Employment Law: Congress Giveth and the Supreme Court Taketh Away: Title VII's Prohibition of Religious Discrimination in the Workplace

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I. Introduction

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination on the basis of race, color, religion, sex, and national origin. Specifically, with respect to religion, Title VII bars overt employment discrimination based on employees' religious beliefs or practices. Congress broadened the scope of Title VII's protections with a 1972 amendment that requires employers to make reasonable accommodations for an employee's religious practices when a facially neutral employment practice has a disparate impact on an employee's religious beliefs or practices. No reasonable accommodation is required, however, if the employer would suffer undue hardship as a result of such accommodation. Because Congress failed to define "reasonable accommodation" and "undue hardship," there is no coherent and consistent framework addressing an employer's duty to accommodate minority religious beliefs under Title VII.

Congress intended Title VII to allow individuals to express their religious beliefs freely without being hindered by otherwise facially neutral employment practices. Congress promulgated Title VII not only to prohibit overt religious discrimination, but also to remove impediments caused by neutral regulations that disproportionately impact adherents of minority religions. Courts, however, have effectively limited the scope of protection by finding an undue hardship when anything more than minimal effort or cost...
to the employer would be necessary to accommodate the employee’s religious beliefs. Consequently, this narrow interpretation of undue hardship has made it exceptionally difficult for employees to prevail on religious discrimination claims.

This note addresses the problems inherent in the current judicial interpretation of Title VII’s religious accommodation provision, specifically regarding religious dress and grooming. Moreover, this note argues that the current interpretation of reasonable accommodation and undue hardship abrogates Title VII of any substantive standards that would ensure employees’ religious beliefs and practices are reasonably accommodated. Accordingly, the manner in which courts currently interpret Title VII opposes congressional intent, making employers’ burden of accommodation devoid of any real meaning or impact. For Title VII’s religious safeguards to be effective, courts must revisit the employer’s burden of accommodation and interpret the duty to accommodate in a manner that not only would be consistent with congressional intent, but also would have a tangible substantive effect by creating a more religiously expressive workplace.

Part II of this note examines Title VII’s history and the case that led to Congress’s adoption of the reasonable accommodation and undue hardship amendment. This part also discusses how the U.S. Supreme Court has narrowly construed the reasonable accommodation provision in two landmark cases involving employment discrimination based on religious beliefs. Part III evaluates how courts inconsistently apply both the reasonable accommodation and undue hardship provisions of Title VII by analyzing five different categories of judicial interpretation. Furthermore, this part examines various policy debates, including the disparate impact doctrine, the extent to which private employers should alter otherwise neutral employment practices to accommodate some employees’ religious beliefs, as well as the need to maintain the appearance of religious neutrality in the context of public employment. Finally, Part III develops and analyzes an alternative model of interpretation that courts should employ to effectuate a more coherent and consistent analysis for determining reasonable accommodation and undue hardship in employment discrimination cases.


10. See, e.g., Philbrook, 479 U.S. 60; Hardison, 432 U.S. 63.
II. Title VII

A. Background

Congress designed the Civil Rights Act of 1964 to prohibit discrimination against minority groups in the United States with respect to both personal and political rights.11 As originally enacted, Title VII failed to include any provision that required employers to take affirmative steps to accommodate the religious beliefs of their employees in situations where a facially neutral employment regulation conflicted with an employee's religious beliefs.12 Accordingly, because Congress did not address this issue, courts had to determine the question of whether Title VII conferred an affirmative duty on employers to reasonably accommodate their employees' religious beliefs.13 In Dewey v. Reynolds Metals Co.,14 a divided Supreme Court failed to resolve the issue, leaving the future of employers' duty to accommodate unclear.15

I. Dewey v. Reynolds Metals Co.

In Dewey, the Supreme Court faced the decision of whether an employer has a duty to accommodate the private religious beliefs of an employee when an employment regulation directly conflicts with the employee's religious


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

42 U.S.C. § 2000e-2(a) (2000). The scope of Title VII is limited to employers with fifteen or more employees. Id.


13. Id.


15. Id. at 689.
beliefs.\textsuperscript{16} In a 4-4 per curiam decision,\textsuperscript{17} the Court affirmed the U.S. Court of Appeals for the Sixth Circuit, holding that employers have no affirmative duty to accommodate employees' religious beliefs when such beliefs conflict with a facially neutral employment regulation.\textsuperscript{18} The Court did not provide an analytical framework or reasoning for its conclusion; rather, the entire text of the opinion merely stated that "[t]he judgment is affirmed by an equally divided Court."\textsuperscript{19} Because the Court failed to provide any rationale for its decision, the Sixth Circuit's opinion provides the only established legal precedent on the issue of employers' duty to accommodate.\textsuperscript{20}

In \textit{Dewey}, Reynolds Metals Company and the United Auto Workers Union entered into a collective bargaining agreement and negotiated mandatory overtime shifts for all employees of Reynolds.\textsuperscript{21} Robert Dewey, a member of the Faith Reformed Church and an employee of Reynolds, refused to work mandatory overtime shifts on Sunday because of his religious objections to working on the Sabbath.\textsuperscript{22} Initially, Reynolds reprimanded Dewey, telling him that if he did not work on Sundays, he would have to find a replacement.\textsuperscript{23} Although Dewey initially provided a replacement to work his shift for an eight-month period, he later refused to either work or seek a replacement, claiming that both actions violated his religious beliefs.\textsuperscript{24} Despite Dewey's bona fide religious belief that conflicted with Reynolds's employment practice, Reynolds subsequently discharged Dewey because of his failure to abide by its mandatory overtime requirement.\textsuperscript{25}

The Sixth Circuit determined that Reynolds did not unlawfully discriminate against Dewey, stating that to "accede to Dewey's demands would require Reynolds to discriminate against its other employees by requiring them to work on Sundays in the place of Dewey, thereby relieving Dewey of his contractual obligation. This would constitute unequal administration of the collective bargaining agreement among the employees . . . ."\textsuperscript{26} The appellate court essentially found that a facially neutral employment practice that has a disparate impact on some employees' religious beliefs does not require any

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} \textit{Id.} Justice Harlan did not take any part in the consideration or decision of the case.
\item \textsuperscript{18} \textit{Id.; see also Dewey v. Reynolds Metals Co., 429 F.2d 324, 330 (6th Cir. 1970) (Dewey II).}
\item \textsuperscript{19} \textit{Dewey I}, 402 U.S. at 689.
\item \textsuperscript{20} \textit{Id.; see also Dewey II, 429 F.2d at 300.}
\item \textsuperscript{21} \textit{Dewey II}, 429 F.2d at 328-29.
\item \textsuperscript{22} \textit{Id.} at 329.
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{Id.} at 330.
\end{enumerate}
\end{footnotesize}
accommodation under Title VII.\textsuperscript{27} Furthermore, the Sixth Circuit held that providing such accommodation results in reverse discrimination against those employees who do not harbor such religious beliefs.\textsuperscript{28} Moreover, and perhaps more upsetting, the court bluntly rejected the Equal Employment Opportunity Commission’s (EEOC) guidelines requiring reasonable accommodation of an employee’s religious beliefs.\textsuperscript{29} In doing so, the court stated:

The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act. . . . To construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede to or accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment . . . . The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees.\textsuperscript{30}

Ultimately, the Sixth Circuit’s holding and the Supreme Court’s per curiam decision substantially limited the significance of Title VII’s prohibition of employment discrimination based on religious beliefs. \textit{Dewey}, however, served as an impetus for an amendment to Title VII, which placed an affirmative duty of accommodation on employers when an otherwise neutral employment regulation may affect a religious minority, rather than a mere prohibition against overt discrimination by an employer.\textsuperscript{31}

