OOC BROWN BAG LUNCH SERIES
RELIGION IN THE WORKPLACE
SEPTEMBER 27, 2017

I. Introduction

The Congressional Accountability Act of 1995 ("CAA"), 2 U.S.C. §§ 1301 *et seq.*, extends the protection of several anti-discrimination statutes to legislative branch employees, and also prohibits retaliation for protected activity. Title VII of the Civil Rights Act of 1964 prohibits "discrimination based on… religion" in the employment context. 42 U.S.C. § 2000e-2(a). Religion is defined to include "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). The courts have applied these provisions both to prohibit employers from taking adverse actions against employees on the basis of religion and also to require employers to accommodate certain types of religious beliefs and practices.

Additionally, the First Amendment of the U.S. Constitution and the Religious Freedom Restoration Act have been interpreted to impose certain restrictions on religious expression in government workplaces.

II. Types of Claims

Religious discrimination claims primarily take three forms: (1) disparate treatment claims based on the employee's religion; (2) claims that the employee suffered harassment in the workplace because of the employee's religion; and (3) claims that the employer failed to accommodate the employee's sincerely held religious belief. Employees also bring retaliation claims after being denied religious accommodations or after complaining of religious discrimination. The prima facie case and burden shifting framework differ among the various types of claims.

1) Disparate treatment

a) *Francis v. Perez*, 970 F. Supp. 2d 48 (D.D.C. 2013) (Judge Ellen Segal Huvelle), *aff'd*, No. 13-5333, 2014 WL 3013727 (D.C. Cir. May 16, 2014) – The two "essential elements" of a religious discrimination claim are that (i) the plaintiff suffered an adverse employment action (ii) because of the plaintiff's religion. Claims of disparate treatment based on religion follow the familiar *McDonnell Douglas* burden shifting framework. As with other types of Title VII discrimination claims, once the employer has articulated a legitimate non-discriminatory reason for the adverse action, the prima facie analysis

drops out and the court need only decide the central question of whether the employee produced sufficient evidence that the employer's proffered reason was pretext and that the real reason was unlawful discrimination because of the plaintiff's religion. Although the plaintiff in this case established the existence of two adverse actions – placement on a performance improvement plan which led to the denial of a salary increase, and reassignment from a supervisory position to a non-supervisory position – she was unable to show that either of those actions was motivated by religious discriminatory animus rather than by her job performance.

b) *Massaquoi v. Dist. of Columbia*, 81 F. Supp. 3d 44 (D.D.C. 2015) (Judge Reggie B. Walton) – As in all Title VII disparate treatment cases, a plaintiff alleging religious discrimination must plead sufficient facts to give rise to an inference of discrimination based on religion. In this case, where the plaintiff asserted only conclusory allegations that the adverse actions taken against him were based on his national origin, gender, and religion, the court cautioned that "it is not reasonable to infer that just because [plaintiff's supervisors] were of a different national origin, gender, and religion than the plaintiff, all disciplinary actions they took against the plaintiff were motivated by these differences. Such an inference is not reasonable here because the complaint is entirely void of any suggestion that the plaintiff was treated any differently than similarly situated employees who were not of the plaintiff's national origin, gender, or religion."

c) *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014) (Judge Colleen Kollar-Kotelly) – Title VII seeks to protect employees not only from discrimination on the basis of their religious beliefs, but also from forced religious conformity or adverse treatment because they do not hold or follow their employers' religious beliefs. The plaintiff in this case, a gay man, alleged that his conservative Catholic supervisor regularly lectured the plaintiff about his homosexuality and about the plaintiff's different religious views generally. The court held that the plaintiff successfully stated a Title VII claim for religious discrimination, because he "alleged sufficient facts to establish a claim of religious discrimination for failure to follow his employer's religious beliefs."

d) *Porter v. City of Chicago*, 700 F.3d 944 (7th Cir. 2012) – To succeed on a claim for disparate treatment, a plaintiff must demonstrate that she was subjected to an adverse action, which "must materially alter the terms or conditions of employment to be actionable under the antidiscrimination provision of Title VII." In this case, a civilian police department employee failed to show that her schedule change, which created a conflict with her church attendance, caused her any economic loss, because she did not take any leave in order to attend church. She also failed to produce evidence that the reason for her schedule change was to "exploit a known vulnerability" – i.e., her practice of attending church on Sunday mornings – rather than for operational reasons. And the employer's issuance of a "counseling session report" regarding the plaintiff's pattern of taking Sundays off (which she did for medical purposes, not religious reasons) was not an adverse action because it did not materially alter the terms or conditions of her employment.

