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"REASONABLE ACCOMMODATION" UNDER TITLE VII: IS IT REASONABLE TO THE RELIGIOUS EMPLOYEE?

THOMAS D. BRIERTON

INTRODUCTION

Since the enactment of the Civil Rights Act of 1964 the courts have struggled to resolve conflicts between job requirements and employee religious expression. Despite recent surveys\(^1\) that show more employers are allowing employees to display religious materials at work and that about two-thirds of employers are allowing flexible scheduling for workers needing time off for religious observance, complaints of religious bias have increased more than fifty percent since 1992.\(^2\) For example, Sears, Roebuck & Company implemented a policy that automatically rejected or fired employees that refused to work on Saturdays for religious reasons. The New York Attorney General investigated Sears after receiving complaints from its employees. The company entered into a settlement agreement that required Sears to create a work schedule to accommodate employees observing the Sabbath on Saturdays and to train all company employees who were involved in hiring and training to deal with religious accommodations.\(^3\)

Employers have had difficulty in determining how far they must go to reasonably accommodate the religious employee. As a

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1. Julie N. Lynem, *Keeping the Faith... Er, Faith: Companies Adjusting to Growing Religious Diversity in the Workplace*, San Fran. Chron., Dec. 9, 2001, at J1 (noting that while the percentage of companies allowing religious displays had increased from 24% in 1997 to 75% in 2001, the percentage allowing flexible scheduling remained the same).


result of significant concerns about employee religious liberties, a coalition of religious organizations pressed Congress to pass legislation bolstering reasonable accommodation. In 1994, the Workplace Religious Freedom Act was introduced in Congress in order to provide clarity to the definition of "undue hardship." The Act was reintroduced in subsequent Congress, but never passed out of committee.\(^4\) The Act was then presented in 1999 as the Workplace Religious Freedom Act of 2000 and was sent to the House Subcommittee on Employer Relations. The subcommittee failed to take it up and the Act stalled out. A version of the Act was reintroduced on May 23, 2002, by Senator John Kerry and on April 11, 2003 by Senator Rick Santorum.\(^5\)

Title VII as originally enacted did not mandate "reasonable accommodation."\(^6\) In 1966, the Equal Employment Opportunity Commission (EEOC) issued guidelines that incorporated "reasonable accommodation" under the concept of religious discrimination.\(^7\) In 1967, the EEOC revised the guidelines to require employers to make reasonable accommodations unless an employer could show a resultant undue hardship.\(^8\) In 1972, Congress amended Title VII to include "reasonable accommodation" and defined "religion" as including all aspects of religious observance and practice.\(^9\) In 1977, the Supreme Court in *Trans World Airlines, Inc. (TWA) v. Hardison*\(^10\) undercut reasonable accommodation by defining undue hardship in terms of the de minimis cost to the employer.\(^11\) The EEOC revised the guidelines in 1980 to explain the *Hardison* decision and attempted to gain back the reasonable accommodation ground

\(^4\) Id.
\(^7\) It shall be an unlawful employment practice for an employer to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, or 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, due to a prohibited classification.
\(^8\) 432 U.S. 63 (1977).
\(^9\) Id. at 84.
lost by the opinion. Nevertheless, the Supreme Court dealt another blow to reasonable accommodation in 1986 in *Ansonia Board of Education v. Philbrook*.

This article first examines the spirit of the “reasonable accommodation” provision by reviewing its history prior to its codification. Second, the article discusses the present state of reasonable accommodation law by considering how the courts have interpreted the “undue hardship” term and describing how district and appellate courts have allowed business interests to supercede religious freedom through the undue hardship standard. Third, this article considers the Workplace Religious Freedom Act and its potential implications. Lastly, this article concludes that the spirit of reasonable accommodation has not been realized through Supreme Court decisions.

I. THE SPIRIT OF “REASONABLE ACCOMMODATION”

A. EEOC Pre-Amendment Guidelines

Title VII as enacted by Congress in 1964 did not initially mandate reasonable accommodation. The Equal Employment Opportunity Commission (EEOC) raised the issue of reasonable accommodation two years after the law had gone into effect due to complaints from religious employees that employers were refusing to allow them to take time off during the regular work week in order to observe holy days. As a result, the EEOC promulgated guidelines concerning discrimination based on religion. In its guidelines, the EEOC not only prohibited discrimination, but required accommodation through the following policy:

The Commission believes that the duty not to discriminate on religious grounds includes an

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12 29 C.F.R. §1605 (1980) (stating that the duty not to discriminate includes an obligation to make reasonable accomodations).

13 479 U.S. 60, 68-69 (1986) (finding that a reasonable accommodation was sufficient and an employer need not accept an employee’s alternative accommodation).


obligation on the part of the employer to accommodate to the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.16

The EEOC used the term “serious inconvenience” three times in the guidelines when describing the extent of the employer’s obligation.17 These directives were an attempt to guide employers on issues of Sabbath observance and religious holidays. They stated that an employer was not in violation if he or she closed the workplace to observe some religious holidays but not others.

Despite what seemed to be strong language in favor of the employee, the guidelines allowed employers to overrule religious observances under certain conditions. For example, employees who accepted a job knowing the job requirements may conflict with his or her religious observances were not entitled to any accommodation.18 The guidelines only required an accommodation when the employee obtained his or her religious beliefs after being on the job, and even in those cases, an accommodation was mandated only if it did not seriously inconvenience the conduct of the business or disproportionately allocate unfavorable work assignments to other employees.

The EEOC rewrote the guidelines the following year making significant changes in the language.19 In 1967, the EEOC promulgated new guidelines that attempted to take a stronger position for accommodating the religious employee. These guidelines restated that employers had an obligation to accommodate the religious needs of employees and applicants, but only mandated “reasonable accommodations” meaning those accommodations that did not impose undue hardship upon the employer. The guidelines placed the burden of proof on the employer to prove that the accommodation was unreasonable.

