



The American Jewish
Committee

OFFICE OF GOVERNMENT AND INTERNATIONAL AFFAIRS

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Freedom →*

STATEMENT OF RICHARD T. FOLTIN

on behalf of

THE AMERICAN JEWISH COMMITTEE

submitted to

THE SENATE COMMITTEE ON THE JUDICIARY

for its Hearing on

RELIGIOUS LIBERTY

Held on October 25, 1995

Mr. Chairman, the American Jewish Committee appreciates the opportunity to submit this statement to the Senate Judiciary Committee for its hearing on religious liberty. My name is Richard T. Foltin, and I serve as Legislative Director and Counsel in AJC's Office of Government and International Affairs in Washington, D.C.

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 whose religious beliefs or practices were threatened.

We submit this statement in order to make the case for enactment of the Workplace Religious Freedom Act. In our view, this legislation should be viewed as the next-generation religious-liberty vehicle, serving to promote the cause of protection of the free exercise of religion so importantly promoted by the enactment in 1993 of the Religious Freedom Restoration Act -- an enactment in which you played a crucial role.

Much of the testimony at the hearings was focused on the pros and cons of proposals for a constitutional amendment or statutory enactment that would purportedly have the purpose and effect of protecting "religious equality." So that there is no ambiguity on this point, let us be perfectly clear at the outset -- the American Jewish

Committee is strongly opposed to these initiatives as unnecessary and dangerous. To amend the First Amendment in the manner suggested, or even to pass the proposed statutory provisions, would threaten the existing balance between the Establishment Clause and the Free Exercise Clause in a fashion that would threaten the freedom of conscience of religious minorities -- and, indeed, of all Americans. And the packaging of these initiatives as protections for religious expression generally, in lieu of an enactment directed at school prayer only, does not mitigate the problem, but magnifies it. To expand upon these points, we enclose a copy of the statement of Robert H. Rosenthal, President of AJC's Southwest Florida Chapter, delivered at a field hearing last June of the House Judiciary Subcommittee on the Constitution.

None of this to suggest that there are not religious-liberty issues for which a legislative remedy will be appropriate. The Religious Freedom Restoration Act was a necessary and appropriate response to the U.S. Supreme Court's drastic undermining of constitutional protections for the free exercise of religion in its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). The Workplace Religious Freedom Act, legislation introduced in the 103rd Congress by Congressman Jerrold Nadler (H.R.5233), 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.

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. Unfortunately, this standard, set forth in Section 701(j) of Title VII and codified as 42 U.S.C. Section 2000e(j), although appropriate on its face, has been interpreted by the Supreme Court -- and other courts -- so narrowly as to place relatively little restraint on an employer's ability to refuse to provide religious accommodation.

Thus, in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), the Supreme Court ruled that anything more than a *de minimis* cost to an employer would be an "undue hardship" for purposes of Section 701(j). This affords precious little protection for any employee. Instead of this *de minimis* standard, the term "undue hardship" would be better understood to mean that an action requires *significant difficulty or expense*. This is 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 the special situation of religiously observant employees requires accommodation so that those employees would not be deprived of equal employment opportunities.

In another case, *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), the Supreme 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. This treatment is inconsistent with cases on racial and national-origin discrimination in which the Court has held that a plaintiff can successfully demonstrate discrimination by proving the existence of alternative employment practices which have a less adverse impact on minorities, but which nevertheless fulfill the employer's business needs.

There are also lower court cases, dealing with other issues, that have read the obligation to provide reasonable accommodation in a similarly narrow fashion.

The Workplace Religious Freedom Act, the 103rd Congress version of which is appended for your information, is intended to assure that employers have a meaningful obligation to reasonably accommodate their employees' religious practices. In doing so, it will restore to Title VII's religious-accommodation provision the weight that Congress originally intended. Passage of the Act would be a milestone in the protection of religious liberty. We strongly urge that the U.S. Congress act promptly to reintroduce the bill and enact it into law.

The restoration of this protection is no small matter. Enactment of the Religious Freedom Restoration Act extended 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 from employers. Employers who will not make reasonable

accommodation for observance of the Sabbath and other holy days. 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.

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. In *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), Justice O'Connor specifically noted, in a concurring opinion, that

...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.

This valid purpose of combating discrimination can only be served if Section 701(j) is read so as to afford religiously observant employees a genuine modicum of protection, which is not now the case.

An employer's obligation to provide religious accommodation is entirely consistent with the prohibition on religious harassment that is encompassed in Title VII's prohibition on religious discrimination. Some have claimed that prohibitions on religious harassment in effect command employers to make the workplace a "religion-free zone." But, in so doing, any employer who attempted to preclude employees from expressing their own religious beliefs and practices in a non-disruptive fashion would very likely violate Section 701(j), even in its currently weak form. Title VII cannot have been intended to be at war with itself. More properly read, the prohibition on religious harassment reaches only exacerbating and aggravating circumstances and conduct. Thus, that prohibition serves the same purpose as Section 701(j) (or, at least, Section 701(j)'s initial intent before it was weakened by the courts) -- to ensure that the American workplace does not provide a hostile environment for Americans of any faith, and of none.