e) *Ali v. D.C. Gov't*, 810 F. Supp. 2d 78 (D.D.C. 2011) (Judge Henry H. Kennedy, Jr.) – In a disparate treatment claim, a plaintiff must show that he suffered objectively tangible harm. In this case, the plaintiff alleged that he was discriminated against because he was a practicing Muslim who took prayer breaks during the work day. He produced evidence that his supervisor had told him he must decide between his religion and his job, and had threatened to discipline his best friend (a coworker and fellow Muslim), but the court held that he failed to show an adverse action, because "criticism from a supervisor that does not affect a subordinate's employment status or opportunities is not adverse action" and neither is a mere threat that is never carried out, because it does not result in any tangible employment consequences.

f) *Morales v. McKesson Health Solutions, LLC*, 136 F. App'x 115 (10th Cir. 2005) – The plaintiff, a telephone triage nurse, claimed that she was fired because she did not hold the same religious beliefs as her supervisors. Her job duties required her to follow a standard algorithm, but the plaintiff "injected Roman Catholic prayer and dogma into triage calls," and despite being reprimanded for these actions, she "persisted in making religious comments that callers apparently found scary or offensive." She also "engaged in a series of harassing incidents involving co-workers, including telling one co-worker she was under attack by the 'powers of darkness,' and implying that another was Satan, or possessed by Satan[.]" She was fired when she refused to agree to stop discussing religion with callers and coworkers, distributing religious literature, and requesting the inclusion of spiritual information in the algorithm. The court affirmed summary judgment in favor of the employer, holding that "Morales's repeated straying from the algorithms and disruptions of workplace harmony were violations of McKesson's workplace policies, and constitute valid, nondiscriminatory reasons for terminating her employment – reasons that Morales has not shown to be pretextual[.]"

g) *Dixon v. Hallmark Cos.*, 627 F.3d 849 (11th Cir. 2010) – A husband and wife were both fired after they refused to remove religious-themed artwork from the wall of the apartment rental office where they worked. The court held that a reasonable jury could find the supervisor's comment "You're fired too. You're too religious" to constitute direct evidence of intentional religious discrimination.

2) Hostile Work Environment

a) *Baloch v. Kempthorne*, 550 F.3d 1191 (D.C. Cir. 2008) – To prevail on a hostile work environment claim, a plaintiff must show that his employer subjected him to discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. The courts look to the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance.

b) *Turner v. Barr*, 811 F. Supp. 1 (D.D.C. 1993) (Judge Charles R. Richey) – White, Jewish deputy marshal successfully established a hostile work environment based on race and religion. Among other things, he provided sufficient evidence of severe and pervasive

harassment because of his religion, including being made to suffer reference to a Holocaust joke, subjected to comments regarding stereotypes of Jews as being good with money or working as jewelers, and so on. Other instances of hostile treatment did not overtly reference the plaintiff's religion or race, but the court noted that "the harassment need not take the form of incidents with clearly racial or religious overtones," but rather any harassment or other unequal treatment of an employee caused by the employee's protected characteristic may create a violation of Title VII.

c) *Hussain v. Gutierrez*, 593 F. Supp. 2d 1 (D.D.C. 2008) (Judge Henry H. Kennedy, Jr.) – Where the plaintiff alleged that her supervisor made three discrete rude remarks occurring over the course of a year and "on occasion pulled her out of prayer," and where the evidence showed that her supervisor yelled and screamed not only at the plaintiff but at many other people as well, the employer was entitled to summary judgment on the plaintiff's hostile work environment claim.

d) *Byrd v. Postmaster Gen., U.S. Postal Serv.*, 582 F. App'x 787 (11th Cir. 2014) – The plaintiff alleged a hostile work environment based on the conduct of one of her coworkers, who sang religious songs, quoted scripture, preached, and frequently spoke about church and the Bible; referred to the plaintiff as the devil and Satan an unspecified number of times over a six-month period; and on one occasion told the plaintiff that she would go to Hell for not believing in Jesus. The court affirmed summary judgment for the employer, holding that even when the incidents were considered cumulatively, they were not severe or pervasive enough to rise to the level of an objectively hostile work environment.

e) *Rivera v. P.R. Aqueduct & Sewers Auth.*, 331 F.3d 183 (1st Cir. 2003) – In order to succeed on a religion-based hostile work environment claim, a plaintiff must show not only that the offending conduct was severe and pervasive, but also that it occurred because of her religion; she "must show that alleged discriminatory conduct was not 'merely tinged' with remarks abhorrent to her religion but actually was, in either character or substance, discrimination *because of religion*" (emphasis in original). Here, the plaintiff was a devout Catholic woman who was open about her religion and who "would often chide her co-workers for their obscene language and poor work habits, and frequently documented their infractions of [the employer's] regulations. Unsurprisingly, this course of conduct provoked them and they responded in ways apparently meant to offend her." However, the court held that "Such antics, while deplorable, do not amount to a violation of Title VII" because the plaintiff failed to show that her coworkers behaved that way toward her because she was Catholic, rather than because of her conduct toward them.