2. Congress Tries Again: The Section 701(j) Amendment Requiring Accommodation

In an effort to broaden the scope of protection against religious discrimination, Congress amended Title VII, stating that “[t]he term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to \textit{reasonably accommodate} to an employee’s or prospective employee’s religious observance or practice without \textit{undue hardship} on the conduct of the employer’s business.”\textsuperscript{32} The amendment places an affirmative duty to accommodate on employers, absent

\begin{itemize}
\item \textsuperscript{27} \textit{Id}.
\item \textsuperscript{28} \textit{Id}.
\item \textsuperscript{29} \textit{Id}. at 334-35.
\item \textsuperscript{30} \textit{Id}.
\item \textsuperscript{32} \textit{Id}. (emphasis added).
\end{itemize}
undue hardship, and effectively broadens the scope of "religion" to include nontraditional practices.\textsuperscript{33} Accordingly, the amendment does not require individuals to belong to an established religious group, so long as they sincerely hold their moral or ethical beliefs with the strength of traditional religious views.\textsuperscript{34}

Courts have since interpreted religion in accordance with the language of the amendment, which is significant because Title VII requires plaintiffs to demonstrate that they hold a sincere religious belief to establish a prima facie case of religious discrimination.\textsuperscript{35} Despite courts' broad interpretation of religion, employees must overcome a narrow interpretation of reasonable accommodation to successfully litigate a claim of religious discrimination under Title VII.

\textit{B. Establishing a Prima Facie Case of Religious Discrimination After the Section 701(j) Amendment}

For employees to establish a prima facie case of religious discrimination under Title VII, they must prove that: (1) they have a bona fide belief that compliance with an employment requirement is contrary to their religious faith or beliefs; (2) they have informed their employer about this conflict; and (3) the employer discharged or disciplined them as a direct result of their refusal to comply with the conflicting employment requirement.\textsuperscript{36} Once the employee satisfies this burden, employers must show that they attempted to reasonably accommodate the employee's religious practices, unless the employer can successfully prove that the accommodation would cause them undue hardship.\textsuperscript{37}

The greatest hurdle for employees bringing Title VII actions is the judiciary's narrow reading of the reasonable accommodation requirement and its correspondingly broad reading of what constitutes an undue hardship.\textsuperscript{38} Generally, employees prevail in Title VII religious discrimination cases only when employers have made absolutely no attempt to reasonably accommodate employees, and employers can make no legitimate showing of undue

\textsuperscript{33} \textit{Id.}
\textsuperscript{34} See, \textit{e.g.}, United States v. Seeger, 380 U.S. 163, 165-66 (1965) ("[T]he 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.").
\textsuperscript{35} Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1383 (9th Cir. 1984).
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} Id.
\textsuperscript{38} See, \textit{e.g.}, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).
hardship. As a practical matter, almost any type of employer accommodation is sufficient to uphold the employer's duty to reasonably accommodate under Title VII.

C. The Confusion Continues: The Supreme Court's Refusal to Give Substantive Meaning to Reasonable Accommodation and Undue Hardship

In two important cases, the U.S. Supreme Court interpreted the extent of employers' obligations to reasonably accommodate under section 701(j). Both cases provided a narrow interpretation at odds with the fundamental purpose of the amendment. Ultimately, the Court failed to place any significant legal obligations on employers to accommodate their employees' religious beliefs.

1. Trans World Airlines, Inc. v. Hardison

In Trans World Airlines, Inc. v. Hardison, the Supreme Court had the opportunity to interpret employers' responsibilities and duties under Title VII. Specifically, the Court addressed the extent to which employers are required to reasonably accommodate employees' religious beliefs after section 701(j). The Court chose to severely limit the amendment's scope and protection by interpreting section 701(j) so narrowly as to clearly conflict with the amendment's original purpose.

In that case, Larry Hardison, a member of the Worldwide Church of God, refused to work on the Sabbath, which lasted from sunset on Friday to sunset on Saturday. After informing TWA of his religious beliefs, Hardison agreed to work traditional holidays in exchange for not working on the Sabbath. When Hardison transferred to a different building, however, his seniority fell to second-from-the-bottom of the list. After a fellow employee went on vacation, TWA assigned Hardison to work shifts that interfered with his observation of the Sabbath. As a compromise, Hardison proposed that he only work four days a week so that he could still observe the Sabbath.

39. Engle, supra note 9, at 388.
40. Id.
41. See id.
42. 432 U.S. 63 (1977).
44. Hardison, 432 U.S. at 87 (Marshall, J., dissenting).
45. Id. at 67-68. Traditional holidays would include Thanksgiving, Christmas, New Year's Day, etc. Hardison's seniority was also a factor in reaching this arrangement. Id.
46. Id. at 68.
47. Id.
48. Id.
rejected this proposal and eventually fired Hardison for insubordination when he refused to report for work on the Sabbath. 49

In analyzing the extent to which TWA had complied with its statutory duty to accommodate Hardison, the Supreme Court noted that Congress had failed to provide sufficient guidelines for the Court to determine the level of accommodation required of an employer. 50 The Court clearly acknowledged, however, that Congress enacted the amendment in response to Dewey and Riley v. Bendix Corp., 51 both of which involved employees who refused to work on their Sabbath and who were subsequently discharged. 52 The Court stated, "It is clear from the language of § 701(j) that Congress intended to change this result 53 by requiring some form of accommodation; but this tells us nothing about how much an employer must do to satisfy its statutory obligation." 54 After noting the absence of a direct congressional mandate, the Court limited the amendment to the extent that it became meaningless, holding that requiring TWA to incur more than a de minimis cost to accommodate the religious beliefs of Hardison constituted an undue hardship. 55 Moreover, the Court determined that when a proposed accommodation will negatively affect other employees, this effect standing alone is sufficient to cause undue hardship to the employer. 56 Specifically, the Court stated that it would "not readily construe [Title VII] to require an employer to discriminate against some employees in order to enable others to observe their Sabbath." 57

The Court's refusal to interpret section 701(j) with any substantive effect stemmed from its concern that by enacting Title VII, Congress had attempted to prevent discrimination in all forms. 58 The Court reasoned that requiring a high degree of accommodation would ultimately lead to disparate treatment

49. Id. at 68-69.
50. Id. at 74.
52. In both Dewey and Riley, employees were discharged because of their religious belief that they could not work on the Sabbath. Both the U.S. Supreme Court and the District Court of Florida held that the application of a facially neutral law, absent overt discrimination, did not constitute religious discrimination under Title VII. Furthermore, there was no requirement for the employer to accommodate the beliefs of the employee.
53. "This result" refers to the decisions of Dewey and Riley, which both held that the employer had no affirmative duty to accommodate. See generally Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971) (Dewey I); Dewey v. Reynolds Metals Co., 429 F.2d 243 (6th Cir. 1970) (Dewey II); Riley, 330 F. Supp. 583.
54. Hardison, 432 U.S. at 74 n.9.
55. Id. at 84.
56. Id. at 85.
57. Id.
58. Id.

