Statement Submitted for the Record

by

HR POLICY ASSOCIATION

Before the

Health, Employment, Labor and Pensions Subcommittee of the U.S. House of Representatives

Hearing on

Protecting American Employees from Workplace Discrimination

FEBRUARY 12, 2008

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE:

Thank you for this opportunity to present the views of HR Policy Association regarding the Workplace Religious Freedom Act of 2007 (H.R. 1431). HR Policy Association represents the chief human resource officers of more than 250 of the largest corporations in the United States, collectively employing over 12 million employees in the United States. One of HR Policy's principal missions is to ensure that laws and policies affecting employment relations are sound, practical, and responsive to the realities of the modern workplace.

HR Policy Association believes that WRFA would substantially expand—not "clarify" as some would argue—the already existing duty of employers to accommodate the religious beliefs and practices of their applicants and employees. H.R. 1431 raises the current accommodation threshold under Title VII of the Civil Rights Act of 1964 by requiring employers to make adjustments for religious beliefs and practices of their employees unless these adjustments result in "significant difficulty or expense."

Two points must be stressed at the outset. First, although the very title of the bill suggests that religious practices and observances lack protection in the workplace, Title VII of the Civil Rights Act of 1964 (which applies to all employers with 15 or more employees) has provided protection against religious discrimination since 1964, and since 1972 has required covered employers to accommodate the religious practices of their employees. In one bizarre recent case, Title VII protection was even extended to an employee whose "religion" preached that all people of color are "savages." In fact, religion—unlike sex, race, and national origin—is the *only* protected category under Title VII to enjoy this special status of requiring "reasonable accommodation."

Second, WRFA would increase substantially the duty of employers to accommodate religious practices of their applicants and employees. In 1997, the Clinton administration issued "Guidelines on Religious Exercise and Religious Expression in the Federal Workplace" to all civilian branch agencies and officials. Those guidelines were issued to "clarify and reinforce the right of religious expression in the federal workplace," so that federal law does not unduly restrict *appropriate* religious enjoyment—*i.e.*, that which does not interfere with the rights of others or with the efficient and effective functioning of the workplace. The guidelines did not alter current law in any way. Though some proponents of WRFA argue that the bill is merely an extension to the private workplace of the Clinton administration's guidelines, this clearly is not the case. WRFA is not a "clarification" of existing law.

According to Senator Santorum, WRFA is intended to extend constitutional protections to religious observers in the workplace and, if enacted, will ensure that employees are not "forced to choose between dedication to the principles of their faith and losing their job because their employers refuse to reasonably accommodate certain needs."[1] But, as discussed in more detail below, there is no absolute right to unbridled religious expression in the workplace. Indeed, there is a serious question as to whether the bill as drafted is constitutional.

As the following analysis documents, it is far from clear that the perceived problem that WRFA attempts to address is as serious as alleged, especially in light of the adequate protection afforded under current law, the small percentage of religious discrimination charges filed in comparison to other types of alleged discrimination, and, most importantly, the fact that the vast

majority of employers do make reasonable accommodations to the religious needs of their employees.

In a nation of cultural and religious diversity such as ours, it is the absolute right of every person to *believe* according to individual conscience. However, how an individual's beliefs can be *practiced* must give due accord to balancing the equal rights of adherents of many different religions and other competing nonreligious interests. In the workplace, this may require neutral conduct rules for the good of all (particularly where, as with religion, no clear viewpoint emerges as the one the employer could, or should, endorse or prohibit).

Title VII attempts to reach an accommodation of conflicting religious practices, without doing violence to the rights and nonreligious interests of employees. Unfortunately, it appears that WRFA as currently drafted could become a new tool for discrimination, by elevating the religious rights of some individuals above other compelling, and at times conflicting, federal antidiscrimination and labor policies.

The following testimony provides an overview of WRFA, the current religious accommodation provision, and explains problems and pitfalls the provisions of WRFA would create.

Overview and Section-by-Section Analysis

WRFA would amend Title VII of the 1964 Civil Rights Act to expand significantly the obligation of employers to accommodate the religious beliefs and practices of their employees and job applicants. An employer would not be required to make reasonable accommodation if the employer can show that the accommodation would result in an undue hardship, which is defined under WRFA to mean "significant difficulty or expense." Although WRFA purports to adopt the undue hardship standard contained in the Americans with Disabilities Act (ADA), the WRFA undue hardship standard is in fact different and would be more difficult to meet. While WRFA would permit employers to establish "essential job functions," those functions could not include scheduling, employee dress codes, or other factors that "may have a temporary or tangential impact on the ability to perform job functions."

Mechanics of WRFA

WRFA operates by making two key amendments to Title VII. The first amends Section 701(j), which defines the term "religion." Among other things, this amendment contains key definitions of "employee" and "undue hardship" that serve to define the bounds of when employers must make accommodations. Secondly, WRFA amends Section 703, which defines unlawful employment practices, by adding additional language that increases the burden on employers in attempting to fashion reasonable accommodations for employees.

Definitions

Religion. Currently, Section 701(j) of Title VII includes the following definition of "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.[2]

WRFA makes several significant amendments to this definition. First, WRFA adds the phrase "after engaging in an affirmative and bona fide effort" to define the effort an employer must undertake in carrying out its existing duty to accommodate an applicant's or employee's religious beliefs or practices. This requirement appears to be derived from an affirmative defense against awards of compensatory or punitive damages established in the ADA. The ADA defense is available if employers make a good faith, but unsuccessful effort to provide a reasonable accommodation for an employee who has requested one.[3] WRFA does not merely borrow the defense, but instead makes it an affirmative obligation. Employers are thus mandated to initiate and engage in affirmative and bona fide efforts to accommodate religious observances or practices. Unlike the ADA, an employer's efforts to do so under WRFA will not constitute a defense for compensatory or punitive damages.

WRFA then modifies the definition of religion to include definitions for "employee" and "undue hardship," which are discussed below.