3) Accommodation

a) *Francis v. Perez*, 970 F. Supp. 2d 48 (D.D.C. 2013) (Judge Ellen Segal Huvelle), *aff'd*, No. 13-5333, 2014 WL 3013727 (D.C. Cir. May 16, 2014) – To establish a prima facie case of religious discrimination based on a failure to provide a reasonable accommodation, plaintiff must show that she (1) held a bona fide religious belief

conflicting with an employment requirement, (2) informed her employer of her belief, and (3) faced an adverse employment action due to her failure to comply with the conflicting employment requirement. Once the plaintiff establishes a prima facie case, the burden shifts to the employer to show that it was unable reasonably to accommodate the plaintiff's religious needs without undue hardship.

b) *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) – An accommodation is considered reasonable if it "eliminates the conflict between employment requirements and religious practices." The employer is not obligated to provide the specific accommodation requested by the employee, as long as the alternative accommodation it offers is reasonable. The Supreme Court stated that it found "no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation." The Court further cautioned: "In enacting § 701(j), Congress was understandably motivated by a desire to assure the individual additional opportunity to observe religious practices, but it did not impose a duty on the employer to accommodate at all costs."

c) *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) – Part of the prima facie case for religious accommodation claims is a showing that the employee informed her employer of the bona fide religious belief that conflicted with a work requirement. In this case, the employer knew that the two plaintiffs were born-again Christians, but there was no evidence in the record that either of them had informed the employer of a religious requirement to evangelize to clients, the activity for which they had been disciplined. As the court explained, "Knowledge that [plaintiffs] are born-again Christians is insufficient to put their employers on notice of their need to evangelize to clients. To hold otherwise would place a heavy burden on employers, making them responsible for being aware of every aspect of every employee's religion which could require an accommodation."

4) Retaliation

a) *Payne v. Salazar*, 899 F. Supp. 2d 42 (D.D.C. 2012) (Judge Colleen Kollar-Kotelly) – Requesting a religious accommodation, by itself, is not protected activity for retaliation purposes under Title VII. In this case, the plaintiff requested a more flexible work schedule so that she could attend Bible school. That request was made and denied twice. The court held that neither request was "opposition" activity; the second one did not mention the prior refusal, and neither request indicated that the plaintiff would consider refusal to be unlawful discrimination. However, a jury could consider any allegedly retaliatory activity that occurred after the plaintiff contacted an EEO counselor.

b) *EEOC v. N. Mem'l Health Care*, No. 15-3675 (DSD/KMM), 2017 WL 2880836 (D. Minn. July 6, 2017) (appeal pending) – The plaintiff claimed that her offer of employment was rescinded in retaliation for her religious accommodation request to not work on Friday nights. Relying on the plain language of the statute, the court held that requesting a religious accommodation is not protected activity under either the opposition clause or the participation clause of Title VII. The court distinguished between religious

accommodation requests and accommodation requests under the Americans with Disabilities Act. (This case is currently on appeal to the Eighth Circuit.)

c) *Rush v. Fed. Nat'l Mortg. Ass'n*, 208 F. Supp. 3d 1 (D.D.C. 2016) (Judge Emmet G. Sullivan) (appeal pending) – Plaintiff requested a work schedule change during Ramadan. The request was ultimately granted, but with an added condition that required her to notify her supervisor when she arrived at work, departed for the day, and spent significant time away from her desk. Plaintiff wrote a letter protesting that condition, and when she was later terminated, she alleged that the termination was retaliatory. The court held that the protest letter was not protected activity because it consisted of a defense of the plaintiff's work performance and did not allege that the condition was unlawful religious discrimination. The court further held that there was substantial record evidence of the plaintiff's work performance deficiencies, and that no reasonable jury could conclude that the employer's rationale for the plaintiff's termination was pretextual. (This case is currently on appeal to the D.C. Circuit.)

d) *Ali v. D.C. Gov't*, 810 F. Supp. 2d 78 (D.D.C. 2011) (Judge Henry H. Kennedy, Jr.) – "Significantly, while unrealized threats cannot constitute adverse action in discrimination cases, they *can* be materially adverse for retaliation purposes.… A credible threat of termination might well dissuade a reasonable employee from pursuing a charge of discrimination…. Moreover, a retaliatory action need not be directed at the party who engaged in the protected conduct that prompted it in order to be materially adverse." In this case, although his disparate treatment and hostile work environment claims ultimately failed, a Muslim plaintiff survived summary judgment on his retaliation claim where he showed that the employer threatened to fire his best friend, who was a coworker and a fellow Muslim, if the plaintiff pursued his complaint.

