ACCOMMODATION OF AN EMPLOYEE'S RELIGIOUS PRACTICES: *TRANS WORLD AIRLINES, INC. V. HARDISON*

Title VII of the Civil Rights Act of 1964 guarantees an individual freedom from religious discrimination in employment.[1] This guarantee generally protects adherents of minority faiths compelled to violate their religious tenets in order to comply with their employment conditions.[2] However, Title VII was also enacted with due regard to the interests of employers and employees with more conventional religious practices. The net effect of these competing interests is a compromise: an employer must reasonably accommodate the religious practices of his employee unless such accommodation works an undue hardship on the employer's business.[3] In *Trans World Airlines, Inc. v. Hardison*,[4] the Supreme Court narrowed the scope of the employer's duty to accommodate religious employees, and placed a new emphasis on the rights of non-religious employees.[5]

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1. Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1970), provides:

> 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 . . . .

The notion of religious freedom is a deep seated American tradition. It alone, perhaps, accounts for the early English and European colonization in the United States. These early struggles for religious freedom may have provided the impetus for the special guarantees in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I, § 1. *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); P. KURLAND, RELIGION AND THE LAW (1962).

2. *See* text accompanying note 21 *infra*.

3. Equal Employment Opportunity Act of 1972, § 2, 42 U.S.C. § 2000e(j) (Supp. II 1972), discussed at text accompanying notes 22 & 23 *infra*.

4. 432 U.S. 63 (1977).

5. Throughout this Comment, those employees who adhere to more conventional religious practices are referred to as "non-religious employees." The term merely designates the class of workers whose religious practices are consistent with, and

In *Hardison*, plaintiff employee was discharged by his employer, TWA, after he failed to report to work on three consecutive Saturdays.[6] The employee was a member of the Worldwide Church of God, which prohibits followers from working on their Sabbath—observed from sundown Friday until sundown Saturday.[7] The employee, who lacked sufficient seniority to transfer to a non-Saturday job,[8] refused to work his assigned Saturday shift. When informed of the employee's problem, TWA considered several possible accommodations, but rejected them as too burdensome on its operations.[9]

Upon his dismissal,[10] plaintiff employee filed suit[11] under Title

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therefore do not interfere with, any typical work schedule. The term also designates workers who adhere to no faith.

6. Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877, 884 (W.D. Mo. 1974). Hardison had been employed as a clerk at TWA's Kansas City, Missouri, maintenance facility since June 1967. He was discharged in April of 1969. Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 35 (8th Cir. 1975).

7. 432 U.S. at 67. The Worldwide Church of God also observes certain annual "holy days" during which its members do not work. The Church presently includes over 30,000 baptized members who are heads of households. Brief Amicus Curiae for Worldwide Church of God at 2, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

8. TWA and the International Association of Machinists and Aerospace Workers (IAM) [hereinafter referred to as the "union"] maintain a seniority system pursuant to their collective bargaining agreement. TWA conducts round-the-clock operations which require that some employees work weekend shifts. As a result, the most senior employees receive first choice with respect to shift assignments, job transfers and promotions, and vacation period selections. 432 U.S. at 66-67.

In December 1969, Hardison voluntarily transferred from "Building 1" where he had been working, to "Building 2" to enable him to work a day shift. Since each Building maintained separate seniority lists, Hardison's transfer caused him to forfeit his relatively high Building 1 seniority for a low position on the Building 2 seniority list. *Id.*

9. TWA refused to allow Hardison to work only four days a week since his job was considered essential and could not be left vacant on weekends. TWA also refused to fill Hardison's position with an employee from a different department since that would leave the department undermanned. Finally, TWA would not assign a regular employee to cover for Hardison on Saturdays since the regular employee would have to be paid premium wages. *Id.* at 68-69.

The union refused to waive the seniority system provisions that prevented Hardison from transferring shifts. *Id.*

10. Hardison was afforded a hearing before a TWA representative at which he was found guilty of insubordination. *Id.* at 69.

11. Prior to initiating this action, Hardison filed an unlawful employment practice charge with the Equal Employment Opportunity Commission (EEOC). The EEOC deferred the charge to the Missouri Commission on Human Rights, which dismissed

VII[12] against TWA[13] and his union.[14] The district court found that TWA could not have reasonably accommodated the plaintiff without an undue hardship[15] and that the union had fulfilled its statutory duty,[16] and accordingly entered judgment for the defendants. The Eighth Circuit affirmed as to the union[17] but reversed against TWA, finding that the employer breached its duty to make a reasonable accommodation to plaintiff's religious needs.[18]

The Supreme Court reversed the judgment against TWA and held than an employer need not violate a seniority system established pursuant to a collective bargaining agreement in order to accommodate an employee's religious observances.[19] In addition, the Court held

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the complaint as not timely filed. Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 37 (8th Cir. 1975).

