TESTIMONY OF RICHARD T. FOLTIN

LEGISLATIVE DIRECTOR AND COUNSEL
OFFICE OF GOVERNMENT AND INTERNATIONAL AFFAIRS
THE AMERICAN JEWISH COMMITTEE

WITH RESPECT TO
THE WORKPLACE RELIGIOUS FREEDOM ACT
(H.R.1431)

AT A HEARING OF THE

HOUSE EDUCATION AND LABOR SUBCOMMITTEE
ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

ON

"PROTECTING AMERICANS FROM
WORKPLACE DISCRIMINATION"

FEBRUARY 12, 2008

OFFICE OF GOVERNMENT AND INTERNATIONAL AFFAIRS
1156 15TH STREET NW, SUITE 1201
WASHINGTON, DC 20005
PHONE: 202.785.5463 • FAX: 202.659.9896 • EMAIL: foltinr@ajc.org
WWW.AJC.ORG

Mr. Chairman, thank you for this opportunity to testify before the House Education and Labor Subcommittee on Health, Employment, Labor and Pensions on the Workplace Religious Freedom Act, important civil rights legislation introduced as H.R.1431 by Representatives Carolyn McCarthy and Mark Souder.

And thank you, as well, Representatives McCarthy and Souder, for bringing this crucial religious liberty and antidiscrimination legislation to the fore. Your bipartisan effort sends exactly the right signal—that the effort to safeguard religious liberty and fight against religious discrimination is one that should, and must, bring together Americans from a broad range of political and religious persuasions.

My name is Richard T. Foltin. I serve as Legislative Director and Counsel in the Office of Government and International Affairs of the American Jewish Committee. The American Jewish Committee was founded in 1906 with a mandate to protect the civil and religious rights of Jews. Through the years, AJC has been a vigorous proponent of the free exercise of religion, not only for Jews, but for people of all faiths.

I also have the privilege of serving as co-chairman—together with James Standish, legislative director of the General Conference of Seventh-day Adventists—of the Coalition for Religious Freedom in the Workplace. This broad coalition of over forty religious and civil rights groups—spanning the political spectrum and reflecting the robust diversity of American religious life—has come together to promote the passage of legislation to strengthen the religious accommodation provisions of Title VII of the Civil Rights Act of 1964. A list of the organizations comprising the coalition is appended to my testimony.

Current civil rights law defines the refusal of an employer to reasonably accommodate an employee's religious practice, unless such accommodation would impose an undue hardship on the employer, as a form of religious discrimination. But this standard has been interpreted by the courts in a fashion that places little restraint on an employer's ability to refuse to provide religious accommodation, needlessly forcing upon religiously observant employees a conflict between the dictates of religious conscience and the requirements of the workplace.

The Workplace Religious Freedom Act (WRFA) will promote the cause of protection of the free exercise of religion just as have two other bipartisan initiatives, the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA), enacted into law in 1993 and 2000, respectively. WRFA is a similar response to the failure of the Supreme Court, and of lower courts following the high court's lead, to give due regard to the importance of accommodation of religious practice in a heterogeneous society.

The Need for WRFA

Why is the Workplace Religious Freedom Act necessary? After all, in 1972 the U.S. Congress amended the Civil Rights Act of 1964 so as to define as a form of religious discrimination the failure of an employer to reasonably accommodate an employee's religious

observance unless such accommodation would impose an undue hardship on the employer's business.[1] In so doing, Congress properly recognized that the arbitrary refusal of an employer to accommodate an employee's religious practice is nothing more than a form of discrimination. Unfortunately, this standard, set forth in section 701(j) of Title VII (42 U.S.C. section 2000e(j)), although appropriate on its face, has been interpreted by the Supreme Court and lower courts in a fashion that makes it exceedingly difficult to enforce an employer's obligation to provide religious accommodation.

The constricted reading of section 701(j) is no small matter. RFRA and RLUIPA were enacted by Congress in order to extend important protections to all Americans from undue *government* encroachment on their religious liberties. But for many religiously observant Americans the greatest peril to their ability to carry out their religious faiths, on a day-to-day basis, may come in the workplace.

Of course, many employers recognize that both they and their employees benefit when they mutually work together to find a fit between the needs of the workplace and the religious obligations of the employee. But it is not always so. In too many cases, employees who want to do a good job are faced with employers who will not make reasonable accommodation for observance of the Sabbath and other holy days.[2] Or employers who refuse to make a reasonable accommodation to employees who must wear religiously-required garb, such as a yarmulke, a turban or clothing that meets modesty requirements.[3] And the issues of holy day observance and religious garb, while accounting for a substantial portion of religious accommodation cases, far from exhaust the situations in which an employee is faced with an untenable choice because of an employer's failure to provide a reasonable accommodation.

Based on figures released by the Equal Employment Opportunity Commission, the number of claims of religious discrimination in the workplace filed for the fiscal year ending on

---

1 Section 701(j) of Title VII provides, with respect to the definition of "religion" as follows:

> 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 practice without undue hardship on the conduct of the employer's business.

This language, in essence, codifies a 1967 Equal Employment Opportunity Commission guideline that provided a definition of "religion" for purposes of enforcement of the law prohibiting employment discrimination on the basis of religion. In enacting this provision, Congress modified the guideline so as to shift from the employee to the employer the burden of proving that the accommodation sought is not reasonable.

2 *E.g., Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir. 1995), *cert. denied*, 515 U.S. 1152, and *Beadle v. Hillsborough County Sheriff's Dep't*, 29 F.3d 589 (11th Cir. 1995), *cert. denied*, 515 U.S. 1128 (1995).

3 *E.g., United States v. Bd. of Education*, 911 F.2d 882 (3d Cir. 1990).

