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Reconciling Religious Rights & Responsibilities

Barbara L. Kramer*

I. INTRODUCTION

In 1982, in *Wessling v. Kroger Co.*,¹ a United States district court held that an employee's request for time off from work to set up and decorate a church hall for a children's Christmas play was not a religious observance protected by Title VII of the Civil Rights Act of 1964 [hereinafter Title VII].² Although the court recited the statutory definition of religion³ before announcing its ruling, it failed to refer to other authority or to further explain why the plaintiff's activities were "social in nature . . . [and therefore] a family obligation, not a religious obligation."⁴

The *Wessling* court also concluded that the employer met its duty to provide a reasonable accommodation to its employee when it promised to make an effort to release her from work early on the play's performance day.⁵ The court noted, however, that the employee failed in her responsibility to "accommodate her work schedule."⁶ This remark is somewhat curious because Title VII requires employers, rather than employees, to accommodate religious observances and practices.⁷

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1. *Wessling v. Kroger Co.*, 554 F. Supp. 548, 552 (E.D. Mich. 1982).

2. 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. II 1996).

3. *See Wessling*, 554 F. Supp. at 552. Section 703(j) of Title VII states that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e-(j).

4. *Wessling*, 554 F. Supp. at 552.

5. *See id.*

6. *See id.* (finding that because the defendant did accommodate plaintiff's work schedule, the defendant did not violate Title VII).

7. *See* 42 U.S.C. § 2000e-(j).

Title VII, the comprehensive federal statute that prohibits employment discrimination based on religion,⁸ at best defines religion in a circular fashion.⁹ In a society where the major religious denominations are well established and easily identified,¹⁰ the lack of a

8. *See id.* Section 703(a)(1) makes it unlawful for a covered employer “to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” *Id.* § 2000e-2(a)(1).

Section 703(a)(2) deems it unlawful for an employer “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-(a)(2).

The government has enacted many laws prohibiting employment discrimination based on religion or creed. *See, e.g.*, Exec. Order No. 11,246, 30 Fed. Reg. 12, 319 (1965) (requiring government contractors and other individuals with federally assisted construction contracts to refrain from religious discrimination); 41 C.F.R. § 60-50.3 (1998) (requiring same contractors and individuals to provide reasonable accommodations for religious needs); Government Employee Rights Act of 1991, 5 U.S.C. §§ 2301(b)(2), 2302(b)(1)(A), 5550a (1994) (protecting federal civil service employees from religious discrimination and authorizing them to work overtime to compensate for absences for religious observances, if their presence is not necessary to efficiently carry out the mission of the employing federal agency). There are also a number of laws covering recipients of federal aid, such as the Job Training Partnership Act, 29 U.S.C. § 1577 (1994), and the Child Care and Development Block Grant program, 42 U.S.C. § 9858(a)(3)(A) (1994); and many state anti-discrimination statutes. *See, e.g.*, OHIO REV. CODE ANN. § 4112.01 (West 1994). Finally, although § 1981 does not encompass discrimination due to religion, Jews may allege race discrimination under that statute. *See* 42 U.S.C. § 1981 (1994); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (noting the concept of race within the meaning of the statute prohibits religious discrimination against Jews as an ethnic group). *But see* *Wald v. International Bhd. of Teamsters, Local 357*, 25 Empl. Prac. Dec. (CCH) ¶ 31,497 (C.D. Cal. 1980) (holding that Jews are not protected by § 1981).

9. *See* 42 U.S.C. §§ 2000e-(j). Instead of asking what *religion* is, the query should be rephrased as to what constitutes *religious* observance, practice, and beliefs. *See also infra* note 23.

10. About 85% of American adults characterize themselves as Christians. *See* STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 17 (1993). The early American colonists were primarily Protestant Christians, albeit with a definite Roman Catholic and Jewish presence. By the nineteenth century, there was a de facto Protestant establishment in the United States, and Christianity was prevalent in government activities because it pervaded American culture. *See* *Vidal v. Girard’s Executioners*, 43 U.S. 127, 162 (2 How. 1844) (noting Christianity is “part of the common law of Pennsylvania”); *People v. Ruggles*, 8 Johns. 290, 295 (N.Y. Sup. Ct. 1811) (“[W]e are a Christian people, and the morality of the country is deeply engrafted upon Christianity”); *see also* THOMAS C. BERG, *THE STATE AND RELIGION IN A NUTSHELL* 35-62 (1998) (discussing establishment of Christianity in early America). Nonetheless, since the 1950s, government has sought to foster a religious mainstream that expanded from Protestantism to include Catholicism and Judaism in a general “Judeo-Christian” tradition. *See id.* at 65. However, as Stephen L. Carter discussed, the Judeo-Christian mainstream’s treatment of

statutory definition presents very few problems.¹¹ Rather, courts and employers can usually recognize religious observances, even if they cannot define the concept of religion in exact terms.¹²

Recent legal and demographic developments increase the need to clarify this informal “know-it-when-I-see-it” analysis. Accordingly, additional anti-discrimination and anti-harassment legislation has been both proposed and passed. At the same time, the United States population has grown more religiously diverse,¹³ and the degree of

Native Americans and Krishna Conscious followers has been less than embracing. See CARTER, *supra*, at 9. Specifically, Carter opined that “contemporary America is not likely to enact legislation aimed at curbing the mainstream Protestant, Roman Catholic, or Jewish faiths.” *Id.* See generally LEO PFEFFER, RELIGION, STATE AND THE BURGER COURT 59-112, 171-97, 235-56 (1984) (discussing religion and the law in the context of schools, family, and employment).

11. See Teresa Brady, *The Legal Issues Surrounding Religious Discrimination in the Workplace*, 44 LAB. L.J. 246, 246 (1993). “For well-known and widely-followed religions, application of the term [‘religion’] is not so much a problem. The disputes over whether a religion is a religion tend to occur when the religion in question is somewhat personal or less commonly known.” *Id.*

12. See *infra* Part II.A. Working definitions of religion rarely appear in court decisions. See Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 749 n.141 (1996) (discussing courts’ reluctance to define religion). One possible working definition of religion is “a tradition of group worship (as against individual metaphysic) that presupposes the existence of a sentence beyond the human and capable of acting outside the observed principles and limitations of natural science, and, further, a tradition that makes demands of some kind on its adherents.” *Id.* (quoting CARTER, *supra* note 10, at 17).

Another approach, which simply describes, rather than defines religion, may be more fruitful.

To describe something is to say what it generally looks like and how it usually works. It is not to say what its innermost realities are, and it is not to say definitely what separates these realities from every other object in the world. Still, describing a thing can tell us much about what it is. Looking at the past and present appearances of religion can tell us what functions and forms go along with it. Learning to recognize these functions and forms helps us know when we are looking at religion.

CATHERINE L. ALBANESE, AMERICA: RELIGIONS AND RELIGION 3 (2d ed. 1992). The various religions may be described in the context of dealing with boundaries: territorial boundaries, the limits of our own bodies, and temporal or life-cycle boundaries. See *id.* at 4-5. “Religion throughout the ages has tried to answer the continuing question of ‘who am I?’” *Id.* at 6. Religion shows people how to live well within boundaries and helps people to transcend boundaries of everyday concerns and culture, to move toward God. See *id.* at 3-6. Religion eludes definition, which “tells where some reality ends,” because it thrives both within and outside of boundaries. *Id.* at 3. It “encompasses all of human life”; it lends itself more to description. *Id.* at 3.

13. The plight of a Sikh applicant who was denied employment due to his beard, worn in accordance with his religion’s dictate not to cut hair, was described in a recent periodical. See David Lauter, *Fulfilling Workers’ Religious Needs Is a Complex Issue for Employers*, PLAIN DEALER, Nov. 29, 1997, at 13A, available in 1997 WL 17354402. An employee who practices the Muslim faith and who could not get permission to change

variation within many religious groups has similarly increased.¹⁴ Religion classes, prayer circles, and the wearing of religious garb occur in the workplace more and more frequently.¹⁵ These events, while neutral in themselves, blur the line between religious obligation and religious preference, create confusion concerning the duty to accommodate, and ultimately give rise to more cases alleging religious discrimination. This is especially true where fact patterns resemble those in *Wessling*.¹⁶

This article discusses the statutory and judicial construction of religion within Title VII, derived in large part from First Amendment jurisprudence.¹⁷ The article then analyzes religious obligation and

his scheduled night duty during the month of Ramadan, the holiest month of his religion, was featured in a newspaper article describing his struggle. See Bill McAllister, *On Workplace Religion Guidelines, Varying Degrees of Faith*, WASH. POST, Aug. 15, 1997, at A23. Another article reported the story of a skin care salon's denial of a Jewish employee's request for time off to observe the Yom Kippur holiday. See *Religious Bias Cases Are Flourishing*, MANAGING RISK, Oct. 1997, at 1, available in LEXIS, News Library, Curnws File.

14. Mainstream American religious groups include:

Christian and Jewish organizations and their adherents. It is comprised of the Catholic Church, the major Protestant denominations and their principal offshoots [Lutherans, Episcopalians, Methodists, Disciples of Christ, Baptists, Presbyterians, United Church of Christ, the Churches of Christ, the United Church Congregationalists, and the Reformed Church in America], the three nationally prominent movements within Judaism (Orthodoxy, Conservatism, and Reform), and . . . Eastern Orthodoxy.

AMERICA'S ALTERNATIVE RELIGIONS 2 (Timothy Miller ed., 1995). There is now a substantial "charismatic movement" in the Catholic Church and in most traditional Protestant churches. See *id.* at 1. Furthermore, the Reconstructionist variant of Judaism has grown to the point where it may have achieved recognition as a fourth mainstream branch. See *id.* at 3. See generally WILLIAM B. WILLIAMSON, AN ENCYCLOPEDIA OF RELIGIONS IN THE UNITED STATES 9-11 (1992) (examining the different types of religion practiced in the United States).

15. See Suzanne Cassidy & Mary Warner, *Workers Bring Religion to Job*, PLAIN DEALER, Dec. 16, 1997, at 8E, available in 1997 WL 6628154 (discussing workplace prayer groups); David W. Chen, *Workplace Religion Classes on the Rise*, PLAIN DEALER, Nov. 29, 1997, at 13A, available in 1997 WL 17354399 (discussing Torah and Bible study groups meeting during lunch hour at corporations like Microsoft and Boeing).

16. In general, the number of religious discrimination and harassment charges filed with the federal government rose from 1,192 in 1991 to 1,709 in 1997. See Stephanie Armour, *Religion, Workplace Collide: Conflict Grows Between Bosses, Devout Workers*, USA TODAY, Nov. 21, 1997, at 1B. Charges of religious discrimination filed with the U.S. Equal Employment Opportunity Commission alone skyrocketed 41.3 percent, from 941 in 1991 to 1,330 in 1996. See Timothy Burn, *Religious Rights of Workers to Be Mulled*, WASH. TIMES, October 22, 1997, at B8; see also Sondra Meyer Raile, *Religious Discrimination Is a Growing Workplace Concern*, KAN. CITY BUS. J., Jan. 26, 1998, at 20, available in 1998 WL 9196849.

