Mississippi College Law Review

Volume 1 | Issue 1 Article 14

6-1-1978

Title VII - Religious Discimination - More than De Minimus Cost in Accommodating Employee's Religious Needs in an Undue Hardship to Employer - Trans World Airlines, Inc. v. Hardison

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Custom Citation
1 Miss. C. L. Rev. 43 (1978-1980)

TITLE VII—RELIGIOUS DISCRIMINATION—MORE THAN *DE MINIMUS* COST IN ACCOMMODATING EMPLOYEE'S RELIGIOUS NEEDS IS AN UNDUE HARDSHIP TO EMPLOYER.

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

INTRODUCTION

Hardison was hired by Trans World Airlines (TWA) in June 1967 as clerk in the Stores Department in Kansas City. Like all other employees at the Kansas City facility, Hardison was subject to a seniority system contained in a collective bargaining agreement between TWA and the International Association of Machinists (IAM). The senior workers have first preference for job and shift assignments. In 1968 Hardison joined the World Wide Church of God. The Sabbath for that religion is observed from sundown Friday to sundown Saturday. Hardison informed the manager of the Stores Department of his religious convictions and was allowed to work the 11-to-7 night shift, which did not require Friday night work. Hardison bid for and received a transfer to another department and a day shift. This department operated twenty-four hours per day, seven days a week. Since Hardison was on the bottom of the seniority list, he was asked to work Saturdays.

TWA agreed to permit the union to allow Hardison a change of work assignments to his advantage, but the union was not willing to violate the seniority provisions of the collective-bargaining contract. TWA rejected Hardison's proposal of working a four-day week. Hardison failed to report to work on three consecutive Saturdays and was discharged on grounds of insubordination for refusing to work during his scheduled shift.

After exercising all administrative procedures, Hardison brought action[1] under Title VII of the Civil Rights Act of 1964,[2] charging TWA and IAM with religious discrimination. The federal district court held in favor of the company and the union. The court said that requiring TWA to accommodate Hardison's religious practice would not constitute an establishment of religion and that TWA had met its "reasonable accommodation" obligations. The court said Title VII was applicable to the union, but that the union was not required to violate its seniority system. On appeal[3] the Eight Circuit reversed,

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[1] Hardison v. Trans World Airlines, Inc., 375 F.Supp. 877 (W.D.Mo. 1974).

[2] 42 U.S.C. § 2000-e (1970).

[3] Hardison v. Trans World Airlines, 527 F.2d 33 (8th Cir. 1975).

holding that TWA had practiced religious discrimination and had not made sufficient efforts to accommodate.

On petition for certiorari,[4] the Supreme Court reversed the Eighth Circuit and held that: (1) the seniority system itself was significant accommodation to the religious and secular needs of TWA's employees;[5] (2) an agreed upon seniority system is not required to accommodate religious observances;[6] (3) under 703(h) of Title VII, absent a discriminatory purpose, a seniority system cannot be an unlawful employment practice even if the system is discriminatory in effect,[7] and (5) to require TWA to bear more than a *de minimus* cost in order to give Hardison Saturdays off would be an undue hardship.[8]

There are three issues presented in this case: (1) what is meant by reasonable accommodation and undue hardship; (2) what is the effect of Title VII on unions, particularly where seniority systems are involved; and (3) does the reasonable accommodation duty violate the establishment clause?

REASONABLE ACCOMMODATION

Title VII, the Equal Employment Opportunity Act, was enacted by Congress in 1964. The purpose of the act was to prohibit discrimination against an individual because of race, color, religion, sex, or national origin.[9] The primary interest of Congress by enacting Title VII was to remedy the past history of racial discrimination in employment.[10] Nevertheless, the Title VII drafters added "religion" among the listed prohibitions, seemingly without providing serious thought to the consequences that would occur.[11]

The Equal Employment Opportunity Commission (EEOC), which promulgates regulations under the statute,[12] issued initial guidelines in

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[4] Trans World Airlines v. Hardison, 432 U.S. 63 (1977).