12. Civil Rights Act of 1964, Title VII, § 703, 42 U.S.C. § 2000e-2(a)(1) (1970). *See* note 1 *supra*.

13. 42 U.S.C. § 2000e-2(a)(1) (1970), discussed at note 1 *supra*.

14. Hardison charged that the union failed to adequately represent him. Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877, 881 (W.D. Mo. 1974). 42 U.S.C. § 2000e-2(c) (1970) provides in part:

> It shall be an unlawful employment practice for a labor organization—
> (1) to . . . discriminate against, any individual because of his . . . religion . . .
> (2) to . . . classify or fail or refuse to refer for employment any individual, in any way which would deprive him or tend to deprive any individual of employment opportunities, or would limit such employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee . . . because of such individual's . . . religion . . . .

15. Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877, 891 (W.D. Mo. 1974). The district court concluded that transferring an employee to work Hardison's Saturday shift would leave the substitute employee's workcrew short-handed. Alternatively, replacing Hardison with an employee not scheduled to work Saturdays would require TWA to pay premium wages to the substitute. In the court's view, either accommodation created an "undue burden" on TWA. *Id.* at 891.

16. *Id.* at 885, 891.

17. Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 44 (8th Cir. 1975).

18. *Id.* The Court of Appeals ruled that TWA refused to consider several alternative plans that could have reasonably accommodated Hardison without an undue hardship on the operation of TWA's business. These alternative accommodations included offering Hardison a four-day week, filling Hardison's Saturday shift with other available personnel, and arranging a swap between Hardison and another employee on Saturdays. *Id.* at 40-41.

19. 432 U.S. at 79-81. The Court granted petitions for certiorari for both TWA and the union, despite the union's favorable verdict at the appellate level. 430 U.S. 903 (1976). The Court agreed with the union's contention that the judgment below against TWA "seriously involve[d]" union interests due to the close relation of the collective bargaining agreement to the duty imposed on TWA to seek accommodation for Hardison. However, the Court ruled that the reversal of the judgment against TWA made a discussion of the union's case unnecessary. 432 U.S. at 70-71 n.5.

that requiring an employer to bear more than a de minimis cost in accommodating such an employee is an undue hardship within the meaning of section 701(j) of Title VII.[20]

Title VII of the Civil Rights Act of 1964 guarantees equal opportunity in the field of employment. Its purpose is to eliminate employment discrimination based on race, color, religion, sex, or national origin.[21] Religious discrimination, however, is subject to particularized treatment under Title VII. Under section 701(j),[22] an employer has a duty to "reasonably accommodate" an employee's or prospective employee's religious observances unless the employer can demonstrate that the accommodation would result in an "undue hardship" on the conduct of his business.[23]

Concerned that Title VII's sweeping prohibition against employment discrimination would compel the annulment of employees' seniority rights,[24] Congress enacted section 703(h) of Title VII, authorizing disparate treatment of employees pursuant to bona fide

20. 432 U.S. at 84-85. Equal Employment Opportunity Act of 1972, § 2, 42 U.S.C. § 2000e(j) (Supp. II 1972).

21. The purpose of [Title VII] is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or natural origin.

H.R. REP. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2401.

22. Congress amended Title VII through the Equal Opportunity Act of 1972, which added § 701(j). 42 U.S.C. § 2000e(j) (Supp. II 1972).

23. Civil Rights Act of 1964, § 701(j), 42 U.S.C. § 2000e(j) (Supp. II 1972). Section 701(j) reads in full:

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.

The reasonable accommodation test first appeared in the 1967 guidelines issued by the Equal Employment Opportunity Commission (EEOC). 29 C.F.R. § 1605.1(b) (1967), 32 Fed. Reg. 10298 (1967). Section 701(j) adopted the EEOC test without any material changes.

For a discussion of the retroactive effect of § 701(j) on pre-1972 discrimination, see note 42 *infra*.

24. Congressional opponents of the Civil Rights Act of 1964 feared Title VII's effect on seniority systems. *See* HOUSE COMM. ON JUDICIARY SUBSTITUTE H.R. 7152 MINORITY REPORT UPON PROPOSED CIVIL RIGHTS ACT OF 1963, 88th Cong., 2nd Sess., *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2431, 2440 ("The provisions of this act grant the power to destroy union seniority"); 110 CONG. REC. 486-88 (1964) (remarks of Sen. Hill) ("Concerted action by the union to enforce its collective bargaining demands would no longer be protected actively under Federal law."). *But see* 110 CONG. REC. 6549 (1964) (remarks of Sen. Humphrey) ("This bill is not an instrument to abolish seniority or unions themselves as some have charged"); *id.* at

seniority systems.[25] Prior to *Hardison*, however, it was not clear whether this preferred status accorded seniority systems affected the employer's duty to accommodate.[26]

In addressing this problem, some courts held that employers must ignore seniority provisions in accommodating a religious employee, particularly when collective bargaining agreements do not expressly establish seniority as the sole criterion in making shift assignments.[27] Other courts held that employers need not compel senior employees to substitute for a junior employee who refuses to work shifts that conflict with his religious observances.[28] Accordingly, employees' seniority rights were considered "of the utmost importance,"[29] superior to the religious employee's accommodation right.

