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## Never on Sunday: Workplace Religious Freedom in the New Millennium

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# NEVER ON SUNDAY: WORKPLACE RELIGIOUS FREEDOM IN THE NEW MILLENNIUM

*Marianne C. DelPo*

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# NEVER ON SUNDAY: WORKPLACE RELIGIOUS FREEDOM IN THE NEW MILLENNIUM

Marianne C. DelPo\*

## I. INTRODUCTION

Imagine being fired for refusing to sing Happy Birthday. Now imagine collecting \$53,000 for that firing—from a waitressing job. Science fiction? Not exactly. Try religious discrimination in the workplace—1990s style.<sup>1</sup> Title VII of the Civil Rights Act of 1964 has long proscribed such treatment, but lawsuits claiming this type of workplace discrimination were relatively rare for many years. Now claims are on the rise, up 18% over the past five years, and the substance of religious discrimination claims is changing to include some unprecedented fact patterns.<sup>2</sup> This new activity in employment discrimination law, as well as the growing likelihood that employers will opt for sometimes costly settlements to avoid the risk, cost, and bad publicity of a trial, seem to reflect a trend toward greater demands on employers to accommodate workers' increasingly diverse religious beliefs.<sup>3</sup> This trend will likely result in a continued increase in workplace religious discrimination lawsuits in the next decade, but, ironically, will ultimately lead to diminished litigation of this type. This Article details where the law is in this area and predicts where it is headed by examining recent statutory, administrative, and constitutional law developments.

## II. STATUTORY LAW: FROM TITLE VII TO THE WORKPLACE RELIGIOUS FREEDOM ACT

Title VII of the Civil Rights Act of 1964 is the source of the federal prohibition of workplace religious discrimination.<sup>4</sup> The statute includes religion in its laundry list of forbidden reasons for business decisions:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .<sup>5</sup>

Religion, however, warranted additional statutory language beyond that applicable to race, color, sex, or national origin:

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1. See Mark Hansen, *Suing Bosses Over Beliefs*, A.B.A.J. April 1998, at 30 (detailing 1993 case and subsequent settlement).

2. See *id.* (citing EEOC statistics demonstrating an increase from 1,444 claims in 1993 to 1,709 in 1997, in contrast to an overall decrease in EEOC complaints during the same period from 87,942 to 80,625, and detailing other "unusual employment-related suit[s]").

3. See *id.* (quoting Lynn Mitchell, resident scholar of religion at the University of Houston).

4. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994).

5. 42 U.S.C. § 2000e-2(a)(1) (1994).

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.<sup>6</sup>

This language, added by amendment in 1972, provided a statutory requirement that employers "reasonably accommodate" employees' religious practices, even when these might somehow impact an employee's ability to do the job.<sup>7</sup> For example, an employee whose religious observances prevent him from working on Friday evenings might nonetheless be able to serve as a payroll clerk simply by moving the time of paycheck distribution from Friday at 5:00 p.m. to Friday at noon. Similarly, a Catholic school might avoid its traditional policy of hiring only Catholic teachers by arranging someone's schedule to teach only math classes.

One might read this 1972 language as a limitation to the "business necessity" and "bona fide occupational qualification" (BFOQ) defenses otherwise available to employers under Title VII.<sup>8</sup> The "business necessity" defense arises in "disparate impact" cases, when a facially neutral job requirement or policy impacts disproportionately on a group protected by Title VII. In such a case—illustrated by the payroll clerk whose job responsibilities include distributing payroll on Fridays at 5:00 p.m.—the employer may defend itself by demonstrating that the facially neutral job requirement is justified by a business necessity.<sup>9</sup> Similarly, BFOQ is the standard defense in a disparate treatment case, that is, one where employment rules or decisions explicitly treat an employee or a group of employees protected by Title VII less favorably than others. In this type of case, typified by a Catholic school's explicit policy to hire only Catholics as teachers,

it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.<sup>10</sup>

While requiring that employers accommodate employee religious beliefs in these situations might appear to undermine the two statutory defenses, judicial interpretation of the term "undue hardship"—the statutory limitation on the accommodation requirement—has counterbalanced this effect by affording employers an additional defense in religious discrimination cases. Indeed, the Supreme Court has held that an employer may justify a refusal to accommodate an employee's religious practices by demonstrating that to do so requires anything more than a minimal effort or expense.<sup>11</sup>

In *TWA v. Hardison*,<sup>12</sup> an employee whose religious beliefs prohibited him from working on Saturdays sued when the airline refused to violate a seniority system established by a collective bargaining agreement in order to accommodate

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6. 42 U.S.C. § 2000e(j) (1994).

7. See 29 C.F.R. § 1605.2 (1998).

8. 42 U.S.C. § 2000e-2(e)(1) (1994).

9. See *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

10. 42 U.S.C. § 2000e-2(e)(1) (1994).

11. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

12. 432 U.S. 63 (1977).

the employee's need to have Saturdays off.<sup>13</sup> The Court held that violating that collective bargaining agreement would have constituted an "undue hardship" under the 1972 amendment to Title VII, stating that

[i]t would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preferences of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.<sup>14</sup>

Thus, in the hypothetical examples set out above, a showing that accommodation would necessitate rearranging the schedules of off-site workers to change payroll distribution to noon, or that it would require causing other teachers to teach extra religion classes to accommodate for the non-Catholic math teacher might well suffice as legal excuses not to accommodate these two workers' religious observances and beliefs.

