

**State Bar of Texas
30th Annual Labor and Employment Law Institute
San Antonio, Texas
August 24, 2019**

Religious Expression and Proselytizing in the Workplace

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Table of Contents

I. Introduction	1
II. Religious Beliefs	1
A. Historical Context.....	1
B. Definition of Religion.....	2
C. Personal Preferences.....	4
III. Protections Against Religious Discrimination in the Workplace.....	5
A. United States Constitution	5
B. Title VII and Chapter 21 of Texas Labor Code.....	6
C. Religious Freedom Restoration Act and Analogous State Statutes.....	6
IV. Duty of Reasonable Accommodation	6
A. Scope of Duty	8
1. Employee Notification.....	8
2. Selection of Accommodation	9
3. Employee Suggestions.....	10
4. Duty to Cooperate.....	10
B. Failure to Make Accommodation as Adverse Employment Action.....	11
C. Types of Accommodations	12
1. Work Schedules	12
2. Religious Dress and Grooming Practices	12
3. Testing and Screening	12
4. Other Accommodations	13
D. Undue Hardship	13
1. Genuine and Immediate Hardship	13
2. Cost Considerations	14
3. Impact on Other Employees	14
4. Collective Bargaining Agreements.....	15
5. Religious Activities in the Workplace.....	15
6. Illegality of Accommodation.....	15
V. Proselytizing in the Workplace	16
A. An Employee’s Right to Proselytize	16
B. An Employer’s Right to Proselytize.....	16
C. Employees’ Right to Be Free from Proselytizing.....	18
D. Proselytizing Employers and the RFRA.....	19
E. Selected Proselytizing Cases	21

I. Introduction

Inevitably, employees who adhere to a certain religious belief system (and those that do not adhere to any religious belief system) are encountering conflicts in the workplace. The right to be free of religious discrimination includes the right to be agnostic and the freedom not to espouse any religious beliefs. Title VII protects all aspects of religious observance and practice as well as belief and defines religion very broadly for purposes of determining what the law encompasses. In protecting an employee's religious observance and practice in the workplace, Title VII also protects employees from discrimination based on the employer's or other employees' religious observance and practice. In some instances, this religious observance and practice includes proselytizing.

The EEOC recognizes workplace conflicts that may result from proselytizing and observes some employees may believe that they have a religious obligation to share their views and to try to persuade co-workers of the truth of their religious beliefs, that is, to proselytize. Some employers, too, may wish to express their religious views and share their religion with their employees. However, some employees may perceive proselytizing or other religious expression as unwelcome harassment based on their own religious beliefs and observances, or lack thereof. The cases addressing proselytizing in the workplace involve many different circumstances and include proselytizing employees, supervisors, and the employer itself. Proselytizing can be as literal as verbal expression or more figurative as in the wearing of religious paraphernalia.

When deciding whether an employment decision involving proselytizing violates the law, the same framework for religious discrimination is analyzed, i.e., Title VII applies. The case law is somewhat mixed, but as it relates to employees proselytizing in the workplace, the courts acknowledge that an employer who permits an employee to proselytize to a co-worker puts the employer in a difficult position. *See Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1021 (4th Cir. 1996).

While there are many circumstances where proselytizing can run afoul of employment laws, this paper examines proselytizing in three areas: an employee's right to proselytize, an employee's right to be free from a proselytizing employee, and an employer's right to proselytize.

II. Religious Beliefs

A. Historical Context

In early cases on the subject of religious beliefs, the U.S. Supreme Court adopted a theistic definition. In *Davis v. Beason*, 133 U.S. 333, 342 (1890), the Court stated that “[t]he term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character and obedience to his will.” By the mid-Twentieth Century the view had expanded. In *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961), the Court noted that neither a state nor the federal government can constitutionally “aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.” By way of example, the Court included the following footnote: “Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical

Culture, Secular Humanism and others.” *Id.* at 495 n.11.

Soon thereafter, in *United States v. Seeger*, 380 U.S. 163 (1965), the Court construed the statutory conscientious objector exemption from military service. The statute defined “religious training and belief” as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.” *Id.* at 165 (quoting 50 U.S.C. § 456(j)). The Court reasoned that Congress’s use of the term *Supreme Being* was meant to embrace all religions, and stated that:

. . . the test of belief “in a relation to a Supreme Being” is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders, we cannot say that one is “in a relation to a Supreme Being” and the other is not.

Id. at 165-66.

An element of subjectivity was thus injected in the consideration of whether one had a sincere religious belief, although the Court described the proper test as essentially objective: “[N]amely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for the [military-service] exemption?” *Id.* at 184. The Court directed the lower courts to decide “whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.” *Id.* at 184-85. *See also Welsh v. United States*, 398 U.S. 333, 338-40 (1970) (“If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual ‘a place parallel to that filled by ‘God’ in traditionally religious persons.”).

B. Definition of Religion

As noted above, Title VII was amended in 1972 to define religion as “all aspects of religious observance and practice, as well as belief . . .” 42 U.S.C. § 2000e(j). The Fifth Circuit has noted that “all forms and aspects of religion, however eccentric, are protected . . .” *Cooper v. General Dynamics, Conair Aerospace Div., Fort Worth Operation*, 533 F.2d 163, 168 (5th Cir. 1976). Referring to the standards laid out in *Seeger* and *Welsh*, the applicable Equal Employment Opportunity Commission guideline stated:

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to *include moral or ethical beliefs* as to what is right and wrong which are *sincerely held with the strength of traditional religious views* . . . The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not

determine whether the belief is a religious belief of the employee or prospective employee.

29 C.F.R. § 1605.1 (emphasis added).

In *Redmond v. GAF Corp.*, 574 F.2d 897 (7th Cir. 1978), the Seventh Circuit held that a professed belief is a bona fide religious one if the belief for which protection is sought is *religious* in the person's own scheme of things, and is *sincerely held*. *Id.* at 901 n.12. Because of the breadth of this definition employers often accept that an employee's profession of his or her religious beliefs, the sincerity of the belief is occasionally litigated.

In *Hussein v. The Waldorf-Astoria Hotel*, 134 F. Supp.2d 591 (S.D.N.Y. 2001), the district court granted summary judgment for the employer on a Muslim employee's religious discrimination claim. Hussein contended that the hotel violated Title VII by refusing to allow him to perform services as a banquet waiter after he appeared for work one evening with a beard in violation of hotel rules. *Id.* at 592. Hussein told the employer that the beard was mandated by his religion although he had not previously told anyone at the hotel about his religious belief. *Id.* at 594. And he had not adorned a beard at work for some 14 years, nor did he claim a recent conversion to the Muslim faith. He later shaved the beard and continued to shave daily until the date of his deposition. *Id.* at 594. The district court concluded that even though it was unusual to grant a summary judgment motion when a party's intent was at issue, a reasonable jury could only find that Hussein's religious assertion was not bona fide. *Id.* at 597 (quoting *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985) ("It is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity . . . of someone's religious beliefs.")).

In *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.3d 49 (1st Cir. 2002), the court reversed summary judgment for the EEOC because there were genuine issues of material fact regarding sincerity of the complainant's religious beliefs. There, the complainant asserted that his Seventh Day Adventist beliefs should excuse him from mandatory union membership. Noting Title VII's capacious definition of religion, the First Circuit observed that the statute left little room for the labor organization to challenge the religious nature of the plaintiff's professed beliefs. *Id.* at 56. But the court reasoned that "while the 'truth' of a belief is not open to question, there remains the significant question of whether it is 'truly held.'" *Id.* Because the sincerity of a particular belief involves credibility issues ordinarily reserved for the trier of fact, summary judgment against the union was improper, especially where the union offered evidence suggesting that the complainant had on several occasions engaged in behavior that conflicted with the tenets of his faith. *Id.* at 56-57

When courts and the EEOC are required to determine whether a belief is religious in nature for the purposes of Title VII, they generally avoid examining the tenets of religion. *See Edwards v. School Bd. of the City of Norton, Virginia*, 483 F. Supp. 620, 625 (W.D. Va. 1980), *vacated on other grounds*, 658 F.2d 951 (4th Cir. 1981). And Title VII protections are not restricted to mandated religious practices. *Heller v. EBB Auto. Co.*, 8 F.3d 1433, 1438-39 (9th Cir. 1993). For example, in *Hoffman v. Henderson*, 2001 WL 953477 (EEOC), Appeal No. 01A01092 (June 29, 2001), the complainant was a Catholic who contended that his beliefs precluded any work on Sundays. The EEOC's investigation unit concluded that the complainant did not have a bona

fide religious belief, rejecting the complainant's interpretation of Roman Catholic canons he cited in support of his Sunday Sabbath practice of not working. The EEOC rejected the finding for the reason that the agency should not have examined the tenets of the religion, and the complainant had stated persuasively that working on Sunday conflicted with his religious practice. *Id.* at *4.

