Note, Employers Beware:
The Workplace Religious Freedom Act Of 2000

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In the contentious struggle between employers and their religious employees, the employer generally prevails , provided it attempts to make some reasonable accommodation for the employee's religious beliefs and practice. Nonetheless, this delicate balance between the employer's right to operate its business and the employee's right to exercise his or her religious beliefs may be upset by the proposed statutory amendment, the Workplace Religious Freedom Act of 2000 ("WRFA" or "the Act").[1] The Act is seriously flawed because it would negatively impact employers and coworkers of religious employees while having a benign effect in the very areas of law that the Act was intended to correct. The main focus of the Act is to overturn two United States Supreme Court cases that have interpreted provisions of Title VII of the Civil Rights Act of 1964 in a light favorable to employers.[2] First, in *Trans World Airlines v. Hardison,* the Court held an "undue hardship" was defined as anything more than a *de minimis*

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[1] H.R. 4237, 106th Cong. (2000)(House Version); S. 1668, 106th Cong. (1999)(Senate Counterpart). Representative Jerrold L. Nadler (D-NY) sponsored the bill. The WRFA has also been proposed in the 105th Cong. H.R. 2948, 105th Cong. (1997); S. 92, 105th Cong. (1997); S. 1124, 105th Cong. (1997); and the 103rd Cong. H.R. 5233. 103rd Cong. (1994), but failed each time.

[2] Senator John F. Kerry (D-MA) introduced the related bill, S. 1668, before the Senate. Speaking of the term "undue hardship" as it applies to employers, he contends that it

> has been interpreted so narrowly as to place little restraint on an employer's refusal to provide religious accommodation. The Workplace Religious Freedom Act will restore to the religious accommodation provision the weight that Congress originally intended and help assure that employers have a meaningful obligation to reasonably accommodate their employee's religious practices.

145 CONG. REC. S11, 647(daily ed. Sept. 29, 1999) (statement of Sen. Kerry).

cost to the employer.[3] Second, in *Ansonia Board of Education v. Philbrook*, the Court held that any act to "reasonably accommodate" is sufficient to meet the obligation to accommodate.[4] In addition, the employee could refuse to consider other alternatives, which would be less onerous to employees.[5]

The proposed amendment would change the definition of undue hardship replacing it with the definition in the Americans with Disabilities Act (ADA).[6] The Americans with

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[3] Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977).

[4] Ansonia Bd. Of Educ. v. Philbrook, 479 U.S. 60, 68 (1986).

> We find no basis in either the statute [42 U.S.C. §2000e(j)] or its legislative history for requiring an employer to choose any particular reasonable accommodation. By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation. The employer violates the statute unless it 'demonstrates that [it] is unable to reasonably accommodate … an employee's … religious observance or practice without undue hardship on the conduct of the employer's business.'

Id.

[5] *Id*.

[6] The ADA's definition of undue burden is found at 42 U.S.C. §12111(10). The version that appears in the WRFA (H.R. 4237 §2(a)(4)) is as follows:

> For purposes of determining whether an accommodation requires significant difficulty or expense--
> (A) an accommodation shall be considered to require significant difficulty or expense if the accommodation will result in the inability of an employee to perform the essential functions of the employment position of the employee; and
> (B) other factors to be considered … shall include--
> (i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retraining or hiring employees or transferring employees from one facility to another, in relation to the size and operating costs of the employer;

Disabilities Act defines undue hardship as – an accommodation "requiring significant difficulty or expense."[7] Such an accommodation will not be deemed reasonable if it does not remove the conflict between employment requirements and the religious practice of the employee.[8]

The WRFA would also alter some other provisions to make it easier for plaintiffs to prevail on their religious discrimination claims against their employers.[9] Furthermore, despite its stated purpose of benefiting employees and employers alike,[10] primarily religious groups support

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> (ii) the number of individuals who will need the particular accommodation to a religious observance or practice; and
> (iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

H.R. 4237 §2(a)(4).

[7] *Id*.

[8] H.R. 4237 §2(b). This provision would be added as section (o)(2) of section 703 of 42 U.S.C. 2000e-2.

[9] H.R. 4237 §2(b) adds (o)(3) to Section 703, which states that an employer commits an unlawful employment practice if he "refuses to permit the employee to utilize leave of general usage to remove such a conflict solely because the leave will be used to accommodate the religious observance or practice of the employee." H.R. 4237 § 2(b). The bill also inserts section (o)(4), which disallows as a defense to a claim of unlawful employment practice that the

> accommodation would be in violation of a bona fide seniority system if, in order for the employer to reasonably accommodate such observance or practice…, an adjustment would be made in the employee's work hours…, shift, [including an adjustment that requires the employee to work overtime in order to avoid working at a time that abstention from work is necessary to satisfy religious requirements] or job assignment, that would not be available to any employee but for such accommodation.

Id.

[10] 145 CONG. REC. S11647 (daily ed. Sept. 29, 1999) (statement of Sen. Kerry). Senator Kerry in introducing the Act stated: "[I]n addition to protecting the religious freedom of employees, this legislation protects employers from an undue burden."

the WRFA. This may be one reason why Congress has not passed it.[11] Another possible reason for its failure is that the Act presents serious Establishment Clause issues while the congressional record concerning such issues is sparse.

Consequently, this note takes the position that passing the WRFA in its current form would upset the balance between employers and their religious employees. PART I of the note discuses the major amendment proposed by the WRFA which would overturn the two United States Supreme Court cases interpreting the requirements imposed on employers by Title VII of the Civil Rights Act of 1964. PART II of the note addresses the so-called "easy cases" of religious discrimination, primarily cases concerning hair, beard, or dress. These cases represent instances where the Act will have a benign effect. PART III examines the major inadequacies of the Act and the new results that might be reached by the courts if the Act were passed. Finally, PART IV discusses predictions in the area of religious discrimination law and suggests what employers could do to avoid litigation.

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[11] *See* 144 CONG. REC. E 4 (daily ed. Jan. 27, 1998)(statement of Rep. Goodling). Supporters of an earlier version of the bill

> include[d] a wide range of organizations including: American Jewish Committee, Baptist Joint Committee, Christian Legal Society, United Methodist Church, Presbyterian Church (USA), Southern Baptist Convention, Traditional Values Coalition, Seventh-Day Adventists, National Association of Evangelicals, National Council of the Churches of Christ, National Sikh Center, and Union of Orthodox Jewish Congregations.

Id.

PART I

The WRFA seeks to overturn two foundational Supreme Court cases because of their narrow interpretations of the term "undue hardship."[12] In the first case, *Trans World Airlines v. Hardison*, the Court interpreted undue influence to mean anything more than a *de minimis* cost.[13] In that case, Larry G. Hardison was employed by Trans World Airlines (TWA) to perform airplane maintenance in a department that operated 24 hours a day throughout the year. Hardison was subject to a seniority system in a collective-bargaining agreement between TWA and the International Association of Machinists & Aerospace Workers (union).[14] According to this agreement most senior employees had first choice for job and shift assignments as they became available.[15] In addition, the most junior employees were required to work when enough employees for a particular shift could not be found.[16] After he sought and was transferred to another department[17], Hardison had low seniority[18], and problems arose due to his refusal to work Saturdays.[19]

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[12] *See supra*, note 2 and accompanying text.

[13] Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977).

[14] *Id*. The seniority system is implemented by the union steward through a system if bidding by employees for particular shift assignments as they become available. *Id.* "The principals of seniority shall apply in application of this agreement in all reductions or increases of force, preferences of shift assignment, vacation periods selection, in bidding for vacancies or new jobs, and in all promotions, demotions and transfers." *Id.*

[15] *Id*.

[16] *Id*. at 67.

[17] *Id*. at 68. "In the spring of 1968, Hardison began to study the religion known as the Worldwide Church of God." *Id*. at 67. He was initially hired on June 5, 1967. *Id*. at 66-67.

[18] Hardison was second from the bottom of the list. Trans World Airlines v. Hardison, 432 U.S. 63, 68 (1977).

Hardison proposed to work only on four days but TWA rejected his proposal because "Hardison's job was essential," and leaving his position empty would impair functions "critical to airplane operations."[20] When no accommodation could be reached,[21] respondent was discharged for refusing to work Saturdays.[22]

Hardison then brought suit under Title VII, claiming that his discharge by TWA constituted religious discrimination in violation of 42 U.S.C. §2000e-2(a)(1).[23] His claim asserted that TWA failed to reasonably accommodate his beliefs based on 1967 EEOC

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[19] "TWA agreed to permit the union to seek a change of work assignments for Hardison, but the union was not willing to violate the seniority provisions set out in the collective-bargaining contract and Hardison had insufficient seniority to bid for a shift with Saturday off." *Id*.

> The District Court voiced concern that if it did not find an undue hardship in such circumstances, accommodation of religious observances might impose " 'a priority of the religious over the secular'" and thereby raise significant questions as to the constitutional validity of the statute under the Establishment Clause of the First Amendment.

Id. at 69 n.4 (quoting *Hardison v. Trans World Airlines*, 375 F.Supp. 877, 833 (W.D. Mo. 1974) (quoting Harry T. Edward & Joel H. Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 628 (1971)).

[20] *Id*. at 68.

[21] A transfer to the twilight shift proved unavailing since that schedule still required Hardison to work past sundown on Fridays. *Id*. at 69.

[22] *Id*. The stated ground for discharge was insubordination. *Id*.

[23] Trans World Airlines v. Hardison, 432 U.S. 63, 69 (1977). 4d U.S.C. § 2000e-2(a)(i) reads in pertinent part: It shall be an unlawful employment practice for an employer … to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's… religion…" 42 U.S.C. 2000e-2(a)(1).

guidelines and on section 701 of Title VII.[24] The District Court ruled in favor of TWA and the union.[25] However, the Court of Appeals disagreed, finding that TWA had rejected three reasonable alternatives, all of which would have satisfied its obligation.[26] Finally, the Supreme Court ruled in favor of TWA, stating that "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."[27] Furthermore, this decision would have also resulted in hardship to TWA employees, for instance, "to give Hardison Saturdays off, TWA would have to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath."[28]

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[24] The guidelines require employers " 'to make reasonable accommodations to the religious needs of employees' " whenever such accommodation would not work an 'undue hardship', *Hardison,* 432 U.S. at 69 (quoting 29 C.F.R. § 1605.1 (1968)). Similar language is found in , 42 U.S.C. 2000e(j)(190 ed. Supp. V), which requires the employer to "reasonably accommodate" an employee's religious practices unless doing so would cause the employer an "undue hardship." Hardison, 432 U.S. at 69.

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> TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII. It held several meetings with plaintiff at which it attempted to find a solution to plaintiff's problems. It did accommodate plaintiff's observance of his special religious holidays. It authorized the union steward to search for someone who would swap shifts, which apparently was normal procedure.

Hardison, 432 U.S. at 77 (quoting *Hardison v. Trans World Airlines*, 375 F. Supp. 877, 890-91 (W.D. Mo. 1974).)

