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SUBJECT: EEOC COMPLIANCE MANUAL

PURPOSE: This transmittal covers the issuance of Section 12 of the new Compliance Manual on "Religious Discrimination." The section provides guidance and instructions for investigating and analyzing charges alleging discrimination based on religion.

EFFECTIVE DATE: Upon receipt

DISTRIBUTION: EEOC Compliance Manual holders

OBSOLETE DATA: This Section of the Compliance Manual replaces Section 628: *Religious Accommodation*, EEOC Compliance Manual, Volume II and its Appendices: Appendix A, *Policy Statement on Ansonia Board of Education v. Philbrook and Religious Accommodation*; Appendix B, *Policy Guidance On 'New Age' Training Programs Which Conflict With Employees' Religious Beliefs*; and Appendix C, *Religious Objections to Unionism*. It also replaces the following policy documents: *Religious Organizations that Pay Women Less than Men in Accordance with Religious Beliefs*; *Religious Organization Exemption Under Title VII of the Civil Rights Act of 1964, as amended*; and *Policy Statement on Goldman v. Weinberger (Accommodation of the Wearing of Religious Dress*).

The Commission's *Guidelines on Discrimination Because of Religion*, 29 C.F.R. Part 1605, remain in effect.

/s/

Naomi C. Earp
Chair

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SECTION 12: RELIGIOUS DISCRIMINATION

OVERVIEW[1]

This Section of the Compliance Manual focuses on religious discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).[2] Title VII protects workers from employment discrimination based on their race, color, religion, sex, national origin, or protected activity. Solely with respect to religion, Title VII also requires reasonable accommodation of employees'[3] sincerely held religious beliefs, observances, and practices when requested, unless accommodation would impose an undue hardship on business operations.[4] Undue hardship

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[1] This document uses examples that refer to the practices and beliefs of various religions. These examples are intended to clarify the legal principles for which they are used and do not purport to represent the religious beliefs or practices to which they refer. In some instances, links to non-EEOC Internet sites are also provided for the reader's convenience in obtaining additional information. EEOC assumes no responsibility for their content and does not endorse their organizations or guarantee the accuracy of these sites.

[2] This Section of the Compliance Manual replaces Section 628: *Religious Accommodation*, EEOC Compliance Manual, Volume II and its Appendices: Appendix A, *Policy Statement on Ansonia Board of Education v. Philbrook and Religious Accommodation*; Appendix B, *Policy Guidance On 'New Age' Training Programs Which Conflict With Employees' Religious Beliefs*; and Appendix C, *Religious Objections to Unionism*. It also replaces the following policy documents: *Religious Organizations that Pay Women Less than Men in Accordance with Religious Beliefs*; *Religious Organization Exemption Under Title VII of the Civil Rights Act of 1964, as amended*; and *Policy Statement on Goldman v. Weinberger (Accommodation of the Wearing of Religious Dress*). The Commission's *Guidelines on Discrimination Because of Religion* (hereafter *Commission Guidelines*) are not affected by this Section. *See Commission Guidelines*, 29 C.F.R. Part 1605.

[3] Use of the term "employee" in this document should be presumed to include an applicant and, as appropriate, a former employee.

[4] 42 U.S.C. § 2000e-2(a) provides that it is an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e(j) provides that:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an

under Title VII is defined as "more than *de minimis*" cost or burden -- a substantially lower standard for employers to satisfy than the "undue hardship" defense under the Americans with Disabilities Act (ADA), which is defined instead as "significant difficulty or expense."[5]

The prohibition on discrimination and the requirement of reasonable accommodation apply whether the religious views in question are mainstream or non-traditional, and even if not recognized by any organized religion. These protections also extend to those who profess no religious beliefs.[6]

Questions about religion in the workplace have increased as religious pluralism has increased. In a 2001 survey of human resource professionals conducted by the Society for Human Resource Management and the Tanenbaum Center for Interreligious Understanding, 36% of human resource professionals who responded reported an increase in the religious diversity of their employees in the preceding five years.[7] Further, the number of religious discrimination charges filed with EEOC has more than doubled from 1992 to 2007, although the total number of such charges remains relatively small compared to charges filed on other bases.[8] Many

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employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

[5] Federal legislation known as the Workplace Religious Freedom Act ("WRFA"), that has been proposed since the 1990s, would amend Title VII to change the current "*de minimis*" standard for establishing undue hardship to require employers to show that the accommodation would cause significant difficulty or expense. *See* H.R. 1431, 110th Cong. (2007). This compliance manual chapter interprets and applies the current federal law, and takes no position on WRFA. *Note:* Various state and local laws extend beyond Title VII in terms of the protected bases covered, the discrimination prohibited or accommodation required, and the legal standards and defenses that apply.

[6] *See, e.g.*, *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (First Amendment does not permit government to distinguish between theistic and non-theistic religions such as Buddhism, Taoism, Ethical Culture, and Secular Humanism); *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975) (Title VII violated by requiring atheist employee to attend prayer portion of business meeting).

[7] Society for Human Resource Management (SHRM) and the Tanenbaum Center for Interreligious Understanding, *Religion in the Workplace Survey*, at 6 (Society for Human Resource Management, 2001) (executive summary and information on obtaining report available at http://www.tanenbaum.org/research.html (last visited July 2, 2008)); Pew Forum on Religion and Public Life, *U.S. Religious Landscape Survey* (2008), available at http://religions.pewforum.org/reports (last visited July 2, 2008).

[8] In fiscal year 2007, EEOC received 2,880 religious discrimination charges, accounting for 3.5% of all charges filed with the Commission that year. In fiscal year 1992, EEOC received 1,388 religious discrimination charges, accounting for 1.9% of all charges filed with the Commission that year. Statistics regarding the number of religious discrimination charges filed with the Commission can be found at http://www.eeoc.gov/stats/charges.html.

employers seek legal guidance in managing the issues that arise as religious diversity in the American workplace continues to increase.[9]

This Section of the Compliance Manual is designed to be a practical resource for employers, employees, practitioners, and EEOC enforcement staff on Title VII's prohibition against religious discrimination. The Section defines religious discrimination, discusses typical scenarios in which religious discrimination may arise, and provides guidance to employers on how to balance the needs of individuals in a diverse religious climate.[10] The Section is organized by legal topic, as follows:

> **I - <u>Coverage issues</u>, including the definition of "religion" and "sincerely held," the religious organization exception, and the ministerial exception.**
>
> **II - <u>Disparate treatment analysis</u> of employment decisions based on religion, including recruitment, hiring, promotion, discipline, and compensation, as well as differential treatment with respect to religious expression; customer preference; security requirements; and bona fide occupational qualifications.**
>
> **III - <u>Harassment analysis</u>, including religious belief or practice as a condition of employment or advancement, hostile work environment, and employer liability issues.**
>
> **IV - <u>Reasonable accommodation analysis</u>, including notice of the conflict between religion and work, scope of the accommodation requirement and undue hardship defense, and common methods of accommodation.**
>
> **V - <u>Related forms of discrimination</u>, including discrimination based on national origin, race, or color, as well as retaliation.**

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[9] "Religion in the Workplace is a Diversity Issue for U.S. Companies," U.S. Department of State's Bureau of International Information Programs (Nov. 28, 2007), available at http://www.america.gov/st/washfile-english/2007/November/20071128173019xlrennef0.1781427.html (last visited July 2, 2008).

[10] The principles discussed in this Section apply to Title VII claims against private employers as well as to federal, state, and local public sector employers, unless otherwise noted. *See* 42 U.S.C. §§ 2000e(a) - (b), 2000e-16(a), *et seq.*, and 2000e-16a. *See, e.g.*, *infra* nn.11-15, 66 (directing attention to situations where the Religious Freedom Restoration Act (RFRA) may apply), and 201-203. As explained in n.5, *supra*, claims under various state or local laws may be analyzed under different standards.

Some charges of religious discrimination may raise multiple claims, for example requiring analysis under disparate treatment, harassment, and denial of reasonable accommodation theories of liability. In addition, there are some instances where Title VII religious discrimination cases implicate federal constitutional provisions.[11] For example, a government employer may contend that granting a requested religious accommodation would pose an undue hardship because it would constitute government endorsement of religion in violation of the Establishment Clause of the First Amendment.[12] A private sector employer may contend that its own First Amendment rights under the Free Exercise or Free Speech Clauses would be violated if it is compelled by Title VII to grant a particular accommodation.[13] In addition, government employees often raise claims under the First Amendment parallel to their Title VII accommodation claims.[14] Defining the exact parameters of the First Amendment is

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[11] The First Amendment religion and speech clauses ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech") protect individuals against restrictions imposed by the government, not by private entities, and therefore do not apply to rules imposed on private sector employees by their employers. The First Amendment, however, does protect private sector employers from government interference with their free exercise and speech rights. Moreover, government employees' religious expression is protected by both the First Amendment and Title VII. *See infra* nn.12-15, 66, and accompanying text; *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995); *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* (Aug. 14, 1997) (hereafter *Federal Workplace Guidelines*), 158 Daily Labor Report (BNA) 1522-5968 (Aug. 15, 1997) (available at http://clinton2.nara.gov/WH/New/html/19970819-3275.html (last visited July 2, 2008)). Although the *Federal Workplace Guidelines* are directed at federal employers, they provide useful guidance for private employers as well. In addition, the U.S. Department of Justice maintains a website, www.firstfreedom.gov, which provides information on a variety of constitutional and statutory religious discrimination issues, including a section on Title VII employment protections based on religion.

[12] *See Daniels v. City of Arlington*, 246 F.3d 500 (5th Cir.) (as a government entity, police department may be able to demonstrate that providing the requested accommodation would have posed an undue hardship because allowing the officer to wear a cross on his uniform would give the appearance of public agency endorsement of the officer's religious views, in violation of the department's constitutional obligations), *cert. denied*, 534 U.S. 951 (2001); *Helland v. South Bend Cmty. Sch. Corp.*, 93 F.3d 327 (7th Cir. 1996) (public school did not violate either plaintiff's Title VII religious accommodation right or his First Amendment free exercise right by removing plaintiff from substitute teacher list due to his proselytizing in class); *Brown v. Polk County*, 61 F.3d at 656-59 (where there was no evidence that subordinates objected on religious grounds**,** it would not have posed an undue hardship under Title VII, or violated the First Amendment Establishment Clause, to accommodate supervisor's occasional affirmations of Christianity and spontaneous voluntary prayers during meetings).

[13] *See, e.g., EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 621 (9th Cir. 1988) (court must balance the application of Title VII to the employment policy against private employers' right under First Amendment Free Exercise clause to practice their religion; private secular employer's free exercise right to hold mandatory religious services for employees did not outweigh its Title VII obligation to accommodate atheist employee's request to be exempt from attending the services on religious grounds; excusing plaintiff's attendance would not pose an undue hardship on operation of employer's business).

[14] *See, e.g., Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156, 164-65 (2d Cir. 2001) (state

beyond the scope of this document. However, these First Amendment issues are referenced throughout this document in order to illustrate how they often arise in Title VII cases.[15]

12-I COVERAGE

Title VII prohibits covered employers, employment agencies, and unions[16] from:

(1) treating applicants or employees differently (disparate treatment) based on their religious beliefs or practices – or lack thereof – in any aspect of employment, including recruitment, hiring, assignments, discipline, promotion, and benefits;

(2) subjecting employees to harassment because of their religious beliefs or practices – or lack thereof – or because of the religious practices or beliefs of people with whom they associate (*e.g.*, relatives, friends, etc.);

(3) denying a requested reasonable accommodation of an applicant's or employee's sincerely held religious beliefs or practices – or lack thereof – if an accommodation will not impose an undue hardship on the conduct of the business;[17] and,

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agency did not violate either Title VII or First Amendment Free Exercise Clause by refusing to allow employee to evangelize clients of state agency while performing job duties; in addition, employer would have risked First Amendment Establishment Clause violation by permitting the accommodation); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (police department violated Sunni Muslim officer's First Amendment free exercise rights by refusing to make a religious exception to its "no beard" policy to accommodate his beliefs, while exempting other officers for medical reasons); *Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608 (W.D. Ky. 2005) (public library employee's First Amendment free speech and free exercise rights were violated when she was prohibited from wearing a necklace with a cross ornament).

[15] Guidance for government workplaces on the First Amendment religious free exercise issues, much of which is also useful for the private sector, is available in the *Federal Workplace Guidelines*, *supra* n.11*; see also Brown*, 61 F.3d at 658 (applying First Amendment test governing free speech of public employees to First Amendment free exercise claims, court balanced an employee's right to free exercise with the employer's interest in providing effective and efficient public services; public employee's termination constituted both denial of religious accommodation under Title VII and violation of First Amendment Free Exercise Clause).

[16] 42 U.S.C. § 2000e-2. To determine whether an entity is covered by Title VII, *see* EEOC Compliance Manual, "Threshold Issues," http://www.eeoc.gov/policy/docs/threshold.html. Although this document concerns Title VII, employers and employees should note that there may be state and local laws in their jurisdiction prohibiting religious discrimination in employment, some of which may be parallel to Title VII and some of which may afford narrower or broader coverage.

[17] 42 U.S.C. § 2000e(j).

(4) retaliating against an applicant or employee who has engaged in protected activity, including participation (*e.g.*, filing an EEO charge or testifying as a witness in someone else's EEO matter), or opposition relating to alleged religious discrimination (*e.g.*, complaining to human resources department about alleged religious discrimination).

Although more than one of these theories of liability may apply in a particular case, they are discussed in separate parts of this manual for ease of use.

• NOTE TO EEOC INVESTIGATORS •

Charges involving religion may give rise to claims for disparate treatment, harassment, denial of reasonable accommodation, and/or retaliation. Therefore, these charges should be investigated and analyzed under all four theories of liability to the extent applicable, even if the charging party only raises one claim.

A. Definitions

Overview: Religion is very broadly defined under Title VII. Religious beliefs, practices, and observances include those that are theistic[18] in nature, as well as non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." Religious beliefs can include unique views held by a few or even one individual; however, mere personal preferences are not religious beliefs. Title VII requires employers to accommodate religious beliefs, practices, and observances if the beliefs are "sincerely held" and the reasonable accommodation poses no undue hardship on the employer.

1. Religion

Title VII defines "religion" to include "all aspects of religious observance and practice as well as belief."[19] Religion includes not only traditional, organized religions such as Christianity,

[18] "Theistic" is defined as "believing in a god or gods." *The American Heritage Dictionary of the English Language, Fourth Ed*, Houghton Mifflin Co. (2004), available at http://dictionary.reference.com/browse/theistic (last visited July 2, 2008).

[19] 42 U.S.C. § 2000e(j). *Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978) (the statutory language "all aspects of religious practice and belief" is interpreted broadly; "to restrict the act to those practices which are mandated or prohibited by a tenet of the religion, would involve the court in determining not only what are the tenets of a particular religion, which by itself perhaps would not be beyond the province of the court, but would frequently require the courts to decide whether a particular practice is or is not required by the tenets of the religion"); *see also Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 887 (1990) (in holding that the Free Exercise Clause did not prohibit application of Oregon drug laws to ceremonial ingestion of peyote, Court noted that "[r]epeatedly

Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.[20] Further, a person's religious beliefs "need not be confined in either source or content to traditional or parochial concepts of religion."[21] A belief is "religious" for Title VII purposes if it is "'religious' in the person's own scheme of things,"[22] *i.e.*, it is "a sincere and meaningful belief that occupies in the life of its possessor a place parallel to that filled by … God."[23] An employee's belief or practice can be "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief or practice, or if few – or no – other people adhere to it.[24]

Religious beliefs include theistic beliefs as well as non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[25] Although courts generally resolve doubts about particular beliefs in favor of finding

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and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim").

[20] *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (although animal sacrifice may seem "abhorrent" to some, Santerian belief is religious in nature and is protected by the First Amendment); *U.S. v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995) ("one man's religion will always be another man's heresy").

[21] *Thomas*, 450 U.S. at 716 ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or [another practitioner] . . . more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

[22] *Redmond*, 574 F.2d at 901 n.12 (Title VII case citing *United States v. Seeger*, 380 U.S. 163 (1969), and *Welsh v. United States*, 398 U.S. 333 (1970), which defined protected "religion" for purposes of the Universal Military Training and Service Act). Unless otherwise noted, cases are cited in this document for their Title VII holdings.

[23] *Seeger*, 380 U.S. at 176. "This standard was developed in [*Seeger*] and [*Welsh*]. The Commission has consistently applied this standard in its decisions." 29 C.F.R. § 1605.1.

[24] *Commission Guidelines*, 29 C.F.R. § 1605.1 ("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."); *Welsh*, 398 U.S. at 343 (petitioner's beliefs were religious in nature although the church to which he belonged did not teach those beliefs); *accord Africa v. Commonwealth of Pa.*, 662 F.2d 1025, 1032-33 (3d Cir.1981); *Bushouse v. Local Union 2209, United Auto., Aerospace & Agric. Implement Workers of Am.*, 164 F. Supp. 2d 1066, 1076 n.15 (N.D. Ind. 2001) ("Title VII's intention is to provide protection and accommodation for a broad spectrum of religious practices and belief not merely those beliefs based upon organized or recognized teachings of a particular sect").

[25] *Commission Guidelines*, 29 C.F.R. § 1605.1; *Torcaso*, 367 U.S. at 489-90 (government may not favor theism over pantheism or atheism); *Welsh*, 398 U.S. 333 (to be religion protected by the First

that they are religious,[26] beliefs are not protected merely because they are strongly held. Rather, religion typically concerns "ultimate ideas" about "life, purpose, and death."[27] Social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII.[28]

Amendment, a belief system need not have a concept of a god, supreme being, or afterlife; plaintiff's belief was deemed to be religious because it was held with strength of traditional religious beliefs); *Townley*, 859 F.2d 610 (Title VII prohibits an employer from compelling its atheist employees to attend religious services); *Young*, 509 F.2d 140 (same).

[26] *United States v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995) (the threshold for establishing the religious nature of beliefs is low; under the First Amendment, "if there is any doubt about whether a particular set of beliefs constitutes a religion, the Court will err on the side of freedom and find that the beliefs are a religion. . . . [because the country's] founders were animated in large part by a desire for religious liberty"), *aff'd*, 95 F.3d 1475, 1482-83 (10th Cir. 1996); s*ee also Smith*, 494 U.S. at 887 (in holding that the Free Exercise Clause did not prohibit application of Oregon drug laws to ceremonial ingestion of peyote, Court noted that "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim").

[27] *Meyers*, 906 F. Supp. at 1502 (religions address "ultimate ideas," *i.e.*, "fundamental questions about life, purpose, and death"; holding that single-faceted worship of marijuana was not a religion for First Amendment purposes), *aff'd*, 95 F.3d at 1483; *accord Africa*, 662 F.2d at 1032 ("a religion [protected by the First Amendment] addresses fundamental and ultimate questions having to do with deep and imponderable matters [and] . . . is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching"); *Dettmer v. Landon*, 617 F. Supp. 592, 595-96 (E.D. Va. 1985) (under the First Amendment, Wiccans' belief is religious in nature because, among other things, the belief structure relates to "ultimate" concerns and reflects a broad concern for improving the quality of life for others), *aff'd in relevant part and rev'd on other grounds*, 799 F.2d 929 (4th Cir. 1986); *Church of the Chosen People (No. Am. Panarchate) v. United States*, 548 F. Supp. 1247 (D. Minn. 1982) (a church whose single-faceted doctrine concerned sexual preference and not ultimate questions was not a religion entitled to tax exemption); *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977) ("religious" belief under Title VII "is based on a theory of 'man's nature or his place in the Universe,' [and is] not merely a personal preference"), *aff'd*, 589 F.2d 1113 (5th Cir. 1979). Although "religion" is often marked by external manifestations such as ceremonies, rituals or clergy, such manifestations are not required for a belief to be "religious." *E.g.*, *Malnak v. Yogi*, 592 F.2d 197, 209-10 (3d Cir. 1979).

[28] For example, EEOC and courts have found that the Ku Klux Klan is not a religion within the meaning of Title VII because its philosophy has a narrow, temporal, and political character. Commission Decision No. 79-06, CCH EEOC Decisions ¶ 6737 (1983); *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025, 1026 (E.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974); *Slater v. King Soopers*, 809 F. Supp. 809, 810 (D. Colo. 1992) (dismissing religious discrimination claim by a member of the Ku Klux Klan who allegedly was fired for participating in a Hitler rally because the Ku Klux Klan is "political and social in nature" and is not a religion for Title VII purposes); s*ee also Brown v. Pena*, 441 F. Supp. 1382 (plaintiff's belief that eating cat food contributes to his well-being is a personal preference and not a religion). In an analogous case, *Peterson v. Wilmur Communications, Inc.*, 205 F. Supp. 2d 1014, 1022 (E.D. Wis. 2002), the court held that an employee's membership in the World Church of the Creator was a "religious" belief, even though the organization's central tenet is white supremacy, because "it functions

Religious observances or practices include, for example, attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, or refraining from certain activities. Determining whether a practice is religious turns not on the nature of the activity, but on the employee's motivation. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons. Whether or not the practice is "religious" is therefore a situational, case-by-case inquiry.[29] For example, one employee might observe certain dietary restrictions for religious reasons while another employee adheres to the very same dietary restrictions but for secular (*e.g.*, health or environmental) reasons.[30] In that instance, the same practice might in one case be subject to reasonable accommodation under Title VII because an employee engages in the practice for religious reasons, and in another case might not be subject to reasonable accommodation because the practice is engaged in for secular reasons.

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as religion in [plaintiff's] life" as evidenced by the fact that he has been a minister in it for more than three years, worked to put the church's teachings into practice, and actively proselytizes. However, the *Peterson* court might have reached a different conclusion had it considered whether the belief was merely one-dimensional and thus not religious, *i.e.*, not part of a moral or ethical belief system concerning "ultimate ideas" about "life, purpose, and death."

[29] *Compare Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679 (9th Cir. 1998) (employer not liable for denying employee's request to be absent from work on particular dates to attend a religious pilgrimage where the evidence showed that her religious needs could be met by going on the pilgrimage at another time and that the particular dates she requested were simply a personal preference), *with Heller v. EBB Auto Co.*, 8 F.3d 1433 (9th Cir. 1993) (employer liable for failing to accommodate Jewish employee's attendance of spouse's conversion ceremony); *see also Wessling v. Kroger Co.*, 554 F. Supp. 548 (E.D. Mich. 1982) (employer not liable for denial of accommodation where employee requested leave to help children get into their costumes and practice before performance of church play; employee's own testimony revealed her participation in this instance was more in the nature of a parental and social obligation); *Redmond*, 574 F.2d at 901 (employer liable for failing to accommodate employee's participation in Saturday Bible classes; the court found his attendance to be pursuant to a sincerely held religious belief given that he was appointed to be lifetime leader of his church Bible study class many years earlier, time of meeting was scheduled by church elders, and employee felt that his participation was at dictate of his elders and constituted a "religious obligation"); *Weitkenaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284, 1288-89 (D. Vt. 1974) (employer liable for failing to protect minister's attendance at monthly church organizational meetings where it was considered necessary to preparing for his pastoral duties and thus essential to his ability to lead his congregation).

[30] *Cf. LaFevers v. Saffle*, 936 F.2d 1117 (10th Cir. 1991) (although not all Seventh-day Adventists are vegetarian, an individual adherent's genuine religious belief in such a dietary practice warrants constitutional protection under the First Amendment).

The following examples illustrate these concepts:

EXAMPLE 1
Employment Decisions Based on "Religion"

An otherwise qualified applicant is not hired because he is a self-described evangelical Christian. A qualified non-Jewish employee is denied promotion because the supervisor wishes to give a preference based on religion to a fellow Jewish employee. An employer terminates an employee based on his disclosure to the employer that he has recently converted to the Baha'i Faith. Each of these is an example of an employment decision based on the religious affiliation of the applicant or employee, and therefore is based on "religion" within the meaning of Title VII.

EXAMPLE 2
Religious Practice versus Secular Practice

A Seventh-day Adventist employee follows a vegetarian diet because she believes it is religiously prescribed by the scriptural passage "[b]ut flesh with the life thereof, which is the blood thereof, shall ye not eat," (Genesis 9:4). Her vegetarianism is a religious practice, even though not all Seventh-day Adventists share this belief or follow this practice, and even though many individuals adhere to a vegetarian diet for purely secular reasons.

EXAMPLE 3
Types of Religious Practice or Observance

A Catholic employee requests a schedule change so that he can attend church services on Good Friday. A Muslim employee requests an exception to the company's dress and grooming code allowing her to wear her headscarf, or a Hindu employee requests an exception allowing her to wear her bindi (religious forehead marking). An atheist asks to be excused from the religious invocation offered at the beginning of staff meetings. An adherent to Native American spiritual beliefs seeks unpaid leave to attend a ritual ceremony. An employee who identifies as Christian but is not affiliated with a particular sect or denomination requests accommodation of his religious belief that working on his Sabbath is prohibited. Each of these accommodation requests relates to a "religious" belief or practice within the meaning of Title VII. By contrast, a request for a schedule change to help set up decorations or prepare food for a church event, for instance, typically does not

involve a "religious" belief or practice within the meaning of Title VII.[31]

EXAMPLE 4
Supervisor Considers Belief Illogical

Morgana asks for time off on October 31 to attend the "Samhain Sabbat," the New Year observance of Wicca, her religion. Her supervisor refuses, saying that Wicca is not a "real" religion but an "illogical conglomeration" of "various aspects of the occult, such as faith healing, self-hypnosis, tarot card reading, and spell casting, which are not religious practices." The supervisor's refusal to accommodate her on the ground that he believes her religion is illogical violates Title VII unless the employer can show her request would impose an undue hardship. The law applies to religious beliefs even though others may find them "incorrect" or "incomprehensible."[32]

EXAMPLE 5
Unique Belief Can Be Religious

Edward practices the Kemetic religion, based on ancient Egyptian faith, and affiliates himself with a tribe numbering fewer than ten members. He states that he believes in various deities, and follows the faith's concept of Ma'at, a guiding principle regarding truth and order that represents physical and moral balance in the universe. During a religious ceremony he received small tattoos encircling his wrist, written in the Coptic language, which express his servitude to Ra, the Egyptian god of the sun. When his employer asks him to cover the tattoos, he explains that it is a sin to cover them intentionally because doing so would signify a

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[31] *See, e.g., Wessling v. Kroger Co.*, 554 F. Supp. 548 (E.D. Mich. 1982) (court held that plaintiff, who had volunteered to arrive at Church early to set up, decorate, and receive children prior to their performance of a play during Christmas Mass, was engaging in a social and family obligation rather than a religious belief, practice, or observance).

[32] *See Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986) (in First Amendment case, rejecting argument that witchcraft was a "conglomeration" of "various aspects of the occult" rather than a religion; religious beliefs need not be "acceptable, logical, consistent or comprehensible to others" to be protected); *Washington Ethical Soc'y v. District of Columbia*, 249 F.2d 127, 128 (D.C. Cir. 1957) (Ethical Society qualifies as a "religious corporation or society" and its building is entitled to tax exemption; belief in a Supreme Being or supernatural power is not essential to qualify for tax exemption accorded to "religious corporations," "churches" or "religious societies"); *Fellowship of Humanity v. County of Alameda*, 315 P.2d 394 (Cal. App. 1957) (same holding with respect to Secular Humanists).

rejection of Ra. These can be religious beliefs and practices even if no one else or few other people subscribe to them.[33]

EXAMPLE 6
Personal Preference That is Not a Religious Belief

Sylvia wears several tattoos and has recently had her nose and eyebrows pierced. A newly hired manager implements a dress code that requires that employees have no visible piercings or tattoos. Sylvia says that her tattoos and piercings are religious because they reflect her belief in body art as self-expression and should be accommodated. However, the evidence demonstrates that her tattoos and piercings are not related to any religious belief system. For example, they do not function as a symbol of any religious belief, and do not relate to any "ultimate concerns" such as life, purpose, death, humanity's place in the universe, or right and wrong, and they are not part of a moral or ethical belief system. Therefore, her belief is a personal preference that is not religious in nature.[34]

2. Sincerely Held

Title VII requires employers to accommodate only those religious beliefs that are "sincerely held."[35] Therefore, whether or not a religious belief is "sincerely held" by an applicant or employee is only relevant to religious accommodation, *not* to claims of disparate treatment or harassment because of religion. In those claims, it is the motivation of the discriminating official, not the actual beliefs of the individual alleging discrimination, that are typically relevant in determining if the discrimination that occurred was because of religion. A detailed discussion of reasonable accommodation of sincerely held religious beliefs appears in § IV, but the meaning of "sincerely held" is addressed here.

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[33] *EEOC v. Red Robin Gourmet Burgers, Inc.*, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005) (denying employer's motion for summary judgment on accommodation claim arising from employee's refusal to cover his Kemetic religious tattoos in order to comply with employer's dress code).

[34] These facts are similar to those in *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004). However, the court in *Cloutier* did not resolve the issue of whether or not the plaintiff's facial piercing, which she alleged was displayed pursuant to her adherence to the beliefs of the Church of Body Modification, was part of a "religious" belief, practice, or observance, instead finding that the proposed accommodation of allowing display of the piercing would have posed an undue hardship.

[35] *Seeger*, 380 U.S. at 185 ("[w]hile the 'truth' of a belief is not open to question, there remains the significant question of whether it is 'truly held'").

Like the "religious" nature of a belief or practice, the "sincerity" of an employee's stated religious belief is usually not in dispute. Nevertheless, there are some circumstances in which an employer may assert as a defense that it was not required to provide accommodation because the employee's asserted religious belief was not sincerely held. Factors that – either alone or in combination – might undermine an employee's assertion that he sincerely holds the religious belief at issue include: whether the employee has behaved in a manner markedly inconsistent with the professed belief;[36] whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; whether the timing of the request renders it suspect (*e.g.*, it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons. However, none of these factors is dispositive. For example, although prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs – or degree of adherence – may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held.[37] An employer also should not

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[36] *EEOC v. Union Independiente De La Autoridad De Acueductos*, 279 F.3d 49, 56 (1st Cir. 2002) (evidence that Seventh-day Adventist employee had acted in ways inconsistent with the tenets of his religion, for example that he worked five days a week rather than the required six, had lied on an employment application, and took an oath before a notary upon becoming a public employee, can be relevant to the evaluation of sincerity but is not dispositive); *Hansard v. Johns-Manville Prods. Corp*., 1973 WL 129 (E.D. Tex. Feb. 16, 1973) (employee's contention that he objected to Sunday work for religious reasons was undermined by his very recent history of Sunday work); *see also Hussein v. Waldorf-Astoria*, 134 F. Supp. 2d 591 (S.D.N.Y. 2001) (employer had a good faith basis to doubt sincerity of employee's professed religious need to wear a beard because he had not worn a beard at any time in his fourteen years of employment, had never mentioned his religious beliefs to anyone at the hotel, and simply showed up for work one night and asked for an on-the-spot exception to the no-beard policy), *aff'd*, 2002 WL 390437 (2d Cir. Mar. 13, 2002) (unpublished).

