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Religious Discrimination in Employment: Striking the Delicate Balance

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Religious Discrimination in Employment: Striking the Delicate Balance

I. Introduction

On December 12, 1975, the Court of Appeals for the Sixth Circuit held in *Draper v. United States Pipe & Foundry Co.*[1] that an employee had the right to observe his religion and refuse to work as assigned on the day on which he celebrated his Sabbath.[2] His discharge for unexcused absences was held to constitute religious discrimination proscribed by Title VII of the Civil Rights Act of 1964.[3] Four days later, on similar facts, the Eighth Circuit reached the same conclusions in *Hardison v. Trans World Airlines, Inc.*[4] These two decisions are the most recent additions to the "small but significant"[5] number of cases addressing the issue of religious discrimination in employment.

"Religious discrimination" within this context does not primarily mean the unequal treatment of an employee or prospective employee arising from social prejudices of an employer or labor union toward a particular religion.[6] Rather, the decisions in cases such as *Draper* and *Hardison* have confronted a much more sensitive question:[7] the legality of religious discrimination when it is motivated not by social prejudice concerning an employee's beliefs[8] but by the economic

1. 527 F.2d 515 (6th Cir. 1975), *reh. denied*, 527 F.2d 515 (1976).

2. *Id.* at 517. A refusal to work on one's Sabbath day is based not only upon the fourth commandment but also upon a literal interpretation of other Biblical passages. "But the seventh day is the sabbath day of the Lord thy God; in it thou shalt not do any work. . . ." *Deut.* 5:14 (King James). The Sabbath day is the "day of rest ordained by God." (Nelson ed. p. 27).

3. 42 U.S.C. § 2000e(j) (1972), *amending* 42 U.S.C. § 2000e (1964).

4. 527 F.2d 33 (8th Cir. 1975).

5. Claybaugh v. Pacific N.W. Bell Tel. Co., 355 F. Supp. 1, 2 (D. Ore. 1973).

6. Such patent misconduct is expressly prohibited by the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a)(1), (2) (1970) (unlawful employment practices by an employer); 42 U.S.C. § 2000e-2(c)(1) to (3) (1970) (unlawful employment practices by a labor organization).

7. Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 524 (6th Cir. 1975).

8. *Cf.* EEOC Dec. 71-1469 (3/19/71), CCH EEOC DEC ¶ 6222 (1971).

consequences of respecting those beliefs.[9] The sabbatarian[10] who is absent from an assigned shift because of religious scruples costs an employer as much in lost productivity as if the absence were caused by some other reason.[11] The employee who violates the appearance regulations of an employer for religious reasons can cost the employer as much in lost goodwill as if another reason had motivated the disobedience.[12] The employee in a closed shop[13] whose religion forbids membership in a labor union or even payment of union dues[14] deprives the union of economic support and correspondingly increases the burden of membership upon other employees who lack similar beliefs.[15] Yet if the employee is discharged or otherwise penalized for asserting his beliefs, the effect on him is just as substantial as if he were the victim of virulent religious prejudice.[16] The dilemma is obvious; the solution perplexing. A "delicate balance" must be reached[17] in determining the extent to which the religious observances and practices of the individual employee may take precedence over the conflicting interests of others.[18]

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9. A reply that is often made as an attempted defense to a charge of discrimination on the basis of religion is "His religion doesn't bother me, didn't bother me at that time, one way or the other. The fact that he could not work Saturday did." Cummins v. Parker Seal Co., 516 F.2d 544, 549 (6th Cir. 1975), *cert. granted*, 424 U.S. 942 (1976); *accord*, Dewey v. Reynolds Metals Co., 429 F.2d 324, 331 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971); EEOC Dec. 70-670 (3/30/70), CCH EEOC DEC ¶ 6141, at 4243 (1970).

10. The term "sabbatarian" will be used hereinafter to describe an employee who observes a particular day as a Sabbath. *See* note 3 *supra*.

11. *E.g.*, Dewey v. Reynolds Metals Co., 429 F.2d 324, 331 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971), 1 CCH EMP. PRAC. GUIDE ¶ 523 (1972).

12. *E.g.*, EEOC Dec. 71-2620 (6/25/71), CCH EEOC DEC. ¶ 6283, at 4501 (1971); EEOC Dec. 71-779 (12/21/70), CCH EEOC DEC. ¶ 6180, at 4305 (1970); Eastern Greyhound Lines v. New York State Div. of Human Rights, 317 N.Y.S.2d 322, 27 N.Y.2d 279, 265 N.E.2d 745 (1970).

13. A "closed shop" is one in which an employee is obligated to become a member of a labor union as a condition of employment. Cooper v. General Dynamics, Convair Aerosp. Div., Fort Worth Oper., 378 F. Supp. 1258, 1260 n.1 (N.D. Tex. 1974).

14. Even in a closed shop, an employee need not actually join a union so long as he pays all dues and fees assessed against members. Linscott v. Millers Falls Co., 316 F. Supp. 1369, 1370 (D. Mass. 1970), *aff'd*, 440 F.2d 14 (1st Cir. 1971).

15. *E.g.*, Yott v. North Am. Rockwell Corp., 501 F.2d 398, 402 n.6 (9th Cir. 1974); Linscott v. Millers Falls Co., 440 F.2d 14, 17 (1st Cir. 1971); Otten v. Baltimore & O.R.R., 205 F.2d 58, 61 (2d Cir. 1953); Cooper v. General Dynamics, Convair Aerosp. Div., Fort Worth Oper., 378 F. Supp. 1258, 1262 (N.D. Tex. 1974).

16. The right of each individual to the free exercise of his religion is guaranteed. U.S. CONST. amend. I.

17. Claybaugh v. Pacific N.W. Bell Tel. Co., 355 F. Supp. 1, 2 (D. Ore. 1973).

18. The problem has been tersely summarized:

> Defendant's position, . . . highlights one of the most important aspects of this case, the relationship of the individual to the overwhelming institutions of modern society. It is time that the corporation and other institutional forms are to a large degree responsible for the current prosperity of the United States. Institutions, however, often grow insensitive to the human beings they encompass. Government itself has grown overwhelming. But we must not lose sight of the paramount rights of free individuals. Protec-

The Civil Rights Act of 1964 has attempted to strike that balance.[19] It states, *inter alia*,[20] that an employer has the duty to "reasonably accommodate" all aspects of religious beliefs, practices and observances of an employee (or prospective employee)[21] unless the employer can demonstrate that accommodation would result in "undue hardship on the conduct of the employer's business."[22] *Draper* and *Hardison* each upheld the validity of this duty.[23] Yet the position of the two cases cannot be relied upon as totally representative of judicial opinion, for the rule of reasonable accommodation is the subject of considerable controversy. For instance, within the nine months preceding its decision in *Draper*, the Sixth Circuit first approved[24] and subsequently questioned[25] the validity of reasonable

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tion of these inalienable rights has been the cornerstone of national policy since the birth of this nation.

Dewey v. Reynolds Metals Co., 304 F. Supp. 1116, 1119-20 (W.D. Mich. 1969).

19. 42 U.S.C. § 2000e(j) (1972), *amending* 42 U.S.C. § 2000e (1964).

20. 42 U.S.C. § 2000e-2(a) (1972) makes it an unlawful employment practice for an employer to discriminate on the basis of religion. *See* note 6 and accompanying text *supra*. 42 U.S.C. § 2000e(j) (1972), *amending* 42 U.S.C. § 2000e (1964) defines "religion" as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

21. "Prospective employees" are protected from discrimination on the basis of religion. 42 U.S.C. § 2000e(j) (1972), *amending* 42 U.S.C. § 2000e (1964). The term "prospective employee" has been defined judicially:

> Both 42 U.S.C. § 2000e(j) and EEOC Regulation 1605.1(b) require employers to accommodate both employees and prospective employees. The phrase 'prospective employees' should not be treated as surplusage but should be interpreted so as to effectuate the remedial intent of Congress to expand religious freedom by requiring that employers must attempt to accommodate the religious beliefs and practices of applicants for employment *prior* to their employment to insure that an applicant can accept a job with a clear conscience knowing that his particular religious needs have been accommodated.

Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172, 179 (W.D.N.C. 1975).

22. 42 U.S.C. § 2000e(j) (1972), *amending* 42 U.S.C. § 2000e (1964).

23. *Accord, e.g.*, Yott v. North Am. Rockwell Corp., 501 F.2d 398, 402 (9th Cir. 1974); Riley v. Bendix Corp., 464 F.2d 1113, 1116 (5th Cir. 1972); Shaffield v. Northrop Worldwide Aircr. Serv., Inc., 373 F. Supp. 937, 941 (M.D. Ala. 1974). In *Hardison* the Eighth Circuit expressly upheld the rule of reasonable accommodation against claims of invalidity based upon alleged statutory inconsistency and conflict with the Establishment Clause. 527 F.2d at 38-44. The Sixth Circuit's approval of the rule in *Draper* was implied in its application of the rule to the facts. 527 F.2d at 519.

24. Cummins v. Parker Seal Co., 516 F.2d 544, 554 (6th Cir. 1975), *cert. granted*, 424 U.S. 942 (1976). The *Cummins* decision was rendered on May 23, 1975.

25. Reid v. Memphis Pub. Co., 521 F.2d 512, 517-21 (6th Cir. 1975) (dicta within maj. opinion). The *Reid* decision was rendered on August 20, 1975.

The panel which decided *Cummins* differed from that which decided *Reid*.

accommodation. The divergence of opinion and the significance of the issues involved are reflected in the recent announcement of the United States Supreme Court that it has granted certiorari in one of the cases decided by the Sixth Circuit, *Cummins v. Parker Seal Co.*[26]

Cummins presents two issues that concern the validity of the reasonable accommodation rule. The first[27] is whether the rule, when first imposed by a regulation[28] of the Equal Employment Opportunity Commission,[29] was invalid as inconsistent with the original intent of the Civil Rights Act.[30] The second[31] is whether the rule is violative of the Establishment Clause[32] as an impermissible preference of religion. The purpose of this comment is to address the issues raised in *Cummins* and other recent decisions[33] in anticipation of the ruling of the United States Supreme Court. It is strongly urged that the validity of reasonable accommodation be upheld on all issues.