Employee. WRFA defines the term "employee" as an employee or prospective employee "who, with or without reasonable accommodation, is qualified to perform the essential functions of the employment position that such individual holds or desires." Thus, individuals are covered employees under WRFA if they are qualified to perform the essential functions of the job. The WRFA, in turn, defines the phrase "perform the essential functions" as carrying out the core requirements of an employment position. However, WFRA specifically excludes the following as constituting essential functions:

- practices related to clothing;
- practices related to taking time off; and
- other practices that may have a temporary or tangential impact on the ability to perform job functions, if such practices restrict the ability to wear religious clothing, to take time off for a holy day, or to participate in a religious observance or practice.

As explained more fully below, WRFA has adopted the ADA's notion of essential functions but has limited the definition of essential functions significantly. Both the adoption of this standard and its further limitation pose significant difficulties to employers.

Undue Hardship. As noted above, Title VII uses the phrase "undue hardship" in its definition of religion, but does not define it. The ADA also uses the phrase "undue hardship," but the language of the ADA provides a more structured definition. Supporters of WRFA claim that they are trying to make Title VII's definition mirror that of the ADA. However, as explained more fully below, the text of WRFA departs significantly from that of the ADA. Furthermore, the ADA's definition of "undue hardship" is not appropriate to use in cases of religious discrimination and would likely cause constitutional conflicts.

- WRFA, like the ADA, defines "undue hardship" as an accommodation requiring significant difficulty or expense. The bill then lists three factors that are to be considered in determining whether an accommodation requires significant difficulty or expense. These factors are:
- the identifiable cost of the accommodation, including the costs of lost productivity, and of retraining or hiring employees or transferring employees from one facility to another;

- the overall financial resources and size of the employer involved, relative to its number of employees; and
- for an employer with multiple facilities, the geographic separateness or administrative or fiscal relationship of the facilities.

The appropriateness of using an ADA-type standard and the distinctions between these elements and the ADA factors to be utilized in determining whether an accommodation requires significant difficulty or expense are explained in more detail below.

Prohibited Employment Practices

Title VII already makes it an unlawful employment practice to discriminate on the basis of religion. This includes an absolute ban on employer discrimination based on religious belief.[4] As noted above, Title VII's definition of "religion" includes a requirement that employers reasonably accommodate employees' observances or practices. WRFA amends Section 703 of Title VII by adding new qualifiers increasing the burden on employers.

First, it specifies that an accommodation is only reasonable if it actually *removes* the conflict between employment requirements and the applicant's or employee's religious observance or practice.

Second, WRFA specifies that an employer cannot deny an employee "leave of general usage" that the employee otherwise would be entitled to, if the only reason for the refusal is that the leave will be taken to accommodate a religious observance or practice. WRFA defines the phrase "leave of general usage" as leave provided under an employer's policy or program that allows employees to adjust work schedules or assignments according to rules set down by the employer for reasons of the employee's choosing. In other words, if an employer policy provides employees with flexibility to adjust scheduling, then the employer cannot deny the use of such leave to accommodate a religious observance or practice.

Effective Date

The amendments made by the bill would generally take effect on the date of enactment of WRFA, except that they would not apply to conduct occurring before the date of enactment.

Religion Broadly Defined Under Title VII

Title VII of the Civil Rights Act defines religion as "*all aspects of religious observance and practice, as well as belief,*" although Congress did not attempt to actually define *what* a "religious observance [or] practice [or] belief" is under Title VII. In 1980, the Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcing Title VII, issued *Guidelines on Discrimination Because of Religion*.[5] Courts traditionally have given deference to EEOC guidelines.

The EEOC's religious guidelines interpret the term "religion" to give it an expansive meaning, including "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." Indeed, the EEOC guidelines go on to state that "[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 of the employee or prospective employee." As one example of

what this can mean in practical terms in the Title VII context, an EEOC area office in 1996 determined that the Orange County (CA) Transit Authority committed *religious* discrimination when it fired a vegetarian employee for refusing to hand out free hamburger coupons.[6]

And more recently, the EEOC's San Francisco district office determined that the Teamsters committed religious discrimination by taking disciplinary action against two UPS employee union members who crossed a picket line because the employees held "religious convictions that preclude [her/him] from withholding [her/his] labor from [her/his] employer."[7]

For purposes of Title VII enforcement, the EEOC adopts, as a practical matter, the broad concept of "religion" as it has been interpreted by the U.S. Supreme Court in its constitutional decisions. For example, in *Thomas v. Review Board of Indiana Employment Security Division*,[8] the Court said that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[9] The Supreme Court considered the "officiality" of the belief to be irrelevant, observing that "the judicial process is singularly ill-equipped" to make such a determination.[10]

The Court also has ruled that religion can be entirely personal to the individual who claims that he or she must do something or refrain from doing something because of "religion," and does not have to come from an organized church.[11] "Religion" is more than the established, mainstream organizations and belief systems that the word "religion" typically conjures up, said the Court in *United States v. Seegar*.[12] A religious belief is "essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?"[13]

The Supreme Court said in *Seegar*:

> The validity of what [the individual] believes cannot be questioned. . . . "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." . . . Local boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.[14]

Even though the Court acknowledged in *Thomas* that some asserted beliefs might be "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause," it gave no hints what such a practice might be, and lower courts have not risked too readily labeling unconventional religious beliefs or practices as "bizarre."[15]

For example, in *Callahan v. Woods*,[16] a person's refusal to obtain a Social Security number because of a religious belief that such numbers were the "mark of the beast" described in the scriptural book of *Revelations* was entitled to protection as religion because "courts may not inquire into the truth, validity or reasonableness of a claimant's religious beliefs."[17] In *Stevens v. Berger*,[18] a U.S. district court said that "a religious belief can appear to every other member of the human race preposterous, yet merit the protections of the Bill of Rights."[19]

For example, in one recent Title VII case an employee claimed to belong to the World Church of the Creator, an organization purporting to be a religion teaching that

> all people of color are "savage" and intent on "mongrelizing the White Race," that African-Americans are subhuman and should be "shipped back to Africa"; that Jews control the nation and have instigated all wars in this century and should be driven from power, and that the Holocaust never occurred, but if it had occurred, Nazi Germany "would have done the world a tremendous favor."[20]