[37] *EEOC v. Ilona of Hungary, Inc*., 108 F.3d 1569 (7th Cir. 1997) (en banc) (Jewish employee proved her request for leave to observe Yom Kippur was based on a sincerely held religious belief even though she had never in her prior eight-year tenure sought leave from work for a religious observance, and conceded that she generally was not a very religious person; the evidence showed that certain events in her life, including the birth of her son and the death of her father, had strengthened her religious beliefs over the years); *Cooper v. Oak Rubber Co*., 15 F.3d 1375 (6th Cir. 1994) (that employee had worked the Friday night shift at plant for approximately seven months after her baptism did not establish that she did not hold sincere religious belief against working on Saturdays, considering that 17 months intervened before employee was next required to work on Saturday, and employee's undisputed testimony was that her faith and commitment to her religion grew during this time); *EEOC v. IBP, Inc.*, 824 F. Supp. 147 (C.D. Ill. 1993) (Seventh-day Adventist employee's previous absence of faith and subsequent loss of faith did not prove that his religious beliefs were insincere at the time that he refused to work on the Sabbath); s*ee also Union Independiente*, 279 F.3d at 57 & n.8 (the fact that the alleged conflict between plaintiff's beliefs and union membership kept changing might call into question the sincerity of the beliefs or "might simply reflect an evolution in plaintiff's religious views toward a more steadfast opposition to union membership").

assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion.[38]

3. Employer Inquiries into Religious Nature or Sincerity of Belief

Because the definition of religion is broad and protects beliefs and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely-held religious belief. If, however, an employee requests religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information. *See infra* § IV-A-2.

• NOTE TO EEOC INVESTIGATORS •

If the Respondent (R) disputes that the Charging Party's ("CP's") belief is "religious," consider the following:

⇒ **Begin with the CP's statements.** What religious belief or practice does the CP claim to have? In some cases, the CP's credible testimony regarding his belief or practice will be sufficient to demonstrate that it is religious. In other cases, however, the investigator may need to ask follow-up questions about the nature and tenets of the asserted religious beliefs, and/or any associated practices, rituals, clergy, observances, etc., in order to identify a specific religious belief or practice or determine if one is at issue.

⇒ **Since religious beliefs can be unique to an individual, evidence from others is not always necessary.** However, if the CP believes such evidence will support his or her claim, the investigator should seek evidence such as oral statements, affidavits, or other documents from CP's religious leader(s) if applicable, or others whom CP identifies as knowledgeable regarding the religious belief or practice in question.

⇒ **Remember, where an alleged religious practice or belief is at issue, a case-by-case analysis is required.** Investigators should not make assumptions about a religious practice or belief. In some cases, to determine whether CP's asserted practice or belief is "religious" as defined under Title VII, the investigator's general knowledge will be insufficient, and additional objective information will

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[38] *Commission Guidelines*, 29 C.F.R. § 1605.1; *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 475 (7th Cir. 2001) (employee's belief that she needed to use the phrase "Have a Blessed Day" was a religious practice covered by Title VII even though using the phrase was not a requirement of her religion); *Rivera v. Choice Courier*, 2004 WL 1444852 (S.D.N.Y. June 25, 2004) (the statutory language providing that Title VII encompasses "all aspects of religious observance and practice, as well as belief," means that Title VII "protects more than . . . practices specifically mandated by an employee's religion").

have to be obtained, while nevertheless recognizing the intensely personal characteristics of adherence to a religious belief.

If the Respondent disputes that CP's belief is "sincerely held," the following evidence may be relevant:

⇒ Oral statements, an affidavit, or other documents from CP describing his or her beliefs and practices, including information regarding when CP embraced the belief or practice, as well as when, where, and how CP has adhered to the belief or practice; and/or,

⇒ Oral statements, affidavits, or other documents from potential witnesses identified by CP or R as having knowledge of whether CP adheres or does not adhere to the belief or practice at issue (*e.g.*, CP's religious leader (if applicable), fellow adherents (if applicable), family, friends, neighbors, managers, or co-workers who may have observed his past adherence or lack thereof, or discussed it with him).

B. Covered Entities

Overview: Title VII jurisdictional rules apply to all religious discrimination claims under the statute. However, specially-defined "religious organizations" and "religious educational institutions" are exempt from certain religious discrimination provisions, and a "ministerial exception" bars Title VII claims by employees who serve in clergy roles.

Title VII's prohibitions apply to employers, employment agencies, and unions,[39] subject to the statute's jurisdictional requirements. *See EEOC Compliance Manual, "Threshold Issues,"* http://www.eeoc.gov/policy/docs/threshold.html. Those covered entities must carry out their activities in a nondiscriminatory manner and provide reasonable accommodation unless doing so would impose an undue hardship.[40] Unions also can be liable if they knowingly acquiesce in

[39] For the text of 42 U.S.C. § 2000e-2(a), which applies to employers, see *supra* n.4. Under 42 U.S.C. § 2000e-2(b), it is unlawful for employment agencies to "fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his . . . religion . . . or to classify or refer for employment any individual on the basis of his . . . religion . . . ." Under 42 U.S.C. § 2000e-2(c), it is unlawful for unions to "(1) to exclude or expel from membership, or otherwise to discriminate against, any individual because of his . . . religion . . . ; (2) to limit, segregate or classify its membership or applicants . . . or to refuse to refer for employment any individual . . . because of such individual's . . . religion . . . ; or (3) to cause or attempt to cause an employer to discriminate . . . in violation of this section."

[40] *See, e.g.*, *Union Independiente*, 279 F.3d 49; *Bushouse*, 164 F. Supp. 2d 1066. *See infra* §§ II, III, and IV; *see also* § IV-C-5.

employment discrimination against their members, join or tolerate employers' discriminatory practices, or discriminatorily refuse to represent employees' interests.[41]

C. Exceptions

1. Religious Organizations

Under Title VII, religious organizations are permitted to give employment preference to members of their own religion.[42] The exception applies only to those institutions whose

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[41] *Goodman v. Lukens Steel Co*. 482 U.S. 656, 668-69 (1987) (unions violated "§ 703(c)(1) [of Title VII, which] makes it an unlawful practice for a Union to 'exclude or to expel from its membership, or otherwise to discriminate against, any individual'" when they "ignored [racial] discrimination claims . . . , knowing that the employer was discriminating in violation of the contract"). *See, e.g.*, *Perugini v. Safeway Stores*, 935 F. 2d 1083 (9th Cir. 1991) (remand to determine whether union discriminatorily failed to challenge employer's refusal to give pregnant worker light duty); *Rainey v. Town of Warren*, 80 F. Supp. 2d 5, 17 (D.R.I. 2000) ("[i]t is axiomatic that a union's failure to adequately represent union members in the face of employer discrimination may subject the union to liability under either Title VII or its duty of fair representation"). To the extent it has been held that a union cannot be held liable where it knowingly acquiesces in discrimination, the EEOC disagrees. *See EEOC v. Pipefitters Ass'n Local Union 597*, 334 F.3d 656 (7th Cir. 2003).

[42] Section 702(a) of Title VII, 42 U.S.C. § 2000e-1(a), provides:

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

Section 703(e)(2) of Title VII, 42 U.S.C. § 2000e-2(e)(2) provides:

> it shall not be an unlawful employment practice for a school, college, university, or educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

While Congress did not include a definition of the § 702(a) term "religious corporation" in Title VII, at least one judge has argued that the legislative history indicates that Congress intended "the § 703(e)(2) exemption to require a lesser degree of association between an entity and a religious sect than what would be required under § 702(a)." *See LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 237 (3d Cir. 2007) (Rendell, J., dissenting).

Executive Order 13279, *Equal Protection of the Laws for Faith-Based and Community Organizations*, issued on December 12, 2002, provides that certain faith-based organizations that provide social programs

"purpose and character are primarily religious."[43] That determination is to be based on "[a]ll significant religious and secular characteristics."[44] Although no one factor is dispositive, significant factors to consider that would indicate whether an entity is religious include:

- Do its articles of incorporation state a religious purpose?
- Are its day-to-day operations religious (*e.g.*, are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion)?
- Is it not-for-profit?
- Is it affiliated with or supported by a church or other religious organization? [45]

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can deliver those services and make hiring decisions on the basis of their religious beliefs even if they receive federal funding. *See* 67 Fed. Reg. 77,141 (12/16/02). The *Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government*, http://www.whitehouse.gov/government/fbci/guidance_document_01-06.pdf (last visited July 2, 2008), issued by the White House Office of Faith Based and Community Initiatives, explains that while religious organizations that receive federal funds to provide social services may choose to hire persons of the same religion, they are also subject to federal, state, and local employment and anti-discrimination laws, such as Title VII.

[43] *Townley*, 859 F.2d at 618; *accord Hall v. Baptist Mem. Health Care Corp.*, 215 F.3d 618, 624-25 (6th Cir. 2000) (college of health sciences qualified as a religious institution under Title VII because it was an affiliated institution of a church-affiliated hospital, had direct relationship with the Baptist church, and the college atmosphere was permeated with religious overtones).

[44] *Townley*, 859 F.2d at 618; *see also Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997) (Baptist university was "religious educational institution" where largest single source of funding was state Baptist Convention, all university trustees were Baptists, university reported financially to Convention and to Baptist State Board of Missions, university was member of Association of Baptist Colleges and Schools, university charter designated its chief purpose as "the promotion of the Christian Religion throughout the world by maintaining and operating institutions dedicated to the development of Christian character in high scholastic standing," and both Internal Revenue Service (IRS) and Department of Education recognized university as religious educational institution).

[45] *Townley*, 859 F.2d at 619 (manufacturer of mining equipment, whose owners asserted that they made a covenant with God that their business "would be a Christian, faith-operated business," is not a religious organization because it is for profit; it produces mining equipment, a secular product; it is not affiliated with or supported by a church; and its articles of incorporation do not mention any religious purpose). *Cf. EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 461 (9th Cir. 1993) (non-profit school not "religious" for Title VII purposes where ownership and affiliation, purpose, faculty, student body, student activities, and curriculum of the schools are either essentially secular, or neutral as far as religion is concerned).

This exception is not limited to religious activities of the organization.[46] However, it only allows religious organizations to prefer to employ individuals who share their religion.[47] The exception does not allow religious organizations otherwise to discriminate in employment on protected bases other than religion, such as race, color, national origin, sex, age, or disability.[48] Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races. Similarly, a religious organization is not permitted to deny fringe benefits to married women but not to married men by asserting a religiously based view that only men can be the head of a household.

EXAMPLE 7
Sex Discrimination Not Excused

> Justina works at Tots Day Care Center. Tots is run by a religious organization that believes that, while women may work outside of the home if they are single or have their husband's permission, men should be the heads of their households and the primary providers for their families. Believing that men shoulder a greater financial responsibility than women, the organization pays female teachers less than male teachers. The organization's practice of unequal pay based on sex constitutes unlawful discrimination.[49]

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[46] *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (a nonprofit church-run business does not violate Title VII if it refuses to hire anyone other than members of its own religion, even for enterprises or jobs that are not religious in nature).

[47] *Killinger*, 113 F.3d at 200 (School of Divinity need not employ professor who did not adhere to the theology advanced by its leadership); *Tirpanlis v. Unification Theological Seminary*, 2001 WL 64739 (S.D.N.Y. Jan. 24, 2001) (seminary operated by Unification Church cannot be sued for religious discrimination by Greek Orthodox employee who was allegedly terminated for refusing to accept the teachings of the Unification Church).

[48] *Ziv v. Valley Beth Shalom*, 156 F.3d 1242 (Table), 1998 WL 482832 (9th Cir. Aug. 11, 1998) (unpublished) (religious organization can be held liable for retaliation and national origin discrimination); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993) (religious institutions may not engage in age discrimination).

[49] *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (religious school violated Title VII and the Equal Pay Act when it provided "head of household" health insurance benefits only to single persons and married men).

2. Ministerial Exception

Courts have held, based on First Amendment constitutional considerations, that clergy members cannot bring claims under the federal employment discrimination laws, including Title VII, the Age Discrimination in Employment Act, the Equal Pay Act, and the Americans with Disabilities Act, because "[t]he relationship between an organized church and its ministers is its lifeblood."[50] This "ministerial exception" comes not from the text of the statutes, but from the First Amendment principle that governmental regulation of church administration, including the appointment of clergy, impedes the free exercise of religion and constitutes impermissible government entanglement with church authority.[51] Thus, courts will not ordinarily consider whether a church's employment decision concerning one of its ministers was based on discriminatory grounds, although some courts have allowed ministers to bring sexual harassment claims.[52]

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[50] *McClure v. Salvation Army*, 460 F.2d 553, 558-60 (5th Cir. 1972); s*ee also Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007) (applying ministerial exception to bar claim by resident in hospital's pastoral care program who alleged disability discrimination); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (applying ministerial exception to bar age discrimination claim brought by Catholic Diocese music director who was terminated following a dispute with the bishop's assistant regarding what to play during the Easter Mass); *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) (applying ministerial exception to bar age discrimination claim); *Combs v. Central Texas Annual Conf. of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (barring claim because court could not determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without entering the constitutionally impermissible realm of internal church management); *EEOC v. Catholic Univ. of America*, 83 F.3d 455 (D.C. Cir. 1996) (ministerial exception barred Title VII sex discrimination claim brought by tenured member of Catholic University's department of religious canon law); *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993) (ministerial exception inapplicable to parochial school teacher's age discrimination claim because employer's contention that teacher was terminated specifically for failing to attend Mass and to lead his students in prayers could be evaluated without risk of excessive entanglement between government and religious institution); *Guianan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849 (S.D. Ind. 1998) (ministerial exception inapplicable to parochial school teacher's age discrimination claim, even though teacher taught at least one class in religion per term, and organized one worship service per month, since vast majority of teacher's duties involved teaching math, science, and other secular courses).

[51] *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).

[52] *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008) (Title VII race discrimination claim by African-American Catholic priest challenging denial of promotion and subsequent termination was barred by the ministerial exception); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (ministerial exception bars Title VII sex discrimination claim by female Catholic chaplain against school, alleging that she was forced out as chaplain after she advocated on behalf of alleged victims of sexual harassment and spoke out against the school's president regarding alleged sexual harassment and discrimination against female employees); *Werft v. Desert Southwest Annual Conf. of the United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004) (ministerial exception barred minister's claim against church for failure to accommodate his disabilities). However, some courts have ruled that the ministerial exception does not bar harassment claims by ministers, but rather only applies to claims involving matters such as hiring,

The ministerial exception applies only to those employees who perform essentially religious functions, namely those whose primary duties consist of engaging in church governance, supervising a religious order, or conducting religious ritual, worship, or instruction.[53] The exception is not limited to ordained clergy,[54] and has been applied by courts to others involved in clergy-like roles who conduct services or provide pastoral counseling. However, the exception does not necessarily apply to everyone with a title typically conferred upon clergy (*e.g.*, minister).[55] In short, in each case it is necessary to make a factual determination of whether the function of the position is one to which the exception applies.

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promotion, and termination. *See Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004) (ministerial exception does not bar sexual harassment claim by minister), *reh'g denied*, 397 F.3d 790 (9th Cir. 2005) (two concurring and three dissenting opinions); *Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999) (novice's sexual harassment claim could be maintained without excessive entanglement between church and state because religious order did not offer a religious justification for the alleged harassment, and plaintiff did not seek reinstatement or other equitable relief); *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996 (D. Kan. 2004) (First Amendment Establishment and Free Exercise Clauses did not preclude minister from pursuing Title VII sexual harassment claim against her church, because claims did not involve choice of clergy); *see also Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 657-59 (10th Cir. 2002) (although "employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions," minister's Title VII harassment claim was subject to dismissal because it was based on communications protected by the First Amendment under the "church autonomy" doctrine; the doctrine is broader than the ministerial exception and bars civil court review of internal church disputes involving matters of doctrine and church governance).

[53] *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324 (3d Cir. 1993) (lay teacher at church-operated elementary school not a minister); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) (lay teachers of private religious schools who "perform no sacerdotal functions [nor] serve as church governors [and] belong to no clearly delineated religious order" are not ministers despite their sincere belief that theirs is a ministry); *but see EEOC v. Catholic Univ. of America*, 83 F.3d 455 (D.C. Cir. 1996) (ministerial exception barred Title VII sex discrimination claim brought by tenured member of Catholic university's department of religious canon law).

[54] *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003) (ministerial exception applied to Communications Director who was responsible for crafting the Church's message to the Hispanic community); *EEOC v. Roman Catholic Diocese of Raleigh*,213 F.3d 795 (4th Cir. 2000) (ministerial exception applies to cathedral's director of music ministry and part-time music teacher); *Rayburn*, 772 F.2d at 1168 (ministerial exception applies to associate pastor who had completed seminary training but was not ordained); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (ministerial exception barred Americans with Disabilities Act claim by church choir director).

[55] *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981) ("[w]hile religious organizations may designate persons as ministers for their religious purposes free from any governmental interference, bestowal of such a designation does not control their extra-religious legal status").

12-II EMPLOYMENT DECISIONS

A. General

Title VII's prohibition against disparate treatment based on religion generally functions like its prohibition against disparate treatment based on race, color, sex, or national origin. Disparate treatment violates the statute whether motivated by bias against or preference toward an applicant or employee due to his religious beliefs, practices, or observances – or lack thereof. Thus, for example, except to the extent permitted by the religious organization and ministerial exceptions, an employer may not refuse to recruit, hire, or promote individuals of a certain religion, may not impose stricter promotion requirements for persons of a certain religion, and may not impose more or different work requirements on an employee because of that employee's religious beliefs or practices.[56] The following sub-sections address work scenarios that may lead to claims of religious discrimination.

1. Recruitment, Hiring, and Promotion

Employers that are not religious organizations may neither recruit individuals of a particular religion nor adopt recruitment practices, such as word-of-mouth recruitment, that have the purpose or effect of discriminating based on religion. Title VII permits employers that are not religious organizations to hire and employ employees on the basis of religion only if religion is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[57]

For example, an employer may not refuse to hire an applicant simply because he does not share the employer's religious beliefs, and conversely may not select one applicant over another based on a preference for employees of a particular religion.[58] Similarly, employment agencies may not comply with requests from employers to engage in discriminatory recruitment or

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[56] *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 281 (3d Cir. 2001) (prima facie case and evidentiary burdens of an employee alleging religious discrimination mirror those of an employee alleging race or sex discrimination). A disparate impact analysis could also apply in the religion context, particularly in the area of recruitment and hiring. *See, e.g., Barrow v. Greenville Indep. Sch. Dist.*, 480 F.3d 377 (5th Cir. 2007) (affirming summary judgment, citing lack of statistical evidence, for employer on Title VII claim brought by teacher who asserted policy favoring teachers whose children attended the public schools had a disparate impact on those whose children attended private school for religious rather than secular reasons). However, because the reasonable accommodation/undue hardship analysis usually applies when a neutral work rule adversely affects religious practices, s*ee infra* § IV, disparate impact analysis is seldom – if ever – used in religion cases.

[57] 42 U.S.C. § 2000e-2(e)(1); *see also* §§ I-C and II-D of this document.

[58] *See, e.g., EEOC v. Preferred Mgmt .Corp.*, 216 F. Supp. 2d 763, 813 (S.D. Ind. 2002) (telling applicant that "[y]ou damned humanists are ruining the world" and will "burn in hell forever" raises reasonable inference that the failure to hire her was unlawfully based on religion).

referral practices, for example by screening out applicants who have names often associated with a particular religion (*e.g.*, Mohammed). Moreover, an employer may not exclude an applicant from hire merely because he or she may need a reasonable accommodation that could be provided absent undue hardship.[59]

EXAMPLE 8
Recruitment

Charles, the president of a company that owns several gas stations, needs managers for the new convenience stores he has decided to add to the stations. He posts a job announcement at the Hindu Temple he attends and asks other members of the temple to refer only Hindu friends or family members who may be interested in the position. He does no other recruitment. By limiting his recruitment to Hindus, Charles is engaging in unlawful discrimination.

EXAMPLE 9
Hiring

Mary is a human resources officer who is filling a vacant administrative position at her company. During the application process, she performs an Internet search on the candidates and learns that one applicant, Jonathan, has written an article for the local chapter of the Ethical Society setting forth his view that religion has been historically divisive and explaining why he subscribes to no religious beliefs or practices. Although Mary believes he is the most qualified candidate, she does not hire him because she knows that many current company employees are observant Christians like her, and she believes they would be more comfortable working with someone like-minded. By not hiring Jonathan because of his lack of religious identification, the company violated Title VII.

EXAMPLE 10
Promotion

Darpak, who practices Buddhism, holds a Ph.D. degree in engineering and applied for a managerial position at the research firm where he has worked for ten years. He was rejected in favor of a non-Buddhist candidate who was less qualified. The company vice president who made the promotion decision advised Darpak

[59] *See Commission Guidelines*, 29 C.F.R. § 1605.3.

> that he was not selected because "we decided to go in a different direction." However, the vice president confided to co-workers at a social function that he did not select Darpak because he thought a Christian manager could make better personal connections with the firm's clients, many of whom are Christian. The vice president's statement, combined with the lack of any legitimate non-discriminatory reason for selecting the less qualified candidate, as well as the evidence that Darpak was the best qualified candidate for the position, suggests that the proffered reason was a pretext for discrimination against Darpak because of his religious views.[60]

2. Discipline and Discharge

Title VII also prohibits employers from disciplining or discharging employees because of their religion. [61]

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[60] In *Noyes v. Kelly Servs. Inc.*, 488 F.3d 1163 (9th Cir. 2007), the plaintiff alleged "reverse religious discrimination" when she was not promoted because she did not follow the religious beliefs of her supervisor and management, who were members of a small religious group and favored and promoted other members of the religious group. The court ruled that while the employee did not adhere to a particular religion, the fact that she did not share the employer's religious beliefs was the basis for the alleged discrimination against her, and the evidence was sufficient to create an issue for trial on whether the employer's decision to promote another employee was a pretext for religious discrimination.

[61] *Tincher v. Wal-Mart Stores*, 118 F.3d 1125, 1131 (7th Cir. 1997) (reasonable jury could conclude that employer's articulated reason for the discharge of a Seventh-day Adventist was pretextual and that the real reason was religious discrimination because of the inconvenience caused by employee's inability to work on Saturdays); s*ee also Campos v. City of Blue Springs*, 289 F.3d 546 (8th Cir. 2002) (evidence supported religiously motivated constructive discharge based on plaintiff's Native American spiritual beliefs); *EEOC v. University of Chicago Hospitals*, 276 F.3d 326 (7th Cir. 2002) (evidence sufficient to proceed to trial in case brought on behalf of recruiter alleging constructive discharge based on her evangelical religious beliefs); *Dachman v. Shalala*, 2001 WL 533760 (4th Cir. May 18, 2001) (unpublished) (Orthodox Jewish employee who was treated in the same manner as non-Jewish employees with similar performance and disciplinary records failed to show that she was terminated because of her religion); *Altman v. Minn. Dep't of Corr.*, 251 F.3d 1199, 1203 (8th Cir. 2001) (in case raising both Title VII and First Amendment claims, holding that employer may not discipline employees for religiously based conduct because it is religious in nature if it permits such conduct by other employees when not motivated by religious beliefs). However, not all employer decisions affect a term, condition, or privilege of employment as required to be actionable as disparate treatment. *See, e.g.*, *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629 (6th Cir. 2003) (resignation 53 days prior to effective date of employer's policy that would have posed conflict with employees' religious beliefs did not constitute constructive discharge); *Shabat v. Blue Cross Blue Shield*, 925 F. Supp. 977 (W.D.N.Y. 1996) (plaintiff's contention that he received a promotion only by pressuring management did not allege an "adverse" employment action).

EXAMPLE 11
Discipline

> Joanne, a retail store clerk, is frequently 10-15 minutes late for her shift on several days per week when she attends Mass at a Catholic Church across town. Her manager, Donald, has never disciplined her for this tardiness, and instead filled in for her at the cash register until she arrived, stating that he understood her situation. On the other hand, Yusef, a newly hired clerk who is Muslim, is disciplined by Donald for arriving 10 minutes late for his shift even though Donald knows it is due to his attendance at services at the local Mosque. While Donald can require all similarly situated employees to be punctual, he is engaging in disparate treatment based on religion by disciplining only Yusef and not Joanne absent a legitimate nondiscriminatory reason for treating them differently.

A charge alleging the above facts might also present a claim for denial of reasonable accommodation. While the employer may require employees to be punctual, it may have to accommodate an employee who seeks leave or a schedule change to resolve the conflict between religious services and a work schedule, unless the accommodation would pose an undue hardship.[62]

3. Compensation and Other Terms, Conditions, or Privileges of Employment

Title VII prohibits discrimination on a protected basis "with respect to . . . compensation, terms, conditions, or privileges of employment," for example, setting or adjusting wages, granting benefits, and/or providing leave in a discriminatory fashion. [63]

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[62] *See infra* § IV, Reasonable Accommodation.

[63] 42 U.S.C. § 2000e-2(a)(1) (discriminating in hiring, discharge, or otherwise with respect to compensation, terms, conditions, or privileges of employment); *see also* 42 U.S.C. § 2000e-2(a)(2) (discriminating by limiting, segregating, or classifying employees or applicants in a way which would deprive or tend to deprive employment opportunities or otherwise adversely affect employment status); *cf. Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986) (a benefit "that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all") (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984)). However, at least one court has held that a private employer providing company resources to recognized employee "affinity groups" does not violate Title VII by denying this privilege to any group promoting or advocating any religious or political position, where the company excluded not only groups advocating a particular religious position but also those espousing religious indifference or opposition. *See Moranski v. General Motors Corp.*, 433 F.3d 537 (7th Cir. 2005).

EXAMPLE 12
Wages and Benefits

> Janet, who practices Native American spirituality, is a newly hired social worker for an agency. As a benefit to its employees, the agency provides tuition reimbursement for professional continuing education courses offered by selected providers. Janet applied for tuition reimbursement for an approved course that was within permitted cost limit. Janet's supervisor denied her request for tuition reimbursement, stating that since Janet believes in "voodoo" she "won't make a very good caseworker." By refusing, because of Janet's religious beliefs, to provide the tuition reimbursement to which Janet was otherwise entitled as a benefit of her employment, Janet's supervisor has discriminated against Janet on the basis of religion.

Title VII's prohibition on disparate treatment based on religious beliefs also can apply to disparate treatment of religious expression in the workplace.[64]

EXAMPLE 13
Religious Expression

> Eve is a secretary who displays a Bible on her desk at work. Xavier, a secretary in the same workplace, begins displaying a Quran on his desk at work. Their supervisor allows Eve to retain the Bible but directs Xavier to put the Quran out of view because, he states, co-workers "will think you are making a political statement, and with everything going on in the world right now we don't need that around here." This differential treatment of similarly situated employees with respect to the display of a religious item at work constitutes disparate treatment based on religion in violation of Title VII.[65]

Charges involving religious expression may present claims not only of disparate treatment, but also of harassment and/or denial of reasonable accommodation. Investigation of claims of harassment and denial of reasonable accommodation are addressed respectively in

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[64] *Delelegne v. Kinney Sys., Inc.*, 2004 WL 1281071 (D. Mass. June 10, 2004) (Ethiopian Christian parking garage cashier could proceed to trial on claims of religious harassment and discriminatory termination where he was not allowed to bring a Bible to work, pray, or display religious pictures in his booth, while Somali Muslim employees were permitted to take prayer breaks and to display religious materials in their booths).

[65] This fact pattern may also give rise to a denial of accommodation claim. *See infra* § IV-C-6.

§§ III and IV of this document. As discussed in greater detail in those sections, Title VII requires employers to accommodate expression that is based on a sincerely held religious practice or belief, unless it threatens to constitute harassment or otherwise poses an undue hardship on the conduct of the business. Thus, for example, an employer can restrict religious expression where it would cause customers or co-workers reasonably to perceive the materials to express the employer's own message, or where the item or message in question is harassing or otherwise disruptive.[66] *For further discussion of how to analyze when accommodation of religious expression would pose an undue hardship, refer to the sections on Harassment at § III-C and Accommodation at § IV-C-6.*

B. Customer Preference

If an employer takes an action based on the discriminatory preferences of others, including co-workers or clients, the employer is unlawfully discriminating.

EXAMPLE 14
Employment Decision Based on Customer Preference

> Harinder, who wears a turban as part of his Sikh religion, is hired to work at the counter in a coffee shop. A few weeks after Harinder begins working, the manager notices that the work crew from the construction site near the shop no longer comes in for coffee in the mornings. When he inquires, the crew complains that Harinder, whom they mistakenly believe is Muslim, makes them uncomfortable in light of the September 11th attacks. The manager tells Harinder that he has to let him go because the customers' discomfort is understandable. The manager has subjected Harinder to unlawful religious discrimination by taking an adverse action based on customers' preference not to have a cashier of Harinder's perceived religion. Harinder's termination based on customer preference would violate Title VII regardless of whether he was Muslim, Sikh, or any other religion.

[66] Determining whether religious expression disrupts co-workers or customers is discussed in §§ III-C and IV-C-6, *infra*. Additionally, in a government workplace, the First Amendment Free Exercise Clause and Establishment Clause may affect the employer's or employee's ability to restrict or engage in religious expression. *See supra* nn.11-15 & *infra* nn.201-203*; see also Federal Workplace Guidelines*, *supra* n.11, at sections 2-B and 2-E, noting implications of the Religious Freedom Restoration Act (RFRA) for neutral rules that burden religion in the federal workplace.

