Religious Accommodations in the *Dobbs* Era

By Ann C. McGinley*

Abstract

Given the deep political divide in the U.S. and the emotional response to the abortion issue, workplaces may become hostile environments that harm workers based on their pro- or anti-abortion views or their out-of-work activism. Besides hostile environments, some workers may suffer workplace discipline based on their speech at work or refusals to engage in certain job requirements. Disciplining employees for engaging in workplace speech or refusal to perform parts of their jobs may violate workers' rights under Title VII of the Civil Rights Act of 1964, which requires that employers grant religious accommodations in the workplace if doing so does not create an undue hardship on the employer's business.

Plaintiffs increasingly sue their former employers for failure to grant them religious accommodations. There are four main types of religious accommodation: permission to wear clothing that otherwise would violate dress/appearance codes, scheduling changes that permit the employee to respect their sabbath, freedom to express religious views on controversial topics such as abortion, and excuse from job responsibilities that are offensive to the employee's religious views. The expression and job responsibilities cases, which are often brought by non-profit religious rights organizations, are part of a larger move for greater religious rights in the U.S.

---

* William S. Boyd Professor of Law, Boyd School of Law, University of Nevada, Las Vegas; J.D. 1982, University of Pennsylvania Law School. Thank you to Justin Iverson and Kathryn Hodges for their excellent research. Thank you to the staff of the Journal for their work on this article and to Nicole Porter for inviting me to participate and hosting the symposium. Thank you to the other participants in this symposium, who asked cogent questions about my paper. Finally, thank you to Professors Dallan Flake and Charlotte Garden for their helpful comments on an earlier draft of this paper. Any errors are my own.

The United States Supreme Court recently decided Groff v. DeJoy*, a scheduling religious accommodation case that ostensibly has nothing to do with abortion, but that may have a major effect on cases brought by religious employees whose opposition to abortion and contraception has interfered with their ability to do and/or keep their jobs.*

This article analyzes the four most common employee requests for accommodations and discusses the current law of religious accommodation as refined in Groff v. DeJoy. *It suggests ways to analyze free expression cases to protect all employees and the business, and it concludes that where employees request permission to avoid certain job duties, courts should adopt principles from the Americans with Disabilities Act (ADA). If courts do not adopt these suggestions, Congress should amend Title VII by explicitly defining the terms "reasonable accommodations" and "undue hardship" and by clarifying whether an employer can prove "undue hardship" by demonstrating that the job duty the religious employee seeks to avoid is an "essential function" of the particular job.*

I. INTRODUCTION

The decision in *Dobbs v. Jackson Women's Health Organization*,[1] has rocked the U.S. The first opinion to take back a well-established federal constitutional right, *Dobbs* overruled *Planned Parenthood of Southeastern Pennsylvania v. Casey*[2] and what was left of *Roe v. Wade*.[3] After *Dobbs,* there is no federal right to an abortion, and, as of now, the states have the right to determine whether to restrict or even ban access to abortions. Many states have responded in kind, severely restricting rights to an abortion under state law.[4] A few progressive

---

[1] 597 U.S. 215 (2022).

[2] 505 U.S. 833, 872 (1992) (upholding *Roe v. Wade*, but rejecting the trimester framework for the state's right to regulate abortion and requiring proof of those challenging the regulation that it posed an undue hardship).

[3] 410 U.S. 113, 153 (1973) (holding that women had a constitutional right to abortion and establishing a three-part framework based on the duration of the pregnancy and the viability of the fetus that governed the state's right to regulate abortions).

[4] *See Interactive Map: US Abortion Policies and Access After* Roe, GUTTMACHER INST. (Mar. 13, 2024), https://states.guttmacher.org/policies/abortion-policies;

states have solidified a right to abortion under the state's laws or constitution.[5]

As a practical matter, *Dobbs*, combined with new or revitalized state laws, has made it extremely difficult for many pregnant individuals to access an abortion because of the costs and difficulty involved in traveling long distances out of state to do so.[6] Moreover, due to legitimate fears of civil or criminal liability, doctors, pressured to ignore their professional judgment and training, refuse to perform abortions on children and teens, even those who are pregnant due to rape or incest.[7] Other medical personnel face the choice between giving women who have miscarriages necessary medical treatment and their own liberty.[8]

Even though *Dobbs* appeared to return to the states the right to regulate abortion, anti-abortion advocates have pressed for stricter federal laws that ban or severely restrict abortion nationwide. Besides lobbying state legislatures and the U.S. Congress, well-funded non-profit legal organizations that advocate religious liberty have filed lawsuits, including one challenging the authority of the Federal Drug Administration's twenty-three-year-old approval of mifepristone, an abortifacient used in conjunction with misoprostol, to terminate early pregnancies.[9]

Tracking the States Where Abortion is Now Banned, N.Y. TIMES https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html (Jan. 8, 2024, 9:30 AM ET).

[5] *See Tracking the States*, *supra* note 4.

[6] Deidre McPhillips, *Travel Time to Abortion Facilities Grew Significantly after Supreme Court Overturned* Roe v. Wade, CNN HEALTH (Nov. 1, 2022, 11:08 AM), https://www.cnn.com/2022/11/01/health/abortion-access-travel-time/index.html.

[7] *See* Shari Rudavsky & Rachel Fredette, *As Ohio Restricts Abortions, Ten-Year Old Girl Travels to Indiana for Procedure*, COLUMBUS DISPATCH, https://www.dispatch.com/story/news/2022/07/01/ohio-girl-10-among-patients-going-indiana-abortion/7788415001 (July 7, 2022, 12:01 PM ET).

[8] *See Many States Impose Jail Sentences for Doctors Who Perform Abortions Past Gestational Limits*, KFF (May 23, 2022), https://www.kff.org/womens-health-policy/slide/many-states-impose-a-jail-sentence-for-doctors-who-perform-abortions-past-gestational-limits.

[9] *See* All. for Hippocratic Med. v. U.S. FDA, No. 2:22-CV-223-Z, 2023 WL 2825871, at *21, 32 (N.D. Tex. Apr. 7, 2023) (granting a nationwide temporary injunction prohibiting the distribution and/or sale of mifepristone, an abortifacient that was approved by the FDA more than twenty years before; concluding that FDA had exceeded its authority in approving the drug). The FDA appealed the order to the Fifth Circuit Court of Appeals, which granted in

These rapid changes in individual rights have created an uproar. Perhaps more than any other decision in a lifetime, *Dobbs* has caused unrest among women, other potentially pregnant persons, and their allies, while simultaneously boosting the morale of anti-abortion activists. Given this division and intensity of opinion, it would be naïve to assume that workplaces would be immune from conflict resulting from *Dobbs*. And, although it is too early for most lawsuits to have made it through the courts since *Dobbs*, news articles and some older cases confirm that workers and workplaces are and will continue to be at the center of the debates over abortion.

In fact, plaintiffs increasingly sue their former employers for failure to grant them religious accommodations in the workplace under Title VII of the Civil Rights Act of 1964.[10] In many of these cases, the plaintiffs allege that, because of their opposition to abortion, they cannot do parts of their jobs or that they have a right

---

part and denied in part the FDA's motion for a stay and ordered an expedited appeal. *See* No. 23-10362; 2023 WL 2913725 (5th Cir. Apr. 12, 2023). The FDA then appealed the portion of the Fifth Circuit's order partially denying a stay to the U.S. Supreme Court, which, over a vigorous dissent by Justice Alito and a dissent by Justice Thomas, stayed the Fifth Circuit's ruling and the federal district court's injunction, and remanded the case to the Fifth Circuit to decide the merits of the case. *See* Danco Laboratories, Inc. v. All. for Hippocratic Med., 143 S. Ct. 1075 (Apr. 21, 2023). The Supreme Court's stay meant that mifepristone could continue to be sold and/or distributed awaiting the Fifth Circuit's ruling on the merits. On August 16, 2023, the Fifth Circuit panel upheld some of the plaintiffs' objections, namely, that the FDA should not have approved the mailing of the drug to patients or the ability of medical professionals who are not doctors to prescribe the pill. *See* Perry Stein, Ann E. Marimow & Rachel Roubein, *Appeals Court Embraces Abortion Pill Limits, Sets up Supreme Court Review*, WASH. POST, https://www.washingtonpost.com/politics/2023/08/16/abortion-pill-mifepristone-court-ruling-appeal (Aug. 16, 2023, 8:17 PM EDT).

[10] *See Charge Statistics (Charges Filed with the EEOC) FY 1997 through FY 2022*, EEOC, https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022 (last visited Mar. 18, 2024) (demonstrating that the number of charges brought alleging religious discrimination rose from 762 (2.1 percent) in 1997 to 3,516 (3.4 percent) in 2021; in 2022, the percentage of religious discrimination charges filed rose to over 18 percent of the overall charges filed, but the increase in charges filed for a failure to accommodate the charging parties' refusals to vaccinate during Covid likely distorted the numbers).

to engage in anti-abortion expression in work environments.[11] These cases, which are often brought by non-profit religious rights organizations, are part of a larger move for greater religious rights in the U.S. that has been ongoing for more than a decade but that has seemed to accelerate more recently.[12] The U.S. Supreme Court has

---

[11] In one case, a Christian physician's assistant sued her former employer for being fired for allegedly refusing to follow the hospital employer's policies on use of pronouns for transgender patients and for refusing to refer transgender patients for gender affirming surgery. *See* James Factora, *A Physician's Assistant Is Suing a Hospital to Avoid Using Trans People's Pronouns*, THEM (Oct. 19, 2022), https://www.them.us/story/nurse-religious-freedom-pronouns; *see also infra* notes 205–26 (discussing *Kloosterman* case).

[12] In *Employment Division Department of Human Resources v. Smith*, 494 U.S. 872, 907 (1990), the Court held that generally applicable laws not targeting specific religious practices do not violate the Free Exercise clause of the First Amendment. In 1993, Congress passed the federal Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993), to overturn *Smith*. *See* Erwin Chemerinsky, *Limiting Congress's Power to Protect Rights*, TRIAL, Jan. 1998, at 87 (Westlaw address 34-JAN JTLATRIAL 87). Subsequently, in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), the Supreme Court held that, when applied to the states, RFRA was unconstitutional. However, numerous states have enacted their own state Religious Freedom Restoration Acts. According to the Family Research Council, state RFRAs are intended to protect against "undue state and local government interference" in religious exercise. TRAVIS WEBER, FAM. RSCH. COUNCIL, ISSUE BRIEF IF15C02, STATE RELIGIOUS FREEDOM RESTORATION ACTS (RFRAS): WHAT ARE THEY AND WHY ARE THEY NEEDED? 2 (2015), https://downloads.frc.org/EF/EF15C119.pdf. Standard state RFRAs contain five-part tests: (1) A religious belief; (2) the religious belief must be sincere; and (3) the religious belief has been substantially burdened by the government action in question. *Id.* at 2. The government must then prove: (1) it has a compelling interest in burdening religious practice; and (2) it has only burdened the practice in the least restrictive way possible. Approximately twenty states have enacted state RFRAs. *Id.* Most are modeled after federal law, but some have been written to be broader and have faced criticism. 13A SHARON P. STILLER, NEW YORK PRACTICE SERIES, EMPLOYMENT LAW IN NEW YORK § 3:83 (2d ed. Westlaw) (database updated Oct. 2022). While at the time that *TWA v. Hardison* was decided, there could have been concern about whether the religious accommodations requirement of Title VII, if interpreted broadly, violated the Establishment Clause, the Supreme Court has subsequently changed the test for evaluating possible Establishment Clause arguments; the new test looks at a historical context and permits more religious expression. Thus, the Court today seems less concerned that the granting of religious accommodations will possibly cause an Establishment Clause violation. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 532–33 (2022) (holding the Free

been much more friendly recently to the arguments of an individual's religious rights and less protective of rights granted by the Establishment Clause of the First Amendment.[13]

Not coincidentally, the United States Supreme Court recently decided *Groff v. DeJoy*,[14] a religious accommodation case that ostensibly has nothing to do with abortion, but that may have a major effect on cases brought by religious employees whose opposition to abortion has interfered with their ability to do and/or keep their jobs.[15]

Exercise and Free Speech clauses of the First Amendment protect an individual engaging in a personal religious observance from government suppression where football coach knelt and prayed on the football field of a public school after games, often with students; Establishment Clause does not require school to prevent coach's prayers because no evidence students who prayed were coerced); *see also* Transcript of Oral Argument at 20–22, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174).

[13] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014) (holding that the Affordable Care Act's mandate that for-profit companies offer insurance that pays for employees' contraceptives violated the owners' religious rights); *Kennedy*, 597 U.S. at 532–33; *see also* Leslie C. Griffin, *What Did Those Sixteen Justices Say?* 58 WILLAMETTE L. REV. 163, 164–71 (2022) (articulating the difference that having seven Catholic justices on the current Court has made and explaining how religious rights have taken precedence over other rights); Leslie C. Griffin, *Goodbye to the Establishment Clause*, VERDICT (June 28, 2022), https://verdict.justia.com/2022/06/28/goodbye-to-the-establishment-clause; 303 Creative LLC v. Elenis, 600 U.S. 579, 588–89 (2023) (enforcement of Colorado anti-discrimination statute that requires website creators to treat all customers, including those creating wedding invitations for an LGBTQ wedding, would violate website creators' right to free speech under the Free Speech Clause of the First Amendment to the U.S. Constitution); Marcia L. McCormick, Dobbs *and Exit in Antidiscrimination Law*, 27 EMP. RTS. & EMP. POL'Y J. 217 (2024).

[14] Groff v. DeJoy, 600 U.S. 447 (2023).

[15] Of course, pro-abortion employees may also face disciplinary action from employers, but although that pro-abortion speech may result from religious conviction, often it does not and will therefore not enjoy the same protections in the private workplace. It would be a shame to create total bans on discussions of this important issue in workplaces. Workplaces, according to Professor Cynthia Estlund, are places that should strengthen democracy because of close working relationships among people of different races, religions, etc. *See generally* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003). That is, although we are often segregated as a nation from others who are unlike us in many ways, workplaces bring together people from different races, genders, religions, and classes and provide an opportunity to hear another person's points of view. In essence, workplaces can be marketplaces for diverse and shared ideas.

Given the deep political divide that has arisen in the U.S. and the emotional response to the abortion issue, workplaces may become hostile environments that harm workers based on their pro- or anti-abortion views or their out-of-work activism. Besides hostile environments, some workers may suffer workplace discipline based on their speech at work or refusals to engage in certain job requirements. Disciplining employees for engaging in workplace speech or refusal to perform parts of their jobs may violate some workers' rights under Title VII, which prohibits discrimination based on religion.