II. Background

A. History

On July 2, 1964, the Civil Rights Act of 1964[34] was enacted by the Eighty-Eighth Congress. Its purpose was to end discrimination

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Judge Anthony Celebrezze heard both cases. He was joined by Phillips, C.J. and McCree, J. on the *Cummins* court and by Weick and Edwards, JJ. on the *Reid* bench. Judge Celebrezze wrote the lone dissent in *Cummins* and sided with Judge Weick on the majority in *Reid.*

26. 516 F.2d 544 (6th Cir. 1975), *cert. granted,* 424 U.S. 942 (1976).

27. *Id.* at 547.

28. 29 C.F.R. § 1605.1(b) (1967).

29. Hereinafter also referred to as the EEOC.

30. Inconsistency was alleged in Reid v. Memphis Pub. Co., 521 F.2d 512, 519 (6th Cir. 1975) (dicta within maj. opinion); *accord,* Dewey v. Reynolds Metals Co., 429 F.2d 324, 329 (6th Cir. 1970), *aff'd by an equally divided court,* 402 U.S. 689 (1971). *Contra,* Hardison v. TWA, 527 F.2d 33, 38 (8th Cir. 1975); Yott v. North Am. Rockwell Corp., 501 F.2d 398, 402 (9th Cir. 1974); Riley v. Bendix Corp., 464 F.2d 1113, 1116 (5th Cir. 1972); Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172, 178 (W.D.N.C. 1975); Weitkenaut v. Goodyear Tire & Rubber Co., 381 F. Supp. 1284, 1288 (D. Vt. 1974).

31. 516 F.2d at 551.

32. "Congress shall make no law respecting an establishment of religion. . . ." U.S. CONST. amend. I.

33. There is a third issue concerning the validity of the reasonable accommodation rule that was not addressed in *Cummins.* This issue concerns whether the provision of the Civil Rights Act that makes unequal treatment of employees permissible if done "pursuant to a bona fide seniority . . . system" should be held subordinate or superior to the provision requiring reasonable accommodation. 42 U.S.C. § 2000e-2(h) (1972). The *Hardison* decision noted the difficulty of this question but reserved judgment upon it. 527 F.2d at 41-42. Another crucial question is whether union security clauses will be held superior to reasonable accommodation. *See* notes 239-251 and accompanying text *infra.* It is hoped, although not anticipated, that these controversial issues will be addressed by the High Court in its opinion on the questions expressly raised in *Cummins.*

34. Title VII of the Act, which concerns equal employment opportunities, is found at 42 U.S.C. § 2000e-2000e-15 (1972).

on the basis of race, color, religion, sex, or national origin.[35] Title VII[36] of the Act provided that such discrimination by an employer regarding the terms and conditions of employment would constitute an unfair employment practice.[37] Discrimination by a labor organization in its terms and conditions of membership was similarly proscribed.[38] The Act established the EEOC to investigate complaints brought under the Act[39] and thereby aid in its enforcement by the courts.[40] The EEOC was also empowered to issue regulations to effectuate the Act[41] consistent with legislative purposes.[42]

The first such regulations[43] concerning discrimination and religious observances by employees became effective on June 15, 1966.[44] These regulations set forth the EEOC's position that an employer was free to schedule a standard work week uniformly applicable to all employees, despite the unequal effect that such schedule might have upon the religious observances of individual employees.[45] The em-

35. *E.g.*, Fagan v. National Cash Reg. Co., 481 F.2d 1115, 1119 n.9 (D.C. Cir. 1973); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969). The dominant consideration was the eradication of racial discrimination as opposed to the other types. U.S. CODE CONG. & AD. NEWS, 88th Cong., 2d Sess. at 2516 (1964); *accord*, Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

36. Title VII went into effect on July 2, 1965, one year after its enactment.

37. 42 U.S.C. § 2000e-2(a) (1972), amending 42 U.S.C. § 2000e-2(c) (1964) reads in relevant part:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . .

38. 42 U.S.C. § 2000e-2(c) (1972), amending 42 U.S.C. § 2000e-2(c) (1964) reads in relevant part:

> It shall be an unlawful employment practice for a labor organization—
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his . . . religion . . . .

39. U.S. CODE CONG. & AD. NEWS, 88th Cong., 2d Sess., at 2515 (1964). The original wording of the Act in committee gave the EEOC power to institute hearings and issue cease-and-desist orders as well as to investigate. That proposal was rejected, however, because it was believed that an employer or labor union would receive a fairer adjudication within the federal courts, where the case must be tried *de novo* upon appeal from an EEOC finding. *Id.* This may explain the statement that "[t]he enforcement powers of the Commission are non-existent." Beverly v. Lone Star Constr. Corp., 437 F.2d 1136, 1138 (5th Cir. 1971).

40. Jackson v. Veri-Fresh Poultry, Inc., 304 F. Supp. 1276, 1277 (E.D. La. 1969).

41. 42 U.S.C. § 2000e-12(a) (1964).

42. Jackson v. Veri-Fresh Poultry, Inc., 304 F. Supp. 1276, 1277 (E.D. La. 1969).

43. 29 C.F.R. § 1605.1 (1966), *as amended* 29 C.F.R. § 1605.1 (1967).

44. Hardison v. TWA, 527 F.2d 33, 38 (8th Cir. 1975).

45. 29 C.F.R. § 1605.1(a)(3) (1966), *as amended* 29 C.F.R. § 1605.1 (1967)

ployer was also permitted to schedule foreseeable overtime requirements.[46] Absent intent of the employer to discriminate on religious grounds, an individual who accepted a job with either actual or constructive knowledge that his regular and overtime work might conflict with the observance of his religion was not permitted to demand subsequent accommodation of such observances from the employer.[47] This position was based[48] upon a broad statement of congressional intent that in the effectuation of proscriptions on discrimination:

> Management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.[49]

By 1967, however, the EEOC felt compelled to issue a new set of regulations on religious discrimination.[50] They were formulated because the EEOC had received "several complaints" that had raised the question whether the discharge of an employee or the refusal to hire a prospective employee because of refusals to work on Sabbath days or other religious holidays was unlawful.[51] Although the EEOC did not expressly repeal its 1966 regulations,[52] its new position was substantially different. The Commission stated that the duty not to discriminate, mandated by Title VII,[53] included

> an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and pro-

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reads:

> However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.

46. 29 C.F.R. § 1605.1(b)(3) (1966), *as amended* 29 C.F.R. § 1605.1 (1967) reads:

> The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs.

47. *Id.*

48. Reid v. Memphis Pub. Co., 521 F.2d 512, 518 (6th Cir. 1975) (dicta within majority opinion); Dewey v. Reynolds Metals Co., 429 F.2d 324, 335 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

49. U.S. CODE CONG. & AD. NEWS, 88th Cong., 2d Sess., at 2516 (1964).

50. 29 C.F.R. § 1605.1 (1967), *formerly* 29 C.F.R. § 1605.1 (1966). The new regulations took effect on July 10, 1967. *Id.*

51. The EEOC reported 87 complaints during its first year of existence. Comment, *Religious Observance and Discrimination on Employment*, 22 SYR. L. REV. 1019, 1020 n.1 (1971).

52. Riley v. Bendix Corp., 330 F. Supp. 583, 589 (M.D. Fla. 1971), *rev'd other grounds*, 464 F.2d 1113 (5th Cir. 1972).

53. *See* note 34 *supra*.

> spective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.[54]

Because of the "particularly sensitive"[55] questions involved, the burden of proving the existence of undue hardship was placed upon the employer.[56] The satisfaction of this burden was to be determined "largely on an *ad-hoc* basis."[57]

B. Application of the Rules of Reasonable Accommodation

The initial step in a determination whether reasonable accommodation is necessitated is a showing by the employee or prospective employee of a prima facie case of religious discrimination.[58] The burden then shifts to the employer (or, in an appropriate case, to the labor union) to show either that no accommodation is possible or that such accommodations that are possible cannot be made without undue hardship.[59]

In 1973, it was observed that there was a "lack of authoritative precedent" concerning the application of reasonable accommodation.[60] This remains true. Even a sharp increase during the past two years[61] in the number of cases involving religious discrimination has failed to resolve several questions in this area. One such question is whether an employer (or union) can prove the existence of undue hardship without actually attempting an accommodation.[62] Conced-

54. 29 C.F.R. § 1605.1(b) (1967), *formerly* 29 C.F.R. § 1605.1 (1966).
55. 29 C.F.R. § 1605.1(c) (1967), *formerly* 29 C.F.R. § 1605.1 (1966).
56. *Id.*
57. Dewey v. Reynolds Metals Co., 429 F.2d 324, 330 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).
58. *E.g.*, Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 143 (5th Cir. 1975); Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172, 178 (W.D.N.C. 1975).
59. Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172, 179 (W.D.N.C. 1975).
60. Claybaugh v. Pacific N.W. Bell Tel. Co., 355 F. Supp. 1, 2 (D. Ore. 1973).
61. Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *cert. granted*, 424 U.S. 942 (1976); Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975); Hardison v. TWA, 527 F.2d 33 (8th Cir. 1975); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975); Yott v. North Am. Rockwell Corp., 501 F.2d 398 (9th Cir. 1974); Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172 (W.D.N.C. 1975); Ward v. Allegheny Ludlam Steel Corp., 397 F. Supp. 375 (W.D. Pa. 1975); Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382 (D. Neb. 1974); Drum v. Ware, 7 EPD ¶ 9244 (W.D.N.C. 1974); Weitkenaut v. Goodyear Tire & Rubber Co., 381 F. Supp. 1284 (D. Vt. 1974); EEOC Dec. 74-107, CCH EEOC DEC ¶ 6430 (1974).
62. *Compare* Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975), *with* Shaffield v. Northrop Worldwide Aircr. Serv., Inc., 373 F.