In *Sidelinger v. Harbor Creek Sch. Dist.*, 2006 U.S. Dist. LEXIS 86703 (W.D. Pa., November 29, 2006), the district court ruled against the plaintiff because he had failed to establish that his religious belief was sincerely held. Sidelinger, a chemistry teacher, refused to wear a photo identification badge because he professed to have deep personal moral and religious convictions against it. *Id.* at *4. Because his belief was not a recognized religious practice, the court required him to adduce evidence to support his assertion that his beliefs were in conflict with display of an identification badge. *Id.* at *43. His mere assertions of a sincerely held belief were insufficient in absence of an established religious practice. *Id.* at *49.

C. Personal Preferences

In addressing religious beliefs, the *EEOC Compliance Manual on Religious Discrimination* states that beliefs are not protected merely because they are strongly held; rather, religion typically concerns "ultimate ideas about life, purpose, and death." Social, political and economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII. EEOC Compliance Manual, Section 12: *Religious Discrimination*, § 12-I, available at <http://www.eeoc.gov/policy/docs/religion.html>.

Employees sometimes request an accommodation for a matter of personal preference in exercising their religious practices. But the duty to make reasonable accommodation to employees' beliefs and practices does not extend to accommodating personal preferences. In *Dachman v. Shalala*, 9 Fed. Appx. 186 (4th Cir. 2001), the plaintiff asked for time off work to observe the Jewish Sabbath beginning at sundown Friday. Although her employer allowed her to leave two hours before sundown, she contended that this was an insufficient amount of time to obtain the bread to be served and perform other household duties before the sun set. The Fourth Circuit held that Dachman was seeking an accommodation that exceeded her religious obligation since the bakery had bread available on Thursday evenings and since nothing in Judaism mandated that all preparation for the Sabbath take place on Fridays.

Similarly, in *Tiano v. Dillard Dept. Stores, Inc.*, 139 F.3d 679 (9th Cir. 1998), an employee who was a devout Roman Catholic requested leave during the employer's holiday season to attend a religious pilgrimage to Medjugorje, Yugoslavia to see a purported vision of the Virgin Mary. Because store policy prohibited such leave during busy retail seasons, her request was denied. *Id.* at 680. When she went on the pilgrimage without permission, Dillard's discharged her. *Id.* at 681. In rejecting her accommodation claim, the Ninth Circuit reasoned that although the employee had a bona fide belief that she was "called" to go on the pilgrimage, nothing in her religious beliefs required it to occur at a particular time.

In *Schwartzberg v. Mellon*, 2008 U.S. Dist. LEXIS 1180 (W.D. Pa., January 8, 2008), plaintiff's religious discrimination claim failed because he could not show that his religious belief

against homosexuality conflicted with the employer's policy prohibiting hostility in the workplace. The employer placed the plaintiff, a Hasidic Jew, on "final warning" and subsequently denied a merit increase after he had violated the policy by sending offensive, anti-gay e-mails to other employees in violation of the policy. *Id.* The employer was not required to accommodate plaintiff's alleged need to express his religious belief against homosexuality because there was no showing that such vindication was a requirement of his faith. *Id.*

Further, Title VII does not sanction an employee's effort to transmute political or other non-religious views into a claim of a sincerely held religious belief. *See, e.g., Seshadri v. Kasraian*, 130 F.3d 798 (7th Cir. 1996) (employee's belief in "scrupulous honesty" was not a protected religious belief); *Eatman v. United Parcel Serv.*, 194 F. Supp.2d 256 (S.D.N.Y. 2002) (wearing dreadlocks as outward expression of internal commitment to Protestant faith and to Nubian belief system was mere personal preference); *Keady v. Nike, Inc.*, 116 F. Supp.2d 428 (S.D.N.Y. 2000) (graduate student's opposition to wearing Nike products was sociopolitical protest, not religious objection); *Slater v. King Soopers, Inc.*, 809 F. Supp. 809 (D. Colo. 1992) (discharge of employee for organizing pro-Nazi rally was based on his political and social views rather than his religious beliefs); *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977) (even though ancient Egyptians worshiped cats, belief in deeply spiritual effects of eating Kozy Kitten People/Cat Food was not a religious belief, so plaintiff's consumption of the cat food was not a religious observance).

III. Protections Against Religious Discrimination in the Workplace

Any analysis of proselytizing in the workplace and alleged violations of religious freedoms begins with the protections against religious discrimination in employment. Since proselytizing is a subset of practice and observance, a primer on the various laws and statutes prohibiting religious discrimination is instructive.

A. United States Constitution

The First Amendment to the United States Constitution prohibits Congress from enacting any law establishing a religion or prohibiting the free exercise of religion. The Establishment Clause and Free Exercise Clause of the First Amendment are also important when evaluating whether a law violates the Religious Freedom Restoration Act (*RFRA*). As a result, conflicts involving employees of religious institutions often implicate First Amendment concerns. In *Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 339 (1987), the U.S. Supreme Court addressed a First Amendment challenge to Title VII's exemption for religious organizations and held that the exemption does not violate the Establishment Clause. *See also Edwards v. Aguillard*, 482 U.S. 578, 618 (1987) (observing in dicta that neither Title VII's prohibition of religious discrimination nor the duty of reasonable accommodation violates the Establishment Clause).

B. Title VII and Chapter 21 of Texas Labor Code

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., prohibits religious discrimination in the workplace. Similarly, the various states have enacted analogous state statutes that protect employees from religious discrimination and retaliation. Some states extend coverage and provide protections to individuals that are not covered under Title VII. The number of religious discrimination cases brought under the Texas Commission on Human Rights Act (Chapter 21 of Texas Labor Code) is increasing. Texas courts look to federal precedent in interpreting the TCHRA. *Grant v. Joe Myers Toyota, Inc.*, 11 S.W.3d 419 (Tex. App. — Houston [14th Dist.] 2000, no pet.).

C. Religious Freedom Restoration Act and Analogous State Statutes

As Justice Scalia explained in *City of Boerne v. Flores*, 521 U.S. 507, 513 (1997), RFRA was enacted in a bipartisan effort in 1993 in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990). The RFRA unanimously passed the House and passed the Senate 97-3. RFRA provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." 42 U.S.C. § 2000bb -1(a). Subsection (b) codifies the previous standard of review for Establishment Clause challenges in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

In 1997, the Supreme Court determined that the RFRA was unconstitutional as to its applicability to states in *City of Boerne v. Flores*, 521 U.S. 507, 17 S. Ct. 2157 (1997). Several states passed legislation in response. To date at least 21 states have enacted their own version of the RFRA. In recent years, the RFRA has lost favor with many of its previous advocates because of attempts to use the statute to advocate for discriminatory practices. U.S. Senator Chuck Schumer, one of the original sponsors of the RFRA, addressed certain false comparisons of the federal RFRA to Indiana's version: "First, the federal RFRA was written narrowly to protect individuals' religious freedom from government interference unless the government or state had a compelling interest. If ever there was a compelling state interest, it is to prevent discrimination. The federal law was not contemplated to, has never been, and could never be used to justify discrimination against gays and lesbians, in the name of religious freedom or anything else."

IV. Duty of Reasonable Accommodation

Many religious discrimination cases concern the employer's duty of reasonable accommodation. The reasonable accommodation model is unique to religious and disability discrimination cases. Title VII requires covered employers to reasonably accommodate employees' religious observances and practices unless such accommodation would result in undue hardship.

The concept of reasonable accommodation was established initially in a 1967 EEOC guideline, which declared that employers had an obligation "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1 (1968). Five years later, with the Equal Employment Act of 1972, Congress enshrined the notion

of accommodation in Title VII. *See* 42 U.S.C. § 2000e(j). The Supreme Court later observed that the “intent and effect of [the definition of ‘religion’] was to make it an unlawful employment practice . . . for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees.” *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

In *Hardison* and *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986), the Court limited employers’ accommodation duty in several respects. *Hardison* established that a requested accommodation is unreasonable if granting it would require an employer to infringe on other employees’ rights. 432 U.S. at 79-81. The Court held that the airline was not required to allow the plaintiff to take Saturdays off for Sabbath observance if that accommodation would require employees with greater seniority to work on those days in violation of the employer’s collective bargaining agreement. The Court also defined *undue hardship* as a burden that arises when an accommodation results in more than a *de minimis* cost to the employer (a very employer-friendly standard). *Id.* at 84.

