5-1-1988

Religious Discrimination in the Workplace: Who's Accommodating Who

Thomas D. Brierton
University of the Pacific, tbrierton@pacific.edu

Religious Discrimination in the Workplace: Who's Accommodating Who?

By Thomas D. Brierton

Mr. Brierton is an Assistant Professor with the College of Business at Northern Illinois University.

The Civil Rights Act of 1964 is a comprehensive federal statute prohibiting discrimination in housing, public accommodations, education, and employment. Title VII of the Act specifically regulates unlawful employment discrimination, covering any employer or labor union engaged in an activity that affects commerce. Commerce has been broadly defined as traffic, trade, commerce, transportation, transmission, or communication among several states, between a state and any location outside of that state, within the District of Columbia or a possession of the United States, or between points in the same state but through a point outside of that state. Congress provided the courts with the means to extend jurisdiction to its fullest. Interstate and intrastate transactions or activities fall under the coverage of Title VII. In 1972, the Act was amended to include state and local government employees. Title VII has a broader reach than both the Fair Labor Standards Act and the Taft-Hartley Act.

Despite all the controversy surrounding the enactment of Title VII, the fundamental purpose is discernible from the Congressional record. It was the intention of Congress to prohibit any employment practices that discriminate against any individual because of race, color, religion, sex, or national origin.[1]

Section 701(b) defines employer as a person engaged in an industry affecting commerce and who employs fifteen or more employees. Section 701(a) states that a person may be one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.[2] Generally, the provisions of Title VII apply to employers, employment agencies, and labor unions.

Employment discrimination involving religion is used less than other Title VII categories, but it is nonetheless important to individuals wishing to practice their beliefs. The United States Constitution grants the right to freely exercise one's religion. An individual's religious observances and practices may interfere with his employer's policies. Balancing the employee's right to practice a sincere religious belief and the employer's loyalty to his business interests and other employ-

[1] *Fekito v. Standard Brands, Inc.*, 424 F2d 331 (CA-3, 1970), on remand 353 FSupp 1177.

[2] 42 USC 2000e(a).

ees is clearly the responsibility of the courts.

Title VII prohibits employers from discriminating against prospective or current employees on the basis of religion in setting compensation, terms, conditions, or privileges of employment.[3]

In 1966, the Equal Employment Opportunity Commission (EEOC) promulgated the Guidelines on Discrimination Because of Religion. The EEOC amended the guidelines in 1967, requiring all covered employers to accommodate employees' religious beliefs and practices unless it would create "undue hardship" on the business.

In 1972, the Act was amended to include Section 2000e(j), which required an employer to reasonably accommodate an employee's religious observances or practices. In some cases, employers may have to find a substitute employee, use flexible scheduling, allow make-up times for lost hours, or allow employees to switch job assignments.[4] Congress affirmed the duty to accommodate by enacting Section 701(j), which established a definition of religion for Title VII purposes.

To establish a prima facie case under Title VII, a plaintiff employee must prove the following: (1) a bona fide religious belief that conflicts with an employment obligation; (2) that the employer received notice of the beliefs and the conflict; (3) that the discharge, discipline, or other employment condition complained of actually occurred.[5] Once the employee has met his burden, the burden shifts to the employer to prove a good faith effort to reasonably accommodate the employee's religious beliefs or that no accommodation reasonably could be made without undue hardship.

Recent court cases, however, have curtailed the employee's right to freely exercise his religion. From *Dewey v. Reynolds Metals Co.*[6] to the *Ansonia Board of Education vs. Ronald Philbrook 1986*[7], the judiciary has severely limited an employee's right to practice his religion.

This article will take a careful look at the Supreme Court's recent religious discrimination case ruling in *Ansonia Board of Education vs. Philbrook.*[8] By comparing the *Ansonia* case with the Court's original religious discrimination opinion, *TWA vs. Hardison*, this article will summarize the court's present attitude toward religious accommodation. Next, this article will present the theories upon which the *Ansonia* case was founded and relate these to the statutory intent. Finally, this article will expose the fallacy of accommodation and present an alternative perspective to the employer's obligation to accommodate.

Hardison to Ansonia

Congress amended the 1964 Act in 1972 for clarification. The Supreme Court itself was divided on the proper intepretation of the accommodation issue before and after the amendment was passed.[9] The situation was ripe for resolve when the Court agreed to hear *Trans World Airlines v. Hardison.*[10]

The Court introduced the issue with these remarks: "In brief, the employer's statutory obligation to make reasonable accommodation for the 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 the Commission guidelines."