The pre-*Hardison* case law also failed to develop any clear or consistent definition of the employer's duty to accommodate.[30] For ex-

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7213 (remarks of Sen. Clark) ("Title VII would have no effect on established seniority rights"); *id.* at 1518 (remarks of Rep. Celler); *id.* at 6564 (remarks of Sen. Kuchel).

25. Codified at 42 U.S.C. § 2000e-2(h) (1970), the provision reads in pertinent part:

> Notwithstanding any other provision of this sub-chapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the results of an intention to discriminate because of race, color, religion, sex or national origin . . . .

26. *See generally* Note, *Accommodation of an Employee's Religious Practices under Title VII*, 1976 U. ILL. L.F. 867, 884 ("Collective bargaining agreements exacerbate the difficulties of assessing the hardships of accommodation . . .").

27. *See* Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975); Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937 (M.D. Ala. 1974).

28. *See* Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975), *cert. denied*, 433 U.S. 915 (1977); Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971); Dawson v. Mizell, 325 F. Supp. 511 (E.D. Va. 1971).

29. Dawson v. Mizell, 325 F. Supp. 511, 514 (E.D. Va. 1971).

30. Accommodation cases usually, although not exclusively, involve Sabbatarians. A number of cases involve Worldwide Church of God members under factual situations similar to *Hardison*. *See, e.g.*, Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977), *rev'g* Blakely v. Chrysler Corp., 407 F. Supp. 1227 (E.D. Mo. 1975); Williams v. Southern U. Gas Co., 529 F.2d 483 (10th Cir. 1976); Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1976); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 429 U.S. 65 (1976); Olds v. Tennessee Paper Mills, 15 FEP Cases 472 (6th Cir. 1977); Drum v. Ware, 7 FEP Cases 269 (W.D. N.C. 1974); Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382 (D. Neb. 1974); CCH EEOC DEC. (1973) ¶ 6206.

Seventh Day Adventists incur similar employment problems. *See, e.g.*, United

ample, the Sixth Circuit, in *Cummins v. Parker Seal Co.*,[31] interpreted the duty to accommodate to mean that no "unreasonable strain" on a business would be permitted. The court found a Title VII violation where an employer failed to demonstrate that procuring a Saturday substitute for a Sabbatarian employee would create an unreasonable strain on his business.[32] However, a later Sixth Circuit panel upheld an employer's refusal to hire a Sabbatarian, citing the "serious morale problems" that would arise if senior employees were forced to work the applicant's regular Saturday shift.[33] The Supreme Court twice attempted to review this accommodation standard, but in each case the Court was equally divided and could only enter per

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States v. City of Alburquerque, 545 F.2d 110 (10th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977); Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975), *cert. denied*, 433 U.S. 915 (1977); Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972); Burns v. Southern Pac. Transp. Co., 11 FEP Cases 1441 (D. Ariz. 1976); Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172 (W.D. N.C. 1975); Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937 (M.D. Ala. 1974); Dawson v. Mizell, 325 F. Supp. 511 (E.D. Va. 1971); Jackson v. Veri Fresh Poultry, Inc., 304 F. Supp. 1276 (E.D. La. 1969); CCH EEOC DEC. (1973) ¶ 6370; *id.* ¶ 6310.

For decisions involving other Sabbatarians, see Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971) (Sunday observer); Kettell v. Johnson & Johnson, 337 F. Supp. 892 (E.D. Ark. 1972); EMPL. PRAC. GUIDE (CCH) Empl. Prac. Dec. ¶ 6500 (1976); CCH EEOC DEC. (1973) ¶ 6367; *id.* ¶ 6120 (Other Sabbatarians); CCH EEOC DEC. (1973) ¶ 6154 (Orthodox Jew).

The accommodation standard also arises where certain employment conditions conflict with an employee's beliefs, such as a religious prohibition against union affiliation. *See, e.g.*, Cooper v. General Dynamics, 533 F.2d 163 (5th Cir. 1976); Yott v. North Am. Rockwell, 428 F. Supp. 763 (C.D. Cal. 1977). *See also* Weitkenaut v. Goodyear Tire & Rubber Co., 381 F. Supp. 1284 (D. Vt. 1974) (Employee minister absent to attend church meetings); Marshall v. District of Columbia, 392 F. Supp. 1012 (D.D.C. 1975) (Employee discharged for wearing beard grown in accordance with religious vow); CCH EEOC DEC. (1973) ¶ 6180 (Employee constructively discharged for wearing scarf in accordance with religious tenet); *id.* ¶ 6283 (Black Muslim woman required by faith to wear ankle-length dress).

31. Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 429 U.S. 65 (1976).

32. *Id.* at 551.

33. Reid v. Memphis Publishing Co., 521 F.2d 512, 517 (6th Cir. 1975), *cert. denied*, 433 U.S. 915 (1977). The *Reid* panel neither cited nor distinguished its earlier opinion in Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 429 U.S. 65 (1976), discussed in text accompanying notes 31-32 *supra*.

See also Dewey v. Reynolds Metals Co., 429 F.2d 324, 330 (6th Cir. 1970), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971) (Court noted the "chaotic personnel problems" arising if collective bargaining agreement were violated to accommodate religious employee).

curiam affirmances.[34] As a result, the Supreme Court in *Hardison* had an opportunity to clarify two issues: first, could an employer avoid his duty to accommodate if such accommodation violated an established seniority system, and second, what is the scope of an employer's duty to accommodate.

The Court resolved the first issue by holding that the accommodation duty does not require an employer to violate a senority system in order to accommodate a religious employee.[35] The Court recognized that although seniority systems which perpetuate discrimination may be set aside,[36] Title VII does not specifically demand that "an agreed-upon seniority system must give way when necessary to accommodate religious observances."[37] The Court concluded that protection of a minority religious observer should not come at the expense of senior employees holding a "contractual right" to their own shift preferences.[38]

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34. *See* Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 429 U.S. 65 (1976). An affirmance by an equally divided court is not entitled to precedential weight. Neil v. Biggers, 409 U.S. 188, 192 (1972); Eaton v. Price, 364 U.S. 263, 264 (1960).

35. 432 U.S. at 79.

36. *Id.* at 79 n.12. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 778 (1976) ("This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest"). *Franks* was a suit brought by black job applicants who showed that an employer had a racially discriminatory hiring policy. The Court awarded retroactive seniority to the applicants as part of the "make-whole" objective of § 706(g) of Title VII (42 U.S.C. § 2000e-5(g) (Supp. II 1972)).

37. 432 U.S. at 79. For lower court decisions on this issue, see notes 31-33 *supra*.

38. *Id.* at 80. Justice Marshall, joined by Justice Brennan in dissent, felt otherwise: "Plainly an employer cannot avoid his duty to accommodate by signing a contract that precludes all reasonable accommodations." *Id.* at 96. The dissent suggested that a voluntary replacement be found for Hardison, to be remunerated at the Saturday overtime rate. Hardison, in turn, volunteered to make himself available for other overtime periods at the regular rate of pay. Alternatively, TWA could transfer Hardison back to his old position where he held sufficient seniority to avoid Saturday work. Although either scheme would violate the collective bargaining agreement, the dissent believed the violations to be of no consequence to the other employees, since they were not *deprived* of any contractual rights. *See also* Brief Amicus Curiae of the National Jewish Commission on Law and Public Affairs (COLPA) at 28, where it was argued that a religious employee has a right to be accommodated as an implied right arising from his employment contract. COLPA argued that the express or implied terms of an individual's contract ensuring accommodation were entitled to greater weight than a contract between an employer and the representative of a majority of employees. *Id.*

Moreover, the Court found that disparate treatment of employees pursuant to bona fide seniority systems is specifically recognized by Title VII.[39] The Court was reluctant to upset a seniority system arising from a collective bargaining agreement, noting that the seniority system itself serves as an accommodation mechanism.[40] The fact that the system operates with a discriminatory *impact* is not sufficient grounds for invalidation absent a showing of some discriminatory purpose in its inception.[41]

Similarly, the EEOC had previously stated its position that a collective bargaining agreement must be modified when it results in one of the parties performing an illegal act. CCH EEOC DEC. (1973) ¶ 6367 n.3.

> [I]f a collective bargaining agreement is so inflexible as to have the effect of requiring a party to the agreement to discriminate against an individual because of his religion, and if the inflexibility of the agreement is not justified by substantial business considerations, then Title VII requires that the agreement be modified so as to eliminate its discriminatory effect.

Id.

39. Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h) (1970). *See* notes 27-29 *supra.*

40. *Id.* at 78. The Court noted that TWA's business required Saturday and Sunday shifts, "even though most employees preferred those days off." *Id.* at 80. Although allocating days off in accordance with religious needs would have solved Hardison's problem, such a method would have come "at the expense of others who had strong, but perhaps non-religious reasons for not working weekends." *Id.* at 81. By contrast, the Court found that a seniority system "represents a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off." *Id.* at 78.