[5] *Id.* at 78.

[6] *Id.* at 79, 80.

[7] *Id.* at 82.

[8] *Id.* at 84.

[9] 42 U.S.C. § 2000e-2 (1970).

[10] H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963). The House Committee on the Judiciary stated that Title VII was incorporated in H.R. 7152 to "commit our Nation to the elimination of many of the worst manifestations of racial prejudice." *Id.* at 2.

[11] Edwards & Kaplan, *Religious Discrimination And The Role Of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 600 (1971); Gordon, *Up Against The Accommodation Rule*, 45 U.M.K.C. L. REV. 56 (1976).

[12] 42 U.S.C. § 2000e-2a (1970). However, the effect and weight to be given to these regulatory guidelines has itself been a controversial issue. *See* Reid v. Memphis Publishing Co., 521 F.2d 512, 520 (6th Cir. 1975) and Griggs v. Duke Power Co., 401 U.S. 424, 433, 434 (1971).

1966.[13] The applicable sections were amended in 1967.[14] The 1967 guidelines placed an affirmative duty on the employer "to make reasonable accommodations to the religious needes of employees . . . where such accommodation can be made without undue hardship on the conduct of the employer's business."[15]

In January 1972 the Act was amended[16] by Congress in S.B. 2515[17] to require the substance of the EEOC guidelines to be incorporated into Title VII. The amendment reads:

> (j) 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.[18]

The uncertainty of the meaning of "unreasonable accommodation" and "undue hardship"[19] has resulted in conflicting judicial interpreta-

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[13] 31 Fed. Reg. 8370 (1966).

[14] EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1976), effective July 13, 1967. § 1605.1.

> (a) Observation of the Sabbath and other religious holidays. Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.
> (b) The Commission believes that the duty not to discriminate on religious grounds required by § 701(a) (1) of the Civil Rights Acts of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
> (c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee reasonable.
> (d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

[15] 29 C.F.R. § 1605.1(b) (1976).

[16] Pub.L. 92-261:86 Stat. 103 (1972).

[17] Senator Randolph of West Virginia, a Seventh-Day Baptist, sponsored this bill with the intentions to erase the law announced by the Sixth Circuit in Dewey v. Reynolds, 429 F.2d 324 (6th Cir. 1970), *aff'd mem. by an equally divided Court*, 402 U.S. 689(1971). *See* 118 Cong. Rec. 705 (1972).

[18] 42 U.S.C. § 2000e (1970) *as amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

[19] Gordon, *Up Against The Accommodation Rule*, 45 U.M.K.C. L. REV. 56, 57, 58, 62 (1972).

tion by the various circuits.[20] It seems that an accommodation is reasonable when there is no undue hardship on the employer. So, the real problem exists in the interpretation of the meaning of "undue hardship."[21]

One meaning suggested by case law is that "undue hardship" is not just hardship, but something "greater than hardship."[22] Another court has held that to deny the rights of some in order to accommodate the religious needs of others is an undue hardship.[23] *Johnson v. U.S. Postal Service*[24] held that anything more than a good-faith effort to accommodate an employee's religious observances and practices would be an undue hardship on the employer.

The inconsistency regarding "undue hardship" and "accommodation" is illustrated in three Sixth Circuit decisions[25] decided within an eight-month period. The first decision was *Cummins v. Parker Seal Company*. Cummins, an employee for Parker Seal Company, was promoted to supervisor after eight years of service. Subsequently, Cummins became a member of the World Wide Church of God and refused to work Saturdays. When fellow supervisors complained about substituting for Cummins on Saturdays, he was discharged. The Sixth Circuit reversed the district court's sustaining of his discharge, stating:

