

# RELIGIOUS DISCRIMINATION IN THE WORKPLACE: THE PERSISTENT POLARIZED STRUGGLE

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*Abstract: Consider the story of Harry Fischel, fired from his job in the 19<sup>th</sup> Century for not compromising his religious practice when it came into conflict with his professional responsibilities. . .Fast forward two centuries to the 21<sup>st</sup> and consider Henry Asher, terminated as well, under strikingly similar circumstances. Has anything changed? This piece examines the effectiveness of current religious protection laws in the United States workplace. Toward this end, the author presents a framework through which to understand Title VII, its history and its purposes. The author then identifies a perplexing disproportion problem by which certain classes of citizens are disproportionately favored over others under the current state of the law. This disproportion problem is a self-perpetuating one in that those groups negatively impacted are those least equipped to rectify their situation through political means. Culminating with a survey of academic treatment of the topic, as well as a hopeful eye toward the future, this piece presents important observations affecting millions of Americans each day, particularly those in low-income professions and classes.*

<b>I.INTRODUCTION:.....</b>	<b>27</b>
<b>II.WHERE THE MOVEMENT WENT RIGHT: THE BEGINNINGS OF RELIGIOUS ACCOMMODATION IN THE WORKPLACE, AND THE PROGRESS GAINED. ....</b>	<b>29</b>
<b>III.WHERE THE MOVEMENT FELL SHORT: PITFALLS OF RELIGIOUS ACCOMMODATIONS IN THE WORKPLACE.....</b>	<b>34</b>
<b>IV.GETTING THE MOVEMENT BACK ON TRACK.....</b>	<b>39</b>
<b>V.THE ACADEMIC WORLD’S TREATMENT OF TITLE VII PITFALLS .....</b>	<b>40</b>

## **I. INTRODUCTION:**

*Consider the story of Harry Fischel (1865-1948)<sup>1</sup>, a Russian immigrant, that arrived in the United States during the turn of the 20<sup>th</sup> century. . .after several weeks of searching for employment, Fischel finally found a job with an architecture firm. . .on Fischel’s first Friday he requested Saturday off, for religious reasons, so he could observe his Sabbath. . .not only was his request denied but the firm issued the*

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1. Harry Fischel’s story is related in JONATHAN D. SARNA, AMERICAN JUDAISM 163 (Yale University Press) (2005).

following ultimatum: either work Saturday or face termination. . .Fischel was  
employed the following Monday in 1947.<sup>2</sup> [1:1  
MORSE, BLSA, LAW JOURNAL

Consider the story of Henry Asher over a century later<sup>3</sup>. . .Asher was a bus  
driver for the Los Angeles County Metropolitan Transportation Authority (“MTA”).  
. . . MTA policy requires a bus operator to remain available on weekends for all shift  
and locations. . .contrary to the policy, Asher requested time off on the weekends in  
observance of his religious Sabbath. . .Asher’s employer denied his request and fired  
Asher for missing work.<sup>4</sup>

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

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

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

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

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2. *Id.*

3. Related from author’s personal knowledge as well as Department of Justice Press  
Release, *see infra* note 4.

4. The Department of Justice ultimately filed suit on Asher’s behalf in 2004. The  
results of which will be related in the article’s conclusion. *See* Department of Justice Press  
Release, Justice Department Settles Lawsuit Alleging Religious Discrimination by The LA  
Metropolitan Transportation Authority (2005),  
[http://www.usdoj.gov/opa/pr/2005/October/05\\_crt\\_534.html](http://www.usdoj.gov/opa/pr/2005/October/05_crt_534.html)  
(last visited Feb 10, 2008).

## II. WHERE THE MOVEMENT WENT RIGHT: THE BEGINNINGS OF RELIGIOUS ACCOMMODATION IN THE WORKPLACE, AND THE PROGRESS GAINED.<sup>5</sup>

In 1964, Congress passed Title VII of the Civil Rights Act of 1964, barring religious discrimination in the workplace.<sup>6</sup> The language of the statute states unequivocally that “[i]t shall be an unlawful employment practice for an employer. . .to discriminate against any individual with respect to his. . .religion.”<sup>7</sup> Prior to the enactment of Title VII, a safeguard for employees did not exist.<sup>8</sup> As drafted, Title VII applied to all private employers who “engaged in an industry affecting commerce [and having] twenty-five or more employees for each working day in

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

6. Compare 42 U.S.C. § 2000e (2007) (amending the Civil Rights Act of 1964 which did not alter the language of the original draft), with Civil Rights Act of 1964, Pub.L. No. 88-352, 78 Stat. 241 (1964).