The court reasoned that for the employee's beliefs to come within Title VII's protection from religious discrimination, they need only be sincerely held and occupy a place in the employee's life "parallel to that held by a belief in God for believers in more mainstream theistic religions."[21] The court then distinguished prior decisions finding that the Ku Klux Klan (KKK) and other white supremacist organizations were not religions because the KKK's racist ideology was found to be of "a narrow, temporal and political character inconsistent with the meaning of 'religion.'"[22] The court noted that the KKK was largely not deemed to be a religion because of its history as a political and fraternal organization, while the World Church of the Creator held itself out to be a religion. As to the moral nature of the employee's beliefs, the court noted that the employee believed in living his life

> according to what will foster the advancement of white people and the denegration of all others. This precept, although simplistic and repugnant to the notions of equality that undergird the very non-discrimination statute at issue, is a means from determining right from wrong.[23]

Consequently, the court found the employee's beliefs constitute a religion for the purposes of Titlve VII's protection and that the employer could not discriminate against the employee based on his beliefs in white supremacy.

Critical to a court's determination that a belief or practice is subject to Title VII's protections, therefore, is determining whether or not the belief is *truly held* by the adherent. From an employer's perspective, given the fact that the courts are extremely reluctant to question the sincerity or nature of someone's claimed religion, how will the employer itself be able to make the determination when a request for an accommodation is made? It is important to understand that as the agency responsible for enforcing WRFA's expanded reasonable accommodation requirement, the EEOC will be compelled to enforce WRFA's increased accommodation duty for every conceivable "religious" practice under its broadly worded guidelines.

Title VII Already Prohibits Religious Discrimination, Requires Employers to Accommodate

Does the Alleged Problem Merit the Major Changes WRFA Would Make?

Even before explaining how current law provides adequate protection to those who seek workplace accommodations for their religious beliefs while at the same time preserving the legitimate rights of other employees, it is worth taking some time to put the alleged problem of workplace religious discrimination in its proper context.

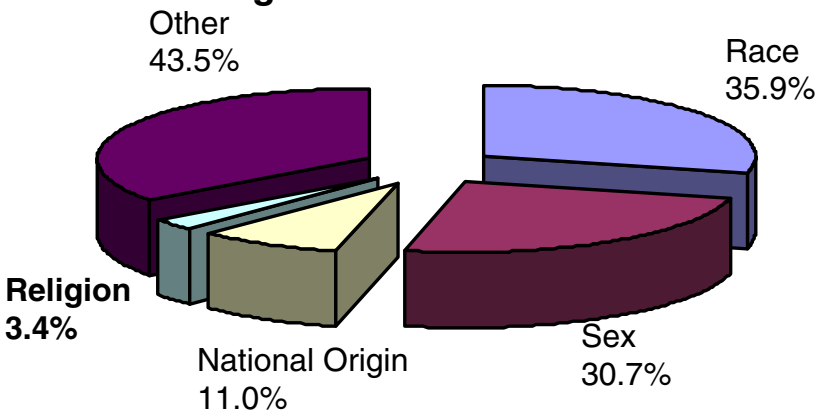
A survey conducted by the Society for Human Resource Management (SHRM) and the Tanenbaum Center for Interreligious Understanding shows that most employers already make reasonable accommodations to the religious needs of their employees of the nature and magnitude that should satisfy WRFA's proponents. SHRM represents more than 160,000 human

resource managers working for corporate America and the Tanenbaum Center is a nonprofit organization that seeks to foster understanding across religions and resolve intergroup conflict. The SHRM/Tanenbaum survey (*2001 Religion in the Workplace Survey*) reports that the demand for religious accommodations in the workplace has remained unchanged in recent years and that 79 percent of employers responding said there is about the same demand for religious accommodation in the workplace today as five years ago. The SHRM survey also reports that the most common forms of requested accommodations include the decorating of office space for religious holidays, allowing employees to display religious materials in work areas, and allowing flexible work schedules.

Proponents of WRFA cite a rise in the number of charges of religious discrimination being filed with the EEOC, the federal agency that enforces Title VII. While the absolute number of charges filed with the EEOC alleging religious discrimination rose slightly in past years (from 1,564 to 2,127 charges over the last five years), the percentage of charges alleging religious discrimination remained nearly the same—2.6 percent of the total number of charges filed in 2001 versus 2.0 percent of the total number of charges filed in 1996.

Further, the number of religious discrimination claims compared to other discrimination charges filed with EEOC has been and continues to be small. For example, the number of charges filed with the EEOC alleging religious discrimination in 2004 was 2,466 out of 79,432 total charges received by the EEOC, or just 3.1 percent of its charge intake.

Chart 1: Charges filed with the EEOC in 2006



Because individuals often file charges claiming multiple types of discrimination, the number of total charges for any given fiscal year will be less than the total of the types of discrimination listed.

A closer look at the raw numbers shows that the basis of the alleged religious discrimination cited in the charges does not justify new legislation. While some individuals still do encounter unreasonable refusals by some employers to accommodate their religious practices, many other individuals file Title VII religious charges and bring court cases to curtail religious practices being forced on them by their employers, supervisors, and co-workers.

The raw numbers also include charges where individuals have been subjected to discriminatory treatment because of their religion ("hostile work environment" harassment against them or overt discriminatory treatment), discriminatory practices that are already prohibited under Title VII. For all anyone knows, the increase in EEOC charges may just as

likely be due to the rise of religious conduct and proselytizing of unwilling targets in the workplace as to any failure to accommodate such. Ironically, WRFA actually could give rise to *more* such claims by these unwilling targets because it increases the likelihood that employees will claim harassment because of accommodations made to others wishing to express their religious beliefs.

Current Law Requires Reasonable Accommodation

To further underscore the fact that Congress already has given religion special attention under Title VII, in 1972 it added a reasonable accommodation requirement to Title VII specifically for religion. While employers since then have been required by Section 701(j) of Title VII to provide reasonable accommodation for employees' religious beliefs and practices, the extent to which employers are required to accommodate particular religious observations to meet this obligation has been defined narrowly by federal courts in order to escape a conflict between Title VII and the First Amendment prohibition against "establishment of religion." Two Supreme Court decisions—*Trans World Airlines v. Hardison*,[25] and *Ansonia School District v. Philbrook*[26] —set the parameters, using very careful reasoning.