Private[16] employers have a legitimate interest in controlling the workplace environment so that workers focus on work rather than on the debates surrounding out-of-work subjects, but employees may have at least a limited right to speak their minds and to refuse to do objectionable work tasks, especially when employee refusals are linked to religious beliefs or practices.[17] Under Title VII, employers must not discriminate against employees based on their religion, and employers must grant reasonable accommodations to employees' religious beliefs and practices unless doing so would present an undue hardship to the conduct of the employer's business. Employers also have an obligation to protect employees from harassment based on their identities, membership in a protected class, and their engagement in protected rights. These obligations can create significant conflicts when a religious employee who opposes abortion and who believes that they must spread the word about abortion harasses an employee for her choice to have an abortion. If tolerated by an employer, such behavior may be illegal gender-based harassment under the Pregnancy Discrimination Act, a subpart of Title VII of the 1964 Civil Rights Act.[18]

This is the first article to discuss in detail real and potential problems created by *Dobbs* regarding religious accommodation claims

---

[16] I am limiting the discussion here to religious accommodations under Title VII and am not discussing the constitutional concerns when public employers deny workers' speech.

[17] There are also rights under section 7 of the National Labor Relations Act that grant employees, unionized or not, the right to concerted action. For a discussion of section 7 rights and the potential conflict when the speech turns into harassment, see Ann C. McGinley & Ryan P. McGinley-Stempel, *Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media*, 30 HOFSTRA LAB. & EMP. L.J. 75 (2012).

[18] 42 U.S.C. § 2000e(k).

made by workers. It focuses on workers who engage in religious expression or who refuse to perform portions of their jobs due to religious objections, but it also discusses other types of religious accommodations. Generally, there are four common types of religious accommodation requests: Type I are requests for an exception from portions of dress and appearance codes; such exemptions would allow the religious employee to wear, for example, a beard (Muslim man), a yarmulke (Jewish man), or a hijab (Muslim woman). Type II are requests for special work scheduling to allow the employee to honor the sabbath. Type III involve requests to engage in religious expression at work through speech or wearing certain logos, on clothing. Type IV requests ask the employer to allow the employee to abstain from doing parts of the employee's job that are antithetical to the employee's religious beliefs.

Part II.A. analyzes these four most common employee requests for accommodations (dress codes, scheduling, expression, and job tasks), two of which—dress code and scheduling accommodations—have less relevance to the topic of abortion. It also discusses the current law of religious accommodation as refined in the recent United States Supreme Court case *Groff v. DeJoy*, a Type II scheduling accommodation case.[19] Part II.B. focuses on a third type of accommodation for abortion-related employee expression at work and the potential conflicts that may arise among employees as a result. Part II.C. analyzes a fourth type of requested accommodations: recent lawsuits brought by employees who have sought accommodation for their refusal to perform portions of their jobs that they find religiously objectionable.

Part III discusses how Supreme Court jurisprudence in scheduling accommodation cases should be adapted when there are Types III (expression) and IV (job duties) accommodation requests and suggests adoption by the courts of certain principles from the jurisprudence of the Americans with Disabilities Act (ADA) to decide these cases. If courts do not adopt these suggestions, this Part urges Congress to amend Title VII by explicitly defining the terms "reasonable accommodations" and "undue hardship" and by clarifying whether an employer can prove "undue hardship" by demonstrating that the job duty the religious employee seeks to avoid is an "essential function" of the particular job.

---

[19] *Groff*, 600 U.S. at 468–71.

The article concludes that *Dobbs* has created and will continue to create issues for workplaces, that if not understood and carefully managed can lead to more conflict in workplaces as well as hostile work environments and discrimination. Courts need to acknowledge the different types of accommodation requests and adapt the law to fit the situation before them. The EEOC should clarify the law with reference to Types III and IV accommodation requests, which differ significantly from Types I and II accommodations. In the absence of this proposed executive action and judicial compliance, Congress should consider amending the statute.

Before moving to Part II, clarification is necessary. When attributing to *Dobbs* the likelihood of conflict at work, I am not saying that the *Dobbs* decision itself has created the conflict. In other words, if *Dobbs* were overruled tomorrow, the conflict would not automatically resolve itself. Rather, my argument is that *Dobbs* reflects a stark fissure in our society that correlates with and likely contributes to increasing requests for religious accommodations in the workplace. Because some of the cases described below occurred well before *Dobbs*, it would be erroneous to claim that *Dobbs* is alone responsible for the focus on religious accommodation in workplaces. In fact, abortion politics both inside and outside of work have been salient at least since *Roe v. Wade* was decided in 1973, pitting abortion opponents against advocates for reproductive freedom. *Dobbs*, however, has occurred at a particular moment in the U.S. in which the rights of racial and gender minorities are both increasing and highly contested. Many see these rights as threatening not only to what they believe to be the identity of the country (White and Christian) but also to their own individual religious rights. Others see the recognition of these rights as the natural progression to a better society, and cases like *Dobbs* stand in the way.

In essence, *Dobbs* is symbolic. To some, it represents a victory for the country and for individual religious rights. To others, it symbolizes a return to an unequal society that does not value the individual rights of all its members. The stakes are high. Employers have no choice but to try to ameliorate the conflicts at work arising from this powder keg. And religious accommodation requests are often central to either creating a conflagration or dousing the fire.

II. COMMON EMPLOYEE REQUESTS FOR ACCOMMODATIONS AND THE LAW OF RELIGIOUS ACCOMMODATION: BEFORE AND AFTER *DOBBS*

A. Four Types of Religious Accommodation Requests

There are four[20] types of religious accommodations that are commonly requested by employees and applicants. First (Type I), and what should be the easiest to resolve are the requests for waivers of dress code requirements. For example, a female Muslim police officer requests the right to wear an hijab, or headscarf, with her uniform;[21] a male Muslim officer asks for a waiver of the "no beards" requirement;[22] a Sikh salesman seeks to wear a turban (a "pagri"); a female Christian waitress asks to wear a skirt that covers her knees, rather than a mini-skirt that is part of her uniform; a male Jewish employee seeks to wear his yarmulke even though the employer has a no-head-coverings rule for male employees. In these types of cases, which will not likely increase post-*Dobbs*, it should not be difficult for an employer to reasonably accommodate the employee and, barring special circumstances, it should be difficult for an employer to prove an undue hardship.[23] Unfortunately, because of the minimalist

---

[20] A fifth type became common during Covid—a request for a religious accommodation allowing the employee to avoid getting the Covid vaccine before returning to work. This paper does not deal with the fifth type, but it is likely not related to abortion or the *Dobbs* decision. Nonetheless, the issue, like the abortion issue has become highly political. *See* EEOC, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS § L (2023), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L.

[21] Webb v. City of Phila. 562 F.3d 256, 258 (3d Cir. 2009).

[22] Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999).

[23] For example, a female actor playing Marilyn Monroe would likely be required to shed the hijab or wear sexy clothing for authenticity's sake. A female employee who wants to wear a skirt may be refused an accommodation if she works near machinery that would make it dangerous to wear a skirt. *See* Transcript of Oral Argument at 78–79, *Groff*, 600 U.S. 447 (No. 22-174). *But see* EEOC v. Abercrombie & Fitch, 575 U.S. 768, 775 (2015) (barring employer from refusing to hire an employee because she wore her hijab to the interview). Because this type of request will likely not result from issues concerning the right to abortion, this article does not deal with these types of cases except to conclude that such requests should not ordinarily impose an undue burden on employers, except in special circumstances noted above. Nonetheless, the courts have often found undue hardship in these appearance and dress code situations with little proof.

language the Supreme Court used in *TWA v. Hardison*, discussed below, many courts have concluded that simple appearance accommodations requests constitute an undue hardship with little proof.[24] These courts have concluded that there is an undue hardship especially when the opposition to the accommodation is contrary to the corporate image.[25]

A second type (Type II) of commonly requested religious accommodation involves a change in the employee's schedule to accommodate their sabbath. This type of accommodation may or may not seriously impact the conduct of the employer's business. This is the type of accommodation requested by the plaintiffs in *Trans World Airlines v. Hardison*[26] and the newly decided Supreme Court case, *Groff v. DeJoy*,[27] both of which are discussed below.

A third type (Type III) of religious accommodation occurs when an employee seeks to speak to other employees about her religion or to "bear witness" to her religious beliefs at work. Depending on how intrusive the employee's religious speech is, an employer may be able to prove that it offered a reasonable accommodation or if not, that doing so would cause the employer an undue hardship in the conduct of its business.[28]

Finally, a fourth type (Type IV) of requested accommodation occurs when an employee finds that her job responsibilities conflict with her religious beliefs. This is the situation in recent cases brought by nurse practitioners in the MinuteClinics at CVS Pharmacies that are discussed below. The plaintiffs allege that they were fired because the employer refused to accommodate their religious beliefs by allowing them to refuse to counsel clients about Plan B, the "morning

---

See Dallan F. Flake, *Image is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699, 725–33 (2015) (demonstrating that in many cases where the employer asserted that the requested accommodation went against the corporate brand, the employer prevailed, even when there were few or no customer complaints).

[24] *See* Flake, *supra* note 23, at 725–33.

[25] *See id*.

[26] 432 U.S. 63, 69 (1977).

[27] *Groff*, 600 U.S. at 456.

[28] *See, e.g.*, Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1342 (8th Cir. 1995).

after pill," and to prescribe other contraceptives that they consider to be abortifacients.[29]

B. Type II Accommodations: Scheduling[30]

1. Trans World Airlines v. Hardison

Title VII of the 1964 Civil Rights Act protects applicants and employees from discrimination based on race, color, national origin, sex, and religion.[31] Originally, the statute made it illegal to discriminate based on religion but said nothing about an employer's duty to accommodate religious practices and beliefs of applicants and employees. After the law was enacted, it became clear that employers could refuse to hire individuals—notably Seventh Day Adventists—because they could not work on Saturdays, their Sabbath, and the statute did not protect the individuals because such behavior occurred because of their unavailability to work, not because of their religion. In response, the Equal Employment Opportunity Commission (EEOC) created a guidance[32] that Congress enacted into law shortly thereafter.[33] The guidance, and subsequently the statute itself, made it illegal to fail to reasonably accommodate an employee's religious

---

[29] There is a debate over whether these drugs are abortifacients. *See infra* note 196.

[30] I begin with Type II because, as noted above, Type I—dress code accommodations requests—should be more easily granted and do not relate to the effect of *Dobbs* and the employee's views on abortion. Type II requests will ordinarily not relate to abortion either, but the Supreme Court caselaw exists in Type II accommodation cases, so it is necessary to analyze whether and how this caselaw can or should be adapted to Type III and Type IV accommodation requests, if at all.

[31] 42 U.S.C. § 2000e-2.

[32] 29 CFR § 1605.1(b) (1968). In 1967 the EEOC amended its guidelines to require employers "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." *Id.* § 1605.1. The EEOC did not suggest what sort of accommodations are "reasonable" or when hardship to an employer becomes "undue."

[33] 42 U.S.C. § 2000e(j) states: "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."

beliefs and practices unless the employer proves that doing so would create an undue hardship on the conduct of the employer's business.[34]

In *Trans World Airlines v. Hardison*,[35] the U.S. Supreme Court established the parameters of the undue hardship defense to an employer's refusal to grant religious accommodations to an applicant or employee. While the facts of the case took place after the passage of Title VII and the EEOC guidance was published but before Congress amended the statute to add the religious accommodation requirement, by the time the case reached the Supreme Court, Congress had amended the statute. Recognizing the existence of the EEOC guidance at the time the dispute occurred and the subsequent congressional amendment, the Supreme Court treated the EEOC guidance as the law governing the case. Because, however, neither the EEOC guidance nor the amended statute gave significant explanation concerning the meaning of "reasonable" or "undue burden" it was up to the Supreme Court and the lower courts to flesh out the meaning of these terms.[36] For more than forty-five years, *Hardison* was the prevailing law on the subject. In the summer of 2023, the Supreme Court decided *Groff v. DeJoy*, which rejected language of *Hardison* but did not overturn its holding. The questions arising from *Groff*, however, are significant and may create confusion among employers and employees about how far an employer must go to accommodate an employee's religion.

Hardison was a TWA employee whose religion required him to abstain from working from sunset on Fridays until sunset on Saturdays, his sabbath.[37] The employer's collective bargaining agreement with the union designated that shifts be assigned in accordance with seniority.[38] In his original assignment, the plaintiff had sufficient seniority to avoid working on his sabbath, but subsequently he transferred to another position in order to avoid the night shift; he had lower seniority in this position.[39] In the new position, it was often impossible for the plaintiff to find another employee to cover for him.[40] Nonetheless, the employer held various

---

[34] 29 CFR § 1605.1(b) (1968).

[35] 432 U.S. 63, 80–83 (1977).

[36] *Id*. at 73–76.

[37] *Id*. at 67.

[38] *Id*.

[39] *Id*. at 68.

[40] *Id*. at 77–78.

meetings to try to resolve the issue and authorized the union to see if there were other employees who would exchange shifts with the plaintiff.[41] The union, however, was unwilling to sanction an exception to the collective bargaining agreement, which allocated shifts by seniority.[42] When TWA did not reach an accommodation, the plaintiff refused to show up for his Saturday shifts, and TWA ultimately fired him.[43]

Hardison sued both the employer and the union for religion-based discrimination. The federal district court judge, in a bench trial, concluded that the union did not have to violate its seniority system and that TWA had satisfied its obligation to grant a reasonable accommodation and any further accommodation would impose an undue hardship on TWA.[44] The Court of Appeals for the Eighth Circuit reversed as to TWA,[45] holding that there were numerous possible accommodations that would not impose undue hardship on the employer. They included: allowing Hardison to work a four-day week; paying another employee overtime to work on Friday nights and Saturdays; and swapping Hardison with another employee for Friday evenings and Saturdays.[46]

The Supreme Court granted the union's and TWA's petitions for certiorari. The question before the Court was whether the employer and/or the union discriminated illegally based on the plaintiff's religion by failing to accommodate his religious practices. The Court held that the employer and the union had made sufficient efforts attempting to accommodate Hardison's religious practices, that neither the employer nor the union is required to violate a collective bargaining agreement to accommodate an employee's religious practices, and that the employer would not be required to pay overtime to another employee or to go shorthanded on Saturdays to accommodate the plaintiff.[47]

The Court stated:

---

[41] *Id*. at 77.

[42] *Id*. at 68.

[43] *Id*. at 69.

[44] *Id*. at 69–70.

[45] Hardison v. Trans World Airlines, 522 F.2d 33, 40–41 (8th Cir. 1975).

[46] *Id*. The court did not rule on the merits of the union's claims. *Id*. at 43.

