)(B) (2012)). See generally Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. (forthcoming 2020); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 932-38 (2005) (analyzing the evolution of employment discrimination law and mixed-motives cases).

151. If the employer legally denies the accommodation but continues to offer the job to the applicant, there will be no violation of the statute: the loss of employment is the result of the applicant's choice, not the employer's violation of any legal duty.

152. See, e.g., Defendant's Reply Brief in Support of Motion to Dismiss at 14, *United States v. Ozaukee County*, No. 2:18-cv-00343, 2018 WL 6304888 (E.D. Wis. June 11, 2018) (arguing that "[t]he fact that [Plaintiff] chose her job over her beliefs by acceding to" behavior that arguably did not conform with her religion after being denied an accommodation "supports a finding of insincerity"), *dismissed*, No. 2:18-cv-00343, 2019 WL 2291514 (E.D. Wis. May 3, 2019).

an unusual situation.¹⁵³ Arguably, that was the case in *North Memorial: Sure-Ondara* indicated she was willing to work despite the absence of an accommodation. It is true that at least some courts have suggested that the duty of accommodation reaches only practices that are religiously required.¹⁵⁴ That intuition may stem from the fact that the accommodation duty is sometimes framed in terms of relieving believers from having to choose between their jobs and their creeds, casting as disingenuous those requesting an accommodation if they are willing to work without it.

But the statute does not say that a religious practice or observance must be “compelled” to be accommodated.¹⁵⁵ In fact, the notion of “required” religious observances reflects a very cramped view of religion since many religions are less commandment-oriented than the Judeo-Christian tradition.¹⁵⁶ Other courts have rejected any

153. See cases cited *infra* note 157.

154. See *Davis v. Fort Bend Cty.*, 765 F.3d 480, 486 (5th Cir. 2014) (“[T]he issue here is whether there exists a genuine dispute of material fact whether Davis sincerely felt that she was *religiously compelled* to attend and participate in a special service at church . . .”) (emphasis added). Some cases speak in terms of “required” or “compelled” religious practices but focus on whether the practices are “religious” to begin with. See *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 451 (7th Cir. 2013) (reasoning that plaintiff presented sufficient evidence for a jury to find that his attendance at burial rites for his father was religious in nature rather than only “a filial duty that Title VII does not recognize or protect”).

155. See 42 U.S.C. § 2000e(j) (2012) (defining *religion* as including “all aspects of religious observance and practice, as well as belief,” and not just aspects that are compelled).

156. See, e.g., *The Seven Principles*, UNITARIAN UNIVERSALIST ASS’N, <https://www.uua.org/beliefs/what-we-believe/principles> [<https://perma.cc/N7M4-K86Q>] (last visited Sept. 28, 2019) (setting out the principles of Unitarian Universalist congregations as a “guide” rather than “dogma or doctrine”).

requirement that the observance or practice be required or central,¹⁵⁷ and that seems more consistent with the general reluctance of secular courts to decide questions of religious doctrine.¹⁵⁸ Further support for rejecting such a view comes from the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act, both of which protect religious practices and beliefs, regardless of whether they are compelled.¹⁵⁹ Generally speaking, “religious liberty” can

157. *E.g.*, *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438–39 (9th Cir. 1993) (allowing a claim for failure to accommodate an employee’s attendance at his wife’s conversion ceremony and further noting that a court should not inquire whether a particular practice is mandated or prohibited by a religion because that would involve deciding religious questions); *Redmond v. GAF Corp.*, 574 F.2d 897, 900–01 (7th Cir. 1978) (attendance at a Bible study class is protected because all “aspects of religious observance and practice” are protected (quoting 42 U.S.C. § 2000e(j) (2012))); *Cooper v. Gen. Dynamics*, 533 F.2d 163, 168 (5th Cir. 1976) (holding that, barring an undue hardship to the employer, “[i]f the employee’s conduct is religiously motivated, his employer must tolerate it”); *Reyes v. N.Y. State Office of Children & Family Servs.*, No. 00 Civ. 7693(SHS), 2003 WL 21709407, at *6 (S.D.N.Y. July 22, 2003) (“Title VII protects more than the observance of Sabbath or practices specifically mandated by an employee’s religion.”).

158. *See, e.g.*, *Watson v. Jones*, 80 U.S. 679, 733 (1872) (declining to resolve a property dispute between competing church factions); *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (declaring that churches should be free from state interference in deciding “matters of church government as well as those of faith and doctrine”).