September 30, 2006, as compared to the fiscal year ending on September 30, 1992, reflect a startling increase of over 75 percent. During the same period, by comparison, claims involving racial discrimination declined slightly.

Behind the filing of each claim is the story of an American forced to choose between his or her livelihood and faith. Frequently, those who put their faith first suffer catastrophic losses, including their homes, their health insurance, their ability to help their children through college, and, in some particularly sad situations, their marriages. Where employers have no good reason for refusing to make religious accommodation, Americans should not face such a harsh choice.

One of the contributing factors to this dramatic rise in claims is the weakness of the accommodation provisions as currently written. Under current law, there is little incentive for recalcitrant employers to accommodate the religious beliefs of their employees. This does not deter people of faith in the workplace from asserting their rights, however, because many of them are unwilling to compromise their conscience no matter what the legal ramifications might be.

But there are other factors behind the increase in religious discrimination claims as well. These include the movement toward a twenty-four-hours-a-day/seven-days-a-week economy, with consequent conflict with religious demands for rest and worship on Saturdays, Sundays, or holidays; our nation's increasing diversity, marked by a broad spectrum of religious traditions, some of which may clash with workplace parameters that do not take into account the religious observances of immigrant communities; latent animosity toward some religious traditions after the September 11 attacks, a phenomenon evidenced by a particularly severe spike in religious claims after the attacks, when Sikh and Muslim Americans faced greater hostility at work; and a growing emphasis on material values at the expense of spiritual ones, with some employers refusing to see any adjustment in workplace requirements to allow for religious practices.

To be sure, beginning in the 1990s both the EEOC and the Justice Department have evidenced a commendable increase in attention to religious discrimination cases, including cases premised on an employer's failure to provide an appropriate accommodation of religious practice. But the government's ability to bring those cases successfully is necessarily limited by the strength of the underlying law. And the claims brought at the federal level are but the tip of the iceberg. Many such claims go through local or state processes instead. And we will never know of the many people who do not bring claims having been advised, whether by an enforcement agency or by private counsel, that the present law leaves them with no—or a vanishingly small chance of—recourse… and, therefore, to the choice of violating a religious precept or giving up a source of livelihood.

Hardison and Its Progeny

The seminal Supreme Court case in this area is *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). Larry Hardison was a member of a seventh-day denomination, the Worldwide Church of God, who was discharged by Trans World Airlines because he refused to work on

Saturdays in his position as a clerk at an airline-maintenance facility that required staffing 24 hours per day, 365 days per year. The U.S. Court of Appeals for the Eighth Circuit ruled that TWA had not provided an adequate religious accommodation. TWA, joined by the employees' collective-bargaining representative, filed an appeal with the Supreme Court contending "that adequate steps had been taken to accommodate Hardison's religious observances and that to construe the statute to require further efforts at accommodation would create an establishment of religion contrary to the First Amendment of the Constitution." The Court did not reach the constitutional question; it determined, instead—in a 7-2 decision—that anything more than a *de minimis* cost to an employer would be an "undue hardship" for purposes of section 701(j), and found that the proposed accommodations would have imposed such a cost. The Court also found that TWA had made reasonable efforts at accommodation.

Hardison had proposed several proposed accommodations to his employer, two of which were found by the Court of Appeals for the Eighth Circuit to be reasonable: "TWA would suffer no undue hardship if it were required to replace Hardison either with supervisory personnel or with qualified personnel from other departments. Alternatively,... TWA could have replaced Hardison on his Saturday shift with other available employees through the payment of premium wages." But the high court rejected "[b]oth of these alternatives [because they] would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages. To require more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." 432 U.S. at 84.

Although Justice Marshall's dissent in *Hardison*, joined by Justice William Brennan, argues that Trans World Airlines had not satisfied its obligation to reasonably accommodate even under the "more than a *de minimis* cost" definition of "undue hardship," its more crucial point is that the Court's reading of section 701(j) reflects a determination by the Court that the Congress, in providing in the Civil Rights Act that an employer must make reasonable accommodation for religious practice, did "not really mean what it [said]." 432 U.S. at 86, 87. Justice Marshall went on to state:

> An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a matter of law today's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise.

432 U.S. at 87. In other words, the Court's reading of section 701(j), in particular the *de minimis* interpretation of "undue burden," so vitiates the obligation to reasonably accommodate as to result in "effectively nullifying it." 432 U.S. at 89.[4]

---

[4] Justice Marshall's discussion of section 701(j)'s legislative history is worthy of note. Section 701(j) was introduced by Senator Jennings Randolph explicitly to rebut cases suggesting that "to excuse religious observers from neutral work rules would 'discriminate against... other employees' and `constitute unequal administration of the collective-bargaining agreement.'[citing *Dewey v. Reynolds Metals Co.*, 429 F.2d 324

The history of religious accommodation litigation since 1977 bears out this vision. It would be an overstatement to say that employees seeking a reasonable accommodation of their religious practices never prevail in court, to say nothing of the many whose cases we never hear about because they and their employers work out an accommodation amicably. But a brief overview demonstrates that for the most part, to borrow the title of one law review article on the subject, "heaven can wait."

