INTRODUCTION

Larry G. Hardison, a member of the Worldwide Church of God, was an employee of Trans World Airlines. Hardison's religion requires that its members refrain from work on its Sabbath, observed each week from sundown Friday to sundown Saturday. A collective bargaining agreement, part of which contained provisions relating to shift clauses, days off, and vacations, covered Hardison's job at TWA. Hardison initially worked at night as a stores clerk in a department in which he had relatively high seniority. He transferred to another department in which day work was available, but as a consequence, he had the second lowest seniority position in that department. As a result, his ability to select days off was considerably diminished. Yet the stores department which employed Hardison operated twenty-four hours per day, seven days a week. Hardison failed to report to work on three consecutively scheduled Saturdays. He was found guilty of insubordination at a discharge hearing and was terminated by TWA.

After exhausting all administrative procedures, Hardison filed suit against TWA and the three unions representing him in United States District Court for the Western District of Missouri. The suit was filed under Title VII of the 1964 Civil Rights Act barring discriminatory labor practices. The district court upheld the defendant employer, finding that TWA had not practiced religious discrimination against Hardison. On appeal the Eighth Circuit Court of Appeals found that TWA indeed had practiced religious discrimination. That court held that TWA did not meet the standards incumbent upon the employer in these types of Title VII re-
religious discrimination cases. The court determined that there was no apparent attempt by TWA to reasonably accommodate Hardison's religious beliefs to the TWA schedule. The seniority clauses of the collective bargaining agreement between the employer and the unions representing Hardison were the apparent reasons that Hardison had difficulty in changing to a weekly schedule which would not have conflicted with his Saturday worship. This Eighth Circuit panel, however, did not directly address the inflexibility of the bargaining agreement contained in the seniority provisions and shift clauses, which restricted employee mobility within the organization.

The situation in *Hardison v. Trans World Airlines, Inc.* [Hardison] is similar to those of recent religious discrimination cases under Title VII of the 1964 Civil Rights Act. This note will examine the standards imposed upon the employer in these religious discrimination cases. This note will also briefly analyze the conflict which has arisen in many religious discrimination cases in attempting to balance the rights under the contractual bargaining agreement and the standards required by the statute to protect the individual employee.

STATUTORY AND REGULATORY FRAMEWORK

**PRIOR LAW AND THE INFLUENCE OF THE EEOC REGULATIONS**

Title VII was passed in 1964. The provisions relating to re-

6. Id. at 44.

7. Id. at 41-42. Circuit Judge Webster, speaking for the court, stated that the "proper relationship between a bona fide seniority system and the requirement of reasonable accommodation under 29 C.F.R. § 1605.1 has not yet been settled by the Supreme Court." The court then cited 42 U.S.C.A. § 2000e-2(h) which provides in part:

Notwithstanding any other provision of this subchapter, 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, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. Id. at 41.

8. Article VI, the seniority clause of the collective bargaining agreement, provided, "(b) The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement." Id. at 41.

9. 527 F.2d 33 (8th Cir. 1975).


religious discrimination were amended by Congress in 1972. \(^{12}\) Prior to the amendment, it was unclear what the duty of the employer was in respect to accommodating the employee's religious beliefs. The Equal Employment Opportunity Commission regulation in effect until 1967 indicated that the employee had no right to demand accommodation by the employer. \(^{13}\) In *Dewey v. Reynolds Metal*
Company [Dewey], the Sixth Circuit Court of Appeals, relying on the initial guidelines promulgated by the EEOC, held that an employer is under no duty to accommodate the employee's religious belief. The court in Dewey interpreted the regulations in effect at the time of the plaintiff's discharge as intending that management should have internal control of the organization and not be subject to attack unless the collective bargaining agreement is discriminatory. The gravamen of the court's opinion in Dewey suggested that the employee was discharged because he violated the collective bargaining agreement which covered all employees equally. The theoretical foundation of the holding, however, was that failure to accommodate an employee's religious belief was not synonymous with intent to discriminate against that employee. The Sixth Circuit therefore concluded that Title VII only proscribed acts with intent to discriminate.

Support for this contention did exist in the legislative history of Title VII. The holding in Dewey was consistent with the reg-

should attempt to achieve an accommodation so as to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees.


15. See note 13, supra.

16. 429 F.2d at 328-31. The court in Dewey cited the legislative history of Title VII from 1964 Cong. & Adm. News at 2516 with respect to internal control of management as follows: "Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that corrections are required in discrimination practices." Id. at 328.