The Court in *Hardison* sought primarily to survey the boundaries of the employer's obligation. Nine years later, in

[3] *Ibid.*

[4] 29 CFR 1605.2(d)(1)(iii).

[5] *Brener v. Diagnostic Center Hospital*, 671 F2d 141 (CA-5, 1982), 28 EPD ¶ 32,550.

[6] 429 F2d 324 (CA-6, 1970), 2 EPD ¶ 10,276.

[7] 107 SCt 367 (1986), 41 EPD ¶ 36,565.

[8] *Ibid.*

[9] *Ibid.*, see note 6.

[10] 432 US 63 (1977), 14 EPD ¶ 7620.

Ansonia Board of Education v. Ronald Philbrook,[11] the Court once again considered the issue of reasonable accommodation. Chief Justice Rehnquist, author of the opinion, stated the issue as follows: "Specifically, we are asked to address whether the Court of Appeals erred in finding that Philbrook established a prima facie case of religious discrimination and in opining that an employer must accept the employee's preferred accommodation absent proof of undue hardship."

Hardison, an employee of TWA, was hired to work as a clerk in the Stores Department at its Kansas City base. The Stores Department was required to operate 24 hours a day, 365 days per year. Hardison was subject to a collective bargaining agreement between TWA and the International Association of Machinists and Aerospace Workers. The most senior employees had first choice of job and shift assignments.

The *Ansonia Board of Education* case involved a collective bargaining agreement between the school board and the teachers' union. Respondent Philbrook, a teacher, was allowed three days annually for observance of religious holidays. Philbrook repeatedly asked the school board to permit leave for religious observance on personal leave days or to allow him to pay the cost of a substitute and receive full pay for additional days off for religious observances. The school board rejected these alternatives, and Philbrook took unauthorized leave without pay. Philbrook was not discharged but lost wages for those days absent.

Both cases were complicated by collective bargaining agreements limiting possible alternatives. Hardison, while working the 11 p.m. to 7 a.m. shift, had sufficient seniority to avoid working on his Sabbath, but a subsequent transfer to another building put his name at the botton of the seniority list. When Hardison failed to report for work he was discharged. Absent from the Court's analysis is any opinion as to the source of Title VII prohibition on religious discrimination or any consideration of the legislative intent of Title VII.

Source of Religious Accommodation

Freedom to exercise one's religion is one of the most basic liberties set forth in the United States Constitution. The proponents of the Act realized the historical significance that religion has played in the development of this nation. The prohibition of religious discrimination in Title VII is not a restatement of the First and Fourteenth Amendments, but it is in conjunction with the Constitution. The Act is based upon Congress' power to regulate commerce, Article I, Section 8.

The courts have consistently referred to First Amendment cases to define religion and the extent of religious accommodation. In *Cummins v. Parker Seal Co.,*[12] a case affirming the constitutionality of religious accommodation, the court quoted Senator Randolph, who proposed the amendment that became 2000e(j).

Mr. Randolph said: "Mr. President, freedom from religious discrimination has been considered by most Americans from the days of the Founding Fathers as one of the fundamental rights of the people of the United States." Senator Randolph believed that the courts had failed to protect Sabbath observers from employers who refuse to accommodate, even though religious observance and belief were guaranteed by the 1964 Act and for public employees by the free exercise of religion clause in the Constitution.[13]

The Equal Employment Opportunity Commission has consistently recognized the Act's protections as founded upon the Constitution. Thus, Title VII's reasonable accommodation clause is an extension of

[11] *Ibid.*, see note 7.

[12] 433 US 903 (1977), 14 EPD ¶ 7635.

[13] 118 *Cong. Rec.* 705-06 (1972). *McCollum v. Board of Educ.*, 333 US 203 (1948).

the free exercise clause to the workplace when employment duties conflict.

Collective Bargaining versus Free Exercise of Religion

The Court in *Ansonia* not only affirmed *Hardison* but also further limited the employee's Title VII rights. The Court failed to recognize a loss of pay as a discriminatory tactic and allowed the employer to dictate reasonable accommodation.

Since *Hardison*, the Court has given priority to seniority systems over religious accommodation. The Court substantiated this position by stating: "Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances." [14]

In both cases, the court refused to disturb the collective bargaining agreement. Prior to the enactment of the National Labor Relations Act in 1935, employees had only a limited right to unionize. The NLRA was an attempt by Congress to protect employees from the powerful bargaining position of the employer. Federal labor law has enabled the less powerful employee to walk on equal ground when negotiating employment terms and conditions with the employer through concerted activities.