7. *Id.* at § 2000e-2(a)(1).

8. The fact that Congress enacted the Civil Rights Act of 1964, and specifically drafted language providing for protection from religious discrimination in the workplace, indicates that such safeguards were necessary and previously lacking. It is true that the Constitution of the United States itself provides safeguards in some form to religious discrimination. The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I. The latter section is the *Free Exercise Clause*, while the former is the *Establishment Clause*. The First Amendment and the Constitution generally restricts those acting on behalf of the government, and thus is relevant to a discussion of religious protection in the public sector. As the focus of this article is on private employers, the protections provided by the First Amendment are beyond the scope of this article. See *Brown v. Polk County, Iowa*, 61 F.3d 650, 654 (8th Cir. 1995) (“In most of the cases alleging religious discrimination under Title VII, the employer is a private entity rather than a government, and the first amendment to the Constitution therefore is not applicable to the employment relationship.”) (citing *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 n.5 (10th Cir. 1989)).

each of twenty or more calendar weeks [per year].”<sup>9</sup> In 1972, the Act reduced the requisite number of employees to 15, further broadening the pool of employers under regulation.<sup>10</sup> As such, from its inception, Title VII applied to most employers in the private sector, with only the smallest escaping reach.

Attempting to secure religious freedom, Title VII sought to regulate a broad spectrum of employment activities.<sup>11</sup> Title VII prevented employers from “fail[ing] or refus[ing] to hire or to discharge. . .or otherwise to discriminate” against an employee due to the employee’s religion.<sup>12</sup> Furthermore, the law prohibited an employer from “limit[ing], segregat[ing], or classify[ing] his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s. . .religion.”<sup>13</sup> These safeguards remain firmly in place within today’s current version of Title VII.

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

Aside from refraining to discriminate, were employers bound in any way to extend themselves or their businesses to actively accommodate religion under the new laws? The ensuing Title VII case law would answer in the affirmative, as the history of the movement would play itself out.<sup>14</sup> In declaring that employers indeed held an affirmative duty to accommodate, the movement for religious accommodation in the workplace achieved its most significant victory.

As initially drafted, the preliminary section of Title VII defined many of the terms that followed, such as *person*, *employer*, *employment agency*, and more.<sup>15</sup> What was not defined, however, was the all-important, but extremely contentious term *religion*.<sup>16</sup> The omission may be conceivably explained by the fact that a universal definition of religion does not exist. Whatever the reason, from the beginning of the movement, interpreting this term was left up to employers or courts on a case-by-case basis. However, in 1972, Congress recognized that “[despite] the commitment. . .to the goal of equal employment opportunity for all our citizens, the

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

10. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

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

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

13. *Id.* at § 703(a)(2).

14. *See infra* notes 18-19 and accompanying text.

15. 42 U.S.C. § 2000e (1964).

16. *See supra* note 5.

machinery created by the Civil Rights Act of 1964 (was) (in)adequate.”<sup>17</sup> Therefore, Congress embarked on amending its laws and enforcement procedures. One such amendment, while falling short of proffering an actual definition, sought to shed more light on this question of *what is religion*:

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.<sup>18</sup>

As demonstrated, this new definition asserts an affirmative duty upon employers to accommodate religion in the workplace where previously there was none. The language “unless an employer demonstrates. . .undue hardship” conveys that for want of such hardship, an employer holds a duty to “reasonably accommodate.” Thus, the burden of proof shifts to an employer once an employee asserts a need for accommodation.<sup>19</sup> In addition, the amendment codified an extremely broad definition of religion, “all aspects of religious observance and practice, as well as belief,” which was absent in the prior statute.

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

The true test of laws is ultimately their effectiveness and enforceability when applied to everyday situations, to *real life*. Questions of applicability of laws in this manner are decided by the courts. In the years following the 1972 amendments to Title VII, the victory achieved by employees in the workplace was affirmed in a number of significant ways.

First, courts began to broadly interpret the definition of religion. The definition of *religion* first codified in 1972 has been interpreted by courts since then to include everything from major religions, to obscure religions, and even as far as self-proclaimed religions where the harmed party is the sole adherent. The EEOC followed suit in its *Guidelines on Discrimination Because of Religion*, noting “[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief.”<sup>20</sup> Notably, the Supreme Court

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17. LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, H.R. REP. NO. 92-238 at 2139 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2139.