In *Ansonia*, the Court held that an employer is obligated to offer only a reasonable accommodation even if an alternative proposal would better protect the employee’s interests. 479 U.S. at 66-69. Consequently, the school board could require the plaintiff to use unpaid leave to fulfill his religious obligations where employees were already given three days of paid leave every year for religious reasons. The plaintiff was not entitled to additional paid leave as an accommodation.

The principles of reasonable accommodation and undue hardship are now woven into the fabric of religious discrimination law. Under Title VII, the term *religion* includes all aspects of religious observance or practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee’s religious observance or practice without undue hardship. 42 U.S.C § 2000e(j). Likewise, the TCHRA “applies to discrimination because of or on the basis of any aspect of religious observance, practice, or belief, unless an employer demonstrates that the employer is unable to reasonably accommodate the religious observance or practice of an employee or applicant without undue hardship to the conduct of the employer’s business.” TEX. LABOR CODE § 21.108. Accordingly, all covered employers must make reasonable accommodation of their employees’ religious observances when such observances conflict with employment practices so that the employees may continue to work and freely exercise their religion. Moreover, an employer may not permit an applicant’s need for religious accommodation to affect its decision whether to hire the applicant unless it cannot reasonably accommodate the applicant’s religious practices without undue hardship. 29 C.F.R. § 1605.3(b). An employer’s failure to accommodate an employee’s religious observance or practice because of “hypothetical hardship” violates Title VII. *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 520-22 (6th Cir. 1975) (observing that employer should attempt various methods of accommodation and point to hardships that actually resulted).

The Texas Legislature has also enacted a separate provision that specifically addresses reasonable accommodation by retail employers. *Id.* § 52.001. A retail employer must reasonably accommodate an employee’s religious practice unless it would create an undue hardship on the conduct of employer’s business. *Id.* § 52.001(c). Retail employers also must grant an employee’s

request for time off in order to attend one religious service a week. *Id.*

To establish a prima facie case of religious discrimination based on an employer's failure to accommodate an employee's religious beliefs, the plaintiff must establish that (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief and requested an accommodation; and (3) he or she was disciplined or discharged for failing to comply with the conflicting employment requirement. *Daniels v. City of Arlington, Tex.*, 246 F.3d 500, 506 (5th Cir. 2001); *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 224 (3d Cir. 2000); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996). Once an employee establishes a prima facie case, an employer can defend the claim by showing that it offered the employee reasonable accommodation or that the accommodation sought cannot be accomplished without undue burden. *United States v. Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882, 886-87 (3d Cir. 1990).

A. Scope of Duty

1. Employee Notification

To establish a prima facie case for failure to make an accommodation, the employee must show that he or she informed the employer of the religion-work rule conflict. In *Chaplin v. Du Pont Advance Fiber Sys.*, 124 Fed. Appx. 771 (4th Cir. 2005), the plaintiffs were self-described white Christians and "Confederate Southern Americans" who alleged discrimination on the basis of race, religion and national origin when their employer forbade the display of the Confederate battle flag. The court found that the plaintiffs had never requested an accommodation of their purported religious beliefs before they filed employment discrimination charges with the EEOC. Although the plaintiffs apparently had informed DuPont of their beliefs, they did not request permission to display the Confederate flag and symbols until months after they filed the charges. The failure to make the requested accommodation in a timely manner resulted in a dismissal of the claims. *See also Wilkerson v. New Media Tech. Charter Sch., Inc.*, 2008 U.S. App. LEXIS 7526 (3d Cir. April 9, 2008) (the court dismissed plaintiff's failure to accommodate claim because she did not inform her employer that attending a "libations" ceremony conflicted with her religious beliefs until after the need for an accommodation had become moot); *Reed v. Great Lakes Cos., Inc.*, 330 F.3d 931 (7th Cir. 2003) (Title VII imposes duty on employer, but also on employee to give fair warning of which employment practices will interfere with religious practices and that employee wants to have waived or adjusted).

In *Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001), two state employees were disciplined for engaging in religious speech and for proselytizing while dealing with clients, some of whom complained of this conduct. The employees filed employment discrimination charges, asserting that the employer had failed to accommodate their religious beliefs and had violated their First Amendment rights. *Id.* at 160. The accommodation claims failed because the employees did not establish that they had informed the employer of their need to evangelize. *Id.* at 167. The employees argued on appeal that the state employer should have known of such need because it knew they were *born-again Christians*, but the Second Circuit declined to impute such knowledge to the employer. *Id.* at 167-68. The appellate court concluded that knowledge that plaintiffs were born-again Christians was insufficient to put their employer on

notice of their need to evangelize to clients, reasoning that to hold otherwise would place a heavy burden on employers, making them responsible for being aware of every aspect of every employee's religion which would require an accommodation. *Id.* at 168 (citing *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1020 (4th Cir. 1996) ("Knowledge that an employee has strong religious beliefs does not place an employer on notice that she might engage in any religious activity . . ."). *See also Collins v. Tarrant Appraisal District*, 2007 Tex. App. LEXIS 7922 (Tex. App. — Fort Worth, June 14, 2007) (plaintiff, who was discharged for refusing to provide hair sample for drug testing, failed to show that employer was aware of her Pentecostal faith and its prohibitions against hair cutting).

2. Selection of Accommodation

Various courts have reached different results as to whether an accommodation must eliminate the workplace conflict in order to be deemed reasonable. The religious discrimination chapter of the EEOC Compliance Manual states in Sec. 12-IV(A) that an accommodation is not reasonable if it merely lessens rather than eliminates the conflict between religion and work, provided that eliminating the conflict would not impose an undue hardship. *See also Walker v. Alcoa, Inc.*, 2008 U.S. Dist. LEXIS 45684 (N.D. Ind. 2008) (holding that in order for an accommodation to be reasonable, it must eliminate the religious conflict; allowing the plaintiff to use vacation days, transfer to another department, or work a double shift on Saturdays was not a reasonable accommodation because it did not create a permanent guarantee of Sundays off). By contrast, both the Fifth and Eighth Circuits have held that an accommodation does not have to completely eliminate a work-religion conflict in order to be reasonable. *See EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307 (5th Cir. 2008); *Sturgill v. United Parcel Serv. Inc.*, 512 F.3d 1024 (8th Cir. 2008).

Generally, an employer is required to devise an action plan in order to accommodate an employee's religious observance once the employee puts the employer on notice that a work-religion conflict exists. An employer's duty to negotiate possible accommodations ordinarily requires it to take "some initial step to reasonably accommodate the religious belief of that employee." *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) (quoting *Heller v. EBB Auto. Co.*, 8 F.3d 1433, 1440 (9th Cir. 1993)). Proposing at least one reasonable accommodation suffices to discharge an employer's duty under Title VII. *Rodriguez v. City of Chicago*, 156 F.3d 771, 777 (7th Cir. 1998).

In *Bruff v. North Miss. Health Servs., Inc.*, 244 F.3d 495 (5th Cir. 2001), a counselor objected to certain job duties on religious grounds. After outlining in writing its alternatives, the hospital employer gave the employee 30 days to obtain another position in the hospital that would not conflict with her religious views. *Id.* at 498. During this 30-day period the employer informed the employee about a number of vacant positions and offered to give her two tests to determine her occupational interests and aptitudes. *Id.* The Fifth Circuit held that the employer had reasonably accommodated the employee's religious views. *Id.* at 503. *See also Vaughn v. Waffle House, Inc.*, 263 F. Supp.2d 1075, 1082-84 (N.D. Tex. 2003) (the mere fact that one suggested accommodation would have resulted in lower compensation for the plaintiff did not render that accommodation unreasonable).

In *Buonanno v. AT&T Broadband, LLC*, 313 F. Supp.2d 1069 (D. Colo. 2004), the court held that an employer had a duty to investigate whether some accommodation could in fact be reached. The plaintiff was a Christian who contested his termination for declining to sign a mandatory anti-discrimination policy that required him to “value” the beliefs of his employer and fellow co-workers. Despite management’s conflicting interpretations of the policy, the employer refused to clarify the language or attempt to reach any accommodation with Buonanno. The district court ruled that the employer violated Title VII by failing to engage in the required dialogue with the employee upon notice of his concerns and by failing to clarify the challenged language to reasonably accommodate his religious beliefs. *Id.* at 1083.