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 conclusion, in place of proposals for a "religious equality" amendment or statute that would "fix" what is not "broke," we urge attention to the very real encroachments upon religious liberty with which the Workplace Religious Freedom Act deals. Perhaps, as the Senate Committee on the Judiciary considers its next steps, it would be appropriate to hold further hearings, this time on the need for legislation to protect the right of religiously observant employees to appropriate accommodation in the workplace. We would be pleased to appear and testify at any such hearing.

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BY RICHARD T. FOLTIN

A

staff pharmacist and Orthodox Jew, Marvin Brener asked his supervisor to arrange his shifts so that he would not have to work on Saturday, the 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 holiday that his faith forbade him to—was forced to resign. He sued, but the federal court of appeals for the fifth circuit ruled 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."

Three Orthodox Jewish bus drivers asked the New York Transit Authority to schedule them so they didn't have to work on the Sabbath and on Jewish holidays. The Transit Authority would have done so, but astonishingly, the Transport Workers Union—the putative representative of these transit workers—argued that its collective bargaining agreement with the Transit Authority barred any schedule adjustment. Even a voluntary switch of shifts, it said, encroached on the seniority rights of other drivers. Two of the three bus drivers were later fired. (In a similar case the union had refused a request for an accommodation by a Seventh-day Adventist, Mary Lee Meyers. When she failed to appear for work, as scheduled, her firing was upheld by an intermediate New York appellate court which held that even though New York state law requires reasonable accommodation of Sabbath observance, a "collective bargaining agreement which rendered seniority rights superior to accommodation for

Why Congress Needs to Pass the Workplace Religious Freedom Act

religious observance was nondiscriminatory. . . . Where the employer and union had agreed to such a seniority system, the employer had no right to contravene those rules unilaterally." On

October 22, 1996, the New York Court of Appeals, the state's highest court, ruled in favor of Mary Lee Myers against the New York Transit Authority and remanded the case to a remedial intermediate court for determination of actual amount of damages.)

Mohan Singh—a Sikh Muslim 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 was denied the position because he wouldn't shave 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 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.

These cases, and others like them, show that the religiously observant worker is faced with a situation in which employers are allowed, and in some cases even required, to grossly disregard the religious obligations of employees.

For this reason Congress should ensure that its 1972 amendment to the Civil Rights Act of 1964 affords religiously observant employees genuine protection. The Workplace Religious Freedom Act (WRFA), introduced toward the close of the 104th Congress by Senator John Kerry of Massachusetts and Representative Jerrold Nadler of New York—and supported by a

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broad range of religious and public-interest organizations—was written to do just that. This law would provide essential clarification for the courts, and for the public, on just what the amendment is supposed to mean.

In 1972 the U.S. Congress amended the Civil Rights Act of 1964—which already forbade employment discrimination on the basis of religion—to include 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. However reasonable on its face, the standard enacted in 1972 has been interpreted by the courts so narrowly that it places relatively little restraint on an employer's ability to refuse a religious accommodation.

The first such interpretation, at least at the High Court level, came in *Trans World Airlines v. Hardison* (1977), in which the Supreme Court ruled that anything more than a *de minimis* cost to an employer would constitute an "undue hardship." The *Hardison* Court concluded that virtually any financial cost to an employer would be more than *de minimis* and thus be "undue," an interpretation that gives precious little protection to the religious employee.

The cases involving Brener, the New York Transit Authority, and Singh show that "undue hardship" has been used to release an employer from accommodating for a range of even noneconomic reasons. According to the courts that rule in these matters, an "undue hardship" occurs if an accommodation would impact "morale," present a technical violation of seniority rules (even where the accommodation does not require another employee to work on, say, Saturday, when the employee's seniority status entitles her not to do so), or impact the employer's "image."

Unfortunately, the definition of "undue hardship" isn't the only difficulty with present interpretation of the 1972 amendment.

In another case, *Ansonia Board of Education v. Philbrook* (1986), the Supreme Court found that "any reasonable accommodation by the employer is sufficient to meet the obligation to accommodate," and that the employer could refuse less onerous, but still reasonable, alternatives to the employee. This treatment is inconsistent with cases of racial and national origin discrimination, in which the Court has held that a plaintiff successfully demonstrates discrimination when he or she proves the existence of alternative employment practices that have less adverse impact on minorities but nevertheless fulfill the employer's business needs.

Then, even assuming an employee gets past the "undue hardship" hurdle, the courts have been unfriendly to religious concerns regarding what a "reasonable accommodation" means. This problem continues especially in the context of employees whose religion forbids them from working on their Sabbath. For instance, in one decision the court found that a work-shift rotation system that would require an employee to violate his or her Sabbath "only" once a month was, without any additional effort by the employer, already a "reasonable accommodation."