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

19. This article will later explore the contentious language “undue hardship,” which has become the subject of considerable case law.

20. 29 CFR § 1605.1 (2007). The EEOC guidelines provide just that, guidance as to the proper interpretation and implementation of Title VII. However, they are not binding authority nor do they carry regulatory force.

stated this assertion even prior to the adopted amendments to Title VII, “[T]he validity [of a claimant’s religious beliefs] can no longer be questioned,” and that such inquiries are “foreclosed to government.”<sup>21</sup>

The second affirmation, related to the previous, is the degree to which courts have granted deference, in almost all cases, to an employee’s religious views. Courts will rarely second-guess an employee’s espoused religious views. This trend has been demonstrated in cases where employees who have either left their job completely, or refused a job offer, due to their alleged religious beliefs, and subsequently sought unemployment compensation. In both Supreme Court cases *Thomas v. Review Board of Indiana Employment Security Division*,<sup>22</sup> and *Frazee v. Ill. Department of Employment Security*,<sup>23</sup> employee claimants sought unemployment compensation benefits in this way - In *Thomas*, an employee refused to engage in the production of armaments and subsequently quit, while the claimant in *Frazee* refused to accept a job assignment where he would be required to work on Sundays; both plaintiffs alleged that the practices at issue violated their religious beliefs.<sup>24</sup> In both cases, the Court found in favor of the employee, and granted the sought after unemployment benefits. In *Thomas*, the Supreme Court overturned a lower court’s ruling that the employee quit on a voluntary basis and was therefore not entitled to unemployment compensation. The Court rejected such an argument noting that “the resolution [of what constitutes a religious belief or practice] is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others.”<sup>25</sup> In *Frazee*, the Supreme Court rejected the lower court’s argument that the claimant’s decision to refuse employment was a personal choice, rather than a religious one, simply because the claimant failed to assert his membership or association with a given religious sect or institution.<sup>26</sup> Rather, the Court unequivocally expressed its “reject[ion] [of] the notion that to claim the protection . . . one must be responding to the commands of a particular religious organization.”<sup>27</sup> It satisfied the Court that the employee’s claims were “based on a sincerely held religious belief[s],” even if not the beliefs of a particular “organized religious denomination.”<sup>28</sup> Other courts have gone so far as to protect even those expressions of one’s religion that fail to fully comply with the required doctrine of the

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*See* Wolf, *supra* note 5, at 3, specifically for this point and generally for further information on law carrying force in the workplace.

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

22. 450 U.S. 707 (1981).

23. 489 U.S. 829 (1989).

24. *See* 450 U.S. at 720 (Thomas was a Jehovah’s Witness who claimed his religious beliefs prevented his participation in the production of military materials); 480 U.S. at 830 (Frazee was a Christian who refused to work on Sunday, which the employment would have required).

25. 450 U.S. at 714.

26. 489 U.S. at 831.

27. *Id.* at 834.

28. *Id.*

employee's faith. For example, in *Equal Employment Opportunity Commission v. Remedial Education and Diagnostic Services, Inc.*,<sup>29</sup> the wearing of a head covering by a Muslim woman was protected activity despite the fact that the covering failed to satisfy the doctrinal requirements of the Islamic faith.<sup>30</sup>

The degree to which courts grant deference to an employee's religious views has also been demonstrated in instances where employees seek haven from a particular aspect of their job description, rather than from the employment entirely. In *McGinnis v. United States Postal Service*<sup>31</sup> a postal window clerk, in observance of the Quaker religion, sought to be excused from having to distribute military draft registration materials as a part of her job. The court granted such protection, deeming the preference a type of religious expression.<sup>32</sup> Further, in *Haring v. Blumenthal*,<sup>33</sup> an IRS employee was granted legal protection, on religious expression grounds, for refusing to process tax-exemption forms for abortion clinics.<sup>34</sup> Thus, the trend clearly demonstrates that courts are quick to defer to an employee's religious views, and will rarely second-guess that an asserted practice is a genuine religious expression.<sup>35</sup>

In addition, courts are slow to question an employee's sincerity in claiming that a requested accommodation arises out of an expression of their religious commitment, as opposed to mere convenience. This trend ties in closely as an extension of the abovementioned trend - the very low burden of proof required of employees by courts as to the sincerity of their religious beliefs. In the noteworthy case *Philbrook v. Ansonia Board of Education*,<sup>36</sup> the court noted, a plaintiff's burden of demonstrating sincerity, "is not a heavy one."<sup>37</sup> Similarly, in *EEOC v. IBP, Inc.*,<sup>38</sup> the court held that employee's lack of observance of a particular religious practice during both the time periods before and after the alleged religious discriminatory incident, was not a sufficient indication of the employee's lack of sincerity.<sup>39</sup> Courts

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29. 759 F. Supp. 1150 (E.D. Pa. 1991).