The EEOC’s only illustration of “undue hardship” involved an employee whose job responsibilities could not be performed by

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16 Id.
17 Id. § 1605.1(a)(2), (b)(2), (b)(4).
18 Id. § 1605.1(b)(3).
19 29 C.F.R. § 1605.1(b)(c) (1967).
Another employee. The guidelines stated that allowing the employee to take off work to observe the Sabbath would have created an undue hardship for the employer. The EEOC for the first time also acknowledged that, in order to reach an equitable conclusion, each case would have to be analyzed on its own fact.

B. Congressional History

In 1971 Senator Jennings Randolph introduced legislation to amend Title VII, which would codify reasonable accommodation law. Prior to this amendment, the courts refused to fully recognize the 1967 EEOC guidelines because they fell outside the literal language of Title VII. The amendment passed Congress and was signed by the President. It added subsection (j) of Section 2000e which states: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Senator Randolph led the charge to amend Title VII because of the inequity he observed in the workplace. Senator Randolph acknowledged that he was a member of Seventh-Day Baptist Church, a denomination that observes the Sabbath from Friday evenings to sundown on Saturday evenings. In support of his religious beliefs, the Senator quoted from Exodus 20:9 stating, "From eve unto eve shall you celebrate your Sabbath."

On the day of the vote, the Senator outlined three themes in his speech before the Senate and premised his remarks on the belief that some employees were losing their jobs because they were involved in a religion.

First, Senator Randolph argued that hundreds of thousands of employees belonging to religious sects or denominations that believe in observing the Sabbath on a day other than Sunday

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23 Id. at 705.
exist in the workforce.\textsuperscript{24} The vast majority of employers observe the traditional Christian holidays such as Christmas and Thanksgiving, leaving out the minority religions. Senator Randolph made the point that the nation is pluralistic in its religious beliefs and as such should protect \textit{all} religions. The Senator summed up this view with the following:

[W]here people of a belief feel that insofar as possible, the law flowing from the original Constitution of the United States should protect their religious freedom, and hopefully their opportunity to earn a livelihood within the American system, which has become, of course, as has been indicated, more pluralistic and more industrialized through the years.\textsuperscript{25}

Second, Senator Randolph asserted that employees who work for private employers should have the same religious freedoms as those employees who work for state or federal employers.\textsuperscript{26} The First Amendment guarantees the right of free exercise of religion whenever the government attempts to infringe on religious freedoms. The right to freely believe in the religion of one's choice and to practice one's religion according to one's own convictions is a fundamental freedom. Senator Randolph acknowledged that the courts have not come down on this issue uniformly but he proposed that Congress intended to protect the same rights for private employees through the Civil Rights Act of 1964 as the Constitution protects for Federal, State and local government employees. Senator Randolph concluded that "it is a well-intentioned amendment, a good amendment, a necessary amendment, a worthwhile amendment, because it carries through the spirit of religious freedom under the Constitution of the United States."\textsuperscript{27}

Third, Senator Randolph asserted that the courts have failed to resolve issues of religious freedom in the workplace,\textsuperscript{28} citing two cases as examples of how the federal courts have

\textsuperscript{24} \textit{Id.}  
\textsuperscript{25} \textit{Id.}  
\textsuperscript{26} \textit{Id.}  
\textsuperscript{27} \textit{Id.} at 706.  
\textsuperscript{28} \textit{Id.} at 705–06.
denied employees religious freedoms in private employment. The first case, *Dewey v. Reynolds Metals Company* \(^\text{29}\) was decided by the district court in favor of the employee. \(^\text{30}\) On appeal, the Sixth Circuit reversed, holding for the employer. Robert Dewey, a member of the Faith Reformed Church, was employed by the Reynolds Metals Company as a die repairman for over fifteen years until being discharged. Reynolds Metals negotiated a collective bargaining agreement in 1965 that set the straight time and overtime schedules of employees. Under the agreement, employees were obligated to work such schedules unless they had a substantial and justifiable excuse. Employees assigned to overtime could not be relieved unless they could find another qualified employee to replace them. Dewey, who observed the Sabbath on Sundays, refused to work on Sundays when scheduled. He was able to find replacements for five Sundays until August of 1966 when he refused to find a replacement on the grounds that it violated his religious beliefs. Dewey was discharged from the company when he failed to report for work. \(^\text{31}\)

The Sixth Circuit held that Reynolds Metals had not intentionally violated the Act and that the District Court erroneously applied the EEOC guidelines that were not in effect at the time of Dewey's discharge. \(^\text{32}\) The dissenting opinion pointed out that Dewey refused to find a replacement not because he was being stubborn, but because, according to his religious beliefs, it was wrong for an employer to induce another to work for him on Sunday. \(^\text{33}\) The replacement system was not a solution to Dewey's conflict. The majority opinion stated that Dewey's request would have caused chaotic personnel problems and led to grievances and additional arbitrations despite lack of evidence in the record of such previous occurrences. The dissenting opinion stated the following:

The First Amendment right to freedom of religion has always been recognized as one of the Bill of Rights' strongest mandates. Even though this

\(^\text{29}\) 429 F.2d 324 (6th Cir. 1970).
\(^\text{30}\) Id. at 328.
\(^\text{31}\) Id. at 329.
\(^\text{32}\) Id. at 329–31.
\(^\text{33}\) Id. at 333.
right has not been extended into the field of labor relations, section 703(a)(1) of the Civil Rights Act is a Congressional directive that reasonable accommodation should be made by management to the religious beliefs of employees when this can be done without undue hardship on the employer.\textsuperscript{34}

The second case cited by Senator Randolph was \textit{Riley v. The Bendix Corporation},\textsuperscript{35} which was decided by the district court in favor of the employer in 1971. Charles Riley was a Seventh Day Adventist who observed the Sabbath from sundown on Fridays to sundown on Saturdays. Riley was employed as a mechanical foreman for the Bendix Corporation, which was under contract with the National Aeronautics and Space Administration in connection with the building of missiles to be launched from Cape Kennedy. Riley was transferred to second shift, which ran from 3:30 p.m. to 12:00 midnight, five days per week.\textsuperscript{36} Riley refused to work after sundown on Friday, requesting an accommodation that was denied. Following the tenets of his religion, Riley left work at sundown on Friday, resulting in his being discharged for walking off the job. The district court held that the EEOC was not vested with the authority to determine the burden of proof, and noted that religious discrimination should not be equated with the failure to accommodate.\textsuperscript{37}