[47] *Hardison*, 432 U.S. at 77.

> TWA would have had to adopt [an allocation of days off in accordance with the religious needs of its employees instead of a neutral allocation system] . . . in order to assure Hardison and others like him of getting the days off necessary for strict observance of their religion, but it could have done so only at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends. There were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath.[48]

The Court therefore concluded that Congress did not require employers to deny the preferences and contractual rights of some employees to accommodate the religious needs of other employees.[49] The Court pointed to Title VII's special protection of seniority practices to bolster its conclusion.[50]

Referring to the possible accommodation of paying overtime to other employees to swap with Hardison, and replacing him with supervisory personnel, the Court noted, "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."[51] Consequently, the Court held that the employer had met its burden of proving that accommodating Hardison would impose an undue burden on TWA.[52]

Justice Marshall, joined by Justice Brennan, dissented, arguing that the religious accommodation provision of Title VII principally

---

[48] *Id.* at 81.

[49] *Id.*

[50] *Id.* at 81–82.

[51] *Id.* at 84.

[52] Justice Marshall, joined by Justice Brennan, dissented, arguing that the employer had not done all it could have to accommodate the employee's practices without creating an undue burden. In particular, the dissent protested the majority's apparent underlying concern that an accommodation would accord preferential treatment to the plaintiff that might violate the Establishment Clause of the First Amendment. *Id.* at 87–91 (Marshall, J., dissenting). The dissent noted that the record did not support the conclusion that there were no other employees who would have voluntarily swapped schedules with the plaintiff; moreover, it suggested that another employee could have been paid overtime for making the change, and the plaintiff could have worked overtime hours for regular pay. *Id.* at 92–96.

protects employees of minority religions because work schedules generally revolve around the religious holidays of majority religions in the U.S.[53] Moreover, they argued that an accommodation requirement necessarily results in differential treatment of individuals based on religion, and that was the intent of Congress in adopting the accommodations requirement.[54] The dissent concluded that TWA failed to carry its burden of establishing that it would have suffered an undue hardship.

Since *Hardison*, many courts have relied on the "more than *de minimis* burden" standard to conclude that the employer has met its undue burden defense. Using this standard, courts have denied plaintiffs' claims that defendant employers have illegally refused to grant accommodation requests that would be relatively simple. From 1977 until 2023, *Hardison* established the rule of religious accommodation under Title VII. Since 1977, however, the Equal Employment Opportunity Commission (EEOC) has interpreted *Hardison* to give guidance to the lower courts and to soften the blow of the Hardison "more than *de minimis*" language. Because courts are not bound by the EEOC guidance, many rejected its more nuanced interpretation of *Hardison* and held, with minimal proof of hardship, that an accommodation would impose an undue burden on the employer.[55]

Recently, members of the Supreme Court who have in other cases focused on individual religious rights have expressed concern about the *Hardison* standard as applied by the lower courts. When the Court granted certiorari in *Groff*, many organizations representing religious freedom filed amicus briefs to condemn the effect of the *Hardison* decision and to urge the Court to consider a different approach.[56]

---

[53] *Id*. at 85.

[54] *Id*. at 87–88.

[55] Groff v. DeJoy, 600 U.S. 447, 465 (2023) (stating that "a bevy of diverse religious organizations has told this Court that the *de minimis* test has blessed the denial of even minor accommodation in many cases, making it harder for members of minority faiths to enter the job market").

[56] *Id*.

2. "More than a de Minimis Burden:" EEOC Interpretation of Hardison *(Pre-*Groff*)*

Although the "more than a *de minimis*" burden appears to set a very low standard for employers to show that a requested religious accommodation creates an undue hardship on the employer, the facts in *Hardison* support a stricter standard than this language suggests. In *Hardison*, for example, there was an established bona fide seniority system for allocation of work assignments. The EEOC published new guidance post-*Hardison*—the most recent in January 15, 2021[57]—to interpret *Hardison*. Although EEOC guidance does not have the power of law, this guidance cites to numerous cases and gives specific advice about what constitutes an undue burden. The EEOC guidance made the following recommendations with reference to the reasonable accommodations requirement and undue burden defense:

- A reasonable accommodation should eliminate the conflict with the individual's religious beliefs and practices completely unless doing so would create an undue hardship. Even if a complete elimination of the conflict would create an undue hardship, the employer should attempt to at least partially eliminate the conflict;
- Reasonableness is a fact-specific inquiry. If an employer cannot accommodate the employee without an undue hardship in the employee's current position, a transfer to another position may be necessary;[58]
- The employer has the burden of proving undue hardship. Undue hardship is determined on a case-by-case inquiry in which the following factors should be considered: the type of workplace; the nature of the employee's duties; the identifiable cost of the accommodation in relation to the size and operating costs of the employer; and the number of employees who will in fact need a particular accommodation;

---

[57] *See* EEOC, EEOC-CVG-2021-3, SECTION 12: RELIGIOUS DISCRIMINATION § 12-IV.A (2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_93767549346516107498433 86. As of the date of the writing of this article, the EEOC had not yet published guidance based on the *Groff* case, which was decided in 2023.

[58] For example, the transfer to the newborn unit of a labor and delivery nurse who opposes abortion.

- To prove undue hardship, the employer must demonstrate real hardship not merely hypothetical hardship;
- Generally, the payment of administrative costs in relation to the accommodation do not create an undue hardship, nor does the temporary payment of premium wages while seeking a more permanent accommodation. But the regular payment of premium wages or the hiring of additional employees ordinarily requires more than a *de minimis* cost;
- The courts should consider not only monetary costs in determining undue burden, but also the burden on the conduct of the employer's business. This includes consideration of whether the accommodation: diminishes efficiency in other jobs; infringes on other employees' rights and/or benefits; impairs workplace safety; or causes coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work;
- If the proposed accommodation deprives another employee of a job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement (CBA), it poses an undue hardship. But the employer should attempt to find an accommodation that does not violate a seniority system or CBA. Voluntary substitutions or swaps, for example, do not generally create an undue hardship; and
- Infringing on coworkers' abilities to perform their duties or subjecting them to a hostile working environment would create an undue burden.[59]

3. Groff v. DeJoy*: Reinterpreting* TWA v. Hardison

In May 2022, the Third Circuit Court of Appeals decided *Groff v. DeJoy*.[60] Groff, a former employee of the U.S. Post Office (USPS),

---

[59] Section 12-IV.B.4. states:

> Applying this standard, it would be an undue hardship for an employer to accommodate religious expression that is unwelcome potential harassment based on race, color, sex, national origin, religion, age, disability, or genetic information, or based on its own internal anti-harassment policy, and it may take action consistent with its obligations under Title VII and the other EEO laws.

EEOC, *supra* note 57, § 12-IV.B.4.

[60] 35 F. 4th 162 (3d Cir. 2022), *cert granted*, 600 U.S. 646 (2023) (Mem.).

believes that Sundays must be reserved for worship and rest. He worked as a letter carrier for the postal service in a job that required him to cover for other employees when they were not available. He notified his supervisor that his religion dictated that he worship and rest on Sundays and requested an accommodation that would permit him never to work on Sundays. Sunday deliveries were important, however, because the USPS signed a contract with Amazon for Sunday deliveries after Groff began to work for the postal service. After signing the contract with Amazon, the post office entered into a memorandum of understanding with the union that established the order in which employees would be called to work on Sundays outside peak season.[61] Groff was in the third group to be called to work on Sundays; when his supervisor told Groff that he would have to work on Sundays, Groff then transferred to a small post office in Holtwood, Pennsylvania where, at the time, there were no Sunday deliveries.[62] After Groff's transfer to Holtwood, however, Sunday deliveries for Amazon from Holtwood began.[63] Groff's supervisor told him that they could ask coworkers to swap delivery days with him, but although the supervisor asked other workers to swap with Groff, there were twenty-four Sundays out of the sixty Sundays for which Groff was scheduled that the defendant could not find coworkers to swap with Groff.[64] On those twenty-four occasions, Groff did not appear at work. Ultimately, the Postmaster where Groff worked had to deliver Groff's packages himself on multiple Sundays.[65] Groff was disciplined, and he resigned.[66]

Groff sued his former employer under Title VII of the 1964 Civil Rights Act for disparate treatment based on his religion and failing to reasonably accommodate his religious beliefs and practices. The lower court granted the defense motion for summary judgment. On appeal, the Third Circuit ruled that "even though shift swapping can be a reasonable means of accommodating a conflicting religious practice, here it did not constitute an 'accommodation' as contemplated by Title

---

[61] *Groff*, 600 U.S. at 454–55.

[62] *Id*.

[63] *Id*.

[64] *Groff*, 35 F. 4th at 166–67, 173.

[65] *Id*. at 166.

[66] *Id*. at 167.

VII because it did not successfully eliminate the conflict" between Groff's religious needs and his work.[67]

The Third Circuit then analyzed whether the defendant had proved that granting the accommodation that the defendant needed—every Sunday off from work—would impose an undue hardship on the defendant's business. Applying the "more than *de minimis*" standard from *TWA v. Hardison*, the Third Circuit held that the defendant had met its burden of proving undue hardship.[68] In support of this conclusion, the Third Circuit pointed to the defendant's evidence that permitting Groff not to work every Sunday at the small Holtwood, Pennsylvania Post Office placed a "great strain" on the Postmaster and the other employees, especially during the busy holiday season; after a co-worker was injured, Groff's absence left only one letter carrier and the Postmaster to deliver the Sunday packages.[69] Moreover, at the hub where Groff also worked, there was a negative effect on employee morale and operations, imposing additional delivery burdens on other employees that resulted in the filing of a grievance.[70]

---

[67] *Id.* at 170–73. There is a split in the circuits as to whether a reasonable accommodation of an employee's religious practices under Title VII requires the elimination of the entire conflict between the employee's religious beliefs and/or practices and work or whether a partial accommodation is sufficient. *See* Dallan Flake, *When "Close Enough" Is Not Enough: Accommodating the Religiously Devout*, 49 BYU L. REV. 49, 64–99 (2023) (noting that the Second, Third, Sixth, Seventh and Ninth Circuits require the elimination of the entire conflict, the Fourth, Eighth, and Tenth Circuits permit partial elimination of the conflict, and the Fifth and Eleventh Circuit have inconsistent cases on the issue; arguing that the text and legislative history as well as some language in Supreme Court precedent and EEOC guidance support total elimination of the conflict). For example, in Groff's case, if the employer allows Groff to work half days on Sundays so that he can attend church services and then go to work, it is offering a partial accommodation. This partial accommodation, however, does not resolve Groff's conflict because his religious belief is that Sunday is a day for devotion and rest. The Third Circuit concluded that any accommodation that only partially resolves the conflict is not reasonable. But that conclusion does not end the case. If the employer is unwilling or unable to fully eliminate the conflict, it must prove that a complete accommodation would pose an undue burden on the conduct of its business. After *Groff*, that proof will impose a more exacting standard.

[68] *Groff*, 35 F.4th at 175–76.

[69] *Id.* at 175.

[70] *Id.*

Groff petitioned for certiorari, and, in January 2023, the Supreme Court granted the petition to consider two issues:

> (1) Whether the court should disapprove the more-than-de-minimis-cost test for refusing religious accommodations under Title VII of the Civil Rights Act of 1964 stated in *Trans World Airlines v. Hardison*; and
> (2) Whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employee's coworkers rather than the business itself.[71]

The Petitioner's attorney argued that the Supreme Court should overrule *Hardison* and the "more than *de minimis*" standard, replacing it with a "significant difficulty or expense" standard, the same standard used by courts in determining whether hardship is undue under the ADA.[72]

The Solicitor General, arguing for the respondent, agreed that the "more than *de minimis*" language is inartful and that the Supreme Court should disavow that language. But she argued that the Court should not overrule *Hardison* because the facts in *Hardison* provide the standard, the determination of what constitutes an undue hardship is context specific, the EEOC has created guidance that has interpreted *Hardison* to impose important requirements on employers without unduly burdening them, and the courts have applied the test properly and have often denied the defense.[73] She noted that to overrule *Hardison* because of its language would create confusion by throwing out nearly fifty years of precedent.[74]

---

[71] Petition for a Writ of Certiorari at i, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174); Groff v. De Joy, 600 U.S. 447 (2023) (Mem.) (granting cert.).

[72] Transcript of Oral Argument at 4–5, *Groff*, 600 U.S. 447 (No. 22-174). Faced with the fact that the ADA standard was created by Congress, and it recognized that its ADA standard may be harder to meet than the *Hardison* standard, petitioner's attorney argued that he would support this standard even if there were no ADA, in part to assure equal opportunity for religious accommodations to other types of accommodations and in part because New York and California have used this standard and the courts know how to apply it. *Id*. at 5, 8, 10, 14.

[73] *Id*. at 51.

[74] Numerous amici briefs were filed with the Supreme Court in the *Groff* case. Although they represent different interests and different approaches, there was

In *Groff v DeJoy*, the Supreme Court unanimously agreed that the *Hardison* "more than *de minimis*" language is not the proper test for deciding whether the employer has violated Title VII for failure to grant a religious accommodation. But the Court stopped short of overruling *Hardison*.[75] Instead, the Court noted that lower courts placed undue emphasis on *Hardison*'s choice of "more than *de minimis*" language, and that other language from the opinion is more representative of what the holding was. The Court confirmed the holding in *Hardison*, noting that breaching the seniority agreement for allocating work would pose an undue burden.[76] Instead of "more than *de minimis* burden," however, the Court applied in *Groff* a test that also came directly from *Hardison*. Citing to *Hardison*, the *Groff* Court held that to prove undue burden, "an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."[77] Furthermore, *Groff* stated that courts should apply the "substantial increased costs" test by examining the specific facts of the cases before them "in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, 'size and operating cost of [an] employer.'"[78]

The Court stated:

> *Hardison* cannot be reduced to that one phrase. [More than *de minimis* cost]. In describing an employer's "undue hardship" defense, *Hardison* referred repeatedly to "substantial" burdens, and that formulation better explains the decision. We therefore, like the parties, understand *Hardison* to mean that "undue hardship" is shown when a burden is substantial in the overall context of an employer's business (citation omitted). This fact-specific inquiry

---

a common refrain: that the "more than *de minimis* burden" standard should be ignored or discarded altogether. *See Groff*, 600 U.S. at 468.

[75] *Id.*

[76] *Id.* at 462.

[77] *Id.* at 470.

[78] *Id.* at 470–71 (citing Brief for the Respondent at 40, *Groff*, 600 U.S. 447 (No. 22-174)).