C. Security Requirements

In general, an employer may adopt security requirements for its employees or applicants, provided they are adopted for nondiscriminatory reasons and are applied in a nondiscriminatory manner. For example, an employer may not require Muslim applicants to undergo a background investigation or more extensive security procedures because of their religion while not imposing the same requirements on similarly situated applicants who are non-Muslim, unless such job requirements are imposed by federal statute or Executive Order in the interest of national security.[67]

D. Bona Fide Occupational Qualification

Title VII permits employers to hire and employ employees on the basis of religion if religion is "a bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal operation of that particular business or enterprise."[68] Religious organizations do not typically need to rely on this BFOQ defense, however, because the "religious organization" exception in Title VII permits them to prefer their co-religionists. *See supra* § I-C. It is well settled that for employers that are not religious organizations and therefore seek to rely on the BFOQ defense to justify a religious preference, the defense is a narrow one and can rarely be successfully invoked.[69]

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[67] 42 U.S.C. § 2000e-2(g) (permitting covered entities to discharge or refuse to "hire and employ" or refer an individual who does not meet federal security requirements). However, the Commission is aware of no statute or order that requires or permits distinctions based on religion. *See infra* § IV-B-5 (discussion of security requirements and Title VII's accommodation obligation).

[68] 42 U.S.C. § 2000e-2(e)(1).

[69] *Compare Abrams v. Baylor Coll. of Med.*, 805 F.2d 528 (5th Cir. 1986) (being non-Jewish was not a BFOQ for a university which had a contract to supply physicians on rotation at a Saudi Arabian hospital when the hospital presented no evidence to support its contention that Saudi Arabia would actually have refused an entry visa to a Jewish faculty member), *and Rasul v. District of Columbia*, 680 F. Supp. 436 (D.D.C. 1988) (Department of Corrections failed to demonstrate that Protestant religious affiliation was a BFOQ for position as prison chaplain because chaplains were recruited and hired on a facility-wide basis and were entrusted with the job of planning, directing, and maintaining a total religious program for all inmates, whatever their respective denominations), *with Kern v. Dynalectron Corp*., 577 F. Supp. 1196 (N.D. Tex. 1983) (requirement that pilot convert to Islam was a BFOQ which warranted employer's refusal to hire him, inasmuch as requirement was not based on a preference of contractor performing work in Saudi Arabia, but on the fact that non-Muslim employees caught flying into Mecca would, under Saudi Arabian law, be beheaded), *aff'd*, 746 F.2d 810 (5th Cir. 1984), *and Pime v. Loyola Univ. of Chicago*, 803 F.2d 351 (7th Cir. 1986) (although university was not a religious organization under Title VII, the court held that having some Jesuit presence in philosophy department was a BFOQ since university was founded by Jesuits, continues to have Jesuit tradition, and requires all of its undergraduates to take philosophy).

• Employer Best Practices •

- Employers can reduce the risk of discriminatory employment decisions by establishing written objective criteria for evaluating candidates for hire or promotion and applying those criteria consistently to all candidates.

- In conducting job interviews, employers can ensure nondiscriminatory treatment by asking the same questions of all applicants for a particular job or category of job and inquiring about matters directly related to the position in question.

- Employers can reduce the risk of religious discrimination claims by carefully and timely recording the accurate business reasons for disciplinary or performance-related actions and sharing these reasons with the affected employees.

- When management decisions require the exercise of subjective judgment, employers can reduce the risk of discriminatory decisions by providing training to inexperienced managers and encouraging them to consult with more experienced managers or human resources personnel when addressing difficult issues.

- If an employer is confronted with customer biases, *e.g.*, an adverse reaction to being served by an employee due to religious garb, the employer should consider engaging with and educating the customers regarding any misperceptions they may have and/or the equal employment opportunity laws.

12-III HARASSMENT

Overview: Religious harassment is analyzed and proved in the same manner as harassment on other Title VII bases, e.g., race, color, sex, or national origin.[70] However, the facts of religious harassment cases may present unique considerations, especially where the alleged harassment is based on another employee's religious practices – a situation that may require an employer to reconcile its dual obligations to take prompt remedial action in response to alleged harassment and to accommodate certain employee religious expression.

A. Prohibited Conduct

Religious harassment in violation of Title VII occurs when employees are: (1) required or coerced to abandon, alter, or adopt a religious practice as a condition of employment (this type of "quid pro quo" harassment may also give rise to a disparate treatment or denial of accommodation claim in some circumstances),[71] or (2) subjected to unwelcome statements or conduct that is based on religion and is so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive, and there is a basis for holding the employer liable.[72]

1. Religious Coercion That Constitutes a Tangible Employment Action

Title VII is violated when an employer or supervisor explicitly or implicitly coerces an employee to abandon, alter, or adopt a religious practice as a condition of receiving a job benefit or avoiding an adverse action.[73]

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[70] *Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998) (harassment claims are actionable on any of Title VII's protected bases); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (the same Title VII harassment principle applies whether the harassment is based on race, national origin, religion, or sex); *see also Abramson*, 260 F.3d at 276; *Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir. 1999); *Tillery v. ATSI, Inc.*, 242 F. Supp. 2d 1051, 1063 (N.D. Ala. 2003), *aff'd*, 97 Fed. Appx. 906 (11th Cir. 2004) (Table).

[71] *See Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997) (employee who was terminated after she disagreed with supervisor's religious beliefs raised a triable Title VII harassment claim based on two separate theories of harassment liability: that a "tangible employment benefit" was conditioned upon acquiescing to her supervisor's religious beliefs, and also that a hostile work environment was created).

[72] *Meritor Sav. Bank*, 477 U.S. at 66 (1986) (prohibition on discrimination "in the terms, conditions, or privileges of employment" requires employers to maintain a workplace free from harassment based upon protected status).

[73] *See, e.g.*, *Venters*, 123 F.3d at 964 (employee established that she was discharged on the basis of her religion after supervisor, among other things, repeatedly called her "evil" and stated that she had to share his Christian beliefs in order to be a good employee).

EXAMPLE 15
Religious Conformance Required for Promotion

> Wamiq was raised as a Muslim but no longer practices Islam. His supervisor, Arif, is a very devout Muslim who tries to persuade Wamiq not to abandon Islam and advises him to follow the teachings of the Quran. Arif also says that if Wamiq expects to advance in the company, he should join Arif and other Muslims for weekly prayer sessions in Arif's office. Notwithstanding this pressure to conform his religious practices in order to be promoted, Wamiq refused to attend the weekly prayer sessions, and was subsequently denied the promotion for which he applies even though he was the most qualified. Arif's conduct indicates that the promotion would have been granted if Wamiq had participated in the prayer sessions and had become an observant Muslim. Absent contrary evidence, the employer will be liable for harassment for conditioning Wamiq's promotion on his adherence to Arif's views of appropriate religious practice.[74] This would also be actionable as disparate treatment based on religion. In addition, if the prayer sessions were made mandatory and Wamiq had asked to be excused on religious grounds, Arif would have been required to excuse him from the prayer sessions as a reasonable accommodation.

A claim of harassment based on coerced religious participation or non-participation, however, only arises where it was intended to make the employee conform to or abandon a religious belief or practice. By contrast, an employer would not be engaging in coercion if it required an employee to participate in a workplace activity that conflicts with the employee's sincerely held religious belief, so long as the employer demonstrates that it would impose an undue hardship to accommodate the employee's request to be excused. However, the same fact pattern may give rise to claims of disparate treatment, harassment, and/or denial of accommodation. For example, terminating rather than accommodating an employee may give rise to both denial of accommodation and discriminatory discharge claims.[75] For discussion of the accommodation issue, *see* § IV, *infra*.[76]

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[74] Many of the example's facts are taken from *Sattar v. Motorola, Inc.*, 138 F.3d 1164 (7th Cir. 1998). However, in *Sattar* the plaintiff did not prevail because the plaintiff failed to prove that his discharge was linked to the harassment by his former supervisor.

[75] *Pederson v. Casey's Gen. Stores, Inc.*, 978 F. Supp. 926 (D. Neb. 1997) (employer's refusal to accommodate employee's need to have Easter day off, while knowing that she could not compromise her religious needs and where it would not have posed an undue hardship, amounted to constructive discharge in violation of Title VII).

[76] *Venters*, 123 F.3d at 972 ("the accommodation framework . . . has no application when the

2. Hostile Work Environment

Title VII's prohibition against religious discrimination can also be violated if the employee is subjected to a hostile work environment because of religion.[77] An unlawful hostile environment based on religion might take the form of either verbal or physical harassment or unwelcome imposition of religious views or practices on an employee. A hostile work environment is created when the "workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[78] To establish a case of religious harassment, an employee must show that the harassment was: (1) based on his religion; (2) unwelcome; (3) sufficiently severe or pervasive to alter the conditions of employment by creating an intimidating, hostile, or offensive work environment; and, (4) that there is a basis for employer liability.[79]

a. Based on Religion

To support a religious harassment claim, the adverse treatment must be based on religion.[80] This standard can be satisfied regardless of whether the harassment is motivated by the religious belief or observance – or lack thereof – of either the harasser or the targeted employee. Moreover, while verbally harassing conduct clearly is based on religion if it has religious content, harassment can also be based on religion even if religion is not explicitly mentioned.[81]

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employee alleges that he was fired because he did not share or follow his employer's religious beliefs").

[77] *Faragher*, 524 U.S. at 788 (environmental harassment claims are actionable on any of Title VII's protected bases); *Meritor Sav. Bank*, 477 U.S. at 67 (same); *see also EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999), available at http://www.eeoc.gov/policy/docs/harassment.html.

[78] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

[79] *Meritor Sav. Bank*, 477 U.S. at 67.

[80] *Marcus v. West*, 2002 WL 1263999, *11 (N.D. Ill. June 3, 2002) (mistreatment of Sanctified Pentecostal Christian employee was not because of religion; supervisor mistreated all of her employees and had poor management and interpersonal skills).

[81] *Turner v. Barr*, 811 F. Supp. 1, 2 (D.D.C. 1993) (hostile environment created where Jewish employee was subjected to a "joke" about the Holocaust, denied opportunity to work overtime, and ridiculed as a "turnkey"; although the latter two incidents did not refer to religion, the facts showed that he was singled out for such treatment because of his religion).

EXAMPLE 16
Harassing Conduct Based on Religion – Religion Mentioned

Mohammed is an Indian-born Muslim employed at a car dealership. Because he takes scheduled prayer breaks during the work day and observes Muslim dietary restrictions, his co-workers are aware of his religious beliefs. Upset about the 9/11 terrorist attacks, his co-workers and managers began making mocking comments about his religious dietary restrictions and need to pray during the workday. They repeatedly referred to him as "Taliban" or "Arab" and asked him "why don't you just go back where you came from since you believe what you believe?" When Mohammed questioned why it was mandatory for all employees to attend a United Way meeting, his supervisor said: "This is America. That's the way things work over here. This is not the Islamic country where you come from." After this confrontation, the supervisor issued Mohammed a written warning stating that he "was acting like a Muslim extremist" and that the supervisor could not work with him because of his "militant stance." This harassment is "based on" religion and national origin.[82]

EXAMPLE 17
Harassing Conduct Based on Religion – Religion Not Mentioned

Shoshanna is a Seventh-day Adventist whose work schedule was adjusted to accommodate her Sabbath observance, which begins at sundown each Friday. When Nicholas**,** the new head of

[82] *See EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306 (4th Cir. 2008) (reversing summary judgment for the employer and remanding the case for trial, the court ruled that a reasonable fact finder could conclude that a Muslim employee who wore a kufi as part of his religious observance was subjected to hostile work environment religious harassment when fellow employees repeatedly called him "Taliban" and "towel head," made fun of his appearance, questioned his allegiance to the United States, suggested he was a terrorist, and made comments associating all Muslims with senseless violence); *EEOC v. WC&M Enter., Inc.*, 496 F.3d 393 (5th Cir. 2007) (reversing summary judgment for the employer and remanding the case for trial, the court ruled that a reasonable fact finder could conclude that harassment initiated after September 11, 2001, against a car salesman who was born in India and is a practicing Muslim was severe or pervasive and motivated by his national origin and religion). In *Sunbelt*, the Fourth Circuit Court of Appeals held: "we cannot regard as 'merely offensive,' and thus 'beyond Title VII's purview,' *Harris*, 510 U.S. at 21, constant and repetitive abuse founded upon misperceptions that all Muslims possess hostile designs against the United States, that all Muslims support jihad, that all Muslims were sympathetic to the 9/11 attack, and that all Muslims are proponents of radical Islam." 521 F.3d at 318.

> Shoshanna's department, was informed that he must accommodate her, he told a colleague that "anybody who cannot work regular hours should work elsewhere." Nicholas then moved the regular Monday morning staff meetings to late Friday afternoon, repeatedly scheduled staff and client meetings on Friday afternoons, and often marked Shoshanna AWOL when she was not scheduled to work. In addition, Nicholas treated her differently than her colleagues by, for example, denying her training opportunities and loudly berating her with little or no provocation. Although Nicholas did not mention Shoshanna's religion, the evidence shows that his conduct was because of Shoshanna's need for religious accommodation, and therefore was "based on" religion.[83]

b. Unwelcome

To be unlawful, harassing conduct must be unwelcome. Conduct is "unwelcome" when the employee did not solicit or incite it and regards it as undesirable or offensive.[84] It is necessary to evaluate all of the surrounding circumstances to determine whether or not particular conduct or remarks are unwelcome.[85] For example, where an employee is upset by repeated mocking use of derogatory terms or comments[86] about his religious beliefs or observance by a colleague, it may be evident that the conduct is unwelcome. This would stand in stark contrast to a situation where the same two employees were engaged in a consensual conversation that involves a spirited debate of religious views, and neither employee indicates that he was upset by it.

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[83] *See Abramson*, 260 F.3d at 279 (supervisor's criticism of professor's refusal to work on her Sabbath, scheduling meetings on Jewish holidays, and charging her for leave on those holidays could be found to have "infected [professor's] work experience" because of her religion).

[84] *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982).

[85] *Meritor*, 477 U.S. at 68.

[86] *See WC&M Enter.*, 496 F.3d at 400-01 (plaintiff's religious and national origin harassment claim was based on having been referred to as a "Muslim extremist," and constantly called "Taliban" among other terms); *Khan v. United Recovery Sys., Inc.*, 2005 WL 469603 (S.D. Tex. 2005) (plaintiff's religious harassment claim was based on alleged comments by co-worker that court characterized as "malicious and vitriolic," including that all Muslims are terrorists who should be killed, that he wished "all these Muslims were wiped off the face of the earth," that plaintiff might get shot for wearing an "Allah" pendant, and questioning plaintiff about what was being taught at her mosque and whether it was "connected with terrorists"; in addition, plaintiff alleged that her supervisor placed newspaper articles on her desk about mosques in Afghanistan that taught terrorism, along with a note telling her to come into his office and justify such activity).

The distinction between welcome and unwelcome conduct is especially important in the religious context in situations involving proselytizing of employees who have not invited such conduct.[87] Where a religious employee attempts to persuade a non-religious employee of the correctness of his belief, or vice versa, the conduct may or may not be welcome. When an employee objects to particular religious expression, unwelcomeness is evident.[88]

EXAMPLE 18
Unwelcome Conduct

> Beth's colleague, Bill, repeatedly talked to her at work about her prospects for salvation. For several months, she did not object and discussed the matter with him. When he persisted even after she told him that he had "crossed the line" and should stop having non-work related conversations with her, the conduct was clearly unwelcome.[89]

c. Severe or Pervasive

Even unwelcome religiously motivated conduct is not unlawful unless "the victim . . . subjectively perceive[s] the environment to be abusive" and the conduct is "severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive."[90] Whether a reasonable person would perceive the conduct as abusive turns on common sense and context, looking at the totality of the circumstances.[91] Relevant factors include whether the conduct was abusive, derogatory, or

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[87] Human resources professionals who responded to a survey by the Society for Human Resource Management (SHRM) and the Tanenbaum Center for Interreligious Understanding reported that 19% of the employees in their organizations engaged in proselytizing to co-workers. While 32% of the employees perceived increased cooperation and communication within their organizations due to acceptance of religious diversity, 9% of the employees felt harassed by co-workers who expressed their religious beliefs. *Religion in the Workplace Survey*, at 24 (Society for Human Resource Management, 2001) (executive summary and information on obtaining report available at http://www.tanenbaum.org/research.html (last visited July 2, 2008)).

[88] *Venters*, 123 F.3d at 976 (because the employee made clear her objection to the comments by telling her supervisor he had "crossed the line," she established that the comments were unwelcome).

[89] *Id.* ("whatever questions there might have been as to whether Venters welcomed these discussions were answered as of th[e] date [that she told him he had crossed the line]").

[90] *Harris*, 510 U.S. at 21-22; *Faragher*, 524 U.S. at 788 ("We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment.").

[91] *Faragher*, 524 U.S. at 787-88; *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82-83 (1998) ("[t]he real social impact of workplace behavior often depends on a constellation of surrounding

offensive;[92] whether the conduct was frequent;[93] and whether the conduct was humiliating or physically threatening.[94]

EXAMPLE 19
Reasonable Person Perceives Conduct To Be Hostile

> Although he hired employees of all religions, the Director of "Get Drug Free Today" required employees to sign a statement that they would support the values of the Church of Scientology. He regularly chastised those whose conduct did not conform to those values. A reasonable person would perceive this to be a religiously hostile work environment. [95]

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circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed"); *Harris*, 510 U.S. at 23.

[92] *Bains LLC v. Arco Prods. Co*., 405 F.3d 74 (9th Cir. 2005) (upholding finding of liability for harassment in violation of 42 U.S.C. § 1981 where Sikh employees were regularly called "rag-heads" and "towel-heads," and were asked to clean up fuel spills with their turbans).

[93] *Williams v. Gen. Motors Corp*., 187 F.3d 553, 564 (6th Cir. 1999) ("a work environment viewed as a whole may satisfy the legal definition of an abusive work environment, for purposes of a hostile environment claim, even though no single episode crosses the Title VII threshold").

[94] *Jones v. United Space Alliance*, 2006 WL 250761 (11th Cir. Feb. 3, 2006) (unpublished) (plaintiff, a member of the Apostolic/Pentecostal faith, alleged that he was subjected to a hostile work environment based on religion when his manager made derogatory remarks to him based on his religion, a co-worker removed from the community bulletin board a flyer describing events at the plaintiff's church, the plaintiff's manager told him to remove the lanyard for his identification badge because it had "Jesus" on it, his manager told him not to leave his Bible on his desk, he was asked to turn down the religious music that he played at work, and he was accused of having a conflict of interest with the space program because he was a pastor; in finding there was insufficient evidence of a hostile work environment, court ruled that the alleged incidents were not objectively severe or pervasive because none occurred on a repeated basis, none were physically threatening or humiliating, and none interfered with the plaintiff's job performance).

[95] *EEOC v. AKZ Mgmt., Inc.*, Civil Action No. 07-8356 (S.D.N.Y. consent decree filed Sept. 26, 2007) (settlement of religious harassment and disparate treatment claims on behalf of employees who were pressured by management to practice or conform to Scientology). *See Johnson v. Spencer Press of Maine, Inc*., 364 F.3d 368 (1st Cir. 2004) (jury properly found harassment was severe and pervasive where supervisor repeatedly insulted plaintiff and mocked his religious beliefs, and threatened him with violence); *Sattar*, 138 F.3d at 1167 (employee harassed with a barrage of e-mails with dire warnings of the divine punishments that awaited those who refuse to follow Islam)*; Preferred Mgmt. Corp*., 216 F. Supp. 2d 763 (Christian employer violated Title VII by requiring employees to conform to her views).

To "alter the conditions of employment," conduct need not cause economic or psychological harm.[96] It need not impair work performance, discourage employees from remaining on the job, or impede their advancement.[97] The presence of one or more of those factors would buttress the claim, but is not required.[98]

However, Title VII is not a general civility code, and does not render all insensitive or offensive comments, petty slights, and annoyances illegal.[99] Offhand or isolated incidents (unless extremely serious) will not rise to the level of illegality.[100]

EXAMPLE 20
Insensitive Comments Not Enough To Constitute Hostile Environment

> Marvin is an Orthodox Jew who was hired as a radio show host. When he started work, a co-worker, Stacy, pointed to his yarmulke and asked, "Will your headset fit over that?" On a few occasions, Stacy, made other remarks about the yarmulke, such as: "Nice hat. Is that a beanie?" and "Do they come in different colors?" Although the co-worker's comments about his yarmulke were

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96 *Harris*, 510 U.S. at 21; *Meritor*, 477 U.S. at 64.

97 *Harris*, 510 U.S. at 22 ("even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality . . . . Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct"); s*ee Dey v. Colt Const. & Dev. Co*., 28 F.3d 1446, 1454-55 (7th Cir. 1994) ("The mention in *Harris* of an unreasonable interference with work performance was not intended to penalize the employee who possesses the dedication and fortitude to complete her assigned tasks even in the face of offensive and abusive [conduct] . . . . As Justice Scalia separately explained in *Harris*, the test under Title VII 'is not whether work has been impaired, but whether working conditions have been discriminatorily altered.'") (citation omitted).

98 *See Harris*, 510 U.S. at 23 ("whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances . . . ; no single factor is required").

99 *Faragher*, 524 U.S. at 788 (citing *Oncale*, 523 U.S. at 80); *Sheikh v. Indep. Sch. Dist. 535*, 2001 WL 1636504 (D. Minn. Oct. 18, 2001) (a Muslim employee who was ostracized by colleagues because he refused to shake hands with female colleagues did not suffer a materially adverse change in the terms and conditions of employment).

100 *See Marcus*, 2002 WL 1263999 at *11 (asking very religious employee to swear on a Bible to resolve differences with a colleague and telling her that people did not like her "church lady act" are isolated incidents that were not severe or pervasive enough to create a hostile work environment); *Sublett v. Edgewood Universal Cabling Sys., Inc.*, 194 F. Supp. 2d 692, 703 (S.D. Ohio 2002) (supervisor's single comment to Rastafarian employee that "those dread things" made him look too "radical" was not sufficiently severe to create a hostile environment).

insensitive, they were not sufficiently severe or pervasive to create a hostile work environment for Marvin.[101]

EXAMPLE 21
Isolated Comments Not Enough to Constitute Hostile Environment

Bob, a supervisor, occasionally allowed spontaneous and voluntary prayers by employees during office meetings. During one meeting, he referenced Bible passages related to "slothfulness" and "work ethics." Amy complained that Bob's comments and the few instances of allowing voluntary prayers during office meetings created a hostile environment. The comments do not create an actionable harassment claim. They were not severe, and because they occurred infrequently, they were not sufficiently pervasive to state a claim.[102]

The severity and pervasiveness factors operate inversely. The more severe the harassment, the less frequently the incidents need to recur. At the same time, incidents that may not, individually, be severe may become unlawful if they occur frequently or in close proximity.[103]

Although a single incident will seldom create an unlawfully hostile environment, it may do so if it is unusually severe, particularly if it involves physical threat.[104]

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[101] *Cf. Tessler v. KHOW Radio, Inc.*, 1997 WL 458489 at *8 (D. Colo. Apr. 21, 1997).

[102] *Cf. Brown v. Polk County*, 61 F.3d at 656-57 (it did not pose an undue hardship for employer to accommodate supervisor's sporadic and voluntary prayers during workplace meetings).

[103] *Williams*, 187 F.3d at 563 (in determining whether the alleged conduct rises to the level of severe or pervasive, a court should consider the factual "totality of the circumstances"; using a "holistic perspective is necessary, keeping in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created thereby may exceed the sum of the individual episodes").

[104] *Cf. Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368 (1st Cir. 2004) (affirming jury verdict for plaintiff on religious harassment claim, court noted that plaintiff testified supervisor who made ongoing derogatory remarks about plaintiff's religion also once put the point of a knife under plaintiff's chin, in addition to threatening to kill him with a hand grenade, run him over with a car, and shoot him with a bow and arrow).

EXAMPLE 22
One Instance of Physically Threatening Conduct Is Enough to Constitute Hostile Environment

Ihsaan is a Muslim. Shortly after the terrorist attacks on September 11, 2001, Ihsaan came to work and found the words "You terrorists go back where you came from! We will avenge the victims!! Your life is next!" scrawled in red marker on his office door. Because of the timing of the statement and the direct physical threat, this incident, alone, is sufficiently severe to constitute hostile environment harassment based on religion and national origin. [105]

EXAMPLE 23
Persistent Offensive Remarks Constitute Hostile Environment

Betty is a Mormon. During a disagreement regarding a joint project, a co-worker, Julian, tells Betty that she doesn't know what she is talking about and that she should "go back to Salt Lake City." When Betty subsequently proposes a different approach to the project, Julian tells her that her suggestions are as "flaky" as he would expect from "her kind." When Betty tries to resolve the conflict, Julian tells her that if she is uncomfortable working with him, she can either ask to be transferred, or she can "just pray about it." Over the next six months, Julian regularly makes similar negative references to Betty's religion. His persistent offensive remarks create a hostile environment.

Religious expression that is repeatedly directed at an employee can become severe or pervasive, whether or not the content is intended to be insulting or abusive. Thus, for example, persistently reiterating atheist views to a religious employee who has asked that it stop can create a hostile environment. However, the extent to which the expression is directed at a particular employee is relevant to determining whether or when it could reasonably be perceived to be severe or pervasive by that employee.[106] For example, although it is conceivable that one

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[105] As with any harassment claim, employer liability will depend on whether the employee can show, in a case of co-worker harassment, that the employer knew or should have known of the misconduct and failed to take prompt and appropriate corrective action. Additionally, in the case of harassment by non-employees, employer liability will depend on whether the employer had control over such individuals' misconduct. For standards regarding liability for harassment by supervisors, see *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999), available at http://www.eeoc.gov/policy/docs/harassment.html.

[106] *See Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535 (7th Cir. 2002) (the impact of actions not directed at a complaining employee is not as great as the impact of harassment directed at him

employee may allege that he is offended by a colleague's wearing of religious garb, expressing one's religion by wearing religious garb is not religious harassment. It merely expresses an individual's religious affiliation and does not demean other religious views. As such, it is not objectively hostile. Nor is it directed at any particular individual. Similarly, workplace displays of religious artifacts or posters that do not demean other religious views generally would not constitute religious harassment.

EXAMPLE 24
No Hostile Environment from Comments That Are Not Abusive and Not Directed at Complaining Employee

> While eating lunch in the company cafeteria, Clarence often overhears conversations between his co-workers Dharma and Khema. Dharma, a Buddhist, is discussing meditation techniques with Khema, who is interested in Buddhism. Clarence strongly believes that meditation is an occult practice that leads to devil worship and complains to their supervisor that Dharma and Khema are creating a hostile environment for him. Such conversations do not constitute severe or pervasive religious harassment of Clarence because they do not insult other religions and they were not directed at him.

B. Employer Liability

Overview: An employer is always liable for a supervisor's harassment if it results in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements: (a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. In cases of harassment by a co-worker or a third party over whom the employer had some control, an employer is liable if it knew or should have known about the harassment and failed to take immediate and appropriate corrective action.

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and the combined impact of all the comments was not severe or pervasive enough to create an unlawful hostile environment).

1. Harassment by Supervisors or Managers

Employers are automatically liable for supervisory harassment that results in a tangible employment action such as a denial of promotion, demotion, discharge, or constructive discharge. If the harassment does not result in a tangible employment action, the employer can attempt to prove, as an affirmative defense to liability, that: (1) the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.[107]

EXAMPLE 25
Supervisory Harassment with Tangible Employment Action

> George, a high level official in a state agency, is an atheist who has frequently been heard to say that he thinks anyone who is deeply religious is a zealot with his own agenda and cannot be trusted to act in the best interests of the public. George particularly ridicules Debra, a devoutly observant Jehovah's Witness, and consistently withholds the most desirable assignments from her. He denies her request for a promotion to a more prestigious job in another division, saying that he can't let her "spread that religious poppycock any further." Debra files a religious harassment charge. Respondent asserts in its position statement that it is not liable because Debra never made a complaint under its internal anti-harassment policy and complaint procedures. Because the harassment culminated in a tangible employment action (failure to promote), the employer is liable for the harassment even if it has an effective anti-harassment policy, and even if Debra never complained. Additionally, the denial of promotion would be actionable as disparate treatment based on religion.

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[107] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998); *Faragher*, 524 U.S. at 788; *Preferred Mgmt. Corp.*, 216 F. Supp. 2d at 839 & n.25 (employer's anti-harassment policy was inadequate because it did not include a prohibition on religious harassment, employer did not provide training on religious harassment, and managers responded to complaints of religious harassment by requiring employees to participate in a training program based on religious principles). However, under agency principles an employer is automatically liable for hostile work environment harassment even if it does not result in a tangible employment action if "the agent's high rank in the company makes him or her the employer's alter ego." *Ellerth*, 524 U.S. at 758. If the harasser is of a sufficiently high rank to fall "within that class of an employer organization's officials who may be treated as the organization's proxy," which would include officials such as a company president, owner, partner, or corporate officer, the harassment is automatically imputed to the employer and no affirmative defense can be raised. *Faragher*, 524 U.S. at 789 *see also EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999), http://www.eeoc.gov/policy/docs/harassment.html.

EXAMPLE 26
Supervisory Harassment Without Tangible Employment Action

Jennifer's employer, XYZ, had an anti-harassment policy and complaint procedure that covered religious harassment. All employees were aware of it, because XYZ widely and regularly publicized it. Despite his knowledge of the policy, Jennifer's supervisor frequently mocked her religious beliefs. When Jennifer told him that his comments bothered her, he told her that he was just kidding and she should not take everything so seriously. Jennifer never reported the problem. When one of Jennifer's co-workers eventually reported the supervisor's harassing conduct, the employer promptly investigated, and acted effectively to stop the supervisor's conduct. Jennifer then filed a religious harassment charge. Because the harassment of Jennifer did not culminate in a tangible employment action, XYZ may assert as an affirmative defense that it is not liable because Jennifer failed to make a complaint under its internal anti-harassment policy and complaint procedures. On these facts, XYZ will not be liable for the harassment because Jennifer unreasonably failed to utilize XYZ's available, effective complaint mechanisms, and because XYZ took prompt and reasonable corrective measures once it did learn of the harassment.