Senator Randolph believed that Dewey and Riley suppressed the religious freedoms of employees. He argued that the EEOC guidelines were correct in mandating "reasonable accommodation" because it was what Congress intended. He stated that "[t]his amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved."\textsuperscript{38}

Despite the Senator's intentions to solidify religious freedom in the workplace, the amendment did not specifically define reasonable accommodation or undue hardship. During the question and answer session on the Senate floor, he

\textsuperscript{34} Id. at 334.
\textsuperscript{35} 330 F.Supp. 583 (M.D. Fla. 1971), \textit{rev'd} 464 F.2d 1113 (5th Cir. 1972).
\textsuperscript{36} Id. at 584.
\textsuperscript{37} Id. at 589.
\textsuperscript{38} 118 CONG. REC. 705–06.
acknowledged that employers and employees should attempt to work out their conflicts. Five years later, the Supreme Court took up the issue of "reasonable accommodation."

C. Case Law: Hardison and Ansonia

In 1977, the Supreme Court decided *TWA v. Hardison*, which defined "reasonable accommodation" contrary to Senator Randolph's intent. Larry Hardison worked for Trans World Airlines (TWA) as a clerk in the Stores Department at its Kansas City base. The Department operated 24 hours per day, 365 days a year. The employees were under a collective bargaining agreement that included a seniority system and employees bid for different shifts according to seniority. Less than one year after Hardison took the job with TWA, he became a member of the Worldwide Church of God. One of the tenets of this religion was to observe the Sabbath from sunset on Fridays until sunset on Saturdays. Initially, Hardison transferred to the 11 p.m. – 7 a.m. shift to solve the problem. He bid for a day shift, which he received in another building and was then asked to work a shift that included Saturday for an employee on vacation. TWA agreed to seek a work assignment change but the union was not willing to violate the collective bargaining agreement. Hardison refused to work on Saturdays and was discharged as a result.

The Supreme Court held that TWA reasonably accommodated Hardison, reversing the decision of the Court of Appeals. The Court of Appeals found that TWA had three reasonable alternatives that would not have caused undue hardship or violated the collective bargaining agreement. It stated that the matter was left up to the union steward who did nothing to assist Hardison in finding an accommodation. The Supreme Court disagreed with the Court of Appeals and

39 Id.
41 Id. at 66.
42 Id. at 67.
43 Id. at 69.
44 Id. at 84–85. The District Court held in favor of the defendants. See 375 F. Supp. 877, 891 (D. Mo. 1974). The Court of Appeals for the Eighth Circuit reversed the judgment holding that TWA had failed to reasonably accommodate Hardison. See Hardison v. TWA, 527 F.2d 33, 44 (8th Cir. 1975), rev'd, 432 U.S. 63 (1977).
45 See Hardison, 527 F.2d at 39–42.
reversed its decision. The Court stated that no accommodation was possible without causing an undue hardship on TWA and redefined the term "undue hardship" as follows:

To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship. Like abandonment of the seniority system to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of religion.\(^{46}\)

The *de minimis* requirement introduced in *Hardison* has created the most difficulty for religious employees attempting to practice their faith. The Supreme Court redefined reasonable in terms of a minimally low burden upon the employer, making most accommodations of religious employees unreasonable.

In 1978, the EEOC held hearings in three locations around the country to respond to issues that were raised by the Supreme Court's decision in *Hardison*.\(^{47}\) Over 150 witnesses testified or submitted written statements. The EEOC concluded from the hearings that there is widespread confusion concerning the extent of accommodation under the *Hardison* decision and the religious practices of some individuals and some groups of individuals are not being accommodated. Some employers read the *Hardison* decision as eliminating the requirement to make any accommodation of religious employees. The Commissioner noted that complaints of religious discrimination and accommodation had increased substantially between 1968 and 1977.\(^{48}\)

During the hearings, employers expressed their concerns over what constituted a religion.\(^{49}\) Two issues that seemed to resonate with employers concerned how to determine the sincerity of an employee's religious beliefs and which religious practices were associated with a particular religion. Many

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\(^{46}\) *Hardison*, 432 U.S. at 84.
\(^{48}\) *Id.* at 1 (Statement of Eleanor Holmes Norton, Chair, EEOC).
\(^{49}\) *Id.*
employers feared the slippery slope since it seemed that the religious employee received preferential treatment. The hearings verified that employers were eager to have the law clarified by limiting the scope of reasonable accommodation. Based on the findings from the hearings, the Commission revised the guidelines to clarify the obligation imposed by the statute.

The EEOC attempted to cut back on the reach of *Hardison* by issuing new guidelines that provided substantially more guidance to employers. These guidelines reaffirmed the employers' reasonable accommodation obligation and provided some examples of possible alternatives for accommodating employees' religious practices. The Commission required an employer to explore different alternatives with the employee and to implement the one that was least disadvantageous to the employee. The Commission stated the following:

Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

The EEOC guidelines attempted to preserve the right to a reasonable accommodation by providing multiple examples and background information in accordance with the original intent of the 1972 amendment.

The second case decided by the Supreme Court was *Ansonia Board of Education v. Philbrook* in 1986. *Ansonia* further limited religious freedom of employees in the workplace. Ronald Philbrook was a high school business and typing teacher in Ansonia, Connecticut. In 1968, Philbrook became a member of the Worldwide Church of God, which required him to refrain

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51 *Id.* § 1605.2(e).
52 *Id.* § 1605.2(c)(2)(ii).
53 479 U.S. 60 (1986).
from work for six designated holy days during the year. Under the collective bargaining agreement, Philbrook was allowed three days for religious holidays and three days for personal business leave. Pursuant to the agreement, a person absent three days for religious holidays could not use personal business days for additional religious observance. Philbrook presented the alternative of either allowing him to use personal days for religious observance or allowing him to pay a substitute teacher with no reduction in his pay. These proposals were consistently rejected by the school administration.