In another problematic application of the 1972 amendment, the courts have held that even amicable, commonsense arrangements between employer and employee intended to accommodate a religious practice are not required—or are perhaps prohibited—when they would constitute hypertechnical violations of existing seniority arrangements. Employees have been prevented from engaging in "shift swaps," even when senior Employee A is willing to give up his right not to work on Saturday in order to accommodate the religious needs of fellow Employee B. The rationale is that the employer is first obligated to offer the shift swap to all employees senior to the employee seeking accommodation, even though, if not for Employee A's desire to accommodate the religious practice of Employee B, no such swap

would have been offered in the first place. In other words, before Employee B can be free from Sabbath work, all employees senior to him must be first allowed to switch with Employee A, which means that anyone senior to Employee B can have the Sabbath off, even if just to play golf.

Similar objections to accommodation, grounded in readings of existing seniority arrangements or applicable labor laws unsympathetic to the needs of the religiously observant, have hindered employers and employees who wish to accommodate religious practice amicably—even when those arrangements have no real-world impact on the interests of other employees. For instance, an employee who cannot work on Saturday for religious reasons can be forbidden to work an extra two hours Monday through Thursday at regular pay if the employer would otherwise be required to pay overtime rates to an employee working additional hours on a weekday.

Of course, the courts do sometimes rule that providing an accommodation does not pose an "undue hardship" on an employer (such as in the Mary Lee Myers case). Even without the courts, employers often find a way—as a matter of decency—to adopt unburdensome measures that can spare the employee an untenable crisis of conscience.

Nevertheless, because enough cases exist in which accommodations have been unfairly denied, America needs the Workplace Religious Freedom Restoration Act. WRFA would define "undue hardship" as "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, thereby undoing the notion that any hardship more than *de minimis* is undue.

WRFA would allow religiously observant employees and their employers—and, where pertinent, sympathetic fellow employees—to make commonsense arrangements to accommodate religious practice, including voluntary shift swaps or modifications of work hours, without being deemed to have violated the rights of fellow employees.

WRFA would require that when several methods of accommodation are available that wouldn't constitute an undue hardship for the employer, the method least onerous to the employee should be used.

And WRFA would require that to qualify as a reasonable accommodation an arrangement

must actually *remove* the conflict (one could hardly imagine that it is necessary to codify this, but it is).

But would not a legislative measure such as WRFA, intended to strengthen the obligation of private employers to accommodate an employee's religious practice, run afoul of the First Amendment's Establishment Clause, which requires that government not favor one religion over another, or religion over nonreligion? In the case of *Estate of Thornton v. Caldor* (1983), the Supreme Court struck down a Connecticut statute that gave employees an absolute right not to work on their Sabbath.

In a concurring opinion in that case, however, Justice Sandra Day O'Connor specifically distinguished the Connecticut statute from the Civil Rights Act's religious accommodation provision: "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 [the Act] calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe that an objective observer would perceive it as an antidiscrimination law rather than an endorsement of religion or a particular religious practice."

In short, the act of the legislature in requiring reasonable accommodation of religious practice in the workplace—especially when coupled with an exemption for employers for whom the provision of even that accommodation would pose an undue hardship—fairly balances the twin constitutional values of government neutrality toward religion under the Establishment Clause and individual religious liberty under the Free Exercise Clause. It balances as well the imperative to avoid placing excessive burdens on employers with the compelling national interest in prohibiting discrimination in the workplace.

Though WRFA didn't get passed in either the House or Senate this year, remedial legislation of the type is long overdue. The enactment of WRFA would present an important step toward ensuring that all members of society, whatever their religious beliefs or practices, will not unfairly be denied equal employment opportunities based on aspects of their identity that are not pertinent to their ability to do the job—a principle of fairness that is part of our national birthright and pride.

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Coalition for Religious Freedom in the Workplace

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(In formation)

Agudath Israel of America • American Jewish Committee • American Jewish Congress •
Americans for Democratic Action • Anti-Defamation League • Baptist Joint Committee on Public Affairs •
Central Conference of American Rabbis • Christian Legal Society • Church of Scientology International •
Council on Religious Freedom • General Board of Church and Society, The United Methodist Church •
General Conference of Seventh-day Adventists • Guru Gobind Singh Foundation • Hadassah - WZO •
International Association of Jewish Lawyers and Jurists • National Association of Evangelicals •
National Council of Churches • National Council of Jewish Women •
National Jewish Community Relations Advisory Council • National Sikh Center •
North American Council for Muslim Women • People for the American Way •
Presbyterian Church (USA), Washington Office • Rabbinical Council of America •
Traditional Values Coalition • Union of American Hebrew Congregations •
Union of Orthodox Jewish Congregations • United Synagogue of Conservative Judaism

CIVIL RIGHTS AND RELIGIOUS ACCOMMODATION

Backgrounder and Statement of Position

SAMUEL RABINOVE and RICHARD T. FOLTIN



BACKGROUNDER AND STATEMENT OF POSITION CIVIL RIGHTS AND RELIGIOUS ACCOMMODATION

by

Samuel Rabinove, Legal Director, and
Richard T. Foltin, Director of Governmental Affairs

Title VII of the Civil Rights Act of 1964 generally prohibits discrimination in employment on the basis of religion. Section 701(j) was added to Title VII by amendment in 1972. It defines "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 observance or practice without undue hardship on the conduct of the employer's business. (42 U.S.C. § 2000e(j)).