"It is also true that TWA itself attempted without success to find Hardison another job. The district court's view was that TWA had done all that could reasonably be expected within the bounds of the security system." *Hardison,* 432 U.S. at 77.

[26] *Id*. at 76-77.

[27] *Id*. at 84.

[28] Trans World Airlines v. Hardison, 432 U.S. 63, 81 (1977).

The second case that the Workplace Religious Freedom Act seeks to overturn is the United States Supreme Court case, *Ansonia Board of Education v. Philbrook*[29]. The outcome of this case was also favorable to employers.[30] The case concerned Ronald Philbrook, who was a schoolteacher employed by the Ansonia Board of Education (Board) since 1962.[31] In 1968 he was baptized into the Worldwide Church of God, the tenets of which caused him to miss

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> Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities.... It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.
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> Our conclusion is supported by the fact that seniority systems are afforded special treatment under Title VII itself. Section 703(h) provides in pertinent part:
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> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system … provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin…." 42 U.S.C. § 2000e-2(h)…. Thus, absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences.

Id. at 81-82.

[29] *See supra*, note 4 and accompanying text

[30] .*Id*.

[31] Ansonia Bd. Of Educ. v. Philbrook, 479 U.S. 60, 62 (1986).

approximately six school days per year.[32] The collective bargaining agreement, however, allowed only three paid days off for mandatory religious observances.[33] Until the 1976-1977 year, Philbrook observed all of his holy days by taking unauthorized leave when necessary, which resulted in a reduction of his salary.[34] After he became dissatisfied with these arrangements,[35] Philbrook asked the Board to adopt one of two alternatives, both of which the board consistently rejected.[36]

Although the Court did not reach the issue of whether the board's leave policy constituted a reasonable accommodation,[37] a scheme was clearly established whereby a plaintiff could proceed on his religious discrimination claim. A plaintiff alleging religious discrimination bears the initial burden of proving a *prima facie* case of discrimination.[38] Once the plaintiff establishes

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[32] *Id*. at 62-63. The Worldwide Church of God requires its members to refrain from working on designated holy days. *Id*.

[33] Notably, the collective bargaining agreement between the teachers and the Board provided three days' annual leave for the observance of mandatory religious holidays, and the use of up to three days accumulated leave each year for "necessary personal business." However, an employee already absent three days for mandatory religious observances could not later use accumulated personal leave for other religious activities. *Id*. at 63-64.

[34] *Id*. at 64

[35] Philbrook observed mandatory holy days by using three (3) days granted in the contract as by taking unauthorized leave. *Id*. Philbrook stopped taking leave for religious reasons and instead, either scheduled required hospital visits on church holy days or worked those days. *Id*.

[36] Philbrook asked the Board to allow the use of personal business leave for religious observance, or to allow him to pay the cost of a substitute while he received full pay for his extra religious observances. *Ansonia Bd. Of Educ. v. Philbrook*, 479 U.S. 60, 64-65 (1986).

[37] *Id*. at 70.

[38] Specifically, the plaintiff must show that "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed her employer of this belief; [and] (3) he or she was disciplined for failure to comply with the conflicting employment requirement." *Id*. at 65-66 (internal quotes omitted).

his case, the burden shifts to the employer, who must show that either it made reasonable accommodations, or it could not make reasonable accommodations without undue hardship on the conduct of its business.[39] However, "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry comes to an end."[40] Thus, the Court essentially held that an employer, having offered its own reasonable accommodation, could refuse to consider or accept other alternatives, although they might be less onerous to employees.[41]

Hardison and *Philbrook* thus limited workplace religious discrimination claims by narrowing the scope of claims that could prevail. Nonetheless, other recent United States Supreme Court cases interpreting Title VII have expanded the possibilities for successful religious discrimination claims.[42] Under these cases, the employee has a claim of religious discrimination or harassment when there is either (1) a tangible employment action,[43] or (2) when the discrimination becomes "severe and pervasive."[44]

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[39] Ansonia, 479 U.S. 60, 68 (1986).

[40] *Id*.

[41] Ansonia Bd. Of Educ. v. Philbrook, 479 U.S. 60, 68 (1986).

[42] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993). Although both are sexual harassment cases, subsequent religious discrimination cases have been analyzed under the frameworks of these cases. *See, e.g.* Venters v. City of Delphi, 123 F.3d 956, 975 (7th Cir. 1997)(citing Harris); Rorie v. United Parcel Serv., Inc., 151 F.3d 757, 762 (8th Cir. 1998).

[43] A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Ellerth*, 524 U.S. at 761.

Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act

In *Burlington Indus., Inc. v. Ellerth*, the Court discussed whether a private employer could be held vicariously liable for a hostile work environment created by a supervisor.[45] In the absence of a tangible employment action, the Court held that a plaintiff could show the existence of a hostile environment if the discrimination is "severe or pervasive" as described in another Supreme Court case, *Harris v. Forklift*.[46] Accordingly, these cases have expanded the employee's ability to proceed on religious discrimination claims, whereas before they could proceed only where there was a tangible employment action. Subsequently, the need for the WRFA has been lessened in this respect.

Despite the fact that plaintiffs now have more grounds upon which to pursue their religious discrimination claims, the WRFA will make it even easier for them to prevail. The Act will overturn *Hardison*[47] and *Philbrook*[48] as it broadens the term "undue hardship."[49] Under the

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of the enterprise, i.e., a company act. The decision in most cases is documented in official company records and may be subject to review by higher-level supervisors. *Id*. at 762.

[44] *Infra* note 45.

[45] "An employer is subject to vicarious liability to a victimized employee" but can raise an affirmative defense "that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior" and "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities." *Ellerth* 524 U.S. at 765.

In a case similar to *Ellerth*, decided on the same day (June 26, 1998), the Court held a municipal employer liable for a supervisor's offensive conduct. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[46] The language of 42 U.S.C. § 2000e-2(a)(1) is not limited to economic or tangible discrimination, but "includes requiring people to work in a discriminatory hostile or abusive environment." . . . 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," Title VII is violated. Harris v. Forklift, 510 U.S. 17, 21 (1993)(citing Meritor Sav. Bank, FSB. V. Vinson, 477 U.S. 57 at 65 (1986)).

[47] Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977).

new construction, undue hardship would mean an accommodation requiring significant difficulty or expense,[50] which would likely lead to different results in many cases.

In evaluating the difficulty or expense of an accommodation, an undue burden will be found if the accommodation would result in the inability of an employee to perform the essential functions of the job.[51] Other factors are also to be considered including the identifiable cost of the accommodation[52] and the number of individuals who will need the particular accommodation.[53]

In addition, the Act reasonably makes an accommodation less burdensome on employers. They will not have to pay overtime or premium wages to an employee if work is performed outside the traditional workweek solely because of the accommodation.[54]

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[48] Ansonia Bd. Of Educ. v. Philbrook, 479 U.S. 60, 68 (1986).

[49] *Supra* note 6.

[50] *Id.*

[51] H.R. 4237, 106th Cong. § 2(a)(3)(A)(2000).

[52] The identifiable costs include the costs of loss of productivity and of retraining or hiring employees or transferring employees from one facility to another, in relation to the size and operating costs of the employer. H.R. 4237, 106th Cong. § 2(a)(3)(B)(i)(2000).

[53] H.R. 4237, 106th Cong. § 2(a)(3)(B)(ii)(2000).

[54] According to the Act:

> (A) An employer shall not be required to pay premium wages or confer premium benefits for work performed during hours to which such premium wages or premium benefits would ordinarily be applicable, if is work performed during such hours only to accommodate religious requirements of an employee.
> (B) As used in this paragraph:
> (i) the term 'premium benefit' means an employment benefit, such as seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, an educational

Despite this aspect, the WRFA is heavily weighted in favor of employees. The WRFA will definitely have an effect on the field of religious discrimination law. By raising the standard as to what constitutes an undue hardship, the Act will increase the number of plaintiffs who are successful in their religious discrimination claims. If passed, the Act's new definition of undue burden will undoubtedly lead to unacceptable results as discussed in Part III.

PART II

The WRFA should not be passed because it will have a benign effect with respect to the intent of the statute. According to the legislative history, the principal intent of the Act is to allow devout employees to take their holy days off and to allow them the right to wear religious clothing at work.[55] Even a sponsor of the Act noted, however, that the failure of employers to

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> benefit, or a pension, that is greater than the employment benefit due the employee for an equivalent period of work performed during the regular work schedule of the employee; and
> (ii) the term 'premium wages' includes overtime pay for night, weekend, or holiday work, and premium pay for standby or irregular duty.

H.R. 4237, 106th Cong. § 2(a)(5)(2000)

[55] In his introduction to S. 1668, Senator Joseph Lieberman (D-CT) stated: "Whether by being forced to work on days their religion requires them to refrain from work or by being denied the right to wear clothing their faith mandates they wear, too many Americans are facing an unfair choice between their job and their religion." 145 CONG. REC. S11640-04.

Similarly, Senator John Kerry noted: "I have heard accounts from around the country about a small minority of employers who will not make reasonable accommodation for employees to observe the Sabbath and other holy days or for employees who must wear religiously-required garb, such as a yarmulke, or for employees to wear clothing that meets religion-based modesty requirements." *Id.*

offer reasonable accommodations is "not a common problem."[56] Furthermore, both the courts and the Equal Employment Opportunity Commission (EEOC) have already been deciding cases correctly,[57] thus making passage of the Act unnecessary.

A. The Easy Cases: Hair, Beard or Dress

The Act is unnecessary for a number of reasons. For example, in those cases dealing with conflicts due to hair, beard, or dress, the decisions have generally been favorable to employees, since accommodation usually comes at no cost to the employer. Moreover

> [t]he U.S. Equal Employment Opportunity Commission (EEOC), which enforces Title VII, has taken the position that it is unlawful for employers to fail to accommodate the religion-oriented dress and grooming practices of employees or prospective employees, unless such employers can demonstrate that accommodation would result in undue hardship on the operation of its business.[58]

In grooming cases dealing with long hair or beards, the employee is likely to prevail. For example, a Native American correctional officer succeeded on his claim that his employer

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[56] Representative William F. Goodling (R-PA), sponsor of an earlier version of the Act (H.R. 2948, 105th Cong. (1997) remarked: "The version of the WRFA that I introduce today is intended to reflect my concern with the instances of employers unreasonably refusing to accommodate the religious needs of workers. *This is not a common problem* (emphasis added), but it is still a serious one." 144 CONG. REC. E 4. *See also* Senator Kerry's statement *supra* note 55 with respect to the number of problematic employers.