> The objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business. If employees are disgruntled because an employer accommodates its work rules to the religious needs of one employee, under EEOC Regulation 1605 and Section 2000e(j) such grumbling must yield to the single employee's right to practice his religion.[26]

Three months after the *Cummins* decision, the Sixth Circuit confronted the same issue in *Reid v. Memphis Publishing Co.*[27] but this

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[20] Hardison v. T.W.A., 527 F.2d 33 (8th Cir. 1975); Draper v. United States Pipe & Foundry, 527 F.2d 515 (6th Cir. 1975); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975). Also note the intra-conflicting decisions of the Sixth Circuit in Reid v. Memphis Publishing Co. (I), 468 F.2d 346 (6th Cir. 1972) and Reid v. Memphis Publishing Co. (II), 521 F.2d 512 (6th Cir. 1975). *See* Gordon, *Up Against The Accommodation Rule*, 45 U.M.K.C. L. REV. 56, 58 (1976).

[21] Gordon, *Up Against The Accommodation Rule*, 45 U.M.K.C. L. REV. 56, 62 (1976).

[22] Cummins v. Parker Seal Co., 516 F.2d 544, 551 (6th Cir. 1975) *aff'd mem. by an equally divided Court* 429 U.S. 65 (1976).

[23] Reid v. Memphis Publishing Co., 521 F. 2d 512, 521 (6th Cir. 1975).

[24] 497 F.2d 128 (5th Cir. 1974).

[25] Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975) *aff'd mem. by an equally divided Court*, 429 U.S. 65 (1976); Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1976); Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975).

[26] Cummins v. Parker Seal Co., 516 F.2d 544, 550 (6th Cir. 1975).

[27] 521 F.2d 512 (6th Cir. 1975).

time reached an opposite conclusion. The court stated that forced substitution and lowered morale among employees created an undue hardship on employers. Reid, a Seventh-Day Adventist, applied for a copyreader job with Memphis Publishing Company. To hire Reid, the Company would have to assign an unwilling copyreader to take Reid's place on Saturdays. The Company believed this would create a serious morale problem among the other nine copyreaders who would have seniority over Reid.[28] On a second appeal,[29] the court reversed and held that the company had established it burden[30] of proving undue hardship.

Just four months after *Reid*, the Sixth Circuit reaffirmed the rationale of *Cummins*. In *Draper v. United States Pipe and Foundry Company*,[31] the Sixth Circuit held 704(j) "that the grumbling of employees because an employer accommodates its work rules to the religious needs of a single employee is not a chaotic personnel problem or an undue hardship on the employer."[32]

The Supreme Court in *Hardison* acknowledged in its first point that the intent and effect of Section 704(j) of Title VII, 42 U.S.C. § 2000e(j) was to make an unlawful employment practice under section 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees.[33] Although the statutory obligation of an employer to reasonably accommodate his employee was clear, the Court felt that the degree or extent of accommodation required by an employer was never specifically outlined by Congress or by the EEOC guidelines.[34]

In defining the limits of an employer's obligation to accommodate, the Court disagreed with the Court of Appeals' suggested alternatives[35] and found that TWA had made reasonable efforts to ac-

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[28] *Id.* at 516.

[29] Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975). Reid first brought suit against Memphis Publishing Company in 1971. The case was appealed to Sixth Circuit on issues of both racial and religious discrimination. The Sixth Circuit remanded the case to the district court to determine whether the Memphis Publishing Company could make a reasonable accommodation to the religious practices of Reid without undue hardship (468 F.2d 346). The case was appealed again to the Sixth Circuit in 1975.

[30] To determine what constitutes an employer's burden, *see* 29 C.F.R. § 1605.1(c) (1976).

[31] 527 F.2d 515 (6th Cir. 1976).

[32] *Id.* at 520, 521.

[33] Trans World Airlines v. Hardison, 432 U.S. 63, 74 (1977).

[34] *Id.* at 79.