This language codifies what previously had been an Equal Employment Opportunity Commission ("EEOC") guideline, adopted in 1967 for enforcement of the law.

In its decisions, the U.S. Supreme Court has interpreted this provision narrowly, so as to place relatively little restraint on an employer's ability to refuse to provide religious accommodation. This is inconsistent with the principle that religious discrimination should be treated fully as seriously as any other type of discrimination. The civil rights of religious minorities should be protected by interpreting the religious accommodation provision of Title VII as broadly as that statute's other provisions. Since this involves interpretation of legislation, rather than constitutional doctrine, this matter is susceptible to correction by the U.S. Congress. Bearing in mind, however, that legislation in this area may be deemed to implicate the Establishment Clause of the First Amendment, let us examine some key cases.

In *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971), the Supreme Court was called upon to interpret the old EEOC guideline, as applied to an employee who refused to work on Sundays. In this case, the company was willing to permit and, in fact, in the past had permitted Dewey to exchange shifts with fellow workers whose conscience did not forbid them to work on Sundays. (The sincerity of Dewey's religious beliefs was not in question.) Dewey, however, declined to continue this practice because, he claimed, his conscience would not allow him to induce others to violate the Christian Sabbath. He therefore insisted that the company make the necessary arrangements. This the company declined to do. The Sixth Circuit Court of Appeals upheld the company's rejection of Dewey's demands, noting that no such arrangements were required by Title VII. Dewey then appealed to the Supreme Court. The High Court divided, 4-4. Under Supreme Court rules, the result was that the circuit court ruling in favor of the company was affirmed, with no opinion issued by any of the Justices. Such a result is not an endorsement of the lower court's ruling nor is it a precedent in future cases of this nature. (The American Jewish Committee had filed an *amicus* brief on the side of Dewey.)

As already noted, in 1972 Congress amended Title VII to make the EEOC guideline a mandatory law of the land. Moreover, in so doing, Congress shifted from the employee to the company the burden of proving that the accommodation sought is not reasonable. It did this by providing that the employer has to prove that "undue hardship" makes the accommodation to the religious needs of the employee unreasonable.

The next case of interest on this issue was *Parker Seal Co. v. Cummings*, 429 U.S. 65 (1976). Cummings was a member of a seventh-day sect, the Worldwide Church of God, who was discharged by the Parker Seal Company because he refused to work on Saturday. Unlike the result in *Dewey*, this time the Sixth Circuit Court of Appeals ruled in favor of the employee. The company then urged the Supreme Court to reverse this decision and to rule the statute unconstitutional under the Establishment Clause. Once again, however, the Supreme Court divided,

AJC filed an *amicus* brief in this case together with the ACLU. In our brief we said, in substance, that the Connecticut statute went too far. We expressed to the Court our belief that a more limited statute, requiring an employer to reasonably accommodate the religious practices of employees absent undue hardship to the employer, did not violate the Establishment Clause. In other words, we took the position that the "reasonable accommodation" standard would fairly balance the twin constitutional imperatives of government neutrality toward religion under the Establishment Clause and individual religious liberty under the Free Exercise Clause.

In another narrow reading of the religious accommodation standard, the Supreme Court held in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), that "any reasonable accommodation by the employer is sufficient to meet the obligation to accommodate" and that the employer could refuse alternatives suggested by the employee which were less onerous to the employee, but still reasonable. The Court was unanimous, except for dissents in part by Justice Marshall and Justice Stevens. This decision is inconsistent with the reading of Title VII provided by the Court with respect to other types of discrimination. In cases of racial and national origin discrimination, the Court has held that a plaintiff can successfully demonstrate discrimination by proving the existence of less onerous alternative employment practices which have a less adverse impact on minorities, but which nevertheless fulfill the employer's business requirements. This principle was recently reaffirmed in *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115 (1989).

Philbrook, a teacher, had three paid days annually for religious observance, pursuant to the terms of his labor contract. He wanted to use additional contractual personal leave time for additional religious observance, or for his employer to allow him to pay a substitute on these occasions. As in *Hardison*, the Court in *Ansonia* found that the employer was not required by law to accept the employee's alternative proposals. This decision strongly relied upon and reinforced the Court's ruling in *Hardison*.