III. Accommodation

Disparate treatment, hostile work environment, and retaliation claims based on religion involve a similar analysis to other such Title VII claims, such as those involving race or gender. Religious accommodation claims, on the other hand, have some unique elements that warrant further examination.

Employers may be asked to provide a wide variety of religious accommodations. Some of the common accommodations addressed by the courts include: adjustments of work schedules to account for observance of the Sabbath or religious holidays, or for prayer breaks; modifications to dress codes or grooming standards; and alterations to job duties to avoid certain types of tasks or interactions that may go against an employee's beliefs. Employees and employers are expected to work cooperatively to arrive at a reasonable accommodation. The employer is not required to provide the employee's preferred accommodation as long as the accommodation it offers resolves the conflict between the employment requirement and the employee's religious belief or practice. The employer may not be required to provide any accommodation, however, if it can show that it cannot do so without undue hardship. The different types of undue hardships that employers have successfully shown run the gamut, including business impacts,

effects on other employees, safety and security concerns, fear of violating other laws or collective bargaining agreements, and others.

1) Sincere religious belief

a) *EEOC v. Consol Energy, Inc.*, 860 F.3d 131 (4th Cir. 2017) (appeal pending) – The plaintiff, a longtime miner, was denied a requested accommodation to avoid using a biometric hand scanner that he believed would mark him with the Mark of the Beast. The employer argued that the plaintiff had misinterpreted the relevant verses from the Book of Revelation and pointed out that even the plaintiff's own pastor did not share the plaintiff's belief that there was a connection between the scanner and the Mark of the Beast. Nevertheless, the court upheld the jury's verdict in favor of the plaintiff, noting that "It is not Consol's place as an employer, nor ours as a court, to question the correctness or even the plausibility of Butcher's religious understandings. … So long as there is sufficient evidence that Butcher's beliefs are sincerely held – which the jury specifically found, and Consol does not dispute – and conflict with Consol's employment requirement, that is the end of the matter." (A petition for a writ of certiorari was filed with the Supreme Court on September 11, 2017.)

b) *Fallon v. Mercy Catholic Med. Ctr. of Se. Penn.*, 200 F. Supp. 3d 553 (E.D. Pa. 2016) (appeal pending) – The employer, a hospital, required its employees to obtain a flu vaccination unless they submitted an exemption form to obtain a medical or religious exemption. The plaintiff hospital worker was terminated for refusing to get vaccinated, after submitting a 22-page essay stating that he did not belong to an organized religion and presenting his views on vaccines, which the court described as "a lengthy editorial on contentious social issues—*i.e.*, the effectiveness and propriety of vaccinations and the motivations of those who make and sell them." Although the court acknowledged that the plaintiff had strong moral and ethical beliefs about vaccines, it held that those beliefs were not "religious" beliefs and thus not entitled to protection under Title VII. The court explained that the plaintiff's "stated opposition to vaccinations is entirely personal, political, sociological and economic—the very definition of secular philosophy as opposed to religious orientation. To adopt [his] argument that he need only show a strongly held moral or ethical belief in lieu of a sincere religious belief would contravene Third Circuit and Supreme Court precedent and would potentially entitle anyone with 'strongly held' beliefs on any topic to protection under Title VII's religious discrimination provision." (This case is currently on appeal to the Third Circuit.)

c) *Reed v. Great Lakes Cos.*, 330 F.3d 931 (7th Cir. 2003) – Atheism is considered a religion for purposes of Title VII, as it requires an individual to "tak[e] a position on divinity." The court noted that "religious freedom includes the freedom to reject religion."

d) *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013) – A plaintiff's "sincerity" in espousing a religious practice is largely a matter of individual credibility, and is rarely challenged. Such inquiries must be handled with a light touch, to avoid the court straying

into the forbidden realm of religious inquiry. Claims of religious belief in a particular practice are generally "accepted on little more than the plaintiff's credible assertions."

e) *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981) – The court identified three "useful indicia" to determine whether a belief is "religious" in nature: (1) a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters; (2) a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching; and (3) a religion often can be recognized by the presence of certain formal and external signs.

