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RELIGIOUS DISCRIMINATION IN EMPLOYMENT: THE 1972 AMENDMENT—A PERSPECTIVE

I. Introduction

In 1964, Congress passed Title VII of the Civil Rights Act (Act)¹ which proscribed discrimination on the basis of race, religion, national origin, color, or sex.² Most of the litigation under the Act has involved allegations of racial or sex discrimination.³ However, according to the Equal Employment Opportunity Commission (EEOC), there has been a steady increase in the number of complaints⁴ of religious discrimination.⁵

1. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e to e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e to e-17 (Supp. II, 1972)).

2. Title VII of the Civil Rights Act contains provisions designed to ensure equal employment opportunity. 42 U.S.C. § 2000e-2(a) (1970), *as amended*, (Supp. II, 1972) provides: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"

3. See generally Carey, *Litigation Involving Sex Discrimination Under the Equal Employment Opportunity Act*, 60 WOMEN LAWS. J. 21 (1974); Ewald, *Public and Private Enforcement of Title VII of the Civil Rights Act of 1964—A Ten-Year Perspective*, 7 URBAN L. ANN. 101 (1974); Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614 (1973); Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463 (1973).

4. The Commission reported handling 87 complaints involving religious discrimination in its first year of operation. 1 EEOC ANN. REP. 58 (1967). During the fiscal year ending on June 30, 1972, 1,176 such complaints were brought before the Commission; 573 of these were recommended for investigation. 7 EEOC ANN. REP. 38, 43 (1973).

5. The procedure for an action before the EEOC is set out in section 706 of Title VII, 42 U.S.C. § 2000e-5 (1970), *as amended*, (Supp. II, 1972). If a person believes that he has been discriminated against he may file a charge with the EEOC alleging that an employer, employment agency, or labor union has engaged in an unlawful employment practice. The Commission will inform the respondent of the action and make an investigation

The language of the original Act was very broad in regard to religious discrimination.⁶ The legislation did not define religion nor did it establish any guidelines as to what constituted religious discrimination.⁷ Entrusted with implementation of the Act, the EEOC issued guidelines⁸ designed to clarify the meaning of the statutory prohibition against such discrimination. These guidelines, however, did not have the force of a congressional mandate and their validity was questioned.⁹ In 1972, Congress acted to eliminate this uncertainty by amending the Civil Rights Act.¹⁰ The amendment defined the term "religion" to include "belief" as well as practices and actions based upon the belief; it requires reasonable accommodation to the employee's religious needs unless the employer can show that an undue hardship is thereby imposed on his business.¹¹ This Comment will evaluate the effect of the 1972 amendment and deter-

of the facts surrounding the alleged discriminatory practice. If the Commission determines that the charge is true it will endeavor to alleviate the unlawful practices through conferences, conciliation, and persuasion. Under the 1964 law as originally enacted, if conciliation failed, the petitioner could bring a civil action. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(e), 78 Stat. 260 (1964) (codified at 42 U.S.C. § 2000e-5 (1970), *as amended*, (Supp. II, 1972)). The 1972 amendment gives the Commission the power to bring a suit in its own name, thereby relieving the petitioner of having to pay for the suit. 42 U.S.C. § 2000e-5(f) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e (1970). Dismissal of the charge by the Commission, or failure of the Commission to bring an action in court does not prevent the petitioner from instituting an action under section 2000e-5. *Id.* § 2000e-5(f)(1), *amending* 42 U.S.C. § 2000e (1970).

6. See note 2 *supra*.

7. See 42 U.S.C. §§ 2000e to e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e to e-17 (Supp. II, 1972).

8. See notes 42-43 *infra*.

9. See *Dewey v. Reynolds Metal Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

10. The Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e(j) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e (1970) provides: "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."

11. *Id.*

mine whether it has resulted in clarification of the law governing religious discrimination. The analysis will focus on three key terms in the amendment: religion, reasonable accommodation, and undue hardship. A final section will consider the problem of employees whose religious beliefs preclude their membership in labor unions.

II. Defining "Religion"

Although the Civil Rights Act prohibited religious discrimination, it failed to define "religion."¹² The courts never determined the meaning of that term intended under the Civil Rights Act.¹³ The Supreme Court, however, had developed a working definition of "religion" in cases arising under the Selective Service Act,¹⁴ and this definition was eventually adopted by the EEOC in religious discrimination cases.¹⁵

In *United States v. Seeger*,¹⁶ for instance, the Court described a test to determine qualification for the conscientious objector exemption of the Selective Service Act. Under that act persons who were opposed to war "by reason of religious training and belief" were exempt from military service.¹⁷ The Court held that a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."¹⁸ *Seeger* im-

12. See 42 U.S.C. § 2000e (1970), as amended, (Supp. II, 1972).

13. See Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 614-19 (1971) [hereinafter cited as Edwards & Kaplan].

14. 50 U.S.C. § 451-71 (App. 1970), as amended, 50 U.S.C. § 451-71a (App. Supp. II, 1972).