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

31. 512 F. Supp. 517 (N.D. Cal. 1980).

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

33. 471 F. Supp. 1172 (D.D.C. 1979).

34. *Id.* at 1178, 1184-85.

35. *But see* Wolf, *supra* note 5, at 32-34 for notable exceptions: *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977) (plaintiff's "personal religious creed" causing eating of cat food is merely preference and not protected religious activity); *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995) (plaintiff's directing employee to type his Bible study notes not protected religious expression); *McCroory v. Rapides Reg'l Med. Ctr.*, 635 F. Supp. 975, 979 (W.D. La. 1986) (plaintiff's "right to commit adultery" not religious belief subject to legal protection).

36. 757 F.2d 476 (2nd Cir. 1985).

37. *Id.* at 482.

38. 824 F.Supp. 147 (C.D.Ill. 1993).

39. *Id.* at 151 ("Plaintiff's absence of faith prior to December 1988 and his loss of faith in 1990 do not prove that his beliefs were insincere in April 1989.")

do not strictly adhere to one's faith as indicator of lacking sincerity. In *EEOC v. Hona of Hungary, Inc.*,<sup>40</sup> the court held that a Jewish employee's request for time off of work for the religious holiday, Yom Kippur, was a sincere expression of religious faith; despite the employee's own concession that "she [was] not a particularly religious person and that she [did] not observe every Jewish holiday."<sup>41</sup>

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

### III. WHERE THE MOVEMENT FELL SHORT: PITFALLS OF RELIGIOUS ACCOMMODATIONS IN THE WORKPLACE.<sup>42</sup>

The movement to secure religious accommodations in the workplace has achieved a number of notable victories. Examples include courts' expansive and inclusive definition of the term *religion*, as well as the considerable deference granted by courts to the religious views of employees. However, the movement's progress slowed shortly after the decades following the drafting of Title VII. As a result, employees are now vulnerable, in certain specific ways, to religious discrimination in the workplace.

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

The way that the system favors employers over their employees will be addressed first. As noted above, a 1972 amendment to Title VII shed light upon the

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40. 108 F.3d 1569 (7<sup>th</sup> Cir. 1996, modified on rehearing Mar. 6, 1997).

41. *Id.* at 1575.

42. See generally, Laurent Belsie, *On The Seventh Day –They Closed Shop*, CHRISTIAN SCIENCE MONITOR, May 04, 1998 at B4. In contrast to viewing this debate from the perspective of an employee seeking accommodation, Goedeker's, a St. Louis, Missouri electronics superstore specializing in home entertainment, closes each Sunday for religious reasons. *Id.* The author personally recalls the since retired Goedeker's advertisement on television or radio "open every day but Sunday...it's the Lord's day." Steve Goedeker, owner of Goedeker's superstore, remarked "[e]verything can't be a business decision...[y]ou have to start with a certain set of principles. You make your business decisions around them." *Id.* Goedeker closes on Sunday "partly to give employees time with their families; partly for religious reasons." *Id.* In regard to Goedeker's ability to compete in the electronics market, despite its six-day schedule, "[i]n St. Louis, Goedeker's battles head-to-head with national retailers Circuit City and Best Buy." *Id.*

term *religion*.<sup>43</sup> This definition placed a duty upon employers to accommodate religion. However, this duty was qualified from its very inception. According to the definition, the duty falls away merely from an employer's demonstration of an "undue hardship" that would be experienced through accommodating.<sup>44</sup>

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

Generally, every federal circuit in the United States employs a three-prong test to evaluate an employee's entitlement to religious accommodation: (1) an employee must hold a sincere religious belief, (2) an employee must place their employer on notice as to a conflict between religious observance and job responsibilities, and finally (3) an employee must demonstrate that hardship will come to him/her absent accommodation.<sup>45</sup> If the employee meets this test, an employer is required to provide a *reasonable accommodation*, unless the employer can demonstrate an undue hardship resulting from an accommodation.<sup>46</sup> In this way, by getting the *last word*, so to speak, employers hold considerable leverage over their employees. What constitutes an *undue hardship*? Any monetary cost, above de minimus,<sup>47</sup> is deemed by a court as an undue hardship. Therefore, any monetary cost that carries any significance can spell victory for an employer and legally permit religious discrimination against an employee.