Thus, one might expect a "reasonable accommodation" to be one that actually removes the conflict with religious practice, with employers then required to show an "undue hardship" before being relieved of the obligation to provide such an accommodation. To be sure, courts have in some instances interpreted the requirement of reasonable accommodation to mean just that. *See Cosme v. Henderson*, 287 F.3d 152, 159 (2d Cir. 2002); *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993), *cert. denied*, 510 U.S. 1121 (1994). Nevertheless, there have also been disturbing cases in which courts have suggested that an accommodation of religious practice may be considered "reasonable" even where it would force an employee to compromise his or her religious beliefs or face termination. Thus, courts have held that employees' rights under collective bargaining agreements or other "neutral" shift-allocation procedures are, in of themselves, reasonable accommodations even when those agreements make absolutely no provision for employee religious practices that may come into conflict with the requirements of the workplace. *See Mann v. Frank*, 7 F.3d 1365 (8th Cir. 1993); *Cook v. Chrysler Corp.*, 981 F.2d 336 (8th Cir. 1992), *cert. denied*, 508 U.S. 973 (1993). Just last month, the Eighth Circuit reaffirmed this troubling principle, holding in *Sturgill v. UPS*, 2008 W.L. 123945 (Jan. 15, 2008), that even absent "undue hardship" an employer does not have an obligation to offer an accommodation that resolves an employee's religious conflict.

But it is in the application of the *Hardison* Court's interpretation of "undue hardship" that religiously observant employees have most often come to grief. The absence of nontrivial economic cost to employers has not prevented the courts from finding, on the basis of quite dubious rationales, that the provision of a reasonable accommodation will amount to an undue hardship. In one case, Mohan Singh—a Sikh forbidden by his religious precepts from shaving his facial hair except in medical emergencies—applied for the position of manager at a restaurant where he was already employed, but he was denied the position because he would not shave off his beard. When the Equal Employment Opportunity Commission brought a religious discrimination claim on Mr. Singh's behalf, a federal district court ruled that "relaxation" of the

---

(6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971)]... The primary purpose of the amendment, [Senator Randolph] explained, was to protect Saturday Sabbatarians like himself from employers who refuse 'to hire or continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days.' [citing 118 Cong. Rec. 705 (1972)] His amendment was unanimously approved by the Senate on a roll-call vote [citing 118 Cong. Rec. 731 (1972)], and was accepted by the Conference Committee [cites omitted], whose report was approved by both Houses. 118 Cong. Rec. 7169, 7573 (1972). Yet the Court today, in rejecting any accommodation that involves preferential treatment, follows the *Dewey* decision in direct contravention of congressional intent." 432 U.S. at 89.

restaurant's grooming standards would adversely affect the restaurant's efforts to project a "clean-cut" image and would make it more difficult for the restaurant to require that other employees adhere to its facial hair policy. *EEOC v. Sambo's of Georgia*, 530 F. Supp. 86 (N.D.Ga. 1981).

Twenty-five years later, another federal district court, this time sitting in Massachusetts, ruled that it would be an undue hardship to require the Jiffy Lube automobile lubrication service to allow a Rastafarian who did not shave or cut his hair for religious reasons to work where he was visible to the public, compelling him to either work only in an underground "lower bay" or lose his job. *Brown v. F.L. Roberts & Co, Inc.*, 419 F.Supp.2d 7 (D. Mass. 2006). Jiffy Lube had instituted a new policy that all employees making contact with the public should be well-groomed in order to promote the company's desired public image. The district court's opinion reflected an apparent discomfort with the decision even as it asserted that "it is compelled by controlling authority." The court commented:

> [I]t is a matter of concern when the balance appears to tip too strongly in favor of an employer's preferences, or perhaps prejudices. An excessive protection of an employer's "image" predilection encourages an unfortunately (and unrealistically) homogeneous view of our richly varied nation. Worse, it places persons whose work habits and commitment to their employers may be exemplary in the position of having to choose between a job and a deeply held religious practice.

419 F.Supp.2d at 19.

Hardison also held that the existence of seniority provisions in a collective bargaining agreement serves as a basis to find undue hardship in the granting of an accommodation because, for instance, to allow the employee his Sabbath off would be in derogation of the seniority rights of another employee. The deference to seniority rights is unremarkable in light of Section 703(h) of Title VII (42 U.S.C. section 2000e-2(h)), which makes clear that "the routine application of a bona fide seniority system [i.e., without intention to discriminate because of race, color, religion, sex, or national origin] would not be unlawful under Title VII." *Teamsters v. United States*, 431 U.S. 324 (1977). But, all too often, the conclusion is reached that Section 703(h) bars an accommodation without further inquiry as to whether the bargaining representative might have been enlisted in a search for voluntary swaps or whether an exemption might be sought to provisions of the collective bargaining agreement that seem to stand in the way of an amicable arrangement (i.e., an arrangement that does not require a senior employee to give up his or her right not to work on a particular day).

The Supreme Court's lead in restrictively reading section 701(j) has been reflected in lower court rulings on other aspects of how that provision is to be applied. In *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982), Marvin Brener, a hospital staff pharmacist and Orthodox Jew, asked his supervisor to arrange his shift so that he would not have to work on Saturday, his Sabbath, or on Jewish holidays, such as *Rosh Hashanah* and *Yom Kippur*. Though granting the request at first, the hospital eventually refused, arguing that accommodation of Mr. Brener's religious practice posed a "morale problem" because other pharmacists were complaining about this "preferential treatment." Brener—scheduled to work on a day that his faith forbade him to—was forced to resign. He sued, but lost. In its ruling, a

federal court of appeals held that it is the employee's, rather than the employer's, duty to arrange job swaps with other employees to avoid conflict with religious observance.[5] But an employer's inquiry is far more likely to be given serious consideration by fellow workers. Further, the employer is better situated to know which of the other employees is likely to be receptive to a request to adjust schedules. Conversely, once the employer appears indifferent to the request for accommodation, other employees may be less likely to cooperate. In short, placing the onus for arranging job swaps on an employee works to insulate an employer from fulfilling its obligation to avoid discrimination, while placing a discouraging—even debilitating—burden on the employee.