[57] Perhaps this is because the reasonableness of an employer's accommodation attempts is viewed by the Equal Employment Opportunity Commission on a case-by-case basis. Smith v. Pyro Mining, Co., 827 F.2d 1081. 1085 (6th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988)

[58] *Quoting* Eric Matusewitch, *Employee Challenges to Religion-Based Dress Increase*, 12 NO. 8 ANDREWS EMPLOYMENT LITIG. REP. 3 (1998), *available at* WESTLAW, 12 No. 8 ANEMPLR 3, citing (*Religious Oriented Dress and Grooming*, EEOC COMPLIANCE MANUAL (CCH), VOL. 2, SEC. 628.9).

violated his right to free exercise of religion when it terminated him for refusing to cut his hair, which he wore long for religious purposes.[59]

Similarly, in *Carter v. Bruce Oakley, Inc*., a Jewish believer was fired after he refused to cut his beard for religious reasons.[60] The plaintiff met the burden laid out in *Philbrook* but the employer could not prove that it caused him undue hardship.[61]

Nonetheless, it is possible for an employer to assert a legitimate defense to such a religious discrimination claim. If the employer in *Carter* had proven that the no-beard policy was in effect for safety reasons, he would have successfully defended against the claim.[62] That was the case in *Bhatia v. Chevron*, where the court found that it is not a violation of Title VII to transfer a Sikh machinist who refuses to shave his beard to another position. [63]

In *EEOC v. Electronic Data Systems*, a plaintiff was fired from his job as a computer programmer for violating a corporate grooming policy by growing a beard, which he was required to do to fulfill his religious duty after he converted to Judaism.[64] The court found that the employer had made no showing that the employee's practice could not be accommodated, and thus found for the employee.[65]

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[59] The tenets of his Mohawk faith prohibited him from trimming his locks. Rourke v. New York State Dep't of Correctional Servs., 615 N.Y.S.2d 470 (N.Y. App. Div. 1994).

[60] Carter v. Oakley, 849 F. Supp. 673 (E.D. Ar. 1993).

[61] The employer's defense that the "no-beard" policy was a tradition started by his father did not justify his refusal to accommodate. *Id.* at 675-76.

[62] *Id.*

[63] Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382 (9th Cir. 1984).

[64] EEOC v. Elec. Data Systems, 1983 U.S. Dist. LEXIS 19293 (W.D. Wash. 1983).

[65] *Id.*

Furthermore, taking a tangible employment action against an employee cannot be justified based on presenting a company image. In *EEOC v. UPS*, the Court of Appeals reversed the District Court's grant of summary judgment to an employer who had a policy of excluding persons with beards from work involving public contact.[66]

Domino's Pizza encountered trouble in 1996 when it refused to hire a bearded Sikh applicant due to Domino's strict grooming code, which barred its workers from wearing beards because hair might get into pizzas. The applicant offered to wear a hair net over his beard, but the employer still refused to hire the man.[67] The appeals board ordered Domino's to revise its no-beard policy and ordered the applicant be offered a position and given back pay.[68]

Garb cases are dealt with in a manner similar to beard cases, unless accommodating an employee's dress would prove costly to the company. Such was the case in *EEOC v. Heil-Quaker Corp.*[69] In *Quaker*, the court held that accommodating an employee's religious belief that women should wear skirts was not required at a manufacturing company because the costs of increased safety hazards would cause the employer an undue burden.[70]

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[66] EEOC v. UPS, 94 F.3d 314 (7th Cir. 1996)(holding that employer offering bearded employee a comparable job not involving public contact was not a reasonable accommodation).

[67] Appeals Board of the Maryland Human Relations Commission , In the Matter of: Prabhjot S. Kohli v. LOOC Inc. d/b/a/ Domino's Pizza, Decision and Order No. E288-C 1781-RL 828, Jan. 17, 1996.

[68] *Id.*

[69] EEOC v. Heil-Quaker Corp., 55 FEP Cases (BNA) 1895 (MD TN 1990).

[70] Undue hardship to the employer would have consisted of increased safety hazards, corresponding risk of employer liability, increased costs of workers' compensation, and decreased employee morale. *Id*.

Also, pursuant to an arbitration ruling, a woman was demoted for refusing on religious grounds[71] to replace the surgical gowns she normally wore with more sanitary garb in the form of pants.[72] "The grievant, however, was given an opportunity to design an outfit that would satisfy both her religious needs and the hospital's sanitation requirements."[73]

Nonetheless, in the standard cases concerning a religious employee's dress, safety is not an issue; therefore courts tend to rule in favor of the employee. Such was the case where an employer discharged a Muslim woman for wearing an ankle-length dress that was required by her religion.[74] The company's reason for discharging the woman was that the her dress did not conform to its standards of "conduct and appearance."[75] The EEOC ruled in her favor.[76]

In another case involving a Muslim employee, no compelling reason could be offered for an employer's failure to accommodate the employee's dress.[77] The employer prevented the Muslim security guard from wearing an Islamic pin in order avoid public confusion of private

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[71] The woman believed that women were not to dress like men. She cited DEUTERONOMY 22:5: "A woman shall not wear anything that pertains to a man, nor shall a man put on a woman's garment, for whoever does these things is an abomination to the Lord your God." *Hurley Hospital*, 78-1 ARB 8266 (1978) (Roumell, Arb.).

[72] Pants had replaced the gown on the basis of journal articles suggesting that they would minimize horizontal fallout of shedding skin, which could lead to infections. *Id*.

[73] Eric Matusewitch, *Employee Challenges to Religion-Based Dres*s Increase, 12 NO. 8 ANDREWS EMPLOYMENT LITIG. REP. 3 (1998), available in WESTLAW, 12 No. 8 ANEMPLR 3.

[74] The EEOC found a violation of Title VII because it occasionally permitted other employees to wear unusual or attention-getting clothing (such as miniskirts) and it offered no evidence that its conservative dress policy was necessary to the safe and efficient operation of its business. EEOC decision No. 76-2620 (1971).

[75] *Id.*

[76] *Id.*

[77] Karriem v. Oliver T. Carr Co., 1985 U.S. Dist. LEXIS 17278 (DDC 1985).

security guards with local police.[78] The pin, however, bore no resemblance whatsoever to the local police badge.[79]

Consider also a case involving an "Old Catholic" whose religion required her to completely cover her head at all times.[80] She was hired as a nurse by the defendant hospital and later told that she would have to wear a nursing cap instead of the close-fitting scarf that she had previously worn and which covered all her hair.[81] The EEOC deemed it a violation of Title VII, finding that the hospital had not demonstrated that the closely wrapped scarf would be less sanitary than the nurse's cap.[82]

B. The Duty to Make Reasonable Accommodations

As the aforementioned cases illustrate, the WRFA is not necessary in these circumstances. When these kinds of cases arise in the future, the Act will have no effect as courts generally seem to reach the correct results. Nonetheless, this is not the only situation in which the WRFA attempts to codify already-existing practice. The Act states "an accommodation by the employer shall not be deemed to be reasonable if such accommodation does not remove the conflict between employment requirements and the religious observance or

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[78] *Id.*

[79] *Id.*

[80] EEOC Decision No. 71-779 (1970).

[81] *Id.*

[82] *Id.*

practice of the employee."[83] Under this provision then, failing to make any accommodation would be unreasonable. However, courts have long recognized that an employer must make some accommodation for its religious employees.[84] Furthermore, employers bear the burden of accommodation,[85] and the employers must either make reasonable efforts when asked to accommodate an employee's religious beliefs or practices or demonstrate that they could not do so without undue burden.[86] The obligation to accommodate is a continuing one.[87] Therefore,

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[83] H.R. 4237 § 2(b)(o)(2). The following are cases illustrative of this point:

In *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1576 (7th Cir. 1997), an offer by an employer to give employees who wanted to take Yom Kippur off a day other than Yom Kippur was not a reasonable accommodation.

In *Cooper v. Oak Rubber Co.*, 15 F.3d 1375 (6th Cir. 1994), an employer offered an employee the option of trading the Saturday day shift for the Friday night shift although the employee requested to not work from sunset Friday to sunset Saturday. The court held that an employer does not fulfill its accommodation obligation when confronted with two religious objections, if it offers an accommodation that completely ignores one. *Id.* at 1379 (citing EEOC v. Univ. of Detroit, 904 F.2d 331, 335 (6th Cir. 1990).).

[84] As early as the *Hardison* case (1977), the Court recognized an employer's duty to accommodate. Trans World Airlines v. Hardison, 432 U.S. 63 (1977). Speaking of § 701(j), 42 U.S.C. § 2000e(j), the Court stated that "The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Hardison*, 432 U.S.at 74.

[85] "Although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer." Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146 (5th Cir. 1982).

[86] "[T]he employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship is clear, but the reach of that obligation has never been spelled out by Congress or by EEOC guidelines." Hardison, 432 U.S. at 75.

[87] "[E]arlier efforts at adequate accommodation will not excuse a subsequent failure to attempt to accommodate an employee's religious beliefs when circumstances have changed." Boomsma v. Greyhound Food Mgmt., Inc., 639 F. Supp. 1448, 1453 (W.D. Mich. 1986)(citing Draper v. United States Pipe and Foundry Co., 527 F.2d 515, 519 (6th Cir. 1975)).

the Act would have no effect in cases where an employer has not attempted to provide any accommodations, where the accommodations provided are unreasonable, or where accommodations are made after discrimination has already taken place.

Courts have recognized the principle that employers must attempt to accommodate the religious observances or practices of an employee. In *Anderson v. General Dynamics,*[88] the Ninth Circuit Court of Appeals found that neither Anderson's employer nor the union offered any accommodation.[89] Based on these facts, the court held that the employer and union failed to carry their burden, and ruled in favor of the plaintiff.[90]

Also, consider the recent *Sears* case where no accommodations were made to a potential employee with religious convictions.[91] Sears refused to accommodate a Jewish repairman by accepting his offer to work Sundays and evening hours due to his Saturday Sabbath.[92] Sears

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[88] Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397 (9th Cir. 1978).

[89] After Anderson established his prima facie case of discrimination, "[t]he burden was thereafter upon General Dynamics and the Union to prove that they made good faith efforts to accommodate Anderson's religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship." *Id*. at 401.

[90] "The burden was on upon the appellees, not Anderson, to undertake initial steps toward accommodation. They cannot excuse their failure to accommodate by pointing to deficiencies, if any there were, in Anderson's suggested accommodation." *Id.*

[91] Debbie N. Kaminer, *When Businesses and Employees' Religion Clash*, N.Y.L.J., July 21, 2000, at 1 (*citing* Spitzer v. Sears, Roebuck and Co., Agreed Final Judgment, N.Y. Sup. Ct. Kings County (April 4, 2000)).