f) *Ali v. Se. Neighborhood House*, 519 F. Supp. 489 (D.D.C. 1981) (Judge Joyce Hens Green) – "Sincere beliefs, meaningful to the believer, need not be confined in either source or content to traditional or parochial concepts of religion. … [a] belief is protected if the belief sought to be protected is 'religious' in that person's own scheme of things and if it is sincerely held."

g) *Peterson v. Wilmur Commc'ns, Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002) – Plaintiff was a follower of Creativity, a white supremacist movement that he argued was a religion. The court agreed, holding that by demonstrating that he was a minister in the World Church of the Creator who worked to put its teachings into practice on a daily basis, he carried his burden to show that "These beliefs occupy for plaintiff a place in his life parallel to that held by a belief in God for believers in more mainstream theistic religions." The court noted that "Title VII protects against discrimination on the basis of religion, regardless of the court's or anyone else's opinion of the religion at issue. Plaintiff has shown that Creativity functions as religion in his life; thus, Creativity is for him a religion regardless of whether it espouses goodness or ill.

h) *EEOC v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377 (E.D.N.Y. 2016) – Employees alleged that they were subjected to religious discrimination in the workplace because they rejected or disagreed with certain practices and beliefs that their supervisors imposed on them, which they argued constituted a religion. The court analyzed the supervisors' "Onionhead" and "Harnessing Happiness" programs, which were aimed at improving employee morale, and determined that they did in fact constitute a religion for Title VII purposes. The employer argued that the program was simply a "multi-purposes conflict resolution tool," but the court cautioned, "That an individual or entity purportedly holding the beliefs rejects the characterization of the beliefs as religious is not dispositive," and noted that courts have increasingly relied on an expansive definition of religion, and so "In accordance with the generous parameters defining religion, courts regularly determine that non-traditional beliefs can qualify as religions." To evaluate whether a program is religious in nature, the court looks at whether it addresses "ultimate concerns" – i.e., concerns that are more than intellectual and would cause a believer to "categorically disregard elementary self-interest in preference to transgressing its tenets." Evidence in the record suggesting that the Onionhead/Harnessing Happiness program required "chanting" and discussions of "God, transcendence, and souls," with a "strong emphasis on spirituality," led the court to conclude that the program addressed these "ultimate concerns."

i) *Sidelinger v. Harbor Creek Sch. Dist.*, No. CIV 02-62 ERIE, 2006 WL 3455073 (W.D. Pa. Nov. 29, 2006) – In some circumstances it may be appropriate for an employer to inquire into the sincerity of an employee's belief and whether that belief is in fact religious before providing a special accommodation. In this case, where the employee refused to wear his ID badge on supposedly religious grounds, the court opined that "Mr. Sidelinger's objection to wearing the ID Badge – that it goes against his moral and religious convictions and would require him to engage in the 'sin of pride and the sin of hypocrisy' – is a belief that cries out for explanation as a 'religious' belief. … Thus, it is expected that an employer would make an inquiry of such a religious belief." Because the employee refused to provide the employer with any explanation for why his objection was religious in nature – even within the plaintiff's own "scheme of things" – the court held that he failed to establish a prima facie case for failure to accommodate. "If Mr. Sidelinger's position were correct, it would permit any employee to claim almost any imaginable belief as a religious belief that conflicts with a work requirement."

2) Adverse action

a) *EEOC v. Consol Energy, Inc.*, 860 F.3d 131 (4th Cir. 2017) (appeal pending) – To show constructive discharge, a plaintiff must prove objective intolerability – i.e., circumstances of discrimination so intolerable that a reasonable person would resign. The plaintiff in this case carried his burden to show constructive discharge where he offered "substantial evidence that [he] was put in an intolerable position when Consol refused to accommodate his religious objection, requiring him to use a scanner system that [he] sincerely believed would render him a follower of the Antichrist, 'tormented with fire and brimstone.'" (A petition for a writ of certiorari was filed with the Supreme Court on September 11, 2017.)

b) *Solomon v. Office of the Architect of the Capitol*, No. 02-AC-34 (CV, RP), 2003 WL 25795031 (OOC Hearing Officer May 9, 2003), *aff'd*, 2003 WL 25795030 (OOC Board Oct. 24, 2003) – The employee failed to show that the leave restriction imposed by the employing office was an adverse action, because the only condition imposed upon him that was not imposed on all employees was the requirement that he provide medical documentation regardless of the length of his absence, rather than only for absences of three or more consecutive days. The Hearing Officer held, and the Board affirmed, that this could not be considered a materially adverse consequence.