edly there may be instances in which any possible accommodation would so clearly impose an undue hardship on the employer that an actual attempt at accommodation would be wasteful. The employer's burden is not satisfied by a mere opinion or allegation of hardship, however,[63] and the rarity of an exceedingly clear case of undue hardship is additional evidence that the view which requires an attempt at accommodation is more realistic.[64]

Questions have also arisen concerning the proper relationship of the two statutory phrases "reasonable accommodation" and "undue hardship on the conduct of the employer's business." Evaluation of the employer's obligation is often considered to be a two-step process in which separate determinations are made of the existence of possible accommodations and the existence of undue hardship in implementing those accommodations.[65] Nevertheless, the two phrases do not establish two standards. Most cases interpret the statutory language to mean that if an accommodation is not found to impose an undue hardship, it is reasonable.[66]

Crucial to the application of the statute, therefore, are definitions of its two key phrases. "Reasonable accommodation" has been held to mean more than a mere absence of intentional discrimination.[67] It must be made in good faith and consider all aspects of the employee's religious beliefs. For instance, when an employee's religion forbids not only working on the Sabbath but also asking another to substitute, an accommodation that would permit absence only if a replacement worker were found would not be considered reasona-

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Supp. 937, 941-42 (M.D. Ala. 1974) and Claybaugh v. Pacific N.W. Bell Tel. Co., 355 F. Supp. 1, 6 (D. Ore. 1973).

63. *E.g.*, Johnson v. United States Postal Service, 497 F.2d 128, 130 (5th Cir. 1974); Hardison v. TWA, 375 F. Supp. 877, 888 (W.D. Mo. 1974), *rev'd in part on other grounds*, 527 F.2d 33 (8th Cir. 1975); EEOC Dec. 70-670 (3/30/70), CCH EEOC DEC ¶ 6141 (1970).

64. Support for the view that an attempt at accommodation should be required before a finding of undue hardship can be made is seen in the admonition of one judge that "sometimes things that you think can't be done, if you try, work far better than you anticipate." Roberts v. Hermitage Cotton Mills, 8 EPD ¶ 9589 (D.S.C.), *aff'd*, 8 EPD ¶ 9589 (4th Cir. 1974). A contrary result to such experimentation is suggested by a decision in an analogous context: "[A]ll too often theories which may seem to be reasonable and logical when viewed alone or in the abstract prove to be highly artificial once they are exposed to every day realities." Willingham v. Macon Tel. Pub. Co., 352 F. Supp. 1018, 1020 (M.D. Ga. 1972) (alleged sex discrimination in dress code requirements).

65. *See* Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975); Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382, 1387 (D. Neb. 1974); EEOC Dec. 72-2066 (6/22/72), CCH EEOC DEC ¶ 6367 (1972).

66. *E.g.*, Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382, 1387 (D. Neb. 1974); EEOC Dec. 72-0606 (12/22/71), CCH EEOC DEC ¶ 6310 (1972); EEOC Dec. 70-670 (3/30/70), CCH EEOC DEC ¶ 6141 (1970); 29 C.F.R. § 1605.1(d) (1967), *amending* 29 C.F.R. § 1605.1 (1966).

67. Hardison v. TWA, 375 F. Supp. 877, 881 (W.D. Mo. 1974), *rev'd in part on other grounds*, 527 F.2d 33 (8th Cir. 1975).

ble.[68] "Undue hardship" has been defined as "something more than hardship."[69] There has been a trend to construe the phrase "on the conduct of the employer's business" as including undue hardship imposed upon the individual's fellow employees and labor union as well as the employer itself.[70] This is because employee relations and the concomitant problems of grievances and general morale difficulties definitely affect the employer's business.[71] Even with this enlargement of the scope of its definition, the existence of "undue hardship" is difficult to prove. Inconvenience in re-scheduling employees to accommodate a sabbatarian has been held insufficient to constitute undue hardship.[72] Similarly, the fact that an accommodation is "bothersome" or "disruptive"[73] is also insufficient. The necessity of finding and paying a substitute and even the training of a replacement[74] do not necessarily constitute undue hardship. "Grumbling" or other manifestations of resentment by fellow employees is not enough to support a claim of undue hardship[75] unless such "grumbling" is so severe that it results in "chaotic personnel problems."[76] Ordinarily, neither an employee's attire[77] nor his conduct

68. *Compare* Dewey v. Reynolds Metals Co., 429 F.2d 324, 331 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971) *with* 42 U.S.C. § 2000e(j) (1972), *amending* 42 U.S.C. § 2000e (1964).

69. Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975); Cummins v. Parker Seal Co., 516 F.2d 544, 551 (6th Cir. 1975), *cert. granted*, 424 U.S. 942 (1976).

70. *E.g.*, Yott v. North Am. Rockwell Corp., 501 F.2d 398, 403 (9th Cir. 1974); Hardison v. TWA, 375 F. Supp. 877, 882 (W.D. Mo. 1974), *rev'd in part on other grounds*, 527 F.2d 33 (8th Cir. 1975); Roberts v. Hermitage Cotton Mills, 8 EPD ¶ 9589 (D.S.C.), *aff'd*, 8 EPD ¶ 9596 (4th Cir. 1974).

71. "The hardship on employees should certainly be considered as hardship on the conduct of business, for the management of employees is one of the chief concerns of a large business. . . ." Hardison v. TWA, 375 F. Supp. 877, 883 (W.D. Mo. 1974), *rev'd in part on other grounds*, 527 F.2d 33 (8th Cir. 1975).

72. Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975); Cummins v. Parker Seal Co., 516 F.2d 544, 550 (6th Cir. 1975), *cert. granted*, 424 U.S. 942 (1976); Kettell v. Johnson & Johnson, 337 F. Supp. 892, 895 (E.D. Ark. 1972). To equate inconvenience with undue hardship has been likened to an "Alice in Wonderland world, where words have no meaning." Cummins v. Parker Seal Co., 516 F.2d at 550, *quoting* Welsh v. United States, 398 U.S. 333, 354 (1970) (concurring opinion by Harlan, J.).

73. Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975), *reh. denied*, 527 F.2d 515 (1976).

74. Ward v. Allegheny Ludlam Steel Corp., 397 F. Supp. 375, 377 (W.D. Pa. 1975); EEOC Dec. 72-0606 (12/22/72), CCH EEOC DEC ¶ 6310 (1972).

75. Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520-21 (6th Cir. 1975), *quoting* Cummins v. Parker Seal Co., 516 F.2d 544, 550 (6th Cir. 1975), *cert. granted*, 424 U.S. 942 (1976).

76. Cummins v. Parker Seal Co., 516 F.2d 544, 550 (6th Cir. 1975), *cert. granted*, 424 U.S. 942 (1976); EEOC Dec. 72-0606 (12/22/71), CCH EEOC DEC ¶ 6310 (1972); EEOC Dec. 71-463 (11/13/70), CCH EEOC DEC ¶ 6206 (1972).

77. *E.g.*, EEOC Dec. 71-779 (12/21/70), CCH EEOC DEC ¶ 6180 (1973).

on the job (such as soft praying while working)[78] are considered undue hardship.

Nonetheless, there are several ways by which an employer can attempt to defeat an employee's demand for accommodation. The most obvious is a challenge to the sincerity of the employee's beliefs.[79] Although in the majority of cases this will not be an issue,[80] a successful defense of insincerity naturally ends the proceeding.[81] Even when sincerity cannot be challenged, other circumstances may be sufficient to show the requisite hardship. One such circumstance is the smallness of the employer's business. If the employer is an exceptionally large corporation, an allegation of undue hardship will be viewed with skepticism.[82] Conversely, if the employer is small, such allegation is more likely to succeed.[83] This may also be applicable where the individual work location is small even though the employer is not. Thus, in *Johnson v. United States Postal Service*[84] a post office employee was denied accommodation because the individual post office in which he worked lacked sufficient manpower to implement it.[85] Another circumstance upon which a finding of undue hardship can be based is the type of job held by the employee seeking accommodation. When the job calls for skills or expertise unique to the individual a sabbatarian's demand for a full day off may well be denied;[86] likewise when the job is part of 24-hour emergency service necessary to protect the public safety.[87] Even a predominant characteristic of the other employees can be determinative in proving a claim of undue hardship. In *Roberts v. Hermitage Cotton Mills*[88] a

78. *E.g.*, Smith v. Universal Services, Inc., 6 EPD ¶ 8919 (E.D. La. 1971).

79. *E.g.*, Cooper v. General Dynamics, Convair Aerosp. Div., Fort Worth Oper., 378 F. Supp. 1258, 1260 (N.D. Tex. 1974).

80. *E.g.*, Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172, 174 n.1 (W.D.N.C. 1975); Drum v. Ware, 7 EPD ¶ 9244 (W.D.N.C. 1974); Kettell v. Johnson & Johnson, 337 F. Supp. 892, 895 (E.D. Ark. 1972); Dawson v. Mizell, 325 F. Supp. 511, 513 (E.D. Va. 1971).

81. *See* note 247 and accompanying text *infra*.

82. Claybaugh v. Pacific N.W. Bell Tel. Co., 355 F. Supp. 1, 5 (D. Ore. 1973).

83. *E.g.*, Shaffield v. Northrop Worldwide Aircr. Serv., Inc., 373 F. Supp. 937, 941 (M.D. Ala. 1974). The duty to accommodate does not apply to employers of less than fifteen persons. 42 U.S.C. § 2000e(b) (1972).

84. 497 F.2d 128 (5th Cir. 1974).

85. *Id.* at 129-30.

86. *E.g.*, Reid v. Memphis Pub. Co., 521 F.2d 512, 522 (6th Cir. 1975); EEOC Dec. 70-773 (5/7/70), CCH EEOC DEC ¶ 70-773 (1970).

87. Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382, 1386 (D. Neb. 1974); Scott v. Southern California Gas Co., 8 EPD ¶ 9450 (C.D. Cal. 1973).

Analogous to these situations is a case decided on first amendment grounds in which police officers were required to shave their beards grown in observance of their religion. Cupit v. Baton Rouge Police Dep't, — La. App. —, 277 So. 2d 454 (1973). The beards conflicted with police regulations based upon the appearance felt necessary to promote the image of a policeman and thereby protect the public welfare. *Id.* at —, 277 So. 2d at 456.

88. 8 EPD ¶ 9589 (D.S.C.), *aff'd*, 8 EPD ¶ 9596 (4th Cir. 1974).

worker's request for time off on his Sabbath was denied principally because such accommodation would have necessitated his co-workers, mostly senior citizens, to work extended shifts.[89] Undue hardship can also be grounded on a showing that accommodation will threaten the safety of the other employees.[90] When no undue hardship can be shown and reasonable accommodation has been implemented, the employer may still avoid such accommodation upon showing that the employee refuses to cooperate.[91]

One factor that has often been applied in the assessment of undue hardship claims, but which should logically be omitted, is the relative good faith or "equities" of the parties. An employee's lack of good faith in failing to cooperate *after* an accommodation has been attempted is certainly relevant to an employer's claim that such accommodation should not be continued.[92] In contrast, however, the equities of either side *before* a decision as to the necessity of accommodation has been made is irrelevant. The sole question posed by the Civil Rights Act is whether the employee can be accommodated without undue hardship.[93] If such accommodation can be made without hardship, it must be. No extraneous "equitable" considerations should enter into the decision.[94] These considerations have included recognition that the employee volunteered for extra work[95] and that the employee failed to check with his crew informally before requesting accommodation.[96] One blatant example of this misapplication of "equitable" factors is a decision of the EEOC in which one of the reasons for finding undue hardship in the hiring of a Seventh-Day Adventist was the employer's demonstration of "good faith" in accommodating the prospective employee's mother for years previous-

89. *Id.*

90. Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 521 (6th Cir. 1975).

91. *See, e.g.*, Roberts v. Hermitage Cotton Mills, 8 EPD ¶ 9589 (D.S.C.), *aff'd*, 8 EPD ¶ 9596 (4th Cir. 1974).

92. *Id.*

93. *See* note 20 and accompanying text *supra.*

94. Enforcement of reasonable accommodation is concededly subject to a rule of "equitable application." 29 C.F.R. § 1605.1(d) (1967), *formerly* 29 C.F.R. § 1605.1 (1966). This emphasizes that accommodation is a flexible concept dependent upon facts of each case rather than that previous "equities" of the parties are to be considered.

95. *E.g.*, Ward v. Allegheny Ludlam Steel Corp., 397 F. Supp. 375, 377 (W.D. Pa. 1975); Weitkenaut v. Goodyear Tire & Rubber Co., 381 F. Supp. 1284, 1286 (D. Vt. 1974).

96. EEOC Dec. 72-2066 (6/22/72); CCH EEOC DEC ¶ 6367 (1972).

ly.[97] Another more frequent example is a consideration of when the employee adopted his religious beliefs in relation to the time at which he accepted the position or shift from which he requests accommodation. In determining whether a reasonable accommodation can be made it should make no difference whether the employee adopted his belief before or after he accepted the conflicting employment.[98] Yet several cases have taken such facts into consideration.[99]

This problem has been recognized by at least one court. In *Hardison*,[100] an employee used his seniority to transfer into a shift which gave him evenings free with his new bride.[101] In his former shift he needed no accommodation for his religious beliefs. Accommodation was necessary after his transfer. Thus an employee deliberately placed himself into a shift for personal reasons out of which he then demanded accommodation for religious reasons. A misuse of "equitable" considerations would probably have dictated that the employee choose between his religious and personal demands. The error of such an approach is that it overlooks the fact that the employer's duty to accommodate is dependent upon only one consideration: his ability to do so without undue hardship.[102] The court correctly held that the circumstances were not grounds for denying accommodation.[103] Rather, in light of a collective bargaining agreement preventing transfers without seniority (of which the employee now had none), these circumstances were merely a factor frustrating the employer's attempts at accommodation.[104]

III. Challenges to the Rule of Reasonable Accommodation

A. Inconsistency with the Civil Rights Act of 1964

The 1967 regulations creating the duty of reasonable accommodation were adopted into statute by Congress in 1972.[105] Nevertheless, the rule was challenged in dicta by the Sixth Circuit in the 1975

97. EEOC Dec. 70-99 (8/27/69), CCH EEOC DEC ¶ 6060 (1969).

98. *Cf.* 29 C.F.R. § 1605.1 (1966), *as amended* 29 C.F.R. § 1605.1 (1967). *See* note 76 and accompanying text *supra*.

99. *E.g.*, Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 518 (6th Cir. 1975); Johnson v. United States Postal Service, 497 F.2d 128, 129 (5th Cir. 1974); Kettell v. Johnson & Johnson, 337 F. Supp. 892, 893 (E.D. Ark. 1972) (obtained job before adopting religious views); Riley v. Bendix Corp., 464 F.2d 1113, 1114 (5th Cir. 1972); Drum v. Ware, 7 EPD ¶ 9244 (W.D.N.C. 1974) (obtained job afterward).

100. 527 F.2d 33 (8th Cir. 1975).

101. 375 F. Supp. 877, 891 (W.D. Mo. 1974).

102. *See* note 20 and accompanying text *supra*.

103. 375 F. Supp. 877, 891 (W.D. Mo .1974), *rev'd in part on other grounds*, 527 F.2d 33 (8th Cir. 1975).

104. *Id.*

105. 42 U.S.C. § 2000e(j) (1972), *amending* 42 U.S.C. § 2000e (1964).

case of *Reid v. Memphis Publishing Co.*[106] This challenge asserts that the rule is inconsistent with the intent of Congress as expressed in the original Civil Rights Act of 1964.[107] The allegation is that the rule is a constitutionally impermissible usurpation of the legislative function by the EEOC as applied to cases arising before the 1972 amendment, and perhaps to all cases.[108]

The position expressed in the *Reid* dicta is an isolated one. It is the only challenge that has been made to the rule on the ground of statutory inconsistency since the enactment of the 1972 amendment. In fact, the *Reid* dicta is a repudiation of the approval that the Sixth Circuit had given the rule in the *Cummins* decision[109] less than three months earlier. The only relevant decisions subsequent to *Reid* have rejected its dicta and have relegated its mention to footnotes.[110] One of these subsequent decisions is from the Sixth Circuit, representing a second reversal of position by that circuit within nine months.[111] The ambivalence of the Sixth Circuit and the fact that this issue will be of first impression before the United States Supreme Court[112] in *Cummins* warrant a close examination of the opposing rationales.

The reasoning of the *Reid* dicta closely resembles that of a 1970 Sixth Circuit case, *Dewey v. Reynolds Metals Co.*[113] *Dewey* presented the first challenge to the rule of reasonable accommodation. In *Dewey* an employee alleged that his discharge in 1966 for refusing to work on Sundays for religious reasons constituted a violation of the Civil Rights Act.[114] The employer's defense was that it had merely acted in accord with a collective bargaining agreement that applied to all employees uniformly and required weekend work as compulsory

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106. 521 F.2d 512 (6th Cir. 1975).
107. *See* note 49 and accompanying text *supra.*
108. 521 F.2d at 520 (dicta within majority opinion).
109. *See* notes 24-25 and accompanying text *supra.*
110. Draper v. United States Pipe & Foundry Co., 527 F.2d 515 n.2 (6th Cir. 1975); Hardison v. TWA, 527 F.2d 33, 38 n.5 (8th Cir. 1975).
111. Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. *reh. denied*, 527 F.2d 515 (1976).
112. Reid v. Memphis Pub. Co., 521 F.2d 512, 524 n.1 (6th Cir. 1975) (dissent).
113. 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).
Certainly a partial explanation of the similarity of *Reid* and *Dewey* is that one judge, the Hon. Paul C. Weick, wrote both the *Reid* decision and the denial of rehearing in *Dewey*. *See* note 164 *infra.*
114. Dewey v. Reynolds Metals Co., 300 F. Supp. 709, 711 (W.D. Mich. 1969), *rev'd*, 424 F.2d 324 (6th Cir. 1970).

overtime to be assigned on the basis of seniority.[115] It was stipulated that the employer had made no accommodation to the employee's religious beliefs other than to permit him to find a substitute worker,[116] a procedure which allowed for absences of all types but which was unavailable to the employee because it too was forbidden by his religion.[117] Because both a reasonable accommodation and a showing of undue hardship were lacking,[118] the employer's defense depended entirely upon whether the 1967 regulations requiring accommodation were to be applied. The district court held for the employee.[119] In so doing, it expressly adopted the 1967 regulations as definitive of the statutory duty not to discriminate.[120] The court of appeals for the Sixth Circuit reversed.[121]

A sufficient ground for reversal was the appellate court's decision that the district court had erred in applying the 1967 guidelines retroactively.[122] More important as precedent, however, was the court's ruling that the duty of reasonable accommodation was not imposed by the Civil Rights Act.[123] The court stated that the Act was aimed only at discriminatory practices.[124] It then declared that a collective bargaining agreement that imposed a uniform rule on all employees was not discriminatory, despite the unequal impact the agreement might have on the religious needs of individual employees.[125] The existing authority for such a distinction between application and impact, *Sherbert v. Verner*,[126] was ruled inapplicable in that it involved state rather than private action.[127] Therefore, no discrimination was seen in the employer's failure to accommodate; to equate discrimination and failure to accommodate was held "fundamental error" because they are "entirely different."[128] The EEOC's authority to impose a duty of reasonable accommodation was "doubted"[129] since this imposition was held to have been inconsistent[130] with the expressed congressional intent that the Commission avoid interference

115. 429 F.2d at 327.
116. Dewey v. Reynolds Metals Co., 300 F. Supp. 709, 711 (W.D. Mich. 1969), *rev'd*, 424 F.2d 324 (6th Cir. 1970).
117. *Id.* *See* note 68 and accompanying text *supra.*
118. *See* note 20 and accompanying text *supra.*
119. 300 F. Supp. at 711.
120. *Id.* at 714.
121. Dewey v. Reynolds Metals Co., 429 F.2d 324, 329 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).
122. *Id.* at 329.
123. *Id.* at 330.
124. *Id.* at 328.
125. *Id.*
126. 374 U.S. 398, 404 (1963).
127. 429 F.2d at 329.
128. *Id.* at 335.
129. *Id.* at 331 n.1.
130. *Id.* at 334.

with the internal affairs of employers and labor organizations.[131] Furthermore, it was thought that application of the reasonable accommodation rule would create "chaotic personnel problems,"[132] raise constitutional issues concerning the Establishment Clause,[133] and interfere with private contractual obligations.[134]

Despite serious flaws in its reasoning,[135] the Sixth Circuit's decision in *Dewey* was affirmed by the United States Supreme Court.[136] The affirmance had no effect as precedent, however, because it was the result of an equally divided court.[137] The EEOC criticized the *Dewey* decision[138] and continued to apply the rule of reasonable accommodation in its administrative proceedings.[139] *Dewey* was followed by several state[140] and federal[141] courts.