The Supreme Court held that the legislative history did not require an employer to accept a particular accommodation requested by an employee. The Court mandated that once an employer had reasonably accommodated an employee’s religious needs, the employer had fulfilled its obligation under Title VII. The employer does not have to make an effort to show that the other accommodations were less disadvantageous to the employee or that they would cause undue hardship.

In *TWA v. Hardison* the Court voted seven to two, reversing the circuit court’s decision in favor of TWA. The *Hardison* majority elicited a spirited dissent from Justices Marshall and Brennan. Justice Marshall believed that the *Hardison* opinion crushed the efforts of Title VII to accommodate the religious practices of employees. Marshall wrote that the *Hardison* decision adopted the very position that Congress rejected in 1972 and in turn, the Court had disregarded Congress’ intent. Marshall stated, “[t]oday's decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices.”

Justice Marshall believed that the *Hardison* opinion was decided in derogation of the congressional intent and, in effect, trivialized the need for reasonable accommodation. Not allowing a reasonable accommodation unless the accommodation is accomplished on an equal basis destroys the essence of the amendment and curtails religious freedom.

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54 Id. at 62–63.
55 Id. at 65.
56 Id. at 68–69.
58 Id. at 86.
59 Id. at 87.
60 Id. at 88–89.
suggested that the congressional intent and the literal meaning of the terms may require preferential treatment of religious employees.\footnote{Id. at 87, 91.}

_Hardison_ and _Ansonia_ set the parameters for reasonable accommodation under Title VII. The courts have affirmed that an employee must establish a prima facie case by first proving three elements. In _Anderson v. General Dynamics Connair Aerospace Div._,\footnote{589 F.2d 397 (9th Cir. 1978).} the Ninth Circuit established the three elements as: (1) he or she had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) he or she informed the employer of the belief and conflict; and (3) the employee was penalized in some way because of the conflict.\footnote{Id. at 401.} Once the employee proves the elements of a prima facie case, the burden shifts to the employer to show either that it initiated good faith efforts of reasonable accommodation or that it could not reasonably accommodate the employee without undue hardship.

Courts within the Fifth Circuit have stated that Title VII's reasonable accommodation is a balancing of both employer and employee interests. Such balancing which protects the employer by not requiring any accommodation that would impose an undue hardship while still protecting the employee by requiring the accommodation be reasonable.\footnote{See, e.g., Favero v. Huntsville Indep. Sch. Dist., 939 F. Supp. 1281, 1286 (S.D. Tex. 1996) (explaining the acceptable accommodation range which protects the interests of both the employer and the employee).} Alternatively, courts within the Eighth Circuit have adopted a two-step analysis in failure to accommodate cases. The first step asks whether an accommodation is possible and the second step determines whether the accommodation is reasonable.\footnote{See, e.g., Vetter v. Farmaland Indus., Inc., 884 F. Supp. 1287, 1308 (N.D. Iowa 1995).} According to _Ansonia_, once the employer demonstrates that it has reasonably accommodated the employee's religious needs, the statutory inquiry ends.\footnote{479 U.S. 60, 68 (1986).} No accommodation is reasonable if it imposes an undue hardship on the employer.\footnote{See Smith v. Pyro Mining Co., 827 F.2d 1081, 1085 (6th Cir. 1987) (noting that where an employer already provided an accommodation, no showing of undue hardship is necessary).} _Hardison_ held that any
accommodation involving more than *de minimis* costs to the employer is undue hardship, yet the costs of accommodation must not merely be speculative.\(^{68}\)

The Ninth Circuit decided two significant reasonable accommodation cases in the late 1990's. In *Opuku-Boateng v. State of California*,\(^ {69}\) the court held for the plaintiff because the State failed to prove undue hardship.\(^ {70}\) The Ninth Circuit stated that additional cost in the form of lost efficiency or higher wages could be considered to determine if the *de minimis* threshold had been met.\(^ {71}\) The case involved a plant inspector for the State of California who was also a Seventh-day Adventist.\(^ {72}\) Employees not subject to a collective bargaining agreement were expected to work some weekends and holidays. Opuku-Boateng's request for Saturdays off was denied by the Department. The Department argued that allowing Opuku-Boateng off on weekends would cause an undue hardship by imposing on other employees. The court reversed in favor of Opuku-Boateng stating, "[w]e have not read *Hardison* so broadly as to proscribe all differences in treatment."\(^ {73}\)

In *Balint v. Carson City, Nevada*,\(^ {74}\) the Ninth Circuit followed *Hardison* and upheld a valid collective bargaining agreement over an employee's request for reasonable accommodation.\(^ {75}\) As a member of the Worldwide Church of God, Lisette Balint observed the Sabbath from sundown Friday to sundown Saturday.\(^ {76}\) Balint was offered a position with the Carson City Sheriffs Department and was informed that working on weekends was based on a seniority-based bidding system. The Department asserted that the mere existence of a seniority system excused them from reasonable accommodation. The court held that the employer was still obligated to attempt an accommodation that was consistent with the seniority system and did not impose more than a *de minimis* cost.\(^ {77}\) The court

\(^{68}\) 432 U.S. 63, 84 (1977).
\(^{69}\) 95 F.3d 1461 (9th Cir. 1996).
\(^{70}\) Id. at 1475.
\(^{71}\) Id. at 1468 n.1.
\(^{72}\) Id. at 1464--65.
\(^{73}\) Id. at 1469.
\(^{74}\) 180 F.3d 1047 (9th Cir. 1999).
\(^{75}\) Id. at 1049.
\(^{76}\) Id.
\(^{77}\) Id. at 1049--50.
cited *Hardison* for the proposition that a reasonable accommodation that deprives employees of their shift and job preferences would constitute unequal treatment of employees not contemplated by Title VII.\(^\text{78}\)

**II. DEFINING "UNDUE HARDSHIP"**

**A. The De Minimis Standard**

The EEOC in 1967 replaced the term “serious inconvenience” with “undue hardship” in the Guidelines on Discrimination Because of Religion.\(^\text{79}\) The EEOC did not provide a justification for changing the standard other than stating that they had received several complaints involving religious discrimination. Prior to 1967, Congress had not drafted the term “undue hardship” into any employment discrimination legislation. Pre-amendment, the term was frequently found in cases concerning jury members, illegal alien deportation and state zoning laws. This line of cases emphasized the hardship that was being placed on an individual as a result of government regulation in a particular circumstance. For example, in a zoning case the landowner might argue an undue hardship will occur unless a variance is granted. In *Beerman v. City of Kettering*,\(^\text{80}\) the court described an undue hardship as “a substantial and unnecessary injustice to the applicant.”\(^\text{81}\) The term “hardship” has generally been defined as hard circumstances of life and the term “undue” as excessive or unreasonable. Combining the terms together generally implied a significantly difficult situation, which required relief under the law to achieve justice.