c) *Lawson v. Washington*, 296 F.3d 799 (9th Cir. 2002) – A State Patrol trooper cadet resigned because job requirements to salute the flag and take an oath of allegiance conflicted with his religious beliefs as a Jehovah's Witness and the employer advised him that he had no alternative but to comply with the requirement. Although the employment manual stated that rule violation could result in discipline or termination, the plaintiff had not actually been disciplined or threatened with discipline for declining to salute the flag or take the oath of allegiance. The court therefore deemed the resignation voluntary and not a constructive discharge, so the plaintiff was unable to satisfy the adverse action prong of his prima facie case.

d) *Nurridin v. Bolden*, 40 F. Supp. 3d 104 (D.D.C. 2014), *aff'd*, 818 F.3d 751 (D.C. Cir. 2016) (Judge John D. Bates) – For an employment action to qualify as "adverse," the employee must experience materially adverse consequences affecting the terms, conditions, or privileges of his employment or his future employment opportunities. Not everything that makes an employee unhappy is an actionable adverse action.

e) *Isse v. Am. Univ.*, 540 F. Supp. 2d 9 (D.D.C. 2008) (Judge Colleen Kollar-Kotelly) – Plaintiff, a Muslim bus driver, alleged that his employer repeatedly refused his request to schedule his Friday lunch breaks to correspond with his Friday prayer sessions. Plaintiff failed to establish a prima facie case of failure to accommodate, because he did not allege that he chose to attend the prayer sessions rather than driving his assigned route. However, the court pointed out that the denial of the request could potentially serve as evidence in support of the plaintiff's claim that his subsequent termination was motivated by anti-Muslim animus.

f) *Francis v. Perez*, 970 F. Supp. 2d 48 (D.D.C. 2013), *aff'd*, No. 13-5333, 2014 WL 3013727 (D.C. Cir. May 16, 2014) (Judge Ellen Segal Huvelle) – Plaintiff, a Seventh-Day Adventist, requested Friday evenings and Saturdays off to observe her Sabbath, and her employer denied the request. Her failure-to-accommodate claim failed because there was no evidence that she ever failed to comply with the conflicting employment requirement by missing work on a Friday evening or Saturday when her presence was otherwise required; indeed, after the request was denied, the issue never came up again. Thus, she could not show that she was disciplined or threatened with discipline as a result of a conflict between her religious belief and an employment requirement.

g) *Mitchell Univ. Med. Ctr., Inc.*, No. 3:07CV-414-H, 2010 WL 3155842 (W.D. Ky. Aug. 9, 2010) – Plaintiff nurse was asked to stop engaging in discussions regarding her religion after several coworkers complained that the conversations were making them uncomfortable. The plaintiff acknowledged "that she received no formal discipline, no loss in benefits or pay and no change in job responsibilities or title. The discipline consisted of an order not to discuss religion at work." The court held that this discipline was "minimal" and "not sufficient to meet the adverse employment action test," so the plaintiff failed to make out a prima facie claim of religious discrimination.

h) *Plotkin v. Shalala*, 88 F. Supp. 2d 1 (D.D.C. 2000), *aff'd*, No. 00-5176, 2000 WL 1838861 (D.C. Cir. Nov. 15, 2000) (Judge James Robertson) – Jewish probationary employee challenged her termination on, *inter alia*, grounds of religious discrimination. She claimed that her complaints to management about the agency's display of Christmas decorations in the office were used as a factor in the decision to terminate her employment. Her claim failed because the employer produced sufficient evidence that management made the decision to terminate the plaintiff *before* she lodged the complaint about the Christmas decorations, even though it did not inform her of the termination until later.

3) Undue hardship

a) *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) – The employee requested to have Saturdays off to observe his Sabbath, but granting this request would have violated the seniority system established through collective bargaining, and allowing the employee to work only four days a week would have impaired critical functions of the airline's operations or required the employer to pay another employee premium overtime pay. The Supreme Court held that all of those options would have constituted undue hardship, and that by meeting several times with the employee to try to find a solution and by authorizing the union steward to try to find someone to swap shifts with the plaintiff, the employer satisfied its obligation to try to reasonably accommodate the employee. The Court emphasized that (1) the duty to accommodate does not require an employer to take steps inconsistent with an otherwise valid collective bargaining agreement, and (2) requiring the employer "to bear more than a de minimis cost" to accommodate an employee's religious beliefs constitutes an undue hardship. The Court concluded, "[T]he paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."

b) *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) – The "undue hardship" inquiry is relevant "only where the employer claims that it is unable to offer any reasonable accommodation without such hardship." If an employer offers an employee a reasonable accommodation, even if it is not the specific accommodation that the employee requested, then the employer has satisfied its obligation and is not required to show that the employee's preferred alternatives would constitute undue hardship.