In the landmark case *Trans World Airlines, Inc. v. Hardison*,<sup>48</sup> the Supreme Court defined *undue hardship*. The Court decided that: (1) a monetary loss sufficed; and (2) the required showing for an employer was staggeringly low. In *Trans World Airlines*, the plaintiff sought time off from his job as a stores clerk because of the Sabbath.<sup>49</sup> The plaintiff had begun adhering to the tenets of the Worldwide Church of God, one of which is to refrain from working from sundown Friday through

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43. See *supra* text accompanying notes 17-18.

44 *Id.*

45. See generally, Wolf, *supra* note 5, at 67-68 (*Heading: Proof that an Employer Has Failed to Accommodate Religious Beliefs or Practices*), and cases cited at 67 n.2 ("See Generally *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996); *Protos v. Volkswagen of America*, 797 F.2d 129, 133 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986); *Turpen v. Missouri-Kansas-Texas R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994); *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 614 n.5 (9th Cir. 1988), *cert denied*, 489 U.S. 1077 (1989)).

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

47. Merriam-Webster's Dictionary defines *de minimis* as "lacking significance or importance...so minor as to merit disregard" available at <http://www.merriam-webster.com> (last visited Feb. 10, 2008)

48. 432 U.S. 63 (1977).

49. *Id.* at 66-67.

sundown Saturday.<sup>50</sup> Consequently, Trans World Airlines (“TWA”) denied the plaintiff’s request for accommodation, and the plaintiff refused to report to work and was subsequently terminated.<sup>51</sup> The Court unequivocally ruled in the employer’s favor that “[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship.”<sup>52</sup> It should be noted that the court determined that the plaintiff’s ensuing absence would cause the employer to endure a number of varied costs such as: shifting other employees to cover the plaintiff’s post, payment of premium wages, and decreased efficiency as to the plaintiff’s post or in other jobs.<sup>53</sup>

The implications of the *Trans World Airlines* decision are staggering and hold grave implications for the religious rights of employees. As indicated in *Trans World Airlines*, TWA would have suffered a monetary cost of only \$150 by accommodating Hardison.<sup>54</sup> Such a loss would remain a negligible expense for most employers covered by Title VII.<sup>55</sup> If the Court deemed a lost of \$150 a hardship to an international airline, such as TWA, then, “there would be only a few accommodation costs that would fail to exceed the Supreme Court’s de minimus standard.”<sup>56</sup>

The *Trans World Airlines* decision continues to plague employees in the United States. It is this standard that gives employers a legal edge over their employees, ultimately giving them the sharper blade of the double-edged sword. Such a standard reverses any progress made in furtherance of the movement for religious accommodation in the workplace, leaving employees vulnerable in a critical way.

The *Trans World Airlines* standard of what constitutes *undue hardship*, benefits employers in two ways. First, the loss of pay disparity favors employers.<sup>57</sup> That is, the burden that employees must bear pales in comparison to the burden that employers must bear. In *Ansonia*, the Supreme Court concluded that granting unpaid leave is a viable option for employers with employees seeking religious accommodation.<sup>58</sup> However, in *Trans World Airlines*, an extremely small monetary burden borne by an employer is grounds for claiming undue hardship, and therefore provides the employer dispensation from Title VII compliance. Thus, while

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50. *Id.*

51. *Id.* at 68-69.

52. *Id.*

53. *Id.* at 84.

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

55. *See American Airlines, available at* <http://www.aa.com>. To provide a frame of reference, American Airlines, the airline that acquired Trans World Airlines (“TWA”) in 2001, recorded net earnings of \$231 million in 2006. Notably, the “investor relations” portion, for more information on the 2001 acquisition as well as yearly company reports.

56. *Wolf, supra* note 5, at 107.

57. *See supra* text accompanying notes 54-56.