In contrast, the Americans with Disabilities Act (ADA), which contains a similar "accommodation unless undue hardship" rule, statutorily set a much stricter standard for indulgence of the "undue hardship" defense in disability discrimination cases: "The term 'undue hardship' means an action requiring *significant difficulty or expense*. . ."<sup>15</sup> This language has led to the introduction of a proposed piece of legislation, the Workplace Religious Freedom Act (WRFA) which seeks to upgrade the Title VII "accommodation" and "undue hardship" definitions to the level of the ADA.<sup>16</sup> Pending passage of the WRFA, however, cases will continue to be resolved based on the current judicial construction of the original statutory balancing test. This construction allows for successful employer defenses based on relatively weak showings of hardship, though employees do prevail at times.

#### A. The "Easy" Cases: *Garb, Hair, Holidays*

The traditional religious discrimination case involves a religious employee who is negatively impacted by the rules or policies of her employer because of her religious beliefs or practices. She is not hired because she will not wear a skimpy uniform due to her religious belief that women should keep their legs and head covered at all times.<sup>17</sup> Alternatively, an employee is denied a promotion to a desk job because he refuses to cut his hair due to his belief that men must wear long braids to express their reverence for God.<sup>18</sup> Perhaps an employee is fired because he will not work past sundown on Friday afternoons due to his belief that one

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13. *See id.*

14. *Id.* at 81.

15. 42 U.S.C. § 12111(10)(A) (1994) (emphasis added).

16. H.R. 2948, 105th Cong. § 2(a)(3) (1997). *See also* Dan Coats, *Workplace Religious Freedom Act*, Congressional Press Releases (Oct. 21, 1997); Hansen, *supra* note 1, at 32 (discussing goals of bill).

17. *See, e.g.*, EEOC Decision No. 71-2620 (1971) (unlawful employment practice for employer to discharge Black Muslim woman due to her manner of dress).

18. *See, e.g.*, *Carter v. Bruce Oakley, Inc.*, 849 F. Supp. 673 (E.D. Ark. 1993); *Equal Employment Opportunity Commission v. Elec. Data Sys.*, No. C83-151C, 1983 WL 464 (W.D. Feb. 14, Wash. 1983).

ought not work on the Sabbath.<sup>19</sup> These sorts of cases continue to arise. Their increased number is largely a reflection of two phenomena: Americans are increasingly comfortable asserting their civil rights in the workplace as jobs are less difficult to obtain<sup>20</sup> and religious observance is more popularly accepted,<sup>21</sup> and the variety of religious beliefs represented in the workplace is increasing as the population grows more diverse.<sup>22</sup>

### 1. Traditional Beliefs Demanding More Respect

In 1993, a federal court ruled in favor of a Jewish laborer who claimed religious discrimination when he was fired for refusing to trim his beard based on religious beliefs.<sup>23</sup> In that case, the unskilled laborer repeatedly refused to honor the company's "no beard" policy, and challenged his subsequent dismissal by questioning the reasons for the underlying policy and its inflexibility.<sup>24</sup> The plaintiff succeeded in convincing the judge that his beard was neither unsafe nor unprofessional and, thus, its existence did not create an "undue hardship" on his employer.<sup>25</sup> Although grooming practices which hinder the employer's operation or conflict directly with health and safety regulations may be the basis for a successful "undue hardship" defense,<sup>26</sup> the employer's defense of its "no beard" policy as family tradition fell short of a justification for refusing to accommodate the employee's religious beliefs.<sup>27</sup>

This type of case is far from new or unique,<sup>28</sup> but its increasing occurrence typifies the increasing willingness of employees to assert their rights to express and to observe their religious beliefs in the workplace. It also illustrates that employers may have been lulled into a false sense of security by precedents allowing minimal hardship to suffice as an employer defense. Even under the current standard employees can and do prevail.<sup>29</sup> Employers who rely on the historically easy undue hardship defense are increasingly startled when courts rule that not just any minor inconvenience constitutes such a hardship.<sup>30</sup>

Plaintiff success encourages other employees to assert their rights. In addition, the rise in popular acceptance of participation in religious services and activities<sup>31</sup> and the strengthening economy<sup>32</sup> also have emboldened workers to risk as-

19. See, e.g., *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992) (involving Seventh Day Adventist whose religion prohibited work from sundown Friday to sundown Saturday put on night shift and fired for refusal to work). See also Eric Matusewitch, *Employee Challenges to Religion-Based Dress Increase*, 12 EMPLOYMENT LITIG. REP. 3 (1998), available in WESTLAW, 12 No. 8 RNEMPLR 3 (summarizing both classic and recent garb and hair cases).

20. See Hansen, *supra* note 1, at 30.

21. See Dominic Bencivenga, *Religion at Work: When Accommodation Becomes Harassment*, N.Y. L.J., Sept. 11, 1997, at 5.

22. See *id.*

23. See *Carter v. Bruce Oakley, Inc.*, 849 F. Supp. at 676.

24. See *id.*

25. See *id.*

26. See, e.g., *Bhatia v. Chevron*, 734 F.2d 1382 (9th Cir. 1984).

27. See *Carter v. Bruce Oakley, Inc.*, 849 F. Supp. at 675.

28. See generally Matusewitch, *supra* note 19.

29. See *id.*

30. See *Carter v. Bruce Oakley, Inc.*, 849 F. Supp. at 675-76.

31. See Bencivenga, *supra* note 21, at 5.

32. See *id.*

serting their rights in the workplace. Witness the two Massachusetts women who sued their employer, a racetrack, over having to work on Christmas.<sup>33</sup> The racetrack, which generated its largest attendance, and thus profits, on weekends and holidays, had a longstanding practice to remain open on Christmas. This necessitated some employees—usually those with the least seniority or those who had not worked the previous Christmas—to work part of the day. The women, who were only scheduled to work the evening shift, sued when they were fired for refusing to work the assigned shift.<sup>34</sup>

Employers long have struggled with the many requests for time off on religious holidays observed by large numbers of employees.<sup>35</sup> It is simply not always possible to honor every worker's request. Typically, employers will attempt to stagger holiday schedules, to offer unpaid leaves, voluntary shift swapping, or even the use of temporary workers as substitutes.<sup>36</sup> Yet, some employees must work. This was once accepted as inevitable, especially by employees with little seniority. Today, in a workplace-rights-oriented age, practices once tolerated by workers are now challenged with regularity.