> comports with both *Hardison* and the meaning of "undue hardship" in ordinary speech.[79]

Thus, although the Supreme Court did not overrule *Hardison*'s holding, it reversed the Third Circuit's decision in *Groff* and remanded the case to the lower court to decide the case in light of the Court's articulation of the "substantial increased costs" standard, which, according to the Supreme Court, may require additional fact finding.[80] In reaching this conclusion, the *Groff* Court both accepted and rejected arguments made by the petitioner and the Solicitor General. It declined petitioner's request to use the "significant difficulty or expense" test and to encourage courts to draw from ADA precedent in deciding whether an undue hardship exists in religious accommodations cases under Title VII.[81] And although it agreed with both parties that the "more than *de minimis*" burden should be rejected, it declined to adopt the Solicitor General's argument that the EEOC guidance *in toto* should provide the rule.[82] The Court noted that while much of the EEOC guidance is "sensible" and will likely be "unaffected" by *Groff*, to adopt all of the guidance that was created without the benefit of the *Groff* opinion would not be wise.[83] Furthermore, the Court explained, the lower courts had often disregarded the EEOC guidance in deciding what an undue burden is, as is obvious by the many amicus briefs the Court received from religious organizations of many different faiths urging it to overrule *Hardison*.[84]

In analyzing the second issue—whether the reaction of coworkers is sufficient to create an undue burden on the conduct of the employer's business—the Court agreed with the analysis of the Solicitor General. Although coworker disruption may place an undue burden on the conduct of the employer's business, if employee unrest arises from hostility to religion in general, to the accommodated

---

[79] *Id.* at 468.

[80] *Id.* at 473.

[81] *Id.* at 470–71.

[82] *Id.*

[83] *Id.*

[84] *Id.* In refusing to adopt the prior EEOC guidance as law, the Court continued its refusal to defer to the EEOC's interpretation of Title VII law even though it appears that the conservative members of the Supreme Court who wish to give greater protections to religious freedoms would likely agree with the EEOC positions on protecting employees in this area of the law.

employee's specific religion, or generally to religious accommodations, that unrest is insufficient to prove undue burden.[85] But, to the extent that the accommodation places a burden on the coworkers that affects the conduct of the business, coworker reactions can be considered.[86] The Court, however, declined to provide specific guidance on how the employer should consider other employees' morale in determining whether or not the burden on other employees is an undue burden. It emphasized, nonetheless, that the employer may not simply assume that accommodation of one employee's religion will create an undue burden because of negative coworker reaction. The Court stated:

> Faced with an accommodation request like Groff's, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary.[87]

Finally, the Court, when remanding the case, noted that the "more than *de minimis* cost" language "may have led the lower court to dismiss a number of possible accommodations, including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees." This language demonstrates in the very least that the employer should consider the cost of numerous potential schemes in an attempt to reasonably accommodate the plaintiff's schedule.[88]

Although the Supreme Court decision in *Groff* governs all religious accommodations cases, it does not answer all the questions

---

[85] *Id.* at 472–73.

[86] *Id.*

[87] *Id.* at 473.

[88] For an excellent discussion of the coworker morale issue and how it should be analyzed, see Dallan F. Flake, *Bearing Burdens: Religious Accommodations that Adversely Affect Coworker Morale*, 76 OHIO ST. L. J. 170, 204–13 (2015) (arguing that coworker morale should be considered in deciding that religious accommodations create an undue burden, and because coworker morale is so intertwined with business success, defendants should not have to prove separate harm to the business caused by coworker morale; when poor coworker morale stems from coworkers' discriminatory attitudes and perceptions of unfairness, their morale should not be considered in determining undue burden; courts should consider whether the proposed accommodation would affect the material terms and conditions of coworkers' jobs, however, and employers should be able to prove undue burden by demonstrating a reasonable likelihood of harm).

that have arisen relating to *Dobbs*—specifically an employee's request for a religious accommodation of her anti-abortion speech or for her refusal to do portions of her job that she claims could lead to an abortion. These Type III and IV requests for religious accommodations and how the courts, the EEOC, and perhaps Congress should deal with them are discussed in the next subpart.

C. Type III Accommodations: Protected Speech or Illegal Harassment?

1. Wilson v. U.S. West Communications

Cases dealing with speech in private workplaces can create thorny situations that raise the question of how far employers must go to accommodate individuals who seek to communicate their religious views on abortion to their coworkers. In an older case, *Wilson v. U.S. West Communications*,[89] the Eighth Circuit affirmed the lower court's conclusion that there was no violation for failing to accommodate the plaintiff.

Christine Wilson, a Roman Catholic, worked for U.S. West Communications as an information specialist.[90] In July 1990, Wilson alleged that she made a vow to oppose abortion by wearing at all times a two-inch-wide button that bore a color photograph of an aborted fetus and the words "Stop Abortion" and "They're Forgetting Someone."[91] Wilson wore the button to work, and a coworker asked Wilson to remove the button while Wilson attended a class the coworker was teaching.[92] Wilson refused to remove the button and explained that she had made a vow.[93]

The button upset other employees at the workplace, some for reasons that were personal (such as miscarriages and stillbirths) and unrelated to their stance on abortion.[94] Wilson's coworkers spent considerable time talking about the button, and some even threatened to walk off the job.[95] Wilson's supervisors, who were both anti-abortion

---

[89] Wilson v. U.S. W. Commc'ns, 58 F.3d 1337 (8th Cir. 1995).

[90] *Id.* at 1338.

[91] *Id.* at 1339.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

Catholics, met with her at least five times and told her that her coworkers were very upset and that there had been a 40 percent decrease in productivity attributable to her wearing of the button and of a T-shirt that had a photograph of an aborted fetus on it.[96] They gave the plaintiff three options.[97] She could wear the button in her cubicle but remove it when she went outside of her own space; she could wear a button with the same words but without the graphic photograph; or she could wear the button but cover it while she was at work.[98] Wilson rejected all three options and told her supervisors that she had promised God that she would be a "living witness."[99] She also suggested that they tell the other employees to stay in their cubicles and do their work.[100]

After numerous meetings with Wilson, her supervisors, and the union steward, the employer agreed to allow Wilson to wear the button to work while the EEOC investigated.[101] But when she returned to work wearing the button, other employees protested, refused to attend meetings, and some filed grievances, accusing the supervisor of harassment for not banning the button.[102] Finally, Wilson's supervisors told her that she could not wear the button, a t-shirt, or anything else with a photograph of an aborted fetus at work.[103] After Wilson did not show up for work for a number of days, the defendant fired her.[104]

At a bench trial, the federal district court judge found insufficient evidence that Wilson's vow required her to be a living witness; consequently, he concluded that the employer's suggestion that she wear the button to work but cover it was a reasonable accommodation.[105] Moreover, the judge found that even if Wilson's vow had required her to be a living witness, an accommodation that

---

[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* at 1339–40.
[103] *Id.* at 1340.
[104] *Id.*
[105] *Id.*

would permit the plaintiff openly to wear the button at work would impose an undue hardship on the employer.[106]

Wilson appealed the decision to the Eighth Circuit Court of Appeals.[107] The Eighth Circuit agreed with the lower court's finding that Wilson had insufficient evidence that her religion required her to be a living witness; given that finding, the employer had offered the plaintiff a reasonable accommodation when it told her she could wear the pin but cover it at work.[108] Therefore, the Eighth Circuit did not analyze whether any other potential accommodation would have posed an undue hardship.[109] In affirming the district court's order, the Court of Appeals stated:

> We recognize that this case typifies workplace conflicts which result when employees hold strong views about emotionally charged issues. We reiterate that Title VII does not require an employer to allow an employee to impose his religious views on others. The employer is only required to reasonably accommodate an employee's religious views.[110]

2. Carter v. Transport Workers of America, Local 556, and Southwest Airlines Co.

Charlene Carter, a conservative Christian who believes that abortion is murder, was a flight attendant for Southwest Airlines for twenty years.[111] Carter testified that she believes that her religion requires her to speak out to protect "unborn babies."[112] She believed the union, Transport Workers of America, did not represent her

---

[106] *Id*.

[107] *Id*. at 1338.

[108] *Id*. at 1342.

[109] *Id*.

[110] *Id*.; *see also* Anderson v. U.S.F. Logistics (IMC), Inc., 274 F.3d 470, 476–77 (7th Cir. 2001) (upholding lower court's finding that the employer had reasonably accommodated an employee who used the term "Have a Blessed Day" in keeping with her religious beliefs when dealing with customers and coworkers; the court found that the plaintiff did not always use the term, and the employer permitted her to use the term with coworkers, but not with a customer (Microsoft) who had complained).

[111] Carter v. Transp. Workers Union of Am., Loc. 556, 353 F. Supp 3d 556, 562 (N.D. Tex. 2019).

[112] *Id*. at 563.

interests; she quit the union in 2013 because of what she contended was political, ideological, and non-bargaining spending of union dues.[113]

Beginning in 2013, Carter made hundreds of posts on Facebook attacking the union and its vice president, Audrey Stone. She placed numerous posts on a Facebook group open to all Southwest flight attendants accusing the union of corruption; these posts also enclosed information about how to quit the union.[114] Carter began in 2015 to post private messages on Stone's Facebook page, criticizing Stone and the union and accusing Stone of using union dues to promote her political anti-abortion agenda.[115] Carter's dispute with the union came to a head in 2017 when she learned that Stone and approximately twenty-four other members of the union announced that they were attending the Women's March on Washington, which was sponsored by Planned Parenthood, among other organizations.[116] The march occurred on the day after Donald Trump's Presidential inauguration.[117]

On her personal Facebook page and on a group Facebook page, Carter posted her opposition to abortion and to the union members' participation in the Women's March on Washington.[118] She also posted petitions to recall both Stone and other officers of the union.[119]

On February 14, 2017, Carter's behavior came to a head. She sent five private messages to Stone's Facebook page.[120] These included:

- A message with a video of an aborted fetus that stated,

  > This is what you supported during your Paid Leave with others at the Women's MARCH in DC. . . . You truly are Despicable in so many ways . . . by the way the RECALL is going to Happen and you are limited in the days you will

---

[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 564.

> be living off of all the [Southwest Airlines Flight Attendants] . . . cant wait to see you back on line." [sic][121]

- An hour later, another video of an aborted fetus with a message that stated, "TWU-AFL-CIO and 556 are supporting this Murder . . ."[122]
- A half-hour later, Carter sent another message to Stone that included a photo of women wearing hats depicting female genitalia. The message stated,

  > Did you all dress up like this . . . Wonder how this will be coded in the LM2 Financials . . . cause I know we paid for this along with your Despicable Party you hosted for signing the Contract. . . . The RECALL [of the Local 556 Executive Board] is going to Happen we are even getting more signatures due to other [flight attendants] finding out what you guys do with our MONEY!!! Can't wait for you to have to be just a regular flight attendant again and not stealing from our DUES for things like this![123] [sic].

- A fourth message later that day included a link to an article noting that one of the leaders of the women's march was a convicted terrorist. Carter's message stated,

  > Did you know this . . . . Hmmmm seems a little counter productive don't you think . . . . you are nothing but a SHEEP in Wolves Clothing or you are just so uneducated that you have not clue who or what you were marching for! Either way you should not be using our DUES to have Marched in this despicable show of TRASH!"[124] [sic]

- The last message that day attached "an article written by the niece of Martin Luther King, Jr., 'explain[ing] that Planned Parenthood hid its pro-abortion agenda from her uncle and

---

[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*

> used his status as a civil rights leader to bolster its credibility.'"[125]

Three days later, on February 17, Carter received an email from Stone on behalf of Local 556 (that was obviously sent to all union members) urging recipients to oppose a National Right to Life bill in Congress. The plaintiff responded,

> First off I do not want your Propaganda coming to my inbox . . . that being said I Support the RIGHT TO WORK Organization 100% ABOVE what I have to pay you all in DUES! YOU and TWU-AFL-CIO do not Speak For Me or over half of our work group . . . . We have a RECALL right now that we want adhered to with over the 50+ 1% and growing. WE WANT YOU all GONE!!!!! (sic) . . .
>
> P.S. Just sent The RIGHT TO WORK more money to fight this. . . . YOU all DISGUST ME!!!!! OH and by the WAY I and so many other of our FAs VOTED FOR TRUMP. . . . so shove that in your Propaganda MACHINE! [sic].[126]

Stone felt threatened by these messages and reported them to Southwest, which, after an investigation, terminated Carter on March 16, 2017.[127] Southwest's termination letter to Carter stated that her postings disparaged Southwest Flight Attendants and all Southwest Employees.[128] The letter further stated that Carter's termination was due to her violation of the Southwest Airlines Mission Statement and Company policies and rules, including but not limited to, the Workplace Bullying and Hazing Policy and the Social Media Policy.[129] Southwest also concluded that Plaintiff's conduct "could also be a violation" of Southwest's Policy Concerning Harassment, Sexual Harassment, Discrimination, and Retaliation.[130]

Carter filed a grievance in response to her termination by Southwest.[131] Local 556 represented Carter in the grievance process

---

[125] *Id.*

[126] *Id.*

[127] *Id.* at 560.

[128] *Id.* at 565.

[129] *Id.*

[130] *Id.*

[131] *Id.*

and negotiated an offer of reinstatement from Southwest, but she rejected the offer and proceeded to arbitration.[132] For the arbitration, Carter retained her own attorneys.[133] The labor arbitrator concluded that Southwest Airlines had just cause to discharge Carter.[134]

Carter sued Southwest Airlines and the union in federal court for violations of the Railway Labor Act,[135] breach of the union's duty of fair representation,[136] and violations of Title VII,[137] among other alleged violations. The Title VII claims alleged that Southwest fired the plaintiff because of her religious beliefs and practices and that the union caused Southwest to fire the plaintiff on the same basis.[138] It also alleged that the defendants failed to accommodate the plaintiffs' religious beliefs and practices in violation of Title VII.[139] In response

---

[132] *Id*.

[133] *Id*. at 565–66.

[134] *Id*. at 566.

[135] Carter v. Transp. Workers Union of Am., Loc. 556, 602 F. Supp. 3d 956, 960 (N.D. Tex. 2002); 45 U.S.C. § 152. The trial court denied defendants' motion for summary judgment of the RLA retaliation claim, stating:

> A reasonable jury could side with Carter or the defendants on the question of whether the defendants retaliated against Carter for exercising her Act-protected rights by messaging president Stone and expressing her disapproval with the union's activities and participation in the Women's March. Accordingly, summary judgment is inappropriate on Carter's Railway Labor Act retaliation claim.

Carter, 602 F. Supp. 3d at 965.

[136] The trial court denied TWA's motion for summary judgment of the duty of fair representation claims, stating:

> [T]he parties genuinely dispute at least one material fact: whether president Stone was acting in her official union capacity when she reported Carter to Southwest. So the Court denies summary judgment to both parties [the union and Carter] on this claim.