17. Id. at 330.
18. Id. at 335.
19. Id. at 331.
20. Senator Hubert Humphrey's remarks on the Senate floor support this more restrictive definition of discrimination:

A new subsection 703(b) [42 U.S.C.A. § 2000e-2(h) (1974)] has been added, providing that it is not an unlawful employment practice for an employer to maintain different terms, conditions, or privileges of employment either in different locations or pursuant to a seniority, merit, or other incentive systems, provided the differences are not the result of an intention to discriminate on grounds of race, religion, or national origin. For example, if an employer has two plants in different locations, and one of the plants employs substantially more Negroes than the other, it is not unlawful discrimination if the pay, conditions, or facilities are better at one plant than at the other unless it is shown that the employer was intending to discriminate for or against one of the
ulations in effect at the time of the employee's discharge. Under this narrow view, the employer did not discriminate against its employee, because the employer applied its compulsory overtime requirement and replacement scheme evenhandedly.21 One commentator contends that Reynolds, by accommodating Dewey’s religious beliefs as it was required to do under the 1967 EEOC regulations, "would arguably be guilty of an unlawful employment practice under [T]itle VII, for such an accommodation would seemingly constitute favored treatment."22

THE 1972 AMENDMENT TO TITLE VII AND ITS EFFECT UPON THE EEOC REGULATIONS

The EEOC regulations promulgated in 1967 on religious discrimination shift the burden of accommodation from the employee to the employer.23 These regulations suggested that under Title VII the employer has the duty to reasonably accommodate his employee's religious belief.24 The only defense which the employer could assert would be to prove that an "undue hardship" would befall the employer's business if an accommodation was made to racial groups. Thus this provision makes clear that it is only discrimination on account of race, color, religion, sex, or national origin, that is forbidden by the title. The change does not narrow application of the title, but merely clarifies its present intent and effect.

110 CONG. Rec. 12723 (1964). Senator Humphrey, with respect to the statute defining the enforcement power of the Commission 42 U.S.C. § 2000e-5(g) (1964) stated:

Section 706(g) [42 U.S.C. § 2000e-5(g)] is amended to require a showing of intentional violation of the title in order to obtain relief. This is a clarifying change. Since the title bars only discrimination because of race, color, religion, sex, or national origin it would seem already to require intent, and, thus, the proposed change does not involve any substantive change in the title. The express requirement of intent is designed to make it wholly clear that inadvertent or accidental discrimination will not violate the title or result in entry of court orders. It means simply that the respondent must have intended to discriminate.


21. 429 F.2d at 328.
23. 29 C.F.R. 1605.1 (Reissue 1975):

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a) (1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

24. Id.
the employee's religious belief. Dewey questioned not only the propriety of retroactive application of the 1967 regulations, but was also skeptical of the validity and binding effect these regulations would have on the courts.

Congressional intent in regard to religious discrimination cases was finally made clear in 1972 when Congress formally legitimized the EEOC regulations. When Congress amended the Civil Rights Act in 1972 to incorporate the guidelines promulgated by the EEOC in 1967, the statute included the following definition:

(j) 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.

This amendment clarifies that the employer has a duty to reasonably accommodate the employee's religious beliefs. In sponsoring this amendment, Senator Randolph of West Virginia indicated that the Supreme Court's affirmation of Dewey by an equally divided Court prompted him to introduce legislation to protect many Saturday Sabbatarians whose jobs were threatened if they chose not to work on that day.

The Supreme Court's holding in Griggs v. Duke Power Co. [Griggs] provided the theoretical foundation for the 1972 amendment to the Act. In Dewey, the Sixth Circuit Court of Appeals

25. 429 F.2d at 330.
28. 118 Cong. Rec. 705 (1972), in which Senator Randolph said:
I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments. Unfortunately, the courts have, in a sense, come down on both sides of the issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.
This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. I think it is needed not only because court decisions have clouded the matter with some uncertainty; I think this is an appropriate time for the Senate, and hopefully the Congress of the United States to go back, as it were, to what the Founding Fathers intended. The complexity of our industrial life, the transition of our whole area (sic) of employment, of course are matters that were not always understood by those who led our Nation in earlier days.
31. 429 F.2d 324 (6th Cir. 1970).
had concluded that failure to accommodate an employee's religious belief was not synonymous with intent to discriminate and that Title VII only prohibited acts with intent to discriminate.  

This conclusion was rejected by the Supreme Court in *Griggs*. Although *Griggs* addressed racial discrimination accomplished by means of employment tests, the standards announced by the Supreme Court have been applied in religious discrimination cases as well.

In *Griggs*, Chief Justice Burger said that:

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

The Court then discussed the business necessity test applied to religious discrimination cases:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

This clearly shifts the burden to the employer to make reasonable accommodations to the individual's religious belief. More important, however, *Griggs* effectively establishes that an intent to discriminate is not required to invoke the proscriptions of Title VII.

This conclusion has had significant consequences on religious discrimination cases. The nature of religious discrimination arising under Title VII usually is not in the form of discrimination on the sole basis of religion, or "per se violations," which are relatively

32. *See* note 19, *supra*, and accompanying text.


35. *Id.*

36. The EEOC has had the opportunity to address the problem of intentional discrimination by an employer against an employee or prospective employee solely because of his religion per se several times. In EEOC Dec. No. 71-1489 (1971), CCH Employment Pract. Guide ¶ 6222, an applicant for a job was asked whether he was Jewish after being offered the job. When the applicant responded to the question in the affirmative, however, he was assured that that fact made no difference. The applicant was not hired, however, and the record demonstrated that a female Gentile without a high school education (the applicant had completed two years of college and was presently enrolled in a data-processing class) was hired for the position. Since the evidence indicated that the applicant was clearly more qualified for the position than the employee who was hired, and the employer had
simple to identify. Congress has clarified, if not expanded the
ambit of employee rights which are protected under the religious
discrimination statute.\textsuperscript{37} This clarification of employee rights has
placed a heavier burden on the employer to prove that it was not
practicing religious discrimination within the meaning of the Act.
Courts now equate failure to accommodate an employee's religious
beliefs with religious discrimination by the employer. This is cer-
tainly the major development under Title VII religious discrimina-
tion cases since the inception of the Act. However this shifting
of the burden has raised serious problems: the stubborn application
by courts of this equation has raised substantial constitutional as
well as collective bargaining issues. Also, equating failure to ac-
commodate the beliefs of the employee with religious discrimination
proscribed by the Act has caused morale problems.