Finally, in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986)—the only case besides *Hardison* in which the Supreme Court has addressed the religious accommodation provisions of Title VII—the High Court found that "any reasonable accommodation by the employer is sufficient to meet the obligation to accommodate" and that the employer could refuse alternatives that were less onerous to the employee, but still reasonable. But even as this holding affords the employer the discretion to choose the reasonable accommodation most appropriate from its perspective, two principles should apply—first, the accommodation should actually remove the conflict (which was the case in *Philbrook* but not, as has been noted above, in other cases), and, second, an accommodation should not treat a religious practice less favorably than other, secular practices that are accommodated.

The Workplace Religious Freedom Act

The constrictive readings of section 701(j) discussed above are inconsistent with the principle that religious discrimination should be treated fully as seriously as any other form of discrimination. The civil rights of religious minorities should be protected by interpreting the religious accommodation provision of Title VII in a fashion consistent with other protections against discrimination to be found elsewhere in this nation's civil-rights laws. Since the problems in this area turn on judicial interpretation of legislation, rather than constitutional doctrine, they are susceptible to correction by the U.S. Congress. That is what the Workplace Religious Freedom Act is intended to do.

Instead of the "not more than *de minimis*" standard, WRFA would define "undue hardship" as an "an action requiring "significant difficulty or expense" and would require that, to be considered an undue hardship, the cost of accommodation must be quantified and considered in relation to the size of the employer. In this respect, it would resemble (although not be identical with) the definition of "undue hardship" set forth in the Americans with Disabilities Act. The ADA presents, in fact, an apt analogy to the provisions of Section 701(j). As it later did for Americans with disabilities, the U.S. Congress determined in enacting Section 701(j) that

---

[5] The court also noted, in yet another example of the courts' restrictive reading of the undue burden standard, that the hospital was not obligated to accommodate Brener's religious observance if that would lead to "disruption of work routines and a lessening of morale among other pharmacists."

the special situation of religiously observant employees requires accommodation so that those employees would not be deprived of equal employment opportunities.

Crucially, WRFA would require that to qualify as a reasonable accommodation an arrangement must actually remove the conflict. This would put to rest the notion that a collective bargaining agreement or any other neutral arrangement, or an "attempt to accommodate," that fails to accommodate a religious practice might itself be viewed as a "reasonable accommodation." The accommodation might, of course, constitute an undue hardship, but a vitiated definition of reasonable accommodation should not be utilized to avoid engaging in undue hardship analysis.

WRFA would also make clear that the employer has an affirmative and ongoing obligation to reasonably accommodate an employee's religious practice and observance. This provision does not in of itself alter the standard for what is a reasonable accommodation or an undue hardship. It does, however, require that all to whom section 701(j) applies bear the responsibility to make actual, palpable efforts to arrive at an accommodation.

On the specific issue of collective bargaining arrangements, nothing in the bill purports to override section 703(h) of Title VII. It would, however, encourage religiously observant employees and their employers, and a collective bargaining representative where applicable, to seek amicable arrangements within the context of an existing seniority system, perhaps through voluntary shift swaps or modifications of work hours.

WRFA also explicitly puts to rest any suggestion in the *Philbrook* case that it is appropriate to forbid the use of personal leave time for religious purposes when that leave is available for other, secular purposes.

Finally, in order to address concerns raised by business interests, WRFA—tracking an element of the Americans with Disabilities Act—would add to existing religious accommodation law, with certain clarifying language, a provision that an employer need not provide a reasonable accommodation if, as a result of the accommodation, the employee will not be able to fulfill the "essential functions" of the job. Once it is shown that an employee cannot fulfill these functions, the employer is under no obligation to show that he or she would incur an undue hardship were a reasonable accommodation to be afforded.

Concerns about Impact on Business

As was just referenced, concerns have been raised that WRFA will impose an unmanageable burden on employers. But the concept of religious accommodation is not, as we have seen, a new one under federal civil rights law. And, as under the current interpretation of Title VII, WRFA does not give employees a "blank check" to demand any accommodation in the name of religion and receive it. Rather, it restores the protection Congress intended for religious employees in enacting the 1972 amendment by adjusting the applicable balancing test in a

fashion that still gives substantial regard to the legitimate needs of business standard even as it somewhat levels the field for an employee in need of accommodation.

In this regard, it is well to note that, as an amendment to Title VII and therefore subject to its restrictions, WRFA does not apply to employers of less than 15 full time employees. Moreover, the factors that it sets forth for determining what is an "undue hardship" are designed to make the determination context specific so that a relatively small employer—of, say, 100 employees, might well not have to provide an accommodation where a larger employer of 1,000 would have to do so.

It is commonly argued that fakers will seek illegitimate accommodations based on fraudulent beliefs. But the fact is that courts have for decades engaged in assessing the sincerity of asserted religious beliefs. Indeed, under the Supreme Court's 1965 decision in *United States v. Seeger,* 380 U.S. 163 (1965), the threshold question of sincerity as to religious belief must be resolved as a question of fact. In practical terms, the problem of insincerity in the realm of religious accommodation in the workplace is particularly small. People who do not have a genuine and sincere reason to ask for an accommodation are simply unlikely to risk employer displeasure and social stigma by doing so. In addition, religious accommodation cases are almost always brought after a worker has been fired. Given the economic disincentive to bring such suits, it would be odd indeed for an individual to be fired and then spend financial resources to vindicate a religious belief she doesn't sincerely hold.

Historical precedent indicates that bogus claims are much more prominent in the minds of WRFA opponents than in reality. New York State has had a holy-day accommodation law for many years, yet there is no record of people bringing cases for failure to honor their "Church of the Super Bowl" or "Mosque of the Long Weekend." For that matter, there has been no epidemic of these fanciful claims under existing federal religious accommodation law.