[35] The alternatives suggested by the Court of Appeals were: (1) TWA could have permitted Hardison to work a four-day week, utilizing in his place a supervisor or another worker on duty elsewhere; (2) TWA could have filled Hardison's Saturday shift from other available personnel; (3) TWA could have arranged a swap between Hardison and

commodate.[36] TWA established that it held several meetings with Hardison and attempted to find a solution. TWA did accommodate Hardison's observance of his special religious holidays. TWA authorized the union steward to search for someone who would swap shifts; but the union was not willing to violate the seniority provisions set out in the contract to make a shift change,[37] and TWA felt that it should not take steps inconsistent with a collective bargaining agreement or seniority provision.[38]

The Court concluded: (1) "to require TWA to bear more than a *de minimus* cost in order to give Hardison Saturdays off is an undue hardship,"[39] and (2) "in the absence of clear statutory language or legislative history to the contrary, we will not readily construe Title VII to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."[40]

Justice Marshall in the dissenting opinion joined by Justice Brennan construed the majority opinion as a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices.[41] Justice Marshall also expressed discontent because the majority totally disregarded the legislative history of the 1972 amendment to Title VII. Marshall said the Court concluded in essence that an employer need not grant even minor special privileges to religious observers to enable them to follow their faith.[42]

UNION SENIORITY SYSTEMS

Another issue addressed in *Hardison* is what accommodation, if any, must a union make to an employee when a collective bargaining agreement which typically allocates work by uniformly applying rules based upon seniority is involved.[43] The senior worker is usually allowed preference over other employees for promotion, shifts, layoffs, and other such advantages.[44] The provisions of 42 U.S.C. § 2000e-2(c)

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another employee either for another shift or for the Sabbath days. 527 F.2d 33, 39, 40, 41 (8th Cir. 1975).

[36] Trans World Airlines v. Hardison, 432 U.S. 63, 77 (1977).

[37] *Id.* at 78,79.

[38] *Id.* at 79.

[39] *Id.* at 84.

[40] *Id.* at 85.

[41] Trans World Airlines v. Hardison, 432 U.S. 63, 86 (1977), (Marshall, J., dissenting).

[42] *Id.* at 88. *See also* R. Nixon (Religious Liberty Counsel for General Conference of Seventh-Day Adventist), *Sabbath Work Problems* 4 (June 24, 1977).

[43] 432 U.S. 63, 78-81 (1977). *See* Gordon, *Up Against The Accommodation Rule*, 45 U.M.K.C. L. REV. 56, 64-70 (1976).

[44] Gordon, *Up Against The Accommodation Rule*, 45 U.M.K.C. L. REV. 56,64 (1976).

seem to indicate that an accommodation by the union is required. 42 U.S.C. § 2000e-2(c) provides:

> It is an unlawful employment practice for a labor organization to discriminate against any individual because of his religion or to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

However, a specific provision of the Act which indicates that Congress intended unions to be bound by different standards is the "bona fide seniority provision"[45] which provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

In *Cooper v. General Dynamics*,[46] the Fifth Circuit determined that unions, as well as employers, must reasonably accommodate the religious beliefs of employees provided there is no undue hardship. The appellants in *Cooper* were members of the Seventh-Day Adventist Church. Each appellant had over ten years service with General Dynamics. None of the appellants were members of the union. In 1972, for the first time, General Dynamics and the International Association of Machinists and Aerospace Workers, AFL-CIO, incorporated a union security provision in their collective bargaining agreement, one of the "agency shop" variety.[47]

When appellants realized that they would have to pay dues[48] to maintain their employment, they filed suit in district court where the employer and union prevailed. On appeal[49] the Fifth Circuit reversed, holding that a reasonable accommodation would include per-

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[45] 42 U.S.C. § 2000e-2 (h) (1970). The Supreme Court stated that the unmistakable purpose of this section was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. The Court also held that absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences. Franks v. Bowman Transportation Co., Inc., 424 U.S. 741, 758 (1976).