Over the last four years, the Sixth Circuit's decision in *Dewey* has had little worth as precedent. There are five reasons for this. The first is the recognition by several federal courts that the statements made in *Dewey* regarding the invalidity of the 1967 regulations were merely dicta. The actual basis for reversal was the district court's error in retroactively applying the 1967 regulations.[142] A second reason is

131. *See* note 49 and accompanying text *supra.*

132. 429 F.2d at 330.

133. *Id.* at 334.

134. 429 F.2d at 330; *cf.* Reid v. Memphis Pub. Co., 521 F.2d 512, 524 n.1 (6th Cir. 1975).

135. *See* notes 143-64 and accompanying text *infra.*

136. 402 U.S. 689 (1971).

137. The rule that an affirmance by an equally divided court establishes no precedent is a fundamental part of American jurisprudence. *E.g.*, Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960); Durant v. Essex Co., 74 U.S. (7 Wall.) 107, 113 (1869).

The Dewey court also considered the major question of whether a complainant under title VII was foreclosed from bringing a legal action after seeking redress through the arbitration proceedings prescribed by a collective bargaining agreement and receiving an adverse decision therefrom. The automatic affirmance caused by the equally divided High Court is therefore "particularly obscure" since it gives no indication of which issue caused the split. Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 990 (D.C. Cir. 1973); *accord*, Reid v. Memphis Pub. Co., 521 F.2d 512, 513 n.2 (6th Cir. 1975); EEOC Dec. 72-0606 (12/22/71), CCH EEOC DEC ¶ 6310 (1971). *See also* Alexander v. Gardner-Denver Corp., 415 U.S. 36 (1974) (adverse arbitration decision does not foreclose title VII remedy).

138. *E.g.*, EEOC Dec. 72-0606 (12/22/71), CCH EEOC DEC ¶ 6310 (1971).

139. EEOC Dec. 72-0606 (12/22/71), CCH EEOC DEC ¶ 6310 (1971); EEOC Dec. 70-580 (3/2/70), CCH EEOC DEC ¶ 6120 (1970).

140. *E.g.*, Corey v. Avco-Lycoming Div., 163 Conn. 309, 307 A.2d 155 (1972); Eastern Greyhound Lines v. New York State Div. of Human Rights, 317 N.Y.S.2d 322, 27 N.Y.2d 279, 265 N.E.2d 745 (1970).

141. *E.g.*, Kettell v. Johnson & Johnson, 337 F. Supp. 892 (E.D. Ark. 1972); Smith v. Universal Services, Inc., 6 EPD ¶ 8919 (E.D. La. 1971); Dawson v. Mizell, 325 F. Supp. 511 (E.D. Va. 1971).

142. Reid v. Memphis Pub. Co., 468 F.2d 346, 349 (6th Cir. 1972); Riley v.

Dewey's invalidation of the 1967 regulations without having given any consideration to a decision by the Supreme Court as to the weight to be given administrative interpretation of statutes. As the dissent in *Dewey* noted, the High Court had stated in *Udall v. Tallman*,[143] that

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration . . . 'Particularly is this respect due when the administrative practice "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." '[144]

The third reason nullifying *Dewey*'s repudiation of reasonable accommodation is its erroneous evaluation of congressional intent. The court's statement that Congress aimed the Civil Rights Act only at discriminatory practices[145] was correct.[146] Yet this statement cannot by itself make the rule of reasonable accommodation inconsistent with the intent of the Act. It begs the question of how "discriminatory" was to be defined. The court offered an answer to that question in its statement that Congress did not intend a collective bargaining agreement with uniformly applicable rules to be considered discriminatory.[147] Its authority for that conclusion was the expressed congressional intent that "management prerogatives" and "[t]he internal affairs of employers . . . [were] not to be interfered with except to the limited extent that correction is required in discrimination practices."[148] The error in the court's reliance on that expression of intent is revealed in the final phrase. The language shows clearly that Congress did not intend all internal policies of employers to be immune from regulation. Rather, only those that were not *discriminatory* were to be left alone. The type of employer policies that were to be considered "discriminatory" was not described by Congress. The *Dewey* court was thus unwarranted in assuming that Congress intended to consider work rules uniform in application but unequal in impact to be non-discriminatory.

Bendix Corp., 464 F.2d 1113, 1117 (5th Cir. 1972); Hardison v. TWA, 375 F. Supp. 877, 886 (W.D. Mo. 1974), *rev'd on other grounds*, 527 F.2d 33 (8th Cir. 1975).

143. 380 U.S. 1 (1965).

144. *Id.* at 16, quoting Power Reactor Dev. Co. v. International Union of Electricians, 367 U.S. 398, 408 (1961); *accord*, Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971); Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172, 178 (W.D.N.C. 1975); Hardison v. TWA, 375 F. Supp. 877, 887 (W.D. Mo. 1974), *rev'd on other grounds*, 527 F.2d 33 (8th Cir. 1975); Jackson v. Veri Fresh Poultry, Inc., 304 F. Supp. 1276, 1277 (E.D. La. 1969).

145. 429 F.2d at 328.

146. *See* note 20 and accompanying text *supra*.

147. 429 F.2d at 334.

148. *See* note 49 and accompanying text *supra*.

In fact, there is considerable support for the view that Congress intended the opposite result.[149] One year before the enactment of the Civil Rights Act,[150] the United States Supreme Court in *Sherbert v. Vermer*[151] struck down a state statute that uniformly required availability for Saturday work as a prerequisite to the reception of state employment benefits. Because it forced a Seventh-Day Adventist who observed a Saturday Sabbath to choose between the precepts of her religion and her only means of income,[152] the uniformly-applied statute was deemed a violation of the Free Exercise Clause[153] because of the inequality of its effect. The Court declared:

> For if the purpose *or effect* of a law is to impede the observance of one or all religions or to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being 'only indirect.'[154]

Thus the Supreme Court recognized that discrimination was properly defined in terms of effect as well as application. Absent a definition of its own,[155] it is unlikely that Congress would have ignored this definition of discrimination stated but one year earlier by the nation's highest court.

This argument that employment practices discriminatory only in effect can nonetheless violate Title VII was offered by the district court in *Dewey*.[156] The Sixth Circuit rejected the application of *Sherbert* because that case "involved state, and not private action."[157] This distinction is insufficient. It had been anticipated and answered by the district court:

> In relation to *Sherbert*, one might question its relevance, since in that case there was 'state action,' while in the instant case there is only private action. That distinction would be im-

149. *See, e.g.*, EEOC Dec. 71-779 (12/21/70), CCH EEOC DEC ¶ 6180 (1970); EEOC Dec. 70-580 (3/2/70), CCH EEOC DEC ¶ 6120 (1970).

150. *See* note 20 and accompanying text *supra*.

151. 374 U.S. 398 (1963).

152. *Id.* at 404. Many Title VII actions in which an employer's failure to grant weekend time off for religious reasons is challenged as discrimination on the basis of religion are brought by Seventh-Day Adventists, since the Sabbath of that religion is observed from sundown Friday to sundown Saturday. *E.g.*, Reid v. Memphis Pub. Co., 468 F.2d 346, 347 (6th Cir. 1972); Riley v. Bendix Corp., 464 F.2d 1113, 1114 (5th Cir. 1972); Dawson v. Mizell, 325 F. Supp. 511, 512 (E.D. Va. 1971); Jackson v. Veri Fresh Poultry, Inc., 304 F. Supp. 1276, 1277 (E.D. La. 1969).

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

154. 374 U.S. at 404, *quoting* Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (emphasis added).

155. *See* notes 145-46 and accompanying text *supra*.

156. 300 F. Supp. at 74.