Concerns about Impact on Third Parties

Another set of concerns has been raised that implementation of WRFA will lead to material adverse impacts on third parties. These concerns arise primarily in the context of two types of hypothetical situations—that WRFA will be used to protect those who would cite religious beliefs as a justification for harassing gays in the workplace, and that WRFA will be used to limit access to reproductive healthcare. These concerns are based on an unreasonable and untenable reading of the proposed law under which claims for accommodations that would have material adverse impact on third parties that have, until now, lost virtually without exception, might have different results should WRFA be passed. As an organization that supports both reproductive rights and measures to protect against discrimination on the basis of sexual orientation, the American Jewish Committee would not be supporting WRFA if we thought that it would lead to such baleful results.

A central component of WRFA, as is the case under current accommodation law, is its balancing test, albeit with a modification of the operative definitions of "reasonable

accommodation" and "undue hardship." Nothing in that change in definition will alter the fact that courts are quick to recognize that workplace harassment imposes a significant hardship on employers in various ways: Permitting harassment to proceed unchecked opens the employer up to lawsuits based on the employer maintaining a hostile work environment; the loss of productivity and collegiality caused by attacks on colleagues constitutes a significant burden; and the cost of recruiting and hiring new employees to replace those who leave due to harassment also meets the significant burden test.

Thus, in *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996), *cert. denied*, 522 U.S. 813 (1997), an appellate court dismissed the religious accommodation claim brought by an employer who was fired for writing accusatory letters to co-employees. The court reasoned, "where 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. If [the employer] had the power to authorize [the plaintiff] to write the letters, the company would subject itself to possible suits from [other employees] claiming that [the plaintiff's] conduct violated *their* religious freedoms or constituted religious harassment." The court considered the proposition that the plaintiff's conduct constituted an undue hardship to be self-evident, and did not find it necessary to analyze the claim in terms of the *de minimis* standard.

Similarly, in *Peterson v. Hewlett-Packard*, 358 F.3d 599 (9th Cir. 2004), a court of appeals unequivocally decided that Title VII provided no protection from termination for a Christian employee who was fired when he refuse to remove from his cubicle a quote from the Bible condemning homosexuality. Both the lower court and the appeals court had no problem at all finding against the plaintiff on the Title VII claim he brought for failure to provide a religious accommodation. The Ninth Circuit did not discuss the standard the employer had to meet, but rather focused on the burden on fellow employees, finding, in effect, that religious beliefs cannot insulate actions that demean or degrade other employees. There is nothing in WRFA that would change this analysis. Moreover, it is significant that there is a paucity of Title VII religious accommodation case involving the issue of harassment of gays in the workplace.

Concerns have also been raised that WRFA would permit an emergency-room nurse to walk away from a woman in need of an emergency abortion on the grounds that the nurse's participation in the procedure would violate his or her religious precepts—as if any court hearing a case brought by the nurse against an employer for unfair dismissal would likely find that it is not a significant burden on the hospital when its employees refuse to treat patients in need of emergent care. If employees leaving patients suffering isn't a significant burden on a hospital, one is forced to ask, what is? If facing significant malpractice liability from the patient for substandard care isn't a significant burden, what is? If risking the hospital's accreditation isn't a significant burden, what would be?[6]

---

[6] *See*, in this regard, *Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000) (opinion by Judge Scirica with Judges Alito and Aldisert concurring). While the nurse's claim was dismissed in that case for her failure to accept the hospital's proffer of a reasonable

The same analysis plays out in the context of the claim that WRFA would permit policemen to refuse to guard abortion clinics. If a policeman had a religious objection to guarding an abortion clinic, he could, under WRFA, ask to be reassigned. His employer would be required to facilitate such a reassignment, but only if by so doing it did not incur a significant burden. Sometimes accommodation would simply not be practicable. Does this mean that the abortion clinic would remain unguarded? No. In such circumstances the policeman would have to accept his assignment or accept the consequences of disobeying an order. Nothing in WRFA comes close to leaving abortion clinics exposed.

And, finally, it is claimed that WRFA would somehow empower pharmaceutical employees to refuse to fill prescriptions for birth control medication or for emergency contraception, even at the cost of the patient's prescription not being filled at all. This concern was raised in the context of a case in which a CVS pharmaceutical employee refused to fill a prescription for birth control pills because the pharmacist did not "believe" in birth control. After some initial confusion, CVS confirmed that the refusal was not in line with company policy, which requires that a pharmacist who refuses to dispense medication based on personal ideology must make sure that the patient's prescription is filled anyway, either by another pharmacist at that location or by another pharmacy in the area. In a similar vein, an Eckerd pharmacy fired a pharmacist who refused to fill a rape victim's prescription for emergency contraception.

As with existing Title VII provisions, WRFA provides a floor in terms of the extent to which an employer must accommodate an employee's religious practice, not a ceiling. Thus, WRFA has no role to play as to whether a pharmacy will require—as CVS and Eckerd do—that prescriptions be filled, regardless of an employee's personal beliefs. But, crucially, as in the context of abortion services, once a pharmacy does have such a policy, a fair reading of the "undue hardship" standard under WRFA would lead to the conclusion that the firing of an employee for not filling the prescription would be sustained if no reasonable accommodation such as having another employee fill the prescription in a timely fashion were available. Given the implications for the pharmacy of having a customer whose prescription is not filled, the failure to fill the prescription would constitute a palpable significant difficulty or expense.

In sum, the courts clearly take impact on third parties very seriously as an element of undue hardship and, again and again, their analysis does not turn on the *de minimis* standard. Indeed, the cases cited by opponents of WRFA often turn on aspects that have nothing to do with the "undue hardship" standard at all.[7]

---

accommodation, the federal court of appeals asserted, in the context of a discussion of "undue burden," that "we believe public trust and confidence requires that a public hospital's health care practitioners—with professional ethical obligations to care for the sick and the injured—will provide treatment in time of emergency." 223 F.3d at 228. Nothing in this statement suggests that the court's analysis would be different in light of the change contemplated by WRFA.