15. EEOC Dec. No. 71-779, summarized at 3 F.E.P. Cas. 172 (Dec. 21, 1970).

16. 380 U.S. 163 (1965).

17. 50 U.S.C. § 456(j) (App. 1970), as amended, (Supp. II, 1972). Under the Selective Service Act of 1948 religious training and belief was meant to be "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation . . ." Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 612-13. This provision was deleted by Congress in 1967. Military Selective Service Act of 1967, Pub. L. No. 90-40, § 6(j), 81 Stat. 100, 104 (codified at 50 U.S.C. § 456(j) (App. 1970), as amended, (Supp. II, 1972).

18. 380 U.S. at 176.

plied that the claimant's belief had to be religious. In a later case, *Welsh v. United States*,¹⁹ the Court broadened its view to include moral, or ethical belief.²⁰ *Welsh* requires that the claimed belief "play the role of a religion and function as a religion in the registrant's life."²¹ The Court recognized that religious beliefs are intensely personal, and that "[r]eligious experiences which are as real as life to some may be incomprehensible to others."²² If the claimed belief is not connected with any moral, ethical, or religious tenet, it will not fall within the definition. This conclusion is supported by the Court's analysis in *Welsh*: if the belief "rests solely upon the consideration of policy, pragmatism, or expediency," it does not fall within the exemption.²³ However, once a determination is made that the claimed belief is based upon moral, ethical, or religious grounds, other considerations or philosophies found to be "merely personal" are not relevant.²⁴

The EEOC adopted the definition of religion articulated in the Selective Service cases in 1970 when it decided a case involving an employee of a hospital who had been discharged because of her refusal to abide by dress regulations set by her employer.²⁵ She contended that her religion required her to wear a head covering at all times. Although she regarded her religion as "Old Catholic," the EEOC found no evidence that she was a member of "an organized

19. 398 U.S. 333 (1970).

20. *Id.* at 340.

21. *Id.* at 339.

22. *United States v. Ballard*, 322 U.S. 78, 86 (1944), cited in *United States v. Seeger*, 380 U.S. 163, 184 (1965) (citations omitted). In *Welsh* the registrant refused to classify his beliefs as religious yet the Court still found the beliefs to be based upon moral and ethical tenets held with the sincerity of traditional religious beliefs. 398 U.S. at 340. In *Seeger* the Court stated that the truth of a belief was not to be questioned. 380 U.S. at 185. Later in that opinion, however, the Court indeed examined *Seeger's* beliefs to determine whether they were based upon political or other ephemeral philosophies which would be considered "merely personal," or "religious" ideals which would therefore fall under the coverage of the Selective Service Act. *Id.* at 186.

23. 398 U.S. at 342-43.

24. *Id.* at 343.

25. EEOC Dec. No. 71-779, summarized at 3 F.E.P. Cas. 172 (Dec. 21, 1970).

sect whose beliefs are common to a number of people.”²⁶ Yet the EEOC found the belief to fall within the coverage of the Act because her conviction was “‘held with the strength of traditional religious convictions.’”²⁷ It was essentially the *Seeger-Welsh* test that was applied to ascertain whether the belief came within the protection of the Act. The case before the EEOC involved not merely a belief, but actions and practices flowing from that belief.

When the Act was amended in 1972, the term “religion” was said to include “all aspects of religious observance and practice, as well as belief”²⁸ There is little legislative history relating to the amendment, but the intent of Congress was clearly expressed during debate in the Senate:

The term “religion” as used in the Civil Rights Act of 1964, encompasses . . . the same concepts as are included in the first amendment—not merely belief, but also conduct; the freedom to believe, and also the freedom to act. . . . [T]he Civil Rights Act . . . [was] thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments.²⁹

The 1972 amendment thus incorporates the *Seeger-Welsh* test into the framework of the Act.

Considerable question exists over the necessary degree of sincerity. *Dewey v. Reynolds Metal Co.*³⁰ presents a good example. At the time Dewey was hired, his religious convictions did not prevent him from working overtime on Sundays. He later converted to the Faith Reformed Church, which considered it a sin to work on Sunday. Five years later Dewey was required to work overtime on a Sunday, and following the dictates of his faith, he refused. On the five Sundays that he was scheduled to work, he obtained a replacement. On the sixth Sunday, he refused not only to work, but also to obtain a

26. *Id.* at 173.