157. 429 F.2d at 329.

portant if this opinion were dealing with whether defendant's overtime rule is constitutional. But the issue before the court is whether the defendant has violated a federal statute—a statute which restricts the activities of private employers and does not require 'state action.' The importance of *Sherbert* to this analysis is not its holding on constitutionality, but its definition of discrimination—a definition which is equally valid whether employed to measure private or state action.[158]

The *Sherbert* decision's declaration that the unequal effect of a rule is as much discrimination as its unequal application was confirmed and extended to Title VII actions by the Supreme Court a decision rendered subsequent to *Dewey*.[159] This is the fourth reason for heavily discounting the statements in *Dewey* that Congress did not intend a uniform employer policy to be found discriminatory. In *Griggs v. Duke Power Co.*,[160] the Court ruled that the effect of private as well as public regulations can render the regulations discriminatory even though their application is uniform and in good faith. The Court stated:

> The [Civil Rights] Act [of 1964] proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity . . . [A]bsence of discriminatory intent does not redeem employment procedures. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.[161]

Although *Griggs* addressed the problems of racial discrimination,[162] many courts have seen a clear analogy to the situation in which a uniformly-applied company policy or collective bargaining agreement discriminates against employees whose religious beliefs conflict with the established rules.[163] Even the Sixth Circuit, which propounded *Dewey*, admitted in *Reid v. Memphis Publishing Co.* that

> [w]hatever doubts there may have been about the constitutionality of this regulation or its consistency with the statute have been, we believe, laid to rest by a unanimous Supreme Court in *Griggs v. Duke Power Co.* [citation omitted]. While *Duke Power* dealt with racial discrimination and our current concern is with religious discrimination, the Equal Employment Statute treats them similarly. The prohibitions against both forms of discrimination (and the exceptions thereto) are usually contained in the same sentences in the statute.[164]

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158. 300 F. Supp. at 714.

159. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

160. *Id.* at 431.

161. *Id.* at 431-32.

162. The allegation in *Griggs* was that the effect of tests required by the employer for job promotion discriminated against black employees even though the tests were administered uniformly and in good faith. *Id.* at 428.

163. Reid v. Memphis Pub. Co., 468 F.2d 346, 350 (6th Cir. 1972); Riley v. Bendix Corp., 464 F.2d 1113, 1116 (5th Cir. 1972); Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172, 178 (W.D.N.C. 1975).

164. 468 F.2d 346, 350 (6th Cir. 1972). The author of this opinion was the

After *Griggs*, the next chronological development furnishes the strongest evidence that the *Dewey* decision must be considered an inaccurate appraisal of congressional intent. Appropriately, this evidence was furnished by Congress itself. In 1972 Congress enacted an amendment[165] to the Civil Rights Act of 1964[166] that incorporated the EEOC's regulations[167] into the statute. This was done expressly to nullify the effect of *Dewey*.[168] The achievement of this congressional goal is shown by an increasing recognition in the federal courts that the rule of reasonable accommodation reflects the will of Congress not only as expressed at the time of the amendment but at the time of the original passage of the Act as well.[169] The 1972 amendment, especially when considered with the other evidence discussed above, has been nearly dispositive in favor of the rule on the question of its consistency with the Civil Rights Act.[170] Only the dicta in *Reid*[171] attacks the rule on this ground.

Hon. George Edwards, Jr. who dissented in the Sixth Circuit's 1975 decision of the same case. *See* notes 25 and 113 *supra*.

165. 42 U.S.C. § 2000e(j) (1972), *amending* 42 U.S.C. § 2000e (1964). The amendment was adopted by a unanimous vote of both houses of Congress. Riley v. Bendix Corp., 464 F.2d 1113, 1117 (5th Cir. 1972).

166. *See* note 20 and accompanying text *supra*.

167. 29 C.F.R. § 1605.1 (1967), *amending* 29 C.F.R. § 1605.1 (1966).

168. Riley v. Bendix Corp., 464 F.2d 1113, 1117 (5th Cir. 1972); Weitkenaut v. Goodyear Tire & Rubber Co., 381 F. Supp. 1284, 1288 n.6 (D. Vt. 1974). The sponsor of the amendment in the Senate, Sen. Jennings Randolph of West Virginia, remarked:

> I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments. Unfortunately, the courts have, in a sense, come down on both sides of this issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.
>
> This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts have apparently not resolved.

118 CONG. REC. 705-06 (1972). Sen. Randolph himself is a sabbatarian. *Id.* at 705. 705.

169. In Riley v. Bendix Corp., 464 F.2d 1113, 1116 (5th Cir. 1972), the court stated:

> If there were any doubt as to the effect to be given to these guidelines because of a lingering doubt as to whether they truly expressed the will of Congress, a significant event has transpired which lays to rest any such doubt. In an amendment to the Civil Rights Act of 1964 . . . .

Accord, Yott v. North Am. Rockwell Corp., 501 F.2d 398, 402 (9th Cir. 1974); Reid v. Memphis Pub. Co., 468 F.2d 346, 351 (6th Cir. 1972); Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172, 178 (W.D.N.C. 1975); Weitkenaut v. Goodyear Tire & Rubber Co., 381 F. Supp. 1284, 1288 (D. Vt. 1974); Shaffield v. Northrop Worldwide Aircr. Serv., Inc., 373 F. Supp. 937, 941 (M.D. Ala. 1974).

170. *See* note 169 *supra*.

171. 521 F.2d at 517.

Reid proposes three contentions for its argument that the rule is invalid. The first[172] is almost identical to the contention made in *Dewey*[173] that the 1967 regulations[174] were contrary to congressional intent expressed within the Civil Rights Act. The second argument[175] is that the 1972 amendment adopting the regulations as part of the Act is insufficient to establish a congressional intent for the original Act. The third argument[176] is that the decision of the United States Supreme Court in *Griggs v. Duke Power Co.*[177] does not necessitate upholding the validity of reasonable accommodation.

The dissent in *Reid* dismisses these contentions. It observes[178] that the issue of statutory consistency had already been resolved in favor of the rule by the Sixth Circuit in its previous consideration of the *Reid* case.[179] The dissent further notes[180] that no motion for reconsideration had been made. Even without these arguments, the contentions of the majority's dicta must be rejected. The first contention is answered by the same reasoning that undermined *Dewey*'s pre-1972 assessment of congressional intent.[181] The second contention is unclear, but it cannot be maintained under either of two alternative interpretations.[182] One interpretation is that the 1972 amendment and the regulations it incorporates are different from the congressional intent expressed in 1964. Since the cause of action in *Reid* arose in 1966, this is the probable meaning of the majority's assertion. If so, it is incorrect under this comment's earlier analysis[183] of what the intent of Congress was in 1964. On the other hand, if the *Reid* majority is stating that the amendment does not establish an expression of congressional intent as of 1972, this would contradict explicit statements of the amendment's sponsors[184] that an expression of intent was precisely the amendment's purpose. In addition, it would disregard a fundamental rule of construction that

> [w]here the older statutes are silent, and where the responsibility for fashioning an effective remedy must be met by the courts, they should look to the policies embodied in the remedial provisions *of the more recent statutes* as a reference in shaping remedies to the needs of the older statutes.[185]

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172. *Id.* at 518.
173. *See* note 113 *supra.*
174. 29 C.F.R. § 1605.1 (1967), *amending* 29 C.F.R. § 1605.1 (1966).
175. 521 F.2d at 520.
176. *Id.*
177. 401 U.S. 424 (1971). *See* notes 160-163 and accompanying text *supra.*
178. 521 F.2d at 524.
179. Reid v. Memphis Pub. Co., 468 F.2d 346 (6th Cir. 1972).
180. 521 F.2d at 523.
181. *See* notes 145-158 and accompanying text *supra.*
182. *See* note 108 and accompanying text *supra.*
183. *See* notes 145-158 and accompanying text *supra.*
184. *See* note 168 and accompanying text *supra.*
185. Riley v. Bendix Corp., 464 F.2d 1113, 1117 (5th Cir. 1972), *quoting* Lee v. Southern Home Sites Corp., 444 F.2d 143, 146 (5th Cir. 1971).

There is also ambiguity in the majority's third contention. If the majority is merely saying that no accommodation is required under the facts of *Reid*, arguably it is correct. If, however, the contention is that *Griggs* requires no accommodation in any case, it would have to yield to the *Griggs* holding that employment practices which are discriminatory only in effect can still violate Title VII. An effect discriminatory on religious grounds cannot be removed without an accommodation.

The foregoing analysis and the weight of authority require that the dicta offered in the *Reid* decision be given no weight in the determination of whether the rule of reasonable accommodation is and has been a valid reflection of congressional intent. The United States Supreme Court should have little difficulty in upholding the rule against a challenge on the ground of statutory inconsistency.

B. Violative of the Establishment Clause

The second issue that will be confronting the Supreme Court in *Cummins v. Parker Seal Co.*[186] is whether the imposition of the duty to reasonably accommodate the religious observances and practices of an employee is violative of the first amendment's Establishment Clause.[187] The assertion that reasonable accommodation is void on this ground is the argument that accommodation creates an impermissible preference for a particular religious belief.[188] This issue arises primarily because the rule allows Sabbatarians with low seniority[189] to avoid weekend work[190] while non-Sabbatarian col-

186. 516 F.2d 544 (6th Cir. 1975), *cert. granted*, 424 U.S. 942 (1976).

187. U.S. CONST. amend. I.

188. Cummins v. Parker Seal Co., 516 F.2d 544, 555 (6th Cir. 1975), *cert. granted*, 424 U.S. 942 (1976) (dissent); Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 628 (1971).

189. Seniority is usually the determinative factor in the assignment of desirable work shifts. Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038, 1046 (3d Cir. 1973); Dawson v. Mizell, 325 F. Supp. 511, 514 (E.D. Va. 1971). *Cf.* Shaffield v. Northrop Worldwide Aircr. Serv., Inc., 373 F. Supp. 937, 942 (M.D. Ala. 1974).

