Testimony of Helen Norton
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on H.R. 1431, the Workplace Religious Freedom Act

before the Subcommittee on Health, Employment, Labor, and Pensions
of the U.S. House of Representatives' Committee on Education and Labor

February 12, 2008

Thank you for the opportunity to testify here today. My testimony draws from my work as a law professor teaching and writing about constitutional law and employment discrimination issues, as well as my experience as a Deputy Assistant Attorney General for Civil Rights in the Department of Justice during the Clinton Administration, where my duties included supervising the Civil Rights Division's Title VII enforcement efforts.

I hope to accomplish three objectives with my testimony here today: 1) to explain my support for H.R. 1431's overarching goal of amending Title VII to provide greater protections for workers' religious practices; 2) to express concern, however, that the language as drafted may create significant conflicts with other persons' important civil and reproductive rights; and 3) to suggest some possible approaches for resolving those concerns.

As originally enacted in 1964, Title VII simply barred employers from firing, refusing to hire, or otherwise taking adverse action against an employee because of his or her religion -- as well as his or her race, color, sex, or national origin. But it soon became clear that more was needed to ensure equal employment opportunity for workers on the basis of religion, and Congress thus amended Title VII in 1972 to require expressly that employers reasonably accommodate an employee's religious practice unless the accommodation would pose an undue hardship to the employer's business.

Indeed, Congress amended Title VII in 1972 in direct response to courts' refusal to require employers to accommodate workers' scheduling requests that would allow them to observe their Sabbath. Senator Randolph, the sponsor of the amendment, highlighted the plight of workers "whose religious practices rigidly require them to abstain from work in the nature of hire on particular days."[1] In particular, he explained the need to correct lower court decisions upholding the firing of workers who could not work on the Sabbath.[2]

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[1] 118 Cong. Rec. at 705 (1972).

[2] *See id.*at 705-06 (1972) (statement of Sen. Randolph) ("Unfortunately, the courts have, in a sense, come down on both sides of the issues. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question. This amendment is intended . . . to resolve by legislation – and in a way that I think was originally intended by the Civil Rights Act – that which the courts apparently have not resolved."); *see also* 118 Cong. Rec. 706-13 (1972) (reprinting two lower court cases as examples of decisions to be reversed by the proposed amendments:

Shortly after the amendment's enactment, however, in a case involving a worker's request for a shift change to accommodate his observance of the Sabbath, the Supreme Court defined the term "undue hardship" to mean that an employer is not required to incur more than "a *de minimis* cost" when accommodating an employee's religious practice.[3] As a practical matter, this interpretation robbed the 1972 amendment of much of its impact: under this standard, an employer need show very little cost to avoid accommodating an employee's observance of the Sabbath or other religious practice.[4]

As a result of the Court's very broad interpretation of undue hardship, employee requests for religious accommodations are too often denied even if they impose only modest costs. An amendment to Title VII to restore Congress' original intent to create a meaningful right to reasonable accommodation is thus long overdue.

But while I fully support H.R. 1431's underlying purpose in this regard, I note my significant concern that the proposal, as currently drafted, may lead to new and different outcomes in cases where requested accommodations conflict with other persons' important civil and reproductive rights. Although the majority of requested accommodations – including, but not limited to, requests for shift changes or leave for religious observances, or departures from workplace appearance policies to accommodate religious practices with respect to apparel and grooming[5] – will not pose difficulties of this sort, the Title VII experience to date indicates that some requested accommodations will conflict with co-workers' antidiscrimination interests or patients' health care needs.

Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971) (finding no Title VII requirement that an employer accommodate employees' religious observance and upholding the firing of an employee who declined to work on Sundays for religious reasons) and *Riley v. Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971) (same).

[3] *Trans World Airlines v. Hardison*, 432 U.S. 63, 85 (1977) ("To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship.").

Justice Thurgood Marshall wrote a powerful dissent:

> Today's decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices. The Court holds, in essence, that although the EEOC regulations and the Act state that an employer must make reasonable adjustments in his work demands to take account of religious observances, the regulations and Act do not really mean what they say. 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 of their job. And as a matter of law today's result is intolerable, for the Court adopts the very position that Congress rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise.

Id. at 86-87 (Marshall, J., dissenting).