## 2. *Non-traditional Beliefs Surfacing*

Where traditional Catholic headdress was once the topic of reasonable accommodation claims,<sup>37</sup> today Muslim women are challenging suspensions, terminations, and refusals of employment for wearing religious head scarves.<sup>38</sup> The Chi Chi's waitress who challenged her termination for refusing to sing Happy Birthday to a customer asserted a Jehovah's Witness's belief that prohibits the celebration of birthdays.<sup>39</sup> Employers who are accommodating of the beliefs and practices of "mainstream" religions nonetheless find themselves being sued by employees with less well known beliefs.

This result can be partially attributed to managers who do not accept unfamiliar religious beliefs as legitimate.<sup>40</sup> Thus, despite a company policy that advocates the respect for and accommodation of religious beliefs and that provides for training on this issue, managers often think that they are honoring company policy

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33. See *Pielech v. Massasoit Greyhound, Inc.*, 668 N.E.2d 1298, 1300 (Mass. 1996). See also Barbara Ettore, *Religion in the Workplace: Implications for Managers*, Management Review 15 (Dec. 1996) (discussing case and state court ruling against plaintiffs on state law grounds).

34. This case was brought under a Massachusetts statute rather than under Title VII. The statute, which sought to protect individuals by giving them the right to be free from work on days of religious observance, was ruled unconstitutional by the Massachusetts Supreme Judicial Court. The ruling leaves open the question of whether the racetrack violated Title VII. See *Pielech v. Massasoit Greyhound, Inc.*, 668 N.E.2d at 1300.

35. See *Juggling Workers During the Holidays* (Dec. 4, 1996) <<http://www.aclu.org/news/W120496a.html>>; Jeffrey S. Klein & Nicholas J. Pappas, *Accommodation of Religious Observances, Parts I and II*, N.Y. L.J. Feb. 3, 1997 and Mar. 19, 1997.

36. See *Juggling Workers During the Holidays*, *supra* note 35; Klein & Pappas, *supra* note 35.

37. See *Matusewitch* *supra* note 19, at 1 (discussing 1970 EEOC decision involving an "Old Catholic" nurse who insisted that her religion required her to keep her head covered at all times).

38. Laurie Goldstein, *Islamic Emblem of Faith Also Trigger for Bias*, N.Y. TIMES, Nov. 3, 1997 (discussing claims against Taco Bell, Domino's Pizza, J.C. Penney, Holiday Inn, and Office Depot).

39. See Hansen, *supra* note 1, at 30.

40. See Ettore, *supra* note 33, at 15-18.

while in actuality they are favoring the requests of members of traditional religions over those of others.<sup>41</sup> This has led to a second tier of cases involving traditional claims—*i.e.*, those pertaining to garb, hair, or holiday observances—arising due to the practice of non-traditional beliefs. For example, a Sikh with a beard,<sup>42</sup> a Mohawk male with long hair,<sup>43</sup> and a Rastafarian with dreadlocks<sup>44</sup> all have been successful in challenging employer hair policies resulting in their being fired or refused employment. Such cases may be the biggest current pitfall for employers.

### 3. Predictions

Employees in a good economy are more likely to risk their jobs by asserting their rights. Add to this a culture where religious observance is on the upswing, and it appears that American workers are likely to continue to assert in increasing numbers their right to have their religious beliefs and practices accommodated in the workplace. This is especially true in the face of the likely passage of the bipartisan-sponsored WRFA.<sup>45</sup> The new statute would effectively override the Supreme Court's *Hardison* standard for undue hardship, requiring instead that employers accommodate religious beliefs absent a showing of significant—rather than minimal—difficulty or expense.<sup>46</sup>

Ironically, the actual number of lawsuits may nonetheless decrease in the first years of the new millennium. This will be a result of heightened employer awareness of the accommodation requirement created by: a) the press that will likely be generated by increased and unusual lawsuits; b) the passage of the WRFA along with the press and legal advice attendant to that passage; and c) prolonged exposure to more diverse religious views in the workplace. Additionally, there will be a growing employer awareness of the costs of defending Title VII lawsuits of any variety, including direct litigation costs, growing jury awards, and the indirect monetary impact of bad press.<sup>47</sup> Ultimately, the current trend is likely to diminish, not because workers become less demanding, but rather because employers become more accommodating—both initially and in the face of a threatened lawsuit.

#### B. The "Difficult" Cases: Religious Symbols, Speech, and Proselytizing

The more challenging religious discrimination cases for both employers and the courts have been those where a religious employee's workplace expression of a religious belief annoys or offends other employees to the extent that the bothered employees demand action.<sup>48</sup> An employee insists on wearing a button graphically

41. *See id.*

42. *See* Matusewitch, *supra* note 19 (discussing 1996 case before the Maryland Human Relations Commission Appeals Board).