The Bankruptcy Reform Act included the term “undue hardship” in relation to the discharge of student loans under Chapter 13.\(^\text{82}\) In the case of *In re Luna*,\(^\text{83}\) the bankruptcy court described undue hardship as a type of hardship that results from extraordinary circumstances that would cause debtor and/or debtor’s dependents extreme hardship if the debt was repaid and

\(^\text{78}\) *Id.* at 1052.
\(^\text{81}\) *Id.* at 650.
that would continue for the foreseeable future. In the case of In re Hawkins, the bankruptcy court described undue hardship as "certainty of hopelessness" of repayment, suggesting that only in the most dire of situations would a debtor be allowed to discharge a student loan.

In addition to the Bankruptcy Code, Congress has injected the term "undue hardship" into the Rehabilitation Act, Title VII and the Americans with Disabilities Act since 1967. Under each of these federal statutes, the courts have ascribed a definition to the term in accordance with its plain meaning. The Supreme Court in Hardison allowed the employer to avoid reasonable accommodation if it would impose a minimum hardship on the employer.

In Hardison, the cost to employ a substitute for Hardison would have amounted to $150 in overtime pay every three months. Considering the financial wealth of TWA at that time, this amount could hardly be considered an undue hardship.

In Burns v. Southern Pacific Transportation Co., the Ninth Circuit was confronted with the issue of an employee who refused to pay union dues because of his sincerely held religious beliefs. Before he was discharged, Duane Burns offered to pay his union dues to a charity instead of the union. The employer recommended Burns pay the dues to the union but not become a union member. The employer argued that keeping track of the payments to charities would cause undue hardship.

The Ninth Circuit held that Burns had "fully met his burden of proving a prima facie case of religious discrimination." He proved that he had a bona fide religious belief, he informed his employer and the Union of his religious belief, and he was thereafter threatened with discharge for his refusal to comply with the collective bargaining agreement. The court described

84 Id. at 293.
86 Id. at 298.
89 Id. at § 1211(10) (2000).
90 589 F.2d 403 (9th Cir. 1978).
91 Id. at 405.
92 Id. at 407.
93 Id. at 405.
the employer's obligation of reasonable accommodation: "Once the employer has made more than a negligible effort to accommodate the employee and that effort is viewed by the worker as inadequate, the question becomes whether the further accommodation requested would constitute 'undue hardship.'"95

The court held that the administrative cost of accommodating Burns's religious beliefs would not cause the employer undue hardship.96

The second case involving a collective bargaining agreement decided by the Ninth Circuit was Yott v. North American Rockwell Corporation.97 Kenneth Yott was discharged because he followed the tenets of his religion, which prohibited the payment of union dues. Yott began working for North American Rockwell in 1947, at which time union dues were not required. In 1968, a provision was inserted into the collective bargaining agreement mandating the payment of union dues by all employees. Prior to his termination, Yott suggested three alternatives to his payment of union dues, all of which were rejected.98

In Yott, the Ninth Circuit fell back on Hardison and noted that the Supreme Court held that "where the impact upon co-workers or cost of an accommodation proposal is greater than de minimis, undue hardship is demonstrated."99 The court further reasoned that to allow Yott to receive an accommodation might constitute preferential treatment over other employees in the bargaining unit and escalate animosity between union and non-union employees. The Ninth Circuit commented on the de minimis standard: "Furthermore, a standard less difficult to satisfy than the 'de minimis' standard for demonstrating undue hardship expressed in Hardison is difficult to imagine."100

The Ninth Circuit has followed the lead of Hardison by diminishing the standard to one that is negligible, or equally simple, for the employer to satisfy.

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95 Id. at 406 (citation omitted).
96 Id. at 405–06, 407.
97 602 F.2d 904 (9th Cir. 1979).
98 Id. at 907.
99 Id. at 908 (citing Hardison, 432 U.S. at 84).
100 Id. at 909.
III. WEAKENING REASONABLE ACCOMMODATION

The courts have weakened reasonable accommodation rights in the workplace through a number of mechanisms. Since employers need only provide a reasonable accommodation to the extent of a *de minimis* cost, the courts have allowed employers to meet the threshold by presenting evidence of potential workplace disruption and imposition on co-worker rights. Both of these defenses permit the court to speculate as to the consequences of allowing the reasonable accommodation.

A. Workplace Disruption

One of the first cases to validate the workplace disruption defense was *EEOC v. Sambo's of Georgia, Inc.*101 Mohan Tucker, responding to an advertisement, applied for employment as a restaurant manager at the regional office of Sambo's Restaurants in Murietta, Georgia.102 At the time, Tucker was employed by a Pizza Hut Restaurant in the Atlanta area. Tucker filled out the application and upon presenting it to a Sambo's representative was instructed that if he was accepted as a manager trainee he would have to shave his beard in accordance with company grooming standards. Tucker responded that he was forbidden to shave his facial hair by his religion.103 Tucker, a practicing Sikh, was forbidden to cut or shave his facial hair except in medical emergencies.