27. *Id.* (footnote omitted).

28. 42 U.S.C. § 2000e(j) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e (1970).

29. 118 CONG. REC. 705 (1972) (remarks of Senator Randolph); *see* *Weitkenaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284, 1288 (D. Vt. 1974) (citing with approval Senator Randolph’s remarks).

30. 300 F. Supp. 709 (W.D. Mich. 1969), *rev’d on other grounds*, 429 F.2d 324 (6th Cir. 1970), *aff’d by an equally divided Court*, 402 U.S. 689 (1971).

replacement. He contended that his beliefs had evolved to the point where obtaining a replacement would also violate the dictates of his faith. Because of this refusal, the company terminated Dewey's employment. Not questioning the abrupt change in Dewey's practice, the court apparently was satisfied as to the sincerity of his belief.³¹ Although this result has been criticized,³² the Supreme Court, in *Welsh*, supported the concept of an evolving belief.³³ It is only required that the belief be religious in the employee's own moral, ethical, or religious conception at the time it is claimed, and be held with the "'strength of more traditional religious convictions.'"³⁴

While it does not matter when the belief becomes firm, the belief must be firm at the time it is raised.³⁵ Thus, where an employee merely stated that his conviction of strict Sunday Sabbath observance was reaffirmed when his son miraculously recovered from surgery, without elaborating on the basis of that belief, a court held that the plaintiff "failed to demonstrate the requisite sincerity of religious convictions to make out a prima facie case."³⁶

The crucial question in examining a particular person's belief is not whether the belief is "religious," but whether it is "truly held."³⁷ Although this determination is a question of fact, differing opinions have been expressed as to which party has the burden of proof. According to one view, "the mere *assertion* of belief will serve as

31. 300 F. Supp. at 711.

32. It has been suggested that the court acted irrationally in finding the religious belief sincere: "It is exasperating to ask how [the] replacement of Dewey was religiously acceptable on August 14, 1966, but not so two weeks later." Edwards & Kaplan 615. This analysis fails to recognize, however, that religious training and personal reflection had led Dewey to the sincere belief that arranging for a replacement to work on Sunday was as sinful as if he were to work himself.

33. "At the time of registration for the draft, neither [conscientious objector] had yet come to accept pacifist principles. Their views on war developed only in subsequent years . . ." 398 U.S. at 336.

34. *Id.* at 337 (citation omitted).

35. *Hansard v. Johns-Manville Prods. Corp.*, 5 Empl. Prac. Dec. 7560 (E.D. Tex. 1973).

36. *Id.* at 7562.

37. *United States v. Seeger*, 380 U.S. 163, 185 (1965).

prima facie evidence of its genuineness."³⁸ Thus, the burden falls upon the employer: "Unless the employer can point to some previous specific and overt behavior that is patently inconsistent with the individual's professed beliefs, it is questionable whether he can successfully challenge the employee's sincerity."³⁹ The contrary view requires "that a finding of the sincerity of the asserted religious conviction is necessary for plaintiff [employee] to make out a prima facie case under the statute."⁴⁰

The better view places the burden of proving sincerity of belief upon the religious observer. Otherwise the employee could claim to be a follower of any religion, and the employer would be forced to determine his sincerity. An employee, so charged with the burden of proof, could possibly prove his sincerity by introducing fellow followers as witnesses.⁴¹

III. Reasonable Accommodation and Undue Hardship

Two years after passage of the Civil Rights Act, the EEOC promulgated its first set of guidelines concerning religious discrimination.⁴² The guidelines were revised in 1967.⁴³ This revision, and the

38. Edwards & Kaplan 614 (emphasis in original).

39. *Id.*

40. *Hansard v. Johns-Manville Prods. Corp.*, 5 Empl. Prac. Dec. 7560, 7561 (E.D. Tex. 1973).

41. Even though the employee who claimed to be a member of the "Old Catholic" faith was the sole member of that faith it might not have been difficult for her to meet the burden of proof by introducing friends who could have testified as to the sincerity of her belief. See text accompanying notes 25-27 *supra*.

42. 29 C.F.R. § 1605.1 (1974) states: "Observation of the Sabbath and other religious holidays. (a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days. (b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed

work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer. (c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable. (d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people."