43. *See* Rourke v. State Dep't of Correctional Servs., 615 N.Y.S.2d 470 (N.Y. App. Div. 1994).

44. *Francis v. Keane*, 888 F. Supp. 658 (S.D.N.Y. 1995).

45. H.R. 2948, 105th Cong. (1997) (bill sponsored by conservative Republican Indiana Sen. Dan Coats and liberal Democrat Massachusetts Sen. John Kerry). *See also* Coats, *supra* note 16; Hansen, *supra* note 1 (discussing goals and bi-party sponsorship of bill).

46. *See id.*

47. *See* Hansen, *supra* note 1.

48. *See* Bencivenga, *supra* note 21.



depicting an aborted fetus as part of her religious beliefs. Other employees claim that this action constitutes religious harassment and demand that the employer intervene.<sup>49</sup> The employer is caught between the proverbial rock and a hard place because requiring the employee to remove her button may result in litigation by her, whereas inaction may result in litigation from the complaining employees.<sup>50</sup>

These situations are exacerbated when the religious expression comes from a supervisor. An employee complains that her supervisor repeatedly proselytizes to her, telling her daily that unless she accepts Jesus as her personal savior she will be forever damned. This employee fears that her continued refusal to attend her supervisor's church services and convert is preventing her promotion to a higher position within the company.<sup>51</sup> Ultimately, she is fired and brings a claim alleging religious discrimination.<sup>52</sup> The Seventh Circuit found that such a situation constituted an actionable claim under Title VII as a form of religious harassment, presumed by that court to be every bit as illegal under Title VII as sexual harassment.<sup>53</sup>

Finally, what if the employer is the government? Although Title VII may protect one from *discrimination* for expressing religious views, one's First Amendment free speech rights (about religion or anything else) may be legally *limited* in a private workplace.<sup>54</sup> In contrast, the government has a direct obligation to avoid the abridgement of free speech, and, additionally to avoid interference with the exercise of one's religious beliefs.<sup>55</sup> Suppose that a federal employee's religion requires that he actively seek to convert others to his beliefs. Interference with such an employee's religious speech may violate both the Free Speech and the Exercise Clauses of the First Amendment.<sup>56</sup> However, tolerance of that speech, in addition to subjecting other employees to statutorily illegal harassment, may violate the Establishment Clause of the First Amendment if the proselytizing employee is perceived by other employees or the public as expressing official views.<sup>57</sup>

### 1. Private Workplace Cases

A federal appeals court upheld a ruling in favor of the employer in the case of the graphic fetus button.<sup>58</sup> The employee plaintiff, a Catholic who was fired after refusing to cover or to remove the offending button while at work, claimed that she had taken a religious vow to wear the button until there was an end to abortion and that the firing constituted an illegal refusal to reasonably accommodate that be-

49. See *Wilson v. U.S. West Communications, Inc.*, 58 F.3d 1337 (8th Cir. 1995).

50. See discussion *infra* Part II.B.1.

51. See *Venters v. City of Delphi*, 123 F.3d 956, 963 (8th Cir. 1997).

52. See *id.* at 964-65.

53. The court presumes that religious, like sexual, harassment is illegal in both the quid pro quo and hostile environment varieties and concludes that evidence of both types is present in this case. See *id.* at 975-77.

54. See *Bencivenga*, *supra* note 21.

55. See *id.*

56. See U.S. CONST. amend. I.

57. See THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, GUIDELINES ON RELIGIOUS EXERCISE AND RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE, § 2(F) (1997) [hereinafter *GUIDELINES*] (contemplating the type of situation described).

58. See *Wilson v. U.S. West Communications, Inc.*, 58 F.3d 1337 (8th Cir. 1995).

lief.<sup>59</sup> The employer claimed it had offered a reasonable accommodation in asking plaintiff to merely cover the button at work and also claimed that it would create an undue hardship to allow the plaintiff to continue to wear the button uncovered since this already had caused substantial disruption and threats from co-workers to walk off the job.<sup>60</sup> The Eighth Circuit agreed with the employer.<sup>61</sup> The ruling is predictable under the current low standard for undue hardship but might be less clearcut if WFRA raises that standard.<sup>62</sup>

Although such cases in the private sector are on the rise<sup>63</sup> and may produce more plaintiff victories if WFRA is passed, their resolution seems tied to the same analysis as the religious garb and holiday cases: one's belief in the obligation to speak about one's religious views must be accommodated unless it creates an undue hardship. The added nuance is simply that accommodation of the proselytizing employee's religious practice of preaching or attempting to convert—in addition to whatever direct costs this may entail—risks claims of harassment by other employees. As indicated by the Eighth Circuit, this risk may itself constitute an undue hardship.<sup>64</sup>

## 2. Public Workplace Cases

A nurse is fired for telling an AIDS patient that her religious belief is that homosexuality is wrong.<sup>65</sup> A government social worker is fired from a family services job for stating that his Christian beliefs prohibit him from placing foster children with openly gay couples.<sup>66</sup> Unless these remarks have created an undue hardship, the employer must tolerate them, right? Not necessarily: when the firing employer is the state of Connecticut or Missouri the legal analysis may be complicated by the First Amendment.

In addition to bolstering the rights of the proselytizing employee by adding increased protection for free speech and unimpeded exercise of one's religious beliefs,<sup>67</sup> the First Amendment complicates the above scenarios because of the Establishment Clause. The courts have construed the First Amendment's proscription of the governmental establishment of a religion to include the appearance of the adoption, promotion, or preference of any particular religion by public officials or employees acting in their official capacity.<sup>68</sup> This creates a potential conflict of legal responsibilities for the government employer. For this reason, in

59. *See id.* at 1339.