THE CONSTITUTIONAL CHALLENGE TO THE VALIDITY OF THE REGULATIONS
AND STATUTE

The Eighth Circuit Court of Appeals in\textit{Hardison}\textsuperscript{38} addressed
the constitutionality of the regulations and statutes proscribing re-
ligious discrimination in employment practices. The challenges to
the validity of the statute and regulation have been described
as not being "frivolous"\textsuperscript{39} because serious problems exist in re-
lation to first amendment guarantees of freedom of religion
and the employer's constitutional rights. In\textit{Hardison} the court re-
lied on\textit{Committee for Public Education & Religious Liberty v. Ny-
quist}\textsuperscript{Nyquist}\textsuperscript{40} to reject any constitutional attack upon the
statute itself.

provided no credible explanation for inquiring about the applicant's religion
and for subsequently not hiring him, the EEOC concluded that the appli-
cant's religion was a factor in the employer's failure to hire him. In EEOC
Dec. No. 72-1301 (1972), CCH Employment Pract. Guide ¶ 6338, the Com-
missioner concluded that by terminating an employee because of the con-
tents of a book he had written, an employer had discriminated against him
because of his religion within the meaning of the Act. Even though the
book was of questionable taste (a chapter of the book was entitled "Reasons
Why We Must Abandon The Anti-Sex Moral Codes of the Masturbating
Christian God of Hatred"), the EEOC held that it was an expression of the
employee's religious views and was protected by Title VII. \textit{See also}, EEOC
Bradington v. International Business Machines Corp.}, 360 F. Supp. 845 (D.
Md. 1973), \textit{aff'm without op.} 492 F.2d 1240 (4th Cir. 1974); and Smith v.
Universal Services, Inc., 454 F.2d 154 (5th Cir. 1972).

38. 527 F.2d 33 (8th Cir. 1975).
39. See dissent in \textit{Reid v. Memphis Publishing Co.}, 521 F.2d 512, 524
fn. 1 (6th Cir. 1975).
In applying the standards established in *Nyquist* the Eighth Circuit Court of Appeals affirmed the district court’s finding that even if there is an incidental effect of government aid to religion, the primary purpose of the statute is to prevent employers from practicing religious discrimination against employees. The court in *Hardison* also relied on the Sixth Circuit Court of Appeals decision in *Cummins v. Parker Seal Company* [*Cummins*] to dispose of the constitutional attack. In *Cummins* the court recognized that Senator Randolph, in proposing the 1972 amendment to Title VII, was concerned about the decline in attendance of Saturday worshippers. The court responded by holding that the “statute and regulations are applicable to all members of all religious faiths who observe Saturday as the Sabbath. We conclude that the argument of one Senator that the proposed legislation would assist a particular pastor and religious group does not require the conclusion that Congress enacted the legislation to promote and support a particular religion.”

1976]  

**TITLE VII**

**803**

41. The Supreme Court in *Nyquist* applied a three-prong test in determining whether the government is violating the Establishment Clause of the first amendment: “first, [the law] must reflect a clearly secular purpose... second, [it] must have a primary effect that neither advances nor inhibits religion... and, third, [it] must avoid excessive government entanglement with religion...” *Id.* at 773.

42. 375 F. Supp. at 888, where the district court in *Hardison* concluded that:

The duty to accommodate, as stated in 42 U.S.C. § 2000e(j), reflects the general secular legislative purpose of guaranteeing an employee that he will not be discharged from his job merely because of his religion. Consistent therewith, the regulation also imposes a duty to accommodate. The incidental effect of the regulation perhaps indirectly aids religion but its primary effect is to guarantee job security. The purpose and effect of the law as interpreted by the regulation is not primarily to aid religion but to prevent employers from devising means to discriminate in effect and intent. This conclusion by the district court, which was affirmed by the circuit court in *Hardison*, 527 F.2d at 43, must be read in conjunction with Senator Randolph’s remarks on the Senate floor when he was sponsoring the 1972 amendment to the statute:

My own pastor in this area, Rev. Delmer Van Horn, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people, and understandably so, with reference to a possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers.

118 CONG. REC. 705 (1972). Certainly an inference can be made from these remarks that one of the purposes behind the 1972 amendment was to aid religions which had poor attendance for Saturday worship. If this was a purpose behind the statute, as Senator Randolph suggests, then the statute would come within the ambit of the *Nyquist* impermissibles, and thus possibly be unconstitutional.

43. 516 F.2d 544 (6th Cir. 1975).

44. *Id.* at 553. See also note 42, supra.

