

RELIGIOUS DISCRIMINATION IN THE WORKPLACE: THE PERSISTENT POLARIZED STRUGGLE

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Abstract:

Consider the story of Harry Fischel, fired from his job in the 19th Century for not compromising his religious practice when it came into conflict with his professional responsibilities. Fast forward two centuries and consider Henry Asher, terminated as well, under strikingly similar circumstances. Has anything changed? This piece examines the effectiveness of current religious protection laws in the United States workplace. Toward this end, the author presents a framework through which to understand Title VII, its history, and its purposes. The author then identifies a perplexing problem by which certain classes of citizens are disproportionately favored over others under the current state of the law. This disproportion problem is self-perpetuating in that those groups negatively impacted are those least equipped to rectify their situation through political means. Culminating with a survey of academic treatment of the topic, as well as a hopeful eye toward the future, this piece presents important observations affecting millions of Americans each day, particularly those in low-income professions and classes.

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I. INTRODUCTION

Consider the story of Harry Fischel (1865-1948),¹ a Russian immigrant who arrived in the United States during the turn of the 20th century. After several weeks of searching for employment, Fischel finally found a job with an architecture firm.² On his first Friday, Fischel requested Saturday off for religious reasons, so he could observe his Sabbath.³ Not only was his request denied, but the firm issued the following ultimatum: either work Saturday or face termination.⁴ Fischel was unemployed the following Monday morning.⁵

Consider the story of Henry Asher over a century later.⁶ Asher was a bus driver for the Los Angeles County Metropolitan Transportation Authority ("MTA").⁷ MTA policy requires a bus operator to remain available on weekends for all shifts and locations.⁸ Contrary to the policy, Asher requested time off on

¹ Harry Fischel's story is related in JONATHAN D. SARNA, AMERICAN JUDAISM 163 (Yale University Press) (2004).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Related from author's personal knowledge. See also Press Release, Department of Justice, Justice Department Settles Lawsuit Alleging Religious Discrimination by The LA Metropolitan Transportation Authority (Oct. 12, 2005), available at http://www.usdoj.gov/opa/pr/2005/October/05_crt_534.html; Complaint filed in Asher's case, available at <http://www.justice.gov/crt/emp/documents/LAMTAcamp.htm>; Settlement Agreement available at <http://www.justice.gov/crt/emp/documents/LMTACD.htm>.

⁷ See Press Release, *supra* note 6.

⁸ See *id.*

weekends in observance of his religious Sabbath.⁹ Asher's employer denied his request and fired Asher for missing work.¹⁰

The stories of Harry Fischel and Henry Asher, and the choices each faced, mirror the experiences of a faceless multitude of employees. Regardless of the historic period, nation of origin, religious faith, race, or social class, employees confront the harsh choice: either abandon your religious practice or give up your job.

While recognizing that this harsh reality once existed in the world of employment, we typically associate it with times long in the past. The past *has passed*, we muse. Surely things are better now. In some ways, this notion may be true, but in other ways the struggles of the past persist. Even today employees fight that same persistent struggle. Has much changed since Harry Fischel's firing from his job for observing the Sabbath at the turn of the 20th Century? In light of Henry Asher's termination from his job for observing the Sabbath at the turn of the 21st Century, it would seem that little has changed.

Must Asher and others today endure the same punishment for remaining loyal to their religious beliefs? This article recounts the history of, and examines the tools that protect, employees from such treatment. In theory, these tools empower employees to fight back within the structure of the legal system. But how successful are these half-century safeguards? The following article explores this question and examines whether employees are truly free to practice their religion without fear of reprisal in the workplace. This article will show that these age-old struggles persist in earnest for certain segments of society.

This article begins by presenting the historical background of religious accommodation in the United States workplace. It examines current law and advancements in the area of religious accommodation. It will then identify serious pitfalls arising from current policy. Broadly speaking, the pitfalls have threatened to turn back the clock, leaving segments of society at risk. Specifically, a two-prong *disproportion problem* unfairly favors employers over employees and professionals over hourly wage earners, leaving the workforce vulnerable to religious intolerance. Next, the article proposes solutions to these problems. The final section analyzes the legal academic treatment of the topic to date.

⁹ *See id.*

¹⁰ *See* Press Release, *supra* note 6. The Department of Justice ultimately filed suit on Asher's behalf in 2004, the results of which will be related in the article's conclusion.

II. WHERE THE MOVEMENT WENT RIGHT: THE BEGINNINGS OF RELIGIOUS ACCOMMODATION IN THE WORKPLACE, AND THE PROGRESS GAINED¹¹

In 1964, Congress passed Title VII of the Civil Rights Act of 1964, barring religious discrimination in the workplace.¹² The language of the statute states unequivocally that “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . religion.”¹³ Prior to the enactment of Title VII, a safeguard for employees did not exist.¹⁴ As drafted, Title

¹¹ Before proceeding, it is necessary to first ask the question: *what is religion?* Courts have reached no clear consensus, but have proffered varying definitions throughout U.S. history. This difficulty in articulating one universal definition of religion may be due to the fact that any definition necessarily manifests the articulator’s own religious, political, and personal outlook. Who is to say that a Supreme Court Justice is in any better position to offer such a definition than a clergyman, an atheist, or anyone in between? In the 1931 Supreme Court decision *United States v. Macintosh*, Chief Justice Hughes articulated that “[t]he essence of religion . . . [as a] belief in a relation to God involving duties superior to those arising from any human relation.” 283 U.S. 605, 633-34 (Hughes, J., dissenting). In contrast, in the 1970 decision *Welsh v. United States*, the Supreme Court denoted that a religion need not even encompass a belief in a supreme being, but “[i]f an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content . . . those beliefs certainly occupy in the life of that individual ‘a place parallel to that filled by God’ in traditionally religious persons.” 398 U.S. 333, 340. As an indicator to the complexity involved in defining religion, an American Bar Association Manual on topic has devoted an entire chapter to the question addressing “How Is Religion Defined?” See MICHAEL WOLF ET AL., RELIGION IN THE WORKPLACE: A COMPREHENSIVE GUIDE TO LEGAL RIGHTS AND RESPONSIBILITIES 28 (1998).