60. *See id.*

61. *See id.* at 1342.

62. This particular case would likely come out the same even under the heightened undue hardship standard of the WFRA because it was decided as much on the reasonableness of the accommodation offered (covering the button while at work) as it was on the undueness of the hardship to be created by complete tolerance of the button. *See id.* at 1342 & n.3.

63. *See Hansen, supra* note 1; Bencivenga, *supra* note 21.

64. *See Wilson v. U.S. West Communications, Inc.*, 58 F.3d at 1339. *See also Wilson v. U.S. West Communications, Inc.*, 860 F. Supp. 665, 675 (D. Neb. 1994).

65. *See Hansen, supra* note 1, at 30.

66. *See id.*

67. *See, e.g., Capitol Sq. Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); U.S. CONST. amend. I. *See also Clinton Guidelines, Section 2(A) & 2(E).*

68. *See GUIDELINES, supra* note 57, § 2(F).

August 1997, the Clinton administration issued guidelines on religious exercise and religious expression in the federal workplace.<sup>69</sup> Although limited to federal employers, these guidelines provide much needed guidance to all government employers.

### 3. Predictions

As religious observance is on the rise,<sup>70</sup> more religious expression cases will arise. The particular rise in the membership of religions that encourage or even require proselytizing<sup>71</sup> promises even more conflicts of this sort. A careful balancing of employee rights is needed, particularly in government workplaces. Balancing the rights of one employee against those of another is tricky at best and seemingly an unfair task to leave to individual employers. For this and other reasons, in 1993 the Equal Employment Opportunity Commission (EEOC) issued guidelines on workplace harassment.<sup>72</sup> As discussed in Section III, although these guidelines were ultimately withdrawn, they are sorely needed and likely to be reformulated and reissued soon. EEOC guidelines would help define the parameters of prohibited religious harassment, thereby instructing employers on how far to accommodate a proselytizer before that accommodation becomes the source of harassment of other employees. The further legal obligations placed on government employers by the First Amendment require even more sophisticated balancing. The Clinton guidelines should prove helpful in that arena.

Once again, employee claims are likely to decrease over time, despite increases in proselytizing and the assertion of the right to do so. This is because employers are likely to become more willing to accommodate proselytizing and other potentially offensive expression of religious beliefs, as well as more adept at doing so. In short, guidance provided to employers by the likely issuance of new EEOC Guidelines, as well as that already available in the President's federal employer guidelines, will enhance employers' willingness to accommodate.

### III. ADMINISTRATIVE LAW: FROM THE EEOC GUIDELINES TO CLINTON'S GUIDELINES

Both the EEOC and the Clinton administration have attempted to provide some much needed guidance to employers in this area. The EEOC attempt was effectively blocked by the religious right,<sup>73</sup> but Clinton's guidelines, whose drafters seem to have considered the concerns of the earlier criticisms, have survived to date.<sup>74</sup>

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69. See GUIDELINES, *supra* note 57. See also Bencivenga, *supra* note 21 (noting that private employers are also using the Guidelines as a template).

70. See Bencivenga, *supra* note 21.

71. See Hansen, *supra* note 1.

72. See discussion *infra* pp. 25-30.

73. See Terry Morehead Dworkin & Ellen R. Peirce, *Is Religious Harassment "More Equal?"*, 26 SETON HALL L. REV. 44, 73 (1995).

74. See Bencivenga, *supra* note 21.

A. *The EEOC Tries to Draw a Landscape*

In 1993, largely in response to the amount of press and growing confusion over the parameters of proscribed sexual harassment in the workplace,<sup>75</sup> the EEOC issued proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability (EEOC Guidelines).<sup>76</sup> The EEOC Guidelines caused quite a stir, leading to Congressional hearings, and eventually EEOC withdrawal of the Guidelines in their entirety.<sup>77</sup>

The loudest objections to the EEOC Guidelines regarded the treatment of religious harassment.<sup>78</sup> The primary area of criticism was the definition of harassment, which was criticized as being too broad, such that almost any expression of religious belief might constitute religious harassment. The proposed language provided:

Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her . . . religion, . . . or that of his/her relatives, friends, or associates . . . .

Harassing conduct includes, but is not limited to, the following:

- (i) Epithets, slurs, negative stereotyping, or threatening, intimidating or hostile acts that relate to . . . religion, . . . and
- (ii) Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of . . . religion . . . , and that is placed on walls, bulletin boards, or elsewhere on the employer's premises, or circulated in the workplace.<sup>79</sup>

This broad definition, its critics feared, would create a "religion free" zone in the workplace, infringing on religious liberty and potentially violating First Amendment rights of both free speech and free exercise of religion—especially in a government workplace.<sup>80</sup> It was suggested that religious harassment be considered separately by the EEOC Guidelines to address the special concerns of religious liberty.<sup>81</sup> Alternatively, it was suggested that religious harassment be edited out of the proposed EEOC Guidelines entirely to be addressed later in a separate document.<sup>82</sup> Ultimately, so much fervor was generated by the proposed EEOC Guidelines that the commissioners unanimously voted to withdraw them from consideration.<sup>83</sup>

75. See Dworkin & Peirce, *supra* note 73, at 72-73 (citing reasons stated in EEOC Guidelines themselves).

76. Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266 (1993) [hereinafter EEOC Guidelines].