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of religions, or reverse discrimination against other religions, which undermined the very purpose of the statute by treating employees, who were otherwise similarly situated, differently based on religion alone.\textsuperscript{59}

Justice Marshall vigorously attacked this reasoning in a compelling dissenting opinion.\textsuperscript{60} As he poignantly stated, "[I]f an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with sound and fury, ultimately signify nothing."\textsuperscript{61} Furthermore, Justice Marshall argued that reasonable accommodation mandates unequal treatment to the extent that it does not impose an undue burden upon employers.\textsuperscript{62} This analysis is persuasive because the accommodation issue only arises in instances where a facially neutral employment regulation applies to all employees, but the regulation disparately affects some employees because of their religious beliefs.\textsuperscript{63} Accordingly, as Justice Marshall stated, proper analysis of a religious discrimination claim would require courts to engage in balancing reasonable accommodation and undue hardship to allow employees to practice their religious beliefs and continue their employment, so long as the burden is not undue.\textsuperscript{64}

The text of Title VII and section 701(j) requires employers in some instances to provide different, and at times even preferential, treatment to employees when necessary to accommodate their religious beliefs or practices.\textsuperscript{65} The very essence of Title VII requires a balancing test that considers two competing interests: the religious beliefs of employees and the cost and burden inherent in the employers' duty of accommodation.\textsuperscript{66} Following the Supreme Court's decision in \textit{Hardison}, courts have been reluctant to actually analyze the factual allegations and apply a balancing test to these countervailing interests.\textsuperscript{67} Rather, courts often find neutral

\textsuperscript{59} \textit{Id.} at 81. The Court stated, "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." \textit{Id.}

\textsuperscript{60} \textit{Id.} at 85 (Marshall, J., dissenting). Justice Marshall stated, "[A]s a matter of law today's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise." \textit{Id.} at 87.

\textsuperscript{61} \textit{Id.} at 87 (Marshall, J., dissenting) (internal quotations and alterations omitted).

\textsuperscript{62} \textit{Id.}

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} Engle, \textit{supra} note 9, at 387.

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} \textit{Id.}
employment regulations nondiscriminatory even when the regulations disparately affect employees with certain religious beliefs, and do not require employers to accommodate religious minorities for fear that doing so would cause employers to discriminate against other employees.\(^{68}\) As such, courts have generally accepted any minimal showing of hardship by employers as sufficient to sustain their burden of showing an undue hardship, effectively limiting both the scope and effect of Title VII and section 701(j).\(^{69}\)

\textit{2. Third Time Is Not a Charm: EEOC Guidelines to the Section 701(j) Amendment}

In 1980, the EEOC published the \textit{Guidelines on Discrimination Because of Religion} in an effort to clarify employers’ responsibilities to reasonably accommodate employees’ religious practices.\(^{70}\) The EEOC guidelines outlined an employer’s duty to accommodate once an individual notifies the employer of a need for accommodation.\(^{71}\) Under the guidelines, employers must consider all available alternatives for accommodating the religious practices of the individual.\(^{72}\) Moreover, when there is “more than one means of accommodation which would not cause undue hardship, the employer . . . must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.”\(^{73}\)

Clearly, the EEOC promulgated the EEOC guidelines to require a much higher degree of accommodation than was required in \textit{Hardison}.\(^{74}\) For instance, the guidelines require employers to evaluate all available options in determining how to reasonably accommodate employees, and when multiple alternatives exist, employers must provide the accommodation which least disadvantages the individual in their employment opportunities.\(^{75}\) The guidelines contrasted significantly with \textit{Hardison}, in that the Court in \textit{Hardison} merely required that the employer show any de minimis hypothetical hardship, which would constitute undue hardship and alleviate an employer’s duty to accommodate.\(^{76}\)

Although the EEOC guidelines attempted to clarify employers’ responsibilities respecting reasonable accommodation, the EEOC failed to

\begin{itemize}
  \item 68. \textit{Id.} at 388.
  \item 69. \textit{Id.}
  \item 70. 29 C.F.R. § 1605 (2003).
  \item 71. \textit{Id.} § 1605.2(c)(1).
  \item 72. \textit{Id.}
  \item 73. \textit{Id.} § 1605.2(c)(2)(ii) (emphasis added).
  \item 74. \textit{See id.} § 1605.2(e).
  \item 75. \textit{Id.} § 1605.2(c)(2)(ii).
\end{itemize}
delineate what constitutes an "undue hardship." The guidelines state that "[t]he Commission will determine what constitutes 'more than a de minimis cost' with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation." Even though the guidelines established some rudimentary factors to help determine whether an undue hardship would result from a particular accommodation, the EEOC clearly failed to reduce the amount of judicial discretion applied in religious discrimination cases. Moreover, the EEOC guidelines did not provide a coherent analytical framework to guide employer-employee relations with respect to religious accommodation. Although the EEOC promulgated the guidelines to strengthen employees' rights under Title VII, the EEOC's failure to provide adequate guidance regarding what constitutes an undue burden has allowed the Court to continue to interpret employers' obligations too narrowly.

3. Ansonia Board of Education v. Philbrook

In 1986, six years after the EEOC passed the guidelines, the U.S. Supreme Court once again had the opportunity to determine what reasonable accommodation required of employers in Ansonia Board of Education v. Philbrook. The Ansonia Board of Education employed Ronald Philbrook, a member of the Worldwide Church of God, as a high school teacher. Philbrook's religious beliefs required him to refrain from secular employment during religious holidays, leading him to miss approximately six days of work each year. The terms of the collective bargaining agreement that governed Philbrook's employment with the school district limited paid leave for religious holidays to three days. The agreement also allotted three days of accumulated paid leave for personal reasons. Teachers could not, however, use personal days for any purpose for which a designated leave was already provided, including leave for religious holidays. Consequently, the collective bargaining agreement limited Philbrook to three days of religious leave; beyond this, Philbrook's only options were to either take an unpaid

77. 29 C.F.R. § 1605.2(e).
78. Id.
79. See id.
80. 479 U.S. 60 (1986).
81. Id. at 62.
82. Id. at 62-63.
83. Id. at 63-64.
84. Id. at 64.
85. Id.
leave of absence to observe additional religious holidays or work on his religious holiday. 86

Dissatisfied with this arrangement, Philbrook requested that the school board adopt one of two alternatives. 87 First, he suggested that he be allowed to use his allotted personal days for religious observances. Such an accommodation would have essentially provided Philbrook three additional days of paid leave specifically for religious holidays. 88 As a second option, Philbrook volunteered to pay the costs of employing a substitute during his religious holidays if he received full pay for the additional days off. 89 When the school board refused both accommodations, Philbrook filed a complaint alleging religious discrimination in violation of Title VII. 90

In addressing the school district’s reasonable accommodation obligation in light of the 1980 EEOC guidelines, the Court held that there was no basis “in either the statute or its legislative history [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.” 91 By directly contradicting the guidelines, the Court significantly undermined the guidelines’ legitimacy. Specifically, the Court stated that “[t]o the extent that the guideline . . . requires the employer to accept any alternative favored by the employee short of undue hardship, we find the guideline simply inconsistent with the plain meaning of the statute.” 92 Ultimately, the Court failed to use the EEOC guidelines at all in its analysis of whether the school board had attempted to reasonably accommodate Philbrook. 93

In his dissent, Justice Marshall admonished the Court for its selective reading of the EEOC guidelines. 94 Justice Marshall reminded the Court that only a year earlier, it had expressly relied on an EEOC guideline in a sexual harassment case arising under Title VII. 95 He further argued that the Court’s refusal to use the EEOC guidelines in its analysis was based on a “selective reading.” 96 Ultimately, the Court effectively invalidated Congress’s and the

86. Id.
87. Id.
88. Id. at 64-65.
89. Id. at 65.
90. Id.
91. Id. at 68.
92. Id. at 69-70 n.6.
93. Id.
96. Id. at 74 (Marshall, J., concurring in part, dissenting in part). Justice Marshall stated
EEOC's attempts to give substantive meaning to the reasonable accommodation provision of Title VII by persisting in a narrow reading of the statute in Philbrook. Because of the Court's narrow interpretation of the reasonable accommodation provision in section 701(j), which undeniably flouts congressional intent, there is no consistent framework of judicial analysis in Title VII religious discrimination cases.