The company recruiter responded that no exceptions would be made to the grooming standard and, on that basis, his application was denied. Tucker brought suit under Title VII for failure to reasonably accommodate his religious beliefs. The EEOC investigated and determined that Sambo's had made a showing of reasonable cause. Sambo's had established a uniform grooming policy for all of its 1100 restaurants that prohibited facial hair with the exception of neatly-trimmed mustaches.104 Sambo's argued its policy was necessary in order to promote their public image and that customers prefer managers and employees that are clean-shaven. The district court upheld

\[\text{101} \quad 530 \text{ F. Supp. 86 (N.D. Ga. 1981).}\
\[\text{102} \quad \text{Id. at 88.}\
\[\text{103} \quad \text{Id.}\
\[\text{104} \quad \text{Id. at 89.}\]
Sambo's grooming policy finding no violation of Title VII and citing Woods v. Safeway Stores, Inc.,105 which upheld a grooming policy that prohibited facial hair as a business necessity.106 The district court concluded that the relaxation of Sambo's grooming policy would impose an undue hardship on the business.

The court considered the possible effects of allowing an exception to the company's grooming policy from the perspective of the employer's business strategy. Yet, the court concluded that allowing an exception to Sambo's grooming policy would have a negative effect on the business operation. The court reasoned, "Exceptions to the grooming standards of Sambo's Restaurants would have an adverse effect on the Sambo's system as a whole and thus Sambo's has never knowingly permitted any exceptions."107 Evidence was produced during the trial which proved that a significant segment of the consuming public would not accept restaurant employees with beards. The court accorded substantial weight to Sambo's business policies in finding that no undue hardship was present.

Another example of the courts use of the workplace disruption doctrine came from the Seventh Circuit in Anderson v. U.S.F. Logistics.108 Elizabeth Anderson worked for U.S.F. Logistics as an office coordinator. Anderson, a follower of the Christian Methodist Episcopal faith, would tell people to "Have a Blessed Day" when signing off to correspondence or as a way to end a telephone conversation.109 Anderson did not use the phrase all the time and, when confronted by her supervisor about it, stated that she would not use the phrase with anyone who did not want to hear it. Anderson never received any complaints about using the phrase until June of 1999 when an employee of U.S.F., Mark LaRussa, a liaison to Microsoft, told her the comment was unacceptable. Anderson was instructed by her employer not to use the phrase in any correspondence with Microsoft.110

Anderson, however, continued to use the phrase arguing that it was part of her religious practice and was reprimanded by

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106 Id. at 43.
107 Sambo's, 530 F. Supp. at 89.
108 274 F.3d 470 (7th Cir. 2001).
109 Id. at 473.
110 Id.
her supervisor as a result.\textsuperscript{111} Several months later, a Microsoft spokesman was quoted in an Indianapolis newspaper as saying that Microsoft did not have a problem with the use of the phrase “Have a Blessed Day.” Anderson continued to use the phrase in correspondence with Microsoft and was reprimanded a second time for use of the phrase. Subsequently, Anderson filed a complaint seeking a preliminary and permanent injunction.

The district court denied the preliminary injunction, which was later affirmed by the Seventh Circuit. The circuit court reasoned that because Anderson was not required by her religion to use the phrase all the time, the employer’s acquiescence, allowing Anderson to use the phrase with co-workers, was a reasonable accommodation and the company had no further obligation.\textsuperscript{112} In addition, the court considered the potential impact of using the phrase when corresponding with Microsoft. The court noted that Microsoft had not officially informed U.S.F. that the phrase was acceptable, “[t]hus, the evidence [suggested] that Anderson’s religious practice could damage U.S.F.’s relationship with Microsoft.”\textsuperscript{113}

Anderson believed she was to end her conversations with people by using the phrase “Have a Blessed Day.” She was willing to forego use of the phrase if the recipient was offended by it or expressed a desire not to have the phrase used. In all other cases, Anderson believed it was her religious duty to use the phrase.

The Seventh Circuit reasoned that a reasonable accommodation would be accomplished if Anderson were still permitted to use the phrase with co-workers. The court speculated as to the potential impact to the business relationship with Microsoft considering that Microsoft had stated that they were not offended by use of the phrase. The court allowed the complaint of one employee to come before the accommodation rights of Anderson, despite the fact that the effect on the business was mere speculation. Anderson’s case was dismissed for failure to prove a prima facie case.

\textsuperscript{111} Id. at 473–74.
\textsuperscript{112} Id. at 476.
\textsuperscript{113} Id. at 476–77.
B. Imposing on Co-Workers

In *Weber v. Roadway Express, Inc.*, the Fifth Circuit affirmed the district court's grant of the motion for summary judgment in favor of the employer. Lynn Weber was hired by Roadway Express as a truck driver. Weber informed Roadway that, as a Jehovah's Witness, his religious beliefs would not allow him to make long-haul overnight runs with a female partner who was not his wife. Weber's supervisor informed him that working with women was part of his job and that if he could not work with women he would not receive any driving assignments. Drivers when initially hired are dispatched on an as-needed basis.

Weber argued that Roadway could accommodate his religious practices by skipping over him when an assignment came up with a female driver. Weber stated that Roadway already had allowed drivers to be skipped over for other reasons. The court acknowledged that if Weber were under a collective bargaining agreement, its analysis would be different. The casual drivers are dispatched in the order in which they have returned from other runs. Driver compensation depends on the number of miles logged.

The court considered the effect that skipping over Weber might have on other casual drivers waiting for a run. The district court surmised that skipping over Weber to avoid pairing with a female partner may adversely affect other drivers. The court then provided several examples of the potential ways other drivers could be adversely affected. The court stated, "The mere possibility of an adverse impact on co-workers as a result of 'skipping over' is sufficient to constitute an undue hardship."