58. 479 U.S. 60, 70 (1986).

employees can be made to accept a significant financial burden, there is virtually no financial burden required of employers. As this disparity indicates, the economic interests of employers are significantly favored over employee interests.<sup>59</sup>

Second, aside from asserting a financial burden, even a very small one, and receiving dispensation from Title VII compliance, employers have another weapon in their arsenal with which to assert undue hardship – *loss of production*. Even if an employee cannot demonstrate financial burden above *de minimus*, courts are receptive to a loss of production argument where accommodating an employee’s religious needs will cause a loss of production.<sup>60</sup> This allows employers an additional avenue for exemption.

While employers hold these two weapons, financial loss and production loss, employees possess little to defend either charge. For example, in *Cook v. Chrysler Corp.*,<sup>61</sup> an employee sought a religious accommodation for Sabbath observance.<sup>62</sup> The circuit court affirmed the lower court’s ruling in favor of the employer, as it noted that “absences affect the quality of work because there are more repairs than usual and lower efficiency when a floater is used on the line.”<sup>63</sup> The employee held no recourse in light of these “significant costs” of production loss asserted by the employer.<sup>64</sup> Consequently, the current system of religious accommodation in the workplace favors employers considerably over their employees.

The second prong of the disproportion problem is that it favors white-collar professional employees disproportionately over blue-collar or hourly-wage employees. For purposes of this article, white-collar professional employees (“professionals”) will be used loosely to encompass employees who earn a periodic salary rather than an hourly-wage. Professionals tend to work in fields like business, accounting, education, politics, and; and at times as management level employees who manage hourly-wage earners. In contrast, blue-collar or hourly-wage employees (“hourly-wage earners”), include employees who are paid by the hour, earning anything from below minimum-wage to above.

Who are hourly-wage employees? These jobs include everything from retail, factory, food, and janitorial services. In 2006, 76.5 million American workers were hourly-wage employees, constituting 59.7 percent of all wage earners.<sup>65</sup> Of those

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59. See *Wolf*, *supra* note 5, at 90 for additional discussion of this disparity.

60. See *Wolf*, *supra* note 5, at 125 (“Quite apart from the payment of extra wages, the courts have also recognized that the use of substitutes, casuals, or transfers may result in other significant costs or reductions in efficiency and productivity...courts have tended to accept employer arguments that these “costs” are more than *de minimus*.”).

61. 981 F.2d 336 (8th Cir. 1992).

62. *Id.* at 338

63. *Id.* at 339.

64. *Id.*

65. See U. S. Dept. of Labor of Labor Statistics, *Characteristics of Minimum Wage Workers: 2006*, available at <http://www.bls.gov/cps/minwage2006.htm#1> (last visited Jan. 22, 2008). This figure “exclude[s] the unincorporated and incorporated self-employed, and refer[s] to earnings on a person’s sole or principal job.”

paid by the hour, 1.3 million workers reported earning wages below minimum wage, accounting for 2.2 percent of all hourly workers.<sup>66</sup>

The clash between work and religion often arises in work scheduling.<sup>67</sup> Employees seek accommodations when working on a given day or working certain hours of a given day stands at odds with their religious needs. For example, an employee may request time off on a Saturday or Sunday to observe their Sabbath. Or, an employee may request a break from work in the early morning or evening for religious prayer time. It is not hard to see how religious accommodation conflicts arise in hourly-wage jobs. In these industries, scheduling is less uniform and work is frequently required beyond the traditional 9-5 *working day*. For example, a commercial janitorial provider may not begin work until after the close of the traditional 9-5 working day.

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

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

In hourly-wage environments, man-power is often at a premium. In factories, retail, food-service, and janitorial work, for example, production is often required around the clock. Therefore, the costs of finding replacements, and the loss of production sustained because of the absence of trained workers become points of extreme contention.

In the professional workplace, on the other hand, employees are typically permitted greater leverage in personal time-management. This is indicated by the fact that many jobs in the professional workplace do not pay by the hour, but on a yearly or periodic salary. Employees are at liberty to leave early, stay late, take off on the weekends, take off during the week and make it up on the weekends, when it suits their schedule and work habits. This is possible, so long as the employee accomplishes what is expected in the long-term. Because of this dynamic, conflicts regarding replacements and loss of production are categorically much less likely to arise in the professional sphere. When scheduling conflicts occur, replacement employees are rarely called upon to fill professional positions. Instead, professional employees are granted leverage to accomplish their work obligations around

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66. *Id.*

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

personal scheduling conflicts as they arise. As such, planned absences rarely cause  
2018 2018 inefficiencies in production. RELIGIOUS DISCRIMINATION 39

For these reasons, hourly-wage employees bear the disproportionate brunt of religious conflicts that arise in the workplace. Professional workers will rarely if ever confront religious discrimination in the ways illustrated above.