17. See *infra* Part II.A.

religious preference in case law, focusing on the *Wessling* decision.¹⁸ Finally, this article advocates that as employee rights to religious expression in the workplace receive enhanced recognition and protection, both employer and employee accommodation responsibilities must be clearly delineated and reconciled to ensure compliance with the law.¹⁹

II. RELIGION WITHIN THE MEANING OF TITLE VII

Religion is defined as:

Man's relation to divinity, to reverence, worship, obedience, and submission to mandates and precepts of supernatural or superior beings. In its broadest sense [it] includes all forms of belief in the existence of superior beings exercising power over human beings by volition, imposing rules of conduct, with future rewards and punishments. [It is the] bond uniting man to God, and a virtue whose purpose is to render God worship due him as source of all being and principle of all government of things.²⁰

While fairly comprehensive, this definition does not approach the complexity and, at times, irony of the meaning of religion under Title VII.

This Part will explore the statutory construction of the term "religion," the requirement that a belief must be sincerely held, and the conundrum posed by personal and religious preferences.

A. *Statutory Construction*

When Congress passed Title VII in 1964, it did not define the term "religion."²¹ In 1967, the Equal Employment Opportunity Commission ["EEOC"]²² issued guidelines that asserted that Title VII

18. See *infra* Part III.

19. See *infra* Part IV.

20. BLACK'S LAW DICTIONARY 1161 (5th ed. 1979).

21. See MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.26, at 256 (1988) (discussing the absence of a statutory definition of religion under Title VII as originally enacted); BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 206 (2d ed. 1983). See generally Thomas D. Brierton, *An Unjustified Hostility Toward Religion in the Workplace*, 34 CATH. LAW. 289, 297-300 (1991) (discussing Supreme Court efforts to define religion).

22. Section 705 of Title VII created the Equal Employment Opportunity Commission. See 42 U.S.C. § 2000e-4 (1994). The EEOC has the power to prevent persons from engaging in discriminatory employment practices made unlawful by Title VII. See *id.* § 2000e-5. To this end, the EEOC may utilize regional, state, local, and other agencies, both public and private, and individuals; pay witnesses whose depositions are summoned; pay mileage fees as are paid to witnesses in the courts of the United States; furnish technical assistance upon request to persons subject to Title VII to further their compliance with the law; make technical studies as appropriate to effectuate the

protected both religious beliefs and religious practices, and that employers have a duty to make reasonable accommodation for those practices.²³ Whenever a court decision raised doubt as to whether the statute extended beyond discrimination based on membership in a religious faith,²⁴ Congress amended the statute to resolve the matter.²⁵

While Title VII does not contain a precise definition of religion, organized faiths such as the Roman Catholic Church, Protestant denominations, and Jewish, Islamic, Hindu, and Buddhist groups, are necessarily included because of custom, convention, and demographics—but especially because they are established and easily recognized.²⁶ This reasoning also leads to the inclusion of smaller and more obscure churches and sects within the mainstream religions, such as the various Eastern Orthodox churches, the Methodist Church, and Hasidic Jews.²⁷ Many small, unorthodox, and often nameless religious groups also come under the broad conceptual umbrella of “religion” within the meaning of the statute.²⁸

purposes and policies of the law; intervene in civil actions brought by aggrieved parties against private respondents; and serve, investigate, and conciliate charges of employment discrimination. See 42 U.S.C. §§ 2000e-4(g)(1) to 2000e-4(g)(6), 2000e-5(b). In addition to Title VII, the EEOC enforces and interprets the Equal Pay Act of 1963, 29 U.S.C. §§ 206-262 (prohibiting wage disparities based on gender); the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (prohibiting employment-related discrimination based on age for persons forty years old and older); Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 1201-2213 (1990) (prohibiting job discrimination based on disability).

23. These guidelines introduced the reasonable accommodation theory of discrimination. They did not, however, attempt to define religion; rather, they referred to “religious needs,” “religious beliefs,” and “religious practices.” See 29 C.F.R. § 1605.1 (1967).

24. See *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by equally divided court*, 402 U.S. 689 (1971) (determining that discharging an employee who refused to work overtime on Sundays or find a replacement was not actionable as religious discrimination). At the district court level, Dewey relied on section 1605.1 of the 1967 EEOC guidelines. See *id.* at 329-30. The guidelines provide that an employer may terminate an employee who observes the Sabbath or another religious day of the week, only when undue hardship is shown. See 29 C.F.R. § 1605.1 (1968). Examples of undue hardship include an employer's inability to find anyone else to work. See *Dewey v. Reynolds Metals Co.*, 300 F. Supp. 709, 712 (W.D. Mich. 1969), *rev'd.*, 429 F.2d 324.

25. Specifically, section 703(j) was added as part of the 1972 amendments. See 42 U.S.C. 2000e-(j); *supra* note 3 (discussing the text of section 703(j)).

26. See *PLAYER*, *supra* note 21, at 256 (discussing the definition of religion).

27. See *id.* (noting that a 1996 EEOC guideline is broad in the religious beliefs and practices covered under the Act).

28. See *id.* at 257 (recognizing that religion, as discussed by the Supreme Court and the EEOC, includes moral or ethical beliefs about what is right or wrong).

The EEOC's view of religion is expansive. The view is similar to the United States Supreme Court's adjudicatory approach to constitutional issues that arise under the First Amendment.²⁹ In short, this First Amendment approach requires government neutrality between religion and religion, and between religion and non-religion.³⁰ The EEOC revised its *Guidelines on Discrimination Because of Religion* in 1980 to include spirituality.³¹ Specifically, the Guidelines provided that religion was considered to include:

[M]oral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.³²

To the contrary, religion within the meaning of Title VII does not presuppose a belief in God or a deity.³³ Nevertheless, "a religious belief excludes mere personal preference grounded upon a non-theological basis, such as personal choice deduced from economic or social ideology. Rather, it must consider man's nature or the scheme of his existence as it relates in a theological framework."³⁴

29. See, e.g., *United States v. Seeger*, 380 U.S. 163, 176 (1965) ("A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying . . . comes within the statutory definition"). A plurality of the Court subsequently confirmed the *Seeger* decision in *Welsh v. United States*, 398 U.S. 333, 335 (1970). The dissent in *Welsh* opposed this expansive view of religion on the grounds that it granted a benefit (for example, exemption from the draft) to a class of individuals to whom Congress had expressly denied exemption. See *Welsh*, 398 U.S. at 367 (White, J., dissenting). "We have said that neither support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment." *Id.* at 372 (White, J., dissenting).

30. See *Cummings v. Parker Seal Co.*, 516 F.2d 544, 551-52 (6th Cir. 1975), *aff'd by an equally divided court*, 429 U.S. 65 (1976), *vacated*, 433 U.S. 903 (1977) (holding that an employer must make reasonable accommodation for an employee to observe the Sabbath).

31. See EEOC Guidelines on Discrimination Because of Religion, 45 Fed. Reg. 72,612 (1980) (codified in scattered sections of 29 C.F.R. §1605).

32. *Id.*

33. See PLAYER, *supra* note 21, at 257 (discussing how a belief in a "God" is not necessary, but the religious belief must be grounded in more than personal choice).

34. *Edwards v. School Bd. of Norton, Va.*, 483 F. Supp. 620, 624 (W.D. Va. 1980), *vacated in part*, 658 F.2d 951 (4th Cir. 1981) (holding that an employee's belief that she had to refrain from work for an eight-day period in order to attend a regional Feast of Tabernacles was a bona fide religious practice even though her church did not require her to abstain from all work during this period); *accord Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978) (concluding that religious observances and practices extend beyond those that are mandated or prohibited by a tenet of the religion); *Yott v. North*

Consequently, an ideology that contains absolutely no religious or moral aspects, regardless of the strength with which it is held, will not qualify as a religious belief, observance, or practice.³⁵

Similarly, predominately social and political beliefs do not rise to the level of religion.³⁶ Section 703(f) of Title VII specifically excludes Communism as a basis entitled to protection from discrimination.³⁷ Membership in organizations such as the Ku Klux Klan and the Nazi Party fails as a religious affiliation because the goals of these organizations are predominantly social and political, rather than religious.³⁸

Title VII also covers practices and observances that are mandated by or expressions of religious principles. Protected religious practices may include specific clothing or grooming styles, such as a certain hair

Am. Rockwell Corp., 501 F.2d 398, 404 (9th Cir. 1974) (holding that discharge of an employee for not paying union dues was not an infringement on one's First Amendment rights); *McGinnis v. United States Postal Serv.*, 512 F. Supp. 517, 520 (N.D. Cal. 1980) (ruling that plaintiff's refusal to distribute draft registration materials protected as consistent with Quaker Peace Testimony and family history of involvement with the Quakers, despite lack of formal membership in Friends Society Meeting); *Geller v. Secretary of Defense*, 423 F. Supp. 16, 17 (D.D.C. 1976) (finding that a well-established tradition of having a beard is protected by the "freedom of religion" provision of the Constitution even though having a beard is not a tenet of the religion).

35. See *PLAYER*, *supra* note 21, at 257. A charge alleging discrimination based on an individual's "personal religious creed" that a certain brand of cat food contributed to his well-being and overall job performance could not be considered a religious belief or practice because it in no way related to a "theory of man's nature or his place in the Universe." *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977), *aff'd mem.*, 589 F.2d 1113, 1113 (5th Cir. 1979).

36. See *PLAYER*, *supra* note 21, at 257 (giving examples of political or social beliefs that are not religions such as Marxism and Nazism).

37. See 42 U.S.C. §2000e-2(f) (1994). Specifically, the statute provides:

'unlawful employment practice' shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950. 50 U.S.C. §781 et seq.

Id.