Further, the employer must accept an accommodation suggested by an employee if the employer is unable to construct its own method or remedy which would reasonably accommodate the employee’s religious observance or practice. *See Kendall v. United Air Lines, Inc.*, 494 F. Supp. 1380, 1387, 1391 (N.D. Ill. 1980), *decision supplemented*, 1981 WL 27010 (N.D. Ill. Oct. 27, 1981); *Kentucky Comm’n on Human Rights v. Commonwealth, Dep’t for Human Resources*, 564 S.W.2d 38 (Ky. App. 1978).

3. Employee Suggestions

In keeping with this initial duty placed on the employer, an employee who experiences a conflict between his or her religious practice and an employment practice is not required to suggest any particular accommodations to the employer. *E.g., Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978) (“While we feel the plaintiff should be free, even encouraged, to suggest to his employer possible ways of accommodating his religious needs, we see nothing in the statute to support the position that this is part of the plaintiff’s burden of proof.”); *Heller*, 8 F.3d at 1441 (plaintiff had no duty to suggest alternatives or compromise his beliefs).

4. Duty to Cooperate

When an employer makes a good faith suggestion in an effort to make a reasonable accommodation, the employee must cooperate. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (an employer’s reasonable accommodation only has to address an employee’s religious beliefs and does not have to coincide with the employee’s preferred accommodation); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982) (employee has an obligation to make a good faith attempt to accommodate his religious needs through means offered by the employer). In *Shelton v. Univ. of Medicine & Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000), an employee nurse asserted that her religion prohibited her from participating in any labor and delivery procedures that could be construed as abortions. The employer invited the employee to seek assistance from the Human Resources Department to search for a comparable position in the facility and also suggested that she be transferred to the neonatal unit. The employee could not show that any religious conflict existed by her working in the neonatal unit. In addition, the court found that she failed to cooperate with her employer’s efforts at reasonable accommodation because she failed to contact Human Resources.

The employee’s obligation to cooperate does not arise until the employer has taken some initial steps to reasonably accommodate the employee’s religious beliefs or practices. *Bruff*, 244

F.3d at 501. And an employer's unreasonable delay in offering an accommodation may violate Title VII. *See Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1483 (10th Cir. 1989) (employer's offer of reasonable accommodation during administrative proceedings after rejecting plaintiff's employment application does not obviate viable claim of religious discrimination).

B. Failure to Make Accommodation as Adverse Employment Action

Establishment of a prima facie case requires the plaintiff to show that he or she suffered an adverse employment action. Some courts have rejected the notion that an employer's failure to make reasonable accommodation is itself an adverse employment action. The Ninth Circuit, for example, affirmed summary judgment for the employer against a Jehovah's Witness who, as a new cadet in the Washington State Patrol Academy, believed his religion prohibited him from saluting the flag or taking the trooper's oath. *Lawson v. Washington*, 296 F.3d 799 (9th Cir. 2002), *reh'g en banc denied*, 319 F.3d 498 (9th Cir. 2003). Lawson resigned his employment without first requesting an accommodation and then sued the state of Washington for constructive discharge. 296 F.3d at 803. Because no reasonable person in Lawson's position would have felt compelled to resign under these circumstances, the court determined that he had failed to establish a prima facie case. *Id.* at 805.

In *Leifer v. New York State Div.*, 2007 U.S. Dist. LEXIS 5130 (E.D.N.Y. January 24, 2007), the court dismissed plaintiff's failure to accommodate claim and rejected his argument that forcing him to choose between his religion and his work was an adverse employment action. The employer failed to reschedule a work meeting which conflicted with Leifer's observance of Rosh Hashanah. He was unable to show that he suffered an adverse employment action as a result of his failure to attend the meeting. *Id.*

In *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629 (6th Cir. 2003), the Sixth Circuit affirmed summary judgment against plaintiffs who argued that they were constructively discharged or, alternatively, that the *discipline or discharge* element had been eliminated by the 1991 amendments to 42 U.S.C. § 1981a(a)(1). These amendments made compensatory and punitive damages available to victims of intentional employment discrimination even if the employee was not discharged or disciplined. *Id.* at 636. (The plaintiffs were Orthodox Jews whom had resigned as insurance agents before the effective date of a new corporate policy requiring the employer's offices to remain open on Friday evenings and Saturday mornings. *Id.* at 632.) Unimpressed, the court held that discipline or discharge remained an element of a prima facie case of religious discrimination following the 1991 amendments to Title VII, noting no court had interpreted them as to eviscerate that element. *Id.* at 635. *But see Storey v. Burns Int'l Sec. Serv.*, 390 F.3d 760, 764 (3d Cir. 2004) (employer's failure to make reasonable accommodation when employee's sincerely held religious belief conflicted with a job requirement may constitute an adverse employment action unless employer demonstrates that such accommodation would result in undue hardship).

C. Types of Accommodations

The *EEOC Compliance Manual on Religious Discrimination* cites seven common methods of accommodation in the workplace including scheduling changes, voluntary substitutes and shift swaps, change of job tasks and lateral transfer, modifying workplace practices policies and procedures, excusing union dues or agency fees, permitting prayer proselytizing, and other forms of religious expression, and employer-sponsored programs.

EEOC Compliance Manual, Section 12: *Religious Discrimination*, § 12-IV(C) (this section is available at <http://www.eeoc.gov/policy/docs/religion.html>).

1. Work Schedules

Work scheduling is one of the most common issues arising in religious discrimination cases because religious beliefs and practices often require time off work for observance of Sabbath days and religious holidays. Consequently, EEOC guidelines suggest various work scheduling accommodations. These include the employer's assignment of a voluntary substitute with similar qualifications, creation of a flexible work schedule for individuals requiring accommodation, and a determination whether a lateral transfer or a change in job assignment may resolve the conflict. 29 C.F.R. §1605.2(d). An employer is not required to grant an employee time off with pay. *See Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390-91 (10th Cir. 1984).

Employers who fail to reasonably accommodate employees' scheduling needs based on their religious beliefs violate Title VII. *See, e.g., Cooper v. Oak Rubber Co.*, 15 F.3d 1375 (6th Cir. 1994) (finding that employer unreasonably required the employee to use all her vacation leave to be off on Saturdays for religious observances); *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979) (allowing a worker to leave at sunset every Friday required only *de minimis* cost because a regular pool of replacements was available); *Vaughn v. Waffle House, Inc.*, 263 F. Supp.2d 1075 (N.D. Tex. 2003) (employer offered reasonable accommodation to plaintiff's Saturday Sabbath observation).

2. Religious Dress and Grooming Practices

An employee's dress and grooming practices based on his or her religious beliefs also require reasonable accommodation. *Carter v. Bruce Oakley, Inc.*, 849 F. Supp. 673 (W.D. Ark. 1993) (requiring employer to permit employee to wear a beard because he believed it was mandated by scripture); *EEOC v. Reads, Inc.*, 759 F. Supp. 1150, 1161 (E.D. Pa. 1991) (employer's refusal to hire Muslim because of rule prohibiting religious garb in classroom violated Title VII).

3. Testing and Screening

Employers who use employment tests must accommodate individuals who cannot attend a scheduled test because of their religious practices unless the accommodation is an undue hardship. *Minkus v. Metro. Sanitary Dist. of Greater Chicago*, 600 F.2d 80, 84 (7th Cir. 1979); 29 C.F.R. § 1605.3(a). Employers also should be conscious of the adverse impact of pre-employment

screening on certain religious groups. A person employed to obtain positions for public school employees may not inquire, directly or indirectly, about the religion or religious affiliation of anyone applying for employment in the public schools of Texas. TEX. EDUC. CODE ANN. § 22.901(a). And pre-employment inquiries about an applicant's availability during normal work hours may exclude individuals who have certain religious practices from employment opportunities. *See* 29 C.F.R. § 1605.3(b)(2). Such inquiries also may be used as evidence of discrimination. *See id.* § 1605.3(b)(2)(3). Thus, no public or private employer should inquire about an applicant's need for religious accommodation until after making the hiring decision. *See id.*

4. Other Accommodations

Even though a desired accommodation may be somewhat unusual, it may nevertheless be mandated by Title VII. For example, in *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1487-88 (10th Cir. 1989), the applicant was a member of the Native American Church, whose religious observances involved the use of peyote. Because his use of the substance violated the employer's drug policy, the employer refused to accommodate his religious practices. The court held that the employer had a duty to at least attempt accommodation. *Id.* at 1487-88.