As a result of these rulings, the religiously observant employee in a secular corporation is left with very little Title VII protection for religious practices and observances. By contrast, the following year, in *Presiding Bishop v. Amos*, 483 U.S. 327 (1987), the Supreme Court granted wide discretion to non-profit institutional religious employers, which may require their secular employees to belong to and to comply with the tenets of the institution's religion. The Court held unanimously that applying Section 702 of the Civil Rights Act, which exempts religious groups from the ban on religious discrimination in employment, to non-religious activities of such groups, does not violate the Establishment Clause. Therefore, in *Amos*, the Court upheld the discharge of a building engineer for a non-profit health and fitness facility operated by the Church of Jesus Christ of Latter Day Saints because he failed to qualify for a "temple recommend", i.e., a certificate indicating that he was a member of the Church in good standing and able to attend its temple services. Thus, while the pertinent Title VII language has been gravely weakened as protection for the religiously observant employee of a secular employer, the Court has significantly strengthened the discretion granted to institutional non-profit religious employers to require employee membership in and compliance with the institution's own faith.

The Supreme Court's restrictive reading of Title VII's religious accommodation provision has been reflected in lower court rulings. In *Brener v. Diagnostic Center*, 671 F.2d 141 (5th Cir. 1982), a case later cited approvingly by the Supreme Court, the Fifth Circuit Court of Appeals held that it is the employee's, rather than the employer's, duty to arrange job swaps with other employees in order to avoid conflict with religious observance. 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 discourage that employee from seeking to avoid discrimination.

To be sure, at some point the Establishment Clause sets a limit as to the burdens which may be placed upon employers or other employees in accommodating religious practice. For this reason, as discussed above, the Supreme Court held in *Thomton* that a state statute which imposed on employers an absolute obligation to accommodate conveyed an impermissible message of endorsement of religion. But the Constitution does not

WJH to
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Elena,

Enclosed is the Workplace Religious Freedom Act, I mentioned. I have also enclosed a religious news article for background.

I have spoken to Marvin Krislov at Labor and Andrew Pincus at Commerce about the Bill and I have also asked OLC for their comments. I have not yet reached out to SBA but I think they should probably be included in the process. Let me know where you want to go from here.

FYI we are getting a lot of inquiries about our position from the religious groups.

Bill

Tom/Mary -

This comes from Bill Marshall.
Could you look into it? I take it that DOL and Commerce have reservations, but it seems like a pretty good bill to me.

First, see if this is likely to come up anytime soon; if not, we might consider ignoring it. If we do want (or have) to go forward, we should invite all the interested parties to a meeting. Let me know.

Elena

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105TH CONGRESS
1ST SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

Mr. KERRY introduced the following bill; which was read twice and referred
to the Committee on _____

A BILL

To amend title VII of the Civil Rights Act of 1964 to
establish provisions with respect to religious accommoda-
tion in employment, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Workplace Religious
5 Freedom Act of 1997".

6 **SEC. 2. AMENDMENTS.**

7 (a) **DEFINITIONS.**—Section 701(j) of the Civil Rights
8 Act of 1964 (42 U.S.C. 2000e(j)) is amended—

9 (1) by inserting "(1)" after "(j)";

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S.L.C.

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1 (2) by inserting ", after initiating and engaging
2 in an affirmative and bona fide effort," after "un-
3 able";

4 (3) by striking "an employee's" and all that fol-
5 lows through "religious" and insert "an employee's
6 religious"; and

7 (4) by adding at the end the following:

8 "(2) As used in this subsection, the term 'employee'
9 includes a prospective employee.

10 "(3) As used in this subsection, the term 'undue
11 hardship' means an accommodation requiring significant
12 difficulty or expense. For purposes of determining whether
13 an accommodation requires significant difficulty or ex-
14 pense—

15 "(A) an accommodation shall be considered to
16 require significant difficulty or expense if the accom-
17 modation will result in the inability of an employee
18 to perform the essential functions of the employment
19 position of the employee; and

20 "(B) other factors to be considered in making
21 the determination shall include—

22 "(i) the identifiable cost of the accommo-
23 dation, including the costs of loss of productiv-
24 ity and of retraining or hiring employees or
25 transferring employees from one facility to an-

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S.L.C.

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1 other, in relation to the size and operating cost
2 of the employer;

3 "(ii) the number of individuals who will
4 need the particular accommodation to a reli-
5 gious observance or practice; and

6 "(iii) for an employer with multiple facili-
7 ties, the degree to which the geographic sepa-
8 rateness or administrative or fiscal relationship
9 of the facilities will make the accommodation
10 more difficult or expensive."

11 (b) EMPLOYMENT PRACTICES. --Section 703 of such
12 Act (42 U.S.C. 2000e-2) is amended by adding at the end
13 the following:

14 "(o)(1) As used in this subsection:

15 "(A) The term 'employee' includes a prospective
16 employee.