2. Harassment by Co-Workers

An employer is liable for harassment by co-workers where it:

- knew or should have known about the harassment, and
- failed to take prompt and appropriate corrective action.[108]

EXAMPLE 27
Harassment by Co-Workers

John, who is a Christian Scientist, shares an office with Rick, a Mormon. Rick repeatedly tells John that he is practicing a false religion, and that he should study Mormon literature. Despite John's protestations that he is very happy with his religion and has

[108] *Sheikh*, 2001 WL 1636504 at *5 (employer not liable because it took steps to stop alleged harassment of Muslim employee by his co-workers); *see Guidelines on Discrimination Because of National Origin*, 29 C.F.R. § 1606.8(d) (employer liable for co-worker harassment about which it knew or should have known and failed to act).

no desire to convert, Rick regularly leaves religious pamphlets on John's desk and tries to talk to him about religion. After vainly asking Rick to stop the behavior, John complains to their immediate supervisor, who dismisses John's complaint on the ground that Rick is a nice person who believes that he is just being helpful. If the harassment continues, the employer is liable because it knew, through the supervisor, about Rick's harassing conduct but failed to take immediate and appropriate corrective action.[109]

3. Harassment by Non-Employees

An employer is liable for harassment by non-employees where it:

- knew or should have known about the harassment,
- could control the harasser's conduct or otherwise protect the employee, and
- failed to take prompt and appropriate corrective action.[110]

EXAMPLE 28
Harassment by a Contractor

Tristan works for XYZ, a contractor that manages Crossroads Corporation's mail room. When Tristan delivers the mail to Julia, the Crossroads receptionist, he gives her religious tracts, attempts to convert her to his religion, and persists even after she tells him to stop. Julia reports Tristan's conduct to her supervisor, who tells her that he cannot do anything because Tristan does not work for Crossroads. If the harassment continues, the supervisor's failure to act will subject Crossroads to liability because Tristan's conduct is pervasive and Crossroads refused to take preventive action within its control. Options available to Julia's supervisor or the appropriate individual in the supervisor's chain of command might include initiating a meeting with Tristan and XYZ management

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[109] *Cf. Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074 (8th Cir. 2006) (employer not liable for religious harassment of plaintiff because upon learning of her complaints about a co-worker's proselytizing, the employer promptly held a meeting and told the co-worker to stop discussing religion matters with plaintiff, and there was evidence that the company continued to monitor the situation to ensure that the co-worker did not resume her proselytizing).

[110] 29 C.F.R. § 1606.8(e). *Berry v. Delta Airlines, Inc.*, 260 F.3d 803 (7th Cir. 2001) (employer not liable for alleged sexual harassment of its female employee by a male contractor because it promptly investigated the allegations, requested a change in the contractor's shift so that he would not have contact with the employee, and asked that all contractors be required to view sexual harassment training video).

regarding the harassment and demanding that it cease, that appropriate disciplinary action be taken if it continues, and/or that a different mail carrier be assigned to Julia's route.

C. Special Considerations for Employers When Balancing Anti-Harassment and Accommodation Obligations With Respect to Religious Expression

While some employees believe that religion is intensely personal and private, others are open about their religion.[111] There are employees who may believe that they have a religious obligation to share their views and to try to persuade co-workers of the truth of their religious beliefs, *i.e.*, to proselytize. Some employers, too, may wish to express their religious views and share their religion with their employees.[112] As noted above, however, some employees may perceive proselytizing or other religious expression as unwelcome harassment based on their own religious beliefs and observances, or lack thereof. This mix of divergent beliefs and practices can give rise to conflicts requiring employers to balance the rights of employees who wish to express their religious beliefs with the rights of other employees to be free from religious harassment under the foregoing Title VII harassment standards.[113]

As discussed in more detail in § IV-C-6 of this document, an employer never has to accommodate expression of a religious belief in the workplace where such an accommodation could potentially constitute harassment of co-workers, because that would pose an undue hardship for the employer. Therefore, while Title VII requires employers to accommodate an employee's sincerely held religious belief in engaging in religious expression (*e.g.*, proselytizing) in the workplace, an employer does not have to allow such expression if it imposes an undue hardship on the operation of the business. For example, it would be an undue hardship for an employer to accommodate proselytizing by an employee if it constituted potentially

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[111] When asked whether they had discussed religion in the workplace in the past twenty-four hours, 48% of Americans answered yes. *See* George Gallup, Jr. & Timothy Jones, *The Next American Spirituality: Finding God in the Twenty-First Century*, at 72 (Cook Communication Ministries 2000).

[112] Employers are permitted to exercise their religion to the extent that such exercise does not infringe on their employees' religious beliefs. *Townley*, 859 F.2d at 621 ("Where the religious practices of employers . . . and employees conflict, Title VII does not, and could not, require individual employers to abandon their religion. Rather, Title VII attempts to reach a mutual accommodation of the conflicting religious practices.").

[113] In a survey conducted by the Tanenbaum Center for Interreligious Understanding, 66% of employees surveyed reported that they had witnessed religious discrimination in the workplace. *Religious Bias in the Workplace: The Employee's View* (Tanenbaum Center for Interreligious Understanding, 1999) (executive summary available at http://www.tanenbaum.org/research_1999.html) (last visited July 2, 2008).

unlawful religious harassment of a co-worker who found it unwelcome, or if it otherwise interfered with the operation of the business.[114]

Because employers are responsible for maintaining a nondiscriminatory work environment, they are liable for perpetrating or tolerating religious harassment of their employees. An employer can reduce the chance that employees will engage in conduct that rises to the level of unlawful harassment by implementing an anti-harassment policy and an effective procedure for reporting, investigating, and correcting harassing conduct.[115] Even if the policy does not prevent all such conduct, it will likely limit the employer's liability where the affected employee allows the conduct to rise to the level of illegality by failing to report it. However, Title VII violations may result if an employer tries to avoid potential co-worker objections to employee religious expression by preemptively banning all religious communications in the workplace, since Title VII requires that employees' sincerely held religious practices and beliefs be accommodated as long as no undue hardship is posed.

• Employer Best Practices •

- Employers should have a well-publicized and consistently applied anti-harassment policy that: (1) covers religious harassment; (2) clearly explains what is prohibited; (3) describes procedures for bringing harassment to management's attention; and, (4) contains an assurance that complainants will be protected against retaliation. The procedures should include a complaint mechanism that includes multiple avenues for complaint; prompt, thorough, and impartial investigations; and prompt and appropriate corrective action.

- Employers should allow religious expression among employees to the same extent that they allow other types of personal expression that are not harassing or disruptive.

- Once an employer is on notice that an employee objects to religious conduct that is directed at him or her, the employer should take steps to end the conduct because even conduct that the employer does not regard as abusive can become sufficiently severe or pervasive to affect the conditions of employment if allowed to persist in the face of the employee's objection.

- If harassment is perpetrated by a non-employee assigned by a contractor, the supervisor or other appropriate individual in the chain of command should initiate a meeting with

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[114] *See* Examples 15, 18-19, 27-28, 49-50. For a further discussion of the circumstances under which reasonable accommodation of religious expression in the workplace, including proselytizing, may be denied because it poses an undue hardship on the conduct of the employer's business, see *infra* § IV-C-6.

[115] *Cf. Bodett v. CoxCom, Inc.*, 366 F.3d 736 (9th Cir. 2004) (employer prevailed on claim brought by terminated employee for disparate treatment based on religion; employee's violation of employer's anti-harassment policy was a legitimate nondiscriminatory reason for termination, even if the violations were motivated by the employee's religious beliefs).

the contractor regarding the harassment and demand that it cease, that appropriate disciplinary action be taken if it continues, and/or that a different individual be assigned by the contractor.

- To prevent conflicts from escalating to the level of a Title VII violation, employers should immediately intervene when they become aware of objectively abusive or insulting conduct, even absent a complaint.

- Employers should encourage managers to intervene proactively and discuss with subordinates whether particular religious expression is welcome if the manager believes the expression might be construed as harassing to a reasonable person.

- While supervisors are permitted to engage in certain religious expression, they should avoid expression that might – due to their supervisory authority – reasonably be perceived by subordinates as coercive, even when not so intended.

• Employee Best Practices •

- Employees who are the recipients of unwelcome religious conduct should inform the individual engaging in the conduct that they wish it to stop. If the conduct does not stop, employees should report it to their supervisor or other appropriate company official in accordance with the procedures established in the company's anti-harassment policy.

- Employees who do not wish to personally confront an individual who is directing unwelcome religious or anti-religious conduct towards them should report the conduct to their supervisor or other appropriate company official in accordance with the company's anti-harassment policy.

12-IV REASONABLE ACCOMMODATION

Overview: Title VII requires an employer, once on notice, to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship.[116] However, the Title VII "undue hardship" defense is defined very differently than the "undue hardship" defense for disability accommodation under the Americans with Disabilities Act (ADA). Under Title VII, the undue hardship defense to providing religious accommodation requires a showing that the proposed accommodation in a particular case poses a "more than de minimis" cost or burden, which is a far lower standard for an employer to meet than undue hardship under the ADA, which is defined in that statute as "significant difficulty or expense."[117]

A religious accommodation claim is distinct from a disparate treatment claim, in which the question is whether employees are treated equally. An individual alleging denial of religious accommodation is seeking an adjustment to a neutral work rule that infringes on the employee's ability to practice his religion. The accommodation requirement is "plainly intended to relieve individuals of the burden of choosing between their jobs and their religious convictions, where such relief will not unduly burden others."[118]

A. Religious Accommodation

A reasonable religious accommodation is any adjustment to the work environment that will allow the employee to comply with his or her religious beliefs. However, it is subject to the limit of more than *de minimis* cost or burden. The need for religious accommodation most frequently arises where an individual's religious beliefs, observances, or practices conflict with a specific task or requirement of the job or the application process. The employer's duty to accommodate will usually entail making a special exception from, or adjustment to, the particular requirement so that the employee or applicant will be able to practice his or her religion. Accommodation requests often relate to work schedules, dress and grooming, or religious expression or practice while at work.

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[116] 42 U.S.C. § 2000e(j); *Commission Guidelines*, 29 C.F.R. § 1605.2(b).

[117] *Compare Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (interpreting Title VII "undue hardship" standard, *with* 42 U.S.C. § 12111(10)(A) (defining ADA "undue hardship" standard); *see infra* n.139.

[118] *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 136 (3d Cir. 1986) ("[t]his is . . . part of our 'happy tradition' of avoiding unnecessary clashes with the dictates of conscience") (citation omitted).

1. Notice of the Conflict Between Religion and Work

An applicant or employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work. The employee is obligated to explain the religious nature of the belief or practice at issue, and cannot assume that the employer will already know or understand it.[119] Similarly, the employer should not assume that a request is invalid simply because it is based on religious beliefs or practices with which the employer is unfamiliar, but should ask the employee to explain the religious nature of the practice and the way in which it conflicts with a work requirement.

No "magic words" are required to place an employer on notice of an applicant's or employee's conflict between religious needs and a work requirement. To request an accommodation, an individual may use plain language and need not mention any particular terms such as "Title VII" or "religious accommodation." However, the applicant or employee must provide enough information to make the employer aware that there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job.[120]

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[119] *See Seshadri v. Kasraian*, 130 F.3d 798, 800 (7th Cir. 1997) (employee who seeks accommodation need not belong to an established church but cannot preclude inquiry into whether he has a religion); *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977) (observing that the plaintiff "did little to acquaint Chrysler with his religion and its potential impact upon his ability to perform his job"); s*ee also Redmond*, 574 F.2d at 902 (relying on *Mann*, concluding that "an employee who is disinterested in informing his employer of his religious needs 'may forego the right to have his beliefs accommodated by his employer'").

[120] *See Heller*, 8 F.3d at 1439 (employee's request for leave to participate in religious conversion ceremony of his wife and children was sufficient to place employer on notice that this was pursuant to a religious practice or belief; an employer need have "only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements"); *Brown v. Polk County*, 61 F.3d at 654 (even though employee did not explicitly ask for a religious accommodation, court held employer was on notice of the need for accommodation given that it reprimanded employee for engaging in known religious activities); *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359 (S.D. Fla. 1999) (although applicant did not himself inform employer about his religious conflict on his job application, employer had learned when he contacted applicant's former supervisor for a reference that the applicant had refused to sell condoms at prior job due to a religious objection, and was therefore on notice); *cf. Wessling*, 554 F. Supp. at 552 (employee's request to leave work early in order to arrive early for a Christmas play at her church in order to decorate and receive children was insufficient to place her employer on notice of a religious practice; it was more in the nature of a social activity or family obligation that happened to be associated with the church).

EXAMPLE 29
Failure to Advise Employer That Request Is Due to Religious Practice or Belief

> Jim agreed to take his employer's drug test but was terminated because he refused to sign the accompanying consent form. After his termination, Jim filed a charge alleging that the employer failed to accommodate his religious objection to swearing an oath. Until it received notice of the charge, the employer did not know that Jim's refusal to sign the form was based on his religious beliefs. Because the employer was not notified of the conflict at the time Jim refused to sign the form, or at any time prior to Jim's termination, it did not have an opportunity to offer to accommodate him. The employer has not violated Title VII.[121]

2. Discussion of Request

While an employer is not required by Title VII to conduct a discussion with an employee before denying the employee's accommodation request, as a practical matter it can be important to do so. Both the employer and the employee have roles to play in resolving an accommodation request. In addition to placing the employer on notice of the need for accommodation, the employee should cooperate with the employer's efforts to determine whether a reasonable accommodation can be granted. Once the employer becomes aware of the employee's religious conflict, the employer should obtain promptly whatever additional information is needed to determine whether an accommodation is available that would eliminate the religious conflict without posing an undue hardship on the operation of the employer's business.[122] This typically

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[121] *Cary v. Carmichael*, 908 F. Supp. 1334 (E.D. Va. 1995), *aff'd*, 116 F.3d 472 (4th Cir. 1997); *see also Elmenayer v. ABF Freight Sys.*, 2001 WL 1152815 (E.D.N.Y. Sept. 20, 2001) (employer not liable for disciplining employee for tardiness where employee failed – until after his discharge – to explain that tardiness was because he attended a prayer service), *aff'd on other grounds*, 318 F.3d 130 (2d Cir. 2003).

[122] Notwithstanding the different legal standards for determining when a failure to accommodate poses an undue hardship under Title VII and the ADA, *see supra* n.117, courts have endorsed a cooperative information-sharing process between employer and employee, similar to the "interactive process" used for disability accommodation requests under the ADA. *See, e.g., Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 n.5 (10th Cir. 2000) ("the [ADA] 'interactive process' rationale is equally applicable to the obligation to offer a reasonable accommodation to an individual whose religious beliefs conflict with an employment requirement"); *Elmenayer*, 2001 WL 1152815, at *5 (same), *aff'd on other grounds*, 318 F.3d 130*; Kenner v. Domtar Indus., Inc.*, 2006 WL 662466 (W.D. Ark. Mar. 13, 2006) ("Title VII's reasonable accommodation provisions contemplate an interactive process, with cooperation between the employer and the employee, but which must be initiated by the employer"); *Cosme v. Henderson*, 2000 WL 1682755, *6 (S.D.N.Y. Nov. 9, 2000) ("[t]he process of finding a reasonable [religious] accommodation is intended to be an interactive process in which both the employer and employee participate"), *aff'd*, 287 F.3d 152 (3d Cir. 2002); *cf. Ansonia Bd. of Educ.*, 479 U.S. at 69 ("courts have noted that 'bilateral cooperation is appropriate in the search for an acceptable reconciliation

involves the employer and employee mutually sharing information necessary to process the accommodation request. Employer-employee cooperation and flexibility are key to the search for a reasonable accommodation. If the accommodation solution is not immediately apparent, the employer should discuss the request with the employee to determine what accommodations might be effective. If the employer requests additional information reasonably needed to evaluate the request, the employee should provide it.

Failure to confer with the employee is not an independent violation of Title VII but, as a practical matter, such failure can have adverse legal consequences for both an employee and an employer. For example, in some cases where an employer has made no effort to act on an accommodation request, courts have found that the employer lacked the evidence needed to meet its burden of proof to establish that the plaintiff's proposed accommodation would actually have posed an undue hardship.[123] Likewise, courts have ruled against employees who refused to cooperate with an employer's requests for reasonable information when, as a result, the employer was deprived of the information necessary to resolve the accommodation request. For example, if an employee requested a schedule change to accommodate daily prayers, the employer might need to ask for information about the religious observance, such as time and duration of the daily prayers, in order to determine if accommodation can be granted without posing an undue hardship on the operation of the employer's business.[124] Moreover, even if the employer does not grant the employee's preferred accommodation but instead provides an alternative accommodation, the employee must cooperate by attempting to meet his religious needs through the employer's proposed accommodation if possible.[125]

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of the needs of the employee's religion and the exigencies of the employer's business'") (quoting *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145-46 (5th Cir. 1982)).

[123] *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 222 (6th Cir. 1991) ("[a]fter failing to pursue [a voluntary waiver of seniority rights] or any other reasonable accommodation, the company is in no position to argue that it was unable to accommodate reasonably [plaintiff's] religious needs without undue hardship on the conduct of its business"); *EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116 (4th Cir. 1988) (employer's failure to attempt to accommodate violated Title VII).

[124] *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 227 (3d Cir. 2000) (by refusing to meet with employer's human resources department, employee failed to satisfy her duty to cooperate in finding a reasonable accommodation).

[125] *Ansonia Bd. of Educ.*, 479 U.S. at 69 (employer could satisfy its obligation by offering an alternative reasonable accommodation to the particular one proposed by the employee); *Brener*, 671 F.2d at 146 ("employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer"); *EEOC v. AutoNation USA Corp.*, 2002 WL 31650749 (9th Cir. Nov. 22, 2002) (unpublished) (employer satisfied its initial burden by showing that it suggested possible accommodations but that the employee short-circuited the process by resigning without first giving the proposed accommodations the opportunity to be implemented or tested); *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1286 (8th Cir. 1977) (where employee "will not attempt to accommodate his own beliefs through the means already available to him or cooperate with his employer in its conciliatory efforts, he may forego the right to have his beliefs accommodated"), *cert. denied*, 434 U.S. 1039 (1978).

Where the accommodation request itself does not provide enough information to enable the employer to make a determination, and the employer has a bona fide doubt as to the basis for the accommodation request, it is entitled to make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice at issue is religious and sincerely held, and that the belief or practice gives rise to the need for the accommodation. *See* "Sincerely Held" and "Employer Inquiries into Religious Nature or Sincerity of Belief," *supra* §§ I-A-2 and I-A-3.[126] Whether an employer has a reasonable basis for seeking to verify the employee's stated beliefs will depend on the facts of a particular case.

EXAMPLE 30
Sincerity of Religious Belief Questioned

> Bob, who had been a dues-paying member of the CDF union for fourteen years, had a work-related dispute with a union official and one week later asserted that union activities were contrary to his religion and that he could no longer pay union dues. The union doubted whether Bob's request was based on a sincerely held religious belief, given that it appeared to be precipitated by an unrelated dispute with the union, and he had not sought this accommodation in his prior fourteen years of employment. In this situation, the union can require him to provide additional information to support his assertion that he sincerely holds a religious conviction that precludes him from belonging to – or financially supporting – a union.[127]

When an employer requests additional information, employees should provide information that addresses the employer's reasonable doubts. That information need not, however, take any specific form. For example, written materials or the employee's own first-hand explanation may be sufficient to alleviate the employer's doubts about the sincerity or religious nature of the employee's professed belief such that third-party verification is unnecessary. Further, since idiosyncratic beliefs can be sincerely held and religious, even when third-party verification is needed, it does not have to come from a church official or member, but

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[126] *See also Bushouse*, 164 F. Supp. 2d 1066.

[127] *Id.* at 1078 & n.18 (court held that union's refusal to provide accommodation unless employee produced independent corroboration that his accommodation request was motivated by a sincerely held religious belief did not violate Title VII's religious accommodation provision, but cautioned that the holding was limited to "the facts and circumstances of the present case" and that "the inquiry [into sincerity] and scope of that inquiry will necessarily vary based upon the individual requesting corroboration and the facts and circumstances of the request").

rather could be provided by others who are aware of the employee's religious practice or belief.[128]

An employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation. By the same token, employers who unreasonably request unnecessary or excessive corroborating evidence risk being held liable for denying a reasonable accommodation request, and having their actions challenged as retaliatory or as part of a pattern of harassment.

It also is important to remember that even if an employer concludes that an individual's professed belief is sincerely held and religious, it is only required to grant those requests for accommodation that do not pose an undue hardship on the conduct of its business.

EXAMPLE 31
Clarifying a Request

> Diane requests that her employer schedule her for "fewer hours" so that she can "attend church more frequently." The employer denies the request because it is not clear what schedule Diane is requesting or whether the change is sought due to a religious belief or practice. While Diane's request lacked sufficient detail for the employer to make a final decision, it was sufficient to constitute a religious accommodation request. Rather than denying the request outright, the employer should have obtained the information from Diane that it needed to make a decision. The employer could have inquired of Diane precisely what schedule change was sought and for what purpose, and how her current schedule conflicted with her religious practices or beliefs. Diane would then have had an obligation to provide sufficient information to permit her employer to make a reasonable assessment of whether her request was based on a sincerely held religious belief, the precise conflict that existed between her work schedule and church schedule, and whether granting the accommodation would pose more than a *de minimis* burden on the employer's business.

3. What is a "Reasonable" Accommodation?

Although an employer never has to provide an accommodation that would pose an undue hardship, *see infra* § IV-B, the accommodation that is provided must be a reasonable one. An

[128] *EEOC v. Tyson Foods, Inc*., Civil Action No. 99-5126 (W.D. Ark. consent decree entered Aug. 14, 2000) (settlement of Title VII challenge to employer's policy of requiring a letter from a church in support of all accommodation requests).

accommodation is not "reasonable" if it merely lessens rather than eliminates the conflict between religion and work, provided eliminating the conflict would not impose an undue hardship.[129] Eliminating the conflict between a work rule and an employee's religious belief, practice, or observance means accommodating the employee without unnecessarily disadvantaging the employee's terms, conditions, or privileges of employment.[130]

Where there is more than one reasonable accommodation that would not pose an undue hardship, the employer is not obliged to provide the accommodation preferred by the employee.[131] However, an employer's proposed accommodation will not be "reasonable" if a

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[129] *See EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997) (employer did not satisfy reasonable accommodation requirement by offering to let Jewish employees take off a day other than Yom Kippur, because that would not eliminate the conflict between religion and work); *Shelton*, 223 F.3d at 225 (citing *Ansonia Bd. of Educ*., 479 U.S. at 68-69) (employer's accommodation of granting unpaid leave for religious observance instead of allowing use of paid personal days provided for in collective bargaining agreement (CBA), was a reasonable accommodation as long as use of the paid days was not allowed for all purposes other than religious ones); *cf. Bruff v. N. Mississippi Health Serv., Inc.*, 244 F.3d 495 (5th Cir. 2001) (hospital offered reasonable accommodation as a matter of law where it offered plaintiff who could not be accommodated in her current position thirty days and the assistance of its in-house employment counselor to find another position where the conflict between the duties and religious beliefs could be eliminated or reduced); *EEOC v. Universal Mfg. Corp*., 914 F.2d 71 (5th Cir. 1990) (employer's offer of five working days off or alternatively seven days off if employee worked one shift within that seven days, did not satisfy obligation to offer reasonable accommodation of her religious practice of refraining from work during seven-day religious festival, where employer did not show undue hardship).

[130] *See infra* nn.131-133. Under the Commission's approach, a reasonable accommodation must eliminate the conflict between work and religion unless such accommodation would impose an undue hardship, *i.e.*, more than *de minimis* cost or disruption on the employer's business. Some courts have approached the issue of what is a reasonable accommodation in a manner that conflicts with longstanding Commission and judicial precedent. *See, e.g., EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307 (4th Cir. 2008) (analyzing reasonableness of proposed accommodation based on facts typically considered as part of undue hardship analysis); *Sturgill v. United Parcel Service, Inc.*, 512 F.3d 1024 (8th Cir. 2008) (noting that terminology which describes a reasonable accommodation as one that eliminates any work-religion conflict is imprecise, because it may incorrectly imply that reasonableness is determined as a matter of law without regard to the facts of an individual case, or that an employer is not permitted to choose among alternative accommodations, or that even accommodations which conflict with a CBA or otherwise pose an undue hardship must be granted). The Commission's approach is more straightforward and more in keeping with the purpose of Title VII's accommodation requirement. Concerns about issues such as conflicts with a union contract or burdens on other employees' settled expectations can and should be addressed in the context of whether or not it would impose an undue hardship. Moreover, the employer need not grant an employee's requested reasonable accommodation if the employer wishes instead to offer an alternative accommodation of its own choosing that also would eliminate the work-religion conflict and does not adversely affect the employee's terms, conditions, or privileges of employment.

[131] In *Ansonia Bd. of Educ.*, 479 U.S. at 68-69, the Court held that an employer has met its obligation under § 701(j) of Title VII when it demonstrates that it has offered a reasonable accommodation to the

more favorable accommodation is provided to other employees for non-religious purposes,[132] or, for example, if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment and there is an alternative accommodation that does not do so.[133]

Ultimately, reasonableness is a fact-specific determination. "The reasonableness of an employer's attempt at accommodation cannot be determined in a vacuum. Instead, it must be determined on a case-by-case basis; what may be a reasonable accommodation for one employee may not be reasonable for another . . . . 'The term 'reasonable accommodation' is a relative term and cannot be given a hard and fast meaning; each case . . . necessarily depends upon its own

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employee; "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship." *Cf. Opuku-Boateng v. California*, 95 F.3d 1461 (9th Cir. 1996) (where employer offered no accommodation and employee offered several possibilities, such as scheduling him instead for other equally undesirable shifts and adopting a system of voluntary or mandatory shift trades, the employer had to accept one of the employee's proposals unless doing so would create an undue hardship). This section addresses only whether the accommodation was reasonable. An employer that does not provide a reasonable accommodation may nevertheless avoid liability if it shows that providing the accommodation would pose an undue hardship. Undue hardship is addressed below in § IV.B.

[132] *Ansonia Bd. of Educ.*, 479 U.S. at 70-71 ("requiring [an employee] to take unpaid leave for holy day observance rather than use personal paid leave days provided for under CBA would generally be a reasonable accommodation" because it has "no direct effect upon either employment opportunities or job status," but "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones . . . [s]uch an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness"). In cases involving requests for schedule changes or leave as an accommodation, an employer does not have to provide paid leave as an accommodation beyond that otherwise available to the employee, but may have to provide unpaid leave as an accommodation if it would not pose an undue hardship.

[133] *Commission Guidelines*, 29 C.F.R. § 1605.2(c)(2)(ii) ("when there is more than one means of accommodation that would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual's employment opportunities"). The Commission's guidelines do not require an employer to accept any alternative favored by the employee, and, thus, are not inconsistent with *Ansonia*. In fact, the Court in *Ansonia* recognized that the limitation in the Commission's guidelines – that alternatives must be considered if they will not "disadvantage an individual's employment opportunities" – distinguished the Commission's position from the position of the Second Circuit that was rejected in *Ansonia*. 470 U.S. at 69 n.6. Appellate courts in the wake of *Ansonia* have, as the Commission's guidelines instruct, evaluated whether employer accommodations had a negative impact on the individual's employment opportunities. *See Cosme v. Henderson*, 287 F.3d 152, 160 (2d Cir. 2002) (an accommodation might be unreasonable if it imposes a "significant work-related burden on the employee without justification"); *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993) (whether an accommodation is reasonable requires a more searching inquiry if an employee, "in order to accommodate his religious practices, had to accept a reduction in pay or some other loss of benefits").

facts and circumstances, and comes down to a determination of 'reasonableness' under the unique circumstances of the individual employer-employee relationship.'"[134]

EXAMPLE 32
Employer Violates Title VII if it Offers Only Partial Accommodation Where Full Accommodation Would Not Pose an Undue Hardship

Rachel, who worked as a ticket agent at a sports arena, asked not to be scheduled for any Friday night or Saturday shifts, to permit her to observe the Jewish Sabbath from sunset on Friday through sunset on Saturday. The arena wanted to give Rachel only every other Saturday off. The arena's proposed accommodation is not reasonable because it does not fully eliminate the religious conflict. The arena may deny the accommodation request only if giving Rachel every Saturday off poses an undue hardship for the arena.[135]

EXAMPLE 33
Employer Not Obligated To Provide Employee's Preferred Accommodation

Tina, a newly hired part-time store cashier whose sincerely held religious belief is that she should refrain from work on Sunday as part of her Sabbath observance, asked her supervisor never to schedule her to work on Sundays. Tina specifically asked to be scheduled to work Saturdays instead. In response, her employer offered to allow her to work on Thursday, which she found inconvenient because she takes a college class on that day. Even if Tina preferred a different schedule, the employer is not required to grant Tina's preferred accommodation.[136]

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[134] *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987) (quoting *Redmond*, 574 F.2d at 902-03).

[135] *Baker v. Home Depot*, 445 F.3d 541 (2d Cir. 2006) (employer's offer to schedule employee to work in the afternoon or evenings on Sundays, rather than the mornings, was not a "reasonable" accommodation under Title VII where employee's religious views required not only attending Sunday church services but also refraining from work on Sundays).

[136] *Wilshin v. Allstate Ins.* Co., 212 F. Supp. 2d 1360 (M.D. Ga. 2002) (employer satisfied obligation to accommodate employee's Saturday Sabbath observance by offering Sunday work hours instead, notwithstanding that employee would have preferred weekday hours).

EXAMPLE 34
Accommodation By Transfer Where Accommodation in Current Position Would Pose Undue Hardship

> Yvonne, a member of the Pentecostal faith, was employed as a nurse at a hospital. When she was assigned to the Labor and Delivery Unit, she advised the nurse manager that her faith forbids her from participating "directly or indirectly in ending a life," and that this proscription prevents her from assisting with abortions. She asked the hospital to accommodate her religious beliefs by allowing her to trade assignments with other nurses in the Labor and Delivery Unit as needed. The hospital concluded that it could not accommodate Yvonne within the Labor and Delivery Unit because there were not enough staff members able and willing to trade with her. The hospital instead offered to permit Yvonne to transfer, without a reduction in pay or benefits, to a vacant nursing position in the Newborn Intensive Care Unit, which did not perform any such procedures. The hospital's solution complies with Title VII. The hospital is not required to grant Yvonne's preferred accommodation where it has offered a reasonable alternative solution that eliminates the conflict between work and a religious practice or belief under its existing policies and procedures.[137] If there had been no other position to which she could transfer, the employer would have been entitled to terminate her since it would pose an undue hardship to accommodate her in the Labor and Delivery Unit.