77. See Dworkin & Peirce, *supra* note 73, at 73. See also Betty L. Dunkum, *Where to Draw the Line: Handling Religious Harassment Issues in the Wake of the Failed EEOC Guidelines*, 71 NOTRE DAME L. REV. 953, 954-57 (1996).

78. See Dunkum, *supra* note 77, at 954-57; Dworkin & Peirce, *supra* note 73, at 73.

79. EEOC Guidelines, *supra* note 76, at 51,269.

80. See Josh Schopf, *Religious Activity and Proselytization in the Workplace: The Murky Line Between Healthy Expression and Unlawful Harassment*, COLUM. J.L. & SOC. PROBS. 39, 55-56 (1997); Dworkin & Peirce, *supra* note 73, at 75-76; Dunkum *supra* note 77, at 954-57.

81. See Dunkum, *supra* note 77, at 954-57.

82. See *id.*; Schopf, *supra* note 80, at 57.

83. See Dunkum, *supra* note 77, at 957; Dworkin & Peirce, *supra* note 73, at 73; Schopf, *supra* note 80, at 56.

Despite the political controversy they generated, the Guidelines were in fact both constitutional and appropriate. They were nothing more than what they purported to be: an attempt to educate employers about already existing harassment caselaw<sup>84</sup> and to remind employers that Title VII affords parallel protection against harassment based on race, color, religion and national origin as it does for sex.<sup>85</sup> While a redraft of the EEOC Guidelines might be in order to reflect more accurately the now existing caselaw,<sup>86</sup> their basic construct was, indeed, sound. The definition of harassment sought to incorporate concepts articulated in sexual harassment caselaw<sup>87</sup> and to extend the definition of hostile environment sexual harassment found in earlier guidelines to the other areas addressed by Title VII.<sup>88</sup>

This seems to be a useful paradigm, as it provides employers with some boundaries for accommodation of a proselytizing employee. Proselytizing becomes illegal harassment when the religious expression creates an intimidating, hostile or offensive environment or unreasonably interferes with an individual's work performance, as evaluated from the perspective of a reasonable person.<sup>89</sup> Revised guidelines could provide examples drawn from caselaw illustrating that in determining when proselytizing becomes harassment, reasonable people typically consider both the severity and the frequency of the offending conduct, as well as the complaining employee's efforts, if any, to have the conduct stopped.<sup>90</sup>

In any case, though a political hot potato, the EEOC Guidelines are a much needed tool for employers. The membership of the Commission has changed and there is some indication that the new Commissioners will attempt to revise and to reissue the Guidelines.<sup>91</sup> Perhaps the issuance of the federal employer guidelines by the President will embolden the EEOC to act.

#### *B. Clinton Guidelines Useful Though Limited to Federal Workers*

On August 14, 1997 the White House issued Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (Clinton Guidelines).<sup>92</sup> The Clinton Guidelines are split largely into two sections:<sup>93</sup> guidelines and guiding legal principles.<sup>94</sup> The Clinton Guidelines, not unlike the withdrawn EEOC Guide-

84. See Hansen, *supra* note 1.

85. See *id.*

86. For example, *Harris v. Forklift Sys.*, 510 U.S. 17 (1993), was decided after the EEOC issued its guidelines. See Dunkum, *supra* note 77, at 957-973 (discussing in detail the validity of the EEOC Guidelines under existing harassment caselaw).

87. See Dunkum, *supra* note 77, at 957.

88. See *id.*

89. See EEOC Guidelines, *supra* note 76, at 51,269.

90. See Dunkum, *supra* note 77, at 964-66.

91. See Larry Witham, *Work Rules on Religion Dropped*, Wash. Times, Sept. 21, 1994, at A1 (quoting a staff member on the Senate Labor and Human Resources Committee as expressing optimism that, with three new members joining the five-member commission, "the legal staff is 'likely to take a fresh crack at the issue'").

92. See *Guidelines*, *supra* note 57.

93. There is a third section but it is brief and insignificant to this discussion. See *id.* at § 3.

94. The section that sets out the guiding legal principles contains subsections discussing the applicability of: the Free Speech Clause of the First Amendment; Title VII; the Due Process Clause of the Fifth Amendment; Article VI, clause 3 of the Constitution; the Free Exercise Clause of the First Amendment; and the Establishment Clause of the First Amendment. This list alone gives some indication of the complexity of this area of the law. See *id.* at § 2.

lines, provide a summary of the relevant rules originated from caselaw. Then, even more useful to the federal manager facing a conflict between rights of multiple employees, the Clinton Guidelines list specific examples of both acceptable and proscribed activities.

The four Clinton Guidelines attempt to reconcile the various applicable laws into an approach to workplace conflicts that strikes a balance between protecting religious expression and avoiding religious harassment or violations of the Establishment Clause. For example, the first Clinton Guideline differentiates between religious expression in private work areas, expression *among* fellow employees, expression *directed at* fellow employees, and expression in areas accessible to the public.<sup>95</sup> In these latter two categories religious expression is still allowed but with limitations. Section 1(A)(3) states that "employees must refrain from such expression when a fellow employee asks that it stop or otherwise demonstrates that it is unwelcome."<sup>96</sup> Section 1(A)(4) advises that "all federal employees must be sensitive to the Establishment Clause's requirement that expression not create the reasonable impression that the government is sponsoring, endorsing, or inhibiting religion generally, or favoring or disfavoring a particular religion."<sup>97</sup>