Id.

[137] 42 U.S. §§ 2000e–2000e-17.

[138] *Carter*, 602 F. Supp. 3d at 965.

[139] *Id*. The trial court denied all motions for summary judgment on the Title VII claims, stating:

> All parties seek summary judgment on this claim but granting it would be inappropriate because the parties genuinely dispute at least one material fact: the precise reason that president Stone reported Carter to Southwest and the reason that Southwest terminated Carter. A reasonable jury could side with Carter or the defendants. A jury could conclude that the defendants indeed discriminated against Carter

to a motion to dismiss, the lower court dismissed some of the claims and retained others.[140] After discovery, the lower court denied the parties' motions for summary judgment on the Railway Labor Act, the union's Duty of Fair Representation, and the Title VII claims.[141]

At trial, the jury awarded more than five million dollars to the plaintiff for violations of the Railway Labor Act, the Duty of Fair Representation, and Title VII. The jury found that Southwest Airlines violated Title VII's prohibition against religious discrimination, failed to accommodate the plaintiff's religious beliefs and practices, and any accommodations would not have imposed an undue hardship on Southwest.[142] The trial judge reduced the award to comply with the cap on compensatory and punitive damages under Title VII and ordered reinstatement of the plaintiff to her position.[143] The union appealed the verdict to the Fifth Circuit Court of Appeals.[144] Southwest Airlines moved for a new trial.[145] That motion was denied.[146] After exhausting post-trial motions, Southwest Airlines filed a notice of appeal to the Fifth Circuit in May 2023.[147]

> because of her religious beliefs and practices, that the defendants acted not because of Carter's religion but instead because of her anti-union activity, or that the defendants had perfectly legal bases for acting the way that they did. So the Court denies summary judgment on Carter's Title VII claims.

Id.

[140] Carter v. Transp. Workers Union of Am., Loc. 556, 353 F. Supp. 3d. 556, 582 (N.D. Tex. 2019).

[141] *Carter*, 602 F. Supp. 3d at 967.

[142] Jury Verdict Sheet, *Carter*, 602 F. Supp. 3d 956 (No. 3:17-CV-2278-X).

[143] Memorandum Opinion and Order at 31, Carter v. Transp. Workers Union of Am., Loc. 556, No. 3:17-CV-2278-X (N.D. Tex. Dec. 5, 2022).

[144] Defendant TWU Local 556's Notice of Appeal to the United States Court of Appeals for the Fifth Circuit, Carter v. Sw. Airlines Co., No. 3:17-CV-2278-X (N.D. Tex. Jan. 4, 2023).

[145] Southwest Airlines Co.'s Renewed Motion for Judgment as a Matter of Law Pursuant in the Alternative for Remittitur, Carter v. Sw. Airlines Co., No. 3:17-CV-2278-X (N.D. Tex. Jan. 2, 2023).

[146] Order Denying Defendant's Motion for a New Trial, Carter v. Transp. Workers Union of Am., Loc. 556, No. 3:17-CV-2278-X (N.D. Tex. Apr. 24, 2023).

[147] Notice of Appeal, Carter v. Sw. Airlines Co., 3:17-CV-2278-X (N. D. Tex. May 24, 2023). The case number on appeal at the Fifth Circuit is 23-10536, and it is consolidated with the union's appeal from January, 23-10008, and Charlene Carter's cross-appeal, 23-10836.

3. Analyzing Carter and Wilson

a. Speech/Harassment as Religious Accommodation

It is unclear what religious accommodation Carter was requesting. There is no evidence that Carter ever requested a religious accommodation, but the court, in response to motions for summary judgment, stated that Carter did not have to ask for an accommodation to be discriminated against because of her religious beliefs and practices.[148] This is problematic because it seems to merge discrimination based on religion from a failure to grant a reasonable accommodation to her religious beliefs and practices. These should be two separate claims. Nonetheless, assuming that Carter had requested an accommodation, what would a reasonable accommodation look like? While the union might have accommodated Carter by allowing her to donate to a charity instead of paying union dues,[149] there appears to be no such request for an accommodation. Moreover, it is unlikely that there would have been any reasonable accommodation that Southwest Airlines could have granted her that did not permit her to violate the company's harassment and workplace bullying policies.

Moreover, there is no support for the proposition that Title VII requires an employer to grant a religious accommodation to an employee who claims that it is her religious belief that she must harass another employee in violation of company policy or anti-discrimination law. The EEOC's guidance makes clear that harassing and bullying speech of other employees creates an undue hardship on the conduct of the employer's business. Carter's arguments that her speech should be protected is similar to arguments made last century that an employee's sexually harassing speech should be protected by the First Amendment.[150] The courts have consistently rejected these

---

[148] Carter v. Transp. Workers Union of Am., 602 F. Supp. 3d 956, 965 (N.D. Tex. 2022).

[149] See EEOC *supra* note 57, § 12-IV.C.5.

[150] *See* Eugene Volokh, *Thinking About Freedom of Speech and "Hostile Work Environments,"* 17 BERKELEY J. LAB. & EMP. LAW 305 (1996). *But see* David Benjamin Oppenheimer, *Workplace Harassment and the First Amendment: A Reply to Professor Volokh*, 17 BERKELEY J. LAB. & EMP. LAW 321 (1996); Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106. VA. L. REV. 1223 (2020) (arguing that an emphasis on neutrality

arguments because of the importance of equality and workplace peace; they have drawn the line at speech that creates a hostile work environment based on sex or other protected characteristic.[151]

Therefore, it appears that the lower courts, and even the Supreme Court would agree: Title VII does not require the employer to tolerate the plaintiff's misconduct toward her coworkers in the name of religious freedom. Even assuming all the facts as alleged by the plaintiff were true, the issues of religious accommodations and undue hardship probably should not have gone to the jury. Although her firing was perhaps a bit heavy-handed and this case could have been handled through negotiation with the plaintiff or an interactive process, defendant Southwest Airlines appears to have been within its rights to discipline Carter for her misconduct.

What if, however, Carter had requested that her employer grant her an accommodation to make her objections to abortion in a civil manner to other employees at work during breaks? Assume further that the employer has a neutral rule that employees avoid discussing controversial subjects on work premises during work time and breaks. This would be a closer case, and, unfortunately, may place the employer in the position of referee, a role that could create great unrest in the workplace.

This situation would differ significantly from dealing with the Catholic employee who wants not to work on Sunday mornings because she must attend mass (Type II accommodation). In the scheduling situation, the employer can engage with other employees to see if a swap is possible, by incentivizing coworkers with some additional temporary or, even perhaps after *Groff,* permanent overtime. In this hypothetical, instead, we have a Type III accommodation request—an employee who sincerely posits that abortion violates her religious beliefs. Moreover, the employee argues that the employer should permit her to advocate against abortion at work during non-work time, behavior that would otherwise break the employer's rule forbidding controversial discussion topics. In fact, our

---

in first amendment jurisprudence elevates interests of the powerful and protects and promotes discrimination against the least powerful).

[151] *See* Nadine Strossen, *Tensions between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 712–15 (1995) (analyzing the Supreme Court's recognition that severe or pervasive harassment that rises to a level of a hostile work environment is illegal under Title VII and arguing that a case-by-case contextual analysis is necessary to draw the line between protected speech and illegal sexual harassment).

anti-abortion employee argues that it is illegal for an employer *not* to permit her to speak about her religious belief about abortion. Note that the employer is not asking her to have an abortion herself or even to listen to others discuss their pro-choice beliefs. It is merely asking her to refrain from voicing her opinion and others to do so as well.

It appears, however, that the employer may have to concede to her request. An accommodation is just that: special treatment of an employee's religious beliefs and practices unless the employer can prove an undue burden, which, after *Groff*, should be more difficult to do. But there are two practical problems arising from this conclusion. First, the employer has no legal obligation to permit pro-choice individuals to speak their minds during breaks unless the source of their pro-choice views is religion.[152] At least one lawsuit has been filed arguing that an abortion ban would violate certain traditions of the Jewish faith due to the belief that abortion is ethical if its purpose is to protect the life or health—physical or emotional—of the mother.[153] Most people, however, who identify as pro-choice would likely say that it is a moral conviction rather than a religious belief.[154] And second, while the court might examine whether the hypothetical religious employee is sincere and her anti-choice belief stems from her religion,

---

[152] Some have argued that under certain conditions a religious accommodation in the context of mandatory vaccination of children violates the Establishment Clause of the First Amendment to the U.S. Constitution. *See* Hillel Y. Levin, *Why Some Religious Accommodations for Mandatory Vaccinations Violate the Establishment Clause*, 68 HASTINGS L.J. 1193, 1196 (2017) (arguing that granting religious accommodations violates the Establishment Clause if the government does not also offer accommodations to non-religious philosophical objectors.). There is a question whether the Supreme Court would agree, especially after the *Groff* decision, which begins with a discussion of how the Court has reevaluated Establishment Clause law and implying that it was the Supreme Court's concern in *Hardison* that it would be wading into establishment of religion if it were to adopt a rigid standard for proving undue burden. *See* Groff v. DeJoy, 600 U.S. 447, 459–63 (2023).

[153] *See* Brendan Pierson, *Florida Abortion Ban Violates Jews' Religious Freedom, Lawsuit Says*, REUTERS (June 14, 2022), https://www.reuters.com/world/us/florida-abortion-ban-violates-jews-religious-freedom-lawsuit-says-2022-06-14; *see also Do Abortion Bans Violate Jews' Religious Rights*?, THE JEWISH EXPERIENCE (June 16, 2022), https://www.brandeis.edu/jewish-experience/social-justice/2022/june/abortion-judaism-joffe.html.

[154] For a discussion of the different moral and religious views about abortion, see Bonnie Steinbock, *Abortion*, THE HASTINGS CTR. (Feb. 22, 2024), https://www.thehastingscenter.org/briefingbook/abortion.

the religious employee has all the power to decide what her brand of religion requires. It would not be advisable for the employer to challenge her beliefs or practices so long as she appears sincere in her assertion that she has a religious belief that requires her to oppose abortion to her coworkers.[155] That is because religious accommodation cannot be limited to organized or mainstream religions because doing so would risk violating the Establishment Clause,[156] and determining whether an individual's belief is sincere is nearly impossible and risky.[157]

The employer can argue that it would pose an undue cost to the conduct of the business to allow this hypothetical employee to advocate for her anti-choice position because other employees may be very angry that the anti-choice employee has a right to speak but that the pro-choice, or even anti-choice employee has no right to respond unless the source of their beliefs is religious. The employer would likely justify its right to ban controversial speech because not doing so, the employer may argue, would create too much tension in the workplace. This seems especially possible now that religion and politics have become so intertwined in our society. The court should seriously consider this defense especially because the plaintiff's request is very specific about what her religion requires and for the employer to fulfill her request would be costly. It may be, however, that even if an employer may have difficulty completely accommodating our hypothetical plaintiff, the employer may be able to at least partially accommodate her by allowing fora in which all employees can voice their views on the subject and/or by allowing the

---

[155] *See* Levin, *supra* note 152, at 1206–09 (explaining the difficulty that states have challenging the sincerity of a religious objector's beliefs).

[156] *See id*. at 1204–06, 1204, n.6 (citing Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; Note, *Toward A Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1080 (1978)); *see also* Sherr v. Northport-E. Northport Union Free Sch. Dist., 672 F. Supp. 81, 92 (E.D.N.Y. 1987) ("Defining 'religion' for legal purposes is an inherently tricky proposition. For one, the very attempt brings the government exceedingly close to the involvement with ecclesiastical matters against which the First Amendment carefully guards. Additionally, the tremendous diversity of the manners in which human beings may perceive of the universe and their place in it may make the task virtually impossible. Scholars have been deeply perplexed by the problems engendered by the necessity of delineating what constitutes the 'religion' which the First Amendment protects, and courts have struggled to formulate workable definitions.") (citations omitted).

[157] *See* Levin, *supra* note 152 at 1206–09.

religious employee to speak through a newsletter opinion piece or some other way but also allowing others who do not want to listen to opt out of doing so or to respond with a writing of their own.

What about the union as a defendant? In *Carter*, it appears that the plaintiff wants two things: 1) that the union not use employee funds for abortion advocacy; and 2) to speak up against the reproductive freedom advocacy of the Vice President of the union. Neither of these is unreasonable or necessarily harmful to the union or the business if the speech is civil. While Carter's speech was abusive, she took the position that it violates her religion to pay for pro-choice advocacy. This issue should be easily accommodated by the union, which can agree not to allocate her union dues to its political advocacy. This alone might not completely accommodate Carter if the union is still collecting dues from her. The union could decide that it will reduce her dues by the amount that supported its political activity, or it could not collect dues from her at all. The failure to collect any dues should completely eliminate her conflict concerning supporting abortion advocacy. Moreover, she should not have an associational conflict because she is no longer a member of the union. But accommodating her by not requiring her to pay any dues may be detrimental to the union, especially if there are many employees who argue that they need the same religious accommodation. As to her second issue, not collecting dues from Carter could blunt her need to criticize the V.P. of the union, but she can still speak up on social media so long as she does so without being abusive or threatening.

b. Employer's Duty to Engage in Interactive Process

If Carter could demonstrate that it was her sincere religious belief that she must counter what she interpreted to be "pro-abortion" statements, policies, and practices of her union coworkers, it appears that the employer should at least consider possible means of accommodating Carter. Although Title VII does not mention an employer's duty to engage in an interactive process with the employee to discuss possible religious accommodations, the EEOC Compliance Manual encourages such a process.[158] Moreover, employers' lawyers

---

[158] EEOC, *supra* note 57, § 12-I.C.3; *see also* Dallan F. Flake, *Interactive Religious Accommodation*, 71 ALA. L. REV. 68, 83–85 (2019) (analyzing the EEOC documents and arguing that employers should have a duty to engage in

encourage their clients in religious accommodations cases to engage in the interactive process of seeking a reasonable accommodation.[159]

The regulations to the ADA[160] impose a continuing duty on an employer who knows of an applicant's or employee's request for an accommodation to engage in an interactive process. Such a process, according to the EEOC, requires employers to explore with the requesting employee potential accommodations and to select an accommodation that would reasonably accommodate the employee's disability as well as the employer's needs.[161] It is axiomatic under the ADA, however, that an employer does not have to adopt the accommodation preferred by the employee but may offer an alternative reasonable accommodation.[162] Under *Ansonia Board of Education v. Philbrook*,[163] this seems to be the rule in religious accommodations law as well.