¹² Compare 42 U.S.C. § 2000e (2006) (amending the Civil Rights Act of 1964, which did not alter the language of the original draft), with Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

¹³ 42 U.S.C. § 2000e-2(a)(1) (2006).

¹⁴ The fact that Congress enacted the Civil Rights Act of 1964, and specifically drafted language providing for protection from religious discrimination in the workplace, indicates that such safeguards were necessary and previously lacking. It is true that the Constitution of the United States itself provides safeguards in some form to religious discrimination. The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I. The latter section is the *Free Exercise Clause*, while the former is the *Establishment Clause*. The First Amendment generally restricts those acting on behalf of the government, and thus is relevant to a discussion of religious protection in the public sector. As the focus of this article is on private employers, the protections provided by the First Amendment are beyond the scope of this article. See *Brown v. Polk County, Iowa*, 61 F.3d 650, 654 (8th Cir. 1995) (“In most of the cases alleging religious discrimination under Title VII, the employer is a private entity rather than a government, and the first amendment to the Constitution is therefore not applicable to

VII applied to all private employers who “engaged in an industry affecting commerce [and having] twenty-five or more employees for each working day in each of twenty or more calendar weeks [per year].”¹⁵ In 1972, the Act reduced the requisite number of employees to 15, further broadening the pool of employers under regulation.¹⁶ As such, from its inception, Title VII applied to most employers in the private sector, with only the smallest firms escaping its reach.

In attempting to secure religious freedom, Title VII sought to regulate a broad spectrum of employment activities.¹⁷ Title VII prevented employers from “fail[ing] or refus[ing] to hire or to discharge . . . or otherwise to discriminate” against an employee due to the employee’s religion.¹⁸ Furthermore, the law prohibited an employer from “limit[ing], segregat[ing], or classify[ing] his employees 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 . . . religion.”¹⁹ These safeguards remain firmly in place within today’s current version of Title VII.²⁰

The passage of Title VII represented a major victory for employee rights in the United States. For the first time, employees had a mode of recourse for religious discrimination by employers. Yet, what did employees really win? A legal duty upon employers to merely *desist* from discriminating is far less compelling than would be a requirement on them to actively *accommodate*. To what degree, if at all, could this abstract religious protection receive application in real life?

Aside from refraining to discriminate, were employers bound in any way to extend themselves or their businesses to actively accommodate religion under the new laws? The ensuing Title VII case law would answer in the affirmative, as the

the employment relationship.”) (citing *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 n.5 (10th Cir. 1989)).

¹⁵ Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241 (1964).

¹⁶ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 701(b), 86 Stat. 103 (1972).

¹⁷ For purposes of this article, “Title VII” will be used hereafter as referring to the sections of the statute specific to religious accommodation in the workplace.

¹⁸ Civil Rights Act of 1964 § 703(a)(1).

¹⁹ *Id.* at § 703(a)(2).

²⁰ 42 U.S.C. § 2000e-2(a)(1)-(2) (2006).

history of the movement would play itself out.²¹ In declaring that employers indeed held an affirmative duty to accommodate, the movement for religious accommodation in the workplace achieved its most significant victory.²²

As initially drafted, the preliminary section of Title VII defined many of the terms used in the statute, such as *person, employer, employment agency*, and more.²³ What was not defined, however, was the all-important but extremely contentious term *religion*.²⁴ The omission may be conceivably explained by the fact that a universal definition of religion does not exist. Whatever the reason, from the beginning of the movement, interpreting this term was left to employers or courts on a case-by-case basis. However, in 1972, Congress recognized that “[d]espite the commitment . . . to the goal of equal employment opportunity for all our citizens, the machinery created by the Civil Rights Act of 1964 [was] [in]adequate.”²⁵ Therefore, Congress embarked on amending its laws and enforcement procedures. One such amendment, while falling short of proffering an actual definition, sought to shed more light on this question of *what religion is*: “[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 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.”²⁶

As demonstrated, this new definition asserts an affirmative duty upon employers to accommodate religion in the workplace where previously there was none.²⁷ The language “unless an employer demonstrates . . . undue hardship” conveys that for want of such hardship, an employer holds a duty to “reasonably accommodate.”²⁸ Thus, the burden of proof shifts to an employer once an employee

²¹ See *infra* notes 26-30 and accompanying text.

²² See *id.*

²³ Civil Rights Act of 1964 § 701(a)-(i).

²⁴ See *supra* note 11.

²⁵ H.R. REP. NO. 92-238, at 2139 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2139.

²⁶ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (1972).

²⁷ *Id.*

²⁸ *Id.*

asserts a need for accommodation.²⁹ In addition, the amendment codified an extremely broad definition of religion – “all aspects of religious observance and practice, as well as belief” – which was absent in the prior statute.³⁰

This affirmative duty placed on employers to accommodate religion in the workplace represented a great victory for employees. No longer, it seemed, would employees operate in fear of asserting religious rights at the mercy of potentially biased employers or biased terms of employment. Eliminating the fear of religious discrimination, Title VII had finally given U.S. employees a voice in the realm of religion in the workplace. But how loud was that voice?