38. See *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504, 505 (4th Cir. 1974) (holding that terminating a man's employment for his association with the Ku Klux Klan was not actionable under the Civil Rights Act of 1964). *But see American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 775 (9th Cir. 1986) (finding that strong opposition to war is a religious belief); *Dorr v. First Ky. Nat'l Corp.*, 796 F.2d 179 (6th Cir. 1986) (working for a church group that aids homosexuals was protected "religion"); *Haring v. Blumenthal*, 471 F. Supp. 1172, 1183-84 (D.D.C. 1979) (holding that an Internal Revenue Service employee refusing to process abortion clinics' requests for tax exempt status was a moral or religious activity entitled to legal protection).

style, head covering, or the wearing of facial hair, as directed or suggested by an individual's religious belief.³⁹ Persons who have pastoral responsibilities also come within the ambit of Title VII's protection.⁴⁰

Religion within the meaning of Title VII is so broad that statutory protection extends to nonbelievers. Thus, religion necessarily encompasses the absence of religion.⁴¹ In particular, the legislative history of Title VII reveals that it prohibits discrimination against an atheist.⁴² Accordingly, discrimination against a person who is a deist or an agnostic would probably also constitute a violation of the statute.⁴³ Therefore, if an employer hires only persons who believe in a supreme being, or requires employees to participate in a certain religious observance or practice, such as daily prayer, that employer is not religion-neutral in employment issues, and a cause of action may arise.⁴⁴

39. See e.g., *Bhatia v. Chevron, U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984) (ruling that a Sikh employee whose religion prohibited him from shaving any body hair had established a prima facie case of religious discrimination, but that he, nonetheless, had to transfer to a janitorial job since he could not comply with company policy requiring all employees at risk of exposure to toxic gases to shave any hair that might interfere with facial respirator); *Goldman v. Secretary of Defense*, 29 Empl. Prac. Dec. (CCH) 32,753 (D.D.C. 1982) (holding that the mere desire to promote *esprit de corps* among employees is not an adequate justification for prohibiting employees from wearing clothes mandated by their religion); *Calloway v. Gimbel Bros., Inc.*, 20 Empl. Prac. Dec. (CCH) 30,091 (E.D. Pa. 1979) (holding that a Muslim worker who was sent home for wearing a kuffi established a claim of religious discrimination); *Isaac v. Butler's Shoe Corp.*, 511 F. Supp. 108, 114 (N.D. Ga. 1980) (finding that a no-beard policy created by employer violated plaintiff shoe-salesman's Title VII rights to wear a beard in accordance with his Church of God beliefs).

40. See *Weitkenaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284, 1289 (D. Vt. 1974) (determining that a minister's attendance at monthly business meetings of his church was within the meaning of "religious practices" protected by Title VII). But see *Baz v. Walters*, 782 F.2d 701, 707 (7th Cir. 1986) (holding that hospital's discharge of a chaplain after repeated incidents in which he proselytized to patients did not violate Title VII); *Spratt v. County of Kent*, 621 F. Supp. 594, 600 (W.D. Mich. 1985), *aff'd*, 810 F.2d 203 (6th Cir. 1986) (holding that terminating a social worker for excessive use of religious counseling was permissible under Title VII).

41. See *PLAYER*, *supra* note 21, at 257 (examining whether deists, atheists, and agnostics are protected under Title VII).

42. See 110 CONG. REC. 2607 (1964) (remarks of Rep. Celler) (explaining that an employer could not discriminate against an employee "just because he is an atheist").

43. See *PLAYER*, *supra* note 21, at 257 (stating that "[r]eligion necessarily includes the absence of religion;" thus, it violates Title VII to discriminate against deists, atheists, and agnostics).

44. See *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975) (finding that an employer who forced an atheist to attend business meetings that commenced with religious talk and prayer was constructively discharged that employee); *Shapolia v. Los Alamos Nat'l Lab.*, 773 F. Supp. 304, 305 (D.N.M. 1991) (holding that a discharged employee had a cause of action for termination for not sharing the

As the population grows more diverse, so too have the forms of religious expression and the need for sensitivity in the work place. For example, an employer may violate Title VII by requiring its staff to participate in "new age" training programs.⁴⁵ While these training programs may not be religion-based, when workers object because they believe the training conflicts with tenets of their faith, then Title VII will provide employees with a valid cause of action.⁴⁶ In addition, employers may violate the statute by taking adverse action against employees who refuse to attend a "new age" training session due to reasons related to their religion.⁴⁷

The claimed religious belief or practice of the employee or applicant should be the sole and exclusive focus of analysis in a cause of action alleging religious discrimination, especially when an employee is denied religious accommodation.⁴⁸ Title VII prohibits discrimination

supervisor's religion even though the employee did not assert a religious belief of his own).

45. See EEOC Compl. Man. (CCH) § 628, at 4203 (1998) (providing that "new age" programs may be conducted by faith healers or mystics; utilize meditation, guided visualization, self-hypnosis, biofeedback or yoga; or focus on changing attitudes and increasing self-esteem, assertiveness, independence, or creativity).

46. See *id.*

47. See *id.* But see EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 621 (9th Cir. 1988) (holding that devotional services may be mandatory unless the objections to attending them are related to the employee's religion). See generally Charles E. Mitchell, *New Age Training Programs: In Violation of Religious Discrimination Laws?*, 41 LAB. L.J. 410 (1990) (defining principal features of new age training techniques and critiquing litigation involving new age training programs).

48. On rare occasions, a plaintiff may allege that his or her conversion from defendant's religion to another faith led to or motivated the act of alleged discrimination. While it may be tempting and even accurate to attribute bias to the employer, the elements required to establish such discrimination must still be met. See *infra* Part IV (discussing the employer's duty to accommodate an employee's religion). For a discussion of religious harassment theory, see Betty L. Dunkum, *Where to Draw the Line: Handling Religious Harassment Issues in the Wake of the Failed EEOC Guidelines*, 71 NOTRE DAME L. REV. 953, 957-72 (1996); Terry Morehead Dworkin & Ellen R. Peirce, *Is Religious Harassment "More Equal?"*, 26 SETON HALL L. REV. 44, 47-72 (1995); David L. Gregory, *Religious Harassment in the Workplace: An Analysis of the EEOC's Proposed Guidelines*, 56 MONT. L. REV. 119, 138-42 (1995); David J. Schaner & Melissa M. Erlemeier, *When Faith and Work Collide: Defining Standards for Religious Harassment in the Workplace*, 21 EMP. REL. L.J. 7, 14-20 (1995); Kevin B. Flynn, Comment, *Religious Harassment Under Title VII: Incentive for a "Religion-Free Workplace or a Protection for Religious Liberty?"*, 22 OHIO N.U. L. REV. 501, 509-18 (1995); Russell S. Post, Note, *The Serpentine Wall and the Serpent's Tongue: Rethinking the Religious Harassment Debate*, 83 VA. L. REV. 177, 181-90 (1997); Julia Spoor, Note, *Go Tell It on the Mountain, But Keep It Out of the Office: Religious Harassment in the Workplace*, 31 VAL. U. L. REV. 971, 990-1008 (1997).

Also, it should be noted that in many instances, the employer and employee are the same religion but interpret the tenets of their faith differently. See, e.g., *Piech v. Massasoit Greyhound, Inc.*, 668 N.E.2d 1298, 1303-04 (Mass. 1996) (granting

based upon an individual's own religious beliefs and not those of the employer.⁴⁹ In contrast, a religious employer—usually a church, synagogue, mission, or seminary—is exempted by Title VII from liability for actions that would otherwise constitute unlawful religious discrimination.⁵⁰

B. *The Requirement of Sincerity*

In order to qualify for protection as a religion within the meaning of Title VII, an employee's beliefs must not only be "religious," but must also be sincerely held. "[A]lthough the validity of religious beliefs cannot be questioned, the sincerity of the person claiming to hold such beliefs can be examined."⁵¹ It is necessary, therefore, to scrutinize the

summary judgment in favor of employers when Roman Catholic employees believed they were obligated to abstain from work Christmas Day; Roman Catholic employer believed only attendance at Mass was required); *infra* Part II.B (discussing *Pielech v. Massasoit Greyhound, Inc.*).

49. See *McCrary v. Rapides Reg'l Med. Ctr.*, 635 F. Supp. 975, 979 (W.D. La.), *aff'd mem.*, 801 F.2d 396 (5th Cir. 1986) (stating plaintiff's allegation that they were discharged because of their supervisor's religious belief prohibiting extramarital affairs failed to state a claim under Title VII).

50. See 42 U.S.C. § 2000e-1(a) (1994). Title VII does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." *Id.* For the most part, only churches or church-owned facilities have qualified for the Section 702 exemption. See *Martin v. United Way of Erie County*, 829 F.2d 445, 449 (3d Cir. 1987); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985); *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972). The determination as to whether an organization or educational facility qualifies for the exemption depends upon whether "the corporation's purpose and character are primarily religious." HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW § 3.4, at 162 (1997). That determination must be assessed on a case-by-case basis, with the court considering "[a]ll significant religious and secular characteristics." *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993) (holding that manufacturer of mining equipment was not exempt under Title VII as a religious incorporation) (quoting *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 617 (9th Cir. 1988)).

51. *United States v. Rasheed*, 663 F.2d 843, 847 (9th Cir. 1981) (citing *United States v. Seeger*, 380 U.S. 163, 185 (1965)) (holding that the First Amendment does not protect fraud exercised in the "name of religion"); see also *Callahan v. Woods*, 658 F.2d 679, 685 (9th Cir. 1981) (explaining that "[i]n applying the free exercise clause of the First Amendment, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs"). The *Callahan* court noted that "[a] religious belief can appear to every other member of the human race preposterous, yet merit the protections of the Bill of Rights." *Callahan*, 658 F.2d at 685 (citing *Stevens v. Berger*, 428 F. Supp. 896, 899 (E.D. N.Y. 1977)). See generally LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986) (discussing the history of the Establishment Clause); PFEFFER, *supra* note 10, at 171-99 (discussing the history of religion and labor law). See, e.g., *EEOC v. Catholic Univ. of Am.*, 856 F. Supp. 1, 9

religious practice or belief that would receive protection under Section 701(j) of the statute, while simultaneously recognizing the personal characteristics of adherence to a particular faith.⁵²

As a general rule, the parties to a court action stipulate to the sincerity of the employee's religious beliefs and practices, or the courts summarily hold that the plaintiff's beliefs are sincere.⁵³ Conversely, if a claimed religious belief is too extreme or implausible the courts easily conclude that sincerity is lacking.⁵⁴

An action that significantly controverts known tenants of the professed religion calls the sincerity of that belief into question.⁵⁵ When the sincerity of an alleged belief is contested, the court examines the consistency with which the employee has acted with respect to that belief and the maintenance of his or her system of beliefs.⁵⁶ Consistent action in accordance with a religious belief over an expansive length of time is not required to prove the sincerity factor. Rather, workers who demonstrated actions consistent with

(D.D.C. 1994) (holding that the First Amendment precludes review of Title VII sex discrimination and retaliation claims made by a nun who was denied tenure in the Canon Law Department of Catholic University's School of Religious Studies, because application of Title VII to the case would violate both the "Free Exercise and Establishment Clauses by entangling government in a primarily religious function and relationship").

52. See EEOC Compl. Man. (CCH) § 628.4(b) (1998).

53. See, e.g., *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 336 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971) (stipulating that plaintiff's religious beliefs were sincere); *Ali v. Southeast Neighborhood House*, 519 F. Supp. 489, 490 (D.D.C. 1981) (recognizing that the sincerity of employee's Black Muslim religious beliefs was not in dispute).