41. 432 U.S. at 82. *Accord,* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977). In *Teamsters,* black job applicants and former employees demanded retroactive seniority from an employer who was found to have discriminated against blacks and Hispanics through its hiring, promotion and transfer policies. 431 U.S. at 329-30. The Court granted retroactive seniority to those applicants who could show instances of discrimination arising after the adoption of the 1974 Civil Rights Act ("post-Act" applicants). The Government argued that the seniority system, by perpetuating the effects of racial discrimination, was not a "bona fide" system within the protection of § 703(h). 431 U.S. at 335. The Court disagreed and refused to extend retroactive seniority to "pre-Act" discriminatees.

> [W]e hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII merely because it perpetuates pre-Act discrimination.

Id. at 353-54. The Court implied that a seniority system would be "not bona fide" only where "an intent to discriminate entered into its very adoption." *Id.* at 346, n.28. *See* Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 517 (E.D. Va. 1968) ("seniority system that has its genesis in racial discrimination is not a bona fide seniority system").

The plaintiff in *Evans,* an airline stewardess, was forced to quit by defendant-employer when she married in 1968. Although plaintiff was rehired in 1972, defendant refused to credit her pre-1972 seniority. The Court deemed plaintiff's failure to al-

The Supreme Court further illuminated the scope of the accommodation duty in holding that an employer is not required to bear more than "de minimis" costs in accommodating religious employees.[42] In reviewing previous accommodation cases, the Court noted conflicting holdings from the Fifth,[43] Sixth,[44] and Tenth[45] Circuits and con-

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lege any intentional discrimination in the system fatal to her demand for retroactive seniority. The *Evans* Court stated:

> [Section 703(h)] provides that it shall not be an unlawful employment practice to apply different terms of employment pursuant to a bona fide seniority system, provided that any disparity is not the result of intentional discrimination. Since respondent does not attack the bona fides of United's [defendant's] seniority system, and since she makes no charge that the system was intentionally designed to discriminate . . . § 703(h) provides a . . . ground for rejecting her claim.

431 U.S. at 559-60.

42. 432 U.S. at 84. It should be noted that the alleged discrimination in *Hardison* occurred in 1968, prior to the 1972 amendment adding the accommodation standard to Title VII. EEOC guidelines containing the accommodation standard were, however, in effect at this time. *See* note 23 *supra*. The Court noted, consistent with General Elec. v. Gilbert, 429 U.S. 125 (1976), that an EEOC guideline is "not entitled to great weight." 432 U.S. at 76 n.11. *But cf.* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) (administrative interpretation of an act by the enforcing agency is entitled to great deference).

However, the Court also noted that here, as in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381-82 (1969), "Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation," entitling the guideline to "some deference." 432 U.S. at 76 n.11. Thus the Court accepted the guideline as a "defensible construction of the pre-1972 statute," thereby imposing the duty of reasonable accommodation on TWA, absent a showing of undue hardship. *Id.* The Court, however, stopped short of actually applying § 701(j) retroactively to the facts in *Hardison*, although it achieved an identical effect by its "defensible construction" analysis.

The retroactivity issue, seemingly avoided here, has caused some concern in the circuit court cases. *See* Riley v. Bendix Corp., 464 F.2d 1113, 1117 (5th Cir. 1972) ("We are satisfied that the guidelines in effect at the time of [employee's] discharge were valid, as being a proper interpretation of the statute, and as validated by the subsequent legislative recognition of that fact"). *But see* Reid v. Memphis Publishing Co., 521 F.2d 512, 520 (6th Cir. 1975) ("The subsequent enactment of [42 U.S.C.] § 2000e(j) in 1972 cannot be relied on to establish a Congressional intent with respect to a 1964 statute which was not expressed in that statute").

43. *Compare* Johnson v. United States Postal Serv., 497 F.2d 128 (5th Cir. 1974) *with* Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972). In *Johnson*, the court found that the employer Postal Service "made a good faith effort to reasonably accommodate Johnson's religious observances and practices" and upheld judgment for the employer. 497 F.2d at 130. The court emphasized that acceding to Johnson's demands would have worked an undue hardship on the employer's operation, which required a "flexible employee, available whenever needed." *Id.* By contrast, in *Riley* the employee prevailed after it was conceded that the employer made no attempt at accommodation. 464 F.2d at 1115. These two cases might be distinguished on the ground that in *Johnson* some accommodation was offered (employer offered to recommend religious employee for a transfer to a post office in a larger city or to

cluded that these decisions provided "little guidance as to the scope of the employer's obligation."[46] Of greater importance to the Court

allow employee "as many Saturdays off as possible," 497 F.2d at 130) while there was no attempt to accommodate in *Riley*. However, as the Supreme Court noted, the Fifth Circuit did not expressly suggest any "theory of decision to justify the differing results." 431 U.S. at 75 n.10.