43. The guidelines were set out in 31 Fed. Reg. 8370 (1966) as follows: "Section 1605.1 Observances of Sabbath and religious holidays. (a) (1) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular work week. These complaints arise in a variety of contexts, but typically involve employees who regularly observe certain special holidays during the year. (2) The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business. (3) However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday. Likewise, an employer who closes his business on Christmas or Good Friday is not thereby obligated to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur. (b) While the question of what accommodation by the employer may reasonably be required must be decided on the peculiar facts of each case, the following guidelines may prove helpful: (1) An employer may permit absences from work on religious holidays, with or without pay, but must treat all religions with substantial uniformity in this respect. However, the closing of a business on one religious holiday creates no obligation to permit time off from work on another. (2) An employer, to the extent he can do so without serious inconvenience to the conduct of his business, should make a reasonable accommodation to the needs of his employees and applicants for employment in connection with special religious holiday observances. (3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to

absence of interpretation or even sanction by the courts, created problems in *Dewey*.⁴⁴ There the district court applied the 1967 guidelines.⁴⁵ It found that these guidelines set forth a two-fold test: "(1) the employer must make reasonable accommodations to the religious needs of its employees; (2) unless such accommodation will cause undue hardship on the conduct of the employer's business."⁴⁶ Applying that test, the court found that the employer violated the Act by failing to reasonably accommodate the employee's religious needs.⁴⁷ Though the Court of Appeals for the Sixth Circuit reversed on the grounds that the 1967 guidelines were not in effect at the time of the alleged discriminatory practices,⁴⁸ it held that even if the 1967 guidelines had been in effect, there was no discriminatory act since the employer had made a reasonable accommodation.⁴⁹ The court of appeals cast doubt on the validity of the guidelines insofar as they interfered with the "internal affairs of an employer, absent discrimination"⁵⁰ The decision was affirmed without opinion by an equally divided Supreme Court.⁵¹ The EEOC and the courts were thus left with no clear understanding of the application and validity of the guidelines.

To relieve these doubts, Congress amended the Civil Rights Act

believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs. (4) Where an employee has previously been employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer should attempt to achieve an accommodation so as to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees."

44. 300 F. Supp. 709 (W.D. Mich. 1969), *rev'd on other grounds*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971).

45. 300 F. Supp. at 712.

46. *Id.* at 714.

47. *Id.* at 714-15.

48. 429 F.2d 324, 329-30 (6th Cir. 1970).

49. *Id.* at 331.

50. *Id.* at 331 n.1.

51. 402 U.S. 689 (1971).

to include within its statutory framework a definition of "religion" in accord with the EEOC guidelines.⁵² The amendment was conceived as an express reaction to the court's decision in *Dewey*.⁵³ The test set out by the district court was given statutory support, and must be the basis of any analysis of religious discrimination.⁵⁴

A. Reasonable Accommodation

Before an employer can meet his burden of showing undue hardship, he must prove he has made a reasonable accommodation to the employee's religious needs. The court of appeals in *Dewey* argued that such a test would require the employer to discriminate against his other employees.⁵⁵ This argument has not been accepted by other courts or by the EEOC. This alleged discrimination against other employees evolves into a conflict between first⁵⁶ and fourteenth amendment rights—between freedom of religion and equal protection of the laws.⁵⁷

52. See note 10 *supra*.

53. 118 CONG. REC. 7563 (1972): "The purpose . . . is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey v. Reynolds Metals Co.*" *Id.* at 7564 (citation omitted).

54. *Claybaugh v. Pacific Nw. Bell Tel. Co.*, 355 F. Supp. 1, 6 (D. Ore. 1973).

55. 429 F.2d at 330.

56. The Act bestows first amendment protection against private employment practices which result in religious discrimination. See text accompanying note 29 *supra*.

57. Although there has been no case that has squarely been faced with a conflict between first amendment rights and fourteenth amendment rights, the Supreme Court has held that first amendment rights have a preferred position. *Thomas v. Collins*, 323 U.S. 516, 530 (1945); see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free practice of religion); *Sherbert v. Verner*, 374 U.S. 398 (1963) (free practice of religion). *But cf.* *Otten v. Baltimore & O.R.R.*, 205 F.2d 58 (2d Cir. 1953), which on appeal from a denial of a motion for preliminary injunction held that an individual is not required by the first amendment to conform his conduct so as to accommodate another's religious necessities. *Id.* at 61. At the trial on the merits the district court refused to issue an injunction, viewing the prior circuit court opinion as dispositive of the federal question. *Otten v. Baltimore & O.R.R.*, 132 F. Supp. 836, 838 (E.D.N.Y. 1955), *aff'd sub nom.* *Otten v. Staten Island Rapid Trans. Ry.*, 229 F.2d 919 (2d Cir.), *cert. denied*, 351 U.S. 983 (1956).