54. See *McCrary*, 635 F. Supp. at 975 (finding that adultery was not a practice sincerely held by the Baptist religion); *Brown v. Pena*, 441 F. Supp. 1382, 1384 (S.D. Fla. 1977), *aff'd*, 589 F.2d 1113 (5th Cir. 1979) (holding that plaintiff's claim that his "personal religious creed" that a certain type of cat food contributed to his work ability was "frivolous"); see also *infra* Part II.C (discussing how courts determine when a personal preference is religious).

55. See, e.g., *McCrary*, 635 F. Supp. at 979 (employees terminated for their extramarital affairs could not claim they had the right to commit adultery when their Baptist religion specifically prohibited such conduct); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993) (employee must establish prima facie case by proving that he had bona fide religious belief, but that does not include showing that employee made efforts to compromise his religious practices before seeking accommodation from employer).

56. Compare *Hansard v. Johns-Manville Prods. Corp.*, 5 FEP Cas 707, 708 (E.D. Tex. 1973) (determining that an employee's claim that his lifelong religious practice prohibited him from working on Sundays was "grounded more in convenience than conviction" since the employee had worked some Sundays and not others), with *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1086 (6th Cir. 1987) (employee's professed belief in avoiding work on Sunday Sabbath was found to be sincerely held although he occasionally worked from 11 p.m. to midnight on some Sundays).

newly-acquired religious beliefs have been found to hold sincere convictions.⁵⁷

An employee who truly believes that his or her religious faith proscribes certain conduct has a sincerely held religious belief, even if the religion in question does not formally prohibit the particular conduct.⁵⁸ A person who sincerely believes that his or her religion requires certain behavior, when the religion in fact does not, may also be covered.⁵⁹ “[T]o restrict [Title VII] to those practices that are mandated or prohibited by a tenant of the religion, would involve the court in determining not only what are the tenants of a particular religion . . . but would frequently require the courts to decide whether a particular practice is or is not required by the tenets of the religion.”⁶⁰

57. See *Kettell v. Johnson & Johnson*, 337 F. Supp. 892, 894-95 (E.D. Ark. 1972) (holding that a plaintiff who made a New Year’s resolution against Saturday work, as required by the Radio Church of God, possessed a sincere belief); see also *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 143 (1987) (rejecting employer’s argument that employee should not receive the requested work schedule accommodation because she herself was the “agent of change” in that she converted to the Seventh Day Adventist religion after she had been hired); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378-79 (6th Cir. 1994) (holding that the plaintiff, a Seventh Day Adventist, had sincere religious beliefs even though she worked the Friday night shift for seven months after her baptism because her faith had grown over time); *EEOC v. IBP, Inc.*, 824 F. Supp. 147, 150-51 (C.D. Ill. 1993) (holding that an employee, a former Seventh Day Adventist who had abandoned the religion after sixteen months, was sincere in his belief because he had faithfully observed the Saturday Sabbaths during the entire time he practiced the religion).

58. See *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981) (holding that religious beliefs need not be universally held within religion in order to qualify as religious or entitled to protection); “Religious” Nature of a Practice or Belief, 29 C.F.R. § 1605.1 (1998) (“[T]he fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee.”).

59. See *Edwards v. School Bd. of Norton, Va.*, 483 F. Supp. 620, 625 (W.D. Va. 1980), *vacated in part*, 658 F.2d 951 (4th Cir. 1981) (finding that plaintiff’s religious interpretation that she must refrain from work for an eight-day period to attend a regional Feast of Tabernacles is a bona fide religious practice, even though her church’s “Fundamentals of Belief” do not require members to refrain from secular work on holy days). In *Edwards*, the plaintiff’s claimed religious belief, while not mandated by her faith, was consistent with, and an extension of, her creed. See *id.* The court therefore accepted her interpretation of her religion. See *id.* Conversely, in *McCrory v. Regional Rapides Medical Center*, 635 F. Supp. 975 (W.D. La. 1986), the plaintiffs’ assertion that they had a private right to have extramarital relationships was clearly contrary to their Baptist faith. See 635 F. Supp. at 979. The Court took judicial notice that the Baptist religion embraces the Holy Bible and the Ten Commandments, one of which forbids adultery, and disallowed the plaintiffs’ claimed “right” as lacking sincerity. See *id.*

60. *Edwards*, 483 F. Supp. at 625 (quoting *Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978)) (holding that an employee’s Saturday bible class was a religious obligation deserving statutory protection).

Courts have no business making such determinations.⁶¹ Consequently, even a belief system that is internally inconsistent may still be sincerely held by the person professing the belief.⁶²

Circuit courts have allowed religious discrimination claims to proceed where employer rules excluded all but "Protestants" in one circumstance⁶³ and favored "Jesuits" in another.⁶⁴ In another instance, a Catholic who maintained views contrary to Church teaching, and who alleged that she was denied employment at a Catholic university with a preference for Jesuits did not prevail in her lawsuit.⁶⁵ The plaintiff also asserted that the university's "Jesuit Preference" had the effect of discriminating against her due to her gender.⁶⁶ The Seventh Circuit, however, denied her allegation, reasoning that, given her controversial beliefs on abortion, she would have been denied employment even if she were a man.

C. Preferences: Religious or Personal?

As previously discussed, a "mere personal preference" devoid of a theological basis does not rise to the level of religion within the meaning⁶⁷ of Title VII, no matter how sincerely the individual

61. Cf. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) ("[I]t is no business of the courts to say what is a religious practice or activity for one group is not religion under the protection of the First Amendment.").

62. See *Carter v. Bruce Oakley, Inc.*, 849 F. Supp. 673, 675 (E.D. Ark. 1993) (proclaiming that the plaintiff's beliefs, while an unusual combination of Christianity and Judaism, were nonetheless sincerely held and therefore protected under Title VII).

63. See *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993). The *Kamehameha* court held that a nondenominational school violated Title VII by denying hire to non-Protestants. See *id.* The school, established under a will, required all trustees and teachers to be Protestants and started classes with daily prayer. See *id.* But its purpose, curriculum, and activities had become primarily secular and most of the students were non-Protestant. See *id.*

64. See *Pime v. Loyola Univ. of Chicago*, 803 F.2d 351, 353-54 (7th Cir. 1986) (finding that a Jesuit presence in the philosophy department of a Jesuit University constituted a bona fide occupational qualification). An argument can be made that discrimination on the basis of "religion-plus" (being Catholic plus being a Jesuit) is not necessarily unlawful since all non-Jesuits, be they Catholic or otherwise, would receive the same treatment. See LEWIS, *supra* note 50, § 3.12, at 195-96.

65. See *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 (7th Cir. 1987). Plaintiff applied for the position of Associate Professor of Theology on several occasions. See *id.* at 1215. The university repeatedly rejected her because her beliefs on the moral theology and public policy of abortion were perceived as hostile to traditional Catholic doctrine. See *id.* Indeed, the larger question might be whether the plaintiff could be considered Catholic in the eyes of the Church and under Title VII when her beliefs clashed with official Catholic dogma. See LEWIS, *supra* note 50, at 196 n.6 (citation omitted).

66. See *Maguire*, 814 F.2d at 1214.

67. See *id.* at 1218.

maintains the preference.⁶⁸ When beliefs or practices are very personal, even in the context of a large body of believers, courts must decide whether those personal beliefs are sufficiently religious in nature to warrant protection under federal law.⁶⁹

In the past, this question was fairly easy to answer. The classic “preference” case, *Brown v. Pena*,⁷⁰ involved a plaintiff who claimed that his “personal religious creed” required him to eat “Kozy Kitten People/Cat Food” on the job so as to enhance his well-being and work performance. The court, however, did not elaborate why a belief in pet food fell into the category of mere personal preference. Instead, the court concluded that such a belief could not be anything but a personal preference.⁷¹ The decision is understandable and acceptable to any layperson.⁷²

The question of preference becomes less clear and far more complicated, however, when the claimed religious belief derives from, dovetails with, or builds upon a more conventional or widely-held belief system. In *Edwards v. School Board of City of Norton, Virginia*,⁷³ the plaintiff, a member of the Worldwide Church of God, believed that church doctrine required her to abstain from secular work on the seven annual holy days and for eight days during the Feast of Tabernacles.⁷⁴ This meant that she would be absent from her job from five to ten days for religious purposes in any given year.⁷⁵ The church’s “Fundamentals of Belief” mandated abstention from work on only the seven holy days, thereby decreasing the number of days off the employee needed under her religion’s rules.⁷⁶ The district court nonetheless accepted the plaintiff’s interpretation of her religion and held that her practice was religious for purposes of Title VII, even

68. See *Edwards v. School Bd. of Norton, Va.*, 483 F. Supp. 620 (W.D. Va. 1980), *vacated in part*, 658 F.2d 951 (4th Cir. 1981).

69. See 3 LEX K. LARSEN, EMPLOYMENT DISCRIMINATION § 54.05(4) n.18 (1995) (citing cases that distinguish between religious preferences and personal preferences).

70. *Brown v. Pena*, 441 F. Supp. 1382, 1384 (S.D. Fla. 1977), *aff’d*, 589 F.2d 1113 (5th Cir. 1979).

71. See *id.* at 1385 (“Since plaintiff’s belief in eating pet food does not qualify as a religion, the Equal Employment Opportunity Commission acted correctly in declining to pursue his charges of employment discrimination on religious grounds.”).

72. See LARSEN, *supra* note 69, at § 54.05(4) (discussing how personal preferences differ from religious beliefs).

73. *Edwards v. School Bd. of Norton, Va.*, 483 F.Supp. 620 (W.D. Va. 1980), *vacated in part*, 658 F.2d 951 (4th Cir. 1981).

74. See *id.* at 623.

75. See *id.*

76. See *id.* at 623 n.1 (delineating the names of the seven annual holy days and their source).

though not required by her church.⁷⁷

The *Edwards* court explained that

[a] religious belief excludes mere personal preference grounded upon a non-theology basis, such as personal choice deduced from economic or social ideology. Rather, it must consider man's nature or the scheme of his existence as it relates in a theological framework. Furthermore, the belief must have an institutional quality about it and must be sincerely held by plaintiff.⁷⁸

The court then recognized that the "Fundamentals of Belief" of the Worldwide Church of God constituted the framework of a religious belief in which the plaintiff sincerely believed, as demonstrated beyond doubt at trial.⁷⁹ Finally, the court refrained from deciding whether plaintiff's belief regarding abstention from work was a valid tenet of the Worldwide Church; instead, the court held only that her religious interpretation should be considered a bona fide religious practice.⁸⁰

Subsequently, adverse results occurred in cases decided under state law. In *Vander Laan v. Mulder*,⁸¹ a dental hygienist sued for unemployment compensation following her termination for persistently telling patients about her religious conversion.⁸² The court denied her claim because her religion did not require her to share her beliefs.⁸³ The record showed that the plaintiff was not proselytizing, but simply wished to share her personal fulfillment with others.⁸⁴ Her conduct on the job, therefore, was a personal rather than a religious choice.⁸⁵ In view of plaintiff's testimony, it is clear why this court did not discuss the *Edwards* analysis when it dismissed her claim.⁸⁶

77. *See id.* at 625.