A second Clinton Guideline sketches out the variety of types of outlawed religious discrimination, from religion as a term or condition of employment, to coercion of employee participation or nonparticipation in religious activities, to hostile work environment, and to religious harassment.<sup>98</sup> The third and fourth Clinton Guidelines address, respectively, the accommodation requirement and the prohibition of the establishment of religion.<sup>99</sup>

The Clinton Guidelines are an admirable attempt to sketch the landscape of religious discrimination law for federal employers. Of course, it is a landscape full of mines since a little too much weight in one direction can trigger a violation of Title VII or the First Amendment. Ultimately, only courts can say where to strike the appropriate balance. The Clinton Guidelines themselves do not have the force of law, and thus are useful only to the extent that they accurately summarize and exemplify the existing law.<sup>100</sup> There will, no doubt, be litigation to test the validity of the Clinton Guidelines' presentation of the law and modifications may result. Still, the Clinton Guidelines provide a model for the type of balancing that must occur in any workplace between an individual's First Amendment and Title VII rights to religious expression and the rights of other workers to be free of religious harassment or establishment.

#### IV. CONSTITUTIONAL LAW: FROM *SHERBERT* TO *FLORES*

The United States Supreme Court has rarely addressed the issue of religious discrimination in the workplace,<sup>101</sup> so its decisions in this area offer limited guidance on how to proceed with evolving modern cases. Here is what we know.

95. *See id.* at § 1(A).

96. *Id.* at § 1(A)(3).

97. *Id.* at § 1(A)(4).

98. *See id.* at § 1(B).

99. *See id.* at §§ 1(C), (D).

100. *See id.* at § 3.

101. *See generally* William Bentley Ball, *Supreme Court Review: Church/State Jurisprudence*, 36 CATH. LAW. 233 (1996).

## A. "Undue Hardship" and "Reasonable Accommodation" Construed

In 1977, the Court first interpreted Title VII's "reasonable accommodation unless undue hardship" language and construed an "undue hardship" to be anything more than "a *de minimis* cost,"<sup>102</sup> thereby establishing a relatively light burden of proof for an employer to meet. Nearly a decade later, the Court again minimized an employer's obligations under Title VII when it determined that an employer's only duty is to reasonably accommodate an employee's religious beliefs.<sup>103</sup> The Court held that "*any* reasonable accommodation by the employer is sufficient to meet its accommodation obligation,"<sup>104</sup> and went on to state further that the "employer need not further show that . . . the employee's [preferred] *alternative* accommodations would result in undue hardship."<sup>105</sup> Taken together, these precedents establish that an employer may avoid liability for religious discrimination under Title VII by offering proof either: that it attempted *some* reasonable accommodation of the employee's religious needs (albeit not the accommodation desired by the employee); or that no accommodation was offered because *any* such accommodation would result in at least a *de minimis* cost to the employer.<sup>106</sup>

Both of the aforementioned precedents dealt with employees whose religious membership in the Worldwide Church of God required that they refrain from work on certain holy days.<sup>107</sup> While the particular religion may not be considered a traditional one, the type of claim certainly is.<sup>108</sup> Neither case negated the basic claim that an employee's need for time off to honor religious holidays is the type of religious belief which Title VII requires employers to reasonably accommodate, absent a showing of undue hardship. What rendered each case a winner for the employer was that, in the former case, the employee's request conflicted with a collective bargaining agreement,<sup>109</sup> and the latter case involved a claim that the employee's preferred resolution of the conflict should have been honored.<sup>110</sup>

Neither case spoke to the more difficult problem of accommodating a belief in the need to proselytize in the face of conflicting employee rights under the same statute to be free of religious harassment.<sup>111</sup> In addition, and perhaps more significantly, both cases may be largely mooted by passage of the WRFA, which would replace judicial definitions of "reasonable accommodation" and "undue hardship" with congressional ones.<sup>112</sup>

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102. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

103. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

104. *Id.* at 68 (emphasis added).

105. *Id.* (emphasis added).

106. See *id.* at 68-71.

107. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 67; *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. at 62-63.

108. See discussion *supra* Section II.

109. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 67-68.

110. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. at 63-65.

111. See discussion *supra* pp. 17-19.

112. See Coats, *supra* note 16. Of course, the WRFA must not only pass but also pass challenges to its constitutionality. However, unlike the RFRA, WRFA appears to be a perfectly legitimate exercise of congressional authority because it seeks to bar future applications of Supreme Court holdings only to the extent that those holdings will conflict with now amended statutory language. Congress may certainly amend or clarify its own language.

*B. Recent Ruling Invalidating the Religious Freedom Restoration Act Has Little Impact on Workplace Law*

The Supreme Court has issued a controversial line of cases in the area of Free Exercise. In 1963 the Court announced that the strict scrutiny standard of review should be applied to laws which interfered with citizens' First Amendment right to the free exercise of their religious beliefs.<sup>113</sup> This meant that when a law substantially burdened a religious practice, that burden could only be justified by a compelling government interest.<sup>114</sup> In 1990, however, the Court declined to apply this standard.