Title VII is violated by an employer's failure to accommodate even if to avoid adverse consequences an employee continues to work after his accommodation request is denied. "An employee does not cease to be discriminated against because he temporarily gives up his religious practice and submits to the employment policy."[138] Thus, the fact that an employee

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[137] *Shelton*, 223 F.3d at 226 (state hospital's offer to transfer nurse to newborn intensive care unit was reasonable accommodation for her religious beliefs which prevented her from assisting in emergency procedures to terminate pregnancies, where nurse presented no evidence that transfer would affect her salary or benefits); *see also Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998) (city's offer to allow police officer to exercise his right under CBA to transfer to a district with no abortion clinics resolved his religious objection to being assigned to guard such facilities; Title VII did not compel employer to instead grant his preferred accommodation of remaining in his district but being relieved of such assignments); *Wright*, 2 F.3d at 217 (7th Cir. 1993) (employer reasonably accommodated employee by suggesting he exercise his rights under CBA to bid on jobs that would have eliminated the conflict between work and religion).

[138] *Townley*, 859 F.2d at 614 n.5 (citing *Am. Postal Workers Union v. Postmaster*, 781 F.2d 772, 774-75 (9th Cir. 1986)); *see also Rodriguez v. City of Chicago*, 1996 WL 22964, at *3 (N.D. Ill. Jan. 12, 1996) (rejecting employer's argument that a threat of adverse action is not enough to state a claim; "it is

acquiesces to the employer's work rule, continuing to work without an accommodation after the employer has denied the request, should not defeat the employee's legal claim.[139]

In addition, the obligation to provide reasonable accommodation absent undue hardship is a continuing obligation. Employers should be aware that an employee's religious beliefs and practices may evolve over time, and that this may result in requests for additional or different accommodations.[140] Similarly, the employer has the right to discontinue a previously granted accommodation that is no longer utilized for religious purposes or poses an undue hardship.

B. Undue Hardship

An employer can refuse to provide a reasonable accommodation if it would pose an undue hardship. Undue hardship may be shown if the accommodation would impose "more than *de minimis* cost" on the operation of the employer's business.[141] The concept of "more than *de*

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nonsensical to suggest that an employee who, when forced by his employer to choose between his job and his faith, elects to avoid potential financial and/or professional damage by acceding to his employer's religiously objectionable demands has not been the victim of religious discrimination"). Moreover, a denial of accommodation claim can be brought if the employer could have provided an accommodation absent undue hardship that did not disadvantage a term, condition, or privilege of employment, but did not do so. For example, if a Muslim employee is transferred to non-customer service position because she refuses to stop wearing a religiously mandated headscarf, she states a claim for denial of accommodation under Title VII. *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515 (6th Cir. 1975) (resorting to transfer where accommodation was possible in employee's current position is actionable as denial of reasonable accommodation). However, an employer need not accommodate an employee who chooses to resign before notifying the employer of the need for accommodation or fails to cooperate with the employer in the accommodation process. *See, e.g., Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629 (6th Cir. 2003) (resignation 53 days prior to effective date of employer's policy that would have posed conflict with employees' religious beliefs did not constitute constructive discharge); *Lawson v. Washington*, 296 F.3d 799 (9th Cir. 2002) (Jehovah's Witness who quit state patrol rather than salute the flag or take an oath in violation of his religious beliefs was not constructively discharged and thus was not subject to an adverse employment action where, rather than request accommodation, he informed employer that he was resigning due to his religious conflict); *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 227 (3d Cir. 2000) (employee who refused to meet with employer's human resources department to pursue alternative accommodations could not argue that accommodation employer offered was not reasonable).

[139] *Townley*, 859 F.2d at 614 n.5*; Rodriguez*, 1996 WL 22964.

[140] *Cooper*, 15 F.3d at 1379 (Seventh-day Adventist employee's need for accommodation to observe Sabbath had changed in the 17 months since employer had last scheduled her to work on a Friday night or Saturday; her "undisputed testimony was that her faith and commitment to her religion grew during this time").

[141] *See, e.g., Hardison*, 432 U.S. at 84. This "more than *de minimis*" Title VII undue hardship standard is substantially lower than the ADA undue hardship standard, which requires employers to show that the accommodation would cause "significant difficulty or expense."

minimis cost" is discussed below in sub-section 2. Although the employer's showing of undue hardship under Title VII is easier than under the ADA, the burden of persuasion is still on the employer.[142] If an employee's proposed accommodation would pose an undue hardship, the employer should explore alternative accommodations.

1. Case-by-Case Determination

The determination of whether a particular proposed accommodation imposes an undue hardship "must be made by considering the particular factual context of each case."[143] Relevant factors may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.[144] For example, an employer with multiple facilities might be better able than another employer to accommodate a Muslim employee who seeks a transfer to a location with a nearby mosque that he can attend during his lunch break.

To prove undue hardship, the employer will need to demonstrate how much cost or disruption the employee's proposed accommodation would involve.[145] An employer cannot rely on potential or hypothetical hardship when faced with a religious obligation that conflicts with scheduled work, but rather should rely on objective information.[146] A mere assumption that

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[142] Both the statute, at 42 U.S.C. § 2000e(j), and the *Commission Guidelines*, at 29 C.F.R. § 1605.2(b), require an employer to reasonably accommodate an employee's or applicant's religious beliefs and practices "unless the employer demonstrates" that doing so would pose an undue hardship. Even under the Fourth Circuit's decision in *EEOC v. Firestone*, and the Eighth Circuit's decision in *Sturgill v. United Parcel Service*, where courts focused on reasonableness before looking at undue hardship, the employer still has the burden of persuasion. *Firestone*, 515 F.3d at 315; *Sturgill*, 512 F.3d at 1033 n.4.

[143] *Tooley v. Martin Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981).

[144] *Commission Guidelines*, 29 C.F.R. § 1605.2(e).

[145] *Compare Cooper*, 15 F.3d at 1380 (employee's request not to be scheduled for Saturday work due to Sabbath observance posed undue hardship for employer because it would have required hiring an additional worker), *and Beadle v. Tampa*, 42 F.3d 633 (11th Cir. 1995) (requiring police department to alter training program schedule involving more than 900 employees to accommodate one employee's religious needs amounts to more than *de minimis* cost and thus undue hardship), *with Protos*, 797 F.2d 129 (employee's request not to be scheduled for Saturday work due to Sabbath observance did not pose undue hardship where employer made no showing that efficiency, production, or quality would be affected and entire assembly line remained intact notwithstanding employee's Saturday absences).

[146] *See Brown v. Gen. Motors Corp.*, 601 F.2d 956, 960 (8th Cir. 1979) ("projected 'theoretical' future effects cannot outweigh the undisputed fact that no monetary costs and *de minimis* efficiency problems were actually incurred during the three month period in which [employee] was accommodated"); *EEOC v. Alamo Rent-A-Car, LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006) (employer incorrectly believed that if it allowed plaintiff to wear her religious headscarf it could not enforce its

many more people with the same religious practices as the individual being accommodated may also seek accommodation is not evidence of undue hardship. The determination of whether a proposed accommodation would pose an undue hardship is based on concrete, fact-specific considerations.[147]

2. More than "*De Minimis*" Cost

To establish undue hardship, the employer must demonstrate that the accommodation would require more than *de minimis* cost.[148] Factors to be considered are "the identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation."[149] Generally, the payment of administrative costs necessary for an accommodation, such as costs associated with rearranging schedules and recording substitutions for payroll purposes or infrequent or temporary payment of premium wages (*e.g.*, overtime rates) while a more permanent accommodation is sought, will not constitute more than *de minimis* cost, whereas the regular payment of premium wages or the hiring of additional employees to provide an accommodation will generally cause an undue hardship to the employer.[150] "[T]he Commission will presume that the infrequent payment of

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uniform policy with respect to other employees, and failed to show undue hardship based on its fear that allowing the accommodation would open "the floodgates to others violating the uniform policy").

[147] *Tooley*, 648 F.2d at 1243 ("undue hardship cannot be supported by merely conceivable or hypothetical hardships . . . . The magnitude as well as the fact of hardship must be determined by 'actual imposition on co-workers or disruption of the work routine'") (quoting *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 406-07 (9th Cir. 1978)); *EEOC v. Alamo Rent-A-Car, LLC*, 432 F. Supp. 2d at 1016 ("'hypothetical hardships'" based on assumptions or "pure speculation" about accommodations which have never been put into practice are insufficient to show undue hardship").

[148] *Commission Guidelines*, 29 C.F.R. § 1605.2(e)(1).

[149] *Id. Compare EEOC and Electrolux Reach Voluntary Resolution in Class Religious Accommodation Case* (press release available at http://www.eeoc.gov/press/9-24-03.html, Sept. 24, 2003) (settlement whereby employer agreed to accommodate the religious request of 165 Somali workers who, pursuant to the tenets of the Islamic faith, must offer at least five daily prayers, two of which must be observed within a restricted time period of between one and two hours) *with Farah v. Whirlpool Corp.*, 3:02cv424 (M.D. Tenn. Oct. 16, 2004) (jury verdict entered in favor of employer, which argued that allowing 40 Muslim factory workers to take a break from the line for their sunset prayers at the same time would result in an undue hardship because as a result of their absence, the line would have to be shut down).

[150] *Commission Guidelines*, 29 C.F.R. § 1605.2(e)(1). Under Title VII, for example, in *Hardison*, the payment of overtime (or premium pay) to another employee so that plaintiff could be off for weekly religious observance was an undue hardship. *Id*. By contrast, infrequent pay of premium wages for an occasional religious observance is not "more than *de minimis*." *See, e.g., EEOC v. Southwestern Bell Tel. LP*, 2007 WL 2891379 (E.D. Ark. Oct. 3, 2007) (summary judgment for employer denied on claim by two employees that they were improperly denied leave for an annual religious observance that would have required company to pay two other workers overtime wages of approximately $220 each to fill in,

premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing reasonable accommodation."[151]

Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs,[152] infringes on other employees' job rights or benefits,[153] impairs workplace safety, or causes co-workers to carry the accommodated

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where the facility routinely paid technicians overtime, the employer failed to contact the union about possible accommodation, the policy providing for only one technician on leave per day was not always observed, and there was no evidence that customer service needs actually went unmet on the day at issue) (jury verdict for plaintiffs subsequently entered), *appeal docketed*, Case No. 08-1096 (8th Cir. filed Jan. 10, 2008); *Brown v. Gen. Motors Corp.*, 601 F.2d at 959-60 (no more than *de minimis* cost imposed by allowing employee to leave work at Sundown on Friday where he did not receive any pay for the time missed, a replacement worker was readily available to fill in for him on the shift during the hours he missed because the company maintained "extra board men" who were at all times available to replace unscheduled absences of regular employees); *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978) (excusing employee from paying his monthly $19 union dues due to religious objection did not pose an undue hardship, where one union officer testified that the loss "wouldn't affect us at all"; the loss was also *de minimis* because "even if so necessary to its fiscal well-being that its equivalent would be collected from the Local's 300 members at a rate of 2 cents each per month; an accommodation that would only result in an increase of other union members dues in amount of 24 cents per year was *de minimis*; unions asserted fear that many more religious objectors would request similar accommodation, resulting in greater cost, was based on mere speculation); *EEOC v. IBP, Inc.*, 824 F. Supp. 147 (C.D. Ill. 1993) (adopting EEOC's interpretation in the *Commission Guidelines* that undue hardship means, with respect to costs for a substitute, "costs similar to the *regular* payment of premium wages," and holding that "[i]nfrequent payment of premium wages made on a temporary basis and administrative costs associated with implementing an accommodation are considered *de minimis*, although the ultimate determination is made with 'due regard given to the identifiable cost in relation to the size and operating cost of the employer.' 29 C.F.R. § 1605.2(e)(1))."

[151] *Commission Guidelines*, 29 C.F.R. § 1605.2(e)(1); *Redmond*, 574 F.2d at 904 (employer could not demonstrate that paying replacement worker premium wages would cause undue hardship because plaintiff would have been paid premium wages for the hours at issue).

[152] *Protos*, 797 F.2d at 134-35; *Brown v. Polk County*, 61 F.3d at 655 (allowing employee to assign secretary to type his Bible study notes posed more than *de minimis* cost because secretary would otherwise have been performing employer's work during that time).

[153] "[A]n employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights." *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (also holding that employee's proposed accommodation of either allowing him to post religiously motivated messages intended to demean and harass co-workers, or the company deleting sexual orientation from its voluntarily adopted diversity and non-discrimination policy, would have posed an undue hardship on the employer); *EEOC v. BJ Servs. Co.*, 921 F. Supp. 1509 (N.D. Tex. 1995) (employer was unable to accommodate employee's religious request for certain day off because no other employees were available to work, there were safety

employee's share of potentially hazardous or burdensome work.[154] Whether the proposed accommodation conflicts with another law will also be considered.[155]

EXAMPLE 35
Religious Need Can Be Accommodated

> David wears long hair pursuant to his Native American religious beliefs. David applies for a job as a server at a restaurant which requires its male employees to wear their hair "short and neat." When the restaurant manager informs David that if offered the position he will have to cut his hair, David explains that he keeps his hair long based on his religious beliefs, and offers to wear it in a pony tail or held up with a clip. The manager refuses this accommodation, and denies David the position based on his long hair. Since the evidence indicated that David could have been accommodated, without undue hardship, by wearing his hair in a ponytail or held up with a clip, the employer will be liable for denial of reasonable accommodation and discriminatory failure to hire.

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concerns regarding untrained substitute personnel, there were significant costs in bringing employees from other locations, and this accommodation would deny other employees their day off); *Virts v. Consol. Freightways Corp. of Delaware*, 285 F.3d 508 (6th Cir. 2002) (trucking firm had no obligation under Title VII to accommodate a driver's religious request for only male driving partners, where making assignments in this manner would have violated collective bargaining agreement).

[154] *BJ Servs. Co.*, 921 F. Supp. at 1509; *Balint v. Carson City, Nevada*, 180 F.3d 1047, 1054 (9th Cir. 1999) (citing *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir.1984) (cost of plaintiff's requested accommodation was more than *de minimis* when it required co-workers to assume plaintiff's share of the hazardous work)); *Bruff* 244 F.3d at 501 (requiring co-workers of plaintiff mental health counselor to assume disproportionate workload to accommodate plaintiff's request not to counsel certain clients on religious grounds would constitute undue hardship).

[155] *See, e.g., Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9th Cir. 1999) (employer not required to accommodate job applicant's religiously based refusal to provide his social security number where employer sought it to comply with Internal Revenue Service and Immigration and Naturalization Service requirements). However, an employer should not assume that it would pose an undue hardship to accommodate a religious practice that appears to conflict with a generally applicable safety requirement, but rather should assess whether an undue hardship is actually posed. For example, there are existing religious exemptions to the government enforcement procedures of some safety requirements. *See, e.g.*, U.S. Department of Labor, Occupational Safety and Health Administration STD 1-6.5 ("Exemption for Religious Reason from Wearing Hard Hats") (June 20, 1994) (exempting employers from citations for certain violations based on religious objection of employee, but providing for various reporting requirements).

EXAMPLE 36
Safety Risk Poses Undue Hardship

> Patricia alleges she was terminated from her job as a steel mill laborer because of her religion (Pentecostal) after she notified her supervisor that her faith prohibits her from wearing pants, as required by the mill's dress code, and requested as an accommodation to be permitted to wear a skirt. Management contends that the dress code is essential to the safe and efficient operation of the mill, and has evidence that it was imposed following several accidents in which skirts worn by employees were caught in the same type of mill machinery that Patricia operates. Because the evidence establishes that wearing pants is truly necessary for safety reasons, the accommodation requested by Patricia poses an undue hardship.[156]

3. Seniority Systems and Collectively Bargained Rights

A proposed religious accommodation poses an undue hardship if it would deprive another employee of a job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement (CBA).[157] Of course, the mere existence of a seniority system or CBA does not relieve the employer of the duty to attempt reasonable accommodation of its employees' religious practices; the question is whether an accommodation can be provided

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[156] *See EEOC v. Oak-Rite Mfg. Corp.*, 2001 WL 1168156 (S.D. Ind. Aug. 21, 2001) (manufacturing employee's proposed accommodation of wearing close-fitting denim or canvas dress or skirt that extends to within two or three inches above the ankle would impose an undue hardship on employer by requiring it to experiment with employee safety, given the absence of evidence demonstrating safety of proposed accommodation in a comparable work setting); *EEOC v. Brink's Inc.*, No. 1:02-CV-0111 (C.D. Ill.) (consent decree filed Dec. 27, 2002) (settlement of case alleging that employee was denied reasonable accommodation when she sought to wear culottes made out of messenger uniform material, rather than the required trousers, because her Pentecostal Christian beliefs precluded her from wearing pants); c*f. Webb v. City of Philadelphia*, 2007 WL 1866763 (E.D. Pa. June 27, 2007) (undue hardship to accommodate the wearing of a traditional religious headpiece called a khimar by a Muslim police officer while in uniform, where evidence showed dress code in para-military organization promotes cooperation, fosters esprit de corps, emphasizes the hierarchical nature of the police force, and portrays a sense of authority as well as public and religious neutrality to the public).

[157] *Hardison*, 432 U.S. at 80; *Stolley v. Lockheed Martin Aeronautics Co.*, 2007 WL 1010418 (5th Cir. March 28, 2007) (unpublished) (affirming summary judgment in favor of the employer, the court ruled that a newly-hired aircraft assembly line worker was not entitled to have the employer reassign him to a different shift as an accommodation for his Sabbath observance, because the employer's union contract dictated that shift swapping and transfers would be based on seniority and the union was unwilling to waive the contract in this case); *see also Balint*, 180 F.3d at 1054.

without violating the seniority system or CBA.[158] Allowing voluntary substitutes and swaps does not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system or CBA.[159]

EXAMPLE 37
Schedules Based on a Seniority System or Collectively Bargained Rights

> Susan, an employee of QRS Corp., asks not to work on her Sabbath. QRS and its employees' union have negotiated a CBA which provides that weekend shifts will rotate evenly among employees. If Susan can find qualified co-workers voluntarily willing to swap shifts to accommodate her sincerely held religious beliefs, the employer could be found liable for denial of reasonable accommodation if it refuses to permit the swap to occur. The existence of the collectively bargained system for determining weekend shifts should not result in the denial of accommodation if a voluntary swap can be arranged by the employee without violating the system or otherwise posing an undue hardship. The result would be the same if QRS had a unilaterally imposed seniority system (rather than a CBA) pursuant to which weekend shifts are determined.
>
> However, if other employees were unwilling to swap shifts or were otherwise harmed by not requiring Susan to work on the shift in question, or the employer would be subject to other operational costs that were more than *de minimis* by allowing Susan to swap shifts, then the employer can demonstrate undue hardship.[160]

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[158] *Balint*, 180 F.3d at 1054; *Killebrew v. Local Union 1683 of Am. Fed'n of State, County, & Mun. Employees, AFL-CIO*, 651 F. Supp. 95 (W.D. Ky. 1986) (union not required to negotiate a change in the CBA to allow an employee to bump another employee to obtain an accommodation because bumping would have been detrimental to those bumped); *see also Virts v. Consol. Freightways Corp. of Delaware*, 285 F.3d 508 (6th Cir. 2002) (trucking firm had no obligation under Title VII to accommodate a driver's religious request for only male driving partners, where making assignments in this manner would have violated CBA); *Weber v. Roadway Express, Inc.*, 199 F.3d 270 (5th Cir. 2000) (same); *Thomas*, 225 F.3d 1149 (because seniority system in CBA gave more senior employees first choice for job assignments, it would be an undue hardship for employer to grant employee's accommodation request not to be scheduled to work on Saturdays); *Mann v. Frank*, 7 F.3d 1365 (8th Cir.1993) (no violation of the duty to accommodate where the union refused the Postal Service's request to assign another worker to take plaintiff's Saturday shift, which would have violated CBA's provisions governing overtime).

[159] *Commission Guidelines*, 29 C.F.R. § 1605.2(e)(2); *Stolley*, 2007 WL 1010418.

[160] *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019 (10th Cir. 1994) (employer satisfied Title VII obligation when it suggested method by which driver would usually be able to work the number of trips each week required under the union contract prior to the Sabbath, and could use vacation time on other

4. Co-worker Complaints

Although infringing on co-workers' ability to perform their duties[161] or subjecting co-workers to a hostile work environment will generally constitute undue hardship,[162] the general disgruntlement, resentment, or jealousy of co-workers will not.[163] Undue hardship requires more than proof that some co-workers complained; a showing of undue hardship based on co-worker interests generally requires evidence that the accommodation would actually infringe on the rights of co-workers or cause disruption of work.[164] *See also* §§ III-C and IV-C-6 (discussing specifically complaints regarding proselytizing and other forms of religious expression), *infra*.

5. Security Considerations

If a religious practice actually conflicts with a legally mandated federal, state, or local security requirement, an employer need not accommodate the practice because doing so would create an undue hardship. If a security requirement has been unilaterally imposed by the employer and is not required by law or regulation, the employer will need to decide whether it would be an undue hardship to modify or eliminate the requirement to accommodate an employee who has a religious conflict.

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occasions; employer was not required to grant driver's request to skip assignments, which would then have to be worked by other drivers, or his request to work less than other full-time drivers and reimburse employer for additional costs; or his request to transfer with no loss of seniority, which would violate its CBA, where the employer had sought but could not obtain a waiver from the union).

[161] *See Bhatia*, 734 F.2d 1382.

[162] *See Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995) (employer reasonably accommodated an employee by asking her when she was outside her cubicle to cover up an anti-abortion button she wore containing a graphic photograph of a fetus because the button so distracted other employees that it had caused a 40% reduction in productivity and some employees threatened to walk off their jobs).

[163] *Opuku-Boateng*, 95 F.3d at 1473 (mere complaints by other employees did not constitute undue hardship; employer failed to establish undue hardship in accommodating employee's religious holidays because it did not show hardship on plaintiff's co-workers or that accommodation required more than *de minimis* cost).

[164] *Burns*, 589 F.2d at 407 ("Undue hardship requires more than proof of some fellow-workers' grumbling or unhappiness with a particular accommodation to a religious belief. An employer or union would have to show . . . actual imposition on co-workers or disruption of the work routine."); *accord Brown v. Polk County*, 61 F.3d at 655; *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (it would have posed an undue hardship for employer to accommodate employee's religiously motivated posting of large signs in his cubicle which he "intended to be hurtful" and to demean and harass his co-workers; it also would have posed an undue hardship for employer to eliminate a portion of its diversity program to which plaintiff had religious objections).

EXAMPLE 38
Accommodation Implicating Security Concerns

Patrick is employed as a correctional officer at a state prison, and his brother William is employed as a grocery store manager. Both Patrick and William seek permission from their respective employers to wear a fez at work as an act of faith on a particular holy day as part of their religious expression. Both employers deny the request, citing a uniformly applied workplace policy prohibiting employees from wearing any type of head covering. The prison's policy is based on security concerns that head coverings may be used to conceal drugs, weapons, or other contraband, and may spark internal violence among prisoners. The grocery store's policy is based on a stated desire that all employees wear uniform clothing so that they can be readily identified by customers. If both brothers file EEOC charges challenging the denial of their accommodation requests, Patrick will likely not prevail because the prison's denial of his request was based on legitimate security considerations posed by the particular religious garb sought to be worn. William will likely prevail because there is no indication it would pose an undue hardship for the grocery store to modify its policy with respect to his request. [165]

EXAMPLE 39
Kirpan

Harvinder, a baptized Sikh who works in a hospital, wears a small (4-inch), dull and sheathed kirpan (miniature sword) strapped and hidden underneath her clothing, as a symbol of her religious commitment to defend truth and moral values. When Harvinder's supervisor, Bill, learned about her kirpan from a co-worker, he instructed Harvinder not to wear it at work because it violated the hospital policy against weapons in the workplace. Harvinder explained to Bill that her faith requires her to wear a kirpan in order to comply with the Sikh Code of Conduct, and gave him literature explaining that the kirpan is a religious artifact, not a weapon. She also showed him the kirpan, allowing him to see that

[165] *See* nn.182-184, *infra*. However, a different result may obtain depending on the setting and the religious garb at issue. *See United States v. New York State Dep't of Corr. Servs.*, Civil Action No. 07-2243 (S.D.N.Y. settlement approved Jan. 18, 2008) (providing for individualized review of correctional officers' accommodation requests with respect to uniform and grooming requirements, and allowing employees to wear religious skullcaps such as kufis or yarmulkes if close fitting and solid dark blue or black in color, provided no undue hardship was posed).

> it was no sharper than butter knives found in the hospital cafeteria. Nevertheless, Bill told her that she would be terminated if she continued to wear the kirpan at work. Absent any evidence that allowing Harvinder to wear the kirpan would pose an undue hardship in the factual circumstances of this case, the hospital is liable for denial of accommodation.[166]

C. Common Methods of Accommodation in the Workplace

Under Title VII, an employer or other covered entity may use a variety of methods to provide reasonable accommodations to its employees. The most common methods are: (1) flexible scheduling; (2) voluntary substitutes or swaps of shifts and assignments; (3) lateral transfer and/or change of job assignment; and, (4) modifying workplace practices, policies, and/or procedures.

1. Scheduling Changes

An employer may be able to reasonably accommodate an employee by allowing flexible arrival and departure times, floating or optional holidays, flexible work breaks, use of lunch time in exchange for early departure, staggered work hours, and other means to enable an employee to make up time lost due to the observance of religious practices.[167] However, EEOC's position is that it will be insufficient merely to eliminate part of the conflict, unless eliminating the conflict in its entirety will pose an undue hardship by disrupting business operations or impinging on other employees' benefits or settled expectations.

EXAMPLE 40
Break Schedules/Prayer at Work

> Rashid, a janitor, tells his employer on his first day of work that he practices Islam and will need to pray at several prescribed times during the workday in order to adhere to his religious practice of praying at five specified times each day, for several minutes, with hand washing beforehand. The employer objects because its written policy allows one fifteen-minute break in the middle of each morning and afternoon. Rashid's requested change in break schedule will not exceed the 30 minutes of total break time

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[166] For example, Title 18 U.S.C. Section 930 generally prohibits the possession of knives, including kirpans, with blades longer than 2.5 inches, in federal facilities, unless otherwise authorized.

[167] The Commission's regulations, *Commission Guidelines*, 29 C.F.R. § 1605.2(d), set forth suggested methods of accommodating scheduling conflicts, but those methods are not intended to comprise an exhaustive list. Different factual circumstances will require different solutions. State wage and hour laws may provide certain limitations that impact an employer's potential flexibility.

otherwise allotted, nor will it affect his ability to perform his duties or otherwise cause an undue hardship for his employer. Thus, Rashid is entitled to accommodation.[168]

EXAMPLE 41
Blanket Policies Prohibiting Time Off for Religious Observance

A large employer operating a fleet of buses had a policy of refusing to accept driver applications unless the applicant agreed that he or she was available to be scheduled to work any shift, seven days a week. This policy violates Title VII to the extent that it discriminates against applicants who refrain from work on certain days for religious reasons, by failing to allow for the provision of religious accommodation absent undue hardship.[169]

2. Voluntary Substitutes and Shift Swaps

Although it would pose an undue hardship to require employees *involuntarily* to substitute for one another or swap shifts, the reasonable accommodation requirement can often be satisfied without undue hardship where a volunteer with substantially similar qualifications is available, either for a single absence or an extended period of time. The employer's obligation is to make a good faith effort to allow voluntary substitutions and shift swaps, under circumstances which do not discourage employees from substituting for one another or trading shifts to

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[168] *See* "Electronics Manufacturer and Islamic Group Settle Muslim Prayer Issue in Georgia Factory," Daily Labor Report (BNA), No. 230 (Dec. 1, 1999) (ISSN 1522-5968); *see also supra* n.149; *George v. Home Depot*, 2002 WL 31319124 (5th Cir. Sept. 22, 2002) (unpublished) (excusing employee who served as department "greeter" from working any Sundays would have posed an undue hardship, because she was the only greeter in the department; the store would have had to do without a Sunday greeter or hire another employee in order to grant the accommodation, both of which would have posed an undue hardship based on the evidence the employer provided regarding the need for the position); *Brener*, 671 F.2d 141 (requiring hospital to hire a substitute pharmacist for days employee sought not to work due to religious observance involved more than a *de minimis* cost, and operating without him or having the pharmacy director substitute for him would have had an unacceptable adverse impact on functions of the pharmacy).

[169] *See U.S. v. Los Angeles County Metropolitan Transit Authority*, Case No. CV 04-07699 JFW (JTLx) (C.D. Cal. consent decree filed Oct. 2005) (lawsuit filed by Civil Rights Division of the U.S. Department of Justice and resolved by consent decree prior to ruling by court on merits; the settlement provided that the employer would accept the applications of Sabbath-observant applicants; provide applicants with information about their accommodation rights; permit drivers to swap assignments with other drivers, and when no acceptable assignment is possible either through use of seniority rights or swaps, permit drivers to take temporary leaves of absence; and provide information about religious accommodation in marketing literature and in its training programs for supervisors).

accommodate a religious conflict.[170] However, if the employer is on notice that the employee's religious beliefs preclude him not only from working on his Sabbath but also from inducing others to do so, reasonable accommodation requires more than merely permitting the employee to swap.[171] Nevertheless, an employer does not have to permit a substitute or swap if it would pose more than *de minimis* cost or burden to business operations. As noted above, if a swap or substitution would result in the employer having to pay premium wages (such as overtime pay), the frequency of the arrangement will be relevant to determining if it poses an undue hardship; "the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are

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[170] *EEOC v. Robert Bosch Corp.*, 2006 WL 406296 (6th Cir. Feb. 21, 2006) (unpublished) (in case involving request for shift swap and relief from mandatory overtime to accommodate Sabbath observance, summary judgment for employer reversed where reasonable factfinder could conclude that employer failed to provide reasonable accommodation based on evidence that plaintiff was told a shift swap would not be permitted and the employer's policy was only designed to identify employees willing to work additional shifts, not to swap shifts); *Beadle v. Hillsborough County Sheriff's Dep't*, 29 F.3d 589 (11th Cir. 1994) (employer satisfied its accommodation obligation by allowing employee to make announcement on bulletin board and at employee meeting to seek out co-workers willing to swap); *McGuire v. Gen. Motors Corp.*, 956 F.2d 607 (6th Cir. 1992) (summary judgment for employer reversed where genuine issue of material fact existed regarding whether employer's accommodation of allowing voluntary shift swaps was a reasonable accommodation where there was evidence employer may have intentionally or unintentionally inhibited volunteers from swapping shifts by issuing a survey to employees regarding whether they would be willing to swap shifts in order to accommodate plaintiff); *see also Beadle v. Tampa*, 42 F.3d at 636-37 (excusing police recruit from rotating training schedule would have posed undue hardship because it would undermine intended educational benefit of working with different training officers); *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 2006 WL 1999133 (S.D. Ala. July 14, 2006) (in case brought by Seventh-day Adventist who requested not to work on her Sabbath, employer satisfied its accommodation obligation by maintaining a neutral shift rotation schedule, allowing plaintiff to arrange a shift swap with co-workers, and making available the schedules of other employees).