78. *Id.* at 624 (citations omitted).

79. *See id.*

80. *See id.* at 625; *supra* notes 58-62 and accompanying text (discussing cases holding that an employee has a "sincerely held religious belief" when she believes that her faith mandates the commission or abstention of specific acts, even if the religion does not mandate or prohibit the act).

81. *Vander Laan v. Mulder*, 443 N.W.2d 491 (Mich. Ct. App. 1989) (per curiam).

82. *See id.* at 493.

83. *See id.* at 494.

84. *See id.*

85. *See id.* at 495.

86. *See id.*; *see also supra* notes 73-80 and accompanying text (discussing the *Edwards* analysis).

In *Pielech v. Massasoit Greyhound, Inc.*,⁸⁷ an employer discharged two Roman Catholic employees who failed to report for work because their religion prohibited them from working on Christmas Day.⁸⁸ The trial court found for the employer since the plaintiffs had failed to demonstrate that the Roman Catholic Church did, in fact, mandate them to refrain from working on Christmas Day.⁸⁹ On appeal, the Supreme Judicial Court of Massachusetts struck down the state's anti-discrimination statute as unconstitutional because it failed to protect sincerely held religious beliefs.⁹⁰ The court announced that the state law protected only individuals who observe religions with a clear set of requirements.⁹¹ Consequently, the statute protected only recognized religions⁹² and thereby favored these religions over

87. *Pielech v. Massasoit Greyhound, Inc.*, 668 N.E.2d 1298 (Mass. 1996), *cert. denied*, 520 U.S. 1131 (1997). Although an employee brought suit under Michigan state law in *Vander Laan* and a Massachusetts anti-discrimination statute intended to protect employees' religious freedom in the workplace in *Pielech*, the issue of preference raised under each law is relevant to a Title VII analysis. See Erin D. Coffman, *Pielech v. Massasoit Greyhound, Inc.: Can a "Sincerely Held Religious Belief" Have Meaning?*, 32 NEW ENG. L. REV. 117, 119-31 (1997). The connection between the analysis of state statutes to Title VII analysis stems from the fact that both must be considered in light of the Establishment Clause of the First Amendment of the United States Constitution. See U.S. CONST. amend. I. The First Amendment religious clauses state that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." *Id.* The language preceding the comma is known as the Establishment Clause and has been the cause of "endless debate and confusion regarding the government's role in religion." Coffman, *supra*, at 120. The courts have used the First Amendment's Establishment Clause to analyze the Title VII provisions prohibiting employment discrimination based on religion and to analyze similar state statutes, given that the First Amendment applies to the states through the Fourth Amendment. See *Pielech*, 668 N.E.2d at 1302-03.

88. See *Pielech*, 668 N.E.2d at 1300. The employees then sued under the state statute. See *id.* The state statute in question "prohibits an employer from requiring an employee . . . to forgo the *practice* of her religion as *required* by that religion. It follows that the threshold showing an employee must make is whether the activity sought to be protected is a religious practice and is required by the religion." *Id.* at 1301 (quoting *Lewis v. Area II Homecare for Senior Citizens, Inc.*, 493 N.E.2d 867 (Mass. 1986)).

89. See *id.* (describing the trial court's findings based on affidavits given by two Roman Catholic priests). The court stated:

The only requirement the [Catholic church] absolutely imposes upon its followers is to attend mass. Plaintiffs were not denied the opportunity to attend mass, and therefore, plaintiffs cannot establish that they were forced to forgo a practice required by their religion. The fact that the plaintiffs wished to further observe the Christmas holiday does not constitute a religious requirement.

Id.

90. See *id.* at 1304.

91. See *id.* at 1303.

92. See *id.*

unrecognized religions.⁹³ The court held that favoritism toward recognized religion violated the Establishment Clause.⁹⁴ Additionally, the court reasoned that, by protecting only those practices mandated by a religion, the statute forced courts to discern which acts are required by a religion and which are not.⁹⁵ Such a mandate creates excessive government entanglement with religion that violates the Establishment Clause.⁹⁶

A person's sincerity, however, has little, if any, bearing on the issue of whether a belief is a religious or a personal preference.⁹⁷ For instance, a sincerely held belief or practice can nevertheless be a personal preference.⁹⁸ This is especially critical when the organized or mainstream religion to which the employee professes allegiance does not require the claimed belief.⁹⁹ An individual's personal religion may be so subjective that the individual may be the only person who knows whether he or she really believes what he or she purports to believe.¹⁰⁰

Another consideration is that when the court equates the sincerity of a person's belief with the religious nature of that belief, the court must ultimately determine the truth or falsity of that belief.¹⁰¹ Such determinations lead to both excessive entanglement with religion and potentially unequal treatment for individuals whose beliefs are not regarded as religious by a court, administrative agency, or other fact-finders.¹⁰²

An emphasis on the sincerity of the belief rather than on religiousness may avoid unequal treatment.¹⁰³ The result, however, protects and accommodates every sincerely held belief, regardless of

93. *See id.* at 1304.

94. *See id.* If religious beliefs are sincerely held, "they are entitled to the same protection as those widely held by others." *Id.*

95. *See id.* at 1303 (citing *Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978)).

96. *See id.* at 1304.

97. *See* LARSEN, *supra* note 69, § 54.05(4) n.23.

98. *See id.*

99. *See id.*

100. *See* *United States v. Ballard*, 322 U.S. 78, 92-94 (1944) (Jackson, J., dissenting). This subjectivity breathes further life to the old quip that "[t]here is only one true church and currently I am its only member."

101. *See* *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (discussing the amorphous nature of a sincerity analysis).

102. *See* *Pielech v. Massasoit Greyhound, Inc.*, 668 N.E.2d 1298, 1303 (Mass. 1996). "A statute that prefers one or more religions over another violates the [E]stablishment [C]ause." *Id.*

103. *See* *Coffman*, *supra* note 87, at 149-50 (discussing the excessive entanglement with religion that results when courts define the religiousness of an individual's belief and sincerity of that belief).

whether the belief is religious or reasonable.¹⁰⁴ This approach, however, trivializes religion in the eyes of employer and employee: “[A]nyone can walk into one of our restaurants and say they have a sincere religious belief that they must wear torn jeans and a Grateful Dead T-shirt.”¹⁰⁵ This takes on additional significance when the claimed belief or observance is a religious preference.¹⁰⁶ If religion is a choice, something that can be changed at will, unlike one’s race, then it may not even be viewed as a civil rights issue deserving of legal protection.¹⁰⁷ The *Wessling* case, with its curious reference to an employee’s duty to accommodate¹⁰⁸ the workplace expression of her or his religion, may hold the key to circumventing the frustrating religious/sincerity analytical framework.

III. *WESSLING V. KROGER CO.*

Patricia Wessling had been hired by the Kroger Company at their Livonia Meat Packing Plant on September 24, 1973.¹⁰⁹ When the Kroger Company terminated her on December 27, 1979, she was working as a wrapper-packer in the “Pork Room” and was paid at the “utility” rate.¹¹⁰ She and all the other employees in the pork room were “trained to [perform,] and did in fact [perform,] each of the jobs and stations in the Pork Room on a regular rotating basis.”¹¹¹ Mrs. Wessling, an adherent of the Roman Catholic faith, was raising her

104. *See id.*

105. Lauter, *supra* note 13 (quoting Domino Pizza Vice President Tim McIntyre who defended Domino’s decision not to hire an applicant based on his refusal to shave his beard in accordance with Domino’s policy, even though the applicant’s religion requires him not to cut his hair).

106. For example, a Roman Catholic employee, scheduled to work Sunday mornings, might request time off to attend Mass at a spectacularly beautiful church, even though several Saturday afternoon and early Sunday morning Masses are held at other local churches. *See* KEVIN ORLIN JOHNSON, *WHY DO CATHOLICS DO THAT? A GUIDE TO THE TEACHINGS AND PRACTICES OF THE CATHOLIC CHURCH* xiv (1994) (formerly entitled *EXPRESSIONS OF THE CATHOLIC FAITH*). The employee would be expressing a *personal* preference, because the Church teaches that Mass is the same whether celebrated in a sumptuous cathedral or an austere chapel. *See id.* If the individual’s reason for doing this is liturgical, such as a Byzantine Mass, his practice would likely be considered both religious and a personal preference; hence, a religious preference. *See id.*

107. *See* Lauter, *supra* note 13. “That’s not a view that any adherent of a religious faith could share When it comes to people’s religions, we don’t view that as a ‘choice.’ Religion is part of what people are, who they are.” *Id.* (quoting Orthodox Jewish Group Agudath Israel representative Abba Cohen).

108. *See* *Wessling v. Kroger Co.*, 554 F. Supp. 548, 552 (E.D. Mich. 1982).

109. *See id.* at 549.