Further, courts generally require employers to make a reasonable accommodation of an employee's religious beliefs on moral issues. *See, e.g., Miller v. Drennon*, 56 Fair Empl. Prac. Cas. (BNA) 274 (D.S.C. 1991) (employer reasonably accommodated male technician's religious beliefs that conflicted with employer's requirement that on-call male technicians sleep in the same room as female technicians), *aff'd*, 966 F.2d 1443 (4th Cir. 1992); *McGinnis v. United States Postal Serv.*, 512 F. Supp. 517 (N.D. Cal. 1980) (suggesting that employer should have attempted to accommodate the beliefs of a postal clerk who refused to distribute draft registration materials). *But see Ryan v. United States Dep't of Justice*, 950 F.2d 458 (7th Cir. 1991), *cert. denied*, 504 U.S. 958 (1992) (holding that FBI's discharge of agent for his refusal to investigate pacifist antiwar protestors did not violate Title VII's reasonable accommodation requirement).

D. Undue Hardship

Many religious discrimination cases turn on the defense of undue hardship. Some considerations relevant to the defense are addressed below.

1. Genuine and Immediate Hardship

Courts draw a bright line between undue hardship that would be immediately experienced by an employer if an employee's religious practices were accommodated and the employer's projections of future hardship. The employer may not circumvent its duty of reasonable accommodation by claiming that a future hardship will result from a present accommodation. *See, e.g., Haring v. Blumenthal*, 471 F. Supp. 1172 (D.D.C. 1979), *cert. denied*, 452 U.S. 939 (1981). And an employer's mere assumption that more employees who exercise the same religious practices as the person being accommodated also may need accommodation is not evidence of undue hardship. *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *see also* 29 C.F.R. § 1605.2.

2. Cost Considerations

Employers are not required to make accommodations if the costs that would be incurred are more than *de minimis*. See 29 C.F.R. § 1605.2(e); see also *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977). Moreover, such considerations are not limited to the direct expenditure of money. Any costs in efficiency or monetary expenditures that are more than *de minimis* may constitute an undue hardship. See *Mann v. Frank*, 7 F.3d 1365, 1370 (8th Cir. 1993); *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir.) cert. denied, 515 U.S. 1152 (1995) (requiring city police department to grant employees shift exceptions imposed more than *de minimis* cost because of public health, safety and welfare considerations); *Favero v. Huntsville Indep. Sch. Dist.*, 939 F. Supp. 1281, 1286 (S.D. Tex. 1996) aff'd, 110 F.3d 793 (5th Cir. 1997). (granting school bus drivers unpaid leave for religious observances would be an undue burden because the school district would have to provide replacement drivers at increased cost and inconvenience).

What constitutes a hardship that is more than *de minimis* is not susceptible of easy definition. Two cases illustrate the difficulties of establishing a hard and fast rule. In *EEOC v. Ilona of Hungary, Inc.*, 97 F.3d 204 (7th Cir. 1996), modified, 108 F.3d 1569 (7th Cir. 1997), a beauty parlor's offer to give two Jewish employees a day off other than the requested Saturday Yom Kippur observance was not a reasonable accommodation even though the employer would lose money if the two employees were absent on that Saturday. In *Tepper v. Potter*, 505 F.3d 508, 516 (6th Cir. 2007), however, the court found for the employer who, after two years of accommodating plaintiff's religious request for Saturdays off, implemented a new policy prohibiting him from switching shifts. Requiring plaintiff to take vacation days and incur loss of pay in order to avoid Saturday work was not unreasonable in light of a staff shortage and undue burden on employer. *Id.*

3. Impact on Other Employees

A significant consideration in determining undue hardship is the effect of a requested or needed accommodation on other employees. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the plaintiff sought a change in shift assignments to accommodate his religious beliefs. A collective bargaining agreement governed the employer's job and shift assignments. The Supreme Court held that it would be unreasonable to require either TWA or the union to breach an extant collective bargaining agreement, accept replacement workers if costs would be incurred, and impose an unwanted shift on other employees. 432 U.S. at 79, 81, 84.

Similarly, it is an undue hardship to require an employer to force employees to permanently switch shifts over their objections to accommodate another employee's different observation of the Sabbath. *Eversley v. MBank Dallas*, 843 F.2d 172, 176 (5th Cir. 1988). See also *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 274 (5th Cir. 2000) (finding undue hardship where Jehovah's Witness requested not to be assigned to overnight trucking runs with female drivers; "mere possibility of an adverse impact on co-workers" was sufficient); *Vaughn v. Waffle House, Inc.*, 263 F. Supp.2d 1075 (N.D. Tex. 2003) (accommodation of employee's religious beliefs does not require employer to impose additional responsibilities on co-workers); *EEOC v. Dalfort Aerospace, LP*, 2002 U.S. Dist. LEXIS 2771 (N.D. Tex. Feb. 19, 2002) (granting summary judgment for employer where evidence showed that employer could not accommodate the beliefs

of a Seventh Day Adventist in light of certain job bidding procedures in a collective bargaining agreement).

4. Collective Bargaining Agreements

Scheduling accommodations often constitute an undue hardship when they adversely affect seniority rights or impair neutral work scheduling requirements under an employer's collective bargaining agreement with a labor organization. *See, e.g., Stolley v. Lockheed Martin Aeronautics Co.*, 228 Fed. Appx. 379 (5th Cir. 2007) (summary judgment granted in favor of employer who was unable to accommodate employee because shift changes were in violation of the collective bargaining agreement); *Virts v. Consolidated Freightways Corp.*, 285 F.3d 508 (6th Cir. 2002) (employer not required to accommodate male truck driver's request that he not be assigned to work with female drivers on *sleeper runs* due to his Christian belief requiring him to avoid the appearance of evil; such an accommodation would result in violation of the seniority provisions of a collective bargaining agreement and would affect other employees' contractual rights); *Thomas v. Nat'l Assn. of Letter Carriers*, 225 F.3d 1149 (10th Cir. 2000) (employee's request to have all Saturdays off for religious observances would violate collective bargaining agreement); *EEOC v. Dalfort Aerospace, LP*, 2002 U.S. Dist. LEXIS 2771 (N.D. Tex. Feb. 19, 2002) (granting summary judgment for employer where evidence showed that certain job bidding procedures in a collective bargaining agreement prevented employer from accommodating beliefs of Seventh Day Adventist); *Turpen v. Missouri-K.T. R. Co.*, 573 F. Supp. 820 (N.D. Tex. 1983), *aff'd*, 736 F.2d 1022 (5th Cir. 1984). Thus, an employer is not required to deviate from its seniority system in order to give an employee a shift preference for religious reasons. *Hardison*, 432 U.S. at 81; 29 C.F.R. § 1605.2(e)(2). But "the mere existence of a seniority system does not relieve an employer of the duty to attempt reasonable accommodation of its employees' religious practices, if such an accommodation can be accomplished without modification of the seniority system and with no more than a *de minimis* cost." *Balint v. Carson City, Nevada*, 180 F.3d 1047, 1049 (9th Cir. 1999).

5. Religious Activities in the Workplace

Generally, an accommodation that would allow an employee to engage in religious activities during working hours constitutes an undue hardship. *See, e.g., Gillard v. Sears, Roebuck & Co.*, 32 Fair Empl. Prac. Cas. (BNA) 1274 (E.D. Pa. 1983) (holding that employer may insist on employee working during business hours rather than reading the Bible on the job).

6. Illegality of Accommodation

Employers need not accommodate an employee or applicant's religious beliefs if such accommodation would cause the employer to violate the law. *Seaworth v. Pearson*, 203 F.3d 1056 (8th Cir. 2000) (employer not liable for declining to hire plaintiff who had refused to provide social security number for religious reasons where employer's failure to provide an employee's social security number to Internal Revenue Service would violate federal law); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9th Cir. 1999) (same holding).

V. Proselytizing in the Workplace

Because employers are responsible for maintaining a nondiscriminatory work environment, they are liable for perpetrating or tolerating religious harassment of their employees. Title VII violations may result if an employer tries to avoid potential co-worker objections to employee religious expression by preemptively banning all religious communications in the workplace since Title VII requires that employees' sincerely held religious beliefs be accommodated as long as no undue hardship is posed. However, as discussed below, an employer is not required to forfeit its sincerely held religious practices and beliefs either.

A. An Employee's Right to Proselytize

Title VII makes it unlawful for an employer 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). "All forms and aspects of religion, however eccentric, are protected except those that cannot be, in practice and with honest effort, reconciled with a business-like operation." *Cooper v. Gen. Dynamics, Convair Aerospace Div., Ft. Worth Operation, et al.*, 533 F.2d 163, 168-169 (5th Cir. 1976).