The Fifth Circuit cited *Hardison* for the principle that shift-skipping, when it would affect other employees, is an undue hardship. The court reasoned that driver-skipping for flexible, secular reasons was *de minimis*, but that Weber's being skipped

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114 199 F.3d 270 (5th Cir. 2000).
115 *Id.* at 275.
116 *Id.* at 272.
117 *Id.* at 273.
118 *Id.* at 273-74 n.3.
119 *Id.* at 272.
120 *Id.* at 274.
121 *Id.*
over was inflexible and therefore an undue hardship. Weber's case was dismissed by the district court and affirmed on appeal.122

IV. REDEFINING SINCERITY OF RELIGIOUS BELIEFS

Some courts have scrutinized the religious beliefs and practices of the employee as a means to dismiss a reasonable accommodation case. If the court concluded that the employee's religious beliefs were insincere, the employee would not be able to prove the prima facie case, and thus would not be entitled to reasonable accommodation. In the case of Tiano v. Dillard Department Stores,123 the Ninth Circuit Court of Appeals concluded that the defendant was not in violation of Title VII.124 Mary Tiano worked for Dillard's Stores as shoe salesperson until she was terminated in October 1988. Tiano, a devout Roman Catholic, learned of a pilgrimage to Medjugorje, Yugoslavia, where several people have claimed that the Virgin Mary has appeared to them. Tiano testified that on August 22, 1988, she had a calling from God to attend the pilgrimage.

Tiano spoke with her supervisor, the operations manager, and the store manager concerning her trip to Medjugorje in October.125 At every level, Tiano's request to take unpaid leave was denied. Dillard's Stores had the policy of not allowing any employee leaves from October to December due to the busy holidays. Tiano asked to be transferred to another store, for which she was supplied the paperwork. She was informed that if she left on the pilgrimage she would not have a job when she returned. Tiano attended the pilgrimage and, in her absence, her immediate supervisor filled in for her.126

"The district court found that Tiano established a prima facie case of religious discrimination and that Dillard's failed to [make] a good faith effort to accommodate her belief or [show] that undue hardship would result."127 The district court also found that Tiano had a bona fide religious belief that she had a

122 Id. at 275.
123 139 F.3d 679 (9th Cir. 1998).
124 Id. at 680.
125 Id. at 680–81.
126 Id. at 681.
127 Id. at 682.
calling from God to attend the pilgrimage between October 17 and October 26. On appeal, the court held that Tiano had a bona fide religious belief that she had to go to Medjugorje, but not necessarily during October. The Court of Appeals placed great weight on the testimony of Tiano's friend that stated the pilgrimage could occur at another time and suggested that the trip's timing was a personal preference. They disregarded the direct testimony of Tiano that her religious convictions required her to go in October.

The appellate court concluded that Tiano failed to prove a conflict between a bona fide religious belief and her employment duty, ending the inquiry before discussing any reasonable accommodation or undue hardship. The district court's ruling that Dillard's made no attempt to accommodate the religious beliefs of Tiano was reversed.

The second case involving a challenge to an employee's religious beliefs was Wilson v. U.S. West Communications. U.S. West employed Christine Wilson for nearly 20 years as an information specialist. In July of 1990, Wilson, a Roman Catholic, made a religious vow to wear a pro-life button at all times. Wilson strongly believed that the Virgin Mary wanted her to wear the button and that taking off the button could cause her to lose her soul. Wilson was asked on several occasions to remove the button at work because it offended co-workers.

Wilson's supervisor told her that the button was causing co-workers complaints and some were refusing to work. Wilson's supervisor gave her three options: (1) wear the button only in her cubicle; (2) cover the button while at work; or (3) wear a different button with the same message but no photograph. Wilson responded that none of the options were acceptable and that if she took one of the options she would break her promise to God. Wilson considered herself to be a living witness. Wilson was sent home for wearing the button and subsequently fired for missing three consecutive days. U.S. West did not have a dress code or policy against wearing buttons or other types of

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128 Id. at 683.
129 58 F.3d 1337 (8th Cir. 1995).
130 Id. at 1338.
131 Id. at 1339.
132 Id.
133 Id. at 1340.
The district court held that Wilson was provided a reasonable accommodation of covering the button and entered judgment for U.S. West. The Court of Appeals affirmed the lower court. The Eighth Circuit agreed that despite Wilson's statements about being compelled to be a living witness, she could not be believed. The court placed great weight on some evidence that suggested Wilson's sincere religious beliefs did not include being a living witness. The court ended the inquiry after concluding that a reasonable accommodation had been provided. In doing so, the court dictated to the employee what her religious beliefs should be.

V. THE WORKPLACE RELIGIOUS FREEDOM ACT

Congress has recognized that employees have minimal protection of their religious beliefs and practices when a conflict exists with an employment requirement. The Sears Roebuck case, in which Sears summarily rejected applicants for employment on the basis of their Sabbath observance, brought the issue to the forefront. The case of Cora Miller, who was fired from Chi-Chi's restaurant near Washington, D.C. because she refused to sing "Happy Birthday" to customers, also brought public attention. Miller, as a Jehovah's Witness, held religious beliefs that forbid her to celebrate birthdays. Congress has realized that some employees have had to choose between their religion and their job.

In 1994, the Workplace Religious Freedom Act (WRFA) was introduced to provide employees with significantly more protection of their religious practices and observances in the workplace. The legislation has not yet passed Congress but has been reintroduced in every session since 1994. A broad-based coalition of religious groups has been lobbying for the WRFA over the past decade. The WRFA would amend Section 701(j) of the Civil Rights Act of 1964 by providing clarity to the

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134 Id. at 1339.
135 Id. at 1340.
136 Id. at 1341.
137 Id. at 1342.
138 See Kaminer, supra note 3.
139 See Mark Hansen, Suing Bosses over Beliefs, 84 A.B.A. J. 30 (1998).
140 See Kaminer, supra note 3.


definition of undue hardship. It reads as follows: "In this subsection, the term 'undue hardship' means an accommodation requiring significant difficulty or expense." 141

The WRFA adopts an undue hardship definition similar to that of the Americans with Disabilities Act. It discards the de minimis standard as set forth by the Supreme Court in Hardison and specifically outlines a number of factors to consider when determining if the threshold "significant difficulty or expense" standard has been met. It identifies the three factors as: "(i) the identifiable cost of the accommodation”; (ii) the overall financial resources and size of the employer involved; and (iii) for the employer “with multiple facilities, the geographic separateness or administrative or fiscal relationship of the facilities." 142 The criteria as enumerated by the WRFA make it less likely that the employer will be able to merely speculate what the accommodation will cost.