The mere fact that the system currently favors one group over another is wrong. And the disfavored group happens to be the group least equipped to mount a challenge. Generally, hourly-wage workers in the categories listed lack the academic or professional training that would permit them to rise to the professional workplace.<sup>68</sup> Otherwise, they may likely do so. Workers in these categories carry the brunt of religious discrimination while being the least equipped to handle it. More specifically, these workers are least equipped to understand and utilize the legal protections available to them.<sup>69</sup> Additionally, these workers fail to use political mechanisms built into our society as a means to achieve political change.

Also, in many cases, workers lack the time to devote to such political endeavors. Many hourly employees work long hours and may work seven days of the week. Hourly workers often juggle multiple jobs preventing them from mobilizing their peers to lobby their local politicians, or to engage in grassroots activities due to their lack of time.

In addition many of these employees are minorities, new immigrants that are disproportionately harmed by a system initially intended to help them. These employees are most vulnerable to abuse inadvertently promoted under the current system. It is time to reach out. The time has come to get the movement back on track.

#### IV. GETTING THE MOVEMENT BACK ON TRACK

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

The first step should encompass the legal realm. The current burden of proof by which employers may demonstrate undue hardship is too low. A higher burden must be placed on employers before they can properly demonstrate undue hardship. The current system permits employers to have the last word, which prevents employees from voicing the discrimination they face. An employee seeks accommodation by meeting the three-prong test related above,<sup>70</sup> and in reply the employer need only show undue hardship. *End of discussion.* Tragically, the employee holds no recourse.

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

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

70. See *supra* text accompanying note 45, for discussion of three-prong test.

It is reasonable for courts to cap the loss that an employer be required to bear through efforts to accommodate. However, Congress already defined the cap: *undue hardship*.<sup>71</sup> It is not up to the courts to lower this burden. A virtually negligible financial loss is not a hardship at all. Such a loss is certainly not an *undue hardship* that should vitiate the employer's duty to provide a reasonable accommodation.<sup>72</sup> Employers must bear the loss of daily profits to accommodate an employee's religious needs. If an employee must endure an unpaid leave, losing 100% of earnings; then employers can bear a higher burden too.<sup>73</sup> Additionally, courts must require employers to demonstrate higher production loss.<sup>74</sup> Also, employers should concurrently train and hire enough employees, so there are employee substitutes for those employees who are absent because of religious reasons. Loss of production dispensation will be reserved for extremely exceptional circumstances.

Next, and most importantly, political change must occur. A political mobilization is needed among hourly-wage earning Americans and among lower-income Americans, who bear the disproportionate brunt of religious discrimination. Only those truly affected can properly make the changes necessary to provide meaningful religious protection for everyone. Title VII's pitfalls demonstrate that those whose employment categorically precludes them from suffering religious discrimination are unfortunately ill-equipped to make decisions for those who do face such discrimination. Judges, politicians, and other professional workers, suffer a disconnect hindering their ability to ensure meaningful safeguards. Hourly-wage workers of the United States must mobilize, and through grassroots efforts, decisions regarding religious discrimination can be placed back into the hands of those truly affected by them.<sup>75</sup>

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

How about the legal academic world? How would academics - the professors, professional students, and traditional students - fare in confronting the above related shortcomings of Title VII enforcement? Would the legal academic recognize the disproportionate treatment, in the realm of religious protection, afforded to certain other large classes of society? If so, would meaningful solutions

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

72. See *supra* text accompanying notes 48-59, for discussion of Supreme Court's ruling in *Trans World Airlines*.

73. See *supra* notes 58-59, and accompanying text for discussion of unpaid leave requirement of employees.

74. See *supra* note 60 and accompanying text for discussion of production loss dispensation provided employers.

75. Thankfully, there are organizations trying to help in this way. Take, for example, the *Citizen Advocacy Center* in suburban Chicago. "CAC" is a non-profit, non-partisan community educational resource for "strengthening the citizenry's capacity and motivation to participate in civic affairs, building community resources and improving democratic protocols within our community institutions." <http://www.citizenadvocacycenter.org> (last visited Feb. 11, 2008).

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

A number of law review articles evaluated the effectiveness of religious protection under Title VII. These articles also examined the pitfalls of the statute from the perspective of the religiously discriminated.