To determine whether allowing or continuing to permit an employee to pray, proselytize, or engage in other forms of religiously oriented expression in the workplace would pose an undue hardship, employers should consider the potential disruption, if any, that will be posed by permitting this expression of religious belief. Expression can create undue hardship if it disrupts the work of other employees or constitutes — or threatens to constitute — unlawful harassment. Since an employer has a duty under Title VII to protect employees from religious harassment, it would be an undue hardship to accommodate such expression.

Religious expression directed toward co-workers might constitute harassment in some situations, for example where it is facially abusive (that is, demeans people of other religions), or where, even if not abusive, it persists even though the co-workers to whom it is directed have made clear that it is unwelcome. It is necessary to make a case-by-case determination regarding whether the effect on co-workers actually is an undue hardship. The determination of whether it is an undue hardship to allow employees to engage in religiously oriented expression toward customers is a fact-specific inquiry and will depend on the nature of the expression, the nature of the employer's business, and the extent of the impact on customer relations. However, an employer is far more likely to be able to demonstrate that proselytizing by an employee to a customer would constitute an undue hardship to accommodate an employee's religious expression without regard to the length or nature of the business interaction.

B. An Employer's Right to Proselytize

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

it costs the employer nothing and does not disrupt business operations or other workers.

As discussed above, an employer can have sincerely held religious beliefs and Title VII does not require that an employer abandon his or her religion. “Where the religious practices of employers ... and employees conflict, Title VII does not, and could not, require individual employers to abandon their religion. Rather, Title VII attempts to reach a mutual accommodation of the conflicting religious practices. This is consistent with the First Amendment’s goal of ensuring religious freedom in a society with many different religions and religious groups.” *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 621 (9th Cir. 1988).

Hobby Lobby, Chick-Fil-A, Tyson Foods, Forever 21, In-N-Out Burger, and Mary Kay are among a number of well-known companies that exemplify a Christian belief system and subject to Title VII. By contrast, all religious organizations are exempt from Title VII with respect to employment decisions based on their religious practices. Title VII “shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” 42 U.S.C. § 2000e-1(a). *See also EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 619 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989); 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2) (2007). And religious organizations are exempt from EEOC reporting requirements (principally on First Amendment grounds). *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 286-88 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982). The rule of reason is embedded in these statutory provisions. It would defy logic and common sense to require churches, synagogues, and mosques to accommodate and employ atheists on their staffs.

While the First Amendment provides that an employer may express its sincerely held religious beliefs in its work, it is nonetheless prohibited under Title VII from proselytizing to employees if the employees object. Nor can an employer force an employee to attend meetings which are overtly religious that include prayer and religious talk. *Young v. Sw. Sav. & Loan Assn.*, 509 F.2d 140, 144 (5th Cir. 1975) (Plaintiff could not be forced to attend the entirety of staff meetings that included religious services which were repugnant to her conscience). *Mathis v. Christian Heating and Air Conditioning, Inc.*, 2016 WL 304766, at *13 (E.D. Pa. Jan. 26, 2016) (employee’s religious-based objection to wearing a name tag displaying a religious message was sufficient to survive summary judgment on a Title VII claim); *Shepherd v. Gannondale*, 2014 WL 7338714, at *8 (W.D. Pa. Dec. 22, 2014) (denying summary judgment where employee was forced to attend monthly “community meetings” containing obligations that violated her beliefs as a Jehovah’s Witness); *Yochum v. FJW Inv., Inc.*, CV 2:11-0378, 2016 WL 1255289, at *5 (W.D. Pa. Mar. 31, 2016) (plaintiff’s case survived summary judgment where employer required her to attend training and *breakout sessions* that contained religious proselytizing and indoctrination concerning a set of religious beliefs despite her objections to the religious content).

The test for determining whether religious discrimination has occurred when faced with a plaintiff’s claim that an employer discriminated against her because she did not share the employer’s or supervisor’s religious beliefs is slightly modified from above. This test, adopted in *Shapolia v. Los Alamos Nat’l Lab.*, 992 F.2d 1033, 1037-38 (10th Cir. 1993), requires the plaintiff to show (1) that she was subjected to some adverse employment action; (2) that, at the time the

action was taken, her job performance was satisfactory; and (3) some additional evidence to support the inference that the adverse action was taken because of a discriminatory motive based on the employee's failure to follow her superior's religious beliefs.

C. Employees' Right to Be Free from Proselytizing

While an employer must accommodate a proselytizing employee, an employer must also protect an employee's right to be free from the proselytizing of another employee, his supervisor, or his employer. "Religious discrimination under this paradigm arises where an employee alleges he or she was retaliated against because he or she was unable to fulfill a job requirement due to religious beliefs or observances. In this scenario, a *prima facie* case requires the employee to demonstrate that the belief or observance was religious in nature, that he called it to the attention of his employer, and that the religious belief or observance was the basis for his discharge or other discriminatory treatment." *Panchoosingh v. Gen. Labor Staffing Servs., Inc.*, 2009 WL 961148, at *5 (S.D. Fla. Apr. 8, 2009). An employee that resists the proselytizing of other employees and his employer cannot be treated differently than those of whom he complains. *Id.* at *7. (Employee who was openly critical of supervisor's constant proselytizing and resisted the urged conversion to Christianity treated less favorably to Christian employees).

Employers can be put in a difficult position when an employee complains of another employee's proselytizing. "While Title VII rightly condemns acts of religious discrimination in the workplace, the line between permissible religious commentary in the workplace and a religiously hostile workplace quickly becomes fuzzy." *Sprague v. Adventures, Inc.*, 121 Fed. Appx. 813, 817 (10th Cir. 2005). An employer has an obligation to protect an employee that is on the receiving end of proselytizing just as much as the employee doing the proselytizing. In situations "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." *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1021 (4th Cir. 1996).

When put in this difficult position, an employer's best option is to remain neutral and prohibit proselytizing of any kind. In *Chalmers*, the employer discharged an Evangelical Christian employee for mailing proselytizing letters to other employees' residences. The court determined that the employer's decision did not violate Title VII because the statute does not require an employer to allow an employee to impose his religious views on others. *Id.* (quoting *Wilson v. U.S. West Communications*, 58 F.3d 1337, 1342 (8th Cir. 1995)).

Employers do not violate Title VII when they prohibit an employee from distributing proselytizing pamphlets or materials. In *Ervington v. LTD Commodities, LLC*, 555 Fed. Appx. 615, 618 (7th Cir. 2014), a former employer sued claiming she was wrongfully discharged for distributing materials to other employees as a part of her religious practice. The court disagreed because her employer was not required to accommodate the employee's religion by permitting her to distribute pamphlets offensive to other employees. A similar result was reached in *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004), where the Ninth Circuit ruled that Title VII does not require an employer to accommodate an employee's desire to impose his religious beliefs upon his co-workers. Likewise, in *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997),

the plaintiff's supervisor relentlessly pressured the plaintiff to conform her thinking and conduct with his own religious beliefs, and he admonished her in no uncertain terms that she was at risk of losing her job if she was unwilling to do so.

Finally, the Southern District of Indiana wrote an extensive opinion on this subject in *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp.2d 763, 819 (S.D. Ind. 2002). This religious harassment and disparate treatment action brought by the EEOC involved both *pattern or practice* claims and individual disparate treatment claims. In addressing egregious violations of Title VII, the court recognized the employer's proselytizing behavior was so aggressive and systematic that "defendant's own recitation of the facts, set forth in some detail ... amply supports the conclusion that [the owner] and other management personnel viewed it as their duty to share their religious beliefs with [the] employees and even to encourage employees to convert to [their] brand of Christianity and that she lost few opportunities to do so." *Id.*

D. Proselytizing Employers and the RFRA

As discussed in the preceding sections, under Title VII an employer cannot require, as a mandate of employment, that employees conform to their religious beliefs and observances. But that has not stopped an increase in litigation and legislation in an effort to circumvent Title VII. In recent years and after some successful legal challenges in courts, some states have enacted their own versions of the RFRA which are extremely deferential to an employer's right to proselytize. With the recent Supreme Court decision on marriage equality, and successful RFRA challenges in *Hobby Lobby* and First Amendment challenges in *Masterpiece Cakeshop*, there are some who strongly believe their "religious freedoms" need enhanced protections. These individuals welcome the enactment of state statutes to protect the religious freedoms they feel are being eroded. Critics of the state RFRA statutes argue that the intent of the state legislatures is to protect the religious freedoms of employers, and not the religious rights of employees as was the intent of the original RFRA. Indeed, the Supreme Court's holding in *Hobby Lobby* reaffirmed the principle that for-profit companies have the right to exercise religion and that such exercise is protected under the RFRA. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772 (2014). While the Court attempted to dispel the notion "that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction," there are cases involving employers who are using that pretense. *Id.* at 2783.