190. Several religions observe a Sabbath from sundown Friday until sundown Saturday. *E.g.*, Weitkenaut v. Goodyear Tire & Rubber Co., 381 F. Supp. 1284, 1285 (D. Vt. 1974) (New Apostolic Church); Kettell v. Johnson & Johnson, 337 F. Supp. 892, 893 (E.D. Ark. 1972) (Radio Church of God); EEOC Dec. 70-580 (3/2/70), CCH EEOC DEC ¶ 6120 (1970) (Holy Church of the Living God); *see* note 152 *supra*. (Seventh-Day Adventist). Workshifts on weekend days are generally considered undesirable. Drum v. Ware, 7 EPD ¶ 9244 (W.D.N.C. 1974); Scott v. Southern California Gas Co., 8 EPD ¶ 9450 (C.D. Cal. 1973).

leagues with equally low seniority must accept such work[191] and even those with sufficient seniority to earn weekends off must nonetheless report during such periods to replace those absent.[192] This issue split the Sixth Circuit in its adjudication of the *Cummins* case. The majority upheld the rule of reasonable accommodation against this challenge.[193]

The first amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[194] These proscriptions have been interpreted to mean that government must be neutral both between religious believers and non-believers and between particular religious groups.[195] Specifically, the United States Supreme Court has stated in *Committee for Public Education v. Nyquist*[196] that to avoid unconstitutionality under the Establishment Clause a law "must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion, . . ."[197] Both the majority and the dissent in *Cummins* apply this tripartite test[198] in reaching opposite conclusions on the constitutionality of the reasonable accommodation rule. An analysis of the two arguments will reveal that the rule should be upheld on this issue.

The first test under the *Nyquist* standards indicates that the statute "must reflect a clearly secular legislative purpose."[199] The majority offers a two-pronged argument in contending that reasonable accommodation has such a secular purpose. First, it argues that such secular purpose exists in that the rule was intended to "put teeth into"[200] the proscriptions on religious discrimination in force when the rule was promulgated.[201] Second, the majority declares that the rule has other secular purposes of a pragmatic nature.[202] These pragmatic considerations include a legislative recognition that certain

191. Cummins v. Parker Seal Co., 516 F.2d 544, 555 (6th Cir. 1975), *cert. granted*, 424 U.S. 942 (1976) (dissent).

192. Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 628 (1971).

193. 516 F.2d at 551.

194. U.S. CONST. amend. I.

195. *E.g.*, Daniel v. Waters, 515 F.2d 485, 490 (6th Cir. 1975). Neutrality has been described as "the heart of the religion clauses of the First Amendment." Cummins v. Parker Seal Co., 516 F.2d 544, 555 (6th Cir. 1975), *cert. granted*, 424 U.S. 942 (1976) (dissent).

196. 413 U.S. 756 (1973).

197. *Id.* at 772-73.

198. 516 F.2d at 551 and 556.

199. *See* note 197 and accompanying text *supra*.

200. 516 F.2d at 551.

201. The proscriptions were effectuated by 29 C.F.R. § 1605.1 (1967), *amending* 29 C.F.R. § 1605.1 (1966).

202. 516 F.2d at 552.

persons will not compromise their religious beliefs, no matter what the consequences might be.[203] These persons should not be punished for following their consciences, for to do so would impair the ideals of a democratic society.[204]

The dissent takes exception to both of the majority's arguments. It states that while the purpose of the Civil Rights Act of 1964[205] in eliminating discrimination on the basis of religion was clearly secular, that purpose was defeated by the 1972 amendment to the Act.[206] The amendment's incorporation of the reasonable accommodation rule is said to have resulted in discrimination by giving preference to those accommodated. The dissent answers the majority's second contention by asserting that even without a requirement of reasonable accommodation persons whose religious observances conflict with work rules would not be punished for obeying their consciences. Instead, the dissent feels that the employee and employer would resolve the matter privately. Therefore, if Congress sought to protect the consciences of those whose beliefs conflict with job requirements, it sought only to protect particular religious views, a clearly non-secular purpose.

The minority position is in error on two points. Accommodation does not create a preference of one religious belief. Rather, it preserves equality of all religious (and non-religious) beliefs by permitting those whose observances conflict with job requirements to be able to enjoy such observances equally with those whose observances (or lack thereof) do not so conflict. This is the very neutrality which the Establishment Clause demands.[207] Furthermore, without a statutory requirement of accommodation, employers and individual

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203. 516 F.2d at 552. The court analogized to Gillette v. United States, 401 U.S. 437 (1971), in which an individual claiming draft exemption as a conscientious objector alleged that the statute controlling such determinations violated the Establishment Clause by granting exemption to adherents of religions which opposed all wars but not to those which opposed only "unjust" ones. *Gillette* held that the exemption rule as applied was supported by pragmatic, secular considerations including the recognition that certain persons simply cannot be trained for combat because of their deep abhorrence of war on religious grounds. *Id. Cf.* Otten v. Baltimore & O. R. Co., 205 F.2d 58, 61 (2d Cir. 1953), in which Judge Learned Hand stated:

> We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

204. 516 F.2d at 552.

205. *See* note 20 and accompanying text *supra.*

206. 516 F.2d at 556.

207. *See* note 195 and accompanying text *supra.*

employees would not resolve matters privately with any semblance of equality. There would be nothing to restrain an employer from demanding adherence to uniform rules of employment.[208] Thus, reasonable accommodation resolves this Establishment Clause issue "in a practical framework"[209] and therefore has a pragmatic non-secular purpose.

The second test for validity under the Establishment Clause is that a statute "must have a primary effect that neither advances nor inhibits religion."[210] The majority in *Cummins* upholds the rule of reasonable accommodation under this test with two arguments. It states first that the primary effect of the rule is not the advancement of religion but rather the assurance of job security for those whose religious practices conflict with uniform employment regulations.[211] This is because the rule prevents imposition of even facially neutral rules upon employees who would suffer discrimination thereby, except when undue hardship is shown.[212] The majority's second point is that the rule does not mandate financial support for any religion,[213] a characteristic that has been termed a "primary evil."[214] The majority contends that the sponsors of the 1972 amendment[215] anticipated that the rule might result in greater attendance and concomitant financial benefits to particular religions when applied to Sabbatarians seeking Saturday off.[216] This result is permissible, first, because the rule does not differentiate between religions but rather is "applicable to *all* members of *all* religious faiths who desire Saturday as the Sabbath;"[217] and second, because a statute is not rendered violative of the Establishment Clause merely because it results in some "incidental or indirect" benefit[218] to a religious institution.

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208. The argument might be proposed that the employee's union would quickly assert its power to insure equality for him in reaching an agreement with the employer. A union does have the obligation to represent all of its members, even those constituting a minority of its total. *E.g.*, Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979 (D.C. Cir. 1973). Since accommodation of a sabbatarian with a weekend observance is often contrary to the wishes of most employees with more seniority (*see* notes 189-190 and accompanying text *supra*), *query* how effective union sanctions such as a strike call would be. Even discipline against non-participants would only jeopardize the union's status as bargaining agent for the employees in the future.

209. Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172, 180 (W.D.N.C. 1975).

210. *See* note 197 and accompanying text *supra*.

211. 516 F.2d at 552.

212. *Id.*

213. *Id.* at 553.

214. *Id.* at 552, *citing* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

215. 42 U.S.C. § 2000e(j) (1972), *amending* 42 U.S.C. § 2000e (1964).

216. 516 F.2d at 553.

217. *Id.*

218. *Id.*

The dissent also offers two arguments. The first is that the rule of reasonable accommodation discriminates between religious and non-religious beliefs.[219] The allegation is that only those who adhere to religious views benefit by the rule. Others not only receive no benefit but may have to take up the slack for those who do. The dissent's second point is that the rule also discriminates *among* religions, because the only religious beliefs subject to the rule's relief are those whose observance creates a conflict with work requirements.[220]

The majority view must prevail on this issue. The rule of reasonable accommodation does not advance one religious belief to the detriment of other beliefs, religious or non-religious. Rather, it allows all religious and non-religious beliefs to be enjoyed equally by preventing *any* from becoming the object of sanctions by an employer. Thus its primary effect is to guarantee job security.[221] Because reasonable accommodation merely preserves the opportunity to observe one's beliefs, religious or non-religious, it does not favor any one view. It simply permits all beliefs to be observed equally. This is precisely what the Constitution demands:

> We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs or creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma.[222]

By preserving the opportunity for an employee to observe his religion without jeopardizing his employment status, the rule of reasonable accommodation might indeed have the effect anticipated by the *Cummins* majority of allowing a religious institution to increase its membership and income. The financial benefits thereby gained by the institution, however, would be incidental to the job security assured the individual desiring to observe his religion. The majority is correct in ruling that a statutory conferral of an incidental benefit upon a religious institution is insufficient to bring a statute within the proscriptions of the Establishment Clause.[223]

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219. *Id.* at 558.
220. *Id.*
221. *Id.* at 552; *accord*, Hardison v. TWA, 375 F. Supp. 877, 888 (W.D. Mo. 1974), *rev'd in part on other grounds*, 527 F.2d 33 (8th Cir. 1975).
222. Zorach v. Clauson, 343 U.S. 313, 314 (1952), *quoted in* Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172, 180 (W.D.N.C. 1975).
223. Hardison v. TWA, 375 F. Supp. 877, 888 (W.D. Mo. 1974), *rev'd on other grounds*, 527 F.2d 33 (8th Cir. 1975).

The third test that a statute must meet to be valid under the Establishment Clause is the avoidance of excessive government entanglement with religion.[224] The majority in *Cummins* states that the governmental bodies charged with the enforcement of reasonable accommodation, the courts and the EEOC, have but one function: to determine whether a reasonable accommodation is available and, if so, whether it would result in an undue hardship.[225] It concludes that the resolution of these questions "certainly does not necessitate any government entanglement with religion."[226] The majority's rationale is that any inquiry into the genuineness of a religious observance would not exceed that presently permitted in the determination of the genuineness of claims for property tax exemptions by religious institutions.[227] The dissent counters by stating that enforcement of the rule of reasonable accommodation would not only require governmental inquiry into the sincerity with which religious beliefs are held by persons seeking accommodation but would also require impermissible governmental value judgments of the merits of a claimed religious observance.