[171] *See, e.g.*, *Pyro Mining Co.*, 827 F.2d at 1088-89 (it would be a reasonable accommodation for employer simply to be amenable to a shift swap; employer not required itself actively to solicit other employees to make such a swap unless plaintiff had religious constraints against arranging his own schedule swap with other employees; a CBA's provision permitting religious observers to trade days off with other employees did not provide reasonable accommodation in the case of an employee who had a religious objection to seeking such a trade); *EEOC v. Texas Hydraulics, Inc.*, Case No. 2:06-cv-161 (E.D. Tenn. April 16, 2008) (employer's proposal that employee find another qualified candidate to take his Saturday shift was not a reasonable accommodation because the employer was on notice that the employee "considers it a sin for anyone to work on Saturday, not just himself"); *EEOC v. Aldi*, 2008 WL 859249 (W.D. Pa. March 28, 2008) ("where an employee sincerely believes that working on [his Sabbath] is morally wrong and that it is a sin to try to induce another to work in his stead, then an employer's attempt at accommodation that requires the employee to seek his own replacement *is not reasonable*") (emphasis in original) (citing *Pyro Mining Co.*, 827 F.2d at 1088).

costs which an employer can be required to bear as a means of providing reasonable accommodation."[172]

An employer may have to make an exception to its scheduling policies, procedures, or practices in order to grant religious accommodation.[173] For example, if it does not pose an undue hardship, an employer must make an exception to its policy of requiring all employees, regardless of seniority, to work an "equal number of weekend, holiday, and night shifts," and instead permit voluntary shift swaps between qualified co-workers in order to accommodate a particular employee's sincerely held religious belief that he should not work on the Sabbath. Of course, if allowing a swap or other accommodation would not provide the coverage the employer needs for its business operations or otherwise pose an undue hardship, the accommodation does not have to be granted.

3. Change of Job Tasks and Lateral Transfer

When an employee's religious belief or practice conflicts with a particular task, appropriate accommodations may include relieving the employee of the task or transferring the employee to a different position or location that eliminates the conflict with the employee's religion. Whether or not such accommodations pose an undue hardship will depend on factors such as the nature or importance of the duty at issue, the availability of others to perform the function, the availability of other positions, and the applicability of a CBA or seniority system.

EXAMPLE 42
Restaurant Server Excused from Singing Happy Birthday

> Kim, a server at a restaurant, informed her manager that she would not be able to join other waitresses in singing "Happy Birthday" to customers because she is a Jehovah's Witness whose religious beliefs do not allow her to celebrate holidays, including birthdays. There were enough servers on duty at any given time to perform this singing without affecting service. The manager refused any

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[172] *Commission Guidelines*, 29 C.F.R. § 1605.2(e)(1); *Redmond.*, 574 F.2d at 904 (employer could not demonstrate that paying replacement worker premium wages would cause undue hardship because plaintiff would have been paid premium wages for the hours at issue); *EEOC v. Southwestern Bell Tel.* LP, 2007 WL 2891379 (E.D. Ark. Oct. 3, 2007) (payment of premium wages for one day to allow two employees to attend a yearly Jehovah's Witness convention as part of their religious practice, at an alleged cost of $220.72 per person in a facility that routinely paid overtime was not an undue hardship as a matter of law, where there was no evidence that customer service needs actually went unmet on the day at issue), *appeal docketed*, Case No. 08-1096 (8th Cir. filed Jan. 10, 2008).

[173] *U.S.F. Logistics (IMC), Inc.*, 274 F.3d at 477 ("[i]n many cases, a company must modify its stated policies in practice to reasonably accommodate a religious practice") (citing *Minkus v. Metro. Sanitary Dist.*, 600 F.2d 80 (7th Cir.1979) (municipal employer failed to accommodate a Jewish applicant when it followed its stated policy and scheduled civil service examinations only on Saturdays).

accommodation. If Kim files a Title VII charge alleging denial of religious accommodation, she will prevail because the restaurant could have accommodated her with little or no expense or disruption.[174]

EXAMPLE 43
Pharmacist Excused from Providing Contraceptives

Neil, a pharmacist, was hired by a large corporation that operates numerous large pharmacies at which more than one pharmacist is on duty during all hours of operation. Neil informed his employer that he refused on religious grounds to participate in distributing contraceptives or answering any customer inquiries about contraceptives. The employer reasonably accommodated Neil by offering to allow Neil to signal to a co-worker who would take over servicing any customer who telephoned, faxed, or came to the pharmacy regarding contraceptives.[175]

EXAMPLE 44
Pharmacist Not Permitted to Turn Away Customers

In the above example, assume that instead of facilitating the assistance of such customers by a co-worker, Neil leaves on hold indefinitely those who call on the phone about a contraceptive rather than transferring their calls, and walks away from in-store customers who seek to fill a contraceptive prescription rather than signaling a co-worker. The employer is not required to accommodate Neil's request to remain in such a position yet avoid all situations where he might even briefly interact with customers who have requested contraceptives, or to accommodate a

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[174] *EEOC v. Razzoo's*, Civil Action No. 3:06-CV-1781-L (N.D. Tex. consent decree filed June 18, 2007) (settlement of case alleging that restaurant unlawfully failed to accommodate server's religious beliefs by excusing her from participating in singing "Happy Birthday" to celebrating customers).

[175] *Noesen v. Med. Staffing Network, Inc.*, 2007 WL 1302118 (7th Cir. May 2, 2007) (unpublished) (pharmacy reasonably accommodated employee by allowing him to transfer to co-worker any customer service involving contraceptives; employee's proposed further accommodation of assigning responsibility for all initial customer contact to lower-paid technicians, even if it could be done, would impose an undue hardship because it would divert technicians from their assigned data input and insurance verification duties, resulting in uncompleted data work). The reasonable accommodation that the employer was able to provide in *Noesen* might pose an undue hardship in a different case where there was no qualified co-worker on duty to whom such customer service duties could be transferred, or where it would otherwise pose more than a *de minimis* burden on the operation of the employer's business.

disruption of business operations. The employer may discipline or terminate Neil for not meeting legitimate expectations.[176]

The employee should be accommodated in his or her current position if doing so does not pose an undue hardship.[177] If no such accommodation is possible, the employer needs to consider whether lateral transfer is a possible accommodation.[178] For example, if a pharmacist who has a religious objection to dispensing contraceptives can be accommodated without undue hardship by allowing the pharmacist to signal a co-worker to assist customers with such prescriptions, the employer cannot choose instead to accommodate by transferring the pharmacist to a different position. Moreover, if the pharmacist cannot be accommodated within his position, the employer cannot transfer the pharmacist to a position that entails less pay, responsibility, or opportunity for advancement unless a lateral transfer is unavailable or would otherwise pose an undue hardship.[179]

EXAMPLE 45
Lateral Transfer Versus Transfer to a Lower-Paying Position

An electrical utility lineman requests accommodation of his Sabbath observance, but because the nature of his position requires being available to handle emergency problems at any time, there is no accommodation that would permit the lineman to remain in his position without posing an undue hardship. The employer can accommodate the lineman by offering a lateral transfer to another

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176 *Id.*

177 *Draper*, 527 F.2d at 519-20 (transfer that involved substantial reduction in pay and would have "wasted [plaintiff's] skills" would not be reasonable accommodation where plaintiff could have been accommodated in his original position without undue hardship).

178 *Commission Guidelines*, 29 C.F.R. § 1605.2(d)(iii) ("When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer."); *Rivera v. Choice Courier*, 2004 WL 1444852 (S.D.N.Y. June 25, 2004) (employer's failure to consider transferring employee to position with less stringent dress code so that he could continue his religious practice of proselytizing by wearing patch stating "Jesus is Lord" may have violated Title VII).

179 *See supra* n.138; *Rodriguez*, 156 F.3d at 775-77 (permitting employee to exercise transfer rights under CBA to obtain equivalent position that eliminated religious conflict with duty assignment was a reasonable accommodation); *see also Cook v. Lindsay Olive Growers*, 911 F.2d 233, 241 (9th Cir. 1990) (under state law parallel to Title VII, transfer of employee to a lower-level position was reasonable where no equivalent position was available); *Bruff*, 244 F.3d at 501 (accommodation by transfer to lower-paying non-counselor job could satisfy Title VII if plaintiff could not be accommodated in her current position or an equivalent position).

> assignment at the same pay, if available. If, however, no job at the same pay is readily available, then the employer could satisfy its obligation to reasonably accommodate the lineman by offering to transfer him to a different job, even at lower pay, if one is available.[180]

4. Modifying Workplace Practices, Policies and Procedures

a. Dress and Grooming Standards

When an employer has a dress or grooming policy that conflicts with an employee's religious beliefs or practices, the employee may ask for an exception to the policy as a reasonable accommodation.[181] Religious grooming practices may relate, for example, to shaving or hair length. Religious dress may include clothes, head or face coverings, jewelry, or other

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[180] *Shelton*, 223 F.3d at 227 (offering transfer to nurse who had religious objection to abortion procedure sometimes performed in her department was a reasonable accommodation); *EEOC v. Dresser-Rand Co.*, 2006 WL 1994792 (W.D.N.Y. July 14, 2006) (summary judgment for employer denied in case on behalf of a Jehovah's Witness who allegedly was denied transfer to different assignment as an accommodation of his religious objection to working on military projects). *But cf. supra* n.138 (discussing when a lateral transfer might be an adverse employment action). At least one court has ruled that it is unreasonable for public protectors such as police officers or fire fighters to seek to be relieved from certain assignments as a religious accommodation. *See Endres v. Indiana State Police*, 349 F.3d 922, 927 (7th Cir. 2003) (state police officer's religious accommodation request not to be assigned to full-time, permanent work at a casino was unreasonable; police and fire departments "need the cooperation of all members" and need them to perform their duties "without favoritism"), *cert. denied*, 541 U.S. 989 (2004). Because public protectors, such as police officers and firefighters, are obliged to serve and protect all under their care, and their public responsibilities must take precedence over their religious and other personal scruples, in some cases conflicts between the requirements of their job and their religious beliefs may not be able to be resolved. However, it is not per se unreasonable for public protectors to obtain changes in job assignments, schedule changes, or transfers in situations where a conflict between their job duties and their religious beliefs could be eliminated or reduced. Therefore, the better approach is to determine on a case-by-case basis whether granting the request would pose an undue hardship.

[181] *See, e.g., EEOC v. United Parcel Serv.*, 94 F.3d 314 (7th Cir. 1996) (genuine issue of material fact regarding whether the employer reasonably accommodated the employee's religious practice of wearing a beard precluded summary judgment for the employer); *EEOC v. Comair, Inc.*, Civil Action No. 1:05-cv-0601 (W.D. Mich. consent decree filed Nov. 22, 2006) (settlement prior to ruling on merits of case on behalf of Rastafarian airline applicant alleging he was not hired because he refused to cut his hair to conform with the company's grooming standards); *EEOC v. Pilot Travel Ctrs .LLC*, Civil Action No. 2:03-0106 (M.D. Tenn. consent decree filed April 9, 2004) (settlement prior to ruling on merits of claim on behalf of Messianic Christian maintenance worker, who wore beard as part of his religious practice, and was terminated for refusing to shave in compliance with employer's no-beard policy).

items. Absent undue hardship, religious discrimination may be found where an employer fails to accommodate the employee's religious dress or grooming practices.[182]

EXAMPLE 46
Facial Hair

> Prakash, who works for CutX, a surgical instrument manufacturer, does not shave or trim his facial hair because of his Sikh religious observance. When he seeks a promotion to manage the division responsible for sterilizing the instruments, his employer tells him that, to work in that division, he must shave or trim his beard because otherwise his beard may contaminate the sterile field. When Prakash explains that he cannot trim his beard for religious reasons, the employer offers to allow Prakash to wear two face masks instead of trimming his beard. Prakash thinks that wearing two masks is unreasonable and files a Title VII charge. CutX will prevail because it offered a reasonable accommodation that would eliminate Prakash's religious conflict with the hygiene rule.

Some courts have concluded that it would pose an undue hardship if an employer was required to accommodate a religious dress or grooming practice that conflicts with the public image the employer wishes to convey to customers.[183] While there may be circumstances in which allowing a particular exception to an employer's dress and grooming policy would pose an undue hardship, an employer's reliance on the broad rubric of "image" to deny a requested religious accommodation may in a given case be tantamount to reliance on customer religious bias (so-called "customer preference") in violation of Title VII.[184]

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[182] *United Parcel Serv*., 94 F.3d at 318-20; c*ompare Daniels*, 246 F.3d 500 (police department may be able to demonstrate that allowing an officer to wear a cross on his uniform would give the appearance of public agency endorsement of the officer's religious views, in violation of the department's constitutional obligations, and therefore would pose an undue hardship under Title VII), *cert. denied*, 534 U.S. 951 (2001), *with Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608 (W.D. Ky. 2005) (public library employee's First Amendment free speech and free exercise rights were violated when she was prohibited from wearing a necklace with a cross ornament).

[183] *See, e.g., Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004) (holding that it would pose "an undue hardship to require Costco to grant an exemption because it would adversely affect the employer's public image," given Costco's determination that facial piercings detract from the "neat, clean and professional image" that it aims to cultivate).

[184] Denying the employer's motion for summary judgment in *EEOC v. Red Robin Gourmet Burgers, Inc.*, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005), the court ruled that notwithstanding the employer's purported reliance on a company profile and customer study suggesting that it seeks to present a family-oriented and kid-friendly image, the company failed to demonstrate that allowing an employee to have visible religious tattoos was inconsistent with these goals. "Hypothetical hardships based on unproven assumptions typically fail to constitute undue hardship . . . . Red Robin must provide evidence of 'actual imposition on co-workers or disruption of the work routine' to demonstrate undue hardship." *See also*

EXAMPLE 47
Religious Garb

Nasreen, a Muslim ticket agent for a commercial airline, wears a head scarf, or hijab, to work at the airport ticket counter. After September 11, 2001, her manager objected, telling Nasreen that the customers might think she was sympathetic to terrorist hijackers. Nasreen explains to her manager that wearing the hijab is her religious practice and continues to wear it. She is terminated for wearing it over her manager's objection. Customer fears or prejudices do not amount to undue hardship, and the refusal to accommodate her and the termination, therefore, violate Title VII. In addition, denying Nasreen the position due to perceptions of customer preferences about religious attire would be disparate treatment based on religion in violation of Title VII, because it would be the same as refusing to hire Nasreen because she is a Muslim. *See supra* § II-B.[185]

Brown v. F.L. Roberts, 419 F. Supp. 2d 7, 17 (D. Mass. 2006) (district court held no Title VII violation occurred when employer transferred lube technician whose Rastafarian religious beliefs prohibited him from shaving or cutting his hair to a location with limited customer contact because he could not comply with a new grooming policy; stating it was bound to follow *Cloutier* as the law of the circuit, the court nevertheless observed in dicta: "If *Cloutier's* language approving employer prerogatives regarding 'public image' is read broadly, the implications for persons asserting claims for religious discrimination in the workplace may be grave. One has to wonder how often an employer will be inclined to cite this expansive language to terminate or restrict from customer contact, on image grounds, an employee wearing a yarmulke, a veil, or the mark on the forehead that denotes Ash Wednesday for many Catholics. More likely, and more ominously, considerations of 'public image' might persuade an employer to tolerate the religious practices of predominant groups, while arguing 'undue hardship' and 'image' in forbidding practices that are less widespread or well known."); *EEOC v. Chriskoll, Inc., d/b/a Brookhaven Burger King*, Civil Action No. 06-cv-1197 (E.D. Pa. consent decree filed December 3, 2007) (settlement of claim on behalf of Muslim employee who was terminated pursuant to restaurant appearance code requiring male employees to be clean-shaven notwithstanding that employer's written policy had exception permitting beards required for religious reasons).

[185] *See generally EEOC v. American Airlines*, Civil Action No. 02-C-6172 (N.D. Ill.) (Order of Resolution filed September 3, 2002) (resolving claim on behalf of employee who was not hired as passenger service agent because she wore a hijab for religious reasons in violation of the airline's since-changed uniform policy; the airline's current uniform policy specifically contemplates exceptions for religious accommodation of employees).

There may be limited situations in which the need for uniformity of appearance is so important that modifying the dress code would pose an undue hardship.[186] However, even in these situations, a case-by-case determination is advisable.[187]

b. Use of Employer Facilities

If any employee needs to use a workplace facility as a reasonable accommodation, for example use of a quiet area for prayer during break time, the employer should accommodate the request under Title VII unless it would pose an undue hardship. If the employer allows employees to use the facilities at issue for non-religious activities not related to work, it may be difficult for the employer to demonstrate that allowing the facilities to be used in the same manner for religious activities is not a reasonable accommodation or poses an undue hardship.[188]

EXAMPLE 48
Use of Employer Facilities

> An employee whose assigned work area is a factory floor rather than an enclosed office asks his supervisor if he may use one of the company's unoccupied conference rooms to pray during a scheduled break time. The supervisor must grant this request if it would not pose an undue hardship. An undue hardship would exist, for example, if the only conference room is used for work meetings at that time. However, the supervisor is not required to provide the employee with his choice of the available locations, and can meet the accommodation obligation by making any appropriate location available that would accommodate the employee's religious needs if this can be done absent undue

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[186] *Webb v. City of Philadelphia*, 2007 WL 1866763 (E.D. Pa. June 27, 2007) (granting summary judgment to the employer, the court ruled that the City of Philadelphia established as a matter of law that it would pose an undue hardship to accommodate the wearing of a traditional religious headpiece called a khimar by a Muslim police officer while in uniform, in contravention of the department's dress code directive).

[187] *See U.S. v. New York State Dep't of Corr. Servs.*, Civil Action No. 07-2243 (S.D.N.Y. settlement approved Jan. 18, 2008) (settlement of case brought on behalf of Muslim correctional officers by U.S. Department of Justice providing that employee requests for religious exemptions from uniform and grooming requirements of state prison system would be determined on a case-by-case basis, and allowing employees to wear religious skullcaps such as kufis or yarmulkes if close fitting and solid dark blue or black in color, provided no undue hardship was posed).

[188] *See also Federal Workplace Guidelines, supra* n.11, at § 1.c ("Accommodation of Religious Exercise"), example (d) (under the First Amendment, government workplaces that allow employees to use facilities for non-work related secular activities generally are required to allow the privilege on equal terms for employee religious activities).

hardship, for example by offering an unoccupied area of the work space rather than the conference room.

c. Tests and Other Selection Procedures

An employer has an obligation to accommodate an employee or prospective employee when scheduling a test or administering other selection procedures, where the applicant has informed the employer of a sincerely held religious belief that conflicts with a pre-employment testing requirement, unless undue hardship would result.[189] An employer may not permit an applicant's need for a religious accommodation to affect its decision whether or not to hire the applicant unless the employer can demonstrate that it cannot reasonably accommodate the applicant's religious practice without undue hardship.[190]

d. Providing Social Security Numbers

It will typically pose an undue hardship for an employer to accommodate an applicant or employee's asserted religious belief against providing or using a social security number.[191]

5. Excusing Union Dues or Agency Fees

Absent undue hardship, Title VII requires employers and unions to accommodate an employee who holds religious objections to joining or financially supporting a union.[192] Such an

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[189] *See, e.g.*, *Minkus*, 600 F.2d 80; *Cary*, 908 F. Supp. at 1343-44 (employee failed to give employer proper notice so that it could attempt an accommodation of his religious objection to signing consent form for a drug test).

[190] *Minkus*, 600 F.2d 80 (employer must demonstrate it would pose undue hardship to allow applicant to take exam at different time than others as a religious accommodation).

[191] *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9th Cir. 1999) (hospital not liable for refusing to hire applicant who declined to provide social security number on religious grounds; because federal tax law required the hospital to obtain all employees' social security numbers, accommodation of applicant's religious belief would pose undue hardship); *Hover v. Florida Power & Light Co.*, 1995 WL 91531 (S.D. Fla. Feb. 6, 1995) (employee's proposed accommodation that employer "make up" a social security number rather than obtain employee's actual social security number posed an undue hardship), *aff'd*, 101 F.3d 708 (11th Cir. 1996) (Table) (unpublished).

[192] *Commission Guidelines*, 29 C.F.R. § 1605.2(d)(2); *Tooley*, 648 F.2d at 1242-44 (union cannot force an employer, under a contractual union security clause, to terminate three Seventh-day Adventists who offered to pay an amount equivalent to dues to a nonreligious charity because the union failed to show that such an accommodation would deprive it of funds needed for its maintenance and operation); *EEOC v. Univ. of Detroit*, 904 F.2d 331 (6th Cir. 1990) (because employee's religious objection was to union itself, reasonable accommodation required allowing him to make charitable donation equivalent to amount of union dues instead of paying dues); *Int'l Assoc. of Machinists v. Boeing*, 833 F.2d 165, 169 (9th Cir. 1987) (an employer may be required to accommodate an employee who has a sincerely held religious opposition to unionism by allowing an equivalent contribution to a mutually agreeable charity in

employee can be accommodated by allowing the equivalent of her union dues (payments by union members) or agency fees (payments often required from non-union members in a unionized workplace) to be paid to a charity agreeable to the employee, the union, and the employer.[193] Whether a charity-substitute accommodation for payment of union dues would cause an undue hardship is an individualized determination based upon, among other things, the union's size, operational costs, and the number of individuals that need the accommodation.[194]

If an employee's religious objection is not to joining or financially supporting the union, but rather to the union's support of certain political or social causes, the employee may be accommodated if it would not pose an undue hardship by, for example, reducing the amount owed and/or by allowing the employee to donate to a charitable organization the full amount the employee owes or that portion that is attributable to the union's support of the cause to which the

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lieu of dues payment); *Burns*, 589 F.2d at 406-07 (allowing equivalent charitable contribution in lieu of dues did not constitute undue hardship notwithstanding administrative cost to union and "grumblings" by other employees); *Cooper v. General Dynamics*, 533 F.2d 163 (5th Cir. 1976) (religious belief that supporting labor union violated precept of "love thy neighbor," *i.e.*, including employers, was subject to reasonable accommodation absent undue hardship); *Reed v. UAW*, 523 F. Supp. 2d 592 (E.D. Mich. Oct. 19, 2007) (union was not liable for denial of reasonable accommodation to employee who objected to paying union dues for religious reasons, because union satisfied its accommodation obligation under Title VII by requiring the employee to pay to a charity of his choice an amount equal to full union dues).

[193] *See McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34 (6th Cir. 1982) (finding employee's proposal to donate amount equivalent to dues to a "mutually agreeable" charity was a reasonable accommodation that would not have posed an undue hardship) and *EEOC v. Am. Fed'n of State, County & Mun. Employees*, 937 F. Supp. 166, 168 (N.D.N.Y. 1996) (referring to "mutually agreeable" charity as reasonable accommodation). Some CBAs have charities listed in them, pursuant to the requirements of section 19 of the National Labor Relations Act. *See* 20 U.S.C. § 169.

[194] *Commission* Guidelines, 29 C.F.R. § 1605.2(e); *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445 (7th Cir. 1981) (charity-substitute religious accommodation for union dues did not pose undue hardship to union where loss of plaintiff's dues represented only .02% of union's annual budget, and the union presented no evidence that the loss of receipts from plaintiff would necessitate an increase in the dues of his co-workers); *see also Burns*, 589 F.2d at 407 (excusing employee from paying his monthly $19 union dues did not pose an undue hardship, where one union officer testified that the loss "wouldn't affect us at all" and union's asserted fear of many religious objectors was based on mere speculation; the court noted, however, that if "in the future, the expressed fear of widespread refusal to pay union dues on religious grounds should become a reality, undue hardship could be proved"). One court has held that it may be inappropriate to require the religious objector to pay the full amount of the union dues to a charitable organization, however, if non-religious objectors are permitted to pay a reduced amount. *See O'Brien v. Springfield Educ. Ass'n*, 319 F. Supp. 2d 90 (D. Mass. 2003) (not a reasonable accommodation to require religious objector to pay full union dues where state statute permitted non-union members to pay a lower amount in form of agency fee). *Cf. Madsen v. Associated Chino Teachers*, 317 F. Supp. 2d 1175, 1179 (C.D. Cal. 2004) (holding that it was not disparate treatment under Title VII to require religious objectors to pay full amount of dues to charity where non-religious objectors were only paying agency fee to union).

employee has a religious objection, or by diverting the full amount to the national, state, or local union in the event one of those entities does not engage in support of the cause to which the employee has a religious objection.[195]

6. Permitting Prayer, Proselytizing, and Other Forms of Religious Expression

Some employees may seek to display religious icons or messages at their work stations. Others may seek to proselytize by engaging in one-on-one discussions regarding religious beliefs, distributing literature, or using a particular religious phrase when greeting others. Still others may seek to engage in prayer at their work stations or to use other areas of the workplace for either individual or group prayer or study. In some of these situations, an employee might request accommodation in advance to permit such religious expression. In other situations, the employer will not learn of the situation or be called upon to consider any action unless it receives complaints about the religious expression from either other employees or customers. As noted in §§ II-A-3 and III-C of this document, prayer, proselytizing, and other forms of religious expression do not solely raise the issue of religious accommodation, but may also raise disparate treatment or harassment issues.

To determine whether allowing or continuing to permit an employee to pray, proselytize, or engage in other forms of religiously oriented expression in the workplace would pose an undue hardship, employers should consider the potential disruption, if any, that will be posed by permitting this expression of religious belief.[196] As explained below, relevant considerations

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[195] *See EEOC v. Univ. of Detroit*, 904 F.2d at 335; *see also U.S. v. Ohio* and *EEOC v. Ohio Civil Service Employees Association*, Case No. 2:05-CV-799 (S.D. Ohio consent decree filed Sept. 2006) (lawsuits filed by Civil Rights Division of U.S. Department of Justice and EEOC against Ohio state agencies and their employee union, respectively, over their refusal to accommodate state employees' religious objections to payment of union dues unless the employees were members of churches that have "historically held conscientious objections to joining or financially supporting" unions; pursuant to settlement reached prior to ruling by court on merits, the consent decree provides that a state employee is permitted to pay an amount equal to the union service fee to a mutually agreeable charity if he has sincerely held religious objections to supporting the union, even if he does not belong to such a church); *Int'l Assoc. of Machinists*, 833 F.2d 165, 169 (9th Cir. 1987) (explaining that because "Title VII defines religion as 'all aspects of religious observance and practice, as well as belief,'" a union may be required to accommodate an employee who has a sincerely held religious opposition to unionism by allowing equivalent contribution to mutually agreeable charity in lieu of dues payment, even if he "is not a member of an organized religious group that opposes unions").

[196] *Wilson*, 58 F.3d at 1341-42 (given disruption among co-workers actually caused in workplace, employee's request to wear at all times a button containing a graphic photograph of a fetus with anti-abortion message posed undue hardship; employer reasonably accommodated employee by offering her several alternatives, including to take the button off or cover up the photograph portion when she left her work cubicle); *cf. Red Robin Gourmet Burgers*, 2005 WL 2090677 (denying employer's motion for summary judgment because issue of whether employee's Kemetic religious wrist tattoos would disrupt work or otherwise pose an undue hardship raised a disputed factual question to be decided by jury).

may include the effect such expression has had, or can reasonably be expected to have, if permitted to continue, on co-workers, customers, or business operations.

a. Effect on Workplace Rights of Co-Workers

Expression can create undue hardship if it disrupts the work of other employees or constitutes – or threatens to constitute – unlawful harassment. Since an employer has a duty under Title VII to protect employees from religious harassment, it would be an undue hardship to accommodate such expression. As explained in § III-A-2-b of this document, religious expression directed toward co-workers might constitute harassment in some situations, for example where it is facially abusive (*i.e.*, demeans people of other religions), or where, even if not abusive, it persists even though the co-workers to whom it is directed have made clear that it is unwelcome. It is necessary to make a case-by-case determination regarding whether the effect on co-workers actually is an undue hardship. However, this does not require waiting until the alleged harassment has become severe or pervasive.[197] As with harassment on any basis, it is permitted and advisable for employers to take action to stop alleged harassment *before* it becomes severe or pervasive, because while isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful.[198]

b. Effect on Customers

The determination of whether it is an undue hardship to allow employees to engage in religiously oriented expression toward customers is a fact-specific inquiry and will depend on the nature of the expression, the nature of the employer's business, and the extent of the impact on customer relations. For example, one court found that it did not impose an undue hardship for a private sector employer to allow a cashier to use the general religious greeting "Have a Blessed Day" in accepting payment where it was said in the context of brief anonymous interactions and had little demonstrable adverse impact on customers or the business.[199] However, other courts

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[197] *Wilson*, 58 F.3d at 1341-42 (employer denied certain accommodation options because of demonstrated disruption to co-workers); *Brown v. Polk County*, 61 F.3d at 656-57 (there was insufficient evidence to establish that supervisor's occasional prayers in meetings posed an undue hardship because, although the employer asserted that the supervisor's conduct had polarized employees along religious lines, it adduced no supporting evidence).

[198] *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999), http://www.eeoc.gov/policy/docs/harassment.html.