III. Analysis: Five Categories of Reasonable Accommodation Interpretation

Title VII cases reveal five basic frameworks for analyzing the reasonable accommodation provision. Implicit in each of these methods is a different set of policy goals and interests that courts must consider in deciding cases. In fact, the variety of outcomes in Title VII cases reflects each "individual court's theoretical assumptions about the interests to be balanced." The five frameworks confront issues regarding: (1) public health and safety regulations; (2) overt religious discrimination by employers; (3) nonconformists failing to abide by generally applicable neutral employment regulations; (4) religious accommodation balanced with public employment and the need to appear religiously neutral; and (5) religious interests balanced with business necessity. Each framework has its own theoretical underpinnings and policy goals that courts consider in making their decisions.

that the "Court's reluctance to accord similar weight to the EEOC's interpretation here rests on nothing more than a selective reading of the express provisions of Title VII and the guidelines." Id.

97. Id.
98. See, e.g., Silbiger, supra note 11, at 848 (discussing three approaches).
99. Id.
100. Id. at 849.
101. Id. at 848.
103. Silbiger, supra note 11, at 849.
105. Silbiger, supra note 11, at 849.
106. Adopting the religious interests balanced with business necessity framework is one of the changes that courts should implement to ensure consistent Title VII interpretation. Another significant area of deviation and inconsistency that plagues Title VII is the meaning of reasonable accommodation. See generally 42 U.S.C. §§ 12,111-12,112 (2000). The Supreme Court has effectively construed the exact same phrase differently in interpreting two different, though significantly related, federal statutes — Title VII and the Americans with Disabilities Act (ADA). See generally id. The de minimis interpretation of reasonable accommodation has played a crucial role in minimizing the effectiveness of Title VII, yet no similar language or exacting standards have been imposed for construing the ADA. Id. This discrepancy exists
A. Public Health and Safety Regulations

The most consistent application of Title VII’s religious accommodation provision falls under the broad category of public health and safety regulations. Generally, when employers would be required to breach a health or safety regulation, regardless of whether it is a self-imposed business regulation, they are not required to accommodate the religious beliefs of employees because compelling accommodation in such a scenario would constitute an undue hardship. Accordingly, plaintiffs who bring Title VII claims are unlikely to be victorious when the employer’s reason for denying the requested accommodation is the need to comply with state laws and regulations, or when such an accommodation would pose serious health and safety risks. Therefore, as a general rule, employers do not have a duty to accommodate their employees’ bona fide religious-based objections to their

because the ADA explicitly defines the undue hardship standard to require “significant difficulty or expense.” Id. § 12,111(10)(A). Interestingly, the purposes of Title VII and the ADA are parallel, in that they both are aimed at eliminating employment discrimination. See, e.g., Dawn V. Martin, Symposium: The Americans With Disabilities Act — Introductory Comments, 8 J.L. & HEALTH 1, 6 (1993/1994).

In fact, the ADA was modeled after both the language and concepts articulated in Title VII. Id. The ADA provides that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12,112(a). The ADA also includes a reasonable accommodation provision similar to Title VII’s, which emphasizes that discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business . . . .” Id. § 12,112(b)(5)(A).

Unlike Title VII, the Supreme Court has not minimized the impact of the ADA’s reasonable accommodation and undue hardship provisions because of the specific language of the statute that requires a “significant difficulty or expense.” Id. § 12,111(10)(A). For Title VII to truly eradicate employment discrimination based on religion, Congress should consider amending the current statute to mirror the ADA provision.

107. Silbiger, supra note 11, at 849.

108. See, e.g., Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1384 (9th Cir. 1984) (holding that the defendant was not liable for religious discrimination when operating in a manner consistent with California Occupational Safety and Health Administration standards); Kalsi v. N.Y. City Transit Auth., 62 F. Supp. 2d 745, 756 (E.D.N.Y. 1998) (holding that the plaintiff, a Sikh, was unsuccessful when claiming religious discrimination under Title VII after being fired for failing to wear a hard hat as required by a safety regulation in a subway maintenance shop); EEOC v. Sambo’s, Inc., 530 F. Supp. 86, 91 (N.D. Ga. 1981) (stating that the restaurant was not required by Title VII to violate its own uniform grooming policy in employing the plaintiff where hygiene was very important to the restaurant business).

109. See Silbiger, supra note 11, at 848.

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employers’ hygiene, grooming, or dress requirements when providing such an accommodation could violate a reasonable health or safety measure promulgated by the employer or the state. 110 The business necessity, in these cases, is to comply with health and safety regulations or be subject to potential criminal or civil penalties. 111 Various cases illustrate how courts have applied this framework.

In EEOC v. Sambo’s Inc., 112 an employee who was a follower of the Sikh religion argued that his employer’s policy of prohibiting its employees from growing beards, although not on its face discriminatory, had a disparate impact 113 on him because his religion prohibited him from cutting or shaving his facial hair in the absence of a medical emergency. 114 In Sambo’s, the U.S. District Court for the Northern District of Georgia held that an employer’s interest in maintaining a hygienic grooming standard constituted a business necessity by furthering the appearance of health and sanitation; thus, any accommodation that would cause a deviation from this regulation would constitute an undue hardship. 115

A similar Title VII challenge arose in Bhatia v. Chevron U.S.A., Inc., 116 where a follower of the Sikh faith claimed that his employer’s safety policy, which required “all employees whose duties involved potential exposure to toxic gases to shave any facial hair that prevented them from achieving a gas-tight face seal when wearing a respirator,” constituted religious discrimination. 117 Chevron adopted this safety regulation to comply with the standards established by California’s Occupational Safety and Health

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110. Dress Codes as Religious Discrimination, EMP. DISCRIM. COORDINATOR ¶ 26,214 (2003). In these cases, the business necessity of maintaining sanitation or complying with a public health or safety regulation fulfills the undue hardship requirement. See, e.g., Karl E. Klare, Power/Dressing: Regulation of Employee Appearance, 26 NEW ENG. L. REV. 1395, 1413 (1992) (discussing EEOC v. Sambo’s, Inc., 530 F. Supp. 86 (E.D. Ga. 1981)).

111. Valid business necessity does not provide an alternative analysis to undue hardship; it merely fulfills the burden of illustrating that the proposed accommodation would create undue hardship on the employer.


113. The Supreme Court introduced the disparate impact doctrine in Griggs v. Duke Power Co., 401 U.S. 424 (1971), holding that neutral employment requirements could violate Title VII if the requirement resulted in a sufficiently disproportionate adverse impact on a member of a minority class. Id. at 429-30. For employers to successfully defend against a disparate impact claim, employers must show that the employment practice in question is a “business necessity.” Id. at 431.


115. Id. at 93.

116. 734 F.2d 1382 (9th Cir. 1984).

117. Id. at 1383.
Administration (COSHA). Once the safety regulation took effect, Chevron announced that it would test all employees affected by the policy to guarantee that they would be able to achieve a gas-tight seal. Bhatia had been working as a machinist for several years before the policy's adoption. Because a machinist's duties risked the potential exposure to toxic gases, Chevron attempted to compel Bhatia to shave his facial hair to comply with its safety regulation. Subsequent to Bhatia's refusal to shave his beard, Chevron terminated Bhatia from his position, even though requiring Bhatia to comply with Chevron's request would have violated his religious beliefs. Instead, Chevron transferred Bhatia to a janitorial job that did not risk any exposure to toxic gases.