The EEOC contends that "to make reasonable accommodations for the religious beliefs of particular employees does not discriminate against other employees whose religious beliefs do not require accommodation."⁵⁸ The EEOC requires the employer to document his inability to accommodate.⁵⁹ Failure to do so may establish a presumption that the employer could reasonably accommodate.⁶⁰

Various courts have supported the EEOC position. In *Claybaugh v. Pacific Northwest Bell Telephone Co.*,⁶¹ the court held that "by its very language [the 1967 guideline] places an affirmative duty upon an employer to attempt an accommodation."⁶² It stated that because of the telephone company's size, "an open position could be found within a short time where Claybaugh's religious needs could be permanently accommodated. It is the employer's duty to seek out such an open position within its organization before it can discharge an employee based on religious needs."⁶³

At least one court has held that in the case of companies with multiple divisions, the practices of all the divisions would be considered in determining whether an employer could make a reasonable accommodation. In *Reid v. Memphis Publishing Co.*,⁶⁴ there was no indication that an accommodation could be made within the division for which the employee worked. The newspaper to which the plaintiff applied was a six-day newspaper, and could not accommodate the employee, who could not work on Saturday. Evidence pertaining to the employment practices of all divisions was held, however, to be relevant to the question of whether a reasonable accommodation could have been made by the defendant corporation.⁶⁵ On

58. EEOC Dec. No. 71-463, summarized at 3 F.E.P. Cas. 385, 386 (Nov. 13, 1970).

59. See 29 C.F.R. §§ 1602.1-.14 (1974). The EEOC requires businesses of 100 employees or more to file yearly reports concerning their employment practices. *Id.* § 1602.7. Besides this requirement, all businesses must preserve employment records for six months from the date of any personnel action involving an employee. *Id.* § 1602.14.

60. See EEOC Dec. No. 72-1578, 1973 CCH EEOC Dec. 4652 (Apr. 21, 1972); EEOC Dec. No. 70-670, 1973 CCH EEOC Dec. 4242 (Mar. 30, 1970).

61. 355 F. Supp. 1 (D. Ore. 1973).

62. *Id.* at 5 (emphasis omitted).

63. *Id.* (footnote omitted).

64. 468 F.2d 346 (6th Cir. 1972).

65. *Id.* at 351.

remand the evidence showed that the other newspaper published by the defendant was a seven-day newspaper and therefore was able to accommodate those who had a Sabbath on a Saturday, by having them work on Sunday.⁶⁶

It is well established under the Act and the EEOC guidelines that "[t]he burden is upon the employer to seek cooperation of other employees, if necessary; and it is clear that the employer must show that it in fact attempted an accommodation, if it is to carry its burden of proof."⁶⁷ According to the EEOC, the minimum requirement placed upon the employer is to inquire if other employees would be willing to adjust their work schedules to accommodate another's religious needs.⁶⁸ Although the court of appeals in *Dewey* found that reasonable accommodation was made when the employer allowed the employee to find a replacement,⁶⁹ subsequent decisions have adhered to the EEOC policy.⁷⁰ It is imperative, at the very least, that the employer ask "that its employees exchange shifts."⁷¹ Other types of accommodations have been suggested by the courts and the EEOC.⁷²

66. *Reid v. Memphis Publishing Co.*, 369 F. Supp. 684, 686 (W.D. Tenn. 1973). *But see Shaffield v. Northrup Worldwide Aircraft Servs., Inc.*, 373 F. Supp. 937 (M.D. Ala. 1974), where a division was too small to make an adequate accommodation.

67. *Shaffield v. Northrup Worldwide Aircraft Servs., Inc.*, 373 F. Supp. 937, 941-42 (M.D. Ala. 1974) (emphasis omitted).

68. EEOC Dec. No. 72-0606, *summarized at* 4 F.E.P. Cas. 311 (Dec. 22, 1971).

69. 429 F.2d at 331.

70. *Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972); *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972).

71. *Claybaugh v. Pacific Nw. Bell Tel. Co.*, 355 F. Supp. 1, 5 (D. Ore. 1973).