17 "(B) The term 'leave of general usage' means
18 leave provided under the policy or program of an
19 employer, under which—

20 "(i) an employee may take leave by adjust-
21 ing or altering the work schedule or assignment
22 of the employee according to criteria deter-
23 mined by the employer; and

24 "(ii) the employee may determine the pur-
25 pose for which the leave is to be utilized.

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S.L.C.

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1 “(C) The term ‘undue hardship’ has the mean-
2 ing given the term in section 701(j)(3).

3 “(2) For purposes of determining whether an em-
4 ployer has committed an unlawful employment practice
5 under this title by failing to provide a reasonable accom-
6 modation to the religious observance or practice of an em-
7 ployee, an accommodation by the employer shall not be
8 deemed to be reasonable if such accommodation does not
9 remove the conflict between employment requirements and
10 the religious observance or practice of the employee.

11 “(3) An employer shall be considered to commit such
12 a practice by failing to provide such a reasonable accom-
13 modation for an employee if the employer refuses to per-
14 mit the employee to utilize leave of general usage to re-
15 move such a conflict solely because the leave will be used
16 to accommodate the religious observance or practice of the
17 employee.

18 “(4) It shall not be a defense to a claim of unlawful
19 employment practice under this title for failure to provide
20 a reasonable accommodation to a religious observance or
21 practice of an employee that such accommodation would
22 be in violation of a bona fide seniority system if, in order
23 for the employer to reasonably accommodate such observ-
24 ance or practice—

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1 “(A) an adjustment would be made in the em-
2 ployee’s work hours (including an adjustment that
3 requires the employee to work overtime in order to
4 avoid working at a time that abstention from work
5 is necessary to satisfy religious requirements), shift,
6 or job assignment, that would not be available to
7 any employee but for such accommodation; or

8 “(B) the employee and any other employee
9 would voluntarily exchange shifts or job assign-
10 ments, or voluntarily make some other arrangement
11 between the employees.

12 “(5)(A) An employer shall not be required to pay pre-
13 mium wages or confer premium benefits for work per-
14 formed during hours to which such premium wages or pre-
15 mium benefits would ordinarily be applicable, if work is
16 performed during such hours only to accommodate reli-
17 gious requirements of an employee.

18 “(B) As used in this paragraph—

19 “(i) the term ‘premium benefit’ means an em-
20 ployment benefit, such as seniority, group life insur-
21 ance, health insurance, disability insurance, sick
22 leave, annual leave, an educational benefit, or a pen-
23 sion, that is greater than the employment benefit
24 due the employee for an equivalent period of work

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1 performed during the regular work schedule of the
2 employee; and

3 "(ii) the term 'premium wages' includes over-
4 time pay and compensatory time off, premium pay
5 for night, weekend, or holiday work, and premium
6 pay for standby or irregular duty."

7 **SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.**

8 (a) **EFFECTIVE DATE.**—Except as provided in sub-
9 section (h), this Act and the amendments made by section
10 2 take effect on the date of enactment of this Act.

11 (b) **APPLICATION OF AMENDMENTS.**—The amend-
12 ments made by section 2 do not apply with respect to con-
13 duct occurring before the date of enactment of this Act.



REPORT FROM THE CAPITAL

Volume 51 No. 19

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NewsMakers

◆ Former Washington Post reporter Carl Bernstein and Italian journalist Marco Politi have published a book claiming Pope John Paul II secretly worked with the CIA to bring down Poland's communist government and that the United States and the Vatican had an "informal" partnership on issues such as abortion and nuclear arms.

◆ New York City Mayor Rudolph Giuliani is considering an offer to send 1,000 public school students to a Catholic school system. He said private funds would be used, but the American Jewish Committee warned the mayor to heed church-state concerns. The AJC said student participation must be voluntary.

◆ Hala Maksoud, president of the American-Arab Anti-Discrimination Committee, is seeking an apology from the Portsmouth (Va.) Police Department for arresting (but later releasing) two Muslim women wearing face veils. Maksoud said the officer told the women, who were walking from a mosque to a store, that it is unlawful to wear a "mask" in public.

◆ Barry Lynn, executive director of Americans United for Separation of Church and State, said that while the Christian Coalition claims 1.8 million members, the actual number is closer to 310,000, according to 1995 U.S. Postal Service reports. Δ

Workplace religious liberty bill favored by U.S. religious groups

A diverse religious coalition is supporting a bill that would require employers to provide greater accommodation for the religious practices of employees.

The Workplace Religious Freedom Act recently was introduced by Rep. Jerrold Nadler, D-N.Y., and Sen. John Kerry, D-Mass.

Backers of the bill hope to raise the issue this year and build support for passage in the next Congress.

The Coalition for Religious Freedom in the Workplace joined Nadler at a press conference to show support for the bill.