The true test of laws is ultimately their effectiveness and enforceability when applied to everyday situations, to *real life*. Questions of applicability of laws in this manner are decided by the courts. In the years following the 1972 amendments to Title VII, the victory achieved by employees in the workplace was affirmed in a number of significant ways. First, courts began to broadly interpret the definition of religion. The definition of *religion* first codified in 1972 has been interpreted by courts since then to include everything from major to obscure religions, and even as far as self-proclaimed religions where the harmed party is the sole adherent.³¹ The Equal Employment Opportunity Commission (“EEOC”) followed suit in its *Guidelines on Discrimination Because of Religion*, noting “[t]he fact that no religious group

²⁹ In Section III, this article will explore the contentious language “undue hardship,” which has become the subject of considerable case law.

³⁰ Equal Employment Opportunity Act of 1972 § 2(7).

³¹ See e.g., *WOLF*, *supra* note 11, at 30 (“Someone who is the sole adherent to a particular religious dogma may still be protected.”); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981) (“The determination of what is a ‘religious’ belief or practice is more often than not a difficult and delicate task . . . [h]owever, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”); *Love v. Reed*, 216 F.3d 682 (8th Cir. 2000) (“[S]elf-proclaimed adherent of the ‘Hebrew religion, but not ascribing to any organized religion . . . is entitled to protection.”); *Jones v. Bradley*, 590 F.2d 294 (9th Cir. 1979) (declining to decide whether or not the Universal Life Church (UCL), which espoused “no traditional doctrine . . . [but only] belie[f] in that which is RIGHT,” constituted protected religion); *In re Palmer*, 386 A.2d 1112 (R.I. 1978) (protecting right of orthodox Sunni Muslim to wear “prayer cap” in court); *State v. Hodges*, 695 S.W.2d 171 (Tenn. 1985) (affirming remand to trial court which failed to adequately inquire into the religious belief, and thereby erroneously held in contempt, defendant who appeared in court dressed “like a chicken,” and asserted before the trial court, “[t]his is a spiritual attire and it is my religious belief . . .”).

espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief.”³² Notably, even prior to the adoption of the amendments to Title VII, the Supreme Court held in *United States v. Seeger* that “the validity [of a claimant’s religious beliefs] cannot be questioned,” and that such inquiries are “foreclosed to [g]overnment.”³³

Second, courts have granted deference in almost all cases to an employee’s religious views. Courts will rarely second guess an employee’s espoused religious views. This trend has been demonstrated in cases where employees either left their job completely or refused a job offer due to their alleged religious beliefs, and subsequently sought unemployment compensation. For example, employee claimants sought unemployment compensation benefits in this way in the Supreme Court cases of *Thomas v. Review Bd. of Indiana Employment Sec. Div.*³⁴ and *Frazee v. Illinois Dep’t of Employment Sec.*³⁵ In *Thomas*, an employee refused to engage in the production of armaments and subsequently quit, while the claimant in *Frazee* refused to accept a job assignment where he would be required to work on Sundays.³⁶ In both cases, the plaintiffs alleged that the practices at issue violated their religious beliefs.³⁷

In both cases, the Court found in favor of the employee, and granted the sought-after unemployment benefits.³⁸ In *Thomas*, the Supreme Court overturned a lower court’s ruling that the employee quit on a voluntary basis and was therefore not entitled to unemployment compensation.³⁹ The Court rejected such an argument,

³² 29 C.F.R. § 1605.1 (2007). The EEOC guidelines provide just that, guidance as to the proper interpretation and implementation of Title VII. However, they are not binding authority, nor do they carry regulatory force. See WOLF, *supra* note 11, at 3 (providing further information on this point and generally on law carrying force in the workplace).

³³ *United States v. Seeger*, 380 U.S. 163, 184 (1965).

³⁴ *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981).

³⁵ *Frazee v. Ill. Dep’t Emp. Sec.*, 489 U.S. 829 (1989).

³⁶ *Id.* at 830; *Thomas*, 450 U.S. at 720.

³⁷ See *Frazee*, 489 U.S. at 830 (Frazee was a Christian who refused to work on Sunday, which the employment would have required); *Thomas*, 450 U.S. at 710 (Thomas was a Jehovah’s Witness who claimed his religious beliefs prevented his participation in the production of military materials).

³⁸ *Frazee*, 489 U.S. at 834; *Thomas*, 450 U.S. at 720.

³⁹ *Thomas*, 450 U.S. at 716.

noting that “the resolution [of what constitutes a religious belief or practice] is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others”⁴⁰

In *Frazee*, the Supreme Court rejected the lower court’s argument that the claimant’s decision to refuse employment was a personal choice, rather than a religious one, simply because the claimant failed to assert his membership or association with a given religious sect or institution.⁴¹ Rather, the Court unequivocally expressed its “reject[ion] [of] the notion that to claim the protection . . . one must be responding to the commands of a particular religious organization.”⁴² It satisfied the Court that the employee’s claims were “based on a sincerely held religious belief[s],” even if not the beliefs of a particular “organized religious denomination.”⁴³

Other courts have gone so far as to protect even those expressions of one’s religion that fail to fully comply with the required doctrine of the employee’s faith. For example, in *Equal Employment Opportunity Commission v. Remedial Educ. & Diagnostic Serv., Inc.*,⁴⁴ the wearing of a head covering by a Muslim woman was a protected activity despite the fact that the covering failed to satisfy the doctrinal requirements of the Islamic faith.⁴⁵

The degree to which courts grant deference to an employee’s religious views has also been demonstrated in instances where employees seek haven from a particular aspect of their job description, rather than from the employment entirely. In *McGinnis v. United States Postal Serv.*,⁴⁶ a postal window clerk, in observance of the Quaker religion, sought to be excused from having to distribute military draft

⁴⁰ *Id.* at 714.

⁴¹ *Frazee*, 489 U.S. at 831.

⁴² *Id.* at 834.

⁴³ *Id.*

⁴⁴ 759 F. Supp. 1150 (E.D. Pa. 1991).

⁴⁵ *Id.* at 1158 n.11 (“The Court credits the statements of [plaintiff] and her Iman that [plaintiff’s] attire does not comply with the requirements of Islam.”).