See also Young v. Southwestern Sav. & Loan, 509 F.2d 140 (5th Cir. 1975) (atheist employee objected to opening prayer at company meetings, *held* employee was constructively discharged in circumstances which amounted to religious discrimination); Cooper v. General Dynamics, 533 F.2d 163 (5th Cir. 1976) (Seventh Day Adventist employee refused to pay union dues on religious grounds, *held* for employee).

44. *Compare* Reid v. Memphis Publishing Co., 521 F.2d 51 (6th Cir. 1975), *cert. denied*, 433 U.S. 915 (1977) *with* Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 429 U.S. 65 (1976) *and* Draper v. United States Pipe and Foundry Co., 527 F.2d 515 (6th Cir. 1976). The *Reid* court cited "serious morale problems" that would arise if senior employees were assigned to substitute on Saturdays for Reid, a Seventh Day Adventist applying for the job of copyreader at defendant's newspaper. 521 F.2d at 520. The Court, turning to *Webster's New International Dictionary* for guidance as to the meaning of "undue hardship," also noted the potential cost of paying overtime to Reid's substitute and held that the employer need not "suffer a hardship" in order to accommodate Reid. 521 F.2d at 517, 521. The *Reid* panel neither cited nor distinguished its earlier opinion in in *Cummins*, involving a religious employee who was discharged "after complaints arose from fellow [employees] who were forced to substitute for him on Saturdays." 416 F.2d at 545. The court, deciding that "undue hardship is something greater than hardship" held that the employer failed to demonstrate that accommodating Cummins would have imposed "an unreasonable strain" on the employer's business. 516 F.2d at 551. *Accord*, Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1976). *See also* Dewey v. Reynolds Metals Co., 429 F.2d 324, 335 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971) ("[T]he employer ought not be forced to accommodate each of the varying religious beliefs and practices of his employees").

45. Williams v. Southern U. Gas Co., 529 F.2d 483 (10th Cir. 1976). The court stated: "The phrases 'reasonably accommodate' and 'undue hardship' are relative terms and cannot be given any hard and fast meaning." *Id.* at 488. Plaintiff Williams was a Sabbatarian discharged after refusing to work one Saturday during an "emergency." *Id.* at 484. The court emphasized that the employer, a public utility, had a duty to provide uninterrupted service to the consuming public as well as a duty to "adhere to employment practices that were fair to its other employees." *Id.* at 488. Weighing these duties against the employer's Title VII duty to accommodate Williams, the court found the employer acted reasonably under the circumstances, although the court conceded the matter was one in which "reasonable minds might conceivably differ." *Id. Cf.* United States v. City of Albuquerque, 545 F.2d 110, 114 (10th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977) (member of Worldwide Church of God discharged as firefighter for not working Saturdays as scheduled, *held* accommodating employee would work an undue hardship on the "business" of "fire suppression").

46. 432 U.S. at 75 n.10. Similarly the Court found that EEOC guidelines were of little aid.

[T]he employer's statutory obligation to make reasonable accommodation for the

was the evidence of increased costs that TWA would incur in accommodating the plaintiff employee.[47] In the Court's view, an employer should not undertake more than de minimis expenditures in accommodating an employee's religious practices.[48] The Court opposed forcing an employer to make significant expenditures on behalf of a religious employee without affording similar treatment to non-religious employees.[49]

The holding in *TWA v. Hardison* illustrates several themes frequently associated with the Burger Court. First, the holding is consistent with prior decisions in which discriminatory intent must be shown before a seniority system will be set aside.[50] Absent a "clear and express indication from Congress,"[51] the Court is reluctant to

religious observances of its employees, short of incurring an undue hardship is clear, but the reach of that obligation has never been spelled out by Congress or by Commission guidelines.

Id. at 75. Earlier the Court had traced the accommodation standard's genesis in EEOC guidelines, but noted "the Commission did not suggest what sort of accommodations are 'reasonable' or when hardship to an employer becomes 'undue.'" *Id.* at 72.

47. The Court rejected the Eighth Circuit's suggestions that Hardison's Saturday shift could have been filled by supervisory personnel or by regular employees at higher wages. Either alternative, in the Court's view, would have involved costs to TWA through lost efficiency or higher wage expenditures. *Id.* at 84.

48. *Id.* at 84. The Court stated: "To require TWA to bear more than de minimis costs in order to give Hardison Saturdays off is an undue hardship." *Id.*

49. "[T]o require TWA to bear additional costs when no such costs are incurred to give other [non-religious] employees the days off that they want would involve unequal treatment of employees on the basis of their religion." *Id.*

50. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), discussed at note 41 *supra*. Hardison alleged no such discriminatory purpose: "It was coincidental that in plaintiff's case the seniority system acted to compound his problems in exercising his religion." 432 U.S. at 82, quoting district court opinion, 375 F. Supp. at 883.