[4] Indeed, according to Black's Law Dictionary, the term "de minimis" means "trifling," "minimal," or "so insignificant that a court may overlook it in deciding a case or issue." BLACK'S LAW DICTIONARY (Seventh Edition).

[5] Justice Marshall's list in *Hardison* of the most common types of accommodation requests remains largely accurate today: "In some of the reported cases, the rule in question has governed work attire; in other cases it has required attendance at some religious functions; in still other instances, it has compelled membership in a union; and in the largest class of cases, it has concerned work schedules." 432 U.S. at 87.

These are very difficult cases because they involve direct clashes between interests that are protected by Title VII and other constitutional and legal rights. These concerns are especially acute given that Congress is considering amendments to one of our nation's most important civil rights laws, and they thus deserve very careful attention. To be sure, the plaintiffs' religious beliefs in these cases are no less sincere and deeply felt than those in any others. These cases are different instead because of the requested accommodations' effect on third parties' civil rights, religious liberties, reproductive rights, and other important health care needs.[6]

And those effects can be extremely significant. Examples include patients who experience delays in or disruptions to health care services if health care workers decline for religious reasons to dispense contraceptives, decline to assist in performing sterilization procedures, or decline to counsel cancer patients seeking information about harvesting eggs or sperm. Other examples include police officers who, for religious reasons, decline to enforce laws regarding civil disturbances at reproductive health care clinics, or workers in a variety of jobs whose religious beliefs compel them to urge the religious conversion of those with contrary beliefs or behaviors in a way that may not only offend the beliefs of others, but also undermine an employer's antidiscrimination policies.

Under the current Title VII interpretation of undue hardship, employers need not provide accommodations that create conflicts of this type when they impose more than a *de minimis* cost. But without clarification, we cannot be confident that the substantial changes proposed by H.R. 1431 would not alter the outcome in these cases.

Under current law, for example, lower courts have consistently held that a health care worker's religiously-motivated request to decline to dispense contraceptives or to provide other health care services poses an undue hardship when it results in delay or disruption to health care services, even when the employee argues that the accommodation is the only one that can remove the conflict with his or her religious beliefs.[7] For instance, in *Grant v. Fairview Hospital*,[8] an ultrasound technician for a women's health clinic held religious beliefs that required him to counsel pregnant women against having an abortion if he became aware that they were contemplating the possibility. His employer agreed that the employee did not have to perform ultrasound examinations on women contemplating abortion, and proposed that he leave the room

[6] Note too that these concerns arise only with respect to requested accommodations – i.e., requests that an employer depart from its religiously neutral policies to accommodate a religious *practice, observance, or other behavior*. An employer may not fire, refuse to hire, or otherwise target an employee for an adverse employment action because of that employee's *beliefs*, no matter how unfamiliar or even disagreeable the employer may consider those beliefs. *See, e.g.*, *Buonanno v. AT&T Broadband*, 313 F. Supp. 2d 1069 (D. Colo. 2004) (holding that Title VII does not permit employer to fire employee who declined to sign diversity policy requiring him to affirm that he "value[d]" all differences when his religious beliefs held that some behaviors and beliefs are sinful); *Peterson v. Wilmur Communications, Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002) (holding that Title VII does not permit employer to demote employee upon learning of employee's religiously-motivated belief in white supremacy).

[7] On the other hand, of course, if accommodating a health care worker's request would *not* delay or disrupt the provision of health care services, it would *not* pose an undue hardship.

[8] 2004 WL 326694 (D. Minn. 2004).

once he found that a patient was considering that possibility. It refused, however, to allow him to counsel such patients against having abortions. Even though the employer's proposal did not eliminate the conflict entirely – the plaintiff felt religiously compelled to provide counseling to women who told him they were considering abortions – the court found that the accommodation was reasonable because it reflected the employer's good-faith negotiation and compromise that resulted in a change that considered both employee and employer concerns.

Others courts have reached similar conclusions under current law. In *Noesen v. Medical Staffing Network/Wal-Mart*,[9] for example, in response to the plaintiff pharmacist's refusal to dispense contraceptives for religious reasons, the employer ensured that another pharmacist remained available during the plaintiff's shift to fill prescriptions and answer customers' questions about birth control. The court ruled that the employer satisfied its duty of reasonable accommodation by excusing the plaintiff from filling contraceptive prescriptions, even though the plaintiff argued that the only way to remove the conflict with his religious beliefs would be to relieve him of all counter and telephone duties that might require him to interact with a customer seeking birth control.