45. *Id.*
The Establishment Clause creates problems with this analysis, however. The promotion of a particular religion, or of any religion, is not a justifiable ground for legislation. Under the test announced by the Supreme Court in Nyquist, a law must have a "primary effect that neither advances nor inhibits religion." The first amendment guarantees neutrality in its religion clause. There can be little doubt that Congress enacted Title VII with secular goals in mind. However, the Act as amended in 1972 defines religion so as to require that certain persons receive preferential treatment because of their religion. Cummins suggests that it is a valid purpose of the Act to grant preferences to persons whose religious practices do not conform with the religious practices of the majority. Certain persons will not compromise their religious convictions and they should not be penalized for not doing so. However, some argue that by reasonably accommodating an employee's religious belief a priority of the religious over the secular develops. One commentator has stated:

Who is to say that the desire to stay at home Sunday and do nothing is any less worthy of protection than is the need to attend church that same day? But the EEOC's standard clearly chooses the one over the other. In so doing, it misconceives not only title VII but the delicate balance between the free exercise of religion and the operation of a secular society.

The Dewey court expressed doubts as to the constitutionality of the statute and the regulations as they affected the internal control of the company. Dewey suggested that management should not be subject to attack in relation to scheduling or seniority problems unless the collective bargaining agreement itself is discriminatory.

The Cummins dissent suggests that a "hands-off" attitude on government's part would be proper, and that the employer and employee should settle their own differences. This would not solve the problem, however. Undoubtedly the employee would, in the long run, be penalized for his religious beliefs, by being discharged or by being compelled to work on his Sabbath. A definitive ruling

46. See dissent in Cummins, 516 F.2d 544, 554-60 (6th Cir. 1975).
47. 413 U.S. 756, 773 (1973). See also note 41, supra.
50. 516 F.2d at 552-53.
51. Id. at 556.
53. 429 F.2d 324, 328-30 (6th Cir. 1970). See note 16 supra.
54. 516 F.2d 544, 556 (6th Cir. 1975).
on the constitutionality of the statute as it has been applied in these recent cases is needed.55

THE EMPLOYER'S DUTY OF REASONABLE ACCOMMODATION

THE HARDISON CASE

The Hardison case56 illustrates how courts have interpreted reasonable accommodation. Although Hardison would not work on Saturday, he would have been willing to alleviate scheduling conflicts by working long weeks or four day weeks which would not have conflicted with the terms of the collective bargaining agreement. Hardison transferred to a day shift because of his recent marriage, but he lost seniority rights in the new department. The district court contended that TWA would have been able to resolve Hardison's dilemma if he had not transferred to another department where he had insufficient seniority to bid on a suitable shift.57 The Eighth Circuit Court of Appeals disagreed with the district court's analysis by stating that to limit the "right of transfer within the company as a condition of accommodation"58 would be to discriminate against Hardison within the meaning of the statute.59 The district court in Hardison apparently did not shift the burden of accommodation to the employer. The Eighth Circuit in rejecting that position, said:

While the regulation implies that the employee must be responsive to a reasonable accommodation, no such accommodation was ever offered by TWA, which at all times contend ed that it was precluded from accommodating Hardison's Sabbath observance by the collective bargaining agreement. Before an employer can assert the defense of non-cooperation, it is incumbent upon it to establish the accommodation which it has tendered and with which the employee refused to cooperate.60

TWA's failure to even attempt an accommodation is the basis of the circuit court's decision in Hardison. Had TWA extended an offer of accommodation to Hardison, it would have been more diffi-

55. Certiorari has been granted by the Supreme Court in Cummins, 19761 U.S.L.W. 3493 (Mar. 2, 1976).
56. 527 F.2d 33 (8th Cir. 1975).
58. 527 F.2d 33, 39 (8th Cir. 1975).
59. Id.
cult for the court to have reached the result it did. The Eighth Circuit also indicated in *Hardison* that an employee's amenability to accommodate his own religious beliefs will not serve as a viable substitute within the meaning of the statute for the employer's duty to provide a reasonable accommodation. The burden of accommodation remains on the employer regardless of the employee's actions.

The Eighth Circuit found three alternatives which TWA could have offered to Hardison that would have reasonably accommodated him without placing undue hardship on TWA. First, TWA could have allowed Hardison to work a four day week, which was within the framework of the collective bargaining agreement. Second, there could have been a "swap" between Hardison and another employee, either for another shift or for the Sabbath days. Third, TWA could have filled Hardison's Sabbath shift from other available personnel. The court rejected the district court's argument that "Title VII cannot be interpreted to require that companies finance employee's religious beliefs" acknowledging that the statute does not "preclude some cost to the employer anymore than it precludes some degree of inconvenience to effect a reasonable accommodation." The third alternative suggested by the court, however, presents possible constitutional problems. *Nyquist* establishes that a law must have a primary effect that neither advances nor inhibits religion. A law that compels an employer to pay an employee overtime to substitute for the Saturday Sabbatarian could be considered one which advances a religion. An employer may be inconvenienced through administrative changes necessary to achieve an accommodation. However, paying another employee overtime to cover the Sabbatarian's scheduled work time is much more of an inconvenience to the employer, and should be an element of undue hardship. This situation probably should not be treated the same as an administrative inconvenience.