⁴⁶ 512 F. Supp. 517 (N.D. Cal. 1980).

registration materials as a part of her job.⁴⁷ The court granted such protection, deeming the preference a type of religious expression.⁴⁸ Further, in *Haring v. Blumenthal*,⁴⁹ an IRS employee was granted legal protection on religious expression grounds for refusing to process tax-exemption forms for abortion clinics.⁵⁰ Thus, the trend clearly demonstrates that courts are quick to defer to an employee's religious views and will rarely second-guess that an asserted practice is a genuine religious expression.⁵¹

In addition, courts are slow to question an employee's sincerity in claiming that a requested accommodation arises out of an expression of their religious commitment, as opposed to mere convenience. This trend ties in closely as an extension of the above-mentioned trend – the very low burden of proof required of employees by courts as to the sincerity of their religious beliefs. In the noteworthy case *Philbrook v. Ansonia Bd. of Educ.*,⁵² the court noted that a plaintiff's burden of demonstrating sincerity “is not a heavy one.”⁵³ Similarly, in *Equal Opportunity Employment Comm'n v. IBP, Inc.*,⁵⁴ the court held that the employee's lack of observance of a particular religious practice both before and after the alleged religious discriminatory incident was not a sufficient indication of the employee's lack of sincerity. Nor do courts deem imperfect adherence to one's faith as indication of a lack of sincerity. In *Equal Opportunity Employment Comm'n v. Ilona of*

⁴⁷ *Id.* at 519.

⁴⁸ *Id.* at 520 (“Petitioner has made a sufficient showing that her asserted religious belief is indeed bona fide The Peace Testimony, a central document of the Quaker religion, expressly opposes war and militarism of all sorts.”).

⁴⁹ 471 F. Supp. 1172 (D.D.C. 1979).

⁵⁰ *Id.* at 1178, 1184-85.

⁵¹ *But see* *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995) (plaintiff's directing employee to type his Bible study notes not protected religious expression); *McCrary v. Rapides Reg'l Med. Ctr.*, 635 F. Supp. 975, 979 (W.D. La. 1986) (plaintiff's “right to commit adultery” not religious belief subject to legal protection); *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977) (plaintiff's “personal religious creed” causing eating of cat food is merely preference and not protected religious activity); WOLF, *supra* note 11, at 32-34.

⁵² 757 F.2d 476 (2d Cir. 1985).

⁵³ *Id.* at 482.

⁵⁴ 824 F. Supp. 147 (C.D. Ill. 1993).

Hungary, Inc.,⁵⁵ the court held that a Jewish employee's request for time off of work for the religious holiday Yom Kippur was a sincere expression of religious faith despite the employee's own concession that "she [was] not a particularly religious person and that she [did] not observe every Jewish holiday."⁵⁶

Thus, as seen from the above cases, courts do not view "religious sincerity" as a game of *all-or-nothing* and are willing to trust an employee's sincerity, even if the sincerity is piecemeal or in partial observance to the tenets of the employee's faith. This overarching deference of courts to assertions of employees within the religious realm, as well as to the significance of religion, constitutes the most important victory for the movement for religious accommodation in the United States workplace. However, despite the considerable progress in the years following the initial drafting of Title VII, the movement ultimately stalled, as indicated in a number of ways illustrated in the following section.

III. WHERE THE MOVEMENT FELL SHORT: PITFALLS OF RELIGIOUS ACCOMMODATIONS IN THE WORKPLACE⁵⁷

The movement to secure religious accommodations in the workplace has achieved a number of notable victories. Examples include courts' expansive and inclusive definition of the term *religion*, as well as the considerable deference granted

⁵⁵ 108 F.3d 1569 (7th Cir. 1996, modified on rehearing Mar. 6, 1997).

⁵⁶ *Id.* at 1575.

⁵⁷ See generally Laurent Belsie, *On The Seventh Day –They Closed Shop*, CHRISTIAN SCIENCE MONITOR, May 4, 1998, at B4. In contrast to viewing this debate from the perspective of an employee seeking accommodation, Goedeker's, a St. Louis electronics superstore specializing in home entertainment, closes each Sunday for religious reasons. *Id.* Steve Goedeker, owner of Goedeker's superstore, remarked "[e]verything can't be a business decision . . . [y]ou have to start with a certain set of principles. You make your business decisions around them." *Id.* Goedeker closes on Sunday "partly to give employees time with their families; partly for religious reasons." *Id.* In regard to Goedeker's ability to compete in the electronics market, despite its six-day schedule: "[i]n St. Louis, Goedeker's battles head-to-head with national retailers Circuit City and Best Buy." *Id.* Consider also popular restaurant chain Chick-fil-A's "Closed-on-Sunday Policy," available at <http://truettcathy.com/pdfs/ClosedonSunday.pdf> ("[F]ounder and CEO of Chick-fil-A Truett] Cathy's practice of closing his restaurants on Sunday is unique to the restaurant business and a testament to his faith in God . . . say[ing] two important things to people: One, that there must be something special about the way Chick-fil-A people view their spiritual life; and, two, that there must be something special about how Chick-fil-A feels about its people."

by courts to the religious views of employees.⁵⁸ However, the movement's progress slowed in the decades following the drafting of Title VII. As a result, employees are now vulnerable, in certain specific ways, to religious discrimination in the workplace.

Today, the enforcement of religious discrimination laws in the workplace causes a two-pronged *disproportion problem*. First, as will be explained, the laws disproportionately favor employers over employees. Second, as elucidated below, the laws are more favorable to white-collar professionals than to blue-collar or hourly workers. Therefore, certain groups of employees are left at risk.