Federal civil rights laws require employers to reasonably accommodate the religious practices of an employee unless the accommodation poses an "undue hardship" for the employer. Supporters of the bill say the Supreme Court has interpreted employees' rights too narrowly.

The new measure would define "undue hardship" for an employer to mean "significant difficulty or expense."

Kerry said the bill's definition of undue hardship has worked well in the Americans with Disabilities Act. "Religious discrimination should be treated fully as seriously as any other form of discrimination that stands between Americans and equal employment," Kerry said.

Nadler said, "No American should ever have to choose between their job and the right to practice their religion." He said two Supreme Court decisions upset

the balance between legitimate business concerns and the rights of employees.

Nadler said that in one case, the high court held an undue burden to be anything more than a "de minimus cost to the employer." A very slight burden could suffice under the decision, he said.

Another decision held that "any reasonable accommodation by the employer is sufficient to meet the obligation to accommodate," even if the employee prefers another form of accommodation.

"No American should ever have to choose between their job and the right to practice their religion."

— Rep. Jerrold Nadler



"If the Civil Rights Act's promise of a workplace free from religious discrimination has any meaning at all, it is that employers must make a genuine effort to accommodate the religious beliefs of employees," he said.

James M. Dunn, executive director of the Baptist Joint Committee, said the measure would ensure an "appropriate" place for religion in the workplace. "It will return the law to its former strength, requiring employers to accommodate religious practices unless doing so would cause significant difficulty," he said.

Steve McFarland, director of the Christian Legal Society's Center for Law and Religious Freedom, said in a written statement that the measure would be good for business. "An accommodated worker of faith will be a grateful, faithful worker," McFarland said. "Conversely, forcing an employee to choose between her job and her deepest convictions will ultimately increase job turnover and decrease productivity," he added. Δ

THE

UNACCOM

BY RICHARD T. FOLTIN

Why Congress Needs to Pass the Workplace Religious Freedom Act

religious observance was nondiscriminatory. . . . Where the employer and union had agreed to such a seniority system, the employer had no right to contravene those rules unilaterally." On

October 22, 1996, the New York Court of Appeals, the state's highest court, ruled in favor of Mary Lee Myers against the New York Transit Authority and remanded the case to a remedial intermediate court for determination of actual amount of damages.)

Mohan Singh—a Sikh Muslim 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 was denied the position because he wouldn't shave 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 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.

These cases, and others like them, show that the religiously observant worker is faced with a situation in which employers are allowed, and in some cases even required, to grossly disregard the religious obligations of employees.

For this reason Congress should ensure that its 1972 amendment to the Civil Rights Act of 1964 affords religiously observant employees genuine protection. The Workplace Religious Freedom Act (WRFA), introduced toward the close of the 104th Congress by Senator John Kerry of Massachusetts and Representative Jerrold Nadler of New York—and supported by a

A staff pharmacist and Orthodox Jew, Marvin Brener asked his supervisor to arrange his shifts so that he would not have to work on Saturday, the 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 holiday that his faith forbade him to—was forced to resign. He sued, but the federal court of appeals for the fifth circuit ruled 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."

Three Orthodox Jewish bus drivers asked the New York Transit Authority to schedule them so they didn't have to work on the Sabbath and on Jewish holidays. The Transit Authority would have done so, but astonishingly, the Transport Workers Union—the putative representative of these transit workers—argued that its collective bargaining agreement with the Transit Authority barred any schedule adjustment. Even a voluntary switch of shifts, it said, encroached on the seniority rights of other drivers. Two of the three bus drivers were later fired. (In a similar case the union had refused a request for an accommodation by a Seventh-day Adventist, Mary Lee Meyers. When she failed to appear for work, as scheduled, her firing was upheld by an intermediate New York appellate court which held that even though New York state law requires reasonable accommodation of Sabbath observance, a "collective bargaining agreement which rendered seniority rights superior to accommodation for

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broad range of religious and public-interest organizations—was written to do just that. This law would provide essential clarification for the courts, and for the public, on just what the amendment is supposed to mean.

In 1972 the U.S. Congress amended the Civil Rights Act of 1964—which already forbade employment discrimination on the basis of religion—to include 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. However reasonable on its face, the standard enacted in 1972 has been interpreted by the courts so narrowly that it places relatively little restraint on an employer's ability to refuse a religious accommodation.

The first such interpretation, at least at the High Court level, came in *Trans World Airlines v. Hardison* (1977), in which the Supreme Court ruled that anything more than a *de minimis* cost to an employer would constitute an "undue hardship." The *Hardison* Court concluded that virtually any financial cost to an employer would be more than *de minimis* and thus be "undue," an interpretation that gives precious little protection to the religious employee.

The cases involving Brener, the New York Transit Authority, and Singh show that "undue hardship" has been used to release an employer from accommodating for a range of even noneconomic reasons. According to the courts that rule in these matters, an "undue hardship" occurs if an accommodation would impact "morale," present a technical violation of seniority rules (even where the accommodation does not require another employee to work on, say, Saturday, when the employee's seniority status entitles her not to do so), or impact the employer's "image."