The *Hardison* Court interpreted Title VII's reasonable accommodation standard narrowly to avoid reaching the constitutional issue of whether Title VII's accommodation provision violated the Establishment Clause of the Constitution; *i.e.*, "Congress shall make no law respecting an establishment of religion . . . ."[27] In doing so, the Supreme Court implied that the religious accommodation requirement of Title VII could reach the unconstitutional level of "establishment of religion" if the accommodation demanded by the statute was sufficiently costly. Therefore, by holding that accommodation that exceeded *de minimis* cost is an undue hardship (therefore not required by Title VII), the Court avoided a decision on whether Title VII violated the Establishment Clause.

The Court explained its reasonable accommodation rationale in *Hardison* as follows:

> To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship . . . . *[T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.* By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.[28]

The Court was sensitive to the issue that when an employer provides too much religious accommodation, particularly financial support, and burdens other employees in the process, it can face "reverse religious discrimination" cases from employees who are not being favored by the employer's accommodation policy. For example, in one case a federal court ruled in favor of an employee who had challenged his employer's policy of granting additional leave to people of

certain religions in order to accommodate their requests for time off.[29] WRFA expands the duty to accommodate but does not adequately address the reverse religious discrimination issue.

Existing Law Provides Adequate Protection to Most Employees

Even with the relatively narrow parameters laid out by the Supreme Court on the employer's duty to accommodate religious beliefs and practices, the court cases illustrate that Title VII as it currently exists is fully capable of vindicating *reasonable* requests for accommodation for religious observances.

Grooming/Dress Policies. In *Carter v. Bruce Oakley, Inc.*,[30] for example, the plaintiff won after suing his employer for failing to reasonably accommodate his religiously motivated practice of wearing a beard. The company could not establish any undue hardship, and the court rejected its reasons for a no-beard policy such as "unprofessional appearance." As explained more fully below, courts have, however, upheld no-beard policies when the worker's safety was at issue.[31]

Scheduling Conflicts. Witnesses who testified at a 1997 Senate Labor Committee hearing on WRFA expressed conflict between tending to a religious obligation and scheduling for work. These issues too are already covered under existing law. For example, a federal court in Nebraska ruled that an employer was required to reasonably accommodate an employee's request for *all* of Easter Sunday off. She had made the request sufficiently in advance, and there was sufficient staff to schedule around her request. In addition, she had been similarly accommodated in the past. The court reasoned that scheduling the employee for the evening shift on Easter interfered with her practice of attending evening as well as morning services.[32]

Similarly, in another case the court ruled that two employees who requested the Jewish high holy days off, weeks in advance, were unfairly disciplined when they did not report for work on Yom Kippur. The employer could easily have scheduled around them.[33] Likewise, an employer could have and should have accommodated an employee who requested time off to attend the religious conversion ceremony of his wife.[34]

Religious Expression. Finally, employees have also established the ability under current law to engage in religious conduct that does not interfere with their official job duties or, in the case where the actor is a manager or supervisor, does not create an environment of religious favoritism. For example, in *Brown v. Polk County, Iowa*,[35] a supervisor's spontaneous prayers and Bible references did not create an undue hardship for the employer, though the employer was justified in disciplining the employee for directing his secretary to type notes for his Bible study class on government time.

WRFA Likely to Provoke Harassment Charges

Under Title VII, an employer is liable for conduct by supervisors, co-workers, and even nonemployees with respect to workplace harassment if the employer knew or should have known about the conduct and failed to take corrective action. In cases involving supervisors, managers, and others employees acting as agents for the employer, the employer can be liable even if it did not know about the harassing conduct.

EEOC Attempted to Provide Guidance on Workplace Harassment

In 1993, the Equal Employment Opportunity Commission proposed guidelines on workplace harassment, including harassment on the basis of religion. The proposed guidelines went into a considerable amount of detail in broadly defining what constitutes harassing conduct. For example, the Commission identified the criteria for determining whether an action constitutes unlawful behavior:

> Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her…religion, …or that of his/her relatives, friends, or associates, and that: (i) has the purpose or effect of creating an intimidating environment; (ii) has the purpose or effect of unreasonably interfering with an individual's work performance; or (iii) otherwise adversely affects an individual's employment opportunities.[36]

The proposed guidelines also made clear that employers would be held liable under Title VII for failure to prevent harassment.

Ironically, EEOC was forced to withdraw the proposed guidelines in 1994 under intense pressure from Congress because of a concern that employers, in response to the guidelines, would attempt to protect themselves from religious harassment claims by virtually banning any form of religious expression in the workplace. But, as already described in detail, WRFA takes a 180-degree opposite tack. The bill would legally bind employers to make greater accommodation to religious beliefs and practices, and thereby exacerbate the problem of harassment that the proposed EEOC guidelines purported to address.

Even under present law, employers already are in a difficult situation because they cannot act to help *prevent* religious harassment; they can only *respond* to it after it has occurred. As such, religion already enjoys a status unlike any other category protected by Title VII. WRFA's increased duty to accommodate will only make it more difficult for employers, putting them between a rock and a hard place if an accommodation of one employee's religious beliefs, observances, or practices permits that employee to express himself or herself in the workplace in ways that harass or intimidate other employees.

WRFA offers no guidance as to how an employer can reasonably accommodate one employee's religious needs, without infringing on other employees' rights, when the two present an irreconcilable conflict.

Religious Conduct That Harasses Others

At its heart, the issue of accommodation versus harassment centers on what is the best way to promote tolerance of diversity (including religion) in the workplace. At times, the way in which rights are exercised must yield to workplace policies that promote the *common* good above individual expression no matter how sincerely the beliefs behind the expression may be held (*e.g.*, racial, sexual, and religious epithets are not tolerated in the workplace, because they erect arbitrary barriers to the achievement of equal opportunity, though they might conceivably be protected as free speech in other contexts).