The Ninth Circuit affirmed the district court's holding that Chevron had not violated Title VII and found that retaining Bhatia as a machinist without any guarantee that he could safely use a respirator would cause undue hardship to Chevron. First, the Ninth Circuit reasoned that retaining Bhatia as a machinist could potentially expose the company to liability for violating the safety standards promulgated by COSHA. Second, the court held that even if Chevron continued to employ Bhatia as a machinist and only required him to perform duties that would not expose him to toxic gases, Chevron would still endure undue hardship because it would be forced to change its system of duty assignments by shifting Bhatia's share of hazardous work to his coworkers. The court held that either of these scenarios would result in an undue hardship on Chevron and, thus, denied Bhatia's claim.

Generally, cases that implicate public health or safety regulations have predictable outcomes. Courts have consistently held that any accommodation that requires employers to violate a state or business imposed health or safety procedure constitutes an undue hardship. At the same time, however,

118. Id.
119. Id.
120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id. at 1384.
126. Id.
127. Id.
128. See, e.g., id. (holding that the defendant was not liable for religious discrimination when operating in a manner consistent with California Occupational Safety and Health Administration standards); Kalsi v. N.Y. City Transit Auth., 62 F. Supp. 2d 745, 756 (E.D.N.Y. 1998) (holding that the plaintiff, a Sikh, was unsuccessful when claiming religious discrimination under Title VII after being fired for failing to wear a hard hat as required by a safety regulation in a subway maintenance shop); EEOC v. Sambo's, Inc., 530 F. Supp. 86, 91 (N.D. Ga. 1981) (stating that
courts have consistently found Title VII violations when an employee can show that they were either discharged or demoted because of overt discrimination on the part of the employer.\textsuperscript{129}

\textbf{B. Overt Religious Discrimination}

A second framework for Title VII interpretation involves the situation where employees are able to demonstrate that their employer discharged or reprimanded them because of religious animus. When discrimination is apparent because an employee's religious dress identifies that employee with a minority religious group, courts have generally found that the employer has violated Title VII.\textsuperscript{130} Typically, these cases involve a neutral clothing or grooming policy that has little, if any, connection to an employer's business.\textsuperscript{131} Moreover, it is not unusual for employers to selectively enforce such policies.\textsuperscript{132} In the usual case, after an employee has repeatedly expressed religious objections to an employer, the employer discharges the employee without any type of accommodation.\textsuperscript{133} Plaintiffs in these cases are often successful because the religious discrimination is quite overt and transparent.\textsuperscript{134} Notably, in such instances, it is often the case that any accommodation would not impose undue cost or hardship on the employer.

In \textit{EEOC v. Electronic Data Systems,}\textsuperscript{135} Dallaire, an employee, was discharged because he refused to shave his beard, which violated corporate policy. Dallaire believed that wearing a beard was required by his Jewish faith.\textsuperscript{136} His employer's policy had no foundation in any health or safety regulation, nor did his employer provide any means of reasonable

\begin{notes}
the restaurant was not required by Title VII to violate its own uniform grooming policy in employing the plaintiff where hygiene was very important to the restaurant business).

\textsuperscript{129} \textit{See infra} Part III.B.  \\
\textsuperscript{131} \textit{See, e.g.,} Carter, 849 F. Supp. 673; Karriem, 1985 WL 56660; \textit{EEOC Decision No. 71-2620}, 1971 WL 3957; Khalsa, 1993 WL 943428. \\
\textsuperscript{132} Carter, 849 F. Supp. at 674 (involving employee who refused to cut beard); Karriem, 1985 WL 56660 (involving employee who wore religious pin); \textit{EEOC Decision No. 71-2620}, 1971 WL 3957, at *2-3 (involving employee who wore religious dress); Khalsa, No. 92-2499, 1993 WL 943428, at *1-3 (same). \\
\textsuperscript{133} Carter, 849 F. Supp. at 676; Karriem, 1985 WL 56660; \textit{EEOC Decision No. 71-2620}, 1971 WL 3957, at *3; Khalsa, 1993 WL 943428, at *6. \\
\textsuperscript{134} \textit{See, e.g.,} Carter, 849 F. Supp. 673; Karriem, 1985 WL 56660; \textit{EEOC Decision No. 71-2620}, 1971 WL 3957; Khalsa, 1993 WL 943428. \\
\textsuperscript{136} \textit{Id.} at *1.
\end{notes}
accommodation after it learned of Dallaire's reason for refusing to shave his beard. Furthermore, the record indicated that other employees who wore beards because of their religious beliefs, such as Sikhs, were accommodated by Dallaire's employer. The company failed to provide a similar type of accommodation to Dallaire. The court enjoined Dallaire's employer from terminating him because of Dallaire's strong showing of probable success on the merits and because other employees clearly had been accommodated where they were similarly situated.

In Karriem v. Oliver T. Carr Co., Karriem, a Black Muslim security guard, was fired for wearing a religious medal on his uniform. Before his termination, Karriem's supervisors had instructed him on several occasions to stop wearing the religious pin on his uniform. Karriem continued to wear the pin while on duty, despite the company's employee manual that provided that "no security officer shall wear or carry a metal or metallic appearing badge." The court found that the purpose of the employment regulation was to avoid confusion between the badges of security guards with official law enforcement badges. After finding that Karriem's religious pin bore no resemblance to a police officer's badge, and thus the company's policy objective was not implicated, the court held that Karriem was dismissed solely because of his employer's resentment of his religion.

Courts have generally held that Title VII is violated in cases such as Electronic Data Systems and Karriem. The transparency of the discrimination involved in these cases, coupled with the reality that accommodating the employees involved would cause little or no hardship to the employers, has led courts consistently to find Title VII violations in cases of such overt discrimination.

137. Id.
138. Id.
139. Id.
140. Id. at *2.
142. Id.
143. Id.
144. Id.
145. Id.
146. Id. The court found that "the defendants engaged in practices of discrimination against [Karriem] because of his race and religion; that the defendants were not justified in terminating the plaintiff's employment[;] . . . that the reasons proffered at trial were pretextual[; and] . . . that the decision to fire him was retaliatory, excessive, and motivated by impermissive factors." Id.
C. Nonconformists: Individuals Requiring Special Treatment to the Detriment of the Group

The most ideologically inconsistent area of the courts’ Title VII reasonable accommodation jurisprudence occurs when “the religious accommodation requirement actively pits an individual against a group.”147 This occurs when employees define their unusual and unconventional religious accommodation needs and then demand that their employers accommodate them.148 Conflicts result in these situations because the employee’s religious practices generally conflict with ordinary work practices.149 Courts that use this model of Title VII interpretation typically decide cases on “societal notions of how much latitude the group must cede to the nonconformist,” instead of the actual standards set forth in Title VII.150 Rather than determining the actual cost of accommodation, courts simply analyze the potential detrimental effects on the plaintiffs’ fellow employees and co-workers that could arise if the employer accommodated the plaintiff.151 Consequently, this approach leads to a bias favoring the group and ultimately the employer, as opposed to the employee requesting accommodation.152

For example, in Wilson v. U.S. West Communications,153 Wilson, a Roman Catholic, was discharged when she missed three consecutive days of work after her employer told her not to return to work wearing an anti-abortion button depicting a fetus, which Wilson had made a religious oath to wear.154 Notably, U.S. West did not have a dress code; however, the company claimed Wilson’s button became a source of disruption at work because employees frequently gathered to discuss it.155 Moreover, U.S. West argued that some