[92] Sears refused Katz's offer to work on Sundays or evenings instead of Saturdays, claiming that Saturdays were the company's busiest days. Later it was determined that Tuesday, in fact was the Sears' busiest day. *Id.*

settled the case with the New York Attorney General's office, but the company's failure to accommodate was extremely costly.[93]

The Sixth Circuit Court of Appeals has also found the failure of an employer to offer an accommodation unreasonable. In *Smith v. Pyro Mining Co.*,[94] Smith, a mechanic and member of the Independent General Baptist Church, repeatedly requested off on his Sabbath, which was Sunday.[95] Smith was scheduled for Sundays nonetheless. However, he did not follow company policy which allowed him to seek out and arrange shift swaps.[96] After two unexcused absences, Smith asked two other employees to swap for his next Sunday shift.[97] These attempts were unsuccessful, and "Smith then decided that it was wrong for him personally to ask someone to swap with him since he was, in effect, asking that person to sin."[98] Following his third

[93] Under the settlement, Sears must hire Mr. Katz and four other complainants, pay their legal fees, and provide them with back pay. Sears must also train its personnel on the law of religious accommodation and pay the American Law Institute $225,000 to fund additional training programs. Furthermore, Sears must pay the attorney general's office $100,000 for the cost of the investigation and establish 10 scholarships for Sabbatarians to attend technical training schools. *Id*.

[94] Smith v. Pyro Mining, Co., 827 F.2d 1081 (6th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988).

[95] *Id*. at 1083.

[96] If an employee could not find a substitute, under Pyro's Open Door Policy, "an employee who had a work-related grievance or other problem [could] personally present the matter first to his supervisor and then up the chain of command to the president of Pyro, if necessary, to resolve the problem." *Id*. at 1083.

[97] *Id*. at 1084.

[98] *Id*. Although Smith refused to arrange a swap for himself, he "was willing to work in a swap arranged by the company." *Id*. This author questions whether compelling another to do what Smith could not do himself is also a sin.

unexcused absence, Smith was discharged.[99] Approving the district court's decision, the Sixth Circuit Court of Appeals held that "Pyro could have reasonably accommodated Smith by simply placing a notice in the [company] newspaper or on a bulletin board that a replacement was needed for him."[100] The court thus found that the company policy alone was not a reasonable accommodation.[101] Furthermore, by failing to carry its burden in offering an accommodation, which was the "entire burden"[102] in this case, the employer unlawfully discriminated against its religious employee.

Likewise, in *EEOC v. Ithaca Industries, Inc.*,[103] the Fourth Circuit Court of Appeals found in favor of a member of the Church of God after determining that no attempts at accommodation had been made.[104] In this instance, Ithaca Industries knew of its employee's

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[99] Smith v. Pyro Mining, Co., 827 F.2d 1081. 1084 (6th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988)

[100] *Id*. at 1089.

[101] However, compare this to *Cowan v. Gilless*, 1996 U.S. App. LEXIS 10107, at *3 (6th Cir. Mar. 29, 1996), where nine years later, the Sixth Circuit Court of Appeals found that "the defendant met his initial burden of showing an absence of evidence to support Cowan's claim, after he presented evidence that he reasonably accommodated Cowan's religious beliefs." *But see* 42 U.S.C. § 2000e(j); Pyro Mining Co., 827 F.2d at 1085. Cowan's employer permitted her to secure a substitute for her shift any time she was scheduled to work on her Sabbath Day. She was permitted to use the employer's bulletin board to notify co-workers of her interest in swapping shifts, when necessary. This policy was sufficient to meet the employer's accommodation obligation under Title VII. Cowan, 1996 U.S. App. LEXIS 10107, at *3.

[102] "[T]he majority erroneously imposes upon the employer the entire burden of reasonably accommodating every religious preference of its employees in a manner prescribed by or acceptable to the employee." Pyro Mining Co., 827 F.2d at 1090 (Krupansky, J., dissenting).

[103] EEOC v. Ithaca Indus., Inc., 849 F.2d 116 (4th Cir. 1988).

[104] Dannel Dean worked for Ithaca Industries for four years with no conflicts because the company did not operate on Sundays. When the company did begin to operate on Sundays Dean gave notice to his supervisor, Cain, that he could not work on that day because of his beliefs. After failing to show on two scheduled Sundays, Dean was discharged. *Id.* at 117.

religious beliefs but failed to find replacements for him[105] or even allow him to post notices seeking replacements on the company's bulletin board.[106]

The failure to accommodate will also be found unreasonable if no attempt at accommodation is made by the employer on account of the potential but unsubstantiated effect of the accommodation on other employees. This was the situation in *Opuku-Boateng v. California,*[107] where a Seventh Day Adventist was denied appointment to a permanent position due to his refusal to work on his Sabbath.[108] Although Opuku-Boateng offered to be accommodated in various ways,[109] his employer failed to offer any accommodation and decided, without sufficiently investigating the matter,[110] that any accommodation would cause an undue

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[105] "At the trial, several employees testified that they would have been available to work on March 18 and April 1 in Dean's place if they had been asked. However, Cain did not contact any of those employees to see if they would work for Dean." *Id.* at 118.

[106] The company did not utilize the bulletin board or nor did it allow its employees to use it. *Id*. at 119.

[107] Opuku-Boateng v. California, 95 F.3d 1461 (9th Cir. 1996).

[108] *Id.* at 1464.

[109] "Opuku-Boateng offered to work undesirable non-Sabbath shifts (i.e., Sundays, nights and holidays) in place of the Sabbath assignments he would ordinarily receive; to trade shifts with other employees; or to transfer to another station or another position within the Department." *Id*. at 1465-66.

[110] The state did conduct "a poll of the staff to determine whether voluntary trading of shifts to accommodate Opuku-Boateng would be feasible." *Id*. at 1466. However, the court "seriously question[ed] the materiality and reliability of the poll conducted by the State, and [found] a total absence of guarantees of trustworthiness." *Id*. at 1471 n.18.

burden to the other employees. The Ninth Circuit Court of Appeals found that accommodation would have caused only a *de minimis* cost.[111]

Notably, the court also held that "[w]here the negotiations do not produce a proposal by the employer that would eliminate the religious conflict, the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do so."[112] Accordingly, in similar cases the WRFA would cause little deviation from the results currently being reached.

Also, it is unlikely that the WRFA will have an effect on other cases where the employer has engaged in religious discrimination and then only afterwards offered accommodations to the employee. In cases of this type, the employee has generally been successful. For example, in *Toledo v. Nobel-Sysco, Inc.*,[113] the Tenth Circuit Court of Appeals found that settlement offers made during administrative proceedings do not qualify as reasonable accommodations for purposes of Title VII.[114] Nobel-Sysco initially declined to hire Toledo because of his religious

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[111] "[A]ll employees … were required to work 'an equal number of undesirable weekend, holiday, and night shifts.' So long as Opuku-Boateng worked that equal number of 'undesirable shifts,' being assigned a holiday, Sunday, or night shift for every shift he missed to observe the Sabbath, he would not have been granted any preferential treatment, nor would any cognizable burden have been imposed on other employees who simply were assigned one undesirable shift instead of another." *Id*. at 1470.

[112] Opuku-Boateng v. California, 95 F.3d 1461, 1467 (9th Cir. 1996) (citing EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 615 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).).

[113] Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990).

[114] Id. at 1483-84.

use of peyote but later offered to hire him with insufficient accommodations after legal action was threatened.[115]

Similarly, in *Boomsma v. Greyhound Food Management, Inc.*,[116] the United States District Court for the Western District of Michigan ruled against an employer who first engaged in discrimination and then later offered accommodations.[117] Boomsma had been transferred to a position that conflicted with his Sabbath.[118] He sought to secure a replacement but his supervisor rejected his proposed substitution.[119] After suspending Boomsma for failing to appear,[120] Greyhound Food then agreed to allow plaintiff to return to work and find his own substitutes.[121]

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[115] Toledo, as a member of the Native American Church, used peyote as part of church ceremonies. After he informed the office manager that he had used peyote, Nobel-Sysco refused to hire him because of the potential liability they might be exposed to if Toledo were in an accident while driving for the company. *Id*. at 1484. Toledo then filed an employment discrimination claim that prompted two offers from Nobel-Sysco, but because each would have required Toledo to drop his claim, he rejected them. *Id*. at 1485.

[116] Boomsma v. Greyhound Food Mgmt., Inc., 639 F. Supp. 1448 (W.D. Mich, 1986).

[117] *Id*. at 1056.

[118] Boomsma, as a member of the Christian Reformed Church, was forbidden to work Sundays. From October 28, 1968 to February 23, 1977, Boomsma worked at the Diesel Equipment Division plant and was always able to find substitutes when needed. However, he was then transferred to the Fisher Body No. 1 plant, where he was one of only three persons in his job category. Although the other two coworkers accommodated plaintiff on some occasions, on others it appears they invoked their contractual rights not to work. *Id*. at 1449-51.

[119] Boomsma "asked [his supervisor] Mr. Throop if he could secure his own replacement…. The parties stipulated that Mr. Throop was not agreeable to this suggestion. Plaintiff testified without contradiction that Mr. Throop explicitly stated that he would not allow a replacement." *Id*. at 1451.

[120] After his second absence, Boomsma was suspended without pay. After his third, he was suspended pending resolution of the problem. *Id*.

[121] Boomsma was suspended on September 12, 1977 and almost one year later, on August 8, 1978, his employer offered to allow him to resume work without compensation for time lost, and

The court, however, found that Greyhound Food did not reasonably accommodate and "made no effort to explore the voluntary substitution alternative before it disciplined plaintiff for refusing to work on Sundays."[122]

Thus, as the aforementioned cases illustrate, the WRFA will be ineffectual in many cases of religious discrimination. The sponsors' intent to allow religious employees to have freedom with respect to their hair, beard or dress is moot since the courts and the EEOC have long recognized this right of employees. Furthermore, the duty to reasonably accommodate is part of the foundation of religious discrimination law and does not need clarification[123] by the WRFA, which, to the contrary, would muddle this area of law.

PART III

In addition to being moot in intended areas, the Workplace Religious Freedom Act will cause various new problems as it fails to address others. First, the Act would have a substantial negative effect on coworkers, a group not contemplated by the WRFA. Second, the WRFA would also give accommodations for religious beliefs priority over seniority systems. Finally,

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would allow him to find his own replacement. Boomsma v. Greyhound Food Mgmt., Inc., 639 F. Supp. 1448, 1452 (W.D. Mich, 1986).

[122] *Id*. at 1456. The court also found that the willingness of the two coworkers to cover Boomsma's shifts could not be attributed to the defendant's attempt at accommodation. Likewise, the employer did not establish that a summer substitute who apparently covered some of Boomsma's Sunday assignments was hired in an effort to accommodate the him. *Id*. at 1454.

[123] Senator Kerry remarked in his introduction of S. 1668 that "[W]e have little doubt that this bill is constitutional because it simply *clarifies* [emphasis added] existing law on discrimination by private employers, strengthening the required standard for employers." 145 CONG. REC. S11647 (daily ed. Sept. 29, 1999)(statement of Sen. Kerry) (emphasis added). But how can the bill both clarify existing law *and* strengthen the standard for employers? Apart from constitutional concerns, the bill undoubtedly strengthens existing standards for employers, but it certainly does not clarify the law. *See infra* PART III.

the Act fails to address issues relating to proselytizing and could have a negative impact on civil rights. If passed, the Act will upset the existing balance between employers, employees and coworkers and could force results that differ dramatically from those currently reached.