Business impacts

c) *Solomon v. Office of the Architect of the Capitol*, No. 02-AC-34 (CV, RP), 2003 WL 25795031 (OOC Hearing Officer May 9, 2003), *aff'd*, 2003 WL 25795030 (OOC Board Oct. 24, 2003) – The complainant, a Senate restaurants worker, requested approximately two weeks off for "Christmas vacation," both to celebrate the birth of Christ and to reflect upon what Christ meant in his life. Not only did he fail to follow the employer's requirement of one week's advance notice when requesting leave of two or more consecutive days – a requirement that was intended to allow managers to plan ahead to ensure that an acceptable level of service is provided – but other employees had already submitted leave requests, and if the complainant was absent the restaurants would have been too short-staffed, so the request was denied. The Hearing Officer found that to grant the complainant his requested time off would have resulted in both loss of efficiency and higher costs: bringing in an unqualified worker from a temporary agency would have caused a lack of efficiency, and paying the wages of the temporary employee would result in the employing office incurring higher costs. Therefore, under *TWA v.*

Hardison, the AOC would have suffered undue hardship, and did not violate Title VII when it denied the complainant's request.

d) *EEOC v. Rent-a-Ctr., Inc.*, 917 F. Supp. 2d 112 (D.D.C. 2013) (Judge Royce C. Lamberth), *appeal dismissed*, No. 13-5085, 2013 WL 4711673 (D.C. Cir. July 30, 2013) – The employer's denial of a store manager's request not to work on Saturdays to accommodate his observance of the Sabbath did not violate Title VII because the accommodation would unduly burden the employer's business. It was uncontested that Saturdays were the busiest and most important day, that the store manager position was the most important position in the store, and that the company's general policy is to require all store managers to work on Saturdays. Citing the Supreme Court's opinion in *TWA v. Hardison*, the court held that the employer was not required to provide the requested accommodation, because "Leaving the store without a Store Manager on Saturdays would cause an 'undue hardship' to RAC by 'impair[ing] [critical] functions'—it would deprive the store of the significant supervisory, managerial, customer-care and other functions that RAC Store Managers are charged with at the very time when these functions are most needed. Because of the importance of the position, the centrality of Saturdays in RAC's weekly cycle, and of RAC's scheduling policy reflect[ing] these two facts by requiring all Store Managers to work on Saturdays, this Court is satisfied that the evidence shows that leaving the position blank on Saturdays imposes 'more than a de minimis cost' on the conduct of RAC's business."

e) *Noesen v. Med. Staffing Network, Inc.*, 232 F. App'x 581 (7th Cir. 2007) – A Roman Catholic pharmacist alleged failure to accommodate because the employer refused to exempt him from all contact with customers seeking to fill prescriptions for birth control. The employer had already made several adjustments in an effort to accommodate the plaintiff's religious beliefs, including relieving him from filling prescriptions for birth control, handling birth control medication, and performing checks on birth control prescriptions, but the employee wanted to avoid all customer interaction either at the counter or by phone until after the customers had been pre-screened by other pharmacy workers to ensure that they were not seeking birth control. The court held that this accommodation would impose an undue hardship because it would require the plaintiff's coworkers to assume a disproportionate workload or to be diverted from their regular work, which could also impose an undue cost of uncompleted work on the employer.

f) *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) – In response to a diversity campaign that included posters featuring gay employees, the plaintiff posted Biblical verses in his cubicle that address homosexuality as a sin, in a typeface large enough for coworkers, customers, and others to see. His supervisor removed the scriptures, based on a determination that they were offensive to certain employees and that posting the verses violated the company's anti-harassment policy. The employee acknowledged that the passages were "intended to be hurtful" and that he hoped his gay and lesbian coworkers would read the passages, repent, and be saved. He requested that the company accommodate his religious beliefs either by allowing him to keep the scriptures posted in his cubicle or by removing the "gay" diversity posters (in which case