The trend may also be seen in some of the Court's equal protection cases involving alleged racial discrimination. *Compare* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (Civil Rights Act of 1964 proscribes practices fair in form but discriminatory in effect) *with* Washington v. Davis, 426 U.S. 229, 239 (1976) (unconstitutionality is dependent upon a showing of a racially discriminatory purpose). The *Davis* Court expressly excepted the case from the stricter standards of Title VII as construed by *Griggs*, over the dissent of Justices Brennan and Marshall. *See also* Village of Arlington Heights v. Metropolitan Hous. Dev. Co., 429 U.S. 252 (1977) (zoning challenge, *held* plaintiffs failed to carry their burden of proving a "discriminatory purpose" as a "motivating factor" in the zoning regulations); Dayton Bd. of Educ. v. Brinkman, 431 U.S. 902 (1977) (court-ordered busing, *held* finding of disproportionate racial percentages in schools not a violation of the Fourteenth Amendment absent a showing of "intentionally segregative actions").

51. 432 U.S. at 79.

place the onus of discrimination on an employer who has failed to accommodate a minority employee's religious practices.[52] Consequently the reasonable accommodation standard, promulgated without a clear indication of its practical effect, is interpreted narrowly by the Court.

Similarly, the Burger Court's reading of the accommodation duty as imposing no greater than "de minimis cost"[53] on an employer is consistent with its refusal to interpret Title VII as requiring an employer to grant special privileges to religious employees.[54] An employer who undertakes significant costs in accommodating his minority employees would be extending "unequal treatment to his employees on the basis of their religion,"[55] resulting in a type of reverse discrimination against the non-religious majority of employees.[56] By requiring only de minimis accommodation expenditures,

52. *Cf.* Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971). "The fundamental error of [employee] and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees." 429 F.2d at 335.

53. The dissent strenuously objected to this interpretation: "As a matter of law, I seriously question whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than a de minimis cost' . . . ." *Id.* at 93 n.6 (Marshall, J., dissenting). Additionally, the dissent felt that TWA had not proven that accommodating Hardison would have saddled it with more than de minimis cost. *Id.*

54. *Id.* at 84-85.

The Court theorized that TWA might allocate days off in accordance with employees' religious needs. Such an alternative was rejected, however, since it would have come "at the expense of others who had strong, but perhaps non-religious reasons for not working on weekends." *Id.* at 81. The court refused to construe the accommodation statute "to require an employer to discriminate against some employees in order to enable others to observe their Sabbath." *Id.* at 85.

In contrast, the dissenting opinion interpreted the Civil Rights Act as requiring employers to "grant privileges to religious observers as part of the accommodation process." *Id.* at 91.

55. *Id.* at 84.

56. Accommodation of a minority religious observer should not come at the expense of the non-religious majority of employees. *See* note 54 *supra*. An employer, in the Court's view, need not afford preferential treatment to minorities if discrimination against the non-religious majority results. In short, "Title VII does not contemplate such unequal treatment." *Id.* at 80.

The dissent would have allowed such "unequal treatment" in favor of the religious employee. *Id.* at 87 (Marshall, J., dissenting). Justice Marshall argued that rejecting an accommodation simply because it includes preferential treatment of a minority employee would mean that § 701(j) of Title VII, while brimming with "sound and fury," ultimately "signif[ies] nothing." *Id.*

the *Hardison* Court not only eased the employer's burden but also protected these majority interests.[57]

Although *Hardison* clarifies the impact of the accommodation standard on seniority systems, the Court's novel use of a de minimis cost test leaves the standard unsettled. The Court clearly holds that TWA was not obligated to order a shift-swap or pay a substitute employee premium wages in accommodating Hardison.[58] What is not clear is whether these accommodations were rejected because they would violate the seniority system or because they would have saddled TWA with greater than de minimis cost.[59]

57. Additionally it might be argued that the Court, by reading a "not more than de minimis cost" test into the accommodation standard, tacitly avoided a possible first amendment Establishment Clause challenge: requiring an employer to bear no more than a de minimis cost of accommodation is not the sort of "excessive government entanglement" that will invalidate a statute under the first amendment. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 773 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The Court never addressed the first amendment issue directly, merely citing in a footnote the district court's concern that accommodation of religious employees might impose a "priority of the religious over the secular," in violation of the Establishment Clause. 432 U.S. at 69-70 n.4. *See* Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration under Title VII*, 69 MICH. L. REV. 599, 628 (1971). Since the Supreme Court found no Title VII violation here, it refused to rule on the constitutionality of the accommodation duty. The Court will not reach a constitutional issue if a case may be decided on non-constitutional grounds. Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

However, the first amendment challenge was a major concern of both parties. *See* Brief for Appellant at 21-46; Brief for Respondent at 23-39. No less than nine amicus briefs were filed addressing the constitutional issue. The dissent concluded that the accommodation duty was beyond constitutional challenge, citing analogous cases in which the exemption of religious observers from state-imposed duties withstood first amendment attacks. 432 U.S. at 91. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Zorach v. Clauson, 343 U.S. 306 (1952).