110. *See id.*

111. *Id.*

daughter under the principles of the Catholic Church.¹¹² Mrs. Wessling also taught in the Confraternity of Christian Development (CCD) program in her parish.¹¹³ In October of 1979, the CCD teachers planned a children's performance for the special Christmas Mass and play.¹¹⁴ Mrs. Wessling volunteered to receive the children who were to arrive between 4:30 p.m. and 5:00 p.m. to don their costumes and rehearse their lines for a final time before the 6:00 p.m. Mass and performance.¹¹⁵ Further, she agreed to set up the church for the play and arranged to set up and decorate the hall adjoining the church.¹¹⁶

The plaintiff's faith did not obligate her to participate. Rather, her participation was voluntary.¹¹⁷ Mrs. Wessling, however, explained that she felt it was her duty to assist with the education of her child and the other children in her parish.¹¹⁸ "This sense of duty was important to her and it is important to all mothers who work at developing a close relationship with their children in a moral and religious environment."¹¹⁹

To ensure her attendance at church, Mrs. Wessling spoke to her foreman sometime before Christmas and informed him of her need to be off on December 24.¹²⁰ He told her to sign up for a personal day. She signed the appropriate book requesting the day off and saved one of her allotted personal days.¹²¹ Due to her low seniority, however, her request was denied and she was scheduled to work in the "Pork Room" from 6:30 a.m. to 3:00 p.m. on December 24, 1979.¹²² On December 21, 1979, she spoke with both her foreman and her supervisor, this time asking permission to leave work at 9:00 a.m. on

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.* at 550. Other teachers also volunteered to take care of the various portions of the program based on their particular skills and available times. *See id.*

116. *See id.*

117. *See id.* Plaintiff could have taken actions to accommodate her work schedule by rescheduling the time she was to be at church, asking her CCD helper to attend the rehearsal dinner in her absence, or arranging for another CCD instructor or her husband to substitute for her until she finished her work at the meat plant. *See id.*

118. *See id.*

119. *Id.*

120. *See id.*

121. The case does not specify exactly how long before Christmas the plaintiff put her supervisor on notice. Her request for a personal day was timely, albeit unsuccessful because she did not have high enough seniority. *See id.* Kroger's shop rules permitted "only seven employees to take a personal day on any given day, and the order was determined by seniority of the employees." *Id.*

122. *See id.*

December 24th, although she was not scheduled to arrive at church until 12:00 p.m.¹²³

In response to her request, on December 21, 1979, the Fabrication Supervisor informed Mrs. Wessling that in all likelihood the meat order would be completed no later than 1:00 p.m. on December 24. If the entire order was completed earlier, the entire pork room would be dismissed to leave.¹²⁴ On December 24, the plaintiff left work without permission at 8:45 a.m., the time of her first break.¹²⁵ When she returned to her job on December 27, 1979, she was suspended and subsequently terminated from her employment for walking off the job without permission.¹²⁶

The court held that Mrs. Wessling's request to leave work early so that she could go to the church hall and set up for the church play, receive the children, and decorate the church, "was not a religious observance [or practice] protected by Title VII."¹²⁷ The court reasoned that her participation was voluntary, and that the plaintiff could have found a substitution.¹²⁸ According to the decision, the plaintiff's early attendance at the church hall was social in nature, because it was "far more extensive in time than necessary for religion,"¹²⁹ and a family obligation rather than a religious duty.¹³⁰

The court ruled that Mr. Kroger, the Fabrication Supervisor, reasonably accommodated Mrs. Wessling by informing her that he would allow her, along with the rest of the pork room staff, to leave as soon as the meat order was processed on December 24.¹³¹ The court held that additional accommodation beyond this was not required because other employees became angry when the plaintiff left early.¹³² In the court's view, "Kroger's relationship with these other workers suffered,"¹³³ and "resulted in more than de minimus hardship to

123. *See id.* The case does not, however, indicate how much time it would have taken Mrs. Wessling to travel from the meat plant to her home and then to church. *See id.* In addition, the court's opinion is silent as to whether she needed time and, if so, how much time, to wash and change into appropriate clothes. *See id.*

124. *See id.*

125. *See id.* at 550-51.

126. *See id.* at 551.

127. *Id.* at 552.

128. *See id.*

129. *Id.* The court did not elaborate on why it placed time limits on religion for the plaintiff. *See id.*

130. *See id.* The court offered no explanation as to why a *voluntary* activity could be a family, though not a religious, *obligation*.

131. *See id.* at 552-53.

132. *See id.* at 552.

133. *Id.*

Kroger.”¹³⁴

Finally, the court indicated that Mrs. Wessling had not been completely candid about her request for a religious accommodation.¹³⁵ The court further concluded that she had a duty to take every possible action to resolve her employment duties and religious conflicts.¹³⁶ By not attempting to reschedule the church function or arrange a substitute for herself, the plaintiff failed her duty.¹³⁷ Her failure to accommodate her work schedule meant that Kroger did not violate Title VII by denying her permission to leave before her scheduled quitting time.¹³⁸

This ruling was unusual because it required the plaintiff to accommodate.¹³⁹ Title VII, however, requires the employer to accommodate, absent undue hardship, the claimed religious belief or practice of the employee.¹⁴⁰ In turn, the employee is not required to accommodate, but the employee must put the employer on notice of the need for accommodation.¹⁴¹ Both of these obligations, as well as a suggested approach for reconciling the competing employer-employee interests, will be discussed in the following section.

134. *Id.*; see also *infra* Part IV.A (discussing the employer's duty to accommodate under Title VII).

135. See *Wessling*, 554 F. Supp. at 552. Apparently, plaintiff's testimony about her request for accommodation had varied, and her request on December 21, 1979, to leave work early was not phrased in terms of a request for an accommodation of her religious observance. See *id.* The decision, however, does not state exactly what she said when she asked for permission to leave early.

136. See *id.*

137. See *id.* The decision states only that the CCD teachers had made arrangements for a "special Christmas Mass and play to be put on by their children." *Id.* at 549. The decision did not state the extent to which the children performed the play during the Mass, or immediately before or following the Mass, such that it would have been, in a sense, part of the Mass. See *id.* There is no indication that Mrs. Wessling or any other CCD teacher or parishioner would have the authority to reschedule the Mass. See *id.*

138. See *id.* at 552. At least the court had the good grace to acknowledge that the discharge penalty dispensed to Mrs. Wessling seemed "unduly harsh." See *id.* at 553.

139. See *id.* at 552.

140. See *supra* note 7 and accompanying text (pointing out the requirement that employers, not employees, accommodate religious practices).

141. See *infra* note 145 and accompanying text (discussing the agreement between the commission and the courts that an employee has the obligation to notify the employer of his need for religious accommodation).

IV. RECONCILING RELIGIOUS RIGHTS AND RESPONSIBILITIES: REASONABLE ACCOMMODATION UNDER TITLE VII

A. *The Employer's Duty to Accommodate*

Section 701(j), in connection with Section 703 of Title VII, creates an employer's duty to reasonably accommodate religious beliefs and practices of employees and applicants.¹⁴² The statute does not require accommodation, however, if the employer can demonstrate that accommodation would result in an undue hardship on the employer's business.¹⁴³ The extent of the employer's duty to accommodate extends to all aspects of an employee's or applicant's sincerely held religious beliefs or observances.¹⁴⁴

Once an employee or applicant places the employer on notice of her or his need for a religious accommodation, it is the employer's responsibility to find a reasonable accommodation for that individual.¹⁴⁵ In the EEOC's view, an employer satisfies its obligation when it offers all reasonable means of accommodation without causing itself undue hardship.¹⁴⁶ An employer who fails or refuses to offer a reasonable accommodation can avoid liability only by demonstrating that undue hardship would ensue from each possible alternative.¹⁴⁷

142. See 42 U.S.C. § 2000e-(j) (1994 & Supp. II 1996); see also *supra* Part I (discussing the text of the statute).

143. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 72 & n.7 (1977); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145-46 (5th Cir. 1982); *Wren v. T.I.M.E.-D.C., Inc.*, 595 F.2d 441, 445 (8th Cir. 1979); *Redmond v. GAF Corp.*, 574 F.2d 897, 903-04 (7th Cir. 1978).

144. See EEOC Compl. Man. (CCH) § 628.5(a)(2) (1998). Employers must accommodate an employee's religious observances such as various holy days and dress unless such an observance would cause undue hardship for the employer. See *id.*

145. See *id.* § 628.5(b). Title VII mandates that employers make reasonable accommodations for those employees "who have notified them of their religious needs." *Id.* The EEOC, however, points out that "neither §1605.2(c) nor the *Hardison* decision, which is the leading case in this area, define in precise language what is meant by reasonable accommodation." *Id.*

146. See *id.* § 628.5(a)(2).

147. See *id.* §§ 628.6, 628.7. Although §701(j) of Title VII specifically states that employers have a duty to accommodate, courts have interpreted the statutory provision to apply to labor organizations. See *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1241 (9th Cir. 1981) (establishing that the reasonable accommodation duty applies equally to unions); *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904, 907 (9th Cir. 1979) (concluding that prohibition of religious discrimination applies equally to labor organizations); *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 400 (9th Cir. 1978) (discussing the existence of the duty to not discriminate based on religion and to accommodate union members by a union); see also EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(b)(2) (1998) (imposing a duty on unions to reasonably accommodate the religious needs of members and employees,

Employees and applicants most frequently request accommodation because their religious observances conflict with their work schedules.¹⁴⁸ Several alternatives are permissive and viable means to accommodate some conflicts that may arise between an employer's employment practices and an employee's or applicant's religious beliefs.¹⁴⁹ One such alternative is a voluntary substitute or "swap," wherein another worker with substantially similar qualifications, who consents to the arrangement, is secured to substitute for or swap positions with the employee who requests the accommodation.¹⁵⁰

The EEOC guidelines maintain that the duty to accommodate the religious practices of current and prospective employees mandates that the employer or labor organization facilitate the arrangements for a suitable substitute.¹⁵¹ Where feasible, however, the EEOC guidelines encourage the employee seeking accommodation to assist the employer when he or she knows of someone with substantially similar credentials who is amenable to substitute or switch positions.¹⁵²

absent undue hardship on the union's operation). A union's duty includes reasonable accommodation of members and prospective members whose religious beliefs prohibit them from joining or paying dues to a labor organization, and the unions must represent employees who need religious accommodations and cooperate with employers to achieve this goal. *See* EEOC Compl. Man. (CCH) § 628.5(a)(3) (1998). In addition to unions, employment agencies and joint labor-management and apprenticeship committees are required to provide reasonable accommodations in matters such as the scheduling of tests and related selection procedures. *See* *Minkus v. Metropolitan Sanitary Dist.*, 600 F.2d 80, 82-83 (7th Cir. 1979) (concluding that a Sanitary District must reasonably accommodate an Orthodox Jew who cannot take the civil service examination due to his religious belief); 29 C.F.R. § 1605.3(a) (1998); EEOC Compl. Man. (CCH) § 628.8 (1998).

148. *See* EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(d)(1). Of course, there are many religious observances or beliefs that do not pose scheduling conflicts, but that nevertheless may necessitate accommodation. Examples of such religious observances include prayer breaks during working hours, certain dietary restrictions, and dress and grooming habits. *See id.* §§ 1605.2, 1605.3 app. A.

149. *See* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 76 (1977) (listing three reasonable alternatives that the employer in question, TWA, may have taken that would not have caused undue hardship).

150. *See* 29 C.F.R. § 1605.2(d)(1)(i).

151. *See id.*; *see also* EEOC Compl. Man. (CCH) § 628.6(b) (1998).