A. The Effect on Coworkers

Most notably, the WRFA fails to take into account the effect of accommodation on the coworkers of a religious employee alleging discrimination. Although the Act aims to allow Sabbatarians to be free from the scheduling conflicts they often face, the cases show that such freedom necessarily comes at the expense of other employees, if not simultaneously at the expense of the employer.[124] Another difficulty in this area is that the law regarding the effects on coworkers is less clear than that pertaining to the burden on the employer. The employer need show only a *de minimis* cost, whereas a "significant discriminatory impact" is the necessary threshold to constitute undue burden on a plaintiff's coworkers.[125]

Nonetheless, despite Justice Marshall's belief that preferential treatment of religious observers could be consistent with the First Amendment,[126] the WRFA goes far beyond what is

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[124] *See, e.g.,* Wilson v. U.S. West Communications, 58 F.3d 1337 (8th Cir. 1995).

[125] "[A]n employer may also show hardship on the plaintiff's coworkers. It is less clear what type of impact on coworkers, apart from a significant discriminatory impact, constitutes an undue hardship." *Opuku-Boateng*, 95 F.3d at 1468.

[126] Justice Marshall wrote in his dissent that the *Hardison* Court "ultimately notes that the accommodation would have required 'unequal treatment' … in favor of the religious observer. That is quite true. But if an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute [§ 703 (a)(1) of 42 U.S.C. § 2000e-2(a)(1)], while brimming with 'sound and fury,' ultimately 'signif[y] nothing.' " Trans World Airlines v. Hardison, 432 U.S. 63, 87,91 (1977) (Marshall, J., dissenting).

constitutionally acceptable by giving preference to religious employees to the detriment of their coworkers.

A frequently cited religious discrimination case involving the effects on coworkers is *Wilson v. U.S. West Communications*.[127] The case concerned a Catholic information specialist who was opposed to abortion, and wore a button and a T-shirt with photographs of a fetus about which other employees complained.[128] After complaints from various employees and work disruptions, Wilson was offered three options, before she would be sent home.[129] However, pending an investigation into the matter, Wilson was allowed to continue working, at which time other employees filed grievances.[130] Wilson was eventually fired, which she alleged constituted religious discrimination.[131] The court, however, held in favor of U.S. West.[132] Despite an

[127] Christine Wilson made a vow "that she would wear an anti-abortion button 'until there was an end to abortion or until [she] could no longer fight the fight.' The button was two inches in diameter and showed a color photograph of an eighteen to twenty-week old fetus. . . . She wore the button at all times, unless she was sleeping or bathing. She believed if she took the button off she would compromise her vow and lose her soul." 58 F.3d 1337, 1339 (8th Cir. 1995).

[128] *Id.* at 1339.

[129] Employees gathered to talk about the button which U.S. West saw as a "time-robbing problem," and even Wilson acknowledged that the button caused a great deal of disruption. Wilson's supervisors offered her three options: (1) wear the button only in her work cubicle, leaving the button in the cubicle when she moved around the office; (2) cover the button while at work; or (3) wear a different button with the same message but without the photograph. *Id*.

[130] Other information specialists refused to go to group meetings with Wilson present because the button made them uneasy. Two employees filed the grievances against one of Wilson's supervisors, accusing her of not resolving the button action to their satisfaction. *Id*.

[131] U.S. West sent Wilson home when she returned to work wearing the button and fired her for missing work unexcused for three consecutive days. *Id*. at 1340.

[132] The Eight Circuit affirmed the district court's finding that Wilson's beliefs did not require her to wear the button. The court also reiterated "that Title VII does not require an employer to allow an employee to impose his religious views on others. The employer is only required to

allegation that the court improperly dissected Wilson's beliefs,[133] it is likely that the 40% decrease in productivity that U.S. West experienced[134] was an undue burden under Title VII, since it imposed more than *de minimis* costs on the employer. Yet, if the case were decided under the WRFA, it is not clear whether the decrease in productivity would be a significant difficulty or expense that would constitute an undue burden. The employer therefore might be forced to accommodate the religious employee despite existing employer and coworker hardships.

Other cases have also noted the problem of religious accommodation and its adverse effects on employees. In *Bynum v. Fort Worth Indep. Sch. Dist.*, a JROTC instructor, who was also a, Seventh Day Adventist, did not perform all the duties expected of him resulting in a negative affect on his coworkers.[135] Although, two of his coworkers accommodated Bynum's religious practices over the course of a year, they eventually became dissatisfied with the

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reasonably accommodate an employee's religious views." Wilson v. U.S. West Communications, 58 F.3d 1337, 1340, 1342 (8th Cir. 1995).

[133] "The court held in quite illegitimate exercise of second-guessing, that the plaintiff's religious beliefs did not really require her to wear the button in front of other employees. The court also suggested that forcing the employer to allow the button would go beyond requiring a reasonable accommodation because the button had offended other employees and disrupted their work." Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J.L. & PUB. POL'Y 959, 978-79 (1999).

[134] It is apparent that the employees of U.S. West were more than offended. In fact, due to the disruptions and the co-workers refusal to attend meetings with Wilson, one of Wilson's supervisors "noted a 40% decline in productivity of the information specialists since Wilson began wearing the button." Wilson, 58 F.3d at 1339.

[135] As a Seventh Day Adventist, Bynum's religious tenets prevented him from working from sunset Friday to sunset Saturday. However, Bynum was told his job duties as JROTC instructor would require work during that period. In fact, 40% of Bynum's job responsibilities involved participation in activities that occurred Friday nights and Saturday afternoons. Bynum v. Fort Worth Indep. Sch. Dist., 41 F. Supp. 2d 641, 643-48 (N.D Tex 1999).

arrangements - because they were not compensated for them.[136] Following a poor performance evaluation due to his failure to attend necessary functions that conflicted with his religion, Bynum was decertified and then terminated.[137] The court, in deciding against the plaintiff, found that accommodating his religious practices against the wishes of his coworkers would have been unreasonable.[138]

Nonetheless, the WRFA could lead to different results in favor of religious plaintiffs. Different results would be likely because the Act would substantially enlarge the duty of employers to accommodate their religious employees, which would impose greater demands on coworkers to acquiesce to religious accommodation requests. Still, this possibility is only speculative since the Act fails to mention coworkers and we are given no indication of the bill sponsors' intent with respect to them. The Act could possibly have only benign effects in cases like Bynum, and continue to come out in favor of employers.

However, it is unlikely that the WRFA, if passed, would have such a benign effect in other cases. For example, some cases leave open the question of whether accommodations that

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[136] Sergeant Hooper and Major Williams accommodated Bynum by doing his work for him at certain weekend events at which Bynum's attendance otherwise would have been required as part of his job, but their resentment developed "over the fact that they were performing an unequal share of the work for which they were not being paid." *Id.* at 647-48.

[137] The Lieutenant who evaluated Bynum recommended that he resign and seek other employment that did not involve work on Friday nights and Saturday mornings. Once he was decertified, the school had no option but to terminate him. *Id*. at 646, 649. The court found that "his conduct unfairly shifted performance of his duties to his fellow instructors. It was causing dissatisfaction within the ranks; and, it was preventing the program from functioning as it was intended to function. The bottom line is that [the school district] could not fully accommodate what Bynum professed his religious beliefs to be without undue hardship." *Id*. at 656.

[138] "An accommodation that would force other employees, against their wishes, to modify their work schedules to accommodate the religious beliefs of the complaining employee would be unreasonable and undue hardship." *Id.* at 653.

have been deemed to involve more than a *de minimis* cost also involve a significant difficulty or expense. In *Brener v. Diagnostic Center Hospital* for example, Brener, an Orthodox Jew and pharmacist, claimed he was discharged because of his religion.[139] Brener was one of five pharmacists that operated a pharmacy, which ran seven days a week.[140] Brenner was unable to work Saturday's because the Saturday shift conflicted with his sitting the Sabbath.[141] Although his supervisor directed trades for the first few weeks, he then told Brener he would not direct further trades, but would approve any trades arranged by Brener.[142] After failing to arrange shift exchanges, Brener did not work his scheduled days, which increased the workload of the other pharmacists to their discontent.[143] Brener was subsequently fired for failing to appear for work.[144] The Fifth Circuit, ruling in favor of the hospital, found the accommodations proposed by the plaintiff would involve more than a *de minimis* effect.[145] However, the court did not go so

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[139] Brener v. Diagnostic Center Hospital, 671 F.2d 141, 142-43 (5th Cir. 1982).

[140] *Id.* at 143.

[141] Brener's faith prohibited him from working from sunset Friday to sunset Saturday. *Id.*

[142] *Id.*

[143] *Id.*

[144] Brener wished to take off October 16, 17, 23, and 24 in observance of the Jewish holy days of Sukkos. Brener v. Diagnostic Center Hospital, 671 F.2d 141, 143 (5th Cir. 1982). "The district court found, however, that Brener made only haphazard efforts to arrange schedule trades. Brener waited until October 15 to approach the employee not scheduled for work on October 16 and 17 to discuss a trade. The court found that Brener did not contact the pharmacist off duty on October 23 and 24, the last two days of Sukkos. Brener's failure to appear for work on these days led to his firing." *Id.* at 145.

[145] Brener here proposed several alternatives to working on his day of religious observances, all of which are similar to the measures rejected in *Hardison*. *Id.* at 146. The first of these options, hiring a substitute pharmacist, plainly would involve more than a *de minimis* cost. *Id.* The district court found that another proposed solution, having Luther substitute for Brener, resulted in decreased efficiency, economic loss, and increased risk to patients. *Id.* A third suggestion,

far as to say whether such accommodations would also involve a significant difficulty or expense.[146] Thus, in this gray area the WRFA would likely affect the outcomes of similar cases decided under it.

B. Constitutional Challenges

As *Estate of Thornton v. Caldor*[147] illustrates, the WRFA may also raise Establishment Clause[148] issues since it ignores the effect the Act would have on co-workers. The Supreme Court struck down a Connecticut statute that provided religious employees an *absolute* right not to work on their Sabbath because it violated the Establishment Clause.[149] When a statute speaks in terms that are absolute, or confers an absolute right not to work as the Connecticut statute did, then the legislature is clearly violating the Establishment clause by providing preferential treatment to religious observers.[150]

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operating without Brener, also was found to have a detrimental impact on the pharmacy's function. *Id.*.

[146] *Id.*

[147] 472 U.S. 703 (1985).

[148] "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. Amend. I.

[149] The Court found that the statute "imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the [religious] employee . . . the statute takes no account of the convenience of the employer or those of other employees who do not observe the Sabbath." Thornton v. Caldor, 472 U.S. 703, 709 (1985).

[150] Likewise, the "[W]RFA constructively pushes "reasonable" into the realm of "absolute" by stripping the employer of discretion in business decisionmaking and, similar to the statute at issue in [Estate of] Thornton [v. Caldor], forces the employer to 'adjust [his] affairs to the command of the [Government] whenever the statute is invoked by the employee.'" Gregory J. Gawlik, *The Politics of Religion: "Reasonable Accommodations" and the Establishment Clause an Analysis of the Workplace Freedom Act*, 47 CLEV. ST. L. REV. 249, 263 (1999), (citing Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709 (1985)).