Unfortunately, one employee's religious expression can result in another employee's harassment.[37] Title VII already recognizes that certain individual "constitutional freedoms" in the private workplace must be balanced against collective needs. For example, a supervisor is not entitled to explicitly berate or single out a female or minority employee on the basis of sex,

race, or national origin, simply as an exercise of "free speech" that the supervisor feels compelled to express in the workplace. Such expressions clearly could rise to the level of prohibited harassment. Yet WRFA as drafted could permit what amounts to religious harassment under the emblem of free expression.

In one case, an evangelical Christian believed she should "share the gospel and look for opportunities to do so." She was "led by the Lord" to write a letter to her supervisor and send it to his home, telling him among other things that he needed to "get right with God." The supervisor's wife opened the letter and believed the reference was to an extramarital affair her husband was having. This caused much grief. The employee wrote another letter to one of her subordinates suggesting that recent health problems she was experiencing were due to her sinful state. The employee sued after she was disciplined, but the court ruled against her, noting that her conduct "is not the type that an employer can possibly accommodate."[38] The court went on to say:

> [W]here an employee contends that she has a religious need to impose personally and directly on fellow employees, invading their privacy and criticizing their personal lives, the employer is placed between a rock and a hard place . . . . [T]he company would subject itself to possible suits from [the employees to whom Chalmers' letters were directed] claiming that Chalmers' conduct violated *their* religious freedoms or constituted religious harassment.[39]

How would this case be decided under WRFA's expansive duty to accommodate?

Reasonable Accommodation Versus Harassment

Clearly, employers risk violating Title VII if they cannot effectively deal with harassment in the workplace. If, as under WRFA, employers will be required to permit the religious conduct and religious expression of some employees that is offensive or intimidating to other employees, employers will run the risk of violating Title VII under a theory of hostile work environment actually *created by* WRFA's strict duty to accommodate.

It is worth noting that when the religious accommodation duty was added to Title VII in 1972, it was done to require employers to examine what may appear to be neutral workplace policies and to make room for employees' sincerely held religious beliefs, *where possible*. However, even as the amendment was being considered by the Senate, there was recognition that not every accommodation would be possible.

It will be of little comfort to employers to simply say that they should wait until someone claims harassment before examining the reasonableness of the accommodation.

WRFA's Expanded Reasonable Accommodation/Undue Hardship Standard

Just how far would employers be required to go in accommodating the religious beliefs and practices of their employees and job applicants if WRFA were to be enacted as drafted? As already mentioned, contrary to the claims of WRFA's sponsors, a direct comparison of WRFA and the Americans with Disabilities Act shows that the definition of undue hardship and the treatment of essential functions and direct threats to safety are key areas in which WRFA diverges from the ADA. Further, there is a fundamental policy question as to whether it is appropriate for WRFA to even adopt the ADA standards, since disability and religion are vastly

different issues. In fact, WRFA and the ADA, while both discrimination legislation, address fundamentally different problems. The problem with borrowing the concept of accommodation from the ADA is that an accommodation for an individual with a disability is designed to *allow* an employee to perform his job's essential functions, not *excuse* him from doing them.

Definition of "Undue Hardship"

WRFA's accommodation duty is controlled by the definition of "undue hardship." In other words, an accommodation must be made unless and until it becomes an undue hardship. Though both WRFA and the ADA define undue hardship as "requiring significant difficulty or expense," the factors that determine what constitutes "significant difficulty or expense" differ.

The following side-by-side comparison of the two standards highlights the differences:

Factors to Consider in Determining "Significant Difficulty or Expense"

ADA: 42 U.S.C.A. § 12111(10)(B)	**WRFA:** *proposed 42 U.S.C.A. § 2000e(j)(3)*
i. the nature and cost of the accommodation needed;	*A. the identifiable cost of the accommodation including the costs of loss of productivity and of retraining or hiring employees or transferring employees from one facility to another;*
ii. the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation on the operation of the facility;	*B. the overall financial resources and size of the employer involved, relative to the number of its employees; and*
iii. the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and	C. *for an employer with multiple facilities, geographic separateness or administrative or fiscal relationship of the facilities.*
iv. the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.	

As can be seen from the comparison, contrary to the assertions of WRFA's supporters, it does not mirror the ADA's definition of undue hardship. Instead, WRFA provides for far fewer

and far narrower factors to be considered in determining whether an accommodation poses an undue hardship. As can be seen from the above comparison, the ADA makes express provision for considering circumstances at particular facilities while WRFA generally aggregates all of the employer's facilities and considers the impact on the employer as a whole. This could pose significant problems for large employers who may have small facilities. While looking at the employer's total resources or total number of employees nationwide may make an accommodation seem reasonable, the accommodation could pose significant costs for an individual facility or could cause substantial disruption at such a facility.

In addition, the factors considered under the ADA clearly consider the type of operations that the employer is engaged in as well as the composition and structure of the employer's workforce. WRFA fails to include such provisions as factors that could be used in examining whether an accommodation imposed significant difficulty or expense.

Essential Functions

As noted earlier, WRFA contains a definition of "essential functions" of a job that is central in determining coverage under the bill. The definition of the phrase "essential functions" appears to be modeled after the ADA in that like the ADA's definition of the phrase "qualified individual with a disability," WRFA's definition of "employee" applies to those who are capable of performing the essential functions of the job. WRFA departs from ADA in its definition of essential functions.