**The Problems of Fellow-Employee Discontent and Employer Expense**

Discontent can result when other employees are compelled to cover a Sabbatarian's worship schedule. The Sixth Circuit Court

---

61. 527 F.2d 33, 39 (8th Cir. 1975).
62. *Id.* at 41.
63. *Id.* at 40.
64. 375 F. Supp. at 891.
65. 527 F.2d at 40.
of Appeals addressed this problem in several cases in 1975. In
Reid v. Memphis Publishing Company [Reid] the Sixth Circuit
changed its position on hearing the case for the second time. The
employee applied for a position as a copyreader on the Press-
Scimitar, Memphis' morning newspaper. A copyreader was consid-
ered a specialist, and was required to be available for Saturday
work. After the employee, a Seventh Day Adventist, disclosed the
fact to the news editor that he would not be available for Saturday
work, his job offer was revoked. The defendant employer con-
tended that all employees had to be available for Saturday work
and that new employees especially would have no seniority to be
relieved from work on Saturday, which was a preferred day off
for many. The district court held that because copyreaders are not
interchangeable with other copyreaders and because of the Satur-
day work policy, the defendant had no duty to accommodate an
employee's or potential employee's religious belief contrary to the
employer's established work schedule.

The Sixth Circuit decided that the district court had interpreted
the regulations incorrectly. In the first appellate decision on re-
ligious discrimination to follow the Supreme Court's holding in
Griggs placing the burden of accommodation on the employer. The court
reversed and remanded the Reid case to the district court to deter-
mine whether a reasonable accommodation could have been made
without undue hardship on the employer. The district court then
held that the defendant could have made reasonable accommoda-
tion, and the plaintiff was awarded damages. However the
Sixth Circuit, on appeal for the second time, found that the defend-
ant employer had met his burden of proving an undue hardship.

The court held that the potential overtime paid to the plaintiff's
substitutes on Saturdays is an element of undue hardship. This
conclusion by the Sixth Circuit is at odds with the opinion of the
Eighth Circuit Court of Appeals in Hardison. The Reid court

67. See Draper v. United States Pipe and Foundry Co., 527 F.2d 515
(6th Cir. 1976); Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir.
1972), on rehearing 521 F.2d 512 (6th Cir. 1975); Cummins v. Parker Seal
Co., 516 F.2d 544 (6th Cir. 1975), cert. granted, 44 U.S.L.W. 3493 (Mar. 2,
1976).
68. 521 F.2d 512 (6th Cir. 1975).
69. 469 F.2d at 348-49.
70. 401 U.S. 424 (1971).
71. Id.
73. 521 F.2d 512 (6th Cir. 1975).
74. 527 F.2d 33 (8th Cir. 1975).
also agreed with the employer that excusing the plaintiff from work on Saturdays and involuntarily assigning other copyreaders with seniority to substitute for Reid, who had no seniority, would raise morale problems among the other copyreaders.75

Another panel of the Sixth Circuit had reached a different conclusion on the morale problem four months before Reid was decided. In Cummins,76 the court held that demonstrating employee dissent because of involuntary work assignments to cover an employee with little or no seniority is not equivalent to establishing an undue hardship.77 The Sixth Circuit stated:

The objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business. If employees are disgruntled because an employer accommodates its work rules to the religious needs of one employee, under EEOC Regulation 1605 and §2000e(j) such grumbling must yield to the single employee's right to practice his religion. Moreover, the fact that Saturday Sabbath observance by one employee forces other employees to substitute during weekend hours does not demonstrate an undue hardship on the employer's business. It is conceivable that employee morale problems could become so acute that they would constitute an undue hardship. The EEOC, in interpreting Regulation 1605, has noted the possibility of undue hardship when the employer can make a persuasive showing that employee discontent will produce "chaotic personnel problems."78

What "so acute" and "chaotic personnel problems" mean in this context has not been defined by any case, but hopefully an employer should be able to prove undue hardship from "grumbling" without having to demonstrate something just short of a revolt in the employment force.79 One must ask whether other employees in the

75. 521 F.2d at 517.
76. Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), cert. granted, 44 U.S.L.W. 3493 (Mar. 2, 1976). See also, the dissent in Reid, 521 F.2d at 522-29, which argues that the Sixth Circuit Court of Appeals in Reid retried the case on the appellate level and refused to establish the undue hardship burden on the employer. This seems to be a correct statement. The Eighth Circuit Court of Appeals in Hardison gave no effect to the Sixth Circuit's findings. In Draper v. United States Pipe and Foundary Co., 527 F.2d 515, 517 (6th Cir. 1976), the court stated in a footnote that "we do not consider that the second opinion of this court in Reid is controlling under the facts of the present case."
77. 516 F.2d 544, 550 (6th Cir. 1975).
79. The Supreme Court has granted certiorari in the Cummins case
work force have some kind of inherent right to be free from infringement of their employment schedule. One employee's day off on Saturday could be as important to him as to another employee who chooses not to work on that day because of his religious beliefs. The EEOC has attempted, in a somewhat less than satisfactory way, to answer this problem by equating failure to accommodate with discrimination. The EEOC ruled:

[W]hile a rule may apply equally to all employees, it may well have unequal impact on them. A rule which forces a person to choose between his religion and his job limits that person's exercise of his religion and is thereby discriminatory in its effect.\(^8\)

While this reflects the Supreme Court's decision in *Griggs*,\(^81\) the *Reid* court contends that *Griggs* should not be interpreted in this way.\(^82\) *Reid* seems to interpret reasonable accommodation to mean that the employer has a duty of accommodation to the point where any expense of accommodation, whether in financial or human expense, outweighs an effort by the employer to attempt to satisfy the employee's needs without causing discontent to others.