The way the system favors employers over their employees will be addressed first. As noted above, a 1972 amendment to Title VII shed light upon the term *religion*.⁵⁹ This definition placed a duty upon employers to accommodate religion. However, this duty was qualified from its very inception. According to the definition, the duty falls away merely when an employer demonstrates an "undue hardship" that would be caused by the accommodation.⁶⁰

The *undue hardship* caveat contained in the definition demonstrates the competition between the various applicable burdens of proof in the following way. While the definition places a burden on employers to accommodate – an affirmative duty – the *undue hardship* caveat permits the burden to shift back to the employee. Although Title VII was intended to empower employees, it has become a double-edged sword. Ultimately, the employer's blade has proven sharper. This caveat, embodied within the language of Title VII, is the greatest pitfall for employees.

Generally, every federal circuit in the United States employs a three-prong test to evaluate an employee's entitlement to religious accommodation: (1) an employee must hold a sincere religious belief; (2) an employee must place his or her employer on notice as to a conflict between religious observance and job responsibilities; and (3) an employee must demonstrate that hardship will come to him or her absent the accommodation.⁶¹ If the employee meets this test, an

⁵⁸ See *supra* notes 31-56 and accompanying text.

⁵⁹ See *supra* notes 26-30 and accompanying text.

⁶⁰ *Id.*

⁶¹ See generally *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994); *E.E.O.C. v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614 n.5 (9th Cir. 1988), *cert denied*, 489 U.S. 1077 (1989); *Protos v. Volkswagen of Am.*, 797

employer is required to provide a *reasonable accommodation* unless the employer can demonstrate an undue hardship resulting from the accommodation.⁶² By getting the *last word*, so to speak, employers hold considerable leverage over their employees. So, what constitutes an *undue hardship*? Any monetary cost, above de minimis,⁶³ is deemed by a court to be an undue hardship. Therefore, any monetary cost that carries any significance can spell victory for an employer and legally permit religious discrimination against an employee.

In the landmark case *Trans World Airlines, Inc. v. Hardison*,⁶⁴ the Supreme Court defined *undue hardship*. The Court decided that: (1) a monetary loss sufficed; and (2) the required showing for an employer was staggeringly low.⁶⁵ In *Trans World Airlines*, the plaintiff sought time off from his job as a store clerk because of the Sabbath.⁶⁶ The plaintiff had begun adhering to the tenets of the Worldwide Church of God, one of which is to refrain from working from sundown Friday through sundown Saturday.⁶⁷ Consequently, Trans World Airlines (“TWA”) denied the plaintiff’s request for accommodation, and the plaintiff refused to report to work and was subsequently terminated.⁶⁸ The Court unequivocally ruled in the employer’s favor that “[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship.”⁶⁹ It should be noted that the Court determined that the plaintiff’s ensuing absence would cause the employer to endure a number of varied costs, such as shifting other employees to cover the plaintiff’s post, payment of premium wages, and decreased efficiency as to the plaintiff’s position or other jobs.⁷⁰

F.2d 129, 133 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986); Turpen v. Missouri-Kansas-Texas R.R. Co., 736 F.2d 1022, 1026 (5th Cir. 1984); WOLF, *supra* note 12, at 67-68.

⁶² See 42 U.S.C. § 2000e(j) (2006) (emphasis added).

⁶³ “Trifling; minimal . . . (Of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case.” BLACK’S LAW DICTIONARY 464 (8th ed. 2004).

⁶⁴ 432 U.S. 63 (1977).

⁶⁵ *Id.*

⁶⁶ *Id.* at 66-67.

⁶⁷ *Id.*

⁶⁸ *Id.* at 68-69.

⁶⁹ *Id.* at 84.

⁷⁰ *Id.*

The implications of the *Trans World Airlines* decision are staggering and hold grave implications for the religious rights of employees. As indicated in *Trans World Airlines*, TWA would have suffered a monetary cost of only \$150 by accommodating Hardison.⁷¹ Such a loss would remain a negligible expense for most employers covered by Title VII.⁷² If the Court deemed a loss of \$150 a hardship to an international airline such as TWA, then “there would seem to be little in the way of accommodation costs that would fail to exceed the Supreme Court’s de minimis standard.”⁷³ The *Trans World Airlines* decision continues to plague employees in the United States. It is this standard that gives employers a legal edge over their employees, ultimately giving them the sharper blade of the double-edged sword. Such a standard calls into serious question any progress made in furtherance of the movement for religious accommodation in the workplace, leaving employees vulnerable in a critical way.

The *Trans World Airlines* standard of what constitutes *undue hardship* benefits employers in two ways. First, the loss of pay disparity favors employers;⁷⁴ that is, the burden that employers must bear pales in comparison to the burden that employees must bear. In *Ansonia*, the Supreme Court concluded that granting unpaid leave is a viable option for employers with employees seeking religious accommodation.⁷⁵ However, in *Trans World Airlines*, an extremely small monetary burden borne by an employer is grounds for claiming undue hardship, and therefore provides the employer dispensation from Title VII compliance.⁷⁶ Thus, while employees can be made to accept a significant financial burden, there is virtually no financial burden

⁷¹ See *id.* at 92 (Marshall, J., dissenting) (holding that “while the stipulations make clear what overtime would have cost, the price is far from staggering: \$150 for three months, at which time respondent would have been eligible to transfer back to his previous department.”).

⁷² See American Airlines, <http://www.aa.com> (last visited Mar. 22, 2010). To provide a frame of reference, American Airlines, the airline that acquired Trans World Airlines (“TWA”) in 2001, recorded net earnings of \$231 million in 2006 and \$504 million in 2007 before experiencing net losses in 2008 and 2009 due to global recession and other causes. For more information on the 2001 acquisition, as well as yearly company reports, refer to the “investor relations” portion.

⁷³ WOLF, *supra* note 11, at 107.

⁷⁴ See *supra* notes 71-73 and accompanying text.