"Essential functions" in terms of coverage of employees under labor and employment laws were first considered in regulations implementing Section 504 of the Rehabilitation Act of 1973.[40] These regulations became the basis for the ADA's use of the term.[41] The use of the phrase "essential functions" was to distinguish fundamental job tasks from marginal job tasks so that employers could continue to require that applicants and employees are capable of performing tasks that are fundamental to the job.[42]

To better understand the nature of essential functions, it is helpful to look at regulations promulgated under the ADA and the EEOC's guidance interpreting those provisions. In making a determination as to whether a task is an essential function, one must first examine whether the employer actually requires employees in the position to perform the tasks that the employer asserts are essential. If the employer actually requires employees to perform the tasks, then the determination centers around whether removing the function would fundamentally alter the position.[43]

While this analysis may be appropriate for determining whether a particular employee or applicant is physically capable of performing the fundamental parts of a job, it is not appropriate to determine specific functions of jobs that employees can effectively waive based on religious belief or practices. The physical demands that will be made of employees in particular positions should be relatively clear to employers at the time of hiring. However, it may not be clear what fundamental parts of a job could conflict with religious beliefs or practices. Indeed, because "religion" and "religious beliefs or practices" are defined subjectively, it is impossible for the employer to know at the outset what types of beliefs or practices might conflict with particular job tasks.

The legislation's ban on considering clothing or scheduling as essential functions further demonstrates how the test is not appropriate in the religious discrimination context. For

example, a fundamental part of a job at a concession stand for a professional football team would likely include the ability to work on Sundays. However, the legislation would prohibit employers from making the ability to work on Sunday an essential function. This leads to the absurd result that employers would be forced to hire people for jobs that they could then virtually always refuse to attend based on their need to observe a holy day.

WRFA Has No Provision for "Direct Threat" and Safety Considerations

The ADA also provides that an employer's qualification standards may include a requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace. This allowance under the ADA recognizes that where an employee, by virtue of his disability, imposes a threat to his own safety, or the safety of others, it is a risk that cannot be tolerated in the workplace. This reinforces the notion that accommodation is not an absolute concept and at times the needs and rights of individuals other than the employee seeking accommodation are paramount. In the disabilities context, health, and safety-related job requirements are recognized and upheld, even where they have a tendency to eliminate individuals with disabilities from holding particular positions.

Current law appropriately recognizes that where an employee's religious practice poses a safety risk, it is not suitable for accommodation. For example, in ***Bhatia v. Chevron USA***,[44] the court recognized that unavoidable potential exposure to toxins in certain jobs required that employees be able to attain a gas-tight seal with a respirator, which is not yet technically achievable when an individual wears a beard. Where the employee would not shave his beard for religious reasons, the court of appeals ruled that the safety risk was not acceptable and therefore, the beard could not be accommodated in particular jobs.

Employers should not be asked to compromise safety when certain religious restrictions are incompatible with safety-sensitive jobs. For example, an employee's religious belief that she not wear "masculine clothing" could not be accommodated where, despite several meetings between the employer, the employee, and the employee's union representatives to discuss alternatives, it was determined that no skirt could be worn on the job without creating a safety risk to herself and others, because of the dangerous machinery involved.[45]

WRFA includes no provision for those circumstances where accommodating an employee's religious practices may constitute a direct threat to the employee or to others. Consequently, compliance with WRFA could force employers to make religious accommodations that threaten employee safety and health, possibly in violation of safety and health laws. Clearly, religious accommodation should have the same exception for direct threat and safety considerations that the ADA recognizes.

Constitutional Issues

It is not merely the rights of the individual wishing to express a religious belief or follow a religious observance that govern whether or how the belief or observance should be accommodated in the employment context. As described in more detail below, WRFA raises a serious constitutional issue as to the extent to which a duty to accommodate can be imposed upon an employer without the government unconstitutionally sanctioning (in constitutional terms, "establishing") a religion.

Freedom of Expression Versus Workplace Rules Designed to Preserve Order, Efficiency, and Equal Opportunity

WRFA in part is designed to open the workplace to greater religious expression by employees. Proponents of the bill sometimes cite it as a measure that will restore, defend, or extend the "constitutional right to free exercise of religion" in the workplace. However, an examination of cases interpreting the Free Exercise Clause of the First Amendment reveals that often religious conduct must yield to important secular interests. As the Supreme Court noted in *Cantwell v. State of Connecticut*,[46] 32 years before Congress first enacted a reasonable accommodation duty for religion in the workplace:

> Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law . . . . [T]he [First] Amendment embraces two concepts—*freedom to believe and freedom to act.* The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.[47]

In a case brought under Title VII, *EEOC v. Townley Engineering & Mfg. Co.*,[48] a company's owners were born-again Christians who had made a covenant with God to operate their company as a "Christian, faith-operated business." Among other religiously oriented activities connected to the business, the owners held weekly devotional services during work time and made attendance mandatory for all employees. One employee, an atheist, asked to be excused from attending these services. He was told by his supervisor that attendance was mandatory. The owners felt they had a right to freely express their religious devotion and had to share it with all their employees as part of their covenant with God.

After the atheist employee sued, the court ruled that the employer could not make attendance at a religious service mandatory for all employees and would have to conduct any business portion of the meetings separately. The court observed that protecting the atheist employee's right to be free from forced observance of his employer's religion is at the heart of Title VII's ban against religious discrimination, and a prohibition against mandatory attendance at services would not unduly burden business owners' free exercise rights. The court explained that the employer must make an accommodation to the atheist's freedom not to believe or observe religious practices, and to do so would not infringe on the owners' freedom to exercise their own religion, despite the owners' sincere belief that their covenant with God required them to share the Gospel with all their employees. The court also pointed out the Supreme Court's ruling that the right to religious practice (unlike the right to religious belief) may be limited by a statute if "it is essential to accomplish an overriding governmental interest."[49]

The *Townley* court also stated that "[t]he strength of the government's interest in eradicating discrimination through Title VII is also clear. We have stated that 'Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions.'"[50]

In another relevant case, a public school could not accommodate the religious beliefs of a teacher that prevented her from teaching any subject relating to love of country or patriotism, because "in seeking to conduct herself in accordance with her religious beliefs, [plaintiff] neglects to consider the impact on her students who are not members of her faith."[51]

Another court pointed out in *Miller v. Drennon*[52] that "[i]f an employee could pick and choose which of his fellow employees he is willing to work with based on those employees'

willingness to comply with *his* notion of moral or Christian behavior, the workplace would be chaotic" and "[t]he Free Exercise Clause does not extend this far."