In the context of an employee's request of a religious accommodation, the courts should encourage employers to consider possible accommodation.[164] If the religious accommodation law were to adopt the ADA approach, the employer could potentially provide a trial period to see if a disruption in the workforce would occur or perhaps allow Carter to post her polite objection on a different, private forum that would be open to employees only.

---

an interactive process with employees under the religious accommodations requirement of Title VII).

[159] *See, e.g.*, Kate Gold, Philippe A. Lebel & Dixie M. Morrison, *Defending Against Title VII Religious Objections to COVID Vax*, PROSKAUER (May 16, 2022), https://www.proskauer.com/pub/defending-against-title-vii-religious-objections-to-covid-vax.

[160] 29 C.F.R. § 1630.9; *see also* 29 C.F.R. pt. 1630 app. § 1630.9 (2023).

[161] *See*, *e.g.*, Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 312–20 (3d Cir. 1999) (detailing what the duty to engage in an interactive process requires); EEOC v. Chevron Phillips Chem. Co., 570 F.3d 606, 622 (5th Cir. 2009) ("Under the ADA, once the employee presents a request for an accommodation, the employer is required to engage in the interactive process so that *together* they can determine what reasonable accommodations might be available.").

[162] EEOC v. Agro Distrib. LLC., 555 F.3d 462, 471 (5th Cir. 2009).

[163] 479 U.S. 60, 68–69 (1986) (holding that if the employer offers a reasonable accommodation, it does not have to adopt the accommodation preferred by the employee or prove that the preferred accommodation would impose an undue hardship).

[164] *See*, Flake, *supra* note 158, at 86–89 (explaining that courts do not uniformly adopt the duty to engage in an interactive process in religious accommodation cases, but some do, and arguing that all courts should do so).

c. Complete vs Partial Elimination of Employee's Religious Conflict with Work

This solution may lead to less than the complete elimination of the conflict, which some circuits and the EEOC require in the religious accommodation context.[165] As explained above, there is a split in the circuits as to the question whether an employer's accommodation must completely eliminate the conflict between work and the employee's religious beliefs and practices.[166] The circuits favoring the complete elimination of a conflict seem to have the better argument, at least when it comes to the scheduling context. However, such a rule may not be appropriate in a religious speech case. *Groff* provides a good example. The plaintiff's religious belief was that he must not work at all on Sundays. An offer to allow him to go to church Sunday mornings and to come to work later did not completely eliminate the work conflict with the employee's religious belief and would therefore not be a reasonable accommodation according to the majority of circuits deciding the issue.[167] Because the employer did not completely eliminate the conflict, it had not offered the plaintiff a reasonable accommodation. Thus, to prevail, the employer would have to prove that an accommodation that would allow Groff not to work at all on Sundays would impose an undue hardship.[168]

A religious speech accommodation case like *Carter*, however, could potentially be resolved through the interactive process and the employer could give Carter permission to publish an objection to other employees' views in a civil manner and in a workplace forum. It would be odd, given the facts in *Carter* if the plaintiff were to respond to the employer's suggestion that it is her religious belief that she must object by using derogatory language and in a public forum. Of course, if this is her belief, then the employer would be able to prove that it offered a reasonable accommodation (or several of them) but the employee rejected them, and it would be an undue hardship on the conduct of the employer's business to allow employees to publicly harass and threaten other employees. To permit this behavior as an accommodation would not only create unrest among employees and

---

[165] *See* Flake, *supra* note 67.

[166] *Id*.

[167] Groff v. DeJoy, 35 F.4th 162, 166 (3d Cir. 2022).

[168] *Id*.

fuel the fires already burning from the disagreement but also could create reputational damage to the company.

In *Wilson*, the federal district judge concluded that there was an inadequate factual basis to conclude that the plaintiff had vowed to "bear witness."[169] This finding allowed the court to conclude that the employer's proposed accommodation that would have permitted Wilson to wear the badge with the photo of the aborted fetus to work but to keep it covered was a reasonable accommodation.[170] In other words, if the plaintiff's religious beliefs required her to bear witness to the truth that abortion is wrong and to communicate this truth to others, covering the photograph on the badge so that no one else could see it at work may not have provided a complete reasonable accommodation of the plaintiff's religious beliefs. But if she was not required by her religion to bear witness, the covering of the badge could reasonably accommodate her need to wear the badge (but not necessarily to communicate its message to others).

What if there were sufficient evidence, however, that Wilson had made a religious vow to bear witness to the fact that abortion was wrong? One could conclude that covering the badge while at work but being permitted to wear it would inadequately and not reasonably accommodate Wilson's religious beliefs because it would not eliminate the conflict between her religious belief and the work rules. Although the courts did not analyze the other potentially reasonable accommodations proposed by the employer in *Wilson*, perhaps the suggested accommodation of removing the graphic photo from the badge but permitting the anti-abortion language to remain on the badge would be a reasonable accommodation. But what would happen if Wilson took the position that wearing the badge with the photo and the language is the only way that she could bear witness? The employers' suggested alternative solutions would likely not be considered reasonable, and it would be up to the employer to prove undue hardship.

This seems like a harsh result, but in religious accommodations cases, the courts are in the position of merely deciding whether the individual's request is a religious one and whether the individual is

---

[169] To "bear witness" is to show that something exists or is true or to make a statement that something is false or true. *Bear Witness*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/bear%20witness (last visited Mar. 20, 2024).

[170] Wilson v. U.S. W. Comm'cns, 58 F.3d 1337, 1340–41 (8th Cir. 1995).

sincere in her belief. It is not up to the courts to determine whether her request is rational or true. Unfortunately, this places courts in an awkward position and as a result places religious accommodation cases on a slightly different plane than disability accommodations cases, at least when it comes to determining whether a requested accommodation is reasonable.

However, employers' interests can and should be adequately protected by allowing employers to demonstrate undue burden on the conduct of the employer's business. Courts must recognize that while proof of financial effects on the employer's business is important in determining whether there is undue hardship, other types of proof that demonstrate the effect on the employer's workforce that also affect the conduct of the employer's business should be important in determining whether an undue hardship exists.[171] This may be especially true in Types III and IV requests for accommodations because these requests, by their nature, may have a significant effect on other workers and on the workplace as a whole.

At the *Groff* oral argument, the Solicitor General argued that coworker grumbling or even hostility engendered by the grant of the accommodation would not be sufficient to demonstrate an undue hardship. There must be, she argued, a showing that the accommodation "materially changed the terms or conditions of the coworkers' employment."[172] The Court's decision in *Groff* appears to have accepted the Solicitor General's argument when it concluded that effects on other employees that harm the conduct of the business can create an undue burden but only if the employer can prove that the accommodation actually did change the conditions in the workplace and that those changes did not result from anti-religious hostility or discriminatory views. Moreover, the Court seemed to suggest that the employer explore various accommodation options. Without using the term, the Court's suggestion appears to sanction, if not require, that the employer engage in a type of interactive dialogue with not only the religious employee but also with the employee's

---

[171] *See* Flake, *supra* note 88, at 209 (explaining that the research proves convincingly that effects on workforce morale affect the conduct of the business and concluding that a separate inquiry into the business effect is unnecessary).

[172] Transcript of Oral Argument at 89, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174).

coworkers to explore the possibility of an acceptable accommodation.[173]

Assuming that there is some requirement of an interactive dialogue, what would this mean in a Type III (expression) accommodation case? It seems that the employer should prevail by demonstrating that the expression is sufficiently objectionable to other employees to alter the terms or conditions of employment. Would this require schedule changes or other "material" changes to prove that the requested accommodation imposes an undue burden? Would it require severe or pervasive harassing expression?[174] Even assuming that the religious expression is offensive to the other employees to the extent that it creates a hostile working environment, would those employees be protected by Title VII's anti-harassment jurisprudence if they are not women (or others) who have had an abortion? In other words, would such an accommodation be required unless it actually created a hostile working environment based on the coworkers' protected characteristics (race, color, sex, gender, national origin or religion)? It seems that the Solicitor General's test may work well for scheduling conflict cases but not necessarily for expression cases.[175]

d. When is the Employer's Burden Undue for Types III and IV Accommodations?

As noted above, Title VII makes it illegal to discriminate against an employee or applicant because of her religion. It defines "religion" broadly to include a reasonable accommodation requirement:

---

[173] *See*, *e.g.*, *Groff*, 600 U.S. at 472–73.

[174] These are the standards for illegal harassment that leads to hostile working environment under Title VII. The harassment must be based on a protected characteristic under Title VII or occur in retaliation to a worker's report of a reasonable belief that illegal discrimination is taking place in the workplace. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–23 (1993); *see also* Wyatt v. Nissan N. Am., Inc., 999 F.3d 400, 426 (6th Cir. 2021).

[175] The Solicitor General stated in another part of her argument before the Supreme Court that in expression cases there is no right to accommodation where the expression harasses other employees. Transcript of Oral Argument at 79-80, *Groff*, 600 U.S. 447 (No. 22-174). But the question would be what test should be used for determining harassment? Should it be sufficient if the expression violates the employer's rules or policies, which often restrict expression more than Title VII does?

> 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.[176]

It is this provision regarding undue hardship that *Hardison* and *Groff* defined. As noted above, both cases involve accommodations regarding scheduling. In her oral argument before the Supreme Court in *Groff*, Solicitor General Elizabeth Prelogar explained that there are three types of common accommodation requests, which she called "buckets:" scheduling, dress code, and expression requests.[177] She asserted that the lower courts are handling these requests well, ordinarily upholding the dress code requests so long as there is no safety issue with the requested accommodation,[178] and upholding the religious expression requests so long as the expression does not constitute harassment.[179]

There is some question about the accuracy of this argument, given the number of cases in which the courts have almost automatically assumed that an alteration of the dress code as a religious accommodation posed an undue burden.[180] Take, for example *Webb v. City of Philadelphia*,[181] a case in the Third Circuit where the court upheld the Philadelphia police department's refusal to allow a female Muslim police officer to wear a headscarf required by her religion because the proposed accommodation would purportedly endanger the neutrality, cohesiveness and *esprit de corps* of the police department. Or, in the expression cases, consider the *Carter* case.

After *Carter*, the question arises as to the standard the employer would need to meet to prove harassment. Under Title VII hostile work environment law, the behavior (or speech) must be sufficiently severe

---

[176] 42 U.S.C. § 2000e (j).

[177] Transcript of Oral Argument at 81, *Groff*, 600 U.S. 447 (No. 22-174).

[178] *Id*. at 78–80.

[179] *Id*. Perhaps the *Carter* case is an outlier, but it is concerning that it went to a jury and the plaintiff was victorious on the religious accommodation claim.

[180] For discussion of this issue, *see* Flake, *supra* note 23 at 725–33.

[181] 562 F.3d 256, 262 (3d Cir. 2009); *see also* Sahar F. Aziz & Valorie K. Vojdik, *Webb v. City of Philadelphia*, *in* FEMINIST JUDGMENTS: REWRITTEN EMPLOYMENT DISCRIMINATION CASES 180 (Ann C. McGinley & Nicole Buonocore Porter eds., 2020).

or pervasive to alter the terms or conditions of the alleged victim's employment.[182] This is a high standard that I believe should not apply here. Requiring this proof from the employer of an undue hardship would discount all the damage done by expression that falls short of the standard. For example, it could be that Carter's harassing emails would not be sufficiently severe or pervasive to create a hostile work environment for Vice President Stone. But it is clear that her posts violated the employer's Workplace Bullying and Hazing Policy and Social Media Policy, and there was evidence of repeated posts that Stone interpreted as threatening. Unless these policies are written with the intent of discriminating based on religion or are so broad that they allow virtually no religious expression, a violation of these policies, assuming they are carefully written and recognize that accommodation must be made to religious beliefs and practices, may be sufficient to prove undue hardship.[183]

The next subpart involves a type of request for religious accommodation that the Solicitor General did not mention: efforts to avoid job responsibilities that employees consider to be religiously objectionable.

D. Type IV Accommodations: When Religious Beliefs Interfere with Job Performance

Paige Casey, a nurse, worked for CVS Pharmacy in the MinuteClinic, where customers receive care, counseling, and prescriptions.[184] Paige is a practicing Catholic, and for nearly four years her employer had recognized that her religion prevented her from prescribing or providing what she believed to be abortion-

---

[182] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986).

[183] Of course, general policies that employers use "off the shelf" might go too far in limiting speech if they needlessly restrict religious rights under Title VII or rights under the National Labor Relations Act, section 7, which protects speech that is concerted action. For a discussion of the section 7 issue with social media policies, see McGinley & McGinley-Stempel, *supra* note 17.

[184] Matthew Barakat, *Nurse Practitioner Says CVS Fired Her over Abortion Stance*, ASSOC. PRESS (Aug. 31, 2022, 5:23 PM CDT), https://apnews.com/article/abortion-health-religion-lawsuits-4bb36dab69b65f86febabdc8651b1c0f; *see also* Defendants' Brief in Support of Their Motion to Dismiss, or Alternatively to Stay, and Compel Arbitration, Casey v. MinuteClinic Diagnostic of Va., No. 1:22-cv-01127-TSE-WEF (E.D. Va. filed Oct. 27, 2022).

inducing drugs, including certain contraceptives.[185] In so doing, CVS had recognized a religious accommodation for Casey.[186] That posture changed when CVS adopted a policy of not allowing religious accommodations for MinuteClinic nurses because providing fertility-related services and contraceptive care including prescribing of hormonal contraceptives are, according to a CVS spokesman, an essential function of the job of MinuteClinic nurse.[187]

Casey, represented by Alliance Defending Freedom, a nonprofit legal group led by conservative Christian Michael Farris, filed suit in Prince William County Circuit Court, alleging that MinuteClinic Diagnostic of Virginia and CVS Health Corporation violated the Virginia Conscience Clause.[188] The case was subsequently removed to federal court on the basis of diversity of citizenship.[189] In their Answer, the defendants disputed the plaintiff's allegation that the hormonal contraceptives can cause an abortion.[190]

There are numerous other suits by nurse practitioners against CVS across the country for failing to continue to grant them religious accommodations.[191] In some of the cases, nurses are refusing to

---

[185] Barakat, *supra* note 184.

[186] *Id.*

[187] *Id.*; *see also* Defendants' Answer and Affirmative Defenses para. 41, *Casey*, No. 1:22-cv-01127-TSE-WEF (E.D. Va. filed Jan. 19, 2023).

[188] VA. CODE § 18.2-75 (2023).

[189] Defendants' Notice of Removal at 3, *Casey*, No. 1:22-cv-01127 (E.D. Va. filed Oct. 06, 2022).

[190] Barakat, *supra* note 184; *see also* Defendants' Answer and Affirmative Defenses para. 40, *Casey*, No. 1:22-cv-91127-TSE-WEF (E.D. Va. filed Jan. 19, 2023).