⁷⁵ *Philbrook v. Ansonia Bd. of Educ.*, 479 U.S. 60, 70 (1986).

⁷⁶ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

required of employers. As this disparity indicates, the economic interests of employers are significantly favored over employee interests.⁷⁷

Second, aside from asserting a financial burden, even a very small one, and receiving dispensation from Title VII compliance, employers have another weapon in their arsenal with which to assert undue hardship – *loss of production*. Even if an employer cannot demonstrate financial burden above *de minimis*, courts are receptive to a loss of production argument where the employer demonstrates that accommodating an employee’s religious needs will cause a loss of production.⁷⁸ This allows employers an additional avenue for exemption.

While employers hold these two weapons – financial loss and production loss – employees possess little to defend either charge. For example, in *Cook v. Chrysler Corp.*,⁷⁹ an employee sought a religious accommodation for Sabbath observance.⁸⁰ The circuit court affirmed the lower court’s ruling in favor of the employer, and noted that “absences affect the quality of work because there are more repairs than usual and lower efficiency when a floater is used on the line”⁸¹ The employee had no recourse in light of these “significant costs” of production loss asserted by the employer.⁸² Consequently, the current system of religious accommodation in the workplace favors employers considerably over their employees.

The second prong of the disproportion problem is that it favors white-collar professional employees disproportionately over blue-collar or hourly-wage employees. For purposes of this article, white-collar professional employees (“professionals”) will be used loosely to encompass employees who earn a periodic salary rather than an hourly wage. Professionals tend to work in fields like business, accounting, education, politics, and at times as management-level employees who

⁷⁷ See WOLF, *supra* note 11, at 90 for additional discussion of this disparity.

⁷⁸ See WOLF, *supra* note 11, at 125 (“Quite apart from the payment of extra wages, the courts have also recognized that the use of substitutes, casuals, or transfers may result in other significant costs or reductions in efficiency and productivity . . . [and] have tended to accept employer arguments that these ‘costs’ are more than *de minimis*.”).

⁷⁹ 981 F.2d 336 (8th Cir. 1992).

⁸⁰ *Id.* at 338

⁸¹ *Id.* at 339.

⁸² *Id.*

manage hourly wage earners. In contrast, blue-collar or hourly wage employees (“hourly wage earners”) include employees who are paid by the hour, earning anything from below minimum wage to above.

Who are hourly wage employees? These jobs include everything from retail and factory jobs to food and janitorial services. In 2009, 72.6 million American workers were hourly wage employees, constituting 58.3 percent of all wage earners.⁸³ Of those paid by the hour, 3.6 million workers reported earning wages at or below minimum wage, accounting for 4.9 percent of all hourly workers.⁸⁴

The clash between work and religion often arises in work scheduling.⁸⁵ Employees seek accommodations when working on a given day or working certain hours of a given day stands at odds with their religious needs. For example, an employee may request time off on a Saturday or Sunday to observe his or her Sabbath. Or, an employee may request a break from work in the early morning or evening for religious prayer time. It is not hard to see how religious accommodation conflicts arise in hourly wage jobs. In these industries, scheduling is less uniform and work is frequently required beyond the traditional 9-5 working day. For example, a commercial janitorial provider may not begin work until after the close of the traditional 9-5 working day.

Scheduling conflicts are less likely to arise in the professional sphere. Professional jobs usually operate on an eight-or-nine-hour work day during the five weekdays. This uniformity and predictability precludes most religious scheduling conflicts. In the professional workplace, employees are rarely expected to work on a Saturday or Sunday. In fact, most professional workplaces do not operate on the weekend. Because most professional workplaces close by 5:00 or 6:00 in the evening, professional employees rarely would need to request time off in the early morning or evening for prayer time.

⁸³ See U.S. Dep’t of Labor Bureau of Labor Statistics, *Characteristics of Minimum Wage Workers: 2009*, <http://www.bls.gov/cps/minwage2009.htm> (last visited Mar. 22, 2010). This figure “refer[s] to earnings on a person’s sole or principal job [and] [a]ll self-employed person are excluded whether or not their businesses are incorporated.” *Id.* at n.1.

⁸⁴ *Id.*

⁸⁵ The remainder of section III consists largely of the author’s original analysis, unless otherwise noted by citation.

Employers tend to contest religious accommodations because of the costs borne by employers for hiring replacements and the loss of work production. These issues have a tendency to arise in hourly wage workplaces, but not in professional workplaces for the following reasons.

First, in hourly wage environments, manpower is often at a premium. In factories, retail, food-service, and janitorial work, for example, production is often required around the clock. Therefore, the costs of finding replacements, and the loss of production sustained because of the absence of trained workers, become points of extreme contention. In the professional workplace, on the other hand, employees are typically permitted greater leverage in personal time-management. This is indicated by the fact that many jobs in the professional workplace do not pay by the hour, but on a yearly or periodic salary. Employees are at liberty to leave early, stay late, take off on the weekends, or take off during the week and make it up on the weekends, when it suits their schedule and work habits. This is possible so long as the employee accomplishes what is expected in the long-term.

Because of this dynamic, conflicts regarding replacements and loss of production are categorically much less likely to arise in the professional sphere. When scheduling conflicts occur, replacement employees are rarely called upon to fill professional positions. Instead, professional employees are granted leverage to accomplish their work obligations around personal scheduling conflicts as they arise. As such, planned absences rarely cause deficiencies in production. For these reasons, hourly wage employees bear the disproportionate brunt of religious conflicts that arise in the workplace. Professional workers will rarely, if ever, confront religious discrimination in the ways illustrated above.