147. Silbiger, supra note 11, at 850.
148. Id.
149. Id. For example, these employees may be subject to their co-workers’ ridicule or contempt.
150. Id.
151. Id. For instance, if the issue was that the plaintiff was unable to work on the Sabbath, rather than analyzing the actual cost of accommodation in rearranging the plaintiff’s schedule, the court would examine the possible effects the accommodation would have on the plaintiff’s co-workers.
152. Id.
153. 58 F.3d 1337 (8th Cir. 1995).
154. Id. at 1339-40. Wilson had previously made a religious vow that she would wear an anti-abortion button until abortion was outlawed. Id. at 1339. The button had a diameter of two inches and depicted a color picture of an eighteen-to-twenty-week-old fetus. Id. Wilson wore the button at all times, save sleeping or bathing, because of her belief that if she “took off the button she would compromise her vow and lose her soul.” Id.
155. Id.
employees threatened to quit because of the button, and many co-workers testified "that they found the button offensive and disturbing."156 Wilson’s supervisors met with her and offered her three alternatives to wearing the button, none of which satisfied her religious obligations.157 Ultimately, Wilson’s supervisor instructed her not to return to work wearing anything that depicted a fetus.158 U.S. West sent Wilson home when she came to work wearing the button and later fired her for missing three consecutive unexcused days of work.159

The U.S. Court of Appeals for the Eighth Circuit affirmed the trial court, holding that Wilson had successfully shown a prima facie case of religious discrimination under Title VII.160 The court, however, also affirmed the trial court’s holding that requiring U.S. West to allow Wilson to wear her button would create an undue hardship.161 In the course of her appeal, Wilson argued that she had not caused the company to suffer any actual loss from rearranging schedules or missing work.162 Wilson further contended that the problem was not her wearing of the button; rather, it was her co-workers response to her decision to wear the button that caused disruption.163 Wilson suggested that U.S. West could simply have requested that her co-workers not discuss the button during work hours.164 Wilson argued that such an instruction would not constitute an undue hardship.165 Both the Eighth Circuit and the trial court summarily rejected Wilson’s argument, holding that U.S. West “was unable to persuade the co-workers to ignore the button[,] and] . . . [t]o simply instruct Wilson’s co-workers that they [had to] accept Wilson’s insistence on wearing a particular depiction of a fetus as part of her religious beliefs [was] antithetical to the concept of reasonable accommodation.”166

Significantly, rather than determining the merit of Wilson’s cause of action based on Hardison’s incredibly low de minimis hardship standard, the Eighth

156. Id.
157. Id. U.S. West provided the following three options to Wilson in an attempt to accommodate her religious needs: (1) wear the button in her cubicle; (2) conceal the button while she was at work; or (3) wear a different button that conveyed the same message but did not have a photograph of a fetus. Id.
158. Id.
159. Id. at 1340.
160. Id. at 1340-41.
161. Id. at 1342.
162. Id. at 1341.
163. Id.
164. Id.
165. Id.
166. Id.
Circuit rejected Wilson’s argument and analyzed the case as a nonconformist individual challenging the accepted standards of the group.\textsuperscript{167} The court held "that Title VII does not require an employer to allow an employee to impose his religious views on others."\textsuperscript{168} Instead of adequately balancing the rights and duties of Wilson and her employer, the court elevated "the concerns of grumbling colleagues above those of the aggrieved employee."\textsuperscript{169} The irony inherent in the court’s analysis is that Congress intended Title VII’s reasonable accommodation protection to serve as a safeguard for employees with minority religious beliefs, despite the unpopularity or inconvenience it causes fellow employees, unless the accommodation would cause an undue hardship on the employer.\textsuperscript{170} One central objective of the Civil Rights Act of 1964, which includes Title VII, was to protect rights of minorities "against the potentially oppressive will of the majority."\textsuperscript{171} The result in \textit{U.S. West} was precisely what Title VII intended to avoid. Congress had already achieved a balance between the individual and the group, with the individual at all times triumphant absent some undue hardship on the employers.\textsuperscript{172} Clearly, the Eighth Circuit’s mode of analysis significantly undermines the benefits that Congress intended Title VII to confer on religious minorities.\textsuperscript{173}

\textbf{D. Religious Accommodation v. Religious Neutrality}

In some instances, courts have been unwilling to require public employers to accommodate the religious beliefs of an employee on the grounds that doing so would create an implied endorsement of that religion, thus destroying the appearance of religious neutrality.\textsuperscript{174} Accordingly, even when a plaintiff successfully proves a prima facie case of religious discrimination

\begin{itemize}
\item \textsuperscript{167} \textit{Id.} at 1342.
\item \textsuperscript{168} \textit{Id.} It is interesting that the Eighth Circuit characterized Wilson’s wearing of a button as imposing her religious beliefs on others. Although she was expressing her religious beliefs in an obvious and vivid manner, there is no indication that her personal religious beliefs were imposed on her co-workers. This seems to be the only logical way the court could have characterized the scenario without explicitly stating that the court was making a policy judgment favoring the status quo of the majority to the detriment of the individual needing accommodation.
\item \textsuperscript{169} Silbiger, \textit{supra} note 11, at 851.
\item \textsuperscript{170} \textit{Id.} at 852-53.
\item \textsuperscript{171} \textit{Id.} at 852.
\item \textsuperscript{172} \textit{Id.} at 853.
\item \textsuperscript{173} \textit{Id.}
\end{itemize}
against a public employer under Title VII, courts are reluctant to provide relief because religious accommodation may create an undue hardship on public employers by undermining the appearance of religious neutrality.\textsuperscript{175}

In \textit{United States v. Board of Education},\textsuperscript{176} the Third Circuit held that an 1895 Pennsylvania statute, known as the Garb Statute, furthered the compelling interest of preserving an atmosphere of religious neutrality in the public school system.\textsuperscript{177} As a result, the court reasoned that any accommodation that undermined the compelling interest of religious neutrality created an undue hardship on the school system.\textsuperscript{178} The statute in question prohibited all public school teachers from wearing any symbol or insignia that would identify a teacher as a member of any religious group.\textsuperscript{179} Alima Reardon, a Muslim woman, was discharged from her position as a substitute teacher for her religious dress in \textit{Board of Education}.\textsuperscript{180} Reardon had worked for the school district as a substitute and full-time teacher for twelve years before embracing the religious belief that required her to alter the manner in which she dressed.\textsuperscript{181} Notably, Reardon taught in Muslim attire for two years without any reprimands from her employer.\textsuperscript{182} In 1984, however, on three separate occasions, Reardon's employer told her that she would no longer be able to teach wearing her religious clothing.\textsuperscript{183} In each

\begin{itemize}
\item \textsuperscript{175} \textit{See Bd. of Educ. I}, 911 F.2d at 893.
\item \textsuperscript{176} 911 F.2d 882 (3d Cir. 1990).
\item \textsuperscript{177} \textit{Id}.
\item \textsuperscript{178} \textit{Id.} at 894.
\item \textsuperscript{179} \textit{PA. STAT. ANN.} tit. 24, § 11-1112 (West 1992). The Garb Statute provides:
\begin{itemize}
\item (a) That no teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination.
\item (b) Any teacher employed in any of the public schools of this Commonwealth, who violates the provisions of this section, shall be suspended from employment in such school for the term of one year, and in case of a second offense by the same teacher he shall be permanently disqualified from teaching in said school. Any public school director who after notice of any such violation fails to comply with the provisions of this section shall be guilty of a misdemeanor, and upon conviction of the first offense, shall be sentenced to pay a fine not exceeding one hundred dollars ($100), and on conviction of a second offense, the offending school director shall be sentenced to pay a fine not exceeding one hundred dollars ($100) and shall be deprived of his office as a public school director.
\end{itemize}
\textit{Id}.
\item \textsuperscript{180} \textit{Bd. of Educ. I}, 911 F.2d at 884 (noting that her religious dress included a scarf that covered her hair, ears, and neck, and a long, loose dress which covered her arms to her wrist).
\item \textsuperscript{181} \textit{Id}.
\item \textsuperscript{182} \textit{Id}.
\item \textsuperscript{183} \textit{Id.} at 884-85.
\end{itemize}
instance, Reardon was given the opportunity to leave work and return without wearing her religious dress; however, the school district prohibited her from teaching when she refused to comply.\textsuperscript{184} Reardon initially filed a complaint with the EEOC.\textsuperscript{185} When attempts at conciliation failed, the EEOC referred the matter to the Department of Justice, which then filed the complaint in district court.\textsuperscript{186}