[46] 533 F.2d 163 (5th Cir. 1976).

[47] Under this provision, union membership was not a condition of continued employment, but payment to the union of a sum equal to its current dues was a condition.

[48] The religious belief of Seventh-Day Adventists is that any support of a labor union, including payment of dues under agency shop provisions, is a godless act inconsistent with the commandment to love one's neighbor. To support a union would be to place one's soul in jeopardy. Cooper v. General Dynamics, 533 F.2d 163, 166 (5th Cir. 1976).

[49] Cooper v. General Dynamics, 533 F.2d 163 (1976).

mitting a continuation of regular work assignments while not paying union dues.[50]

The opposite view is that a union should not be held to the same reasonable accommodation standard as an employer. This view was convincingly argued in several legal comments.[51] The Civil Rights Act itself provides evidence throughout its provisions that Congress did not intend for unions to be bound by the duty to accommodate,[52] since the decision-making power necessary for accommodation is vested in the employer only, and not in the power of the union.[53] So long as the collective bargaining agreement is non-discriminatory, the union's duty is limited to a fair enforcement of the contract on behalf of all its members.[54]

Although significant judicial interpretations of 42 U.S.C. § 2000e-2(h) were provided in racial discrimination cases,[55] prior to *Hardison*,[56] this section had not been argued persuasively in any religious discrimination suits. Considering the application of this section the Court felt that it could not require an agreed-upon seniority system to yield to accommodate religious observances.[57] The opinion of the Court was that the seniority system itself represented a significant accommodation to the needs, both religious and secular, of all TWA employees.[58]

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[50] *Id.* at 163, 164, 169, 170.

[51] Bernstein, *Employer's Duty To Reasonably Accommodate*, 9 CREIGHTON L. REV. 795, 813-816 (1976); Gordon, *Up Against The Accommodation Rule*, 45 U.M.K.C. 56, 64-70 (1976). These comments argued that the relationship between the accommodation rule and the bona fide seniority exception should not create a preference for individual religious practice which supersedes a bona fide collective bargaining agreement. To allow such a discriminatory preference would be contrary to the very thing that the Supreme Court had forbidden in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[52] The Act distinguishes between employers and labor organizations. The EEOC regulation clearly places the obligation to accommodate on the part of the employer where such accomodation can be made without undue hardship on the conduct of the employer's business. 29 C.F.R. § 1605.1 (b) (1976).

[53] Gordon, *Up Against The Accommodation Rule*, 45 U.M.K.C. L. REV. 56, 66 (1976).

[54] *Id.*

[55] Franks v. Bowman Transportation, Inc., 424 U. S. 747 (1976); Griggs v. Duke Power Co., 401 U.S. 424 (1971). The crux of these decisions was that a seniority system is bona fide if (1) there is no intent to discriminate, (2) the system does not have the effect of perpetuating past discrimination, and (3) if the system does have a discriminatory effect it can be justified by a business necessity.

[56] Trans World Airlines v. Hardison, 432 U.S. 63 (1977).

[57] *Id.* at 79. The Court seemed to ignore 42 U.S.C. § 2000e-2(c) which makes it an unlawful employment practice for a labor orgainzation to discriminate against any individual because of his religion. It also appears that the obligation placed on the union in Copper v. General Dynamics, 533 F.2d 163 (5th Cir. 1976) was discarded.

[58] *Id.* at 78.