Courts have upheld Title VII as a compelling reason for curtailing First Amendment expression because of the paramount interest in preventing discrimination in the workplace. In cases such as *Robinson v. Jacksonville Shipyards Inc.*[53] and *Jenson v. Eveleth Taconite Co.*,[54] courts have rejected First Amendment arguments against liability under Title VII for sexual harassment. Likewise, in *Lambert v. Condor Mfg. Inc.*,[55] the court ruled that "a private employer has the right to require that the pictures [of nude women that offended an employee's religious beliefs] be taken down, and the exercise of that right would not implicate any First Amendment problems."

WRFA ignores the careful balance between protecting the right of religious expression and the need for workplace rules to preserve order, efficiency, and equal opportunity. By tilting the balance in favor of religious expression, WRFA will decrease protections for equal opportunity and will likely increase charges of harassment. Doing so will only serve to frustrate rules designed to promote efficient workplaces.

Does WRFA Violate the Constitution's "Establishment Clause"?

The Constitution's First Amendment also contains the Establishment Clause stating that "Congress shall make no law respecting an establishment of religion . . . ."[56] One case illustrating the application of the Establishment Clause to the workplace is *Estate of Thornton v. Caldor.*[57] In this case, the Supreme Court considered a Connecticut state statute that provided employees with an absolute right not to work on a particular day of the week that they observe as the Sabbath. The Court noted that the statute was intended to relieve those who observe a Sabbath on any day of the week from the duty to work on that day, regardless of the burden or inconvenience placed on the employer or fellow workers.[58] The Court thus found that the statute had more than an incidental or remote effect advancing religion and that it was unconstitutional because the Establishment Clause "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."[59]

It is thus clear that rules that protect religious freedom in the workplace may cause tension with the Establishment Clause's prohibition on policies that advance religion. Courts have recognized this tension in analyzing the reasonable accommodation provision of Title VII. For example, in *Hardison* (discussed earlier), the Supreme Court chose the *de minimis* standard for reasonable accommodation of religion cases because a requirement that employers bear a greater cost might be invalid under the Establishment Clause—a ruling the court desired to avoid making.

In a later decision further interpreting Title VII's religious accommodation obligation, the Supreme Court again explained:

> In enacting Sec. 701(j), Congress was understandably motivated by a desire to assure the individual *additional* opportunity to observe religious practices, but it did not impose a duty on the employer to accommodate at all costs . . . . [P]rovision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work . . . . But unpaid leave is not a reasonable accommodation

> when paid leave is provided for all purposes *except* religious ones . . . . Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness.[60]

A fundamental and founding principle of this nation is the separation of church and state. As the opponents of a constitutional amendment to "restore religious freedom" point out, the reason that religious institutions are not eligible for public funds is to protect the integrity of the would-be beneficiary religious groups from government interference and to protect taxpayers from funding religious viewpoints with which they disagree (and also to avoid running the risk of establishing government religions).[61] WRFA's increased financial obligation on employers to accommodate religious practices shifts the cost of accommodations to employers, who consequently are being asked to fund religious viewpoints with which they may disagree. No compelling reason has been cited by WRFA's proponents for why employers should be asked to do in the private arena what taxpayers are not asked to do in the public arena.[62]

Some Additional Practical Considerations

In an attempt to further illustrate in practical terms the kind of difficulty that employers could experience in attempting to meet WRFA's new reasonable accommodation threshold, we pose below a series of (and by no means exhaustive) hypotheticals. The legislation does not provide a clear answer to any of them.

- How will the number of individuals who will need the same or similar accommodation affect the duty to accommodate? As the number increases, does the duty decline?
- Who decides what the accommodation will be?
- What would be the employer's right under WRFA to deny a religious accommodation request that would interfere with safety?
- How does an employer referee competing religious expressions among employees? Where can the employer draw the line on religious expression in the workplace?
- Would an employer be required to establish a Kosher (other?) cafeteria if enough employees wanted it as a religious accommodation?
- What if an employee's request is unusual by commonly accepted standards but is cloaked with religion? (The employer has no real right to question the "religion" of an employee, but clearly has a financial obligation under WRFA to support accommodations—no matter how unusual—until the point of undue hardship.)
- What about religious observances or practices that do not involve time off to attend to religious requirements (Sabbath, holy days) but instead involve daily religious routines on the employer's premises?

Conclusion

In the final analysis, WRFA as currently drafted is a religious preference amendment. By increasing the obligation of employers to accommodate the demands of applicants and employees to practice their religious convictions or observe religious Sabbaths, WRFA raises serious constitutional questions under the Establishment Clause. WRFA elevates the rights of the "faithful" over more secular but equally strong and legitimate interests of other employees, and impermissibly promotes or encourages religious adherence because it carries special benefits to those claiming religious protection for their behavior. Moreover, WRFA creates serious conflict by pitting the rights of religious employees to express themselves in the workplace against the rights of nonreligious employees (or employees of different religious beliefs) and against the ability of employers to maintain rules to preserve equal employment opportunity for all employees. We strongly encourage the Committee to take a very close look at these and other problems related to rewriting the religious accommodation provision of Title VII. We are very eager to join you in this effort and thank you for allowing us an opportunity to express our views.