In addition, WRFA takes the vagueness out of the term reasonable accommodation. What may seem reasonable to the employer may not be reasonable to the employee. It provides guidance through the following provision:

For purposes of determining whether an employer has committed an unlawful employment practice under this title by failing to provide a reasonable accommodation to the religious observance or practice of an employee, for an accommodation to be considered to be reasonable, the accommodation shall remove the conflict between employment requirements and the religious observance or practice of the employee. 143

This provision insures that employers consider which accommodation will remove the conflict. In many instances, the courts have held an accommodation, which did not provide relief to the religious employee, to be reasonable. Take, for example, Teresa George who was fired by Home Depot for not reporting to work on Sundays. 144 George had talked with her supervisor

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142 Id. § 3.
143 Id.
144 See George v. Home Depot, Inc., No. 00-2616, 2001 WL 1558315, at *5 (E.D.
about her religious beliefs requiring her to observe Sunday as the Sabbath. George requested that she be allowed to take the entire day off to observe her Sabbath. Bordelon, her supervisor, responded that he knew Catholics could work on Sunday and offered George the option of taking off time to attend mass on Sunday, after which she would have to return to work or be fired. The district court held that Home Depot had fulfilled its duty under Title VII by offering George a reasonable accommodation, stating that “[a]llowing George to dictate the days when she would work is not a reasonable accommodation.”

Teresa George’s religious beliefs were so strongly held that she was willing to forego her position at Home Depot. It is in just such an instance that the WRFA would provide the protections a religious employee needs to avoid having to choose between her religion and a job.

The WRFA has been promoted by a coalition of religious organizations and critically reviewed by others. One legal scholar has analyzed the WRFA, calling it a “lemon,” and concluded that it would violate the Establishment Clause. The article applied the three-pronged Lemon Test to the WRFA. The author concluded that requiring more than a de minimis expense to reasonably accommodate would fail under the second prong of the test by advancing religion. Critics argue that the Supreme Court placed limits on reasonable accommodation in Hardison and that any greater burden will trigger constitutional prohibitions. In addition, it is argued that the WRFA requires the employer to remove the conflict and succumb to the religious employees’ accommodation, thus advancing religion. In light of the general concern over the Lemon Test among Supreme

La. 2001).

145 Id. at *8.
147 Id. In Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971), the Supreme Court outlined the three prong test to be followed in Establishment Clause cases. A statute, to be consistent with the Establishment Clause, must comply with the following: (1) “the statute must have a secular legislative purpose”; (2) “its principal or primary effect must be one that neither advances nor inhibits religion”; and (3) “the statute must not foster ‘an excessive entanglement with religion.’” Id. (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)).
148 See Gawlik, supra note 138 at 262.
149 Id. at 264–65.
Court justices, predicting the outcome of a constitutional challenge to the WRFA seems premature.\textsuperscript{150}

CONCLUSION

The enactment of Title VII created hopes that discrimination based upon membership in a protected class would be stricken from the workplace. Religion as a protected class assumes a sincerely held belief system, which translates into some level of everyday religious practices. An employer would have no occasion to know that an employee is religious unless some practicing of the employee's religion occurs. The inevitable result of protecting an employee's religion is to also protect the practice. Congress amended Title VII by adding "reasonable accommodation" to resolve conflicts that arise in the workplace between religious practices and employment requirements.

According to the pre-code EEOC guidelines, Congressional history, and some justices on the Supreme Court, the spirit of reasonable accommodation was to mandate that the employer make an effort to resolve a conflict between an employee's religious practice and an employment requirement. If the parties could not reach a resolution voluntarily, the interests of the business would be balanced against the employee's freedom of religious exercise. Employee free-exercise rights were to be accommodated unless it caused an undue hardship. The spirit of reasonable accommodation sought to protect minority religions despite the potential to treat other employees unequally. The Congressional history strongly suggests that religious interests should take precedence over secular interests since the statute does not specifically protect secular ideals.

The Supreme Court, through \textit{Hardison} and \textit{Ansonia}, has diminished the reasonable accommodation provision. Congress failed to specifically define "undue hardship" thereby leaving the Supreme Court the opportunity to set the parameters. The Supreme Court defined "undue hardship" in terms of \textit{de minimis}: no more than a \textit{de minimis} burden on the employer would be allowed in accommodation cases. The high court opened the door

\textsuperscript{150} Several of the Supreme Court Justices have advocated altering our present Establishment Clause framework.
to an expansion of the employer's rights to mandate business policy, superceding employee reasonable accommodation. Business efficiency, lack of workplace disruption, and equal treatment of all employees have become justifications for curtailing an employee's religious practices. Workplace disruption and alteration of business operation can occur anytime the employer decides to expedite changes in personnel or policy.

Allowing employers to rigidly enforce workplace rules irrespective of religious practices denigrates the free exercise of religion and can create hostility toward religion. The *de minimis* standard sends the implicit message that religious beliefs and practices are of minimal value to the workplace. Elevating the secular over the sectarian in the workplace denies the spirit of reasonable accommodation. The Supreme Court has tipped the balance in favor of the employer in determining what is a reasonable accommodation. Those outside the religion often perceive religious beliefs and practices as irrational. The protection of minority religions, which are generally not well understood by employers, was one objective of the amendment. The courts tend to interpret "reasonable" from the perspective of the reasonable employer, instead of asking what would be reasonable to the religious employee under the same circumstances. Working with employees to reach an equitable resolution from the employee's perspective fulfills the intent behind reasonable accommodation provisions and accords significance to the religious beliefs of the employee.

The Workplace Religious Freedom Act, as most recently introduced in Congress, attempts to clarify reasonable accommodation by defining the terms "undue hardship" and "reasonable." The WRFA not only affirms the employer's responsibility to work with the employee to find an accommodation, but also promotes a dialog concerning what the employee believes to be reasonable in the situation. Since it is the employee that must bring the conflict to the employer's attention, the employee is allowed to initially frame the issue. Employers under the WRFA will not be permitted to insert their notions of what is "reasonable" unless the conflict from the employee's perspective is removed. Removal of the conflict may cause an undue hardship to the employer, but only if it involves significant difficulty or expense. The *de minimis* standard
appears to have been intentionally written out of the WRFA.