152. *See* EEOC COMPL. MAN. (CCH) § 628.6(b). The existence of a collective bargaining agreement cannot be used to deny accommodation of a religious belief or practice unless it is shown that breaching the labor agreement would violate a bona fide seniority system. *See* *Huston v. Local 93, UAW*, 559 F.2d 477, 480 (8th Cir. 1977) (concluding that a statutory duty of accommodation does not supersede contractual seniority rights of other employees); *United States v. City of Albuquerque*, 545 F.2d 110, 114-15 (10th Cir. 1976) (deciding that circumventing the seniority system is undue hardship). "Undue hardship [is] shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when

A second successful method used to provide a religious accommodation relies on the creation of a flexible work schedule.¹⁵³ This may be accomplished in the following areas: adjustable arrival and departure times, floating or optional holidays, flexible work breaks, adaptable use of lunch time or breaks in exchange for early departure, staggered work schedules, and changeable work days that allow employees to make up time missed due to religious observance.¹⁵⁴

Lateral transfers, wherein employees are placed in different job classifications but at the same salary grade or rate of pay, and changes in job assignments offer another means to accommodate employee religious practices.¹⁵⁵ This may succeed when no voluntary substitute, temporary swap, or schedule modification is possible for the individual seeking reasonable religious accommodation.¹⁵⁶ Here again, the availability of a qualified replacement for the religious employee, as well as the existence of a vacancy for which the employee is qualified, must receive consideration by the employer before this accommodation may be utilized.¹⁵⁷

The duty to accommodate not only applies to employers, but also affects labor organizations. Under Title VII, labor organizations have a duty to provide reasonable accommodation for employees and applicants who object to union membership or to the payment of union

doing so would deny another employee his or her job or shift preference guaranteed by that system." 29 C.F.R. § 1605.2(e)(2).

Conversely, if an employer and a union agree to provide an exception to a bona fide seniority or merit system in order to facilitate a reasonable accommodation and doing so does not imperil the rights of another employee who is not requesting religious accommodation, this practice is permissible and does not constitute a violation of Title VII. *See* EEOC Compl. Man. (CCH) § 628.6(b) (1998). To this end, employers and labor organizations are encouraged to publicize policies which facilitate accommodation through voluntary substitution or swapping. *See id.*; 29 C.F.R. § 1605.2(d)(1)(i). They are further encouraged to provide a central file, bulletin board, or other means of accessible notification so that employees who are willing to substitute or swap may be matched with positions where their skills are needed. *See* 29 C.F.R. § 1605.2(d)(1)(i); *Brown v. General Motors Corp.*, 601 F.2d 956, 959 (8th Cir. 1979) (failing to accommodate an employee's Sabbath needs constituted religious discrimination when there were extra employees available for the scheduled absences).

153. *See* EEOC Compl. Man. (CCH) § 628.6(c) (1998).

154. *See* 29 C.F.R. § 1605.2(d)(1)(ii). The federal government has created flexible work schedules by permitting its employees to elect to work overtime in exchange for compensatory time off from work because of religious beliefs and practices that require abstention from work during holy days and other periods of time. *See* 5 U.S.C. § 5550a (1994).

155. *See* 29 C.F.R. § 1605.2(d)(1)(iii).

156. *See id.*

157. *See* EEOC Compl. Man. (CCH) § 628.6(d) (1998).

dues based on their religious beliefs.¹⁵⁸ When an employee's religion prohibits him from joining or financially supporting unions, that individual should be permitted to donate a sum equivalent to union dues to a charitable organization.¹⁵⁹

According to the EEOC guidelines, once an employer or other covered entity has offered all reasonable means of accommodation without meeting the religious needs of the current or prospective employee, the employer may assert that more action would create undue hardship to the business.¹⁶⁰ In *Trans World Airlines, Inc. v. Hardison*,¹⁶¹ however, the United States Supreme Court established an even lighter burden. Specifically, where accommodation measures create more than a de minimus financial cost, employers are not required to accommodate the employee's religious beliefs or practices.¹⁶² The Court further announced that undue hardship will be

158. See *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1241 (9th Cir. 1981) (concluding that employee's requested accommodation—payment of union dues to a charity—was reasonable); *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 400 (9th Cir. 1978) (determining that the employee's payment of the equivalent amount of dues to a charitable organization was not an undue hardship).

159. See 29 C.F.R. § 1605.2(d)(2). The charitable substitution is the only accommodation required of an employer or labor organization under Title VII. See *id.* The statute requires reasonable accommodation, but does not oblige an employer or union to accommodate the religious practices of an employee in exactly the manner requested or preferred by that individual. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986) (concluding that an employer does not have to choose a particular accommodation); *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390-91 (10th Cir. 1984) (determining that an employer does not have to adopt the exact measures of the employee); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145 (5th Cir. 1982) (establishing that the employer's accommodation was reasonable regardless of the variance from the employee's request).

Section 169 of the National Labor Relations Act ["NLRA"] offers a similar, albeit narrower, provision that allows employees with religious objections to union membership or to the payment of union dues to pay an equivalent amount to a non-religious or non-labor related charity designated by agreement or, in some instances, selected by the employee. See 29 U.S.C. § 169 (1994). In contrast to Title VII, however, the NLRA requires that a religious objector belong to a bona fide religion that has historically held conscientious objections to joining or financially contributing to labor organizations. See *id.*

160. See EEOC Compl. Man. (CCH) § 628.7(a) (1998).

161. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

162. See *id.* at 84. In particular, the Court reasoned that to accommodate Hardison, the employer would have had to pay substitute employees a premium wage. See *id.* at 81, 84. This expense exceeded the ceiling allowance of a de minimus cost and therefore constituted an undue hardship. See *id.* at 84.

Hardison was a member of the Worldwide Church of God, which observes the Sabbath from sunset on Friday to sunset on Saturday. See *id.* at 67. He was, therefore, unable to work on Saturdays due to his religious beliefs. See *id.* The employer made an initial effort to find him another position where his hours would not conflict with the Sabbath. See *id.* at 68. After this effort failed, the airline told Hardison that he could not swap his

recognized if accommodation would require variance from a bona fide seniority system that would result in another employee being denied his job or shift preference as guaranteed by the system.¹⁶³

Subsequent to this decision, conflicts arose as to whether the concepts of “reasonable accommodation” and “undue hardship” are one duty, or whether an employer has two separate obligations to offer both “reasonable accommodations” and demonstrate that any proposed accommodation would pose an “undue hardship.”¹⁶⁴ In *Ansonia Board of Education v. Philbrook*, the Supreme Court resolved this dilemma in holding that an employer met its obligation under Section 701(j) when it is established that the employer had offered a reasonable accommodation to the employee.¹⁶⁵ Hence, an employer has no obligation to either accept or prove the unreasonableness of an employee’s suggested accommodation.¹⁶⁶ The Court decided, in effect, that the absence of “undue hardship” for proposed accommodations is merely one factor in determining the “reasonableness” of the employer’s proffered accommodation.¹⁶⁷

The EEOC guidelines recognize that the feasibility of accommodation may vary between employers. What might be considered reasonable for one employer may constitute a hardship for another.¹⁶⁸ For this reason, decisions demand a case-by-case determination.¹⁶⁹ Factors used to determine the feasibility of the reasonable accommodation will include the employer’s size, operating costs, cost of making the required accommodation, and other

shift with another employee or work only four days a week. *See id.* at 68. The employer eventually discharged Hardison due to unexcused absences. *See id.* at 69.

163. *See id.* at 81. Although the formal seniority system utilized by the airline strengthened the Court’s conclusion, section 701(j) does not require an employer to disregard objectively neutral methods for assignment of preferred working days. *See Brener*, 671 F.2d at 144-45.

164. *See* PLAYER, *supra* note 21, at 258 (providing an overview of the differences of the two concepts and how many interpretations collapse the two concepts into one duty).

165. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) (concluding that an employer does not have two separate obligations, only the obligation to offer reasonable accommodation to the employee).

166. *See id.* This conflicts with the EEOC Guidelines on Discrimination Because of Religion, which state that “when there is more than one means of accommodation which would not cause undue hardship, the employer . . . must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.” 29 C.F.R. § 1605.2(c)(2)(ii) (1998); *see* Sonny Franklin Miller, Note, *Religious Accommodation Under Title VII: The Burdenless Burden*, 22 J. CORP. L. 789, 794 n.46 (1997).

167. *See* PLAYER, *supra* note 21, at 59-60.

168. *See* EEOC Compl. Man. (CCH) § 628.5(b) (1998).

169. *See id.*

intangible factors "peculiar to that particular entity."¹⁷⁰

Unfortunately, most judicial decisions based on *Hardison* have adopted a more superficial approach, in which "virtually all cost alternatives have been declared unduly harsh simply because a loss is involved."¹⁷¹ As a result, the burden on employers has become unreasonably light and—as in the *Wessling* case, where the accommodation for the religious employee consisted of an offer to let not only her, but the entire department leave early upon completion of the day's work—almost ludicrous.¹⁷²

B. *The Employee's Duty Under the Reasonable Accommodation Standard*

EEOC guidelines note that an employee or applicant does not have a duty to cooperate or accept a means of accommodation suggested by employers and other covered entities, when an accommodation is needed for his or her religious beliefs and practices.¹⁷³ The EEOC has maintained that an employee's refusal to accept whatever accommodations an employer, union, or other entity may offer is irrelevant to the issue of whether it has fulfilled its duty to accommodate the religious needs of the individual worker.¹⁷⁴

Several courts have rejected the EEOC's position. These courts attribute a limited responsibility to reasonably cooperate with accommodation undertakings to ensure fairness to all parties.¹⁷⁵ Both

170. *Id.*

171. Miller, *supra* note 166, at 795 (quoting Peter Zablotzky, *After the Fall: The Employer's Duty to Accommodate Religious Practices Under Title VII After Ansonia Board of Education v. Philbrook*, 50 U. PITT. L. REV. 513, 514 (1989)).

172. See Sidney A. Rosenzweig, *Restoring Religious Freedom to the Workplace: Title VII, RFRA and Religious Accommodation*, 144 U. PA. L. REV. 2513, 2513 (1996) (advocating a higher standard of reasonable accommodation upon employers). *But see* Hunter C. Carroll, Note, *Damned If They Do, Damned If They Don't: The Collision Between Religion and the Workplace Has Employers Caught in the Middle*, 20:2 AM. J. TRIAL ADVOC. 353, 379-80 (1996) (arguing that inconsistent case law makes it difficult for employers to know how to reasonably accommodate employees).

173. See EEOC Compl. Man. (CCH) § 628.5(a)(1)(1998).

174. See *id.* The Commission does acknowledge, though, that an employee who fails to cooperate or accept an accommodation may subject himself to adverse or disciplinary action where the employer offered all reasonable accommodation without undue hardship, or may make accommodation impossible to achieve by virtue of his or her reluctance or refusal to cooperate. See *id.* In 1993, the Commission softened its stance when it proposed a clarification that, so long as the accommodation offered is reasonable, it does not have to be the one "preferred by the employee or prospective employee." 58 Fed. Reg. 49,456 (1993) (to be codified at 29 C.F.R. § 1605) (proposed Sept. 1993).