[191] In another lawsuit against CVS, a Kansas nurse practitioner alleges that the company retracted its policy of allowing religious accommodations to nurses working in the MinuteClinic and that she was fired for refusing to prescribe Plan B. *See* Andrew Bahl, *Kansas Nurse Practitioner Says CVS Fired Her over Her Religious Stance on Birth Control*, TOPEKA CAPITAL-J., https://www.cjonline.com/story/news/state/2022/10/14/kansas-nurse-practitioner-says-she-was-fired-over-birth-control-stance-religious-exemption-abortion/69563437007 (Oct. 14, 2022, 4:14 PM). A physician's assistant brought a similar lawsuit against her employer, a hospital, alleging that she was discriminated against based on her religion when the hospital denied her a religious accommodation for refusing to refer transgender patients for gender-affirming care and also refused to use the pronouns the patients desired. *See* Gillian Richards, *Physician Assistant Sues Hospital for Religious Discrimination over Transgender Stance*, DAILY SIGNAL (Oct. 12, 2022),

prescribe contraceptives that they consider abortifacients, even though the FDA does not categorize the pills as abortifacients.[192]

For example, Suzanne Schuler, a nurse practitioner in Kansas at CVS, sued CVS, alleging that she was fired in 2021 for refusing to give advice and counseling to women about contraceptives and refusing to prescribe drugs she considered to be abortifacients.[193] The amended petition (complaint) alleged that CVS had earlier permitted her a religious accommodation so that she did not have to counsel patients about contraceptives and abortifacients. CVS had permitted the plaintiff, the amended complaint alleges, to send patients to other CVS stores to get contraceptive services or to reschedule the patient for a day when the plaintiff was not working.[194] Later, the amended complaint alleges, CVS changed the job description to require that nurse practitioners counsel women on birth control and prescribe contraceptives.[195] In 2021, the plaintiff filled out another religious accommodation request in which she said she would not counsel, advise, or prescribe contraceptives because doing so was against her religion. The amended complaint alleged that Schuler was fired in October 2021 for refusing to provide "abortion causing drugs."[196]

---

https://www.dailysignal.com/2022/10/12/physicians-assistant-sues-hospital-religious-discrimination-transgender-stance.

[192] Ian Lopez, *Reproductive Rights Clash with Religious Ones in Abortion Wars*, BLOOMBERG L. (Jan. 30, 2023), https://www.bloomberglaw.com/bloomberglawnews/exp/eyJjdHh0IjoiSExOVyIsImlkIjoiMDAwMDAxODUtZTcwNC1kNTgxLWFiY2YtZWYzZjVhN (Jan. 30, 2023). For a discussion of what an abortifacient is, *see infra* note 196.

[193] Amended Petition at 1–2, 9, Schuler v. CVS Pharmacy, No. 2:22-cv-02415 (D. Kan. filed Oct. 13, 2022); The court entered a stay in the case on February 8, 2023, pending the Supreme Court decision in *Groff v. DeJoy*. Order, *Schuler*, No. 2:22-cv-02415 (D. Kan. filed Feb. 8, 2023).

[194] Amended Petition at 2, 4, 7, *Schuler*, No. 2:22-cv-02415 (D. Kan. filed Oct. 13, 2022).

[195] *Id.* at 4.

[196] *Id.* at 2. It is unclear what "abortion-causing drugs" the amended complaint refers to. Plan B, an emergency contraceptive has been available over the counter without a prescription to women and men aged seventeen and older since 2006. In 2014, the Food & Drug Administration removed the age limitation, and Plan B, and other emergency contraceptives have been available over the counter to women of all ages. *See Emergency Contraception*, KFF (Aug. 4, 2022), https://www.kff.org/womens-health-policy/fact-sheet/emergency-contraception. The scientific community has concluded that Plan B and its generics are not abortifacients. They do not cause abortions, but they are used

In response to questions from reporters about Schuler's case, Michael DeAngelis, a spokesman for CVS, stated:

> [I]t is not possible . . . to grant an accommodation that exempts an employee from performing the essential functions of their job.
>
> MinuteClinic does not prescribe abortifacients or provide abortion services, but educating and treating patients regarding sexual health matters—including pregnancy prevention, sexually transmitted infection prevention,

---

after unprotected intercourse or a contraceptive failure to prevent a pregnancy by delaying or inhibiting ovulation. They do not work if a pregnancy is established. *Id.*; *see also Plan B One-Step (1.5 mg levonorgestrel) Information*, FDA (Dec. 23, 2022), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/plan-b-one-step-15-mg-levonorgestrel-information. *But see* Alexandra DeSanctis, *Yes, Some Contraceptives Are Abortifacients*, NAT'L REV. (Nov. 4, 2016), https://www.nationalreview.com/2016/11/contraception-birth-control-abortion-abortifacients-ella-plan-b-iud-embryo-life (claiming that Plan B and other emergency contraception can act as abortifacients because they can prevent implantation of an embryo in the woman's uterus). The problem appears to be a debate between what many scientists and some churches view as abortifacients. Those who conclude that Plan B and some contraceptives such as the intrauterine device (IUD) are abortifacients believe that life and pregnancy begin at fertilization (even though approximately half of fertilized eggs do not implant in the uterus and do not develop). Those who say these devices and drugs are not abortifacients see life and pregnancies beginning once the fertilized egg is implanted in the uterus. While Plan B and its generics and the IUD tend to prevent fertilization, at times they may operate to prevent implantation. As a result, in fact, this is a moral question, depending on one's view of when life and pregnancies begin: fertilization or implantation of the fertilized egg. *See* Claire Horner & Lisa Campo-Engelstein, *Dueling Definitions of Abortifacient: How Cultural, Political, and Religious Values Affect Language in the Contraception Debate*, 50 HASTINGS CTR. REP. 14 (2020). As noted in Part I, mifepristone, combined with misoprostol, are used as abortifacients to terminate early pregnancies. At the time, to get mifepristone, however, a woman needed a prescription from a doctor, not a registered nurse, a pharmacist, or a nurse practitioner. Thus, Casey could not have been urged to prescribe mifepristone. Nor could she have been urged to prescribe Plan B or its generics because they are available over the counter and the user does not need a prescription. On the other hand, Casey could have been required to counsel patients about the use of these drugs and/or on the uses of other contraceptives that the scientific community does not consider to be "abortion-causing," but that may interfere with the survival of a fertilized but not yet implanted egg.

> screening and treatment, and safer sex practices—have become essential job functions of our providers and nurses. DeAngelis said. . . . We cannot grant exemptions from these essential MinuteClinic functions.[197]

Schuler's and Casey's cases raise issues not commonly seen in religious accommodation cases historically but that seem to be growing in number. These plaintiffs do not request accommodations to the employer's dress code, a vaccine requirement, a scheduling conflict, or a policy regarding religious speech. Instead, the conflict arises with the performance of job tasks that the employer deems essential to the job. This makes the requests for accommodations different from most religious accommodation cases and more like cases brought under the Americans with Disabilities Act. Therefore, although the ADA cases do not govern the courts' response in Title VII cases, they may provide guidance in analyzing this type of religious accommodations case.[198]

Under the ADA, plaintiffs must prove that they are qualified to perform the essential functions of the job, either with or without reasonable accommodations.[199] "Essential functions" mean "fundamental job duties of the employment position . . . not . . . marginal functions of the position."[200] In determining whether a job duty is an "essential function," under the ADA the factfinder would consider: whether the position exists in order to perform the function,

---

[197] Bahl, *supra* note 191.

[198] One note of caution about using ADA cases as a guide to treat Type IV religious accommodation cases under Title VII is that much of the law under the ADA is statutory, whereas there is no legislative language in Title VII that even mentions that an individual needs to be "qualified," that there are "essential functions" to jobs that might distinguish whether an individual is "qualified," or that specifies what a "reasonable accommodation" and/or "undue hardship" mean. Therefore, relying on the ADA comparison necessarily invites judges to interpret at least these types of accommodation requests to incorporate ADA law into Title VII when Congress has not spoken as to the situation. The best result would likely be for Congress to amend Title VII to add its understanding of the meaning of religious accommodation, but given Congress's failure to get many bills passed recently, it is unlikely it could make these changes.

[199] The ADA defines "qualified individual with a disability" as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C.S. § 12111(8).

[200] 29 C.F.R. § 1630.2(n)(1) (2023).

whether there is a limited number of employees who are available to take on the job duties; whether the job duty is highly specialized and/or; whether the individual was hired to perform that function.[201] The court would give some deference to the employer's testimony about what the essential functions of the job are, but would also consider written job descriptions that were prepared in advance of hiring, the amount of time performed on the function, and work experience of other employees in the position.[202]

Most important in this context is that under the ADA a proposed accommodation that would remove essential functions from the employee's job is not required.[203] Thus, if we follow the ADA in these religious accommodation cases, the first question would be whether counseling on family planning and prescribing contraceptives (that the plaintiffs object to) are essential functions of the nurse practitioner's job in the MinuteClinic. The answer to this question would likely depend on a case-by-case analysis of how each CVS MinuteClinic operates, how many other nurse practitioners work in the individual store, the demand for family planning services at the particular CVS store, and the percentage of the nurse practitioners' work that is devoted to these services. Moreover, the court would look at written job descriptions that were prepared in advance of hiring and the work experience of other employees in the position as well as the testimony of the employer.

CVS has adopted a uniform policy that counseling and educating patients on women's health as well as prescribing contraceptives are essential functions of the nurse practitioner positions at its MinuteClinics across the country. While this position appears reasonable, it could potentially be subject to challenge, especially if CVS changed its policy after the plaintiffs began working at the MinuteClinics. These factors weigh in the plaintiffs' favor because CVS's previous behavior could be evidence that at least in the stores where there were religious accommodations given, these functions

---

[201] *Id.* § 1630.2(n)(2).

[202] *Id.* § 1630.2(n)(3).

[203] *See, e.g.*, Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 140 (2d Cir. 1995) (noting that an employer is not required to accommodate an individual by eliminating essential functions from the job: "[H]aving someone else do part of a job may sometimes mean eliminating the essential functions of the job. But at other times, providing an assistant to help with a job may be an accommodation that does not remove an essential function of the job from a disabled employee").

were not essential to the operation of the job of nurse practitioner. On the other hand, CVS's willingness to accommodate the plaintiffs previously does not subject it to forced accommodation in the future. Reaching a conclusion, however, will likely require a case-by-case analysis depending on operation of the particular MinuteClinic store.

If the court concludes that counseling patients about and prescribing contraceptives to which the plaintiff objects are essential functions of the job at her particular MinuteClinic, she would not be entitled to an accommodation. Only if these are marginal functions of the job may an employer be required (under the ADA) to transfer these duties to another employee.[204]

Assuming that the factfinder concludes that at the particular MinuteClinic counseling about and prescribing contraceptives is not an essential function, the issue of whether the employer can

---

[204] But under the ADA there is another inquiry that we would make: whether there is a vacant position for which the plaintiff is qualified. Even if there is a vacant position, there are some limitations on accommodating the employee by moving her to the position. In *U.S. Airways v. Barnett*, 535 U.S. 391, 403 (2002), the Supreme Court held that in most cases where there is a seniority system in the workplace (with or without the presence of a union) and an employee with a disability asks for assignment to a vacant position as a reasonable accommodation, the individual with seniority should get the job over the person with a disability. The justification for this rule is to protect the reasonable expectations of the employees. An exception to this rule exists, however, if the employer does not regularly enforce the seniority rules in determining assignments, thereby failing to create settled expectations of employees in the seniority system. This rule is consistent with *Hardison's* respect for the priority of a collective bargaining agreement's scheduling rules over an individual's request for a religious accommodation. *See* Trans World Airlines v. Hardison, 432 U.S. 63, 84–85 (1977).

Furthermore, even if there is no seniority system, there is a split in the circuits as to the employer's obligation under the ADA to permit an individual with a disability to fill a vacant position if another more qualified person applies for the job. In *Huber v. Wal-Mart Stores*, *Inc.*, 486 F.3d 480, 484 (8th Cir. 2007), the court held that an employer with an established policy of hiring the most qualified person for a vacant position may refuse to grant the position as an accommodation to a qualified disabled employee if another applicant (even one from outside the firm) is more qualified. Other courts disagree, holding that the individual with a disability who is qualified for the position should get the position as a reasonable accommodation without allowing other non-disabled more qualified individuals to compete for the job. *E.g.*, EEOC v. United Airlines, 693 F.3d 760, 761 (7th Cir. 2012). It appears that neither Casey nor Schuler requested a transfer to a vacant position, but employees and employers need to be aware of this as a possible accommodation under Title VII.

completely eliminate the conflict in a religious accommodation case will arise. A major issue in these cases turns on the definition of abortifacient. It is likely that the courts will not permit the defendants to challenge the sincere belief of the plaintiffs that life begins at conception, rather than implantation, even though most of the scientific community agrees that avoiding implantation is not an abortion. Thus, courts may avoid adjudicating the question of whether the plaintiffs' position is a reasonable one and conclude that there can be no complete accommodation without exempting the plaintiff from these job duties.

The question will then become whether such an accommodation will impose an undue hardship on the conduct of the business. At this point, the employer will bear the burden of proving undue hardship. Many of the same considerations will likely come into play as those discussed above with reference to whether these job duties are essential functions. The employer should focus on the particular MinuteClinic, how accommodating this individual will affect others, whether there are other nurse practitioners who can do the family planning work without burdening them with a workload that is too great, whether customers will continue to get prompt and professional services, and perhaps, whether there are other CVS MinuteClinics that are sufficiently near to which customers can be referred for these services. The effect on other nurse practitioners as well as on customers should be a key question in making this determination, but simple grumbling by other employees would not be sufficient to prove undue hardship.

Although it is not an abortion case, a similar case against Metropolitan Hospital (University of Michigan Health-West) by a Christian physician's assistant (P.A.) provides a good example.[205] Valerie Kloosterman alleges that she worked as a P.A. at Metropolitan Hospital for seventeen years and that she received praise for her relationship with and care for her patients.[206] After the local hospital merged with the University of Michigan Hospital system, she was fired following a confrontational meeting with members of the Diversity, Equality and Inclusion (DEI) and Human Resources Departments (H.R.).[207]

---

[205] Corrected First Amended Complaint, Kloosterman v. Metro. Hosp., No. 1:22-CV-944 (W.D. Mich. filed Jan. 31, 2023).

[206] *Id*. at 1–2.

[207] *Id*. at 2.