Similar to the relationship between the employer and union is the relationship between the union and the religious employee. Many religious employees do not join a union because it is against the tenets of their faith. Even though the collective bargaining agent represents the interests of all employees in the bargaining unit, religious employees are not receiving equal representation of their views for inclusion in the collective bargaining agreement. In *Ansonia*, the respondent Philbrook did not have enough influence with the union to propose a change in the collective bargaining agreement. Thus, the employer can vicariously discriminate against the religious employee through the collective bargaining agent.

Most religious discrimination cases have required the courts to balance the employee's right to freely contract against the plaintiff's free exercise right. Both are constitutionally protected in the workplace, subject to some limitations. The courts have, on various occasions, considered religious accommodation within the context of the rights of the other employees to be treated similarly.[15]

Thinly veiled, but evident in *Hardison* and *Ansonia*, is the notion that employees might consider a reformation of the collective bargaining agreement extremely unfair. The Court stated in *Hardison*: "The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin. This is true regardless of whether the discrimination is directed against majorities or minorities." [16]

The Court, instead of analyzing the accommodation of the employer, considered only the contract provisions that were not desirable to the employee attempting to exercise his religion. Examples of contract provisions that attempt to protect the religious employee from discrimination are employee shift selection,

[14] *Ibid.*, at note 10.

[15] "Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement since Trans World Airlines v. Hardison," 53 *Fordham Law Review* 839 (1985).

[16] *Ibid.*, at note 10.

voluntary assignment swapping, and personal days off.[17]

Courts that accentuate the fairness of the accommodation in relation to the other employees impose on the aggrieved employee an obligation to cooperate in accepting the employer's accommodation. Some courts have found an employer need not accommodate if co-workers have complained.[18]

Establishment versus Freedom to Exercise One's Religion

A second explanation for the *Hardison* and *Ansonia* decisions is predicated on the wall of separation concept. Thomas Jefferson first used the term to explain the relationship between church and state.[19] If the Court were to require the employer to accommodate the employee's religious needs at any cost, a clear preference for one religion might be established. Therefore, the Court in *Hardison* held that accommodation need not exceed a de minimis cost, thus avoiding constitutional problems and allowing only incidental benefits to accrue to religion.

The conflict between the free exercise clause and the establishment clause has been accurately explained by Justice Rehnquist in his dissenting opinion in *Thomas v. Review Board of Indiana Employment Security Division.*[20] "The Court correctly acknowledges that there is a tension between the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution."

Justice Rehnquist states in his dissent that the causes of the tension are threefold: the growth of social welfare legislation; incorporation of the First Amendment into the Fourteenth Amendment; and the overly expansive interpretation of both clauses. To remedy the conflict, Justice Rehnquist would reinterpret the Establishment Clause and the Free Exercise Clause.

Justice Rehnquist proposes to abandon the three-part test of *Lemon v. Kurtzman*[21] and adopt Justice Stewart's dissent in *Abington School District v. Sehempp*[22] to determine the reach of the Establishment Clause. Justice Rehnquist explained: "Conversely, governmental assistance which does not have the effect of 'inducing' religious choice does not impermissibly involve the government in religious choice and therefore does not violate the Establishment Clause of the First Amendment."

Furthermore, Justice Rehnquist advocates the application of *Braunfeld v. Brown*[23] to properly interpret the Free Exercise Clause. *Braunfeld* established that the state may impose an indirect burden upon the free exercise of religion if the purpose and effect of the legislation advanced a secular goal and no other alternatives were available. Justice Rehnquist states in his dissent: "Chief Justice Warren explained that the statute did not make unlawful any religious practices of appellants; it simply made the practice of their religious beliefs more expensive."

Assimilating Justice Stewart's dissent in *Abington* and Justice Rehnquist's dissent in *Thomas,* the religion clauses become strained. Application of the free exercise clause according to Justice Stewart's dissent expands the government's power to assist religion, while Justice Rehnquist's dissent in *Thomas* would make it burdensome for an individual to practice his religion.

In the *Ansonia School Board* case,[24] Chief Justice Rehnquist follows his dissent in *Thomas* by balancing the establishment clause against the free exercise

[17] *McGinnis v. U.S. Postal Service,* 512 F Supp 517.

[18] *Ibid.,* at note 5.