The burden of undue hardship is supposed to be on the employer, but in reality that burden is distributed among the other employees. A recent Sixth Circuit case said that administrative problems in reassigning employees is not an undue hardship. *Draper v. U.S. Pipe & Foundry Co.* [Draper]\(^83\) recognized that:

undue hardship is something greater than hardship . . . an employer does not sustain his burden of proof merely by showing that an accommodation would be bothersome to administer or disruptive of the operating routine. In addition, we are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted.\(^84\)

and presumably that Court will address this problem. 44 U.S.L.W. 3493 (Mar. 2, 1976).

\(^{80}\) 2 FAM EMPL. PRAC. CAS. at 516.
\(^{81}\) 401 U.S. 424 (1971).
\(^{82}\) We do not read *Griggs* as requiring the appellant, in order to accommodate Reid, to suffer a hardship. . . . [by] involuntarily assign[jing] other copyreaders who would have seniority over Reid, to substitute for him on Saturday, thereby creating havoc and serious morale problems among its employees.

\(^{83}\) 527 F.2d 515 (6th Cir. 1975).
\(^{84}\) Id. at 520.
Draper seems to indicate that an administrative accommodation is not an undue hardship. This language does not address the problem of financing an employee's religion as in the Hardison decision. However, Draper encourages "various methods of accommodation." This vague language does not clarify how far an employer must go to accommodate an employee. Yet it can be inferred that the Draper court would not preclude financial cost to the employer as being within the ambit of reasonable accommodation. Nor would this language preclude substantial shift changes which could cause hardships or inconvenience to other employees.\(^{85}\)

Reasonable accommodation should not be interpreted to require considerable financial expense to the employer. This standard, however, does not exclude any financial expense to accommodate the employee's beliefs. Financial expense, regardless of whether it is administrative or an actual outlay for overtime pay to a substitute employee, apparently will have to be incurred by the employer to satisfy the statute. One must ask how many "various methods" must be tried before the employer will be found to have attempted a reasonable accommodation. The expense of accommodation in terms of financial and human resources could become considerable when "various methods" must be tried. A possible solution could be a good faith standard interpreted with the statute. If the employer cannot, in good faith, accommodate the observant employee by shifting other employees into the Sabbatarian's schedule without causing discontent, then the employee cannot be reasonably accommodated. If the employee can be accommodated, in good faith, through administrative inconvenience, a minor financial outlay in terms of employment expense, with little or no employee grumbling, then an employer probably will not be able to successfully assert a defense of undue hardship.

**The Reasonable Accommodation Doctrine in Related Cases**

The doctrine of reasonable accommodation has recently been expanded into another area of employment relationships. In *Yott v. North American Rockwell Corp.* [*Yott*]\(^{86}\) the Ninth Circuit Court of Appeals ruled that the district court must determine whether a reasonable accommodation could be made to an employee who refused to pay union dues on religious grounds. Prior to the Ninth Circuit's ruling, the prevailing theory was that failure to pay union

---

85. Id. at 520-21.
86. 501 F.2d 398, 403 (9th Cir. 1974).
dues for religious reasons was grounds for discharge. The United States Supreme Court held solely on first amendment grounds that those who benefit from a union must provide the financial support required under the collective bargaining agreement, regardless of religious beliefs. The court in Yott, however, recognized that union security agreements had long been favored by Congress, and that Congress did not by enacting Title VII modify the congressional authority of the National Labor Relations Act or the Taft-Hartley Act on union security agreements. The Ninth Circuit acknowledged that it is unlikely that a reasonable accommodation could be made in this situation. It seems improbable that any court could find any form of accommodation which would be reasonable for both the employer and the union in these union security clause cases.

The EEOC has had opportunities to address the problem of employees wearing religious garb which does not conform to the standards of the employer. In one case, a registered nurse employed by a large private hospital was required by her religion to wear a scarf that covered her head beneath her scrub hat. She was transferred to a floor which required all nurses to wear the traditional nurses’ cap. The nurse resigned because her superiors refused to allow her to wear the religious headdress. The EEOC found that the hospital had constructively discharged her. The EEOC applied the reasonable accommodation standard and found that the hospital’s policy had a “harsher impact” on the nurse than on other employees solely because her religion is different from the majority’s religion. The hospital contended that sanitary requirements compelled it to adopt such policies, but no evidence was offered by the hospital to prove this. Presumably, however, an em-

88. Railway Employees’ Dept. v. Hanson, 351 U.S. 225 (1956), in which the Court held:
the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause does not violate either the First or Fifth Amendments.
Id. at 238. See also Cooper v. General Dynamics, 378 F. Supp. 1258 (N.D. Tex. 1974).
89. 501 F.2d at 404.
93. Id. at 4306. See also EEOC Dec. No. 71-2620 (1971), CCH Employment Pract. Guide ¶ 6283.
ployer could prove an undue hardship if safety or sanitary conditions were in fact adversely affected by an employee's religious practices, or if the employee's garb was so outrageous as to offend customers or fellow employees.