[7] *See*, as to both propositions, *Anderson v. U.S.F. Logistics (IMC), Inc.,* 274 F.3d 470 (7th Cir. 2001) (case turns on employer's having offered a reasonable accommodation, not undue hardship issue); *Parrott v. District of Columbia*, 1991 WL 126020, 58 Empl. Prac. Dec. P 41,369 (D. D.C. 1991)

Moreover, the assertion that baleful results will flow from strengthening federal protections against religious discrimination are also without basis in the experience of prior efforts to enhance antidiscrimination law. In 2002, New York State amended the religious accommodation provisions of its Human Rights Law, found at New York *Executive Law* Section 296(10), in a fashion similar in material respects to WRFA.[8] Earlier, in 1997, President Bill Clinton adopted guidelines on the treatment of religion in the federal workplace that functionally strengthened the religious accommodation standards of that workplace.

In a state as large and diverse as New York, and given the speed with which information travels in this Age of the Internet, we would expect to have heard if the predicted onslaught of such claims were occurring, much less that these claims were prevailing. But there is no evidence that enactment of the 2002 amendments has led to the parade of horribles foretold by some critics of WRFA. As Eliot Spitzer, now Governor and then Attorney General of New York,

---

(strongly worded discussion of the undue hardship that the requested accommodation would pose for employer suggests that WRFA standard would not have made a difference in result); *Bruff v. N. Miss. Health Services, Inc.*, 244 F.3d 495 (5th Cir.) (similarly), *cert. denied*, 534 U.S. 952 (2001); *Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995) (case turns on employee's failure to accept a reasonable accommodation, not undue burden); *Johnson v. Halls Merchandising, Inc.*, 1989 WL 23201 (W.D. Mo. 1989) (plaintiff's claim dismissed because the defendant attempted to reasonably accommodate plaintiff's religious practices but "plaintiff did not make any effort to cooperate with her employer or to accommodate her beliefs to the legitimate and reasonable interests of her employer, i.e., to operate a retail business so as not to offend the religious beliefs or non beliefs of its customers").

[8] New York's amended religious accommodation law is, to be sure, not identical with H.R.1431. Nevertheless, this New York law incorporates the most crucial aspect of H.R.1431—a heightened standard for determining whether a proposed religious accommodation will impose an "undue hardship."

The revised New York law incorporates two significant new elements. Firstly, subsection (a) of Section 296(10), as amended, explicitly extends the obligation of an employer to provide a reasonable accommodation of an employee's religious practice to any "sincerely held practice of his or her religion;" the prior law had referenced only holy day observance. Secondly, subsection (a), as amended, goes on to provide that it is a discriminatory practice for an employer to require an employee or prospective employee "to violate or forego a sincerely held practice of his or her religion… unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business."

"Undue hardship" is defined by subsection (c)(1) to mean "an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system)"—a definition that is similar to, although not identical with, the definition of "undue hardship" in WRFA. While WRFA does not include the parenthetical, the provision that an employer shall not be obligated to accede to "a violation of a bona fide seniority system" is consistent with the provisions of Section 703(h) of Title VII, which will continue to be applicable to federal religious accommodation cases if WRFA is adopted, as it is now. Further, the clause regarding "safe or efficient operation of the workplace" simply expands on the meaning of "significant difficulty or expense." Subsection (c)(1) goes on to list a number of factors to be considered in determining whether the accommodation constitutes "an undue economic hardship," a list which is, again, similar, but not identical, to the nonexclusive list to be found in WRFA.

stated in an op-ed appearing in the *Forward* on June 25, 2004, "New York's law has not resulted in the infringement of the rights of others, or in the additional litigation that the ACLU [a WRFA critic] predicts will occur if WRFA is enacted. Nor has it been burdensome on business. Rather, it strikes the correct balance between accommodating individual liberty and the needs of businesses and the delivery of services. So does WRFA."

Thus, the suggestion that Congress should not pass WRFA because it will open the door to harassment and denial of essential medical treatment places a fanciful swatting at phantoms over the very real need to remedy the harm faced by religiously observant employees every day.

Why the "Targeted" Approach Will Not Work

It has been suggested that the way to deal with these concerns is to resort to a so-called "targeted" approach, under which Congress would single out particular religious practices—dress, grooming, holy days—for protection under the WRFA standard. But the "targeted" approach embraces a troubling notion—that certain religious practices are simply not worthy of even a day in court to establish whether accommodation of those practices can be afforded without significant difficulty or expense for the employer or third parties. Again, the AJC—joined by many of the organizations supporting WRFA—is committed to combating discrimination on the basis of sexual orientation and to reproductive rights. But we are also committed to a fundamental premise of our Constitution and our society, that it is not up to the government to prescribe orthodoxies of belief or practice, and that the religious beliefs and practices of those with whom we disagree on these (and other) fundamental matters should be accommodated if this can be done without harm to others.

Moreover, under the "targeted" approach as many as 25% of accommodation claims would be consigned by a Faustian bargain to the old, inadequate standard—all in order to ensure that a subset of those claims with little chance of success are eliminated from a miniscule improved chance of success.

Claims that would be eliminated from coverage a targeted application of the WRFA standard include:

- Jehovah's Witness employees who request to opt out of raising the flag and pledging allegiance at work;
- A Methodist attorney who requests accommodation not to work on tobacco litigation;
- A Quaker (Society of Friends) employee who requests to be transferred to a division that does not work on armaments;
- An Orthodox Jewish woman who requests permission not to shake the hands of male customers;
- A Hindu employee who requests permission not to greet guests with the phrase "Merry Christmas;"
- A Christian employee who requests to be assigned to work that does not involve embryonic research;

- A Muslim hospital employee who requests to be exempted from duty in which she would be present when a member of the opposite sex is unclothed.