The mere fact that the system currently favors one group over another is wrong. Moreover, the disfavored group happens to be the group least equipped to mount a challenge. Often, hourly wage workers in the categories listed lack the academic or professional training that would permit them to rise to the professional workplace.⁸⁶ Otherwise, they may likely do so. Workers in these categories carry the brunt of religious discrimination while being the least equipped to handle it. More specifically, these workers are least equipped to understand and utilize the legal

⁸⁶ This generalization may apply equally whether such work undertaken represents full-time employment or merely part-time employment undertaken while pursuing a degree. At the time the employment is accepted, the worker lacks the skills, training, or credentials for the non-hourly paying employment.

protections available to them.⁸⁷ Additionally, these workers may fail to be aware of political mechanisms built into our society as a means to achieve change.

Also, in many cases, workers lack the time to devote to such political endeavors. Many hourly employees work long hours and may work seven days a week. Hourly workers often juggle multiple jobs, preventing them from mobilizing their peers to lobby their local politicians or to engage in grassroots activities. In addition, many of these employees are minorities or immigrants that are disproportionately harmed by a system initially intended to help them. These employees are most vulnerable to the abuse inadvertently promoted under the current system. It is time to reach out. The time has come to get the movement back on track.

IV. GETTING THE MOVEMENT BACK ON TRACK

A number of strategies must be employed to avoid the pitfalls of Title VII. Each concurrent strategy aims at repairing another of the shortcomings mentioned in the previous section.

The first step should encompass the legal realm. The current burden of proof by which employers may demonstrate undue hardship is too low. A higher burden must be placed on employers before they can properly demonstrate undue hardship. The current system permits employers to have the last word, which prevents employees from voicing the discrimination they face. An employee seeks accommodation by meeting the three-prong test relayed above, and in reply the employer need only show undue hardship.⁸⁸ *This should be the end of any discussion.* Tragically, the employee holds no recourse.

It is reasonable for courts to cap the loss that an employer is required to bear through efforts to accommodate. However, Congress already defined the cap: *undue hardship*.⁸⁹ It is not up to the courts to lower this burden. A virtually negligible financial loss is not a hardship at all. Such a loss is certainly not an *undue* hardship

⁸⁷This would include initiating the process of filing a religious discrimination complaint with the EEOC, or merely confronting a potentially discriminating employer.

⁸⁸See *supra* note 61 and accompanying text for discussion of the three-prong test.

⁸⁹See 42 U.S.C. § 2000e(j) (2006) (emphasis added).

that should vitiate the employer's duty to provide a reasonable accommodation.⁹⁰ Employers must be forced to bear at least some monetary loss to accommodate an employee's religious needs. If an employee must endure an unpaid leave, losing 100% of earnings, then employers can bear some of that burden too.⁹¹ Additionally, courts must require employers to demonstrate higher production loss.⁹² Also, employers should concurrently train and hire enough employees to allow for employee substitutes for those employees who are absent because of religious reasons. Loss of production dispensation should be reserved only for extremely exceptional circumstances.

Next, and most importantly, political change must occur. A political mobilization is needed among hourly wage-earning Americans and among lower-income Americans, who bear the disproportionate brunt of religious discrimination. Only those truly affected can properly make the changes necessary to provide meaningful religious protection for everyone. Title VII's pitfalls demonstrate that those whose employment categorically precludes them from suffering religious discrimination are unfortunately ill-equipped to make decisions for those who do face such discrimination. Judges, politicians, and other professional workers suffer a disconnect hindering their ability to ensure meaningful safeguards. Hourly wage workers of the United States must mobilize, and through grassroots efforts, decisions regarding religious discrimination can be placed back into the hands of those truly affected by them.⁹³

⁹⁰ See *supra* notes 64-77 and accompanying text for discussion of Supreme Court's ruling in *Trans World Airlines*.

⁹¹ See *supra* notes 75-77 and accompanying text for discussion of the unpaid leave requirement of employees.

⁹² See *supra* note 78 and accompanying text for discussion of the production loss dispensation provided to employers.

⁹³ Thankfully, there are organizations trying to help in this way. Take, for example, the Citizen Advocacy Center in suburban Chicago—a non-profit, non-partisan community educational resource for “strengthening the citizenry's capacity and motivation to participate in civic affairs, building community resources, and improving democratic protocols within our community institutions.” Citizen Advocacy Center, <http://www.citizenadvocacycenter.org> (last visited Mar. 22, 2010).

V. THE ACADEMIC WORLD'S TREATMENT OF TITLE VII PITFALLS

How about the legal academic world? How would academics – the professors, professional students, and traditional students – fare in confronting the above related shortcomings of Title VII enforcement? Would the legal academic recognize the disproportionate treatment, in the realm of religious protection, afforded to certain other large classes of society? If so, would meaningful solutions be proffered or would the academic world also suffer from the same disconnect as shown from the professional world?

On one hand, professional thinkers in our nation's top academic institutions are, after all, just *professionals*. On the other hand, these professionals are academics, equipped with unique abilities and resources and, in many cases, paid to devote their professional lives to intellectual pursuit. Perhaps this would provide the academic world with an edge in resolving this puzzle. For purposes of examining this question, poignant works of legal academics from several of our nation's top law schools were analyzed.

A number of law review articles evaluated the effectiveness of religious protection under Title VII. These articles also examined the pitfalls of the statute from the perspective of the religiously discriminated. For the purpose of emphasis, the articles will be referred to by the institution of authorship, rather than their individual author. First, the publication of an article by an institution entitles the institution to a certain degree of ownership. Second, it is a common practice in legal scholarship, as well as case law, to refer to articles in this way. Finally, an institution is quick to claim its students' scholarship as its own when such work receives praise. These institutions must be given responsibility in the critical response. Articles were reviewed from each of the following prominent universities around the country: California, Indiana, Iowa, Louisiana, and Pittsburgh.⁹⁴ The specific titles are contained in footnote 94.