Once again the argument of the majority upholding reasonable accommodation is more persuasive. The dissent is correct in its statement that governmental inquiry for purposes of judging the relative merits of any religious belief or observance is clearly illegal. The dissent is incorrect, however, in stating that mere determinations whether a belief or observance is actually that of *some* religion and that the individual is sincere in his belief are illegal. These latter determinations are extremely limited and are solely for the purpose of protecting an employer or union from an employee who fraudulently claims "religious observance" to avoid weekend shifts or other unpopular work. As so limited, these determinations are proper. The mere evaluation of the sincerity with which religious beliefs are held does not constitute an excessive entanglement of government with religion.[228]

C. *Conflicts Between Reasonable Accommodation and Protected Employee and Union Interests*

1. Conflict with Seniority Privileges under the Civil Rights Act.—A provision within the Civil Rights Act presents a major chal-

224. *See* note 197 and accompanying text *supra*.
225. 516 F.2d at 553-54.
226. *Id.* at 554.
227. *Id.*
228. There is a clear analogy between evaluations of the sincerity of an individual's beliefs for purposes of accommodation and for purposes of acquiring conscientious objector status. *See* Gillette v. United States, 401 U.S. 437 (1971).

lenge to the scope of the application of reasonable accommodation. That provision states that discriminatory conduct otherwise prohibited by the Act is permissible if done "pursuant to a bona fide seniority . . . system."[229] The question arises about which is to take precedence: reasonable accommodation or seniority. The court alluded to this issue in *Hardison*[230] but did not address it. Because it was not directly raised in *Cummins*, perhaps the Supreme Court will make no judgment upon it. The issue is crucial, however, since the effectiveness of the rule of reasonable accmmodation will be nullified if the seniority savings clause is held paramount. Most workers prefer weekends off,[231] and the fact situation in which accommodation has most often been demanded is that of an employee who lacks sufficient seniority to earn weekends off but nevertheless requests that time for religious reasons.[232]

A literal interpretation of the seniority provision would require that it supersede the rule of accommodation. This literal interpretation should not be made. Reasonable accommodation should be held superior to seniority. This is supported by several considerations. First, it cannot be assumed that Congress enacted the 1972 amendment incorporating the rule of reasonable accommodation into the Civil Rights Act[233] without intending the rule to apply in the situation in which it is most at issue. Second, those employees who lose weekend time off so that others' religious observances are accommodated have no valid claim. These employees may attempt to allege a deprivation of a property right without due process, in violation of the fifth and fourteenth amendments.[234] If the right to reasonable accommodation is held to be part of the free exercise of religion

229. 42 U.S.C. § 2000e-2(h) (1964). This provision is popularly known as the Mansfield-Dirksen Amendment. Shaffield v. Northrop Worldwide Aircr. Serv., Inc., 373 F. Supp. 937, 942 (M.D. Ala. 1974). The provision reads in relevant part as follows:

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

230. 527 F.2d at 41-42.

231. *See* notes 189-90 *supra.*

232. 1 CCH EMP. PRAC. GUIDE 117 (1972).

233. 42 U.S.C. § 2000e(j) (1972), *amending* 42 U.S.C. § 2000e (1964).

234. U.S. CONST. amends. V, XIV; *cf.* Colbert v. Brotherhood of Ry. Trainmen, 206 F.2d 9, 13 (9th Cir. 1953), *quoted in* Wicks v. Southern Pac. Co., 121 F. Supp. 454, 457 (S.D. Cal. 1954), *aff'd*, 231 F.2d 130 (1956).

guaranteed by the first amendment, however, a situation of conflicting constitutional rights is presented. Accommodation should prevail. Deprivation of accommodation would destroy an individual's right to exercise his religion when it conflicts with rules imposed by his employer or union. Denial of one element of seniority rights, the right to choose particular times off when another employee requests such time for religious purposes, is not as serious an infringement of rights. Moreover, loss of this aspect of seniority is minimized because it can be shared[235] by all those with the seniority level immediately higher than the employee seeking accommodation. Even those employees would not have to bear the burden at all once new employees occupy that low seniority level.

A third reason why reasonable accommodation should prevail over seniority is based on precedent. The United States Supreme Court has said that a union has the affirmative duty to represent all of its members, even those constituting a minority of the total membership.[236] This duty has been extended to negotiations for a collective bargaining agreement.[237] Therefore, unions will have to include provisions in a negotiated collective bargaining agreement that the use of seniority in the assignment of work shifts must yield to sincere claims for accommodation. Claims by other union members who must fill in for accommodated members are answered by the analysis in the preceding paragraph.[238]

2. *Subordination to Union Security Clauses.*—Another difficult question concerning the rule of reasonable accommodation is raised when an employee refuses on religious grounds to either join a labor union or pay its dues as required by a union security clause of a collective bargaining agreement.[239] The issue arises when the union demands that the employer discharge the employee in accord with the agreement.[240] For at least two decades judicial decisions, including

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235. "Rotation" of the burden on the other employees caused by accommodation has been suggested in several cases. *E.g.*, EEOC Dec. 70-670 (3/30/70), CCH EEOC DEC ¶ 6141 (1970).

236. *See* note 208 *supra.*

237. Robinson v. Lorillard Corp., 444 F.2d 791, 799 (5th Cir. 1971); Hardison v. TWA, 375 F. Supp. 877, 883-84 (W.D. Mo. 1974), *rev'd on other grounds*, 527 F.2d 33 (8th Cir. 1975).

238. *See* notes 234-35 and accompanying text *supra.*

239. Seventh-Day Adventists hold this view because "a church member must love his neighbor as himself and that since a church member's employer is his neighbor he cannot join in such activities of a labor union such as strikes and picketing without violating the commandment to love his neighbor." Cooper v. General Dynamics, Convair Aerosp. Div., Fort Worth Oper., 378 F. Supp. 1258, 1260 (N.D. Tex. 1974). Other religions forbid membership in any type of secular organizations, on the Biblical admonition that "Be ye not unequally yoked together with unbelievers. . . ." Wicks v. Southern Pac. Co., 231 F.2d 130, 132 n.2 (9th Cir. 1956), *quoting* II CORIN. VI, 14.

240. *See* note 13 and accompanying text *supra.*

those of the United States Supreme Court, have held that the first amendment does not give an employee the right to disregard union demands for membership or dues payment pursuant to a union security clause.[241] The rationale of these decisions is that the public interest in a strong union and consequently the free flow of commerce and the avoidance of industrial strife supersedes public interest in the free exercise of religion.[242] Under Title VII of the Civil Rights Act,[243] however, reasonable accommodation is required in these circumstances. The EEOC has made the express distinction:

> We are aware of the First Amendment cases holding that when religious practices come into conflict with labor practices authorized by statute, a balancing of the interests involved requires that free exercise of religion yield, in part, to the Congressionally supported principle of the union shop [citation omitted]. These cases involve fact situations virtually identical to that presented here—the refusal of a Seventh-Day Adventist to join a labor organization because of his religious convictions in the face of a union shop clause in the collective bargaining agreement. But these are not Title VII cases. * * * In those Title VII cases where an employee refused to work on the Sabbath, in conflict with rules or policies of the employer, an attempt at reasonable accommodation by the employer has been required. . . .[244]

The courts have split on this question. In *Yott v. North American Rockwell Corporation*[245] the Ninth Circuit supports the rationale of the EEOC requiring reasonable accommodation.[246] A district court decision[247] of the Fifth Circuit takes the opposite view. The reasoning of the latter case is that those seeking to avoid union dues are avoiding a "tax"[248] that supports collective bargaining activities from which they receive benefits. Moreover, union dues are seen as essential to the preservation of peace between "neighbors," a peace that at least one religious group deems unattainable if unions exist.[249]

Reasonable accommodation should be upheld in this situation. It has been shown that Congress intended Title VII to prevent discrimi-

241. Railway Employees' Dep't v. Hanson, 351 U.S. 225, 233 (1956); *accord*, Yott v. North Am. Rockwell Corp., 501 F.2d 398, 403 (9th Cir. 1974); Linscott v. Millers Falls Co., 440 F.2d 14, 18 (1st Cir. 1971).
242. *Id.*
243. *See* note 20 and accompanying text *supra.*
244. EEOC Dec. 74-107 (4/2/74), CCH EEOC DEC ¶ 6430 (1974).
245. 501 F.2d 398 (9th Cir. 1974).
246. *Id.* at 403.
247. Cooper v. General Dynamics, Convair Aerosp. Div., Fort Worth Oper., 378 F. Supp. 1258 (N.D. Tex. 1974).
248. *Id.* at 1261.
249. *Id.* at 1260.

nation in effect as well as in purpose.[250] Since the imposition of union membership upon those whose religion forbids such membership is discriminatory in effect it should be forbidden by Title VII. In addition, there is no reason for not requiring unions to accommodate employees with religious scruples against joining on the same basis as employers are compelled to accommodate employees with analogous scruples. Surely the loss of potential dues from a few employees will not impair a union's bargaining power. "Grumbling" among union members should be tolerated by unions in the same manner as it is tolerated by employers under present law.[251] Where the number of adherents forbidden to join or pay dues is such that the union's bargaining position might be weakened, the union should be permitted relief only if it can prove "undue hardship" on the same basis as any employer.

IV. Conclusion

This comment anticipates the Supreme Court's decision of *Cummins v. Parker Seal Company*.[252] It is strongly recommended to the Court that it uphold the rule of reasonable accommodation. Analysis of the challenges against the rule demonstrates conclusively why the rule is valid. Its consistency with congressional intent has been found repeatedly in express statements not only by the courts but by Congress itself. Application of the strict three-legged *Nyquist* tests shows that the rule is valid under the Establishment Clause. A balancing of interests threatened by the rule dictates that these interests must be subordinated to those rights preserved by reasonable accommodation.

Interference with the right of any person to worship as he pleases cannot be permitted except in the clearest of cases. The evidence offered in this comment makes the case against reasonable accommodation only a tenuous one. The Court is urged to follow its own precedents and those of Congress in upholding reasonable accommodation.

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250. *See* notes 145-85 and accompanying text *supra*.
251. *See* notes 75-76 and accompanying text *supra*.
252. 516 F.2d 544 (6th Cir. 1975), *cert. granted*, 424 U.S. 942 (1976).