Kloosterman's amended complaint alleges that as a devout Christian and lifelong member of a United Reformed Church, she believes that all people are created in God's image, that each individual's sex is ordained by God, that each of us should care for our bodies as they are, that one should not attempt to erase or alter one's sex, and that "'gender reassignment' drugs and procedures have a permanent sterilizing effect that cannot be justified."[208]

She further alleges that as a Christian medical professional, she believes that it would be sinful to aid a patient to procure "sterilizing drugs or surgical procedures designed to erase or alter his or her sex."[209] Moreover, she alleges that it would be against her medical judgment to place an erroneous gender designation on an individual's medical record, because if she were to do so, the patient might be deprived of important medical tests or procedures such as pregnancy tests.[210]

Kloosterman also alleges that over the years she has treated a dozen Lesbian patients and two other patients who were likely transgender.[211] She also alleges that when she treated patients whose "biological sex" may have differed from the individual's preferred pronouns, she used the individual's name instead of their pronouns in their records and to address the patients.[212] Neither of the transgender patients ever complained about her care or asked to see a different provider.[213]

The complaint further alleges that in 2018, University of Michigan Health-West required Ms. Kloosterman to do an online training on serving LGBTQ+ patients to which she had no religious objection. A subsequent mandatory training in 2021 required her to "affirm statements concerning sexual orientation and gender identity that her Christian faith prohibited her from affirming."[214] The plaintiff contacted the Vice President of the university's DEI department, explained her position, and requested a religious

---

[208] *Id*. at 7–8. Kloosterman's complaint alleges many causes of action, but I focus here on the Title VII religious accommodations claim.

[209] *Id*. at 9.

[210] *Id*.

[211] *Id*. at 11–12.

[212] *Id*. at 12.

[213] *Id*.

[214] *Id*. at 13.

accommodation.[215] She alleges that medical personnel received accommodations that were not religious for refusing to perform treatments or to treat certain individuals, and that it would not have been difficult to accommodate her request not to have to use pronouns that did not comport with patients' "biological sex" and not to have to refer patients for gender affirming surgery.[216]

At a subsequent meeting with the DEI and H.R. representatives, Kloosterman alleges that one member of the administration called her "evil" and belittled her religious beliefs.[217] Soon thereafter, she was fired.[218] The complaint alleges that according to her dismissal letter, her firing resulted from

> her unwillingness to refer "gender transitioning" patients for certain drugs and procedures, her unwillingness to use pronouns that do not correspond to a patient's biological sex, and a newly fabricated and baseless allegation that Ms. Kloosterman had altered medical records to change patients' templated pronouns (a false charge that Ms. Kloosterman continues to deny).[219]

Kloosterman's complaint clearly alleges that none of her patients has ever asked her to refer them for certain drugs and procedures or to use pronouns that they preferred.[220] If Kloosterman can prove her allegations, the question could be whether using preferred pronouns and referring individuals for gender affirming surgery were essential job functions that could not be accommodated. The answer to this question may depend on what type of practice she was engaged in at the clinic, the percentage of transgender patients in the clinic, the number of doctors and P.A.s working there, and whether it would be relatively easy to refer any transgender patients who express an interest in transition care, or in the healthcare worker's explicit use of preferred pronouns, to another healthcare worker.

Of course, if the clinic's practice is limited to transitional care for transgender patients, it is likely that working with transgender individuals on transitional care would be an essential function of the

---

[215] *Id*. at 14.
[216] *Id*. at 24–26.
[217] *Id*. at 15.
[218] *Id*. at 17–18.
[219] *Id*. at 21.
[220] *Id*. at 12.

plaintiff's job and, therefore, she would not be qualified for the job. If, however, the clinic is a general medical practice clinic as it appears to be from the complaint, it may not be an essential function of the job to work on transitional care for transgender individuals, depending on how many transgender individuals the clinic serves and how many other healthcare practitioners work at the clinic.

Assuming it is not an essential function of the job and that a reasonable accommodation exists that would not impose an undue hardship on the operation of the clinic (or on the patients themselves), it may be possible to accommodate both the religious employee and the transgender patient.[221] The defendant could potentially have reasonably accommodated Kloosterman's religious beliefs by allowing her to refer her transgender patients who request specific treatments and surgery to other P.A.s or to the supervising physician. Because she is a P.A. and not a doctor, Kloosterman always works under a supervising physician. To refer these patients directly to her supervisor would apparently impose no hardship unless a large portion of her patients seek this treatment.

But one more question remains. Would it be a reasonable accommodation never to assign any transgender patients to Kloosterman? My answer is no. The complaint clearly alleges that the plaintiff has already cared for two transgender individuals, one for a potential brain tumor; another for a respiratory issue.[222] It also appears to allege that she cares for all her patients with compassion, that her religion, combined with her medical training, allow her to respect and care for all, including those whose lives do not comport

---

[221] Although the Americans with Disabilities Act of 1990 explicitly excludes those with "gender identity disorders not resulting from physical impairments," 42 U.S.C. § 12211(b) from the definition of disability, at least one case has decided that gender dysphoria can be a covered disability under the Act. *See* Williams v. Kincaid, 45 F.4th 759, 769–70 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2414 (2023) (Mem.); *see also* Kevin M. Barry, *Challenging Transition-Related Care Exclusion Through Disability Rights Law*, 23 U. D.C. L. REV. 97 (2020) (arguing that gender dysphoria is a disability and not covered in the gender identity disorder exclusion). *But see* Doe v. Northrop Grumman Sys. Corp., 418 F. Supp. 3d 921, 929 (N.D. Ala. 2019) ("[T]he terms 'gender identity disorder' and 'gender dysphoria' are legally synonymous for purposes of the present motion."). Assuming gender dysphoria is a covered disability, it would be illegal under Title II of the ADA for a state hospital to discriminate against an individual with gender dysphoria.

[222] Corrected First Amended Complaint at 12, *Kloosterman*, No. 1:22-CV-944.

with her religion.[223] She makes clear that because of her religion combined with her medical training she does not agree with certain procedures and medications, but that her "religious objection has nothing to do with the background or identity of the patient, but rather the nature of the drugs and procedures that the patient might request."[224] Of course, these are only allegations, but if the plaintiff can prove their veracity there is no reason to believe that she could not care compassionately and ably for transgender patients who seek care unrelated to these medications and procedures.

To understand the importance of this distinction, consider the following examples. First, assume that a P.A. or other employee tells his boss that his religion supports the proposal that persons of Mexican national origin are inferior, and he therefore refuses to care for them. This total refusal to deal with Mexican patients should not allow for a religious accommodation. The statute is an anti-discrimination statute and concluding that an employee must be accommodated in order to avoid dealing with an individual because of her Mexican national origin, would indirectly subvert the policy of the Act. In fact, if the employer were a public accommodation, it would be illegal to discriminate against patients based on their national origin.[225] If the employer were a state, the discrimination would violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[226]

Second, consider a gynecologist who works in a state where abortion is legal but who refuses to perform abortions because doing so violates his religion. If the doctor works in an abortion clinic, it is likely that performing abortions is an essential function of his job, and he cannot be reasonably accommodated. But, if he works in the maternity ward as a laborist employed by the hospital (where it is necessary to perform occasional abortions), it may not be an essential function of the job to perform abortions, and the employer can reasonably accommodate his religious beliefs if there are other doctors employed by the hospital who can perform the necessary, occasional abortions. If the same gynecologist refused to treat all pregnant women because doing so violated his religion, there should be no accommodation because refusing to treat all pregnant women is

---

[223] *Id.* at 8.

[224] *Id.* at 9.

[225] 42 U.S.C. § 2000a(a).

[226] U.S. CONST. amend. XIV, § 1.

discrimination based on the individual's status that is so related to her gender that it would likely be illegal under the Fourteenth Amendment even though the federal public accommodations law does not include gender or sex as a protected class.

The distinction between asking for a religious accommodation to discriminate against a whole class of persons belonging to protected groups and permitting an employee to avoid providing a religiously objectionable procedure or drug is the key.

In the *Kloosterman* case, it appears that the employer failed to engage in an interactive process with the plaintiff to try to reach a reasonable accommodation that would not impose an undue hardship on her hospital employer. Assuming the veracity of the complaint, it appears that the meeting that occurred between Kloosterman and the representatives of DEI and HR was hostile toward her, and little effort was made to hear her views or to reach an agreement with her. Because of the early stage of the case at the time of writing this article, it is unclear whether this characterization will prove true, but if, after discovery takes place, it does, there appears to be a serious argument that the defendant may have illegally failed to accommodate the plaintiff.

III. THE CHANGING NATURE OF RELIGIOUS ACCOMMODATIONS REQUESTS UNDER TITLE VII AFTER *DOBBS*

A. Different Legal Considerations for Different Types of Accommodations Requests

This article argues that the courts should consider the different types of accommodation requests made in determining whether a reasonable accommodation exists in a religious discrimination case and, if so, the employer can prove that the proposed accommodation would impose an undue hardship on the conduct of its business.

In the Type II cases where the employee requests scheduling accommodations, *Groff* sets the standard. It makes proof of an undue burden more difficult than it was under the *Hardison* "*de minimis*" language, and instead requires that the employer prove a substantial increase in costs to demonstrate undue hardship. When it comes to the effects on other employees, *Groff* permits these effects to constitute an undue hardship under certain conditions: the employer must attempt to grant a reasonable accommodation and must search for alternatives that other employees would agree to. The effect on other employees, however, must be material, and coworker hostility to religion or religious accommodations that affect the conduct of the

employer's business is not sufficient to prove undue burden. The bottom line is that employers must examine the facts in the workplace and engage in a dialogue to attempt to find an accommodation that would not unduly burden the conduct of the business. Courts must look carefully at the facts of the particular employer's business in deciding whether the employer met its burden.

In Types III and IV cases where the employee requests accommodation to religious expression or to elimination of certain job duties, while *Groff* controls, there are other issues that the courts and employers should consider. Those include in the Type III religious expression cases the potential deleterious effect on coworkers, whether the expression rises to the level of harassment of other employees, what standard should be used to determine whether harassment has occurred, and the role the violation of the employer's policies play in determining whether the proposed accommodation would create an undue hardship.

In the Type IV cases where the employee requests an accommodation that would eliminate (objectionable) job tasks, the ADA's law on essential functions of the job provides guidance about whether the employer should be required to accommodate the individual by eliminating the function or assigning it to others. In determining whether a particular job duty is an essential function, the courts should consider the job duty at the particular location of the business. An employer's overall policy or statement that a job duty is an essential function should be considered but should not be determinative. How the job is performed on the ground, the percentage of time a person in that job description spends on that duty, and whether other employees in that location with the same job perform that function should all be taken into consideration.

Many of the same considerations as to whether the objectionable duties are essential to the position also weigh in if the burden shifts to the employer to prove that the accommodation would impose an undue hardship on the conduct of the employer's business. Courts should look at economic effects on the bottom line, but not exclusively. Other factors such as how other employees are affected, the difficulties (or not) of accommodating the employee, and how it affects client services will also be important.

Employers can play a role in assuring peace among workers by engaging in an interactive dialogue with the employee requesting an accommodation and trying not to pit one employee against another. Employees should be able to express themselves civilly at work so long as doing so does not harm the business and other employees. Workplaces, according to Professor Cynthia Estlund, are places where

democracy should work the best.[227] That is, although we are often segregated as a nation from others who are unlike us in many ways, workplaces bring together people from different races, genders, religions, and classes and provide an opportunity to hear another person's points of view. In essence, workplaces can be marketplaces for diverse and shared ideas. There is a democratic value in creating an environment in which both employees seeking accommodations and those who do not can express themselves without animosity and jealousy and without feeling burdened by other employees' opinions or accommodations request.

B. Questions Remaining After Strengthening Religious Accommodations Law

The strengthening of religious accommodations law that *Groff* represents may result in numerous unseen repercussions that will impose serious limitations on workplaces. First, if the current cases against Southwest Airlines and CVS are indicative of future lawsuits, there will be an increase in employees who engage in harassment based on their views of abortion, some of whom will argue that they have a right to religious accommodation and not to be punished for harassing speech or behavior. Second, there will likely be an increase in employees demanding religious accommodations in the health care professions that would protect them from performing portions of their jobs to which they have religious objections. These cases differ greatly from the traditional cases like *TWA v. Hardison* and *Groff* where the employees' requests of religious accommodation involved changes of schedules so that they could abstain from working on their sabbath, or like *Webb v. City of Philadelphia*, where a female police officer requested a religious accommodation that would permit her to wear the hijab, tucked into the collar of her police uniform.[228]

Carter, *Wilson*, the CVS cases, and *Kloosterman* go a step beyond the more traditional work scheduling cases. Instead of asking for different work schedules so that they can worship as their consciences dictate as Groff did, these cases involve harassment of other employees or the refusal to do a significant portion of their own jobs. These cases also raise serious questions about the future of religious accommodations. These include: What happens when two employees

---

[227] *See* ESTLUND, *supra* note 15.

[228] 562 F.3d 256, 258 (3d Cir. 2009).

clash, both arguing that they deserve religious accommodation, which, on their face would be inconsistent and impossible to grant? Is accommodation even possible in this situation? Can misconduct, if combined with protected speech or behavior, ever be protected as a religious accommodation? If so, how severe must the conduct be to lose protection? What happens if an employee claims as a religious accommodation a right not to work with another employee who has had an abortion? Who refuses to have one? Who is in an interracial or same sex marriage? Who, in a hospital situation refused to treat all transgender individuals or to use the patient's preferred pronouns? All in the name of religion.

How can an employer possibly negotiate this conflict in a workplace?

Finally, to what extent does the division in our country over these very crucial issues, a division that leads to violence, eliminate the ideal articulated by Professor Estlund of the workplace as a living democracy?

IV. CONCLUSION

Dobbs has created and will continue to create issues for workplaces, that if not understood and carefully managed can lead to more conflict in workplaces as well as hostile work environments and discrimination. Employers should recognize the value of civil discourse in workplaces as well as the benefit of attempting to accommodate employees who have sincere religious beliefs that require accommodations at work. But at the same time, other employees who do not seek accommodations and who may oppose the religious beliefs of their coworkers should not suffer unduly. It is important to the workplace, the workforce, and our democracy that such potential conflicts be managed appropriately.

Because *Groff*'s analysis is limited to requests for scheduling accommodations, courts need to acknowledge the different types of accommodation requests and adapt the law to fit the situation before them. Moreover, the EEOC can play an important role in clarifying how Title VII religious accommodation law should apply to Types III (expression) and IV (job tasks) accommodation requests, which differ significantly from Types I (dress codes) and II (scheduling) accommodations. If the courts fail to acknowledge the distinctions among these types of requests (either without or in the face of EEOC guidance), Congress should consider stepping in to amend the statute.