72. *See Drum v. Ware*, 7 F.E.P. Cas. 269 (W.D.N.C. 1974) (reasonable accommodation had been made when the religious observer was shifted to another post office located 25 miles from where he had been working); *Claybaugh v. Pacific Nw. Bell Tel. Co.*, 355 F. Supp. 1 (D. Ore. 1973) (reasonable accommodation can be made by finding an "open position" for the religious observer); EEOC Dec. No. 72-2066, *summarized at* 4 F.E.P. Cas. 1063 (June 22, 1972) (where there is substitution, the religious observer can make up time by working shifts for his substitute); EEOC Dec. No. 71-463, 1973 CCH EEOC Dec. 4350 (Nov. 13, 1970) (if there is no available substitute, the employer is required to train a person to cover);

Controversies also appear where there is voluntary overtime. To insure an adequate work force over the weekend an employer may require an employee choosing to work overtime during the weekend to work both days.⁷³ In one case, discrimination was alleged when an employer allowed Saturday workers to be absent on Sunday while not allowing a person unable to work on Saturday to work on Sunday.⁷⁴ The EEOC found that reasonable accommodation could have been made by allowing the Saturday observer to be absent on his day of religious observance.⁷⁵

Although the Act speaks in terms of a reasonable accommodation being made by the employer, it is not proper to assume that only a unilateral obligation is imposed. Recent decisions indicate that the employee must also be willing to make reasonable accommodations.⁷⁶ In the first instance the employee must give his employer reasonable notice for the employer to make necessary adjustments.⁷⁷

EEOC Dec. No. 70-716, 1973 CCH EEOC Dec. 4255 (Apr. 23, 1970) (where there is no need of supervision or assistance, a reasonable accommodation can be made by allowing the religious observer to compensate for time lost by working different hours); EEOC Dec. No. 70-580, 1973 CCH EEOC Dec. 4214 (Mar. 2, 1970) (where work is normally done by one employee, it is not unreasonable to have another trained in the operation so there can be coverage).

73. EEOC Dec. No. 73-0314, 1973 CCH EEOC Dec. 4711 (Aug. 31, 1972); EEOC Dec. No. 70-110, 1973 CCH EEOC Dec. 4099 (Aug. 27, 1969).

74. EEOC Dec. No. 70-110, 1973 CCH EEOC Dec. 4099 (Aug. 27, 1969); *see* EEOC Dec. No. 73-0314, 1973 CCH EEOC Dec. 4711 (Aug. 31, 1972).

75. EEOC Dec. No. 70-110, 1973 CCH EEOC Dec. 4099 (Aug. 27, 1969).

76. In numerous court cases and EEOC decisions decided against the employer, it has been noted that the employee was always willing to accommodate and in fact had suggested reasonable accommodations which could have been adopted by the discriminating employer. *See* Drum v. Ware, 7 F.E.P. Cas. 269 (W.D.N.C. 1974); Claybaugh v. Pacific Nw. Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973); Daniels v. Pacific Nw. Bell Tel. Co., 7 F.E.P. Cas. 1323 (D. Ore. 1972); EEOC Dec. No. 72-2066, *summarized at* 4 F.E.P. Cas. 1063 (June 22, 1972); EEOC Dec. No. 70-716, 1973 CCH EEOC Dec. 4255 (Apr. 23, 1970).

77. EEOC Dec. No. 72-1579, 1973 CCH EEOC Dec. 4654 (Apr. 21, 1972). There, the employee had not given any indication that he would be leaving early until questioned by the employer. Finding no lack of accom-

The employee must exert efforts to reach an accommodation; where the employer cannot make a reasonable accommodation without undue hardship, the burden shifts to the employee.⁷⁸

B. Undue Hardship

Determination of a "reasonable accommodation" involves a balancing between ease of accommodation and undue hardship. The court in *Claybaugh* stated: "As the degree of business hardship increases, the quantity of conduct which will satisfy the reasonable accommodation requirement decreases."⁷⁹ According to the EEOC guidelines, "[s]uch undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer."⁸⁰

The EEOC has determined that where a job requires specialized skills, an attempt to accommodate may cause undue hardship to the employer.⁸¹ Practical time elements of the job may also be held to impose an undue hardship upon the employer, thereby relieving him of having to make accommodations to his employee's religious practices.⁸² The size of the employer's operation will also affect the

modation by the employer, the EEOC stressed that the employer "had no available pool of qualified employees, on such short notice, from which a relief employee could be obtained . . ." *Id.* at 4656.

78. *Fischer v. Alsing*, 7 F.E.P. Cas. 220, 221 (D. Ore. 1974). In *Fischer*, the necessity of having the job supervised made it impossible for the employer to accommodate the employee's religious needs. *Id.* at 222. The court found that the employee "did not make a reasonable effort to relocate his family's residence" closer to his job and therefore could not claim that the termination of his employment violated the Civil Rights Act. *Id.*

79. 355 F. Supp. at 6.

80. 29 C.F.R. § 1605.1(b) (1974).

81. EEOC Dec. No. 70773, 2 F.E.P. Cas. 686 (May 7, 1970). In that case the Sabbath observer applied for a job as a process engineer. The position required that he be available for work seven days a week. "Given the specialized nature of the process engineer's knowledge and the continuous call-in nature of his responsibilities, the Commission [concluded] 'that accommodation of Charging Party's religious practices with the duties of the job applied for would involve an 'undue hardship on the conduct of Respondent's business' within the meaning of the Guidelines.'" *Id.* (citation omitted).