Similarly, under current law lower courts have consistently concluded that police officers' religiously-motivated requests to decline certain assignments – such as enforcing the law with respect to disturbances and disruptions at reproductive health care clinics – pose an undue hardship to the law enforcement mission. In *Rodriguez v. City of Chicago*, for example, the plaintiff police officer declined an assignment to provide security at abortion clinics for religious reasons. The Seventh Circuit found that the employer had satisfied its obligation to provide a reasonable accommodation through the availability of a transfer – without any loss in pay or benefits -- to another district without an abortion clinic. The court held that the employer was not required to remove the conflict by providing the employee's preferred accommodation, which was to remain in his current district while declining clinic duty.[10] In a concurring opinion, Judge Posner agreed that this employer had provided a reasonable accommodation, but noted that he preferred a rule making clear under Title VII that a request by a law enforcement officer to refuse an assignment always poses an undue hardship, because of the "loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect." The Seventh Circuit later adopted Judge Posner's view as a matter of Title VII law in Endres v. Indiana State Police.[11]

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[9] 232 Fed. Appx. 581 (7th Cir. 2007); *see also Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220 (3rd Cir. 2000) (holding that the employer hospital satisfied its obligation to provide a reasonable accommodation to a staff nurse whose religious beliefs "forbade her from participating directly or indirectly in ending a life" when it offered to transfer her to a position that did not involve abortions or sterilizations).

[10] 156 F.3d 771 (7th Cir. 1998); *see also Parrott v. District of Columbia*, 1991 WL 126020 *3 (D.D.C. 1991) ("Title VII's guarantee of de minimis accommodation does not contemplate the type of dispensation Sergeant Parrott requests from the police force" – i.e., to be exempted from enforcing law regarding civil disturbances and demonstrations at abortion clinics).

[11] 349 F.3d 922 (2003) (holding that the state police had no duty to accommodate a police officer's request that he be allowed to refuse assignment to a casino for religious reasons).

Nor have lower courts, under the current Title VII standard, required employers to accommodate workers whose religious beliefs compel them to urge the religious conversion of those with contrary beliefs or behaviors, in a way that may not only offend the beliefs of others but also undermine an employer's antidiscrimination policies. For example, in *Peterson v. Hewlett-Packard*, the Ninth Circuit declined to require the employer to adopt the plaintiff's proposed accommodation where the plaintiff contended that only way to remove the conflict between Hewlett-Packard's diversity campaign and his religious beliefs would be either to require HP to remove its posters (featuring a photo of an HP employee above the caption "Gay," along with a description of the pictured employee's personal interests and the slogan "Diversity is our Strength") or to allow him to display his concededly "hurtful" messages condemning homosexuality in hopes of changing others' behavior.[12]

Each of these cases was decided under current Title VII law. Without clarification, their outcome under H.R. 1431's proposed new standard remains uncertain.

Several factors create this uncertainty. First, H.R. 1431 proposes a new and more rigorous understanding of undue hardship for Title VII purposes, drawing from the Americans with Disabilities Act's (ADA) narrower definition of undue hardship to mean "an action requiring significant difficulty or expense."[13] The ADA then identifies a number of factors to be considered when determining whether a proposed accommodation requires significant difficulty or expense; these factors focus on the requested accommodation's net monetary cost to employer.[14] The ADA's undue hardship standard reflects Congress' judgment that the need to expand employment opportunities for workers with disabilities by providing accessible facilities and other accommodations justifies the imposition of some economic cost on employers so long as that cost falls short of significant difficulty and expense. [15] But some of the religious accommodations at issue here impose costs most directly on other co-workers or patients and may or may not impose monetary costs to employers. As a result, without

[12] 358 F.3d 599, 606-08 (9th Cir. 2004).
[13] 42 U.S.C. § 12111(10) (A).
[14] 42 U.S.C. § 12111(10) (B) of the ADA identifies these factors as follows: "**(i)** the nature and cost of the accommodation needed under this chapter; **(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 upon the operation of the facility; **(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 **(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."
[15] 42 U.S.C. § 12111(9) of the ADA provides that "[t]he term 'reasonable accommodation' may include-- **(A)** making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and **(B)** job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."