For the purpose of emphasis, the articles will be referred to by the institution of authorship, rather than their individual author. First, the publication of an article by an institution entitles the institution to a certain degree of ownership. Second, it is a common practice in legal scholarship as well as case law to refer to articles in this way. Finally, institutions are quick to claim its students' scholarship as its own when such work receives praise. These institutions must be given responsibility in critical response. Articles were reviewed from each of the following prominent universities, geographically ranging the country: California, Indiana, Iowa, Louisiana, and Pittsburgh, and the specific titles are contained in the footnotes.<sup>76</sup> The results of the search were not promising.

*No publication identified the specific disproportion problem described above, let alone offer any meaningful solutions.*

Perhaps the results should not be surprising. Professional academics are *professionals*. Their schedules, responsibilities, and systems of salary operate in comparable ways to the professional world at large. The disconnect to hourly-wage earning in America should be present just the same.

Most of the articles offered various solutions to their proffered ills of Title VII. However, in each case, the articles called upon professional America to make the changes. For example, Indiana suggested that "[a] new amendment to Title VII is needed," and that "[a] good starting point would be a repudiation of the current Supreme Court doctrine."<sup>77</sup> Additionally, Iowa suggested that "Congress should

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76. Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575 (2000) ("California"); Alan D. Schuchman, *The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable-Accommodation Clauses in Title VII and the ADA*, 73 IND. L.J. 745 (1998) ("Indiana");

Sonny Franklin Miller, *Religious Accommodation under Title VII: The Burdenless Burden*, 22 J. CORP. L. 789 (1997) ("Iowa"); Clare Zerangue, *Sabbath Observance and the Workplace: Religion Clause Analysis and Title VII's Reasonable Accommodation Rule*, 46 LA. L. REV. 1265 (1986) ("Louisiana"); Peter Zablotsky, *After the Fall: The Employer's Duty to Accommodate Employee Religious Practices under Title VII After Ansonia Board of Education v. Philbrook*, 50 U. PITT. L. REV. 513 (1989) ("Pittsburgh").

77. Schuchman, *supra* note 76, at 764.

establish an objective test.”<sup>78</sup> Lastly, California suggested a pair of amendments to Title VII, as well as a number of ways for Congress to clarify the title or provide guidance toward a more effective application.<sup>79</sup>

Louisiana and Pittsburgh chose a more broad-brush approach in evaluating the state of the law and omitted solutions to any of the above enumerated problems. Louisiana went so far as to recognize that “the outcome in [TWA vs.] *Hardison* severely limited the extent of the accommodation required under [Title VII].”<sup>80</sup> Rather than taking issue with the disproportionate burden placed on employees as a result, Louisiana instead glorified the disparity as a means of ensuring any accommodations made “will be made within the existing system rather than in derogation of it.”<sup>81</sup> Pittsburgh too identified sources of case law under Title VII that has “limit[ed] the employer’s duty to accommodate employee religious practices.”<sup>82</sup> Pittsburgh then dropped the ball by proffering that such limits “do not appear to affect the majority of accommodation cases.”<sup>83</sup>

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

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

Henry Asher made change. He stood up. His courageous voice, after being fired from his job because of his religious practices, led to genuine grass-root change. In 2005, Henry Asher obtained a civil legal settlement against his employer, the Los Angeles Metropolitan Transportation Authority because of its discriminatory

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78. Miller, *supra* note 76, at 813.

79. Kaminer, *supra* note 76, at 629.

80. Zerangue, *supra* note 76, at 1285.

81. *Id.*

82. Zablotzky, *supra* note 76, at 573.

83. *Id.*

treatment.<sup>84</sup> The settlement called for monetary compensation as well as the establishment of new policies at his former workplace to ensure religious accommodation in the future.<sup>85</sup> Henry Asher did not have to suffer the silent fate of Harry Fischel or countless others, because he refused to remain silent. Thanks to the progress of Title VII, others suffering discrimination can have a voice too. But it must start there, from within.

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84. See Department of Justice Press Release, Justice Department Settles Lawsuit Alleging Religious Discrimination by The LA Metropolitan Transportation Authority (2005), [http://www.usdoj.gov/opa/pr/2005/October/05\\_crt\\_534.html](http://www.usdoj.gov/opa/pr/2005/October/05_crt_534.html) (last visited Feb. 10, 2008).

85. *Id.*