[19] H.A. Washington, Ed., *The Works of Thomas Jefferson,* Vol. 8, p. 113 (1884).

[20] 450 US 707, 25 EPD ¶ 31,662.

[21] 403 US 602 (1971).

[22] 374 US 203 (1963).

[23] 366 US 599 (1961).

[24] *Ibid.,* at note 7.

clause to the detriment of the religious employee. Chief Justice Rehnquist, writing for the majority, states: "The provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work." The Court fails to consider the obligation of the employer to reasonably accommodate the employee's religious needs.

Interpreting Reasonable Accommodation

The benefits of *Ansonia* will accrue to the employer, since his obligation to accommodate has been severely curtailed. The Court stated the employer's responsibility as follows: "We accordingly hold that an employer has met its obligation under 701(j) when it demonstrates that it has offered a reasonable accommodation to the employee." [25]

The Court has reinstated its fears of establishment clause problems, requiring the employer to accommodate as he sees fit and not in derogation of a collective bargaining agreement. The problem is that this interpretation is not in accordance with the language of the statute. The Court fails to give the full force and effect to the statute but falls short of declaring the statute unconstitutional. Instead of considering the practical costs to the employer, the Court has foreclosed accommodation that would provide a remedy for the aggrieved employee. Such an interpretation cuts off the employee's free exercise rights and is not acceptable in the context of the statutory language.

The Court has thrust the reasonable accommodation issue into an analysis that attempts to determine if other employees are treated unfairly and thus discriminated against. Such consideration tends to favor the group and the employer. Approaching the problem from the point of view of the group will almost always provide an inequity. If provision has been made in the collective bargaining agreement for the religious observer, this approach usually labels the accommodation as reasonable.

The irony is that the major purpose of the Act was to require the employer to treat employees as individuals. Permitting employers to contract away individuality is contrary to the statute's intent and purpose. The Act was intended to protect the unpopular rights of the individual against the overbearing force of the majority.[26]

The Court in *Hardison* analyzed carefully the EEOC guidelines to determine the boundaries of accommodation. In 1966, the EEOC promulgated guidelines requiring an employer "to accommodate to the reasonable religious needs of employees." In 1967, the EEOC amended its guidelines "to require reasonable accommodation to the religious needs of employees and prospective employees where such accommodation can be made without undue hardship on the conduct of the employer's business." [27] The EEOC guidelines place the responsibility on the employer to accommodate. The Commission has interpreted the statute broadly, requiring the employer to make reasonable efforts to accommodate.[28] The Court in *Ansonia* failed to give deference to the EEOC guidelines.

The Court's decision in *Ansonia* is not consistent with the statutory language. Under Title VII, discrimination with respect to any "terms, conditions, or privileges of employment" is an unlawful practice.

The plain meaning of the statute prohibits any discrimination, however slight, based upon the individual's protected status. In *Ansonia* the respondent Philbrook

[25] *Ibid.*, at note 7.

[26] 29 CFR 1605.1 (1967).

[27] 29 CFR 1605.1(b) (1980).

[28] 29 CFR 1605.2 (1980).

was allowed three days with pay for religious observance. The tenets of Philbrook's faith required him to be absent more than the three days allowed each year. Philbrook was not allowed to use personal leave days for his religious holidays, even though other employees could have used personal leave days for almost any other reason except religious observance. Philbrook attempted to reach a compromise with the school board by suggesting that personal leave days include religious holidays or by paying the salary of substitute teachers for the days he was gone. Both alternatives were rejected by the school board, which was upheld by the court. Philbrook was clearly denied a privilege of employment as a result of practicing the tenets of his religion.

Chief Justice Rehnquist adopted the language of *Nashville Gas Co. v. Satty,*[29] in *Ansonia,* contrary to the statutory language of Title VII. Quoting from *Nashville Gas,* Chief Justice Rehnquist states: "Generally speaking, the direct effect of [unpaid leave] is merely a loss of income for the period the employee is not at work; such an exclusion has no effect upon other employment opportunities or job status."

Expanding Religion

The *Ansonia* decision is an illustration of how far astray the Court has gone in interpreting the reasonable accommodation clause of Title VII. The Court's decision to cut back on free exercise rights is not unexpected, considering the confusion surrounding the interpretation of the religion clauses. The confusion stems from an improper concept of religion. Congress failed to define religion in the original enactment of Title VII.[30] Not until the 1972 amendments did Congress attempt to set forth a definition.[31] The definition protects all aspects of religious observance and practice as well as belief. In the 1980 revisions of EEOC Guidelines on Discrimination, religion is defined as a moral or ethical belief as to what is right and wrong that is sincerely held with the strength of traditional religious views.[32] Interpreting religion expansively requires the Court to provide Title VII protection to individuals not originally intended.