The 1990 case involved a challenge to an Oregon law which made use of the drug peyote—a hallucinogen used by members of the Native American Church for sacramental purposes—criminal, resulting in plaintiffs being denied unemployment benefits when they lost their jobs due to their peyote use.<sup>115</sup> In *Employment Division v. Smith*, the Court distinguished its prior holding by limiting its application to laws targeting particular religious practices, in contrast to laws of general applicability which incidentally burden exercise of a religious belief.<sup>116</sup> Since the Oregon statute was one of general applicability, the Court held that a more relaxed standard of review was appropriate, lest many Americans assert religious views as reason to disobey neutral, generally applicable “prohibitions of socially harmful conduct.”<sup>117</sup> In direct response to this apparent change in the law, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA).<sup>118</sup>

The RFRA acknowledges that “laws ‘neutral’ toward religion may substantially burden religious exercise as surely as laws intended to interfere with religious exercise.”<sup>119</sup> It then declared that “governments should not substantially burden religious exercise without compelling justification.”<sup>120</sup> The RFRA sought “to restore the compelling interest test”<sup>121</sup> which it defined as follows:

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

113. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

114. See *id.* at 403.

115. See *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

116. *Id.* at 885. The *Smith* ruling came despite the fact that in 1972 the Court had appeared to follow the *Sherbert* holding in analyzing a statute of general applicability. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Wisconsin v. Yoder*, the Court struck down a Wisconsin mandatory school attendance law as it applied to Amish parents who refused on religious grounds to send their children to school. See *id.* at 234. The Court held that the state statute impermissibly infringed upon the Amish plaintiffs' rights to exercise their religious beliefs. See *id.* The *Smith* decision distinguished *Yoder* as implicating multiple rights and thus warranting higher scrutiny than other general laws implicating only free exercise of religion. See *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. at 881-82. See also *City of Boerne v. Flores*, 117 S. Ct. 2157, 2161 (1997).

117. See *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. at 885.

118. See Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq. (1993) [hereinafter RFRA].

119. *Id.* at § 2000bb(a)(2).

120. *Id.* at § 2000bb(a)(3).

121. *Id.* at § 2000bb(b)(1).



(1) is in furtherance of a compelling governmental interest; and

(2) is the least intrusive means of furthering that compelling governmental interest.<sup>122</sup>

In June of 1997, the Supreme Court declared RFRA unconstitutional.<sup>123</sup> Congress had justified its attempt to directly overrule the Supreme Court on an issue of constitutional interpretation by claiming to exercise its authority under Section 5 of the Fourteenth Amendment, which empowers Congress to enforce the Free Exercise guarantee as it applies to the states.<sup>124</sup> The Supreme Court disagreed, holding that Congress had exceeded its authority in enacting RFRA because it was seeking to *change* or *define* the substance of the Free Exercise clause rather than merely to *enforce* it.<sup>125</sup>

This line of cases has limited impact on religious discrimination in the workplace. *Smith* was, at best, indirectly a workplace case, implicating workplace rights not as a challenge to the plaintiffs' dismissal for exercising their religious beliefs, but rather, only as a challenge to plaintiffs' rights to collect unemployment.<sup>126</sup> Should RFRA be redrafted and re-passed, it would restrict government employers from burdening the exercise of employee religious practices only in those situations where the government employer could point to a compelling governmental interest. It would not similarly affect private employers. Therefore, employees in the private sector would not gain any additional workplace rights as a result of RFRA. As for the government employee, it is questionable whether RFRA would provide more protection than Title VII, which already requires that all employers reasonably accommodate employees' religious beliefs and practices. Possibly, it would provide an alternative way to strengthen the undue hardship standard, but this may well be accomplished sooner and more broadly by passage of the WRFA, a more constitutionally sound exercise of congressional authority.<sup>127</sup>

## V. CONCLUSION

Several factors will contribute to the continued increase of workplace religious discrimination claims in the next decade. Economic indicators are good, which means that workers are more willing to risk their current jobs. Thus, they are more likely to demand what they perceive as "fair" treatment in the workplace, including accommodation of religious beliefs and observances. Participation in religious observances and activities is rising so more Americans are actively participating in religious practices and holidays. This means that more workers are likely to develop conflicts between workplace policies and religious beliefs and observances. The workforce is growing ever more diverse while many managers remain unfamiliar with the myriad of religious beliefs and observances of employees. Hence, managers may unwittingly create litigation despite company policies

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122. *Id.* at § 2000bb-1(b).

123. *See City of Boerne v. Flores*, 117 S. Ct. at 2160.

124. *See id.*

125. *See id.*

126. *See Employment Div., Oregon Dept of Human Resources v. Smith*, 494 U.S. 872, 882-83 (1990).

127. *See Coats, supra* note 16.

in favor of accommodating religious beliefs and observances. WRFA is likely to pass, which will toughen the standard for the statutory employer defense of "undue hardship." Employers will no longer be legally excused from accommodating employee religious beliefs and observances whenever doing so would create a minimal expense or inconvenience. Instead, they will have to demonstrate a "significant" difficulty or expense.

In the long term, the number of lawsuits will likely decrease as employers grow ever more accommodating of employee beliefs and practices. This will happen as employer awareness of diverse beliefs increases. In addition, employers will become more accommodating as the costs of defending and losing lawsuits grow and as employers become more sensitive to the cost of bad publicity in an era when public opinion supports employee rights.<sup>128</sup> Driven largely by economic factors, employers will yield to these popular demands and workplace religious freedom in the new millennium will reach new heights.

The biggest challenge for the next century in this area of employment law promises to be striking a balance between the rights of employees to speak, preach, or proselytize about their religious beliefs and the right of employees to be free from religious harassment in the workplace. The Clinton Guidelines are a first step in calibrating that scale, but caselaw alone can flush out the appropriate mix. It promises to be an interesting journey.

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128. See Brian O'Reilly, *The New Deal: What Companies and Employees Owe One Another*, *FORTUNE*, June 13, 1994, at 44 (detailing surveys and studies of employee attitudes about what employers ought to give employees, especially if they want loyalty).