The Massachusetts statute involved in *Pielech v. Massosoit Greyhound, Inc.*,[151] did just that as it gave religious individuals the guaranteed right to be free from work on days of religious observance.[152] Under that statute, two Roman Catholic women sued their employer, a racetrack, after it fired them when they refused to work on Christmas day.[153] The statute, however, was ruled unconstitutional because it granted preferential treatment to some religious beliefs over others[154] and violated the establishment clause's essential purpose by promoting excessive entanglement with religion.[155]

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[151] Pielech v. Massosoit Greyhound, Inc., 668 N.E.2d 1298, 1300 (Mass. 1996).

[152] The statute, General Laws c. 151B, § 4 (1A), in relevant part states the following:

> It shall be unlawful discriminatory practice for an employer to impose upon an individual as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such individual to violate, or [forgo] the practice of, his creed or religion as required by that creed or religion including but not limited to the observance of any particular day or days or any portion thereof as sabbath or holy day and the employer shall make reasonable accommodation to the religious needs of such individual. … The employee shall have the burden of proof as to the required practice of his creed or religion.

Id. at 1300-01.

[153] *Id.* at 1300.

As a practical matter, it is important to note that employers often struggle with requests for time off during the holidays, but it is simply not always possible to honor every worker's request. Juggling Workers During the Holidays (Dec. 4, 1996), http://www.aclu.org/news/W120496a.html (on file with the *Rutgers Journal of Law and Religion*). But surely then, if employers struggle now with religious accommodation requests, then under the WRFA they will fare much worse, when accommodations will not as easily be deemed reasonable. Pielech v. Massosoit Greyhound, Inc., 668 N.E.2d 1298, 1301 (Mass. 1996).

[154] The statute does not protect employees whose sincere religious beliefs differ from the established dogma of their religion or are not accepted as dogma by any religion. Pielech, 668 N.E. 2d at 1301.

Also, reconsider the *Sears* case,[156] in which Sears failed to offer any accommodation to a Jewish repairman. Sears was undoubtedly at fault, as evidenced by the settlement terms.[157] However, apart from providing preferential treatment to religious adherents in general, the Sears settlement goes further and discriminates unfairly by favoring the Sabbatarians.[158] If this were not enough, "[t]he Sears decision is somewhat problematic since it fails to address the potential effect of an accommodation on a Sabbatarian's colleagues."[159] The settlement actually "mandates that if a position is not available on a Sunday schedule then Sears will 'transfer a non-Sabbath observer to the non-Sunday schedule and offer the Sunday schedule to the Sabbath observer.'"[160] Coworkers thus have no choice but to work the undesirable shifts passed over by

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"A statute that prefers one or more religions over another violates the establishment clause." *Id.* at 1303 (citing School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Larson v. Valente, 456 U.S. 228 (1982).

[155] The establishment clause's essential purpose "is to assure that that government maintains a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Walz v. Tax Comm'n of the City of N.Y., 397 U.S. 664, 669 (1970) (internal quotes omitted).

[156] Kaminer, *supra*, notes 91-93 and corresponding text.

[157] *See supra*, note 93.

[158] One critic noted: "the holding of *Opuku-Boateng* is equally applicable to all religious time-off cases [*see supra*, notes 83 through 86]. The Sears settlement, on the other hand, while enjoining Sears to abide by Executive Law § 296(10), only mandates a specific accommodation for Sabbatarians. Kaminer *supra* note 91,

[159] *Id.*

[160] *Id.*

their Sabbatarian colleagues. Such a policy that imposes an absolute mandate is clearly in violation of the Establishment Clause as illustrated in *Caldor*.[161]

C. Abolition of Bona Fide Seniority Systems

The WRFA, like the Sears settlement, would also impose absolute requirements of the type specifically found to be repugnant in *Caldor*, which would further worsen the position of coworkers. In its wholesale disregard of the contractual rights of parties participating in a seniority system, the WRFA states that "It shall not be a defense to a claim of unlawful employment practice … that such accommodation would be in violation of a bona fide seniority system if, in order for the employer to reasonably accommodate such observance or practice … an adjustment would be made in the employee's work hours, shift, or job assignment, that would not be available to any employee but for such accommodation."[162] By restricting the availability of accommodations to religious adherents only, the Act clearly respects establishments of religion in blatant disregard of the rights of other employees and violates the Establishment Clause.

Thus, the balance between employers and religious employees would be upset if the Act were passed, since it would effectively allow religious beliefs to trump seniority systems. In various cases the WRFA would force unpalatable results. For example, in *Williams v. Owens-Corning Fiberglass, Inc.*, the plaintiff was hired at a plant that is operated twenty-four hours a day, seven days a week, on three 8-hour shifts per day.[163] In January, 1981, he became the

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[161] See *supra*, notes 149 through 151 and accompanying text.

[162] H.R. 4237, 106th Cong. §2(b)(4)(A)(2000).

[163] Williams v. Owens-Corning Fiberglass, Inc., 1986 U.S. Dist. LEXIS 26160, 1 (1986).

acting pastor of his Baptist Church when the regular pastor fell ill.[164] Although he "does not believe that working on Sunday is contrary to his religious beliefs," he still sought to have Sundays off.[165] Plaintiff had only four years seniority whereas those who could request Sundays off had at least twelve years seniority.[166] After refusing the accommodations offered him[167] and failing to appear when scheduled on nine Sundays, plaintiff was discharged.[168]

Similarly, a Seventh Day Adventist was denied relief in her religious discrimination claim against her employer, NYNEX, primarily because of a collective bargaining agreement.[169] Before receiving her promotion, plaintiff Durant was able to arrange schedule so that it would not conflict with her Sabbath.[170] After becoming a Customer Service Administrator (CSA), however, Durant was told that due to rotating schedules within the agreement and her lack of seniority, she could not be guaranteed every Sabbath off.[171] NYNEX was granted summary

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[164] *Id.* at 2.

[165] *Id.*

[166] *Id.* at 3.

[167] Plaintiff's supervisor offered two accommodations: "(1) he could have every Sunday shift off, 7:00 o'clock a.m. to 3:00 o'clock p.m., so that he could deliver his sermon; or (2) he could take an extended leave of absence until his church's pastor was able to return to his duties which would also give plaintiff an opportunity to clean up his attendance record." *Id.* at 3-4.

[168] Williams v. Owens-Corning Fiberglass, Inc., 1986 U.S. Dist. LEXIS 26160, 21 (D. Ka. 1986).

[169] Durant v. NYNEX, 101 F. Supp. 2d 227 (S.D.N.Y 2000).

[170] *Id.*

[171] "The CSA's collective bargaining agreement committed NYNEX to assign CSA night shifts on a rotating basis to all CSA's with fewer than 25 years of experience." *Id*. at 229.

judgment as the court found that they had reasonably accommodated Durant's religious practices.[172]

Another Seventh Day Adventist confronted seniority issues in *Blair v. Graham Correctional Center*.[173] Blair was hired as a correctional officer and for the first six-month probationary period did not have to work on his Sabbath.[174] However, after completing this period, he became subject to the seniority provisions of a labor contract and could no longer take off for his weekend Sabbath.[175] The court found that it "is difficult for any organization to accommodate employees who are choosy about assignments."[176] The court also relied on *Hardison* in upholding the seniority system.[177]

In addition to containing seniority provisions, many collective bargaining agreements also have priority provisions for determining who gets overtime. In *Mann v. Frank,* for example, a postal worker claimed the United States Postal Service (USPS) failed to reasonably

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[172] "NYNEX claims, and Durant does not dispute, that it offered Durant various accommodations, allowing her to swap shifts, to utilize her vacation days and personal times, or to return to her previous position as a Directory Assistance Operator." *Id.* at 231.

[173] Blair v. Graham Correctional Ctr., 1993 U.S. App. LEXIS 23051 at1 (7th Cir. 1993).

[174] *Id.*

[175] To have weekends off was the preference of most of the employees. *Id.* at 2.

[176] *Id.* at 9, *citing* Ryan v. United States Department of Justice, 950 F.2d 458, 462 (7th Cir. 1991), [*cert. denied,* 112 S. Ct. 2309 (1992)].

[177] "Hardison, as we set out above, makes clear that Graham need not abandon its seniority system in order to accommodate the religious preferences of an employee, and, in fact, holds that the seniority system itself represented a 'significant accommodation' to the religious needs of employees." *Id.* at 8-9.

accommodate her religious beliefs when it required her to work on her Sabbath[178] pursuant to a collective bargaining agreement.[179] Of eight qualified employees, only Mann and one other employee, Higgins, were not already scheduled when the need for overtime arose.[180] Accordingly, since Mann but not Higgins had requested overtime, she was required to work on her Sabbath.[181] The court found that the USPS had reasonably accommodated Mann by asking Higgins to cover[182] and additionally through the collective bargaining agreement.[183]

Similarly in *Cary v. Anheuser-Busch*, an employee filed suit after he was required to work overtime one night despite his supervisor's knowledge that he was attending classes at a

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[178] As a Seventh Day Adventist, her religious beliefs prohibit her from working from sundown Friday to sundown Saturday. 7 F.3d 1365, 1367 (8th Cir. 1993).

[179] "The overtime provisions of the collective bargaining agreement state that employees desiring to work overtime shall place their names on the Overtime Desired List (ODL). When the need for overtime arises, employees possessing the requisite skills who have listed their names on the ODL are selected in order of their seniority on a rotating basis. The collective bargaining agreement further provides that employees not on the ODL may be required to work overtime only if all available employees on the ODL have been utilized." *Id.*

[180] *Id.* at 1368.

[181] *Id.*

[182] Higgins declined the overtime and "claimed that she could not be forced to work until the ODL had been exhausted, and if she were forced to work before the ODL was utilized, she would file a grievance against the Postal Service for violating the terms of the collective bargaining agreement." *Id.*

[183] Relying on *Hardison*, the court found that "the seniority system and the voluntary ODL in the collective bargaining agreement themselves represented significant accommodations to Mann's religious needs. … They represented a nondiscriminatory vehicle for minimizing the number of occasions when an employee would be called upon to work an overtime shift on a day that he or she preferred to have off." Mann v. Frank, 7 F.3d 1365, 1369 (8th Cir. 1993).

at 1369. *See also* Andrew M. Campbell, *Annotation: What Constitutes Employer's Reasonable Accommodation of Employee's Religious Preferences Under Title VII of Civil Rights Act of 1964*, 134 A.L.R. FED. 1, 38.

theological seminary.[184] Overtime was doled out in order of those requesting it first, then to those who indicated no preference, and finally to employees who refused overtime.[185] Although Cary had indicated no preference, the court found that "Cary could have most easily marked 'refused' on the overtime canvass sheet for that day."[186]

Although *Williams v. Owens-Corning Fiberglass, Inc.*, *Durant v. NYNEX*, and *Blair v. Graham Correctional Center* were rightly decided, the WRFA would undoubtedly compel different results through the provision preempting bona fide seniority systems. Likewise, other related provisions in collective bargaining agreements, like those found in *Mann v. Frank* and *Cary v. Anheuser-Busch* might also be disregarded under the WRFA.