The Court has always struggled with defining religion. Over the past one hundred years, the term religion has evolved to include not only traditional notions of religion but all other sincere belief systems.

In 1878, the Court defined religion involving the conviction of a Mormon for polygamy, stating: "The term religion has reference to one's views of his relations to his Creator. And the obligations they impose for reverence for His being and character and obedience of His will." [33]

Religion as defined up until 1940 involved the belief in a Creator who imposed certain obligations on a individual. After 1940, a string of conscientious objector cases came before the High Court. In the landmark case of the *United States v. Seeger*[34] the Court stated: "We believe that under this construction, the test of belief in relation to a Supreme Being is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."

Five years later, the Court affirmed *Seeger* in *Welsh v. United States.*[35] The *Welsh* case became the impetus for the EEOC Guidelines on Religion. However, not all courts have adopted an expanded definition of religion.[36] One Fifth Circuit case went so far as to hold that atheism was a religion.

---

[29] 434 US 136 (1977), 15 EPD ¶ 7948.

[30] Schlei and Grossman, *Employment and Discrimination Law,* 2d Ed. (ABA Section of Labor and Employment Law, 1983).

[31] Section 701(j).

[32] 29 CFR 1605 (1980).

[33] *Davis v. Beason,* 133 US 33, p. 341-42 (1890).

[34] 380 US 163 (1965).

[35] 398 US 333 (1970).

[36] *Yott v. North American Rockwell Corp.,* 502 F2d 398, EPD ¶ (CA-9, 1974).

The problem with classifying all sincere belief systems as religious is that it allows almost every employee to utilize Title VII when an employment conflict arises. Taking religion out of the context of a traditional orthodox view creates an immense potential for tension in the employment environment. Employers, as a result, are placed in the precarious position of attempting to reasonably accommodate an extremely wide variety of religious needs. In light of the probable disruption of the workplace, the courts have restricted free exercise.

In *Ansonia*, the Court bolstered the employer's right to be free of undue accommodation. Instead of balancing the employer's business interests against the employee's free exercise rights, the Court mandated the employer's right to dictate a reasonable accommodation.

Chief Justice Rehnquist writing for the majority states: "By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation." [37]

Conclusion

In an attempt to treat all employees fairly and not reform the collective bargaining agreement, the U.S. Supreme Court has interpreted reasonable accommodation to mean that the employer may choose how to accommodate the employee's religious needs. The majority of courts have been overly concerned about establishment and equal protection problems when deciding where to draw the line on reasonable accommodation. Allowing a preference to be given to religious employees provides only incidental benefits to a religion and is not an establishment. Aside from the constitutional considerations, few courts have attempted to balance the business interests of the employer against the religious needs of the employee.

Where the court requires the employer to substantiate the cost of accommodation, the employee has received a more equitable remedy. The term religion has evolved into a consideration of the individual's sincerety of belief. From this expanded definition came a multitude of employment litigation. Klu Klux Klan members, an atheist, and an individual believing Kozy Kitten cat food contributed to his well being have all sought to have their beliefs protected.[38] As a result of an overly broad definition of religion, the Supreme Court has eviscerated the employee's free exercise rights.

One solution to the problem is to redefine religion narrowly enough to limit the number of accommodations. Title VII's passage was promoted by blacks, Jewish groups, church organizations, and public interest groups. An attempt to correct past discrimination does not require an expansive definition of religion.

The court should return to *Davis v. Beason*[39] for a definition of religion. Harvard law professor Lawrence Tribe commenting on *Davis* wrote: "at least through the nineteenth century religion was given a fairly narrow reading ... religion referred to theistic notions respecting divinity, morality, and worship." [40]

The employer must be required to work with the employee to come to a reasonable accommodation. Employers should not be able to dictate the accommodation. If an employee presents a reasonable alternative, the employer should be required to consider the implementation of the accommodation. Allowing employers to contract away reasonable accommodation derogates the rationale supporting Title VII.

[The End]

[37] *Ibid.*, at note 7.

[38] Larson, *Employment Discrimination*, § 91.15 (1981).

[39] *Id.*, see note 33.

[40] Lawrence Tribe, *American Constitutional Law*, p. 826.