While these examples provide an overview of some of the types of cases that would be omitted from coverage by WRFA were the targeted approach adopted, it is by no means designed to give the totality of cases. Indeed, the variety of religious beliefs is one of the factors that make our nation such a fascinating place to live. In addition, there are numerous relatively new religious groups in the United States. Many of these groups are relatively small and some are primarily made up of immigrants. As a result, they often are unaware of their rights under current law, and frequently do not have the resources to vindicate their rights in the courts. Thus, the reported cases almost certainly undercount the claims from these groups. To agree to a targeted bill is to agree to a lower protection for these groups without their having any input in the decision.[9]

WRFA provides that when it can be shown that accommodating a person of faith in the workplace proves significantly difficult or expensive, the accommodation need not be provided. Whether that difficulty arises due to disharmony caused by a religious employee harassing another employee or refusing to provide medical care when no reasonable accommodation can be made, or because accommodation of the religious employee would result in disfavoring fellow employees or other third parties in a host of other ways, the balancing test provides assurance that religious employees will not trample the rights of others in the workplace.

Constitutional Issues

Amendment of the law so as to provide a reading of Section 701(j) that affords meaningful protections for religiously observant employees is consistent with the Establishment Clause's requirement that government action not favor one religion over another, or religion over non-religion. It has been suggested by some commentators that the reading of "undue hardship" to mean not more than *de minimis* difficulty or expense was necessary to avoid a reading of the accommodation provision that would have caused it to run afoul of the Establishment Clause. Although not explicitly invoking the Establishment Clause, Justice White—writing for the Court in *Hardison*—asserted that any construction of Title VII that was more protective of religious practice would mean that employees would be treated not on a nondiscriminatory basis but unequally on the basis of their religion. "...[T]he privilege of having Saturdays off would be allocated according to religious belief," he said in writing for the Court, "Title VII does not contemplate such unequal treatment."

But Justice Marshall's dissent in *Hardison*, joined by Justice Brennan, saw no constitutional problem in requiring employers "to grant privileges to religious observers as part

---

[9] This carving up of religious claims into two different categories is both philosophically troubling and possibly constitutionally problematic, as it opens WRFA up to claims that it violates the Establishment Clause by privileging some religious beliefs over others. *See Estate of Thornton v. Calder, Inc.*, 472 US 703 (1985).

of the accommodation process." Justice Marshall went on, "If the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer." 432 U.S. at 91. He added in a footnote:

> The purpose and primary effect of requiring such exemptions is the wholly secular one of securing equal economic opportunity to members of minority religions.... And the mere fact that the law sometimes requires special treatment of religious practitioners does not present the dangers of "sponsorship, financial support, and active involvement of the sovereign in religious activity," against which the Establishment Clause is principally aimed.

432 U.S. at 90-91, fn. 4. As we all know, Justices Marshall and Brennan were both resolute supporters of a strict reading of the Establishment Clause. Thus, it is particularly compelling that neither believed that the Constitution required a weak reading of section 701(j).

The case of *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), is distinguishable. In that case the Supreme Court struck down by a vote of 8-1, as a violation of the Establishment Clause, a Connecticut statute that gave employees the absolute right not to work on their respective Sabbaths. Writing for the Court, Chief Justice Burger said the state law imposed an excessive burden on employers, as well as on non-religious employees who also had "strong and legitimate" reasons for wanting to avoid having to work on the weekend. 472 U.S. at 710, fn.9. The opinion of the Chief Justice did not, however, address the question of the constitutionality of a less absolute approach to the issue of employee Sabbath observance.

In a concurring opinion, joined by Justice Marshall, Justice O'Connor agreed with the Court's decision, but stated also that "the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of Sabbath observance." She went on to note that "the statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees." 472 U.S. at 711 (O'Connor, J., concurring). Hence, in her view, the statute advanced religion in violation of the Establishment Clause. Importantly, Justice O'Connor distinguished the Connecticut statute from the religious accommodation provision of Title VII:

> ...a statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society.... Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only ... Sabbath observance, I believe that an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.

472 U.S. at 712.

Both prior to and subsequent to *Thornton*, a number of federal appellate courts have held the reasonable accommodation provisions of section 701(j) to be constitutional, reasoning that, under the tripartite analysis of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the requirement had a

secular purpose (the elimination of religious workplace discrimination); a primary effect that neither advances nor prohibits religion; and does not lead to excessive government entanglement with religion. *See, e.g., EEOC v. Ithaca Industries, Inc.*, 849 F. 2d 116 (4th Cir.), *cert. denied*, 488 U.S. 924 (1988); *McDaniel v. Essex International, Inc.*, 696 F.2d 34 (6th Cir. 1982).

Left unaddressed by the courts, except for the views expressed by Justices Marshall and Brennan in their dissent in *Hardison*, is whether a standard more protective of religious observance than *de minimis* but not absolute, as was the Connecticut statute struck down in *Thornton*, would survive Establishment Clause scrutiny. In our view, it would. Turning to the *Lemon* analysis,[10] easing of the undue hardship standard (and, indeed, the other aspects of the bill), so as to afford greater protection for employees serves the secular purpose of combating discrimination. Moreover, the parallels between WRFA and the Americans with Disabilities Act—albeit their provisions are not identical—demonstrate that the Congress will not be granting a religion a kind of protection not available to secular interests. The primary effect prong appears satisfied by the balancing of interests and non-absolute nature of the accommodation reflected in the bill. Finally, the excessive entanglement prong—subsumed in the primary effects prong by *Agostini v. Felton*, 521 U.S. 203 (1996)—has been invoked by the courts only in cases involving government monitoring of religious institutions that receive public funds.