D. Significant Difficulty or Expense

The Act would also lead to undesirable results due to another provision which states: "an accommodation shall be considered to require significant difficulty or expense if the accommodation will result in the inability of an employee to perform the essential functions of the employment position of the employee."[187] Therefore, short of an employee's inability to perform his major duties, no accommodation will be reasonable. Certainly this provision will cause employers to incur substantial costs in accommodating their employees and will ultimately affect the coworkers who will be forced to perform the religious employee's nonessential functions and work his unsatisfactory shifts.

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[184] Cary v. Anheuser Busch, 741 F.Supp. 1219, 1220 (E.D. Va. 1988).

[185] *Id.* at 1222.

[186] *Id.*

[187] H.R. 4237 §2(a)(3)(A)(2000).

This provision of the WRFA, even more than others, could lead to ridiculous results. For example, in *Getz v. Pennsylvania*, an Orthodox Jewish woman employed by a Pennsylvania state agency wanted to take her religious holidays with pay in addition to her paid vacation leave.[188] She sought to obtain more vacation time by working overtime.[189] The court found, however, that her proposal would violate the collective bargaining agreement[190] and ruled that no religious discrimination had occurred.[191] Nonetheless, since Getz would still be able to fulfill her major duties, would the WRFA then consider the accommodation unreasonable in this case?

Additionally, under this provision even a substantial good faith effort at accommodation could fail simply because it did not require significant difficulty or expense. In *Wright v. Runyon*, Wright's position as a box sorter with the USPS was being abolished.[192] However, USPS let him bid for positions that would not have conflicted with his Sabbath.[193] Wright would have received at least two of the positions had he bid for them, but instead, bid for other positions which he did not receive.[194] Wright was then assigned to a position that required

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[188] Getz v. Pennsylvania, Dep't of Public Welfare, 802 F.2d 72 (3rd Cir. 1986).

[189] *Id.*

[190] *Id.* at 74.

[191] "Plaintiff has not had to choose between sacrificing a portion of her salary and her religious beliefs nor has she had to choose between taking a religious holiday and being penalized by her employer for missing a workday. On the contrary, plaintiff has been able to take paid leave to observe all of her holidays and, under the current collective bargaining agreement, has 20.6 days of annual and personal leave with which to observe her 13 religious holidays in the future, many of which will not even occur on workdays." *Id.* at 73-74.

[192] Wright V. Runyon, 2 F.3d 214, 215 (7th Cir. 1993).

[193] *Id.* at 216.

[194] As the senior bidder, Wright would have received at least two positions. *Id.*

Sabbath work so he resigned and brought suit.[195] Although the court denied relief to Wright[196] under the WRFA, these good faith accommodations might fail because they did not impose even a *de minimis* cost on the USPS, let alone a significant difficulty or expense.

E. Effect on Proselytizing Cases

One problem area the WRFA fails to mention is the effect its broad reading of the undue hardship term would have on proselytizing cases. The proselytizing issue has been described as the "conflict between every employee's right to religious expression and every employee's countervailing right not to be harassed because of his religion or lack thereof."[197] If the WRFA were passed it might impose higher tolerance levels for both proselytizing religious employees and employers. Proselytizing cases are also interesting because they potentially turn one argument for the WRFA on its head. Namely, that there should be religious freedom in the workplace because that is where many people spend most of their time.[198]

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[195] *Id.*

[196] "Wright, in refusing to bid on two 'flat sorter machine operator' jobs that would not have required work during his Sabbath, chose not to take full advantage of the bidding system. Wright, not the Postmaster General, is therefore responsible for the consequences. ..... We would be presented with a different question if Wright were a skilled craftsman asked to assume an unskilled position. But, in terms of requisite skills, the flat sorter and box positions are essentially equivalent." *Id.*

[197] Kimball E. Gilmer & Jeffrey M. Anderson, *Zero Tolerance for God?: Religious Expression in the Workplace After Ellerth and Farragher*, 42 HOW. L.J. 327, 330, *quoting The Effect of the EEOC's Proposed Guidelines on Religion in the Workplace*: *Hearing Before the Subcomm. On Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 103rd Cong., 2d Sess. 39 (1994) (prepared statement of Professor Douglas Laycock of the University of Texas Law School).

[198] "[To] restrict expression in the workplace is to deprive people of the ability to speak in the place where they are likely to spend the largest share of their waking hours and devote much of

EEOC v. Townley Engineering & Mfg., for example, offers a most interesting perspective on the WRFA as the case considers the rights of religious employers and the bounds within which they can assert their beliefs.[199] Jake and Helen Townley, founders of Townley Manufacturing Company, made a covenant with God that their business "would be a Christian, faith-operated business."[200] Accordingly, they required all employees to attend weekly devotional services.[201] Nonetheless, in Townley's Eloy, Arizona plant, devotional services were not instituted until April 1984, five years after plaintiff Louis Pelvas was hired.[202] Pelvas, a machinist at the Eloy plant, attended the services until June 1984, when he asked to be excused from the services because he was an atheist. After being forced to attend, he filed a religious discrimination charge with the EEOC.[203] The court found that Title VII applied,[204] that a prima

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their energy." Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J.L. & PUB. POL'Y 959, 972 (1999).

[199] EEOC v. Townley Engineering & Mfg., 859 F.2d 610 (9th Cir. 1988).

[200] Townley reflects its founders' covenant with God in several ways. For example, the company encloses a Gospel tract in every piece of outgoing mail; it prints Biblical verses on all company invoices, purchase orders, and other commercial documents; it gives financial support to various churches and missionaries; and of particular importance to this case, it holds a devotional service once a week during work hours. *Id*. at 612.

[201] The Townley employee handbook stated: "All employees are required to attend devotional services each Tuesday. Employees are paid for their time while attending these services." *Id.*

[202] *Id.*

[203] The EEOC charged that Townley violated section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), (1) by requiring its employees to attend devotional services, (2) by failing to accommodate Pelvas' objection to attending the services, and (3) by constructively discharging Pelvas. *Id.*

[204] "We hold that Congress did clearly intend for Title VII to cover Townley's mandatory devotional services. Sections 701(j) and 703(a) of Title VII make clear that requiring employees over their objection to attend devotional services cannot be reconciled with Title VII's

facie case of discrimination had been established,[205] and that Townley failed to carry its burden in offering a reasonable accommodation.[206] Townley's argument that accommodating Pelvas would cause spiritual hardship was not persuasive.[207]

The case brings up an interesting question: Would the WRFA, which "represents a milestone in the protection of the liberties of all workers,"[208] allow a proselytizing employer to subject its employees to the employer's religious beliefs? Would the answer be different if the employee was atheist or agnostic or of a different religion from his employer? Clearly, accommodation of the employee's beliefs, or lack thereof, is the correct result as the court in *Townley* held.[209] This case illustrates that an employee lacking religious beliefs should be afforded the same protection as a person with religious beliefs.[210] No preferential treatment should be given to either employee. Unfortunately, however, the WRFA fails in this regard, as it is highly favorable to religious employees.

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prohibition against religious discrimination." EEOC v. Townley Engineering & Mfg., 859 F.2d 613 (9th Cir. 1988).

[205] The court found that a *prima facie* case had been made which Townley did not contest. *Id.* at 614.

[206] "Townley admits that it has made no effort to accommodate Pelvas' objections to the services." *Id.*

[207] "To assert that excusing Pelvas from the services would have inflicted spiritual costs on the company, or on Jake and Helen Townley is not enough. ...Townley, the corporate entity, must connect the asserted spiritual hardship to an adverse impact on the conduct of the business." *Id.* at 615

[208] Statement by Senator Kerry in his introduction of the WRFA, S. 1668. 145 CONG. REC. S11460-04.

[209] EEOC v. Townley Engineering & Mfg., 859 F.2d 610 (9th Cir. 1988).

[210] In accord with this proposition, it is noted that Townley did not argue that atheistic beliefs are not protected against religious discrimination. *Id.* at 614.

Nevertheless, not all legislative enactments like the WRFA are skewed in favor of religious employees. For example, an agnostic employee, Cline, recently used the Michigan Elliot-Larsen Civil Rights Act (ELCRA)[211] to claim his employer constructively discharged him because he did not share his employer's religious beliefs.[212] The owner of the company, Phillip Tripp, a "born-again Christian," and his wife, pressured Cline to accept their beliefs by offering better working terms and conditions.[213] When he refused to attend Church, Cline was given more difficult assignments, and under mounting pressure, he resigned.[214] The Michigan appellate court reversed the lower court's decision, finding that an employee could suffer bias under the Act "because of religion" or because of the lack thereof.[215]

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[211] In relevant part, section 202 (1) of ELCRA provides that an employer cannot:

(a) Fail or refuse to hire or recruit, discharge or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment because of religion.

(b) Limit, segregate, or classify an employee … for employment in a way that deprives or tends to deprive the employee … from an employment opportunity, or otherwise adversely affects the status of an employee … because of religion.

[212] In *Cline v. Auto Body Shop, Inc*., 614 N.W.2d 687 (Mich. Ct. App. 2000), the employee was able to proceed with his religious discrimination claim under ELCRA. *See* Kevin B. Hirsh, *Michigan Civil Rights Law Protects Atheists and Agnostics, Too*, 11 No. 5 MICH. EMP L. LETTER 7 (2000).

[213] Cline says his treatment at work and the terms and conditions of his employment, including compensation, job assignments, and opportunities for advancement, were correlated directly with his attendance at Tripp's church. He was allegedly told that his pay would increase and his opportunities for promotions would be bolstered if he accompanied Tripp to his place of worship. In fact, he received a raise when he capitulated.

Cline, 614 N.W.2d at 687

[214] *Id.*

[215] *Id.*

Proselytizing cases are indeed difficult because of the countervailing interests at stake. *Chalmers v. Tulon Co. of Richmond*, interestingly involved an evangelical Christian[216] employee who wrote letters outside of her employment to two of her coworkers.[217] The letters expressly or implicitly asserted that each of the coworkers had engaged in immoral conduct.[218] The Tulon

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[216] After becoming an evangelical Christian, Chalmers "accepted Christ as her personal savior and determined to go forth and do work for him. As an evangelical Christian, Chalmers believes she should share the gospel and looks for opportunities to do so." Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1014 (4th Cir. 1996).

[217] *Id.* at 1015-16.