In *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp.2d 763, 819 (S.D. Ind. 2002), an employer alleged the EEOC violated the Establishment Clause and RFRA with an "overly-aggressive and intrusive inquiry" into the employer's religious beliefs and the religious beliefs of other employees and former employees in order to make its Title VII case. *Id.* at 806. Preferred Management asserted that the EEOC violated the test established in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2015 (1971), when the EEOC "enmeshed itself in an administrative entanglement of religion" by intruding in the religious beliefs of Preferred's owner and its current and former employees. *Id.* at 806-807. Ultimately, there was no evidence to support the allegations that the agency was either acting with the purpose or had the effect of advancing or inhibiting religion. *Id.* at 807. The EEOC's authority to investigate, conciliate, and institute legal proceedings has been repeatedly upheld in other First Amendment inquiries. *See, e.g., University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990); *Keyishian v. Board of Regents of University of New York*, 385 U.S. 589 (1967).

In 2018, the Sixth Circuit reversed a district court decision and upheld Title VII when faced with a RFRA challenge. The circuit court determined that the RFRA has minimal impact on the EEOC's authority to enforce the anti-discrimination statute, holding that:

Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII. The unrefuted facts show that the Funeral Home fired Stephens because she refused to abide by her employer's stereotypical conception of her sex, and therefore the EEOC is entitled to summary judgment as to its unlawful-termination claim. RFRA provides the Funeral Home with no relief because continuing to employ Stephens would not, as a matter of law, substantially burden Rost's religious exercise, and even if it did, the EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination.

Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 600 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 18-107, 2019 WL 1756679 (Apr. 22, 2019). The Supreme Court granted certiorari on the following question: "Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U. S. 228 (1989)." *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 18-107, 2019 WL 1756679, at *1 (U.S. Apr. 22, 2019).

There are continuing concerns that RFRA may be construed to allow discriminatory employment practices. On October 6, 2017, then-Attorney General Jeff Sessions issued explicit guidance for federal agencies to apply religious liberty protections in federal law. Sessions' guidance laid out 20 fundamental principles for the Executive Branch to follow. On July 30, 2018, Sessions announced the creation of a Religious Liberty Task Force to enforce the 2017 DOJ memorandum ordering federal agencies to make the broadest possible interpretation of *religious liberty* when enforcing federal laws. Sessions believed the task force was a necessary step in preventing secularism which he claimed is "a dangerous movement, undetected by many, [which] is now challenging and eroding our great tradition of religious freedom." According to Sessions, the October 2017 guidance included "the principle that free exercise means a right to act — or to abstain from action...the principle that government shouldn't impugn people's motives or beliefs. We don't give up our rights when we go to work, start a business, talk about politics, or interact with the government. We don't give up our rights when we assemble or join together. We have religious freedom as individuals and as groups. In short, we have not only the freedom to worship — but the right to exercise our faith. The Constitution's protections don't end at the parish parking lot nor can our freedoms be confined to our basements."

Going forward, it is unclear exactly how the courts will view the impact of RFRA and religious liberties on employment practices. As Justice Brennan described this neutrality, the Constitution demands that:

not only that government may not be overtly hostile to religion but also that it may

not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.

Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 9 (1989).

The constitutional mandate for government neutrality when it comes to religion seems to be teetering on a precipice. In view of the Trump Administration's recent guidance on the place of religion in society and the Supreme Court's decisions in *Hobby Lobby* and *Masterpiece Cakeshop*, the tension between religious expression in the workplace and the right to be free from unwelcome proselytizing inevitably will escalate and more litigation will ensue.

E. Selected Cases

***Carter v. Transport Workers Union of America*, 353 F. Supp.3d 556 (N.D. Tex. 2019).** Plaintiff, a flight attendant, alleged that she was discharged because of her religious beliefs and practice requiring her to share with others that abortion is the taking of a human life. When she learned that the local union representing all Southwest Airlines flight attendants participated in the Women's March and supported pro-abortion activities, she posted videos to her personal Facebook page opposing abortion and sent the union president a series of videos and messages opposing abortion and criticizing the union's support for abortion. Following a meeting at which plaintiff alleged she notified Southwest Airlines management of her religious beliefs and explained why she sent the Facebook messages to the union president, she was discharged for violation of the employer's Workplace Bullying and Hazing Policy and Social Media Policy. The termination notice also noted that her conduct might also violate the harassment policy. The court denied the employer's motion to dismiss her Title VII claims for discriminatory discharge, holding that whether accommodating plaintiff's beliefs would have imposed an undue hardship on Southwest Airlines was a fact-intensive inquiry to be addressed on summary judgment or at trial.

***Diss v. Portland Pub. Sch.*, 727 F. App'x 438 (9th Cir. 2018).** Plaintiff, a teacher, asserted violations of Title VII and the First Amendment right to the free exercise of religion, asserting that he was discriminated against based on his Catholic religious beliefs, including his opposition to Planned Parenthood and abortion, and that the school denied him religious accommodation. Specifically, he alleged that the employer unlawfully instructed him to cease using religious phrases such as "God Bless" in professional communications, required that he avoid associating the school with his outside activities, and required that he not interfere with a Planned Parenthood program intended to reduce academic failures and teen pregnancies that was scheduled to be presented in his classroom. The district court held the employer's actions did not violate the plaintiff's Title VII accommodation rights or his First Amendment right to free exercise of religion, and that the evidence showed he was discharged for his demeaning conduct and insubordination, denigrating students, disrespectful conduct toward colleagues, and refusal to follow directives. The court also determined that allowing the teacher to use religious phrases in official communications might subject the school to an Establishment Clause violation. With respect to the Planned Parenthood presentation, the court observed that he was not required to

endorse the program and that even if he had requested a religious accommodation, he did not present evidence establishing that allowing the school's presenters to discuss teenage pregnancy in his class conflicted with a religious belief or practice. The appellate court affirmed, citing *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) (holding plaintiff was not entitled to accommodation to post messages in violation of employer's anti-harassment policy even if content reflected his religious views).

***Mial v. Foxhoven*, 305 F. Supp.3d 984 (N.D. Iowa 2018).** Denying the employer's motion for summary judgment, the court held that it did not pose an undue hardship to accommodate a state government psychiatric security specialist who signed internal business e-mails to co-workers "In Christ" in accordance with his religious beliefs in proclaiming his faith in all of his endeavors. There was insufficient evidence to show the communications would cause anyone to perceive that the employer, a government agency, was endorsing Christianity in violation of the Establishment Clause or that the communications caused any disruption in the workplace.

***Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (9th Cir. 2017).** The plaintiff, a public high school football coach, challenged on Title VII and First Amendment grounds his suspension for kneeling and praying at the football field's 50-yard line in view of students and parents immediately after games. The court denied his motion for preliminary injunction on his First Amendment claim, holding that he was unlikely to succeed on the merits because he was acting as a public employee, not a private citizen, when he prayed at a school function in a capacity that may have been viewed as official.

***Marrero-Mendez v. Calixto-Rodriguez*, 830 F.3d 38 (1st Cir. 2016).** The court held that a police officer's First Amendment rights were violated when he was required to stand nearby while his colleagues prayed and then was humiliated for his nonconformance.

***Ervington v. LTD Commodities, LLC*, 555 F. App'x 615 (7th Cir. 2014).** The plaintiff was discharged for violating the company's anti-harassment policy by distributing Christian religious tracts at a company Halloween party, including tracts that depicted Muslims and Catholics in a negative way and stated that they would go to hell. Plaintiff asserted that because proselytizing was part of her religious practice, the company was obligated to allow her communications to co-workers. The Seventh Circuit held that the company was not required to accommodate religious expression that was offensive to other employees. To the extent the plaintiff also claimed she was subjected to disparate treatment because a Muslim co-worker only received a written warning for an earlier incident in which he had violated the anti-harassment policy, the court found he was not similarly situated to the plaintiff because management previously had counseled her for imposing her religious beliefs on other employees. The plaintiff also asserted that her conduct was not severe enough to constitute unlawful harassment, but the court held that Title VII does not prohibit employers from enforcing an anti-harassment policy that defines harassment more broadly than does Title VII.