[199] *U.S.F. Logistics (IMC)*, 274 F.3d at 476 (employer reasonably accommodated plaintiff's religious practice of sporadically using the phrase "Have a Blessed Day" when it permitted her to use the phrase with co-workers and supervisors who did not object, but prohibited her from using the phrase with customers where at least one regular client objected; allowing her to use the phrase with customers who objected would have posed an undue hardship); *Banks v. Serv. Am. Corp.*, 952 F. Supp. 703 (D. Kan. 1996) (plaintiff food service employees at company cafeteria, who were terminated when they refused to stop greeting customers with phrases such as "God Bless You" and "Praise the Lord," presented a triable issue of fact regarding whether they could have been accommodated without undue hardship; in the

have found undue hardship where religiously oriented expression was used in the context of a regular business interaction with a client.[200] Whether or not the client objects, this may be an undue hardship for an employer where the expression could be mistaken as the employer's message. Where the religiously oriented expression is not limited to use of a phrase or greeting, but rather is in the manner of individualized, specific proselytizing, an employer is far more likely to be able to demonstrate that it would constitute an undue hardship to accommodate an employee's religious expression, regardless of the length or nature of the business interaction.[201]

EXAMPLE 49
Display of Religious Objects By an Employee

> Susan and Roger are members of the same church and are both employed at XYZ Corporation. Susan works as an architect in a private office on an upper floor, where she occasionally interacts with co-workers, but not with clients. Roger is a security guard stationed at a desk in the front lobby of the XYZ building through which all employees, clients, and other visitors must enter. At a recent service at Susan and Roger's church, the minister distributed posters with the message "Jesus Saves!" and encouraged parishioners to display the posters at their workplaces in order to "spread the word." Susan and Roger each display the poster on the wall above their respective work stations. XYZ orders both to remove the poster despite the fact that both explained that they felt

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absence of employer proof that permitting the statements was disruptive or that it had any legitimate reason to fear losing business, a reasonable jury could conclude that no undue hardship was posed; the employer received only 20 to 25 complaints while serving approximately 130,000 to 195,000 customers, which is a complaint rate of between .01025 and .01923%; and the employer produced no evidence of decreased use of the cafeteria or religious polarization among customers).

[200] *See infra* nn.201-203; *see also Johnson v. Halls Merch.*, 1989 WL 23201 (W.D. Mo. Jan. 17, 1989) (court found it would have posed undue hardship on employer to permit retail employee's regular statement to customers "in the name of Jesus Christ of Nazareth," because it offended the beliefs of some customers and therefore cost the company business).

[201] *See Knight*, 275 F.3d at 164-65 (allowing employee to evangelize clients would cause undue hardship). *Compare Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986) (government hospital did not violate employee chaplain's Title VII religious accommodation or First Amendment Free Exercise rights by terminating him for evangelizing patients; it would have posed an undue hardship under Title VII, and would have violated the First Amendment Establishment Clause, to permit chaplain to remain employed given his intention to minister to patients), *with Rivera v. Choice Courier Sys., Inc.*, 2004 WL 1444852 (S.D.N.Y. June 25, 2004) (genuine issue of material fact existed as to whether courier was denied reasonable accommodation where employer could have accommodated courier's need to evangelize by transferring him to a position with a less stringent dress code that would have allowed employee to continue wearing a patch stating "Jesus is Lord").

a religious obligation to display it, and despite the fact that there have been no complaints from co-workers or clients.

Susan and Roger file charges alleging denial of religious accommodation. The employer will probably be unable to show that allowing Susan to display a religious message in her personal workspace posed an undue hardship, because there was no evidence of any disruption to the business or the workplace which resulted. By contrast, because Roger sits at the lobby desk and the poster is the first thing that visitors see upon entering the building, it would appear to represent XYZ's views and would therefore likely be shown to pose an undue hardship.[202]

EXAMPLE 50
Undue Hardship to Allow Employee to Discuss Religion with Clients

Helen, an employee in a mental health facility that served a religiously and ethnically diverse clientele, frequently spoke with clients about religious issues and shared religious tracts with them as a way to help solve their problems, despite being instructed not to do so. After clients complained, Helen's employer issued her a letter of reprimand stating that she should not promote her religious beliefs to clients and that she would be terminated if she persisted. Helen's belief in the need to evangelize to clients cannot

[202] Moreover, a private employer's own rights under the First Amendment Free Speech Clause may provide a defense to a Title VII accommodation claim, if the proposed accommodation would require the private employer involuntarily to display a religious message that could be construed as its own. *See also infra* § IV-C-7. Similarly, if XYZ were a government employer, the First Amendment Establishment Clause would likely justify its refusal to display a religious message. However, Susan's display probably would not violate the Establishment Clause, or pose an undue hardship for Title VII purposes, because it has a minimal effect on any co-workers who saw it, whereas Roger's display might be perceived to constitute government endorsement of a particular religion and pose an Establishment Clause violation. *See Berry v. Dep't of Social Servs.*, 447 F.3d 642 (9th Cir. 2006) (accommodating social worker's request to display religious items in his cubicle and to discuss religion with clients would have posed an undue hardship under Title VII on county social services department since the accommodations sought would create a danger of the employer violating the Establishment Clause); *cf. Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994) (school district's restriction on teacher's First Amendment right of free speech in prohibiting teacher from talking with students about religion during school day was justified by school district's interest in avoiding Establishment Clause violation); *Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608 (W.D. Ky. 2005) (public library's decision to bar employee from wearing necklace with cross was not justified by library's purported interest in avoiding Establishment Clause violation; "[a] different conclusion might be justified, if for example, the library allowed employees to actively proselytize or if it permitted religious banners or slogans to be hung from the rafters").

> be accommodated without undue hardship. The employer has the right to control speech that threatens to impede provision of effective and efficient services. Clients, especially in a mental health setting, may not understand that the religious message represents Helen's views rather than the clinic's view of the most beneficial treatment for the patient.[203]

7. Employer-Sponsored Programs

Some employers have integrated their own religious beliefs or practices into the workplace, and they are entitled to do so.[204] However, if an employer holds religious services or programs or includes prayer in business meetings, Title VII requires that the employer accommodate an employee who asks to be excused for religious reasons, absent a showing of undue hardship.[205] Excusing an employee from religious services normally does not create an undue hardship because it does not cost the employer anything and does not disrupt business operations or other workers.[206]

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[203] *Knight*, 275 F.3d 156; *Grant v. Fairview Hosp. & Healthcare Serv.*, 2004 WL 326694 (D. Minn. 2004) (ultrasound technician was offered a reasonable accommodation of his religious beliefs when hospital excused him from performing ultrasounds on women contemplating abortions; hospital did not have to allow technician to provide pastoral counseling, as that accommodation would have posed an undue hardship); *see also Grossman v. South Shore Pub. Sch. Dist.*, 507 F.3d 1097 (7th Cir. 2007) (affirming summary judgment for school district on terminated guidance counselor's First Amendment free exercise and Title VII claims, the court ruled that the school district was permitted to terminate counselor for her conduct, even if her actions of praying with students who approached her for guidance and throwing away school contraceptive education materials were motivated by her religious beliefs; there was insufficient evidence that her termination was based on her religious views alone as opposed to these actions, which the school district was entitled to prohibit).

[204] *See Townley*, 859 F.2d at 619-21 (private employer has First Amendment free exercise right to express its religion in the workplace).

[205] *Young*, 509 F.2d 140; *see, e.g., EEOC v. Native Angels Homecare Agency*, Civil Action No. 7:06-cv-83 (E.D.N.C. consent decree filed March 22, 2007) (settlement prior to decision by court on the merits of claim alleging that a registered nurse was required to attend a "prayer circle" at work and was then terminated because she objected and refused to attend).

[206] *Townley*, 859 F.2d at 620-21 (employer must accommodate an employee's atheism; no undue hardship because excusing employee from services would not have cost anything nor caused a disruption; employer's free exercise rights may be overridden where necessary to avoid religious discrimination in violation of Title VII).

EXAMPLE 51
Prayer at Meetings

Michael's employer requires that the mandatory weekly staff meeting begin with a religious prayer. Michael objects to participating because he believes it conflicts with his own sincerely held religious beliefs. He asks his supervisor to allow him to arrive at the meeting after the prayer. The supervisor must accommodate Michael's religious belief by either granting his request or offering an alternative accommodation that would remove the conflict between Michael's religious belief and the staff meeting prayer, even if other employees of Michael's religion do not object to being present for the prayer.[207]

EXAMPLE 52
Employer Holiday Decorations

Each December, the president of XYZ corporation directs that several wreaths be placed around the office building and a tree be displayed in the lobby. Several employees complain that to accommodate their non-Christian religious beliefs, the employer should take down the wreaths and tree, or alternatively should add holiday decorations associated with other religions. Title VII does not require that XYZ corporation remove the wreaths and tree or add holiday decorations associated with other religions. The result under Title VII on these facts would be the same whether in a private or government workplace.[208]

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[207] *Young*, 509 F.2d 140 (employee was constructively discharged based on her religion in violation of Title VII where her superior advised her that she had obligation to attend monthly staff meetings in their entirety and advised her that she could simply "close her ears" during religious exercises with which meetings began).

[208] Although it is beyond the scope of Title VII enforcement, we note for the sake of completeness that the U.S. Supreme Court has held that wreaths and Christmas trees are "secular" symbols, akin to items such as lights, Santa Claus, and reindeer, and thus that government display of these items does not violate the establishment clause of the First Amendment. *See County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (stand-alone crèche on county courthouse steps violated establishment clause, but display elsewhere of Christmas tree next to a menorah and a sign proclaiming "liberty" did not); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (holding that government-sponsored display of crèche did not violate establishment clause because it was surrounded by various secularizing symbols, thus precluding a perception of government endorsement of religion); *Federal Workplace Guidelines*, *supra* n.11 at Section D (example (b)). For a discussion of both Title VII and establishment clause claims arising from holiday decorations in federal government employment context, *see, e.g., Spohn v. West*, 2000 WL 1459981 (S.D.N.Y. Oct. 2, 2000). In the private sector, establishment clause constraints would not apply. As a

Similarly, an employer is required, absent undue hardship, to excuse an employee from compulsory personal or professional development training where it conflicts with the employee's sincerely held religious beliefs or practices.[209] There may be cases, however, where an employer can show that it would pose an undue hardship to provide an alternative training or to excuse an employee from any part of a particular training, even if the employee asserts it is contrary to his religious beliefs to attend (*e.g.*, where the training provides information on how to perform the job, on how to comply with equal employment opportunity obligations, or on other workplace policies, procedures, or applicable legal requirements).

EXAMPLE 53
Religious Objection to Training Program –
Employee Must Be Excused

As part of its effort to promote employee health and productivity, the new president of a company institutes weekly mandatory on-site meditation classes led by a local spiritualist. Angelina explains to her supervisor that the meditation conflicts with her sincerely held religious beliefs, and asks to be excused from participating. Because it would not pose an undue hardship, the company must accommodate Angelina's religious belief by excusing her from the weekly meditation classes, even if the company and other employees believe that this form of meditation does not conflict with any religious beliefs.

EXAMPLE 54
Religious Objection to Training Program –
Employee Need Not Be Excused

Employer XYZ holds an annual training for employees on a variety of personnel matters, including compliance with EEO laws and also XYZ's own internal anti-discrimination policy, which includes a prohibition on sexual orientation discrimination. Lucille asks to be excused from the portion of the training on sexual orientation discrimination because she believes that it "promotes the acceptance of homosexuality," which she sincerely believes is

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best practice, however, all employers may find that sensitivity to the diversity of their workplace promotes positive employee relations.

[209] An employer may accommodate the employee's religious belief by substituting an alternative technique or method that does not conflict with the employee's religious belief or by excusing the employee from that part of the training program that poses a conflict, if doing so would not pose an undue hardship.

immoral and sinful based on her religion. The training does not tell employees to value different sexual orientations but simply discusses and reinforces the employer's conduct rule requiring employees not to discriminate against or harass other employees and to treat one another professionally. Because an employer needs to make sure that its employees know about and comply with such employer workplace rules, it would be an undue hardship for XYZ to excuse Lucille from the training.[210]

• NOTE TO EEOC INVESTIGATORS •

While not all of the following issues will be in dispute in every charge alleging denial of religious accommodation, if CP alleges that R failed to accommodate CP's religious beliefs or practices, the investigator should generally follow this line of inquiry, considering these steps:

⇒ Ascertain the nature of the belief or practice that CP claims R has failed to accommodate (*e.g.*, dress, grooming, holy day observance, etc.) and what accommodation was sought (e.g., exception to dress code, schedule change, leave, etc.).

⇒ If disputed by R, determine whether CP's beliefs are "religious" in nature.

⇒ If disputed by R, determine whether CP "sincerely holds" the particular religious belief or practice at issue.

⇒ Ascertain whether CP actually notified R of the need for a religious accommodation, *i.e.*, whether it was made known to R that an accommodation

[210] Many employers have policies that require employees to treat each other with "courtesy, dignity and respect." This terminology fits within the ambit of "professionally" as used in the example. *See also Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (it would have constituted undue hardship for employer to accommodate employee by eliminating portions of its diversity program to which employee raised religious objections; to do so would have "infringed upon the company's right to promote diversity and encourage tolerance and good will among its workforce"). If training conflicts with an employee's religious beliefs, the content of the training materials may be determinative in deciding whether it would pose an undue hardship to accommodate an employee by excusing him from the training or a portion thereof. If the training required or encouraged employees to value certain lifestyles or dimensions of diversity, it might be more difficult for an employer to establish that it would pose an undue hardship to accommodate an employee who objects to participating on religious grounds. *Buonanno v. AT&T Broadband, LLC*, 313 F. Supp. 2d 1069 (D. Colo. 2004) (company can require and instruct employees to treat co-workers with respect in accordance with corporate diversity policy, but violation of Title VII occurred where company did not accommodate employee's refusal on religious grounds to sign diversity policy asking him to "value" homosexual co-workers, which he reasonably believed required him to subscribe to a certain belief system rather than simply agree to treat his co-workers appropriately).

was needed and that it was for religious reasons. The investigator should seek evidence of when, where, how, and to whom such notice was given, and the names of any witnesses to the notification.

⇒ If R claims that it was not notified of CP's need for an accommodation, the investigator should attempt to resolve the discrepancies between R's contention and CP's allegation by gathering additional available evidence corroborating or refuting CP's and R's contentions.

⇒ Determine R's response, if any, to the accommodation request. Was an accommodation offered, and if so, what? The investigator should obtain R's statement of all attempts to accommodate CP, if any attempts were made.

⇒ The investigator should seek a specific and complete explanation from R as to the facts on which it relied (*e.g.*, why R concluded CP did not have a sincerely-held religious belief or practice, or why R concluded that accommodation would have posed an undue hardship in terms of cost, disruption, effect on co-workers, or any other reason). For example, in the event R is a union and the accommodation claim relates to payment of agency fees or union dues, the investigator should obtain any relevant information regarding how the particular union at issue may have handled payment by this religious objector in order to provide accommodation.

⇒ If R asserts that it did not accommodate CP's request because it would have posed an undue hardship, obtain all available evidence regarding whether or not a hardship would in fact have been posed, *i.e.*, whether the alleged burden is more than *de minimis*. If R's undue hardship defense is based on cost, ascertain the cost of the accommodation in relation to R's size, nature of business operations, operating costs, and the impact, if any, of similar accommodations already being provided to other employees. If R's undue hardship defense is based on a factor other than cost (*i.e.*, disruption, production or staffing levels, security, or other factor), similarly ascertain the impact of the accommodation with respect to R's particular workplace and business.

⇒ When there is more than one method of accommodation available that would not cause undue hardship, the investigator should evaluate whether the accommodation offered is reasonable by examining: (1) whether any alternative reasonable accommodation was available; (2) whether R considered any alternatives for accommodation; (3) the alternative(s) for accommodation, if any, that R actually offered to CP; and (4) whether the alternative(s) the employer offered eliminated the conflict.[211]

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[211] *Commission Guidelines*, 29 C.F.R. § 1605.2.

⇒ If R asserts CP failed to cooperate with R in reaching an accommodation, obtain any available evidence regarding the relevant communications, including whether CP refused any offer of reasonable accommodation.

• Employer Best Practices •

Reasonable Accommodation - Generally

- Employers should inform employees that they will make reasonable efforts to accommodate the employees' religious practices.

- Employers should train managers and supervisors on how to recognize religious accommodation requests from employees.

- Employers should consider developing internal procedures for processing religious accommodation requests.

- Employers should individually assess each request and avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate.

- Employers and employees should confer fully and promptly to the extent needed to share any necessary information about the employee's religious needs and the available accommodation options.

- An employer is not required to provide an employee's preferred accommodation if there is more than one effective alternative to choose from. An employer should, however, consider the employee's proposed method of accommodation, and if it is denied, explain to the employee why his proposed accommodation is not being granted.

- Managers and supervisors should be trained to consider alternative available accommodations if the particular accommodation requested would pose an undue hardship.

- When faced with a request for a religious accommodation which cannot be promptly implemented, an employer should consider offering alternative methods of accommodation on a temporary basis, while a permanent accommodation is being explored. In this situation, an employer should also keep the employee apprised of the status of the employer's efforts to implement a permanent accommodation.

Undue Hardship – Generally

- The *de minimis* undue hardship standard refers to the legal requirement. As with all aspects of employee relations, employers can go beyond the requirements of the law and should be flexible in evaluating whether or not an accommodation is feasible.

- An employer should not assume that an accommodation will conflict with the terms of a seniority system or CBA without first checking if there are any exceptions for religious accommodation or other avenues to allow accommodation consistent with the seniority system or CBA.

- An employer should not automatically reject a request for religious accommodation just because the accommodation will interfere with the existing seniority system or terms of a CBA. Although an employer may not upset co-workers' settled expectations, an employer is free to seek a voluntary modification to a CBA in order to accommodate an employee's religious needs.

- Employers should train managers to be aware that, if the requested accommodation would violate the CBA or seniority system, they should confer with the employee to determine if an alternative accommodation is available.

- Employers should ensure that managers are aware that reasonable accommodation may require making exceptions to policies or procedures that are not part of a CBA or seniority system, where it would not infringe on other employees' legitimate expectations.

Schedule Changes

- Employers should work with employees who need an adjustment to their work schedule to accommodate their religious practices.

- Notwithstanding that the legal standard for undue hardship is "more than *de minimis*," employers may of course choose voluntarily to incur whatever additional operational or financial costs they deem appropriate to accommodate an employee's religious need for scheduling flexibility.

- Employers should consider adopting flexible leave and scheduling policies and procedures that will often allow employees to meet their religious and other personal needs. Such policies can reduce individual requests for exceptions. For example, some employers have policies allowing alternative work schedules and/or a certain number of "floating" holidays for each employee. While such policies may not cover every eventuality and some individual accommodations may still be needed, the number of such individual accommodations may be substantially reduced.

Voluntary Substitutes or Swaps

- An employer should facilitate and encourage voluntary substitutions and swaps with employees of substantially similar qualifications by publicizing its policy permitting such arrangements, promoting an atmosphere in which substitutes are favorably regarded, and providing a central file, bulletin board, group e-mail, or other means to help an employee with a religious conflict find a volunteer to substitute or swap.

Change of Job Assignments and Lateral Transfers

- An employer should consider a lateral transfer when no accommodation which would keep the employee in his or her position is possible absent undue hardship. However, an employer should only resort to transfer, whether lateral or otherwise, after fully exploring accommodations that would permit the employee to remain in his position.

- Where a lateral transfer is unavailable, an employer should not assume that an employee would not be interested in a lower-paying position if that position would enable the employee to abide by his or her religious beliefs. If there is no accommodation available that would permit the employee to remain in his current position or an equivalent one, the employer should offer the available position as an accommodation and permit the employee to decide whether or not to take it.

Modifying Workplace Practices, Policies, and Procedures

- Employers should make efforts to accommodate an employee's desire to wear a yarmulke, hijab, or other religious garb. If the employer is concerned about uniform appearance in a position which involves interaction with the public, it may be appropriate to consider whether the employee's religious views would permit him to resolve the religious conflict by, for example, wearing the item of religious garb in the company uniform color(s).

- Managers and employees should be trained not to engage in stereotyping based on religious dress and grooming practices and should not assume that atypical dress will create an undue hardship.

- Employers should be flexible and creative regarding work schedules, work duties, and selection procedures to the extent practicable.

- Employers should be sensitive to the risk of unintentionally pressuring or coercing employees to attend social gatherings after the employees have indicated a religious objection to attending.

Permitting Prayer, Proselytizing, and Other Forms of Religious Expression

- Employers should train managers to gauge the actual disruption posed by religious expression in the workplace, rather than merely speculating that disruption may result. Employers should also train managers to identify alternative accommodations that might be offered to avoid actual disruption (*e.g.*, designating an unused or private location in the workplace where a prayer session or Bible study meeting can occur if it is disrupting other workers).

- Employers should incorporate a discussion of religious expression, and the need for all employees to be sensitive to the beliefs or non-beliefs of others, into any anti-harassment training provided to managers and employees.

• Employee Best Practices •

- Employees should advise their supervisors or managers of the nature of the conflict between their religious needs and the work rules.

- Employees should provide enough information to enable the employer to understand what accommodation is needed, and why it is necessitated by a religious practice or belief.

- Employees who seek to proselytize in the workplace should cease doing so with respect to any individual who indicates that the communications are unwelcome.

12-V RELATED FORMS OF DISCRIMINATION

A. National Origin, Race, and Color

Title VII's prohibition against religious discrimination may overlap with Title VII's prohibitions against discrimination based on national origin, race, and color. Where a given religion is strongly associated – or perceived to be associated – with a certain national origin, the same facts may state a claim of both religious and national origin discrimination.[212] All four bases might be implicated where, for example, co-workers target a dark-skinned Muslim employee from Saudi Arabia for harassment because of his religion, national origin, race, and/or color.[213]

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[212] *EEOC v. WC&M Enter., Inc.*, 496 F.3d 393 (5th Cir. 2007) (evidence was sufficient for employee to proceed to trial on claim that he was subjected to hostile work environment harassment based on both religion and national origin where harassment motivated both by his being a practicing Muslim and by having been born in India); *Vitug v. Multistate Tax Comm'n*, 88 F.3d 506, 515 (7th Cir. 1996) (Catholic Filipino employee made out a prima facie case of national origin and religious discrimination, although he did not prevail on the merits).

[213] *Raad v. Fairbanks N. Star Borough Sch.*, 323 F.3d 1185 (9th Cir. 2003) (employer's summary

B. Retaliation

Title VII prohibits retaliation by an employer, employment agency, or labor organization because an individual has engaged in protected activity.[214] Protected activity consists of opposing a practice the employee reasonably believes is made unlawful by one of the employment discrimination statutes or of filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the statute. EEOC has taken the position that requesting religious accommodation is protected activity.[215]

EXAMPLE 55
Retaliation for Requesting Accommodation

> Jenny requests that she be excused from daily employer-sponsored Christian prayer meetings because she is an atheist. Her supervisor insists that she attend, but she persists in her request that she should be excused, and explains that requiring her to attend is offensive to her religious beliefs. She takes her request to human resources, and informs them that requiring her to attend these prayer meetings is offensive to her religious beliefs. Despite her supervisor's objections, the human resources department instructs the supervisor that in the circumstances no undue hardship is posed

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judgment motion denied on Lebanese Muslim substitute school teacher's discrimination claim because a reasonable jury could conclude that preconceptions about her religion and national origin caused school officials to misinterpret her comment that she was angry but did not want to "blow up"); *Tolani v. Upper Southampton Township,* 158 F. Supp. 2d 593 (E.D. Pa. 2001) (employee from India who was Asian stated a claim of discriminatory discharge based on race, religion and national origin because employer mocked the way Indian people worship).

[214] Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a); EEOC Compliance Manual, Section 8, "Retaliation," May 20, 1998 (available at http://www.eeoc.gov/policy/docs/retal.html); *see also Burlington N. v. Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

[215] EEOC Compliance Manual, Section 8, "Retaliation," May 20, 1998 (available at http://www.eeoc.gov/policy/docs/retal.html) (stating that requests for religious accommodation and for disability accommodation are protected activity). While courts have not directly addressed the issue in a Title VII case, some courts have assumed that requests for religious accommodation are protected activity. *See, e.g., Richardson v. Dougherty County, Ga.*, 2006 WL 1526064 (11th Cir. June 5, 2006) (district court found request for accommodation one year before adverse employment action was insufficiently close in time, and court of appeals affirmed on alternative grounds); *Virts v. Consol. Freightways Corp. of Delaware*, 285 F.3d 508 (6th Cir. 2002) (employer conceded prima facie case of retaliation in religious accommodation case where plaintiff's refusal to work without accommodation was deemed a voluntary resignation by management). At least one appellate court has upheld a jury verdict finding that an employee's complaints about required participation in activities which violate his religious beliefs constituted protected activity under Title VII. *Ollis v. HearthStone*, 495 F.3d 570 (8th Cir. 2007).

and he must grant the request. Motivated by reprisal, her supervisor shortly thereafter gives her an unjustified poor performance rating, and denies her requests to attend training that is approved for similarly situated employees. This violates Title VII.

• Employer Best Practices •

Retaliation

- Employers can reduce the risk of retaliation claims by training managers and supervisors to be aware of their anti-retaliation obligations under Title VII, including specific actions that may constitute retaliation.

- Employers can help reduce the risk of retaliation claims by carefully and timely recording the accurate business reasons for disciplinary or performance related actions and sharing these reasons with the employee.

APPENDIX A
HOW APPLICANTS OR EMPLOYEES CAN FILE A CHARGE

If you believe you have been discriminated against by a private sector or state or local government employer, labor union, or employment agency when applying for a job or while on the job because of your race, color, religion, sex, national origin, age (40 or over), or disability, or believe that you have been discriminated against because you opposed unlawful discrimination or participated in an equal employment opportunity (EEO) proceeding, you may file a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC). Charges against private sector and local and state government employers may be filed in person, by mail, or by telephone by contacting the nearest EEOC office. If there is no EEOC office in the immediate area, call toll free 1-800-669-4000 or 1-800-669-6820 (TTY) for more information. To avoid delay, call or write beforehand if you need special assistance, such as an interpreter, to file a charge. Federal sector employees and applicants should contact the EEO office of the agency responsible for the alleged discrimination to initiate EEO counseling.

There are strict time frames in which charges of employment discrimination must be filed or your agency's EEO office must be contacted. When charges or complaints are filed beyond these time frames, you may not be able to obtain any remedy. Charges against private sector or state or local governments must be filed with EEOC within 180 days of the alleged discriminatory act. The time frame is extended to 300 days if the alleged discrimination arose in a state or locality that has a fair employment practices agency (FEPA) with the authority to grant or seek relief for the alleged discrimination. Federal sector employees and applicants must initiate EEO counseling at the agency responsible for the alleged discrimination within 45 days of the alleged discriminatory event. Allegations of harassment based on race, color, religion, sex, or national origin are timely if at least one incident of harassment that is part of the larger pattern of harassment occurred within the filing period.

If you wish to remain anonymous during the period when an EEOC charge is being processed involving a private sector or state or local government employer, another individual or an organization may file a charge on your behalf. In some circumstances, an EEOC Commissioner may file a charge against a private sector or state or local government employer. Federal sector employees and applicants may remain anonymous during EEO counseling, but lose the right to anonymity after filing a formal complaint.

APPENDIX B
WHEN A CHARGE IS FILED AGAINST A PRIVATE SECTOR OR STATE OR LOCAL GOVERNMENT EMPLOYER

This appendix provides general information regarding the processing of a charge alleging discrimination by a private sector or state or local government employer under the EEO statutes. The information presented in this appendix applies to private sector and state and local government employers only. For information on the processing of complaints against federal agencies, visit the EEOC's "Federal Sector Information" page on the Internet at http://www.eeoc.gov/federal/index.html.

Anyone who believes that a private sector or state or local government employer has violated his or her employment rights based on race, color, sex, religion, national origin, age (40 or over), disability, opposition to unlawful discrimination, or participation in an EEO proceeding, may file a charge of discrimination with the EEOC. A charge does not constitute a finding that your company did, in fact, discriminate. The EEOC has a responsibility to investigate and determine whether there is reasonable cause to believe discrimination occurred.

That process begins with the EEOC sending your company a copy of the charge, which will briefly identify the charging party, the basis (*e.g.*, race, religion, etc.) and issues (hiring, promotion, etc.), and the date(s) of the alleged discrimination. You also may be asked to provide a response to the charge and supporting documentation. The EEOC also may ask to visit your work site or to interview some employees. It is important that your company retain records relating to issues under investigation as a result of the charge until the charge or any lawsuit based on the charge is resolved.

In some cases, the EEOC notice may offer mediation as a method of resolving the charge before an investigation. EEOC's mediation program is a free service, and participation is voluntary. The process is confidential, and there is a firewall (*i.e.*, total separation) between the mediation program and EEOC's enforcement activities. Mediation provides employers and charging parties the opportunity to reach mutually agreeable solutions early in the process. The EEOC will notify your company if a charge is eligible for mediation. In the event that mediation does not succeed, the charge is referred for investigation.

If the EEOC finds reasonable cause to believe that your company discriminated against a charging party, it will invite you to conciliate the charge (*i.e.*, the EEOC will offer you a chance to resolve the matter informally). In some cases, where conciliation fails, the EEOC will file a civil court action. If the EEOC does not find discrimination, or if conciliation fails and the EEOC chooses not to file suit, it will issue a notice of a right to sue, which gives the charging party 90 days to file a civil court action. The EEOC also must issue a notice of right to sue to the charging party on request if its handling of the charge is still pending after 180 days, or earlier if the EEOC knows it will take more than 180 days to complete action on the charge.

In all cases, your company should remember that it is unlawful to retaliate against the charging party for filing the charge, even if you believe the charge is without merit. You should submit a response to the EEOC and provide the information requested, even if you believe the

charge is frivolous. If the charge was not dismissed by the EEOC when it was received, that means there was some basis for proceeding with further investigation. There are many cases where it is unclear whether discrimination may have occurred and an investigation is necessary. You are encouraged to present any facts that you believe show the allegations are incorrect or do not amount to a violation of the law.

U.S. Equal Employment Opportunity Commission
Best Practices for Eradicating Religious Discrimination in the Workplace

Disparate Treatment Based on Religion

• Employer Best Practices •

- Employers can reduce the risk of discriminatory employment decisions by establishing written objective criteria for evaluating candidates for hire or promotion and applying those criteria consistently to all candidates.