An invalidation of WRFA on Establishment Clause grounds would be grounded in paradox; it would be to say that an assuredly valid government purpose of combating religious discrimination may be accomplished only by a reading of section 701(j) so circumscribed as to fail to afford religiously observant employees a genuine modicum of protection. Surely, that cannot be the constitutionally mandated result.

The Supreme Court's rulings in *United States v. Lopez*, 514 U.S. 549 (1995), and in *City of Boerne v. Flores*, 521 U.S. 507 (1997), among other decisions reflecting a change of the Court's approach to legislation enacted in reliance upon the Commerce Clause and section 5 of the Fourteenth Amendment, respectively, give rise to an understandable concern as to the prospects for WRFA should it be enacted.

Turning to the *Boerne* issue first, the Court went to significant lengths in that case to distinguish its decision striking down the Religious Freedom Restoration Act as applied to the states from earlier cases upholding the authority of the Congress under section 5 to enact the voting rights laws. To the extent the Civil Rights Act of 1964 is grounded in section 5, WRFA is simply a clarification of terms from Title VII of the 1964 act, as amended. In any event, *Boerne* relates to the question of whether WRFA will be enforceable against state and local governments. However, that issue may be resolved—and important as it is to afford stronger protections against religious discrimination to both public and private sector employees—even a WRFA

---

[10] Although the continued vitality of the *Lemon* test is in doubt, it is useful to apply that analysis in this context because it is a restrictive reading of what government action is allowed pursuant to the Establishment Clause.

whose reach is limited by an expansion of *Boerne* would still serve a crucial purpose.

In addition, and crucially, the 1964 Civil Rights Act is founded in the Commerce Clause. *Lopez* notwithstanding, Commerce Clause legislation remains valid so long as Congress has a rational basis for concluding that the regulated activity "substantially affects" interstate commerce. *United States v. Lopez*, 514 U.S. at 558-59. The prohibition on invidious discrimination in connection with employment is the *sine qua non* of legislation with respect to an activity that "substantially affects" interstate commerce. *See Lopez*, 514 U.S. at 559, citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding Title II of the Civil Rights Act of 1964 and, by implication, the rest of the Act) as an example of "congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce."

Conclusion

Enactment of the Workplace Religious Freedom Act will constitute an important step towards ensuring that all members of society, whatever their religious beliefs and practices, will be protected from an invidious form of discrimination. The refusal of an employer, absent undue hardship, to provide reasonable accommodation of a religious practice should be seen as—and was intended by Congress in 1972 to be treated as—a form of religious discrimination. And religious discrimination should be treated fully as seriously as any other form of discrimination that stands between Americans and equal employment opportunities.

In assuring that employers have a meaningful obligation to reasonably accommodate their employees' religious practices, WRFA will restore to Title VII's religious-accommodation provision the weight that Congress originally intended. And, although necessarily framed as a strengthening of the legal protection to be afforded religiously observant employees, enactment of WRFA will, it is hoped, have a benefit that is not strictly legal. It may cause employees and employers to start talking to each other where they have not—employers may not think they now have to address issues of accommodation because they believe the law is on their side, and some employees may simply think they have no recourse. The true mark of this bill's success, when it becomes law, will be if there is less, not more, litigation over accommodation of religious practice.

We come to this hearing some two months before the Jewish holiday of *Pesach* (Passover). During that holiday, as at other times of the year, there are a number of days on which work is religiously proscribed. Too often a season that should be one of joy becomes, for Jews who observe the proscription on work, a period of anxiety and, sometimes, blighted careers as they face the possibility of losing their livelihood for following the dictates of their faith.

Nearly thirty years ago, Justice Thurgood Marshall concluded his dissent in *Hardison* by saying:

> The ultimate tragedy [of this decision] is that despite Congress' best efforts, one of this Nation's pillars of strength - our hospitality to religious diversity - has been seriously eroded. All Americans will be a little poorer until today's decision is erased.

432 U.S. at 97. Perhaps we will come to look back on the hearing held today as the harbinger of the realization of Justice Marshall's hope—that the civil rights laws of this great nation will give due regard to the religious diversity that is one of its marks of pride.

ORGANIZATIONS SUPPORTING THE WORKPLACE RELIGIOUS FREEDOM ACT

Agudath Israel of America
American Jewish Committee
American Jewish Congress
Americans for Democratic Action
American Islamic Congress
American Values
Anti-Defamation League
Baptist Joint Committee on Public Affairs
Bible Sabbath Association
B'nai B'rith International
Center for Islamic Pluralism
Central Conference of American Rabbis
Christian Legal Society
Church of Scientology International
Concerned Women for America
Council on Religious Freedom
Family Research Council
General Board of Church and Society,
The United Methodist Church
General Conference of
Seventh-day Adventists
Guru Gobind Singh Foundation
Hadassah - WZOA
Institute on Religion and Public Policy
Interfaith Alliance
International Association of
Jewish Lawyers and Jurists
International Commission on
Freedom of Conscience
International Fellowship of
Christians and Jews
Islamic Supreme Council of America
Jewish Council for Public Affairs
Jewish Policy Center
NA'AMAT USA
National Association of Evangelicals
National Council of
the Churches of Christ in the U.S.A.
National Jewish Democratic Council
National Sikh Center
North American Council for
Muslim Women
North American
Religious Liberty Association
Presbyterian Church (USA)
Rabbinical Council of America
Religious Action Center of Reform Judaism
Republican Jewish Coalition
Sikh American Legal Defense
Education Fund
Sikh Council on Religion and Education
Southern Baptist Convention,
Ethics and Religious Liberty Commission
Traditional Values Coalition
Union of Orthodox Jewish Congregations
Union for Reform Judaism
United Church of Christ
Office for Church in Society
United States Conference of
Catholic Bishops
United Synagogue of Conservative Judaism