82. EEOC Dec. No. 70-99, 1973 CCH EEOC Dec. 4096 (Aug. 27, 1969).

degree of hardship.⁸³

The burden of proving undue hardship is placed upon the employer,⁸⁴ and the EEOC requires specific evidence that he could not accommodate without undue hardship.⁸⁵ The employer is required to document "its inability to find a substitute employee and the economic effect of [the employee's] absence on its business."⁸⁶ The employer cannot argue that accommodation will cause dissatisfaction or inconvenience, as "inconvenience is not 'undue hardship.'"⁸⁷ Thus, to sustain a finding of undue hardship there must be a showing by the employer of a substantial burden upon the continued operation of his business.

IV. Union Membership and Religious Discrimination

The power of a labor organization⁸⁸ emanates from its size and the

A Sabbath observer was hired as an employee for the harvesting season. The EEOC recognized that it was impossible for the employer to obtain and train a substitute to work once a week for six weeks.

83. *Shaffield v. Northrup Worldwide Aircraft Servs.*, 373 F. Supp. 937 (M.D. Ala. 1974). "Generally, the issue in cases of this nature is whether the rearranging of the work schedule would cause undue hardship. Of course, in very small offices and enterprises . . . the shifting of one employee to another shift may cause very real hardship to an employer." *Id.* at 941 (citations omitted). In a recent case where the plaintiff was employed by a post office with eight employees, the court found that the defendant "simply did not have the manpower to accommodate plaintiff's request." *Johnson v. United States Postal Serv.*, 364 F. Supp. 37, 42 (N.D. Fla. 1973).

84. 29 C.F.R. § 1605.1(c) (1974).

85. See note 59 *supra* and accompanying text.

86. EEOC Dec. No. 72-1578, 1973 CCH EEOC Dec. 4652, 4653 (Apr. 21, 1972).

87. *Kettell v. Johnson & Johnson*, 337 F. Supp. 892, 895 (E.D. Ark. 1972).

88. "Labor organization" is defined in the National Labor Relations Act as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5) (1970). The Civil Rights Act contains a similar definition. See 42 U.S.C. § 2000e (1970), *as amended*, (Supp. II, 1972).

control it exerts over its membership. The most effective means of maintaining and increasing such power is through a union shop agreement.⁸⁹ Where an individual's religious convictions prevent him from joining any type of labor organization there is a potential conflict between first amendment rights and labor laws.

Union interest in total employee membership has been recognized by Congress in the union shop provisions of the Railway Labor Act⁹⁰ and the National Labor Relations Act.⁹¹ Prior to the 1972 amendment to the Civil Rights Act, courts consistently held that when a union shop agreement is in force an individual must be discharged if he refuses to join the union; this termination is without regard to the individual's religious convictions and first amendment protections, since courts readily find compelling state interests in sustaining labor unions.⁹² As one court stated:

We conclude that in weighing the burden which falls upon the plaintiff if she would avoid offending her religious convictions, as against the affront which sustaining her position would offer to the congressionally supported principle of the union shop, it is plaintiff who must suffer.⁹³

89. A union shop agreement has been defined as an agreement between the employer and a union which provides that a new employee must join the union within a specified time as a condition of employment. Failure to continue as a member in good standing requires termination of employment by the employer. See 2 J. JENKINS, LABOR LAW § 4.9(2) (1969). The National Labor Relations Act provides for union shop agreements: "[N]othing . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later . . ." 29 U.S.C. § 158(a)(3) (1970).

90. Railway Labor Act § 2(11), 45 U.S.C. § 152(11) (1970) provides: "Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States . . . or of any State, any carrier . . . and a labor organization . . . shall be permitted—(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment . . . all employees shall become members of the labor organization representing their craft or class"

91. 29 U.S.C. § 158(a)(3) (1970); see note 88 *supra*.

92. See *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956); *Otten v. Baltimore & O.R.R.*, 205 F.2d 58 (2d Cir. 1953).

93. *Linscott v. Millers Falls Co.*, 440 F.2d 14, 18 (1st Cir. 1971).