Courts have held that constructive discharge is within the meaning of the statutory language of refusal "to hire or discharge." The Fifth Circuit Court of Appeals recently held that an employer constructively discharged the plaintiff when she resigned her position as a teller after refusing to attend mandatory business meetings which began with a prayer. The court said that the employer has a duty to accommodate the individual's religious beliefs (she was an atheist) and that her resignation was the equivalent of a discharge:

[I]f the employer deliberately makes an employee's working condition so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct therein as if it had formally discharged the aggrieved employee.

Issues in this section outside of the actual Saturday employment circumstances raise fewer analytical problems for the courts. Compelling an employer to accommodate an individual's religious belief by allowing the employee to wear a particular garment

---


Because undue hardship has been a difficult burden to sustain, few cases have upheld the employer. In addition to the safety and sanitary problem discussed in the text, undue hardship can also be demonstrated when the total employment force is too small to require other employees to substitute and it would be impractical to require the employer to hire additional employees to cover for the religious observer. 2 FAIR EMPL. PRAC. CAS. 227, No. 7099 (August 27, 1969). Undue hardship has been proved when the job required a specialist and the employee was required to be available seven days a week; EEOC Dec. No. 70-773 (1970) CCH Employment Pract. Guide ¶ 6154. When the government was the employer in a rural post office, the court held that accommodation to a Saturday Sabbatarian would inconvenience other workers and would frustrate the program of using part-time help at the discretion of the postmaster for peak business hours, Johnson v. United States Postal Service, 364 F. Supp. 37 (N.D. Fla. 1973), aff'd 497 F.2d 128 (5th Cir. 1974). But merely forcing employees to substitute during the weekend hours for the Saturday Sabbatarian does not demonstrate an undue hardship on that employer's business, Ward v. Allegheny Ludlum Steel Corp., 397 F. Supp. 375 (W.D. Pa. 1975).


96. Young v. Southwestern Savings & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975).

97. Id. at 144.

98. See note 92 and accompanying text, supra.
or making the devotional at a meeting optional for the employees raises few problems of employer expense or employee morale. Contrary to what one employer has said, Saturday worship is not a "deviate religious practice." Yet a religious Sabbath observed on a Tuesday or Wednesday certainly may be considered outside the norm. The courts have not yet addressed the problem of the employer's duty to an employee whose Sabbath occurs on a day other than Saturday (or Sunday). It is questionable whether an employer should be required to accommodate his schedule to employees who observe their religion on various days of the week. If accommodation in this situation would result in serious financial burden to the employer, the employer should be under no requirement to make such accommodation.

THE COLLECTIVE BARGAINING AGREEMENT AND THE ISSUES RAISED

The collective bargaining agreement in religious discrimination cases has become a device asserted by the employer to demonstrate that it does not have the contractual flexibility required to accommodate the employee. The Eighth Circuit Court of Appeals in Hardison expressly declined to rule on the proper relationship between the bargaining agreement and the requirement of reasonable accommodation under the statute and regulation. It would seem, however, that there must be a certain degree of flexibility in any collective bargaining agreement to reasonably accommodate an employee's religious beliefs. The employer should not be permitted to hide behind the terms of a particular seniority clause in the contract. If Saturday work inevitably falls to the employees with lowest seniority, such seniority provisions may effectively preclude the employer from ever hiring Seventh Day Adventists, Orthodox Jews, members of the Worldwide Church of God, and any others whose religious convictions preclude work from sundown on Friday until sundown on Saturday. The Eighth Circuit Court of Appeals contends that "[i]t is no answer to such a person, or to the statute itself, that if he compromises his religious beliefs for

99. 509 F.2d 140 (5th Cir. 1975).
101. 527 F.2d 33 (8th Cir. 1975).
102. The court in Hardison commented in dicta that it would seem that a collective bargaining agreement, the seniority provisions of which preclude any reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act.

Id. at 41 (Emphasis in original).
a time he may develop enough seniority to practice them again.\textsuperscript{103}

Of the few cases that have specifically dealt with the balancing of interests problem, only one has upheld the provisions of the contract and denied that the worker has a right to a transfer to accommodate his religious beliefs without loss of seniority.\textsuperscript{104} One court, however, directed that an article in a collective bargaining agreement which would have required an employee to work occasional Saturdays in violation of his religious beliefs not be applied to such employee.\textsuperscript{105} The EEOC has determined that:

[If 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.\textsuperscript{106}]

The EEOC has applied the Supreme Court's standard enunciated in \textit{Griggs}\textsuperscript{107} to the collective bargaining process itself. In one recent case the court indicated that the employee was saved by a flexibility clause in the bargaining agreement which stated that "seniority cannot be the sole determining factor in making shift assignments."\textsuperscript{108} However that case stated in dicta that the existence of a seniority agreement might limit the freedom of an employer to affect the necessary reasonable accommodation in some cases.\textsuperscript{109} This language must be scrutinized closely in light of the EEOC pronouncements and other appellate holdings.\textsuperscript{110} It is unlikely that the employer and union can bargain away an individual's religious rights even though a particular agreement may affect two