clarification, it remains uncertain how the ADA understanding of undue hardship will apply to conflicts with other persons' civil rights or health care needs.[16]

Adding to this uncertainty is the fact that while H.R. 1431 draws from the ADA factors to be considered when determining undue hardship, it does not track them precisely. If anything, H.R. 1431 appears to focus even more narrowly on the employer's monetary costs as the measure of undue hardship. For example, H.R. 1431 as proposed requires consideration of "the identifiable cost of the accommodation, including the costs of loss of productivity and of retraining or hiring employees or transferring employees from 1 facility to another."[17] In contrast, the ADA more broadly requires consideration of "the nature and cost of the accommodation needed."[18] Again, the effect of these changes remains unclear when applied to accommodations that conflict with third parties' civil and reproductive rights.

Adding further still to this uncertainty is H.R. 1431's provision that:

> For purposes of determining whether an employer has committed an unlawful employment practice under this title by failing to provide a reasonable accommodation to the religious observance or practice of an employee, for an accommodation to be considered to be reasonable, *the accommodation shall remove the conflict between employment requirements and the religious observance or practice of the employee*.[19]

But the holdings in cases under current law involving conflicts with third parties' civil and reproductive rights frequently rest on courts' conclusion that an employer's accommodation need not completely remove the conflict with the employee's religious beliefs to be considered reasonable. Indeed, in many of these cases, the only way truly to remove the conflict with the employee's sincerely-held religious beliefs is for the employer to stop providing certain health care services that the employee finds inconsistent with his faith or for the employer to permit the employee to engage in

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[16] As written, H.R. 1431 creates a duty of reasonable accommodation only with respect to employees or applicants for employment who can perform the "essential functions" of the job with or without reasonable accommodation, leaving employers free to argue that the inability to perform certain duties for religious reasons means that that employee cannot perform the job's essential functions. But the bill goes on to provide that "the ability to perform essential functions" should not be considered compromised by "practices that may have a temporary or tangential impact on the ability to perform job functions." H.R. 1431, section 2(a). Without clarification, it is difficult to predict with confidence the meaning of "temporary or tangential impact." For example, would it require accommodation of a pharmacist's request to decline to dispense contraceptives if such contraceptives constitute only a small percentage of the pharmacy's sales, or a nurse's request to decline to assist in performing tubal ligations or vasectomies if such surgeries constitute only a small percentage of a hospital's health care services?

[17] H.R. 1431, section 2(a). H.R. 1431 goes on to identify a shorter and arguably narrower list of additional factors to be considered in determining undue hardship for Title VII purposes as compared to the ADA undue hardship factors listed above in note 14: "(B) the overall financial resources and size of the employer involved, relative to the number of its employees; and (C) for an employer with multiple facilities, the geographic separateness or administrative or fiscal relationship of the facilities."

[18] 42 U.S.C. § 12111(10) (B) (i).

[19] H.R. 1431, section 2(b) (emphasis added).

religiously-compelled witnessing or proselytizing activities regardless of the effect on others' beliefs or the employer's antidiscrimination policies. Again, without clarification, this change in the law may well result in different outcomes in cases involving conflicts with other workers' civil rights or patients' important health care needs.

There appear to be at least two possible approaches to resolving these concerns. One possible solution would revise H.R. 1431's definition of "undue hardship" to expressly provide that accommodations that impose an undue hardship include practices that conflict with employers' legally-mandated or voluntarily-adopted antidiscrimination requirements or that delay or disrupt the delivery of health care services.

Another approach might require an employer to accommodate the most frequently-requested accommodations – and those that do not create conflicts of the sort described above – unless it can show that the accommodation would pose an undue hardship as rigorously defined under H.R. 1431 as proposed. These accommodations include scheduling and leave requests to observe the Sabbath or religious holidays, as well as requests for departures from uniform appearance standards to accommodate religious practices with respect to apparel and grooming. Other types of accommodation requests would continue to receive the protections available under Title VII's current standard – employers are, and would continue to be, required to provide such accommodations unless doing so poses more than a *de minimis* hardship.

In short, while I fully agree that Congress should amend Title VII to expand the circumstances under which employers must accommodate employees' religious practices, it should do so in a way that does not conflict with others' civil and reproductive rights. Again, thank you for the opportunity to testify here today. I look forward to your questions.