Two recent cases have, however, specifically extended the requirements of the 1972 amendment to union membership cases.⁹⁴ The EEOC held that the discharge of a Seventh-Day Adventist who refused to pay union dues because of his religious convictions constituted unlawful religious discrimination.⁹⁵ The EEOC recognized that the facts of the case were "virtually identical" to the first amendment cases⁹⁶ which had consistently found that the employer was required to fire the religious observer. Nevertheless, the EEOC refused to apply these principles to the Title VII case. Instead the EEOC imposed upon the employer a requirement to attempt a reasonable accommodation before any termination, regardless of the requirements of the union shop agreement. While it noted that there was a conflict between Title VII and the National Labor Relations Act, it refused to resolve it until such an attempt at reasonable accommodation was made.⁹⁷

The Ninth Circuit, in *Yott v. North American Rockwell Corp.*,⁹⁸ has affirmed the EEOC view. The court held that the 1972 amendment requires the employer to show he cannot reasonably accommodate the employee without undue hardship, before the worker can be fired.⁹⁹ It remanded the case to the district court to determine whether or not it was possible for the employer to make such a reasonable accommodation, noting that in a union membership case it may be impossible to do so.¹⁰⁰

The decision did not indicate the approach the district court might follow. The thrust of the court of appeals' decision indicates, however, that if an employee refuses to pay any union dues and the

94. *Yott v. North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974); EEOC Dec. No. 74-107, 2 CCH Empl. Prac. Guide 4149 (Apr. 2, 1974). *But cf.* EEOC Dec. No. 71-1784, summarized at 6 EEOC ANN. REP. 17 (1972); Edwards & Kaplan 599 nn.142, 144.

95. EEOC Dec. No. 74-107, 2 CCH Empl. Prac. Guide 4149 (Apr. 2, 1974).

96. *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956); *Otten v. Baltimore & O.R.R.*, 205 F.2d 58 (2d Cir. 1953).

97. EEOC Dec. No. 74-107, 2 CCH Empl. Prac. Guide 4149, 4150-51 (Apr. 2, 1974).

98. 501 F.2d 398 (9th Cir. 1974).

99. *Id.* at 403.

100. *Id.* at 403-05.

union insists on enforcement of the union shop clause, the employee may be fired:

Since we hold that if a reasonable accommodation can be reached between the parties it must be offered appellant Yott and such determination is for the District Court on remand . . . we leave analysis of whether the 'business necessity' test would be met for the District Court's determination. We are certain that the court will keep in mind that the purpose of a union security clause is to insure that all who receive the benefits of the collective bargaining agreement pay their fair share.¹⁰¹

Neither *Yott* nor the EEOC decision specifically delineates what constitutes a reasonable accommodation or an undue hardship in a union membership case. Recognition of the importance of a union shop has been demonstrated in first amendment cases.¹⁰² But unlike Sabbath cases in which an employee's work schedule can often be easily changed, the repercussions in the union of allowing a free rider would certainly be considerable.¹⁰³ Although Title VII may require the employer to make some effort to save the employee's job, it would appear that the Act has not affected the right of the union to insist on enforcement of the union shop clause.

V. Conclusion

One purpose of the 1972 amendment was to clarify what constituted unlawful discrimination on the basis of religion. The amendment incorporated the *Seeger-Welsh* definition of religion, encompassing religious practices, observances, and beliefs into the statutory framework of the Civil Rights Act. Although the 1972 amendment did not place the burden of proving the sincerity of the religious conviction with either party, the EEOC and the courts should place it solely with the person claiming it—the employee. The 1972 amendment requires an employer to attempt a reasonable accommodation of an employee's religious needs unless he can show undue hardship on his business. The terms "reasonable accommodation" and "undue hardship" are both relative concepts. While neither the EEOC nor the courts have attempted to fashion rules applicable to every conceivable factual situation, some basic guidelines for rea-

101. *Id.* at 402 n.6.

102. *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956); *Otten v. Baltimore & O.R.R.*, 205 F.2d 58 (2d Cir. 1953).

103. 501 F.2d at 402 n.6.

sonable accommodation have developed. Where the accommodation is made difficult, the degree of hardship to be shown which would relieve the employer of his duty to accommodate is lessened.

Prior to the 1972 amendment, litigation in union membership cases was primarily concerned with first amendment issues. Recent cases, however, have sought to apply the reasonable accommodation mandate of the 1972 amendment in the union membership area. These cases direct an employer to attempt a reasonable accommodation before discharging the employee. It would appear, however, that whether a case is brought under first amendment grounds or under the Act the result will be the same: the employee who, because of his religious beliefs, refuses to join the union (*i. e.*, pay dues) may be fired when a union shop agreement is in effect. Nevertheless, Title VII and the labor laws might be harmonized by requiring the employer to find the discharged employee another job in a segment of the employer's business not covered by a union shop agreement, if this can be done without undue hardship. Thus, the 1972 amendment will have little effect on the ability of the union to enforce a union shop contract.

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