The Court continued:

> Had TWA nevertheless circumvented the seniority system by relieving Hardison of Saturday work and ordering a senior employee to replace him, it would have denied the latter his shift preference so that Hardison could be given his. The senior employee would have been deprived of his contractual rights under the collective-bargaining agreement.[59]

The Court concluded that Title VII does not require an employer to go that far. In support of this conclusion, the Court cited 42 U.S.C. § 2000e-2(h), reiterating the fact that a bona fide seniority system was not unlawful under Title VII.[60]

ESTABLISHMENT CLAUSE

The constitutional validity of the accommodation rule has been raised repeatedly in religious discrimination cases.[61] In *Dewey v. Reynolds Metals Company*,[62] the Sixth Circuit doubted the validity of the "accommodation rule" because it appeared to violate the Establishment Clause of the first amendment. Most courts, however, have rejected this view.[63]

In *Cummins* the Sixth Circuit extensively discussed the argument that the "reasonable accommodation rule" was an establishment of religion.[64] The court rejected this argument, relying upon the tripar-

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[59] *Id.* at 80.

[60] *Id.* at 81, 82.

[61] Cummins v. Parker Seal Co., 516 F.2d 545 (6th Cir. 1975) *aff'd mem. by an equally divided Court* 429 U.S. 65 (1976); Cooper v. General Dynamics, 553 F.2d 164 (5th Cir. 1976); Dewey v. Reynolds Metals Co., 429 F.2d 326 (6th Cir. 1970) *aff'd mem. by an equally divided Court* 402 U.S. 689 (1971).

[62] 429 F.2d 326, 334, 335 (6th Cir. 1970). Sixth Circuit Judge Weick said "to construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede to or accommodate the religious beliefs of all his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment. It is settled that the Government, in its relations with religious believers and nonblievers, must be neutral. The Government is without power to support, assist, favor or handicap any religion."

[63] *See* Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd mem. by an equally divided Court* 97 S.Ct. 342 (1976); Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir. 1972).

[64] Cummins v. Parker Seal Co., 516 F.2d 540, 551 (6th Cir. 1975). Parker Seal Company argued that the reasonable accommodation rule could require an employer to excuse an employee from Saturday work in order to attend church while an atheistic employee who wanted Saturday for leisure activities would have no similar rights under the Civil Rights Act. Thus, the accommodation rule was alleged to constitute a government-mandated preference for religion impermissible under the First Amendment.

tite "establishment" test set forth in *Committee for Public Education v. Nyquist:* [65]

(1) Purpose Standard - The statute must reflect a clearly secular legislative purpose; (2) Effect Standard - The statute must have a primary effect that neither advances nor inhibits religion; (3) Entanglement Standard - The statute must avoid excessive government entanglement with religion.

The purpose standard was satisfied regarding "the reasonable accommodation rule" because, like Title VII as a whole, the Act's primary purpose was to prevent discrimination in employment and to assure that employees are judged solely on merit, not on nonemployment-related criteria.[66] The effect standard was also satisfied because the primary effect of the rule was to inhibit discrimination, not to advance religion.[67] Finally, the entanglement standard was complied with because the government was not entangled with the issues; only the EEOC and the courts can resolve whether the employer has made a reasonable accommodation and whether an undue burden has resulted.

Although the first amendment establishment clause challenge was addressed, the Court decided *Hardison* on other grounds; but it appears to be beyond dispute that the Act's requiring employers to grant privileges to religious observers as part of the accommodation process[68] is not violative of the first amendment.

ANALYSIS

The Court in *Hardison* stated that provided there is no violation of an agreed-upon seniority provision or collective bargaining agreement, employers, and presumably labor organizations, still must make reasonable accommodations, short of incurring an undue hardship, to the religious observances of their employees or members. However, all of the discussion by the Court focused on one pertinent issue, to what extent must an employer accommodate.

The Court limited "reasonable accommodation" to a *de minimus* cost. The rationale for the Court's selection of such a limitation is not stated. A *de minimus* standard conflicts with the previous require-

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[65] 413 U.S. 756 (1973), *See also* Tilton v. Richardson, 403 U.S. 602, 612-13 (1971). *See* Handler, *Title VII And The Sabbath Observer*, 5 HOFSTRA L. REV. 911, 921, 922 (1977).