Unfortunately, the definition of "undue hardship" isn't the only difficulty with present interpretation of the 1972 amendment.

In another case, *Ansonia Board of Education v. Philbrook* (1986), the Supreme Court found that "any reasonable accommodation by the employer is sufficient to meet the obligation to accommodate," and that the employer could refuse less onerous, but still reasonable, alternatives to the employee. This treatment is inconsistent with cases of racial and national origin discrimination, in which the Court has held that a plaintiff successfully demonstrates discrimination when he or she proves the existence of alternative employment practices that have less adverse impact on minorities but nevertheless fulfill the employer's business needs.

Then, even assuming an employee gets past the "undue hardship" hurdle, the courts have been unfriendly to religious concerns regarding what a "reasonable accommodation" means. This problem continues especially in the context of employees whose religion forbids them from working on their Sabbath. For instance, in one decision the court found that a work-shift rotation system that would require an employee to violate his or her Sabbath "only" once a month was, without any additional effort by the employer, already a "reasonable accommodation."

In another problematic application of the 1972 amendment, the courts have held that even amicable, commonsense arrangements between employer and employee intended to accommodate a religious practice are not required—or are perhaps prohibited—when they would constitute hypertechnical violations of existing seniority arrangements. Employees have been prevented from engaging in "shift swaps," even when senior Employee A is willing to give up his right not to work on Saturday in order to accommodate the religious needs of fellow Employee B. The rationale is that the employer is first obligated to offer the shift swap to all employees senior to the employee seeking accommodation, even though, if not for Employee A's desire to accommodate the religious practice of Employee B, no such swap

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would have been offered in the first place. In other words, before Employee B can be free from Sabbath work, all employees senior to him must be first allowed to switch with Employee A, which means that anyone senior to Employee B can have the Sabbath off, even if just to play golf.

Similar objections to accommodation, grounded in readings of existing seniority arrangements or applicable labor laws unsympathetic to the needs of the religiously observant, have hindered employers and employees who wish to accommodate religious practice amicably—even when those arrangements have no real-world impact on the interests of other employees. For instance, an employee who cannot work on Saturday for religious reasons can be forbidden to work an extra two hours Monday through Thursday at regular pay if the employer would otherwise be required to pay overtime rates to an employee working additional hours on a weekday.

Of course, the courts do sometimes rule that providing an accommodation does not pose an "undue hardship" on an employer (such as in the Mary Lee Myers case). Even without the courts, employers often find a way—as a matter of decency—to adopt unburdensome measures that can spare the employee an untenable crisis of conscience.

Nevertheless, because enough cases exist in which accommodations have been unfairly denied, America needs the Workplace Religious Freedom Restoration Act. WRFA would define "undue hardship" as "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, thereby undoing the notion that any hardship more than *de minimis* is undue.

WRFA would allow religiously observant employees and their employers—and, where pertinent, sympathetic fellow employees—to make commonsense arrangements to accommodate religious practice, including voluntary shift swaps or modifications of work hours, without being deemed to have violated the rights of fellow employees.

WRFA would require that when several methods of accommodation are available that wouldn't constitute an undue hardship for the employer, the method least onerous to the employee should be used.

And WRFA would require that to qualify as a reasonable accommodation an arrangement

must actually *remove* the conflict (one could hardly imagine that it is necessary to codify this, but it is).

But would not a legislative measure such as WRFA, intended to strengthen the obligation of private employers to accommodate an employee's religious practice, run afoul of the First Amendment's Establishment Clause, which requires that government not favor one religion over another, or religion over nonreligion? In the case of *Estate of Thornton v. Caldor* (1983), the Supreme Court struck down a Connecticut statute that gave employees an absolute right not to work on their Sabbath.

In a concurring opinion in that case, however, Justice Sandra Day O'Connor specifically distinguished the Connecticut statute from the Civil Rights Act's religious accommodation provision: "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 [the Act] calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe that an objective observer would perceive it as an antidiscrimination law rather than an endorsement of religion or a particular religious practice."

In short, the act of the legislature in requiring reasonable accommodation of religious practice in the workplace—especially when coupled with an exemption for employers for whom the provision of even that accommodation would pose an undue hardship—fairly balances the twin constitutional values of government neutrality toward religion under the Establishment Clause and individual religious liberty under the Free Exercise Clause. It balances as well the imperative to avoid placing excessive burdens on employers with the compelling national interest in prohibiting discrimination in the workplace.

Though WRFA didn't get passed in either the House or Senate this year, remedial legislation of the type is long overdue. The enactment of WRFA would present an important step toward ensuring that all members of society, whatever their religious beliefs or practices, will not unfairly be denied equal employment opportunities based on aspects of their identity that are not pertinent to their ability to do the job—a principle of fairness that is part of our national birthright and pride.