\textsuperscript{103} Id. at 41 fn. 12.
\textsuperscript{104} Dawson v. Mizell, 325 F. Supp. 511 (E.D. Va. 1971). In Dawson, the court stated that "seniority rights contained in the agreement are of the utmost importance to the employees." Id. at 514. The reassignment of the plaintiff would be "violative of the spirit as well as the substance of the agreement under which the post office employees work." Id. at 514. The court concluded that "religious discrimination should not be equated with failure to accommodate." Id. at 514. However, regardless of whether failure to accommodate should be synonymous with discrimination, courts have consistently implied that it is in order to invoke Title VII. See generally dissent in Cummins, supra note 46.
\textsuperscript{105} Drum v. Ware, 7 Fair Empl. Prac. Cas. 269 (W.D.N.C. 1974).
\textsuperscript{107} 401 U.S. 424 (1971).
\textsuperscript{109} Id.
\textsuperscript{110} Robinson v. Lorillard Co., 444 F.2d 791, 800 (4th Cir. 1971).
thousand employees and the problem of accommodation would be bothersome only to one.\textsuperscript{111}

It is clear that courts will not be impressed with an employer's argument that the collective bargaining agreement with its seniority clause prevents the employer from reasonably accommodating the employee's religious beliefs. Collective bargaining agreements, even though their function should serve as a uniform contract covering all employees, must be read in a flexible manner in order to accommodate the Saturday Sabbatarian.

A bona fide seniority system is valid only if it is not the "result of an intention to discriminate because of race, color, religion, sex, or national origin."\textsuperscript{112} However, this section of the statute states that there must be an "intention" to discriminate, whereas the section addressing discharged employees on the above mentioned grounds omits the word "intention."\textsuperscript{113} As discussed above, an intent to discriminate need not be proved to compel an employer to reasonably accommodate the employee's religious beliefs. It is only necessary to show that employment practices are discriminatory in effect. Even though the statutory language seems to require an intentional discrimination in the seniority or merit system itself, decisions discussed here indicate that these agreements must be flexible to the extent that employers will still have to demonstrate an undue hardship as a defense to reasonable accommodation. Courts however should give the bargaining agreement more weight as a defense of undue hardship than administrative problems.\textsuperscript{114} Protected rights, however, cannot be bargained away in the agreements even if there was not an intent to do so in the drafting of the provisions of the agreement.\textsuperscript{115} As long as religious

\begin{itemize}
\item \textsuperscript{111} We recognize Lorillard's point that changing the seniority system may frustrate the expectations of employees who have established departmental seniority but not employment seniority in the preferable departments. However, Title VII guarantees that all employees are entitled to the same expectations regardless of 'race, color, religion, sex, or national origin.' Where some employees now have lower expectations than their co-workers because of the influence of one of these forbidden factors, they are entitled to have their expectations raised even if the expectations of others must be lowered in order to achieve the statutorily mandated equality of opportunity.\textit{Id.} at 800. \textit{See also} United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301 (8th Cir. 1972).
\item \textsuperscript{112} 42 U.S.C.A. § 2000e-2 (h) (1974).
\item \textsuperscript{113} 42 U.S.C.A. § 2000e-2 (a) (1) (1974).
\item \textsuperscript{114} \textit{See} note 20, \textit{supra}, where Senator Humphrey remarked that seniority systems should be upheld unless there was an intentional scheme in the system itself to discriminate.
\item \textsuperscript{115} United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301, 309
\end{itemize}
discrimination cases continue to equate failure to accommodate with
discrimination, courts will probably continue to abandon inflexible
clauses of the collective bargaining agreement in order to compel
employers to accommodate the employee's religious beliefs.

CONCLUSION

Recent religious discrimination cases under Title VII have held
that an employee's right to practice his religion will be protected
to a large extent even if protecting that right causes inconvenience
or expense to others. Clearly this was not the case before the enact-
ment of Title VII. 116 However the prevailing view must be re-
viewed and perhaps modified. 117 Should employers be compelled
to try "various methods" in an attempt to accommodate the relig-
ious beliefs of the employee when this causes a financial burden
on the employer? Should an employee with seniority be compelled
to cover for the religious observer if he does not so choose?

The analytical problem of the religious discrimination cases
stems from the fact that failure to accommodate has been equated
with discrimination. Courts must begin to ask where the line will
be drawn in a society which cannot possibly yield to every individ-
ual's idiosyncracies. Religious discrimination in employment must
end. Title VII mandates that it will end. However, the present
reasonable accommodation standard should be modified or reinter-
preted so that it will not become a device which compels discrimina-
tion of one kind to end another kind.

John H. Bernstein—'77

---

116. See Otten v. Baltimore & O.R.R. Co., 205 F.2d 58, 61 (2d Cir. 1953),
where Judge Learned Hand wrote:

The First Amendment protects one against action by the govern-
ment, though even then, not in all circumstances; but it gives no
one the right to insist that in the pursuit of their own interests,
others must conform their conduct to his own religious necessities.
A man might find it incompatible with his conscience to live in
a city in which open saloons were licensed; yet he would have no
costitutional right to insist that the saloons must be closed. He
would have to leave the city or put up with the iniquitous dens,
no matter what economic loss his change of domicile entailed. We
must accommodate our idiosyncracies, religious as well as secular,
to the compromises necessary in communal life.

117. The U.S. Supreme Court will review the interpretation of 42 U.S.C.
§ 2000e(j) when it considers the Sixth Circuit's decision in Cummins.