159. “The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A) (2012). This definition, found in the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), was adopted by reference for the Religious Freedom Restoration Act (“RFRA”) when RLUIPA was passed. *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 7(a)(3), 114 stat. 803, 806; 42 U.S.C. § 2000bb-2(4) (2012). The original text of RFRA merely defined the “exercise of religion” as “the exercise of religion under the First Amendment to the Constitution.” Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 5(4), 107 stat. 1488, 1489; *see also* Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 151 (1995) (“Congress rejected the view that only religious compulsion is protected. In committee hearings, lobbyists offered amendments to change to a compulsion standard, but those amendments went nowhere.”).

Of course, one could argue that RLUIPA’s language reflects a perceived need to expand prior protections rather than confirming what earlier statutes may have meant. Nevertheless, the Court has often stressed the inappropriateness of the judiciary assessing religious claims beyond testing the sincerity of such views. *E.g.*, *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 887 (1990) (“[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”); *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989)

certainly reach religious practices that do not rise to the level of religious mandates.¹⁶⁰

In short, an applicant or employee can ask for an accommodation while not “needing” it to remain employed, and such a request does not necessarily raise questions about her sincerity.¹⁶¹ In *North Memorial* itself, Sure-Ondara’s beliefs were apparently more nuanced than they at first appeared. According to an amicus brief submitted in part on behalf of Seventh-day Adventist governing bodies, rest on the Sabbath “is near the center of what it means to be a Seventh-day Adventist.”¹⁶² However, the religion also highly values “the relief of human suffering and care for the sick . . . values that go back to the ministry of Jesus Christ.”¹⁶³ As a result, “Adventist hospitals and healthcare workers balance this biblical good of healing with Sabbath observance by not

(“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”). See generally Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions*, 28 HARV. J.L. & PUB. POL’Y 501, 522–29 (2005) (arguing that requiring religious activity be compelled is contrary to clear Supreme Court precedent but noting a number of lower-court cases that imposed such a requirement under RFRA (as originally enacted)). Accordingly, the provisions of RFRA and RLUIPA to this effect are best viewed as declarative of a constitutional requirement rather than a mere statutory command.

160. Admittedly, such a view expands the universe of potential accommodations and therefore poses more of a burden on employers, even under the current grudging approach to what is required.

161. While there can be no inquiry into the rationality of a particular belief, a court can determine whether the asserted belief is sincerely held. See, e.g., *EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.3d 49, 56–57 (1st Cir. 2002) (reversing summary judgment for the EEOC where the sincerity of a claimed Seventh-day Adventist was challenged by evidence of his conduct contrary to the tenets of his professed religious belief). Nevertheless, there are very few cases successfully challenging an employee’s sincerity. See *Tagore v. United States*, 735 F.3d 324, 325–26, 328 (5th Cir. 2013) (reversing summary judgment and holding that, despite arguments that a slightly shorter blade length would satisfy plaintiff’s religion, there was a genuine issue of material fact on the sincerity of Tagore’s practice of wearing a kirpan with a three-inch blade). See generally Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185 (2017) (explaining the sincerity requirement in the law of religious accommodations and arguing for its continued viability). But see Cameron & Hutchinson, *supra* note 69, at 498–99 (arguing that inquiry into sincerity is impermissible).

162. Amicus Brief, *supra* note 141, at 27.

163. *Id.* at 28.

doing *unnecessary* work that day.”¹⁶⁴ That meant that Sure-Ondara’s request for an accommodation was not inconsistent with her later willingness to work on Fridays if such work proved necessary. Such a principle seems applicable to a wide range of accommodation requests from adherents to any number of religions.

This interpretation of Title VII largely moots the holding in *North Memorial*, but it raises two questions. The first is the possible chilling effect on believers of a rule under which requests for accommodation are not protected from employer retaliation. The countervailing textualist positions are well set out in both the majority and the dissent,¹⁶⁵ but the Supreme Court has not always been as relentlessly textualist as it has sometimes been recently. For example, while § 704 does not by its terms apply to former employees, the Court has held retaliation against them to be impermissible.¹⁶⁶ More generally, the Court has held that retaliation for opposing discrimination falls within the prohibition of discrimination itself under several statutes even without specific language to that effect.¹⁶⁷ In short, it would not be unprecedented to find requests for accommodation protected under the statute even if they do not fit neatly into a court’s interpretation of *opposition*. The *North Memorial* dissent’s reading is at most a short step away from textualism, and certainly within the outer bounds *Crawford’s* broad reading of *opposition*.¹⁶⁸

The second question this interpretation of Title VII raises is how § 703 would apply in a case such as Sure-Ondara’s or in other situations

164. *Id.* at 29.

165. *EEOC v. N. Mem’l Health Care*, 908 F.3d 1098, 1101 & n.2 (8th Cir. 2018) (textualist argument for the majority); *id.* at 1104 (Grasz, J., dissenting) (textualist argument for the dissent).

166. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

167. *E.g.*, *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 446, 452–53 (2008) (noting that 42 U.S.C. § 1981 prohibits not only racial discrimination but also retaliation against those who oppose such discrimination); *Gómez-Pérez v. Potter*, 553 U.S. 474, 479 (2008) (prohibiting retaliation against federal employees asserting ADEA rights under the ADEA’s federal-employee provisions, which explicitly reach only age discrimination); *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 173, 179 (2005) (prohibiting retaliation against those asserting Title IX rights under Title IX’s bar on sex discrimination); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (holding that retaliation against those asserting 42 U.S.C. § 1982 rights against race discrimination is prohibited by that provision). *But see* *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 356–57 (2013) (concluding that Title VII’s retaliation provision requires a higher standard of causation than the Title’s status protections given differences in statutory language).

168. *See* *Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U.S. 271, 276–78 (2009).

where a request for an accommodation raises doubts in the employer's mind about the employee's willingness to perform if the accommodation is not forthcoming. Recall that Sure-Ondara said that, absent shift swaps, she would work in "an emergency or [a] life-or-death situation."¹⁶⁹ That, quite naturally, gave rise to concerns by the hospital as to whether she would make her own determinations about what counted as a sufficient reason to work. Even the dissent seemed to think that North Memorial should be exonerated if the jury credited its claim that it revoked the conditional job offer "because it was legitimately and sincerely concerned that, if hired, Sure-Ondara could not be counted on to work her designated shifts."¹⁷⁰

But, of course, such doubts could arise only from Sure-Ondara's original request for an accommodation and what the hospital viewed as insufficient assurances that she would work even if denied it. Unfortunately, there does not seem to have been much development of this between the employer and the applicant, but it would seem that, given *Abercrombie*, the hospital would be required to accept sufficiently concrete assurances by an applicant that she would perform the duties of the position.¹⁷¹ While the hospital could discharge an employee for not working when required, it cannot assume that an employee's religious practices and beliefs will preclude her from working those shifts.¹⁷² This is where the ADA's interactive process requirement would prove helpful. Whether Sure-Ondara's statements were sufficiently concrete seems to be a question of fact.¹⁷³

169. *North Memorial*, 908 F.3d at 1100.

170. *Id.* at 1106–07 (Grasz, J., dissenting).

171. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033 (2015) (explaining that an employer violates Title VII when acting on an "unsubstantiated suspicion" that accommodation would be needed). *See also* *North Memorial*, 908 F.3d 1098, 1106–07 (8th Cir. 2018) (Grasz, J., dissenting) ("Where an employer [denies] an accommodation request that it is not legally obligated to grant, . . . the employer can show the legitimacy of the action by evidence that the inability to perform the job was the cause of the employer's [decision], rather than retaliation for making the accommodation request.").

172. *See* *Abercrombie*, 135 S. Ct. at 2033 (2015) ("If the applicant actually requires an accommodation . . . and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII.").

173. *See* *North Memorial*, 908 F.3d at 1106 (Grasz, J., dissenting) (explaining that Sure-Ondara repeatedly assured North Memorial that "she would take the job even without the accommodation and would 'make it work,'" which should create a question of fact). The structure of the litigation could be debated. While the plaintiff almost certainly has the burden of showing that the employer fired or refused to hire a worker because it believed she would not work without the requested accommodation which was legally denied, at that point the employer should be required to show

CONCLUSION

It is a troubling notion that requests for a religious accommodation are unprotected under Title VII unless the requested accommodation is mandated under the law—a possible reading of *Abercrombie* through the *North Memorial* lens. If generally accepted, it would chill religious employees from requesting any accommodation, especially since *Hardison*'s narrow view of an employer's accommodation duty means that employers are often not legally required to grant the request. Fortunately, the *North Memorial* opinion did not address the question of whether denying a job to someone whose accommodation request was legitimately turned down may violate § 703's prohibition of status discrimination, even if it does not violate Title VII's prohibition of retaliation under § 704. Nevertheless, the *North Memorial* result is problematic on its own terms since it reflects an overly literal reading of the statute, one that is contrary to several Supreme Court opinions. Further, as the *North Memorial* dissent suggests, a request for an accommodation may easily be interpreted as opposing an employer's failure to accommodate, and thus fit within even narrower views of "opposition."

that it had reasonable grounds for belief that the employee would not work in that setting. Proof that the position was offered to an applicant or that an employee refused to perform would suffice but sufficiently concrete statements by the employee would also suffice. An interactive process clarifying the employee's plans would be helpful. What would not be permissible is the assumption that the plaintiff would not work if not accommodated merely because she requested an accommodation.