[218] Chalmers wrote one letter to Brenda Combs, who was directly supervised by Chalmers. Chalmers knew that Combs was sick and suffering from an undiagnosed illness after giving birth out of wedlock. The letter stated:

> Brenda,
>
> You probably do not want to hear this at this time, but you need the Lord Jesus in you life right now.
>
> One thing about God, He doesn't like when people commit adultery. You know what you did is wrong, so now you need to go to God and ask him for forgiveness.
>
> Let me explain something about God. He's a God of Love and a God of Wrath. When people sin against Him, He will allow things to happen to them or their family until they open their eyes and except [sic] Him. God can put a sickness on you that no doctor could ever find out what it is. I'm not saying this is what happened to you, all I'm saying is get right with God now. Romans 10:9;10vs says that is [sic] you confess with your mouth the Lord Jesus and believe in your heart that God has raised him from the dead thou shalt be saved. For with the heart man believeth unto righteousness; and with the mouth confession is made unto salvation. All I'm saying you need to invite God into your heart and live a life for him and things in your life will get better.
>
> That's not saying you are not going to have problems but it's saying you have someone to go to.
>
> Please take this letter in love and be obedient to God.

Company fired Chalmers after concluding "that the letters caused a negative impact on working relationships, disrupted the workplace, and inappropriately invaded employee privacy."[219] Chalmers claims under both the disparate treatment[220] and accommodation theories were dismissed.[221]

If, however, Chalmers had not been fired, the supervisor could have sued the employer.[222] *Chalmers* illustrates the conundrum employers face. On one hand, employers must

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> In his name,
> Charita Chalmers

Id. at 1016. Chalmers also wrote a letter to her supervisor, LaMantia, because she believed he had told customers information that was not true. The letter stated in part:

> Dear Rich,
>
> The reason I'm writing you is because the Lord wanted me to share somethings [sic] with you. . . .
>
> The last thing is, you are doing somethings [sic] in your life that God is not please [sic] with and He wants you to stop. All you have to do is go to God and ask for forgiveness before it's too late.

Id. at 1015. LaMantia, however, was out of town on business when the letter arrived at his house. His wife opened it, read it, and interpreted it to mean that her husband was committing adultery. *Id.* at 1015-16.

[219] *Id.* at 1017.

[220] "Tulon's proffered reasons for discharging Chalmers – because her letters, which criticized her fellow employee's personal lives and beliefs, invaded the employees' privacy, offended them and damaged her working relationships – are legitimate and non-discriminatory." *Id.* at 1018.

[221] The court found that Chalmers did not establish a prima facie case of religious discrimination. "If we had concluded that Chalmers had established a prima facie case, Chalmers' religious accommodation claim would nonetheless fail. This is so because Chalmers' conduct is not the type that an employer can possibly accommodate, even with notice." Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1021 (4th Cir. 1996).

[222]

reasonably accommodate their employees. On the other, they must not do so in a way that is fair to other employees, for fear of a lawsuit by a non-religious employee. The fact is, however, that both competing interests cannot always be accommodated. Constitutionally then,[223] accommodation of the religious practices of an employee must yield to avoidance of preferential treatment.

F. Religious Freedom v. Other Civil Rights

The WRFA also fails to take into account the possible effect of religious freedom on civil rights. In fact, the WRFA may pit religious freedoms against gay rights. In one case,[224] "three Minnesota prison employees turned a diversity" program on gays and lesbians into a Bible study class.[225] The workers claimed that the mandatory programs on gays and lesbians were "state sponsored propaganda" promoting homosexuality, which was in opposition to their religious

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> In a case like the one at hand, however, where an employee contends that she has a religious need to impose personally and directly on fellow employees, invading their privacy and criticizing their personal lives, the employer is placed between a rock and a hard place. If Tulon had the power to authorize Chalmers to write such letters, and if Tulon had granted Chalmers' request to write the letters, the company would subject itself to possible suits from Combs and LaMantia claiming Chalmers' conduct violated their religious freedoms or constituted religious harassment.

Id.

[223] "Congress shall make no law respecting an establishment of religion. . ." U.S. CONST. AMEND. I.

[224] Altman v. Minnesota Department of Corrections, 1999 U.S. Dist. LEXIS 14897, 80 Fair Empl. Prac. Cas. (BNA) 1166, 16 I.E.R. Cas. (BNA) 1712 (D. Mn. 1999).
[225] Debra Baker, *Acting on One's Beliefs: Clash Between Gay Rights and Religious Freedom Spills Over Into Workplace*, 86 A.B.A.J. 18 (Jan. 2000).

beliefs.[226] Although the employees engaged in protest by bringing Bibles to the programs and reading silently, they still received reprimands.[227] Subsequently, they filed suit and their state was ordered to withdraw the disciplinary notices.[228] Nonetheless, the Eighth Circuit reversed and remanded on appeal, finding that the prison employees' religious beliefs were not substantially burdened.[229]

The Altman cases clearly show the competing interests of religion and gay rights. Moreover, as Matthew Coles, a top member of the American Civil Liberties Union contends, "There is no question there is a very concerted effort to say religious freedom should give you an out from civil rights laws."[230]For example, there is some fear that religious employers "might object to being required to afford spousal benefits such as health insurance or pension payments to the partners of homosexual employees."[231] These fears might be well grounded. If the WRFA

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[226] The programs went against their religious beliefs that same sex intimacy is sinful. *Id.*

[227] The employees were reprimanded for violating prison policies prohibiting improper conduct and prejudicial behavior. Their supervisors charged that the protest attempted to impede efforts to prevent harassment based on sexual orientation. *Id.*

[228] Anne D. Montgomery, United States District Judge of Minnesota, said the actions violated the employees' First Amendment right to free expression of religion and the Minnesota Constitution's Freedom-of–Conscience Clause. Baker, *supra* n.225. The Court held that the silent protest did not damage any working relationships within the facility or affect the employee's ability to perform their jobs effectively. *Id.*

[229] Altman v. Minn. Dep't of Corr., 251 F.3d 1199 (8th Cir. 2001). Thus, the only burden placed on Appellants was a requirement they attend a seventy-five-minute training program at which they were exposed to widely-accepted views that they oppose on faith-based principles. This was not, in the view of the court, a substantial burden on their free exercise of religion.

[230] Matthew Coles is director of the American Civil Liberties Union's National Gay and Lesbian Rights Project. Baker, *supra* n.225.

[231] Nathan J. Diament, *Religion In the Workplace: We Don't Respect Faith When Its Acted On*, WASH. TIMES, Sept. 6, 1999, at A19.

would allow accommodation of religious observance to trump seniority systems, then, consequently, it might allow religious freedoms to prevail over civil rights as well.

PART IV

For the foregoing reasons, the WRFA should not be passed. It is also my opinion that the WRFA, at least in its current form, will not be passed at any time in the near future.[232] The WRFA is highly preferential to religious employees at the expense of employers, coworkers, and civil rights. Another reason the Act will not pass is that, even without the WRFA, religious discrimination claims are at their highest levels ever.[233] Furthermore, if the economy stays strong, this trend is likely to continue.[234] Fortunately there are a number of things employers can do to avoid discriminating against religious employees while simultaneously avoiding litigation.

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[232] Although some believe the WRFA will pass, *see* Marianne C. DelPo, *Never on Sunday: Workplace Religious Freedom in the New Millenium*, 51 ME. L. REV. 341, 357 (1999) (WRFA is likely to pass), others believe it will fail once again. One can look to the WRFA's past record as an indication that the bill will again fail. *Supra*, n. 1.

[233] Since 1992, the EEOC has reported a thirty percent increase in the number of religious-based discrimination claims. *See* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM'N., *Religion Based Charges*, FY 1992-FY 2000, *at* http://www.eeoc.gov/stats/religion.html (last modified Jan. 18, 2001) (on file with the *Rutgers Journal of Law and Religion*).

The Bureau of Justice Statistics found that between 1990 and 1998, employment discrimination claims nearly tripled, from 8,413 to 23,735. Roger Clegg, *I See Protesters: Businesses Should be Free to Criticize Our Nation's Civil Rights Laws Without Suffering the Wrath of the Civil Rights Bar*, LEGAL TIMES, June 26, 2000 at 86.

[234]

> Employees in a good economy are more likely to risk their jobs by asserting their rights. Add to this a culture where religious observance is on the upswing, and it appears that American workers are likely to continue to assert in increasing numbers their right to have their religious beliefs and practices accommodated in the workplace.

DelPo, *supra* n.231, 51 ME. L. REV. at 347.

As the American workforce becomes more diverse and as religious fundamentalists grow more willing to fight to protect their religious expression, the potential for lawsuits based on religious-

In order to avoid discrimination, employers and employees must work together to find acceptable solutions. As one attorney stated, "the essential concept of an 'accommodation' is for a means to be found to allow the co-existence of competing interests - not the elimination of either; to eliminate the conflict means the requested accommodation becomes a non-negotiable order."[235] Accordingly, employers and employees can avoid the breakdown of negotiations through a number of different methods. For example, employers can allow employees to arrange shift swaps, to use company bulletin boards, and to use personal or vacation days for religious observances. They should also attempt to find the religious employee other positions without conflicting schedules or, if possible, offer to transfer the employee to another department or facility. These are just a few of the options available to employers.

Nonetheless, the employer must offer some reasonable accommodation. The rising costs of defending against and/or losing lawsuits, coupled with media scrutiny should be enough to encourage many employers to accommodate an employee, even where it causes some undue burden. The company's loss of productivity or threats of grievances or action from other employees should not be overlooked. There is a fine line between accommodation and preferential treatment.

Although it is unfortunate that some people are forced to make the choice between their religion and their work, in some situations that choice must be made. Regardless of how devout

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based dress will continue to rise. Eric Matusewitch, *Employee Challenges to Religion-Based Dress Increase*, 12 No. 8 ANDREWS EMPLOYMENT LITIG. REP. 3 (1998), *available in* WESTLAW, 12 No. 8 ANEMPLR 3.

[235] Gawlick, 264 *quoting To Amend Title VII of the Civil Rights Act of 1964 to Establish Provisions With Respect to Religious Accommodation in Employment, and for Other Purposes: Hearings on S. 1124 Before the Comm. on Labor and Human Resources*, 105th Cong. 1, 49 (statement of Lawrence Z. Lorber, employment discrimination lawyer with Verner, Liipfert, Bernhard, McPherson & Hand, Washington, D.C.).

one is in his or her beliefs, when those convictions begin to affect other employees to their detriment, then religious accommodations become more harmful than beneficial.

As for other developments in the area of religious discrimination law, some think that the Bush Administration may be less committed to agencies such as the EEOC.[236] However, in light of President Bush's recent establishment of the White House Office of Faith-Based and Community Initiatives, if anything, Bush might favor the WRFA. In any event, employers should beware.

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[236] According to Jan Duffy, a San Francisco-based employment practices educator, "[a] Bush Administration will likely gradually undo the funding, the staffing and even the commitment that the Clinton Administration showed to enforcement agencies like the EEOC." She fears that could lead to "lowering of the bar on what Faragher and Ellerth have started in the equal employment opportunity field, with employers paying greater attention to harassment and discrimination prevention and correction." *Litigation Lawcast, In Employment Law, Even Narrow Election Day Victories May Bring Big Differences.* Vol. V, Number 21, p. 3, *available at* www.lawcast.com (on file with the *Rutgers Journal of Law and Religion*).