***Scott v. Montgomery Cty. Sch. Bd.*, 963 F. Supp.2d 544 (W.D. Va. 2013).** The plaintiff, who was of the same religion as her supervisor, alleged that her supervisor subjected her to religious discrimination when she received negative performance evaluations and as a result her contract was not renewed. The court denied the employer's motion for summary judgment on the plaintiff's disparate treatment claim, observing there was undisputed evidence that plaintiff did not joint a Bible

study group or attend a religious retreat when invited by her supervisor, and that she told him she was not comfortable beginning each day with a prayer or devotional before work. A reasonable jury could find that the supervisor knew the religious overtures were unwelcome but nonetheless persisted in making them, that plaintiff's rejection of these overtures led him to evaluate and criticize her work harshly, and that the plaintiff's contract would have been renewed but for such criticisms. The court also found, however, that the supervisor's actions did not create a hostile work environment.

***Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277 (11th Cir. 2012).** The plaintiff, an EPA counselor engaged as a contractor at a federal agency, described herself as "a devout Christian who believes that it is immoral to engage in same-sex sexual relationships." Believing that her religion prohibited her from encouraging same-sex relationships, the plaintiff declined to provide counseling to a lesbian employee who had sought counseling about her same-sex relationship based on the plaintiff's personal values. When the employee filed a complaint stating that she felt "judged and condemned," the plaintiff was subsequently removed from the agency contract because of concerns that she would convey in an unacceptable manner the reason for rejecting requests for counseling. The Eleventh Circuit affirmed summary judgment for the defendant on the plaintiff's claims, holding that the plaintiff was accommodated when she was provided with an opportunity to apply for another position before being discharged, but defendant was not required to allow her to disclose her religious objection to serving counseling clients.

***Gadling-Cole v. West Chester Univ.*, 868 F. Supp.2d 390 (E.D. Pa. 2012).** The plaintiff, a university professor, alleged that she was subjected to a hostile work environment based on religion and that she was denied an Assistant Professor position because she did not support the LGBTQ community by reason of her Baptist beliefs. Denying the university's motion to dismiss, the court held that plaintiff's pleadings were sufficient to state a Title VII religious discrimination claim. Considering whether a *religious* belief was at issue under Title VII, the court observed that many courts have held Title VII religious discrimination claims cognizable with respect to topics that overlap both the religious and political spectrum, such as abortion, so long as the claims are based on a plaintiff's bona fide religious belief.

***Hickey v. State Univ. of New York at Stony Brook Hospital*, 2012 WL 3064170, at *2 (E.D.N.Y. July 27, 2012).** The employer directed plaintiff to remove an "I ♥ Jesus" lanyard "because it is not part of [his] uniform." Plaintiff refused to remove the lanyard stating that he would do so only if other employees were also required to remove their religious paraphernalia. The employer was aware that plaintiff was a *Born-Again Christian*, and he insisted that the lanyard was a necessary expression of his faith. The court rejected defendant's argument of undue hardship, as courts have consistently held that Title VII's religious accommodation provision does not violate the Establishment Clause. *Id.* at 9.

***Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552 (7th Cir. 2011).** The plaintiff was discharged for making comments to a lesbian co-worker that homosexuals are sinners and will "go to hell." Affirming summary judgment for the employer, the court held that the discharge was not discrimination because the plaintiff's comments could reasonably have been interpreted as harassment based on sexual orientation in violation of the company's policy.

***Dixon v. Hallmark Cos.*, 627 F.3d 849 (11th Cir. 2010).** The employer discharged an apartment

complex property manager for violating the employer's religious displays policy by refusing to remove religious artwork — a large poster of flowers with the words *Remember the Lilies...Matthew 6:28* — that she had hung in the on-site management office. The employer also discharged the manager's husband for being "too religious." The court reserved summary judgment for the employer and remanded the case for trial on the disparate treatment and denial of accommodation claims.

***Schwartzberg v. Mellon Bank, NA*, 307 F. App'x 676 (3d Cir. 2009).** The plaintiff, an Orthodox Jew with a religious belief that homosexuality is immoral, sent correspondence to co-workers expressing this belief in strident terms. After the first instance, the employer issued him a warning that the conduct violated its harassment policy and would not be tolerated. After the second incident, the employer gave him a "final written warning," informing him that subsequent violations of company policies could result in termination. After he was subsequently discharged for sleeping on the job, he brought suit under Title VII, alleging discrimination based on his religious beliefs. Granting summary judgment for the employer, the district court held that because the plaintiff conceded that there was no conflict between his religious beliefs and the employer's prohibition against denigrating co-workers based on sexual orientation, the employer had no duty to accommodate the plaintiff. On appeal, the Third Circuit affirmed the judgment for substantially the same reasons.

***Berry v. Department of Soc. Servs.*, 447 F.3d 642 (9th Cir. 2006).** The employer prohibited a county social worker from discussing his religion with clients, displaying religious messages in his work cubicle, and using the department's conference room for prayer meetings. The plaintiff brought suit alleging disparate treatment and denial of accommodation in violation of Title VII. The court rejected both claims. Permitting the plaintiff to discuss his religion with clients would have posed an undue hardship by putting the agency at risk of violating the Establishment Clause. Moreover, allowing the plaintiff to display religious messages in his cubicle would suggest state sponsorship of his religion. The court also rejected the plaintiff's claim that the department's refusal to allow him to use the conference room for prayer meetings constituted disparate treatment based on religion absent any evidence that the department's stated nondiscriminatory reason to preserve the room as a nonpublic forum was a pretext.

***Rice v. City of Kendallville*, 2009 WL 857463 (N.D. Ind. Mar. 31, 2009).** Plaintiff's supervisor was also a pastor at a church the plaintiff had visited, but plaintiff did not hold the same beliefs. The supervisor displayed religious signs and a poster of Jesus in the workplace, and presented a note about overtime compliance that stated, "Remember, you are Christians. Be true to your word." He also made numerous comments to plaintiff condemning him for engaging in premarital sex. And employee computers were configured to require religious passwords. The employer discharged plaintiff for misconduct while failing to discipline a co-worker who attended the supervisor's church and who had engaged in similar misconduct. The court found that the evidence of pretext was sufficient to infer discriminatory intent where plaintiff showed that he was meeting performance expectations and the supervisor had threatened to discipline him for objecting to moral judgments about his personal life.

***Grant v. Fairview Hosp. & Healthcare Servs.*, 2004 WL 326694 (D. Minn. Feb. 18, 2004).**

A hospital did not violate Title VII when it discharged an ultrasound technician whose religious views required him to attempt to dissuade women from having abortions. The hospital offered the technician a reasonable accommodation when it agreed to excuse him from performing ultrasounds on women who were considering abortion and to excuse him from remaining in the examination room with such patients. But the hospital was not required as an accommodation to permit the technician to attempt to dissuade women from having abortions or to provide pastoral counseling to them.

***Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470 (7th Cir. 2001).** The employer reasonably accommodated the plaintiff's religious practice of sporadically using the phrase "have a blessed day" when it permitted her to use the phrase with supervisors and co-workers who did not object, and did not violate Title VII by prohibiting her from using the phrase with customers.

***Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996), cert. denied, 522 U.S. 813 (1997).** The employer discharged the plaintiff for sending correspondence to the home of her supervisor and a co-worker accusing them of immoral conduct. The court held that the plaintiff failed to establish disparate treatment based on her religious beliefs. The employer established a legitimate, nondiscriminatory motive in discharging plaintiff because her letters invaded the employees' privacy, offended them, and damaged her working relationships.

***Banks v. Service Am. Corp.*, 952 F. Supp. 703 (D. Kan. 1996).** The employer discharged two food service employees who refused to stop greeting customers with religious greetings such as *God Bless You* and *Praise the Lord*. The court held that plaintiffs presented a triable issue of fact regarding whether the employer could have accommodated them without undue hardship. A reasonable jury could find that no undue hardship was posed. The employer received only 20 to 25 complaints while serving approximately 130,000 to 195,000 customers — a complaint rate of between .01025 and .01923 percent — and the employer presented no evidence of decreased use of the cafeteria or religious polarization among customers.

***Johnson v. Halls Merch.*, 1989 WL 23201 (W.D. Mo. Jan. 17, 1989).** The court found it would have posed an undue hardship on the employer to permit a retail employee to regularly state to customers "in the name of Jesus Christ of Nazareth" because it offended some customers and the company lost business as a result.