1. \textit{Round One: The District Court Decision}

After Reardon proved a prima facie case of religious discrimination, the district court found that the school board failed to present any evidence of accommodation.\textsuperscript{187} The court rejected the school board’s first argument — that a violation of the Garb Statute could potentially result in criminal liability, thus creating an undue hardship — because no such criminal prosecution had ever been pursued since the statute’s inception.\textsuperscript{188} Furthermore, the school board’s argument was logically inconsistent because it had permitted teachers, including Reardon, to wear religious garb in the past without any consequences.\textsuperscript{189}

The school board also argued that allowing Reardon to teach in religious dress would sacrifice the public employer’s “compelling interest in avoiding the actual or symbolic endorsement of religion by the public schools.”\textsuperscript{190} The court, however, rejected this argument, holding that the school board failed to provide sufficient evidence to show that Reardon’s religious dress would cause students to believe that the school district had endorsed Islam.\textsuperscript{191}

Moreover, the district court rejected the school board’s third argument that accommodating Reardon would result in a violation of the Establishment Clause of the First Amendment.\textsuperscript{192} In its Establishment Clause analysis, the court applied the tripartite test introduced in \textit{Lemon v. Kurtzman}.\textsuperscript{193} First, the

\begin{itemize}
\item \textsuperscript{184} \textit{Id.} at 885.
\item \textsuperscript{185} \textit{Id.}
\item \textsuperscript{186} \textit{Id.}
\item \textsuperscript{187} United States v. Bd. of Educ., No. 87-2842, 1989 WL 52506, at *13 (E.D. Pa. May 17, 1989) (\textit{Bd. of Educ. II}). The school board had to prove that any accommodation would have created an undue hardship, and therefore the school board was unable to reasonably accommodate Reardon. \textit{Id.}
\item \textsuperscript{188} \textit{Id.} at *14; see \textit{Pa. Stat. Ann. tit. 24, § 11-1112(b)} (West 1992).
\item \textsuperscript{189} \textit{Bd. of Educ. II}, 1989 WL 52506, at *14.
\item \textsuperscript{190} \textit{Id.}
\item \textsuperscript{191} \textit{Id.}
\item \textsuperscript{192} \textit{Id. at *15.}
\item \textsuperscript{193} 403 U.S. 602 (1972). “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” \textit{Id.} at 612-13
\end{itemize}
court found that allowing Reardon to continue to teach wearing her religious garb in order to comply with Title VII constituted a secular legislative purpose. 194 Second, the court held that the school board would not advance or inhibit religion by its mere acquiescence to Reardon’s desire to wear religious attire. 195 Finally, the court found that allowing Reardon to teach wearing her religious attire would not create an excessive government entanglement with religion. 196 To the contrary, requiring teachers to abstain from wearing any religious garb or symbol would result in continual evaluation and surveillance of religious activity. 197

The district court then awarded compensatory damages to Reardon in the form of back pay and enjoined the school district from further enforcement of the Pennsylvania Garb Statute on the grounds that it was inconsistent with Title VII. 198 The district court’s analytical framework correctly applied Title VII’s burden on employers to reasonably accommodate absent undue hardship. 199 Unfortunately, the court’s holding and rationale were erroneously overturned on appeal. 200

2. Round Two: The Third Circuit’s Decision

The U.S. Court of Appeals for the Third Circuit reversed the district court’s holding that Title VII prohibited the enforcement of any religious garb statute, finding that accommodating Reardon would pose an undue hardship on the school board. 201 The court based its holding on both the potential exposure of the school board to criminal liability for violating the Pennsylvania statute and the compelling need to preserve an atmosphere of religious neutrality in the public school system. 202

The court relied heavily on Cooper v. Eugene School District No.4 203 to justify its rationale that accommodating Reardon would cause the school

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(internal citation omitted).
195. Id. at **16-17.
196. Id. at *16.
197. Id.
198. Id. at *20.
199. Pennsylvania district courts also held for plaintiffs, either on Title VII or First Amendment grounds, in two related cases where an employee was discharged because of religious garb or symbolism. See Nichol v. ARIN Intermediate Unit 28, 268 F. Supp. 2d 536 (2003); EEOC v. Reads, Inc., 759 F. Supp. 1150 (1991).
201. Id.
202. Id. at 890-91.
board to sacrifice the compelling interest of religious neutrality. 204 Cooper involved nearly indistinguishable facts; however, in that case, the Oregon Supreme Court analyzed only the First Amendment Free Exercise claim and ignored the Title VII religious discrimination claim. 205 Cooper held that the compelling state interest of religious neutrality superceded the First Amendment's Free Exercise Clause. 206 After discussing Cooper, the Third Circuit held that "it necessarily follow[ed]...that the Oregon statutes [did] not violate Title VII." 207

The Third Circuit followed the reasoning and analysis of the fourth framework of jurisprudence concerning Title VII in the context of public employment. 208 Rather than correctly applying Title VII, the Third Circuit sidestepped the opportunity to formulate any accommodation standards by allowing a perceived noneconomic need for neutrality to suffice as a compelling government interest. Ultimately, the court found that any deviation from the appearance of neutrality would automatically constitute an undue hardship. 209 The court did not provide any substantive relief or

205. Cooper, 723 P.2d at 313.
206. Id.
207. Bd. of Educ. I, 911 F.2d at 890. As noted by the concurrence, Cooper expressly declined to review the Title VII issue raised by the Plaintiff. "[I]n essence, the majority states that while Cooper did not speak directly to Title VII, the reasoning in Cooper imports that Title VII would not be violated by the Garb Statute." Id. at 897. (Ackerman, J., concurring). The Third Circuit's reliance on Cooper is problematic for two reasons: (1) the Oregon Supreme Court did not address the Title VII claim at all; it merely evaluated whether the statute served a compelling interest; and (2) the Oregon Supreme Court's decision was based largely on state constitutional interpretation, rather than the U.S. Constitution, which would be far more relevant in Board of Education.
208. Id.
209. Id. Perhaps what is more significant in this case is the Eighth Circuit's selective application of the First Amendment. Rather than emphasizing the freedom of Reardon to exercise her religion, the court prevented her from expressing her religious beliefs on the grounds that her appearance alone would make the school district seem as if it was endorsing a particular religion. Id. The court's rationale is logically inconsistent. While the court states that "the offending dress is dress that communicates to the teacher's students adherence to a religion, noting that this would not include dress that communicates an ambiguous message, such as, for example, the occasional wearing of jewelry that incorporates decorations like a cross or a Star of David," id. at 80, the court fails to acknowledge that a cross is the universal symbol for Christianity, just as the Star of David is for Judaism. The only distinction being made is the frequency with which the symbol is worn. Under the court's rationale, differentiating the symbols based on the number of times it is worn would be illogical. If the symbol in question would show an absence of neutrality when worn, then it should not be worn, even one time. The repeated logical inconsistencies in the courts' rationale illustrate the incredible flaws in the underlying analysis. Ultimately, the Third Circuit simply did not want to impose upon the school district the duty to reasonably accommodate Reardon, even where the financial cost
accommodation to Reardon or similarly situated individuals.\textsuperscript{210}