The lower courts have frequently confronted this question. A federal district court in California declared 42 U.S.C. § 2000e(j) unconstitutional. Yott v. North Am. Rockwell Corp., 428 F. Supp. 763 (C.D. Cal. 1977). *Accord*, Cummins v. Parker Seal Co., 516 F.2d 544, 554 (6th Cir. 1975) (dissenting opinion). *See also* Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration under Title VII*, 69 MICH. L. REV. 599, 628 (1971). Note, *Is Title VII's Reasonable Accommodation Requirement a Law "Respecting an Establishment of Religion*?" 51 NOTRE DAME LAW. 481, 485 (1976).

The *Hardison* district court expressly found the statute not in violation of the first amendment. 375 F. Supp. at 887. *Accord*, Cummins v. Parker Seal Co., 516 F.2d 544, 552 (6th Cir. 1975); Jordan v. North Carolina Nat'l. Bank, 399 F. Supp. 172, 180 (W.D.N.C. 1975); Ward v. Allegheny Ludlum Steel Corp., 397 F. Supp. 375, 377 (W.D. Pa. 1975); Comment, *Religious Observance and Discrimination in Employment*, 22 SYR. L. REV. 1019, 1027 (1971). *See also* Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, 1977 U. ILL. L.F. 69, 103.

58. 432 U.S. at 84.

59. Arguably the holding might be limited by its factual situation—a 24-hour, 7-day operation requiring weekend employees. However, a recent Eighth Circuit case

TWA v. Hardison in effect allows an employer two "outs" from his duty to accommodate an employee's religious practices. He might show accommodation would violate his collective bargaining agreement.[60] Alternatively (or, preferably, in addition) he could prove accommodation would force him to bear greater than de minimis costs. The combination of these two avenues of escape leaves an employer with less of a burden than the "reasonable-accommodation-unless-undue-hardship" test[61] seems to require.[62] Hopefully an employer who makes *no* attempt at accommodating his employee's religious needs is still in violation of Title VII.[63]

The accommodation standard is significantly weakened by the *Hardison* court's narrow interpretation. The employer's duty is now lessened, "undue hardship" is construed as "not greater than de minimus costs," and the "rights" of non-religious employees arising from their collective bargaining agreements are secured. Although Title VII and its reasonable accommodation standard are aimed at eliminating discrimination in employment, the *Hardison* decision neither furthers this goal nor advances America's long tradition of religious pluralism. Instead, it forces members of minority faiths increasingly to choose between their religion or their job.[64]

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indicates *Hardison* retains some broader ramifications. *See* Huston v. UAW Local 93, 559 F.2d 477 (8th Cir. 1977) (court in *Huston*, noting Hardison's *temporary* shift transfer was deemed an undue hardship on his employer, *held* that employer and union may refuse to approve religious employee's *permanent* shift change if such transfer violates seniority provisions).

60. Two post-*Hardison* decisions have affirmed the primacy of a collective bargaining agreement over the accommodation of religious employees. *See* Huston v. UAW Local 93, 559 F.2d 477, 480 (8th Cir. 1977); Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir. 1977), *rev'g* Blakely v. Chrysler Corp., 407 F. Supp. 1227 (E.D. Mo. 1975).

61. 42 U.S.C. § 2000e(j) (Supp. II 1972). *See* note 23 *supra*.

62. *See* notes 53 and 56 *supra* (comments of Justice Marshall).

63. For cases where employers who made no attempt at accommodation were held guilty of employment discrimination, see Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972); Shaffield v. Northrop Worldwide Aircraft Services, Inc., 373 F. Supp. 937 (M.D. Ala. 1974). Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977), *rev'g* Blakely v. Chrysler Corp., 407 F. Supp. 1227 (E.D. Mo. 1975) (court suggested that an *employee* is under a duty to "attempt to accommodate his religious beliefs himself"). *See also* Note, *Title VII: An Employer's View of Religious Discrimination Since the 1972 Amendment*, 7 LOY. CHI. L.J. 97, 107 (1976) ("Failure to make any effort will virtually ensure a finding that the employer committed an unlawful employment practice").

64. *See* 432 U.S. at 87 (Marshall, J., dissenting).