- In conducting job interviews, employers can ensure nondiscriminatory treatment by asking the same questions of all applicants for a particular job or category of job and inquiring about matters directly related to the position in question.

- Employers can reduce the risk of religious discrimination claims by carefully and timely recording the accurate business reasons for disciplinary or performance-related actions and sharing these reasons with the affected employees.

- When management decisions require the exercise of subjective judgment, employers can reduce the risk of discriminatory decisions by providing training to inexperienced managers and encouraging them to consult with more experienced managers or human resources personnel when addressing difficult issues.

- If an employer is confronted with customer biases, *e.g.*, an adverse reaction to being served by an employee due to religious garb, the employer should consider engaging with and educating the customers regarding any misperceptions they may have and/or the equal employment opportunity laws.

Religious Harassment

• Employer Best Practices •

- Employers should have a well-publicized and consistently applied anti-harassment policy that: (1) covers religious harassment; (2) clearly explains what is prohibited; (3) describes procedures for bringing harassment to management's attention; and, (4) contains an assurance that complainants will be protected against retaliation. The procedures should include a complaint mechanism that includes multiple avenues for complaint; prompt, thorough, and impartial investigations; and prompt and appropriate corrective action.

- Employers should allow religious expression among employees to the same extent that they allow other types of personal expression that are not harassing or disruptive.

- Once an employer is on notice that an employee objects to religious conduct that is directed at him or her, the employer should take steps to end the conduct because even conduct that the employer does not regard as abusive can become sufficiently severe or pervasive to affect the conditions of employment if allowed to persist in the face of the employee's objection.

- If harassment is perpetrated by a non-employee assigned by a contractor, the supervisor or other appropriate individual in the chain of command should initiate a meeting with the contractor regarding the harassment and demand that it cease, that appropriate disciplinary action be taken if it continues, and/or that a different individual be assigned by the contractor.

- To prevent conflicts from escalating to the level of a Title VII violation, employers should immediately intervene when they become aware of objectively abusive or insulting conduct, even absent a complaint.

- Employers should encourage managers to intervene proactively and discuss with subordinates whether particular religious expression is welcome if the manager believes the expression might be construed as harassing to a reasonable person.

- While supervisors are permitted to engage in certain religious expression, they should avoid expression that might – due to their supervisory authority – reasonably be perceived by subordinates as coercive, even when not so intended.

• Employee Best Practices •

- Employees who are the recipients of unwelcome religious conduct should inform the individual engaging in the conduct that they wish it to stop. If the conduct does not stop, employees should report it to their supervisor or other appropriate company official in accordance with the procedures established in the company's anti-harassment policy.

- Employees who do not wish to personally confront an individual who is directing unwelcome religious or anti-religious conduct towards them should report the conduct to their supervisor or other appropriate company official in accordance with the company's anti-harassment policy.

Reasonable Accommodation of Religious Beliefs and Practices

• Employer Best Practices •

Reasonable Accommodation - Generally

- Employers should inform employees that they will make reasonable efforts to accommodate the employees' religious practices.

- Employers should train managers and supervisors on how to recognize religious accommodation requests from employees.

- Employers should consider developing internal procedures for processing religious accommodation requests.

- Employers should individually assess each request and avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate.

- Employers and employees should confer fully and promptly to the extent needed to share any necessary information about the employee's religious needs and the available accommodation options.

- An employer is not required to provide an employee's preferred accommodation if there is more than one effective alternative to choose from. An employer should, however, consider the employee's proposed method of accommodation, and if it is denied, explain to the employee why his proposed accommodation is not being granted.

- Managers and supervisors should be trained to consider alternative available accommodations if the particular accommodation requested would pose an undue hardship.

- When faced with a request for a religious accommodation which cannot be promptly implemented, an employer should consider offering alternative methods of accommodation on a temporary basis, while a permanent accommodation is being explored. In this situation, an employer should also keep the employee apprised of the status of the employer's efforts to implement a permanent accommodation.

Undue Hardship – Generally

- The de minimis undue hardship standard refers to the legal requirement. As with all aspects of employee relations, employers can go beyond the requirements of the law and should be flexible in evaluating whether or not an accommodation is feasible.

- An employer should not assume that an accommodation will conflict with the terms of a seniority system or CBA without first checking if there are any exceptions for religious accommodation or other avenues to allow accommodation consistent with the seniority system or CBA.

- An employer should not automatically reject a request for religious accommodation just because the accommodation will interfere with the existing seniority system or terms of a CBA. Although an employer may not upset co-workers' settled expectations, an employer is free to seek a voluntary modification to a CBA in order to accommodate an employee's religious needs.

- Employers should train managers to be aware that, if the requested accommodation would violate the CBA or seniority system, they should confer with the employee to determine if an alternative accommodation is available.

- Employers should ensure that managers are aware that reasonable accommodation may require making exceptions to policies or procedures that are not part of a CBA or seniority system, where it would not infringe on other employees' legitimate expectations.

Schedule Changes

- Employers should work with employees who need an adjustment to their work schedule to accommodate their religious practices.

- Notwithstanding that the legal standard for undue hardship is "more than de minimis," employers may of course choose voluntarily to incur whatever additional operational or financial costs they deem appropriate to accommodate an employee's religious need for scheduling flexibility.

- Employers should consider adopting flexible leave and scheduling policies and procedures that will often allow employees to meet their religious and other personal needs. Such policies can reduce individual requests for exceptions. For example, some employers have policies allowing alternative work schedules and/or a certain number of "floating" holidays for each employee. While such policies may not cover every eventuality and some individual accommodations may still be needed, the number of such individual accommodations may be substantially reduced.

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Change of Job Assignments and Lateral Transfers

- An employer should consider a lateral transfer when no accommodation which would keep the employee in his or her position is possible absent undue hardship. However, an employer should only resort to transfer, whether lateral or otherwise, after fully exploring accommodations that would permit the employee to remain in his position.

- Where a lateral transfer is unavailable, an employer should not assume that an employee would not be interested in a lower-paying position if that position would enable the employee to abide by his or her religious beliefs. If there is no accommodation available that would permit the employee to remain in his current position or an equivalent one, the employer should offer the available position as an accommodation and permit the employee to decide whether or not to take it.

Modifying Workplace Practices, Policies, and Procedures

- Employers should make efforts to accommodate an employee's desire to wear a yarmulke, hijab, or other religious garb. If the employer is concerned about uniform appearance in a position which involves interaction with the public, it may be appropriate to consider whether the employee's religious views would permit him to resolve the religious conflict by, for example, wearing the item of religious garb in the company uniform color(s).

- Managers and employees should be trained not to engage in stereotyping based on religious dress and grooming practices and should not assume that atypical dress will create an undue hardship.

- Employers should be flexible and creative regarding work schedules, work duties, and selection procedures to the extent practicable.

- Employers should be sensitive to the risk of unintentionally pressuring or coercing employees to attend social gatherings after the employees have indicated a religious objection to attending.

Permitting Prayer, Proselytizing, and Other Forms of Religious Expression

- Employers should train managers to gauge the actual disruption posed by religious expression in the workplace, rather than merely speculating that disruption may result. Employers should also train managers to identify alternative accommodations that might be offered to avoid actual disruption (*e.g.*, designating an unused or private location in the workplace where a prayer session or Bible study meeting can occur if it is disrupting other workers).

- Employers should incorporate a discussion of religious expression, and the need for all employees to be sensitive to the beliefs or non-beliefs of others, into any anti-harassment training provided to managers and employees.

• Employee Best Practices •

- Employees should advise their supervisors or managers of the nature of the conflict between their religious needs and the work rules.

- Employees should provide enough information to enable the employer to understand what accommodation is needed, and why it is necessitated by a religious practice or belief.

- Employees who seek to proselytize in the workplace should cease doing so with respect to any individual who indicates that the communications are unwelcome.

Retaliation

• Employer Best Practices •

- Employers can reduce the risk of retaliation claims by training managers and supervisors to be aware of their anti-retaliation obligations under Title VII, including specific actions that may constitute retaliation.

- Employers can help reduce the risk of retaliation claims by carefully and timely recording the accurate business reasons for disciplinary or performance related actions and sharing these reasons with the employee.

Questions and Answers: Religious Discrimination in the Workplace

Title VII of the Civil Rights Act of 1964 prohibits employers with at least 15 employees, as well as employment agencies and unions, from discriminating in employment based on race, color, religion, sex, and national origin. It also prohibits retaliation against persons who complain of discrimination or participate in an EEO investigation. With respect to religion, Title VII prohibits:

- treating applicants or employees differently based on their religious beliefs or practices – or lack thereof – in any aspect of employment, including recruitment, hiring, assignments, discipline, promotion, and benefits (disparate treatment);

- subjecting employees to harassment because of their religious beliefs or practices – or lack thereof – or because of the religious practices or beliefs of people with whom they associate (*e.g.*, relatives, friends, etc.);

- denying a requested reasonable accommodation of an applicant's or employee's sincerely held religious beliefs or practices – or lack thereof – if an accommodation will not impose more than a *de minimis* cost or burden on business operations; [1] and,

- retaliating against an applicant or employee who has engaged in protected activity, including participation (*e.g.*, filing an EEO charge or testifying as a witness in someone else's EEO matter), or opposition to religious discrimination (*e.g.*, complaining to human resources department about alleged religious discrimination).

The following questions and answers were adapted from EEOC's Compliance Manual Section on Religious Discrimination, available at www.eeoc.gov/policy/docs/religion.html, which contains more detailed guidance, legal citations, case examples, and best practices. It is designed to be a practical resource for employers, employees,

[1] Undue hardship under Title VII is defined as "more than *de minimis*" cost or burden -- a lower standard for employers to satisfy than the "undue hardship" defense under the Americans with Disabilities Act (ADA), which is defined instead as "significant difficulty or expense." Various state and local laws may have provisions that are broader than Title VII in terms of the protected bases covered, the discrimination prohibited or accommodation required, or the legal standards and defenses that apply.

practitioners, and EEOC enforcement staff on Title VII's prohibition against religious discrimination, and provides guidance on how to balance the needs of individuals in a diverse religious climate.

1. What is "religion" under Title VII?

Title VII protects all aspects of religious observance and practice as well as belief and defines religion very broadly for purposes of determining what the law covers. For purposes of Title VII, religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others. An employee's belief or practice can be "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief or practice, or if few – or no – other people adhere to it. Title VII's protections also extend to those who are discriminated against or need accommodation because they profess no religious beliefs.

Religious beliefs include theistic beliefs (i.e. those that include a belief in God) as well as non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held. Rather, religion typically concerns "ultimate ideas" about "life, purpose, and death." Social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII.

Religious observances or practices include, for example, attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, or refraining from certain activities. Whether a practice is religious depends on the employee's motivation. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons (*e.g.*, dietary restrictions, tattoos, etc.).

Discrimination based on religion within the meaning of Title VII could include, for example: not hiring an otherwise qualified applicant because he is a self-described evangelical Christian; a Jewish supervisor denying a promotion to a qualified non-Jewish employee because the supervisor wishes to give a preference based on religion to a fellow Jewish employee; or, terminating an employee because he told the employer that he recently converted to the Baha'i Faith.

Similarly, requests for accommodation of a "religious" belief or practice could include, for example: a Catholic employee requesting a schedule change so that he can attend church services on Good Friday; a Muslim employee requesting an exception to the company's dress and grooming code allowing her to wear her

headscarf, or a Hindu employee requesting an exception allowing her to wear her bindi (religious forehead marking); an atheist asking to be excused from the religious invocation offered at the beginning of staff meetings; an adherent to Native American spiritual beliefs seeking unpaid leave to attend a ritual ceremony; or an employee who identifies as Christian but is not affiliated with a particular sect or denomination requests accommodation of his religious belief that working on his Sabbath is prohibited.

2. Are there any exceptions to who is covered by Title VII's religion provisions?

Yes. While Title VII's jurisdictional rules apply to all religious discrimination claims under the statute, s*ee EEOC Compliance Manual, "Threshold Issues,"* http://www.eeoc.gov/policy/docs/threshold.html, specially-defined "religious organizations" and "religious educational institutions" are exempt from certain religious discrimination provisions, and a "ministerial exception" bars Title VII claims by employees who serve in clergy roles.

Religious Organization Exception: Under Title VII, religious organizations are permitted to give employment preference to members of their own religion. The exception applies only to those institutions whose "purpose and character are primarily religious." Factors to consider that would indicate whether an entity is religious include: whether its articles of incorporation state a religious purpose; whether its day-to-day operations are religious (*e.g.*, are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion?); whether it is not-for-profit; and whether it affiliated with, or supported by, a church or other religious organization.

This exception is not limited to religious activities of the organization. However, it only allows religious organizations to prefer to employ individuals who share their religion. The exception does not allow religious organizations otherwise to discriminate in employment on the basis of race, color, national origin, sex, age, or disability. Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races.

***Ministerial Exception*:** Courts have held that clergy members generally cannot bring claims under the federal employment discrimination laws, including Title VII, the Age Discrimination in Employment Act, the Equal Pay Act, and the Americans with Disabilities Act. This "ministerial exception" comes not from the text of the statutes, but from the First Amendment principle that governmental regulation of church administration, including the appointment of clergy, impedes the free exercise of religion and constitutes impermissible government entanglement with church authority. The exception applies only to employees who perform essentially religious functions, namely those whose primary duties consist of engaging in church governance, supervising a religious order, or conducting religious ritual, worship, or instruction. Some courts have made an exception for harassment claims where they concluded that analysis of the case would not implicate these constitutional constraints.

3. What is the scope of the Title VII prohibition on disparate treatment based on religion?

Title VII's prohibition against disparate (different) treatment based on religion generally functions like its prohibition against disparate treatment based on race, color, sex, or national origin. Disparate treatment violates the statute whether the difference is motivated by bias against or preference toward an applicant or employee due to his religious beliefs, practices, or observances – or lack thereof. For example, except to the extent permitted by the religious organization or ministerial exceptions:

- employers may not refuse to recruit, hire, or promote individuals of a certain religion, impose stricter promotion requirements for persons of a certain religion, or impose more or different work requirements on an employee because of that employee's religious beliefs or practices

- employers may not refuse to hire an applicant simply because he does not share the employer's religious beliefs, and conversely may not select one applicant over another based on a preference for employees of a particular religion

- employment agencies may not comply with requests from employers to engage in discriminatory recruitment or referral practices, for example by screening out applicants who have names often associated with a particular religion (*e.g.,* Mohammed)

- employers may not exclude an applicant from hire merely because he or she may need a reasonable accommodation that could be provided absent undue hardship.

The prohibition against disparate treatment based on religion also applies to disparate treatment of religious expression in the workplace. For example, if an employer allowed one secretary to display a Bible on her desk at work while telling another secretary in the same workplace to put the Quran on his desk out of view because co-workers "will think you are making a political statement, and with everything going on in the world right now we don't need that around here," this would be differential treatment in violation of Title VII. (As discussed below, Title VII also requires employers to accommodate expression that is based on a sincerely held religious practice or belief, unless it threatens to constitute harassment or otherwise poses an undue hardship on the conduct of the business.)

4. What constitutes religious harassment under Title VII?

Religious harassment in violation of Title VII occurs when employees are: (1) required or coerced to abandon, alter, or adopt a religious practice as a condition of employment (this type of "quid pro quo" harassment may also give rise to a disparate

treatment or denial of accommodation claim in some circumstances); or (2) subjected to unwelcome statements or conduct that is based on religion and is so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive, and there is a basis for holding the employer liable.

It is necessary to evaluate all of the surrounding circumstances to determine whether or not particular conduct or remarks are unwelcome. For example, where an employee is upset by repeated mocking use of derogatory terms or comments about his religious beliefs or observance by a colleague, it may be evident that the conduct is unwelcome. In contrast, a consensual conversation about religious views, even if quite spirited, does not constitute harassment if it is not unwelcome.

Even unwelcome religiously motivated conduct is not unlawful unless the victim subjectively perceives the environment to be abusive and the conduct is severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive. Religious expression that is repeatedly directed at an employee can become severe or pervasive, whether or not the content is intended to be insulting or abusive. Thus, for example, persistently reiterating atheist views to a religious employee who has asked that this conduct stop can create a hostile environment.

The extent to which the expression is directed at a particular employee is relevant to determining whether or when it could reasonably be perceived to be severe or pervasive by that employee. For example, although it is conceivable that an employee may allege that he is offended by a colleague's wearing of religious garb, expressing one's religion by wearing religious garb is not religious harassment. It merely expresses an individual's religious affiliation and does not demean other religious views. As such, it is not objectively hostile. Nor is it directed at any particular individual. Similarly, workplace displays of religious artifacts or posters that do not demean other religious views generally would not constitute religious harassment.

5. When is an employer liable for religious harassment?

An employer is always liable for a supervisor's harassment if it results in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by showing that: (a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, **and** (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. An employer is liable for harassment by co-workers where it knew or should have known about the harassment, and failed to take prompt and appropriate corrective action. An employer is liable for harassment by non-employees where it knew or should have known about the harassment, could control the harasser's conduct or otherwise protect the employee, and failed to take prompt and appropriate corrective action.

6. When does Title VII require an employer to accommodate an applicant or employee's religious belief, practice, or observance?

Title VII requires an employer, once on notice that a religious accommodation is needed, to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless doing so would pose an undue hardship. Under Title VII, the undue hardship defense to providing religious accommodation requires a showing that the proposed accommodation in a particular case poses a "more than de minimis" cost or burden. Note that this is a lower standard for an employer to meet than undue hardship under the Americans with Disabilities Act (ADA) which is defined in that statute as "significant difficulty or expense."

7. How does an employer learn that accommodation may be needed?

An applicant or employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work.

Employer-employee cooperation and flexibility are key to the search for a reasonable accommodation. If the accommodation solution is not immediately apparent, the employer should discuss the request with the employee to determine what accommodations might be effective. If the employer requests additional information reasonably needed to evaluate the request, the employee should provide it. For example, if an employee has requested a schedule change to accommodate daily prayers, the employer may need to ask for information about the religious observance, such as time and duration of the daily prayers, in order to determine whether accommodation can be granted without posing an undue hardship on the operation of the employer's business. Moreover, even if the employer does not grant the employee's preferred accommodation, but instead provides an alternative accommodation, the employee must cooperate by attempting to meet his religious needs through the employer's proposed accommodation if possible.

8. Does an employer have to grant every request for accommodation of a religious belief or practice?

No. Title VII requires employers to accommodate only those religious beliefs that are religious and "sincerely held," and that can be accommodated without an undue hardship. Although there is usually no reason to question whether the practice at issue is religious or sincerely held, if the employer has a bona fide doubt about the basis for the accommodation request, it is entitled to make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice at issue is religious and sincerely held, and gives rise to the need for the accommodation.

Factors that – either alone or in combination – might undermine an employee's assertion that he sincerely holds the religious belief at issue include: whether the

employee has behaved in a manner markedly inconsistent with the professed belief; whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; whether the timing of the request renders it suspect (*e.g.*, it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

However, none of these factors is dispositive. For example, although prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs – or degree of adherence – may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held. An employer also should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion.

9. When does an accommodation pose an "undue hardship"?

An accommodation would pose an undue hardship if it –would cause more than *de minimis* cost on the operation of the employer's business. Factors relevant to undue hardship may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.

Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work. Whether the proposed accommodation conflicts with another law will also be considered.

To prove undue hardship, the employer will need to demonstrate how much cost or disruption a proposed accommodation would involve. An employer cannot rely on potential or hypothetical hardship when faced with a religious obligation that conflicts with scheduled work, but rather should rely on objective information. A mere assumption that many more people with the same religious practices as the individual being accommodated may also seek accommodation is not evidence of undue hardship.

If an employee's proposed accommodation would pose an undue hardship, the employer should explore alternative accommodations.

10. Does an employer have to provide an accommodation that would violate a seniority system or collective bargaining agreement?

No. A proposed religious accommodation poses an undue hardship if it would deprive another employee of a job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement (CBA). Of course, the mere existence of a seniority system or CBA does not relieve the employer of the duty to attempt reasonable accommodation of its employees' religious practices; the question is whether an accommodation can be provided without violating the seniority system or CBA. Often an employer can allow co-workers to volunteer to substitute or swap shifts as an accommodation to address a scheduling need without violating a seniority system or CBA.

11. What if co-workers complain about an employee being granted an accommodation?

Although religious accommodations that infringe on co-workers' ability to perform their duties or subject co-workers to a hostile work environment will generally constitute undue hardship, general disgruntlement, resentment, or jealousy of co-workers will not. Undue hardship requires more than proof that some co-workers complained; a showing of undue hardship based on co-worker interests generally requires evidence that the accommodation would actually infringe on the rights of co-workers or cause disruption of work.

12. Can a requested accommodation be denied due to security considerations?

If a religious practice actually conflicts with a legally mandated security requirement, an employer need not accommodate the practice because doing so would create an undue hardship. If a security requirement has been unilaterally imposed by the employer and is not required by law or regulation, the employer will need to decide whether it would be an undue hardship to modify or eliminate the requirement to accommodate an employee who has a religious conflict.

13. What are common methods of religious accommodation in the workplace?

Under Title VII, an employer or other covered entity may use a variety of methods to provide reasonable accommodations to its employees. Some of the most common methods are:

- **Scheduling Changes, Voluntary Substitutes, and Shift Swaps**

An employer may be able to reasonably accommodate an employee by allowing flexible arrival and departure times, floating or optional holidays, flexible work breaks, use of lunch time in exchange for early departure, staggered work hours, and other means to enable an employee to make up time lost due to the observance of religious

practices. Eliminating only part of the conflict is not sufficient, unless entirely eliminating the conflict will pose an undue hardship by disrupting business operations or impinging on other employees' benefits or settled expectations.

Moreover, although it would pose an undue hardship to require employees *involuntarily* to substitute for one another or swap shifts, the reasonable accommodation requirement can often be satisfied without undue hardship where a volunteer with substantially similar qualifications is available to cover, either for a single absence or for an extended period of time. The employer's obligation is to make a good faith effort to allow voluntary substitutions and shift swaps, and not to discourage employees from substituting for one another or trading shifts to accommodate a religious conflict. However, if the employer is on notice that the employee's religious beliefs preclude him not only from working on his Sabbath but also from inducing others to do so, reasonable accommodation requires more than merely permitting the employee to swap, absent undue hardship.

An employer does not have to permit a substitute or swap if it would pose more than *de minimis* cost or burden to business operations. If a swap or substitution would result in the employer having to pay premium wages (such as overtime pay), the frequency of the arrangement will be relevant to determining if it poses an undue hardship. The Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing reasonable accommodation. 29 C.F.R. Part 1605.

- **Changing an employee's job tasks or providing a lateral transfer**

When an employee's religious belief or practice conflicts with a particular task, appropriate accommodations may include relieving the employee of the task or transferring the employee to a different position or location that eliminates the conflict. Whether such accommodations pose an undue hardship will depend on factors such as the nature or importance of the duty at issue, the availability of others to perform the function, the availability of other positions, and the applicability of a CBA or seniority system.

The employee should be accommodated in his or her current position if doing so does not pose an undue hardship. If no such accommodation is possible, the employer needs to consider whether lateral transfer is a possible accommodation.

- **Making an exception to dress and grooming rules**

When an employer has a dress or grooming policy that conflicts with an employee's religious beliefs or practices, the employee may ask for an exception to the policy as a reasonable accommodation. Religious grooming practices may relate, for example, to shaving or hair length. Religious dress may include clothes, head or face coverings, jewelry, or other items. Absent undue hardship, religious discrimination may be found where an employer fails to accommodate the employee's religious dress or grooming practices.

Some courts have concluded that it would pose an undue hardship if an employer was required to accommodate a religious dress or grooming practice that conflicts with the public image the employer wishes to convey to customers. While there may be circumstances in which allowing a particular exception to an employer's dress and grooming policy would pose an undue hardship, an employer's reliance on the broad rubric of "image" to deny a requested religious accommodation may amount to relying on customer religious bias ("customer preference") in violation of Title VII. There may be limited situations in which the need for uniformity of appearance is so important that modifying the dress code would pose an undue hardship. However, even in these situations, a case-by-case determination is advisable.

- **Use of the work facility for a religious observance**

If an employee needs to use a workplace facility as a reasonable accommodation, for example use of a quiet area for prayer during break time, the employer should accommodate the request under Title VII unless it would pose an undue hardship. If the employer allows employees to use the facilities at issue for non-religious activities not related to work, it may be difficult for the employer to demonstrate that allowing the facilities to be used in the same manner for religious activities is not a reasonable accommodation or poses an undue hardship. The employer is not required to give precedence to the use of the facility for religious reasons over use for a business purpose.

- **Accommodations relating to payment of union dues or agency fees**

Absent undue hardship, Title VII requires employers and unions to accommodate an employee who holds religious objections to joining or financially supporting a union. Such an employee can be accommodated by allowing the equivalent of her union dues (payments by union members) or agency fees (payments often required from non-union members in a unionized workplace) to be paid to a charity agreeable to the employee, the union, and the employer. Whether a charity-substitute accommodation for payment of union dues would cause an undue hardship is an individualized determination based upon, among other things, the union's size, operational costs, and the number of individuals that need the accommodation.

If an employee's religious objection is not to joining or financially supporting the union, but rather to the union's support of certain political or social causes, possible accommodations include, for example, reducing the amount owed, allowing the employee to donate to a charitable organization the full amount the employee owes or that portion that is attributable to the union's support of the cause to which the employee has a religious objection, or diverting the full amount to the national, state, or local union in the event one of those entities does not engage in support of the cause to which the employee has a religious objection.

- **Accommodating prayer, proselytizing, and other forms of religious expression**

Some employees may seek to display religious icons or messages at their work stations. Others may seek to proselytize by engaging in one-on-one discussions regarding religious beliefs, distributing literature, or using a particular religious phrase when greeting others. Still others may seek to engage in prayer at their work stations or to use other areas of the workplace for either individual or group prayer or study. In some of these situations, an employee might request accommodation in advance to permit such religious expression. In other situations, the employer will not learn of the situation or be called upon to consider any action unless it receives complaints about the religious expression from either other employees or customers.

Employers should not try to suppress all religious expression in the workplace. Title VII requires that employers accommodate an employee's sincerely held religious belief in engaging in religious expression in the workplace to the extent that they can do so without undue hardship on the operation of the business. In determining whether permitting an employee to pray, proselytize, or engage in other forms of religiously oriented expression in the workplace would pose an undue hardship, relevant considerations may include the effect such expression has on co-workers, customers, or business operations.

For example, if an employee's proselytizing interfered with work, the employer would not have to allow it. Similarly, if an employee complained about proselytizing by a co-worker, the employer can require that the proselytizing to the complaining employee cease. Moreover, if an employee was proselytizing an employer's customers or clients in a manner that disrupted business, or that could be mistaken as the employer's own message, the employer would not have to allow it. Where the religiously oriented expression is limited to use of a phrase or greeting, it is more difficult for the employer to demonstrate undue hardship. On the other hand, if the expression is in the manner of individualized, specific proselytizing, an employer is far more likely to be able to demonstrate that it would constitute an undue hardship to accommodate an employee's religious expression, regardless of the length or nature of the business interaction. An employer can restrict religious expression where it would cause customers or co-workers reasonably to perceive the materials to express the employer's own message, or where the item or message in question is harassing or otherwise disruptive.

14. What if an employee objects on religious grounds to an employer-sponsored program?

Some private employers choose to express their own religious beliefs or practices in the workplace, and they are entitled to do so. However, if an employer holds religious services or programs or includes prayer in business meetings, Title VII requires that the employer accommodate an employee who asks to be excused for religious reasons, absent a showing of undue hardship.

Similarly, an employer is required to excuse an employee from compulsory personal or professional development training that conflicts with the employee's sincerely held religious beliefs or practices, unless doing so would pose an undue hardship. It would be an undue hardship to excuse an employee from training, for example, where the training provides information on how to perform the job, or how to comply with equal employment opportunity obligations, or on other workplace policies, procedures, or legal requirements.

15. Do national origin, race, color, and religious discrimination intersect in some cases?

Yes. Title VII's prohibition against religious discrimination may overlap with Title VII's prohibitions against discrimination based on national origin, race, and color. Where a given religion is strongly associated – or perceived to be associated – with a certain national origin, the same facts may state a claim of both religious and national origin discrimination. All four bases might be implicated where, for example, co-workers target a dark-skinned Muslim employee from Saudi Arabia for harassment because of his religion, national origin, race, and/or color.

16. Does Title VII prohibit retaliation?

Yes. Title VII prohibits retaliation by an employer, employment agency, or labor organization because an individual has engaged in protected activity. Protected activity consists of opposing a practice the employee reasonably believes is made unlawful by one of the employment discrimination statutes or of filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the statute. EEOC has taken the position that requesting religious accommodation is protected activity.

17. How might First Amendment constitutional issues arise in Title VII religion cases?

The First Amendment religion and speech clauses ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech") protect individuals against restrictions imposed by the government, not by private entities, and therefore do not apply to rules imposed on

private sector employees by their employers. The First Amendment, however, does protect private sector employers from government interference with their free exercise and speech rights. Moreover, government employees' religious expression is protected by both the First Amendment and Title VII. See *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* (Aug. 14, 1997) (available at http://clinton2.nara.gov/WH/New/html/19970819-3275.html). For example, a government employer may contend that granting a requested religious accommodation would pose an undue hardship because it would constitute government endorsement of religion in violation of the Establishment Clause of the First Amendment.

18. What should an applicant or employee do if he believes he has experienced religious discrimination?

Employees or job applicants should attempt to address concerns with the alleged offender and, if that does not work, report any unfair or harassing treatment to the company. They should keep records documenting what they experienced or witnessed, as well as other witness names, telephone numbers, and addresses. Employees may file a charge with the EEOC, and are legally protected from being punished for reporting or opposing job discrimination or for participating in an EEOC investigation. Charges against private sector and local and state government employers may be filed in person, by mail, or by telephone by contacting the nearest EEOC office. If there is no EEOC office in the immediate area, call toll free 1-800-669-4000 or 1-800-669-6820 (TTY) for more information. Federal sector employees and applicants should contact the EEO office of the agency responsible for the alleged discrimination to initiate EEO counseling. For more details, see *How to File a Charge of Employment Discrimination*, http://www.eeoc.gov/charge/overview_charge_filing.html.

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