Courts employing this framework fail to place any meaningful burden on employers to reasonably accommodate the religious beliefs of employees. In these cases, courts have somehow managed to turn Title VII on its head by construing a statute that requires employers to account for religious pluralism by accommodating their employees as calling for a facially neutral religious atmosphere devoid of any religious expression.\textsuperscript{211} Title VII unequivocally sought to avoid this exact form of discrimination.\textsuperscript{212} Using the First Amendment or the need for the appearance of neutrality as a tool to avoid enforcement of Title VII's religious accommodation provision is simply inconsistent with the Supreme Court's jurisprudence regarding the Establishment Clause.\textsuperscript{213} A more coherent and consistent analytical framework should be applied to Title VII cases. Such a framework should adequately balance the competing interests of employees and employers.

E. Religious Interests Balanced With Business Necessity

Balancing the religious interests of employees with employers' business necessity concerns is the only framework that truly reflects the actual language of section 701(j).\textsuperscript{214} Furthermore, this model's predictable framework simultaneously provides consistency and flexibility.\textsuperscript{215} Under this model, courts analyze Title VII cases as falling somewhere on a continuum, with one end requiring reasonable accommodation and the other end constituting undue hardship.\textsuperscript{216} Courts may use various factors to determine

\textsuperscript{210} As the district court noted, there was no evidence presented at trial that indicated a probability, or even a possibility, that Reardon's head-scarf would create a "perception by students that the school or local governmental entity endorsed the teacher's religion." \textit{Id. of Educ. II}, 1989 WL 52506, at **14-15.


\textsuperscript{212} \textit{Id.}

\textsuperscript{213} \textit{See} Lynch v. Donnelly, 465 U.S. 668 (1984). The Supreme Court explicitly stated: In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court. Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith — as an absolutist approach would dictate — the court has scrutinized legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.

\textit{Id.} at 1361-62.

\textsuperscript{214} Silbiger, \textit{supra} note 11, at 857.

\textsuperscript{215} \textit{Id.}

\textsuperscript{216} The weight of the individual's religious interest and belief, provided it is proved to be
what part of the continuum the case falls on, and thus, what level of accommodation, if any, is required. Courts mainly consider "the individual's statutory right to exercise religion freely . . . balanced against the employer's statutory right to be free of accommodation requirements that unduly burden its business." Because the business hardship variable is significant, it is evaluated using a two-pronged analysis: (1) the court must consider the proven financial cost to the employer, and not merely speculative or hypothetical costs, and (2) the court must evaluate the reasonableness of the accommodation by determining how well the employer can bear the costs.

The U.S. Court of Appeals for the Eighth Circuit articulated this method of analysis in Brown v. General Motors Corp. when it stated that

[unless the statutory mandate (which requires reasonable accommodation) is to be rendered meaningless, it must be held to provide that until facts or circumstances arise from which it may be concluded that there can no longer be an accommodation without undue hardship, the employee's religious practices are required to be tolerated.]

This approach requires courts to analyze actual costs to evaluate the reasonableness of the accommodation sought by the employee. After the employee has made a prima facie showing of religious discrimination, the employer must affirmatively prove that reasonable accommodation would create an undue hardship on the business, using actual, rather than speculative or hypothetical, costs. By relying on the existence of an actual hardship to the employer instead of hypothetical hardship, this framework gives teeth to Title VII's reasonable accommodation provision. Moreover, balancing each interest and placing the outcome somewhere along the accommodation-hardship continuum provides a greater degree of consistency and certainty to Title VII's prohibition of religious discrimination.

sincere, is constant and would not shift the case along the continuum toward or away from either reasonable accommodation or undue hardship. Id.

217. See, e.g., Brown v. Gen. Motors Corp., 601 F.2d 956 (8th Cir. 1979). Courts would have to evaluate the specific factual allegations underlying the case in determining the relevant costs.
218. Silbiger, supra note 11, at 857.
219. Id. at 858-59.
220. 601 F.2d 956 (8th Cir. 1979).
221. Id. at 961.
222. Silbiger, supra note 11, at 859.
223. Id.
224. Id.
By using this framework to analyze the cases previously discussed, both the consistency and flexibility of the model are readily apparent. For example, in *Sambo*'s, if the employer proved the existence of an actual significant cost that would result from employing individuals with beards, such as lost sales or revenue, the case would shift toward undue hardship, and the employer would not be liable for discrimination. In contrast, if there was only a hypothetical cost established, or if the actual cost was insignificant, Title VII would require an employer to reasonably accommodate its employees.

*Bhatia* would clearly fall on the undue hardship side of the continuum because accommodating the employee would cause the employer to violate California law, which could subject the employer to civil and criminal penalties. Title VII does not require an employer to suffer such a hardship. Therefore, *Bhatia*'s holding would remain undisturbed under this framework. Similarly, the decisions in both *Karriem* and *Electronic Data Systems* would remain unaltered because in both cases the employers could not prove any actual hardship that arose from accommodating the plaintiffs. Thus, both cases would fall along the reasonable accommodation portion of the continuum.

Before applying the continuum analysis in *Wilson*, the court would have to evaluate the potential for actual hardship in terms of decreases in productivity and minor losses in revenue. However, because the employer failed to adequately illustrate that this type of hardship would occur if Wilson continued to wear her anti-abortion pin, the case would likely fall on the reasonable accommodation end of the continuum. Notably, this analysis would result in a different outcome than the one provided by the *Wilson* court.

Additionally, this framework would have required the employer to reasonably accommodate Reardon in *Board of Education* because the employer almost entirely relied on hypothetical hardships that were not

226. Although it may seem as though noneconomic loss would not be taken into consideration within this framework, if the employer can prove that they will *actually suffer* some intangible loss if it accommodates an employee, courts can use the noneconomic loss as a factor within the analysis.
228. *See 29 C.F.R. § 1605.2(e) (2003).*
231. *Id.*
substantiated by any evidence.\textsuperscript{232} Accordingly, this case would have been decided in favor of the plaintiff.

The reasonable accommodation-undue hardship continuum provides a framework which, if used by courts, would provide a consistent standard in interpreting religious discrimination cases under Title VII. Although variables will inevitably continue to exist because of factual variations, the continuum still provides more objective standards than those that currently exist. As a result, judicial discretion will be significantly constrained and mainly relegated to borderline cases.

\textit{IV. Conclusion}

Title VII's objective is to eliminate employment discrimination on the basis of race, color, religion, sex, and national origin.\textsuperscript{233} Title VII's impact, however, has been severely constrained by the U.S. Supreme Court's narrow interpretation of the scope of an employer's duty to accommodate.\textsuperscript{234} Courts have further minimized the effects and purpose of Title VII by inconsistently applying and interpreting employees' rights and employers' duties. To limit this type of inconsistency, courts must begin implementing a method of analysis that balances accommodation with business necessity, which will ultimately provide a more certain legal landscape.

\textit{Huma T. Yunus}

\textsuperscript{232} United States v. Bd. of Educ., 911 F.2d 882, 896 (3d Cir. 1990) (Ackerman, J., concurring) (\textit{Bd. of Educ. I}).