175. See, e.g., *Beadle v. Hillsborough County Sheriff's Dep't*, 29 F.3d 589, 593 (11th Cir. 1994) ("While we recognize an employer's duty to reasonably accommodate

the EEOC and the courts agree that an employee has an obligation to notify the employer, labor organization, or other covered entity of his need for a religious accommodation.¹⁷⁶ Actions alone do not give sufficient notice to the employer of the need for a religious accommodation.¹⁷⁷ The EEOC guidelines advocate that once an employee places the employer on notice of the need for a religious accommodation, the employee has satisfied his obligations under Title VII. The employer's duty to accommodate, however, arises only after such notification occurs.¹⁷⁸

The *Wessling* court did not clearly conclude whether the employee gave a notice of a need to accommodate.¹⁷⁹ The fact that the employer took steps to accommodate the employee under Title VII, however, strongly suggests that the employee gave sufficient information to invoke the employer's obligation.¹⁸⁰ To the extent that the children's play and preparation was part of or contiguous with the Mass, Mrs. Wessling was more likely than not engaging in a religious observance.¹⁸¹ By not offering an accommodation geared to the

the religious practices of its employee, we likewise recognize an employee's duty to make a good faith attempt to accommodate his religious needs through means offered by the employer."); *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019, 1022 (10th Cir. 1994) ("The defendant's efforts to reach a reasonable accommodation triggered Mr. Lee's duty to cooperate."); *United States v. City of Albuquerque*, 545 F.2d 110, 113-14 (10th Cir. 1976) (concluding that an employee has a duty to cooperate with the employer's reasonable means of accommodation offered). "An employee shirks his duties to try to accommodate himself or to cooperate with his employer in reaching an accommodation by a mere recalcitrant citation of religious precepts. Nor can he thereby shift all responsibility for accommodation to his employer." *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904, 908 (9th Cir. 1979) (quoting *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977)).

176. See *Chrysler Corp.*, 561 F.2d at 1285-86 (noting that the employee has the duty to inform his employer of the need for an accommodation and to make the employer aware of those tenets of his religion that conflict with the ability to perform the job); 29 C.F.R. §1605.2(c)(1).

177. See EEOC Compl. Man. (CCH) § 628.5(a)(1)(1998). Specifically, the guidelines provide that "[t]he Commission and the courts, however, do agree that an employee *has an obligation* to make his employer or any other covered entity of his/her needs for a religious accommodation." *Id.*

178. See *id.* According to EEOC's regulations, a prospective employee is not obligated to inform a prospective employer of a need for accommodation. It is only after an applicant has been hired that the duty to inform arises, because that is when the need for accommodation arises. See 29 C.F.R. §1605.3(b).

179. See *Wessling v. Kroger Co.*, 554 F. Supp. 548, 552 (E.D. Mich. 1982) (finding that adequate notice of a need for accommodation was not given); see also *supra* note 121 (discussing *Wessling*).

180. See *Wessling*, 554 F. Supp. at 552; *supra* text accompanying note 124 (discussing accommodations made by *Wessling's* employer).

181. See *supra* text accompanying notes 97-100 (discussing the difference between personal preference and religious belief).

plaintiff's request, such as allowing her to seek a voluntary substitute or job swap, it is doubtful that the defendant met its duty to accommodate.¹⁸² By walking out without trying to change or lessen her duties for the preparation of the Mass and the play, the plaintiff did not fulfill her duty to cooperate either.¹⁸³ Sadly, what is certain is that there was no "bilateral cooperation . . . appropriate in the search for an acceptable reconciliation."¹⁸⁴ Ideally, this should always be the hallmark of any discussion concerning religion in the workplace.

C. Faith and Work

American religious history has been described as the "paradoxical story of the of religions and the oneness of religion in the United States."¹⁸⁵ The "manyness of religion" embodies religious pluralism; it refers to the distinct religions of the many peoples who have settled in the United States.¹⁸⁶ Conversely, the "oneness of religion" encompasses the religious unity experienced by Americans.¹⁸⁷ It refers to the "dominant public cluster of organizations, ideas, and moral values that have characterized this country."¹⁸⁸ It celebrates the aspects of religious faith that people share throughout the United States.¹⁸⁹

The religion of oneness or unity is also known as American civil religion.¹⁹⁰ It has supplied a continuing theme in American public life and has collapsed boundaries between peoples, thereby transforming them into "partisans of the center."¹⁹¹ Historically, civil religion in the United States has been mostly white, Anglo-Saxon, Protestants.¹⁹²

182. See *Wessling*, 554 F. Supp. at 550. The company simply directed Wessling to apply for a personal day and wait to be let go early with the rest of the department, as it would have for other employees with requests unrelated to religion. See *id.*

183. See *id.* at 550-51. For example, Mrs. Wessling might have purchased and put up decorations several days before Christmas Eve, which would have lessened the amount of time off she needed. See *id.* at 552.

184. *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145-46 (5th Cir. 1982).

185. ALBANESE, *supra* note 12, at 12.

186. See *id.*

187. See *id.* European travelers in the nineteenth century reported that America seemed more religious than any other country they had visited. This was probably because new U.S. residents and citizens, who may have taken their faith for granted in their native lands, had to become actively involved in institutional religion and practiced their inherited faith with "self-conscious deliberateness." See *id.* at 13.

188. *Id.* at 12.

189. See *id.*

190. See *id.* at 13.

191. See *id.*

192. See *id.* Although American civil religion borrowed the forms of primarily Protestant Christian religion, its content was political. See Yehudah Mirsky, Note,

But this civil religion is also the daily religion of American culture, transmitted through and observed in the media, the public school system, and commercial networks.¹⁹³ Ultimately it is carried into the workplaces of America.

The civil religion has attracted persons of all religions and of no religion. By linking political ideas and institutions, naturally shared by all citizens, to their mutual, heartfelt sentiments and aspirations, American civil religion has unified a religiously diverse, modern society.¹⁹⁴ Ironically, the very Protestants who begat the unifying civil religion also introduced the beginnings of personal choice and consequently, variety, in religion.¹⁹⁵

When a large majority of Americans of all religions and no religion revere and observe American civil religion, places of employment can operate in a fairly standard manner. Under such conditions only religious minorities are likely to experience conflicts between generally accepted business procedures and their religious beliefs and practices.¹⁹⁶ In these circumstances, the easy “de minimus cost” duty placed on employers may be tolerable, though hardly acceptable in a just society.¹⁹⁷

As diversity increases both among and within religious groups, the standard for reasonable accommodation required of employers, labor organizations, and other covered entities should be heightened or at least clearly defined.¹⁹⁸ Concomitantly, in line with the EEOC’s

Civil Religion and the Establishment Clause, 95 YALE L.J. 1237, 1251 (1986). Mirsky observed that American civil religion:

[F]inds expression in myths of origin and eschatology (the Revolution, the Boston Tea Party, the Great Society, the American Century); a pantheon of heroes, saints, and martyrs (the Founding Fathers, the fallen Lincoln, the Unknown Soldier); sacred places (the Lincoln Memorial, Plymouth Rock); a liturgical calendar of consecration and remembrance (the Fourth of July, Memorial Day, Thanksgiving); sacred texts (the Declaration of Independence, Lincoln’s Second Inaugural Address); and an all-embracing world-view (the American Way of Life, the Four Freedoms).

Id. As American historical experience was filtered through religious modes of thought, the resulting civil religion filled the void left by the disestablishment of an official state religion. *See id.* at 1251-52.

193. *See* ALBANESE, *supra* note 12, at 13.

194. *See* Mirsky, *supra* note 192, at 1250.

195. *See* ALBANESE, *supra* note 12, at 13.

196. *See supra* Part I (discussing the predominance of the Judeo-Christian religious traditions).

197. *See supra* Part III (explaining the facts and holding of the *Wessling* case).

198. *See* Carroll, *supra* note 172, at 354 (arguing for a clear standard because the courts have varied interpretations of the EEOC guidelines).

modified view,¹⁹⁹ the obligation of the employee to cooperate to achieve a mutually satisfactory accommodation needs to be reconsidered.²⁰⁰ This becomes especially important when the claimed religious belief is not mandated by an external religious body or teaching, but involves the personal religious preferences cherished by all Americans, as in the *Wessling* case.²⁰¹

Ultimately, faith and work are connected far more deeply than most Americans realize. In Hebrew, the word “avodah” represents both the concept of worship as well as the concept of labor, and the link between the two is clear.²⁰² Catholic Christians employ the term “vocation” in a special sense, a calling to God’s service or Holy Orders.²⁰³ Most modern workers, however, whether Catholic, Protestant, or Jewish, are familiar with the more general meaning of vocation as a mission, a purpose in life, or simply a job.²⁰⁴ Hopefully, as the expression of religious beliefs and rituals becomes more common in the workplace, so will reverence for the Sacred and respect for fellow human beings. Both of these are at the heart of all religions and are necessary for the genuine reconciliation of religious rights and responsibilities.

V. CONCLUSION

Fifteen years ago, a federal district court decided that an employee’s request for time off from work so that she could set up a church hall for a Christmas play and receive children was not a religious observance protected by Title VII. Although the employee, who was a CCD teacher in her parish, sincerely believed that her participation was required by her duty to educate the children in the Roman Catholic faith, the court regarded her activities as social, rather than religious, in nature.

The court also found that the employer had met its statutory duty to accommodate the plaintiff, although, in reality, the company offered

199. See *supra* notes 150-54 and accompanying text (discussing the EEOC’s position).

200. See *id.*

201. See *supra* text accompanying notes 118-19 (explaining how Mrs. Wessling’s own personal beliefs of duty, not her faith, obligated her participation).

202. See JEFFERY K. SALKIN, *BEING GOD’S PARTNER: HOW TO FIND THE HIDDEN LINK BETWEEN SPIRITUALITY AND YOUR WORK* 47 (1994).

203. See JOHNSON, *supra* note 106, at 120.

204. See generally ALAN BRISKIN, *THE STIRRING OF SOUL IN THE WORKPLACE* (1996) (presenting stories of people in a wide range of occupations and their personal struggles to reclaim their souls and keep their spiritual integrity and values alive in the pragmatic environment of the workplace).

her only a promise to try to dismiss her whole department early. Curiously, the court commented that the employee had failed to accommodate her work schedule despite the lack of a Title VII requirement for a worker to provide an accommodation.

Nevertheless, there is some case precedent in support of an obligation for employees to cooperate with their employers, unions, and other covered entities to arrange religious accommodations when the need arises. Moreover, a few years ago, the EEOC proposed a modification of its regulations that would allow for accommodations other than those preferred by employees seeking such arrangements.

Recent legislation and legislative proposals have sought to raise the accommodation duty of employers when the religious expression of employees conflicts with usual business operations. Title VII provides a vague, circular definition of religion and the line differentiating a personal preference from a religious one has blurred. As religious beliefs and practices become more diverse and the number of religious discrimination claims increases, reallocating the burdens of employers and employees may provide one method for achieving a just reconciliation of religious rights and responsibilities in the workplace.