⁹⁴Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575 (2000) [hereinafter "California"]; Sonny Franklin Miller, *Religious Accommodation under Title VII: The Burdenless Burden*, 22 J. CORP. L. 789 (1997) [hereinafter "Iowa"]; Alan D. Schuchman, *The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable-Accommodation Clauses in Title VII and the ADA*, 73 IND. L.J. 745 (1998) [hereinafter "Indiana"]; Peter Zablotsky, *After the Fall: The Employer's Duty to Accommodate Employee Religious Practices under Title VII After Ansonia Board of Education v. Philbrook*, 50 U. PITT. L. REV. 513 (1989) [hereinafter "Pittsburgh"]; Clare Zerangue, *Sabbath Observance and the Workplace: Religion*

The results of the search were not promising. *No publication identified the specific disproportion problem described above, let alone offered any meaningful solutions.* Perhaps the results should not be surprising. Professional academics are *professionals*. Their schedules, responsibilities, and systems of salary operate in comparable ways to the professional world at large. The disconnect to hourly wage earning Americans should be expected just the same.

Most of the articles offered various solutions to the proffered ills of Title VII. However, in each case, the articles called upon professional America to make the changes. For example, Indiana suggested that “[a] new amendment to Title VII is needed,” and that “[a] good starting point would be a repudiation of the current Supreme Court doctrine.”⁹⁵ Additionally, Iowa suggested that “Congress should establish an objective test.”⁹⁶ Lastly, California suggested a pair of amendments to Title VII, as well as a number of ways for Congress to clarify the title or provide guidance toward a more effective application.⁹⁷

Louisiana and Pittsburgh chose a more broad-brush approach in evaluating the state of the law and omitted solutions to any of the above enumerated problems.⁹⁸ Louisiana went so far as to recognize that “the outcome in [*TWA vs.*] *Hardison* severely limited the extent of the accommodation required under [Title VII].”⁹⁹ Rather than taking issue with the disproportionate burden placed on employees as a result, Louisiana instead glorified the disparity as a means of ensuring that any accommodations made “will be made within the existing system rather than in derogation of it.”¹⁰⁰ Pittsburgh too identified sources of case law under Title VII that have “limit[ed] the employer’s duty to accommodate employee religious

Clause Analysis and Title VII’s Reasonable Accommodation Rule, 46 LA. L. REV. 1265 (1986) [hereinafter “Louisiana”].

⁹⁵ Indiana, *supra* note 94, at 764.

⁹⁶ Iowa, *supra* note 94, at 813.

⁹⁷ California, *supra* note 94, at 629.

⁹⁸ See Pittsburgh, *supra* note 94; Louisiana, *supra* note 94.

⁹⁹ Louisiana, *supra* note 94, at 1285.

¹⁰⁰ *Id.*

practices.”¹⁰¹ Pittsburgh then dropped the ball by proffering that such limits “do not appear to affect the majority of accommodation cases.”¹⁰²

While each article had different approaches and content, each institution similarly failed to recognize the disproportion problem. They failed to connect the movement’s pitfalls with the disproportionate effects on certain large classes of society. Each called upon professional America – *Congress, judges, lawyers, and professors* – to make changes, but these professionals will categorically, rarely, if ever, encounter the discrimination in question. None of the publications recognized that there may be an inherent disconnect suffered by professional America. The ability to implement meaningful change for the hourly wage earning America may very well hinge on being able to recognize this disconnect.

VI. CONCLUSION

True change cannot occur until those truly affected can be taught how to make the change; until hourly wage earning Americans are empowered and educated as to how to fight for their rights. Also, hourly wage earners must learn how to use the political and legal instruments of our government to affect change. This education can start in many ways: through federally mandated distribution of educational materials in the workplace, federally mandated posting of flyers and posters at the water coolers and in the lunchrooms of America’s factories and workplaces, federally mandated employee workshops, or through town-hall meetings facilitated by politicians and professionals who care. However, true change must start at the grassroots level.

Henry Asher caused change. He stood up. His courageous voice, after being fired from his job because of his religious practices, led to genuine grassroots change. In 2005, Henry Asher obtained a civil legal settlement against his employer because of its discriminatory practices.¹⁰³ The settlement called for monetary compensation, as well as the establishment of new policies at his former workplace to ensure religious accommodation in the future.¹⁰⁴ Henry Asher did not have to suffer the silent fate of Harry Fischel or countless others because he refused to remain silent.

¹⁰¹ Pittsburgh, *supra* note 94, at 573.

¹⁰² *Id.*

¹⁰³ See Press Release, *supra* note 6.

¹⁰⁴ See *id.*

Thanks to the progress of Title VII, others suffering discrimination can have a voice too. But it must start there, from within. And perhaps from efforts to cause positive change – like that of Asher and others like him – we can truly see the dawn of a new beginning¹⁰⁵ in the way we accommodate religion in the workplace.¹⁰⁶

¹⁰⁵ How ironic and perhaps telling it is then, that Asher’s case was filed on Sept. 16, 2004 and settled on Oct. 4, 2005 — dates each corresponding to 1 Tishrei in the Hebrew lunar calendar in consecutive years. One Tishrei marks the beginning of Rosh Hashanah — the *Jewish New Year*.

¹⁰⁶ Asher’s case now appears as a concrete example in the *EEOC Compliance Manual* proscribing “Blanket Policies [in the workplace] Prohibiting Time Off for Religious Observance”:

A large employer operating a fleet of buses had a policy of refusing to accept driver applications unless the applicant agreed that he or she was available to be scheduled to work any shift, seven days a week. This policy violates Title VII to the extent that it discriminates against applicants who refrain from work on certain days for religious reasons, by failing to allow for the provision of religious accommodation absent undue hardship.

Compliance Manual § 12–IV (C)(1), *available at* http://www.eeoc.gov/policy/docs/religion.html#_Toc203359530 (citing Asher’s case).