[66] Cummins v. Parker Seal Co., 516 F.2d 544, 552 (6th Cir. 1975), *aff'd mem. by an equally divided Court* 97 S.Ct. 342 (1976). *See* Handler, *Title VII And The Sabbath Observer*, 5 HOFSTRA L. REV. 911, 921 (1977).

[67] Cummins v. Parker Seal Co., 516 F.2d 544, 553 (6th Cir. 1975); Handler, *Title VII And The Sabbath Observer*, 5 HOFSTRA L. REV. 911, 922 (1977).

[68] This statement is assumed because the Supreme Court in *Hardison* avoided the first amendment issue or failed to state otherwise.

ment of proving undue hardship. Did not Congress intend for an employer to show a "substantial" loss before there would be an undue hardship? Has not the burden of employers to show they could not accommodate without undue hardship been shifted partially to the employee as a result of this limitation? Does this new rule now make it possible for employers and unions to discriminate intentionally against the religious practices of individuals and to disguise their intentions by proving any accommodation would be more than a *de minimus* cost and thus an undue hardship?

The Court said to allow Hardison to trade shifts with another employee would be a violation of the seniority provisions of the collective-bargaining agreement and thus an undue hardship. Would the Court have ruled differently if the seniority provisions had been part of a company policy but not part of a collective-bargaining agreement? The answer may be implied from the Court's opinion. A labor organization's duty to accommodate religious observances is less than the duty imposed on an employer. As a result of this unequal standard, unfavorable repercussions are possible for Sabbatarians.[69]

The effects of the *Hardison* decision can be seen in several recent court decisions.[70] But in more elementary terms, the following are several assumptions that can be made concerning the impact of this decision on Saturday worshippers:

(1) Sabbatarians will have less inclination to take union affiliated jobs and therefore will seek less paying employment.

(2) Some Sabbatarians will have to choose between their religious preferences and their employment preferences.

(3) Many will be forced to sacrifice years of training and expertise and seek other employment; and

(4) Finally, there will be an overall effect of some underemployment and economic waste.

CONCLUSION

Hardison has completed what seems to be a circle of religious discrimination cases. Beginning with *Dewey*, prior to the 1972

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[69] Sabbatarians are those who worship on the seventh day of the week (Saturday). Orthodox Jews, Seventh-Day Adventists, Seventh-Day Baptists and the World Wide Church of God are religious denominations that require their members to worship on Saturday. It is important to note that the "accommodation rule" applies to all weekend worshippers, Friday through Sunday.

[70] *See* Jordan v. North Carolina, 46 U.S.L.W. 2225 (1977); Chrysler Corp. v. Mann, 15 Fair Empl. Prac. Cas. 788 (1977); Huston v. Auto Workers, Local 93, 15 Fair Empl. Prac. Cas. 326 (1977); Ward v. Allegheny Ludlum Steel Corp., 15 Fair Empl. Prac. Cas. 471 (1977). These decisions cited *Hardison* as controlling and applied its rationale in regard to seniority provisions as well as the *de minimus* cost to employers in accommodating employees.

amendment, the employer's duty to accommodate the religious practices of an employee was narrowly construed. Then in *Cummins*, after the 1972 amendment, the duty was extended by requiring an employer to make substantial efforts to accommodate the religious observances of employees. Finally, in *Hardison* the Court has once again held the employer's duty to accommodate to a minimum.

While subsequent attempts to circumvent the *Hardison* decision have been unsuccessful,[71] whether it represents a final solution to religious discrimination is yet to be determined.

Hunter W. Lundy

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[71] *See* H.R. 8429, 95th Cong., 1st Sess. (1977); H.R. 8670, 95th Cong., 1st Sess. (1977) and H.R. 9809, 95th Cong., 1st Sess. (1977). Congressmen have introduced these bills to amend § 701(j) of the Civil Rights Act of 1964. The acts redefine the word "religion" and the accommodation rule and thus provide increased protection to employees' religious observances and practices.