Endnotes

[1] Santorum, Kerry Introduce Legislation to Protect Religious Freedom In the Workplace, Press Release issued by Sen. Rick Santorum, March 17, 2005.
[2] Codified at 29 U.S.C. § 2000e(j).
[3] *See* 42 U.S.C. § 1983a(3).
[4] *See, e.g., Peterson v. Wilmur Communications*, 205 F. Supp. 2d 1014, 1019-20 (E.D. Wis. 2002).
[5] 29 C.F.R. § 1605.1.
[6] *Anderson v. Orange County Transit Authority*, No. 345960598 (Aug. 20, 1996).
[7] *Hawkins & Christolear v. International Brotherhood of Teamsters*, Charges Number 375-98-0014 & 375-98-0015 (Jan. 12, 1998).
[8] 450 U.S. 707 (1981).
[9] *Id*. at 714.
[10] *Id*.
[11] *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989).
[12] 380 U.S. 163 (1965).
[13] *Id.* at 184.
[14] *Id.* at 184-185 (citations omitted).
[15] *Thomas*, 450 U.S. at 715.
[16] 658 F.2d 679 (9th Cir. 1981).
[17] *Id*. at 685. *Cf. Sutton v. Providence St. Joseph Medical Center,* 192 F. 3d 826 (9th Cir. 1999) (refusal to provide Social Security number not protected under Title VII where accommodation would require employer to violate law).
[18] 428 F. Supp. 896 (E.D.N.Y. 1977).
[19] *Id*. at 899.
[20] *Peterson,* 205 F. Supp. 2d at 1015 (citations omitted).
[21] *Id*. at 1022.
[22] *Id*. (citing *Bellamy v. Mason's Stores, Inc*., 368 F. Supp. 1025, 1026 (E.D. Va. 1973)).
[23] *Id*. at 1023.
[24] See, e.g., *Turner v. Barr*, 806 F. Supp. 1025 (D.D.C. 1992)(hostile environment including jokes about the Holocaust).
[25] 432 U.S. 86 (1977).
[26] 479 U.S. 60 (1986).
[27] U.S. CONST. amend. I.
[28] 432 U.S. at 84-85 (emphasis added).
[29] *Ka Nam Kuan v. City of Chicago*, 563 F. Supp. 255 (N.D. Ill. 1983).
[30] 849 F. Supp. 673 (E.D. Ark. 1993).
[31] *See Bhatia v. Chevron*, 734 F.2d 1382 (9th Cir. 1984).
[32] *Pedersen v. Casey's General Stores, Inc.*, 978 F. Supp. 926 (D. Neb. 1997).
[33] *EEOC v. Ilona of Hungary, Inc.,*108 F.3d 1569 (7th Cir. 1997).
[34] *Heller v. EEB Auto Co.*, 8 F.3d 1433 (9th Cir. 1993).
[35] 61 F.3d 650 (8th Cir. 1995), *cert. denied*, 516 U.S. 1158 (1996).
[36] Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266, 51,269 (proposed Oct. 1, 1993).
[37] *See generally Sattar v. Motorola, Inc.*, 138 F.3d 1164 (7th Cir. 1998)(employee alleged that his supervisor, a devout Muslim, harassed and unfairly evaluated him because he was a lapsed Muslim).
[38] *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996), *cert. denied*, 522 U.S. 813 (1997).
[39] *Id*. at 1021 (emphasis original).
[40] *See* 45 C.F.R. § 84.3(k).
[41] *See* S. Rep No. 116, 101st Cong., 1st Sess. 26 (1989).
[42] *Id*.
[43] 29 C.F.R. § 1630.2(n) (Interpretive Guidance).
[44] 734 F.2d 1382 (9th Cir. 1982).
[45] *Killebrew v. Local 1683 AFSCME*, 651 F. Supp. 95 (W.D. Ky. 1986).
[46] 310 U.S. 296 (1940).

[47] *Id*. at 303-4 (emphasis added). *See also Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985) (citing Judge Learned Hand's opinion in *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)) ("The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.")).
[48] 859 F.2d 610 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).
[49] *United States v. Lee*, 455 U.S. 252, 257-58 (1982).
[50] *Townley*, 859 F.3d at 620. Additionally, the Free Exercise Clause is only implicated where a *central tenet* of faith *is substantially burdened. See, e.g., Graham v. Commissioner,* 822 F.2d 844, 850-51 (9th Cir. 1987), *aff'd sub nom. Hernandez v. Commissioner,* 490 U.S. 680 (1980). Title VII's accommodation provision is relevant where any asserted religious belief or practice conflicts with any work requirement—i.e., the Free Exercise Clause is "not a guarantee against inconvenience." *Kelly v. Municipal Court,* 852 F. Supp. 724 (S.D. Ind. 1994), *aff'd*, 97 F.3d 902 (7th Cir. 1996).
[51] *Palmer v. Chicago Bd. of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980) (noting that the First Amendment is not a teacher license for uncontrolled expression, and that "[p]laintiff's right to her own religious views and practices remains unfettered, but she has no constitutional right to require others to submit to her views and to forego a portion of their education they would otherwise be entitled to enjoy").
[52] 56 FEP Cas. (BNA) 274, 281 (D.S.C. 1991), *aff'd,* 59 FEP Cas. (BNA) 192 (4th Cir. 1992).
[53] 760 F. Supp. 1486, 1534-36 (M.D. Fla. 1991).
[54] 824 F. Supp. 847, 884 n.89 (D. Min 1993), *rev'd in part on others grounds*, 130 F.3d 1287 (8th Cir. 1997), *cert. denied sub nom. Oglebay Norton Co. v. Jenson*, 524 U.S. 953 (1998).
[55] 768 F. Supp. 600, 604 (E.D. Mich. 1991).
[56] U.S. CONST. amend. I.
[57] 472 U.S. 703 (1985).
[58] *Id*. at 708-09.
[59] *Id*. at 710 (citing *Otten v. Baltimore & Ohio R.* Co., 205 F.2d 58, 61 (2d Cir. 1953)).
[60] *Philbrook*, 479 U.S. at 70-71 (citations omitted) (emphasis in original). *See also Miller v. Drennon*, 56 FEP Cas. (BNA) 274, 280 (D.S.C. 1991), *aff'd*, 59 FEP Cas. (BNA) 192 (4th Cir. 1992) ("To permit plaintiff to be exempt from assignment at certain locations or to exempt him from assignment with a female partner solely because of his religious beliefs would single out his religious beliefs for preferable treatment. Such action would, when undertaken by Lexington County, constitute a violation of the Establishment Clause.").
5 *See* testimony from the House of Representatives Committee on the Judiciary, Subcommittee Hearing on H.J. Res. 78, "Proposing an Amendment to the Constitution Restoring Religious Freedom," July 22, 1997.
[62] *See, e.g., International Ass'n. of Machinists v. Boeing Co.*, 833 F.2d 165, 169 (9th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988) (pointing out that a religious accommodation cannot result in financial support for a particular religious group) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 234 n.22 (1972); *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963)).