he would take down the scriptures). The company refused both requests, but the employee put the scriptures back up and was eventually terminated for insubordination. The employee's claim for failure to accommodate his religious belief failed, because as the court explained, "it is readily apparent that the only accommodations that Peterson was willing to accept would have imposed undue hardship upon Hewlett-Packard." The company satisfied its duty to negotiate possible accommodations by holding at least four meetings with the plaintiff, during which "they explained the reasons for the company's diversity campaign, allowed Peterson to explain fully his reasons for his postings, and attempted to determine whether it would be possible to resolve the conflict in a manner that would respect the dignity of Peterson's fellow employees. Peterson, however, repeatedly made it clear that only two options for accommodation would be acceptable to him," both of which the court found would impose undue hardship on the company: "Peterson's first proposed accommodation would have compelled Hewlett-Packard to permit an employee to post messages intended to demean and harass his co-workers. His second proposed accommodation would have forced the company to exclude sexual orientation from its workplace diversity program. Either choice would have created undue hardship for Hewlett-Packard because it would have inhibited its efforts to attract and retain a qualified, diverse workforce, which the company reasonably views as vital to its commercial success; thus, neither provides a reasonable accommodation."

Violations of other laws or collective bargaining agreements

g) *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013) – Federal employee was terminated after insisting on wearing a ceremonial 3-inch sword into the federal building where she worked. There was no dispute that wearing the sword, known as a kirpan, was a sincerely held religious belief pursuant to her formal initiation in the Sikh religion. However, wearing the blade would have violated federal law, and "an employer need not accommodate an employee's religious practice by violating other laws." The employee's suggested accommodation of working from home would have imposed more than a de minimis hardship on her employer, and her other requested accommodations were not viable because they would still have run afoul of the law. Therefore the employer did not violate Title VII when it terminated her.

h) *Matthews v. Wal-Mart Stores, Inc.* 417 F. App'x 552 (7th Cir. 2011) – Wal-Mart fired an employee after she screamed at a gay coworker that homosexuals are sinners who are going to hell, which the company found to be a violation of its zero-tolerance Discrimination and Harassment Prevention Policy. The employee brought a religious discrimination claim, alleging that Wal-Mart fired her because of her religious beliefs about homosexuality, but the court disagreed, explaining that "if Matthews is arguing that Wal-Mart must permit her to admonish gays at work to accommodate her religion, the claim fails. … Wal-Mart fired her because she violated company policy when she harassed a coworker, not because of her beliefs, and employers need not relieve workers from complying with neutral workplace rules as a religious accommodation if it would

create an undue hardship. In this case, such an accommodation could place Wal-Mart on the 'razor's edge' of liability by exposing it to claims of permitting workplace harassment."

i) *Bhatia v. Chevron U.S.A., Inc.* 734 F.2d 1382 (9th Cir. 1984) – A newly-adopted company policy required employees who may be exposed to toxic gases to be clean-shaven so that they could wear respirators with an airtight face seal. The plaintiff, a Sikh machinist who had been working for the company for several years, requested an exemption from the policy because his religion prohibited him from shaving his beard. The employer attempted to reassign him to another position that would not require the use of a respirator; the plaintiff initially rejected those offers, but ultimately accepted a transfer to a janitorial position, and then sued the company for violating Title VII. The court affirmed an award of summary judgment in favor of the employer, holding that retaining the employee in a machinist position would have created an undue hardship: either the company would have risked violating the California Occupational Safety and Health Act by allowing the plaintiff to work without a respirator, or it would have had to completely revamp its duty assignment procedure and force the plaintiff's coworkers to assume a disproportionate share of the hazardous work so that he wouldn't be exposed to toxic gases.

j) *Dixon v. Hallmark Cos.*, No. 3:08-cv-620-J-25 JRK, 2011 WL 13175784 (M.D. Fla. Sept. 30, 2011) – A husband and wife were both fired after they refused to remove religious-themed artwork from the wall of the apartment rental office where they worked. The evidence showed that the employer knew that the plaintiffs were dedicated Christians who had previously opposed policies prohibiting the public display of religious items, so they successfully established a prima facie case for failure to accommodate. However, the employer received federal funding and was therefore subject to the Fair Housing Act, and the court agreed with the employer that "allowing the painting to remain on display posed a risk that Defendants could have been sanctioned for violating the FHA" and therefore constituted an undue hardship. Summary judgment was granted in favor of the employer on the failure to accommodate claim.

k) *Rasch v. Nat'l R.R. Passenger Corp.*, Civ. A. No. 90-0913 (JHG), 1991 WL 221270 (D.D.C. Oct. 11, 1991) (Judge Joyce Hens Green), *aff'd*, 993 F.2d 913 (D.C. Cir. 1993) – Because the employer could not accommodate the employee's request to observe the Sabbath without violating the seniority system established in a collective bargaining agreement, the court held that granting the accommodation request would pose an undue hardship, and therefore the employee's claim failed.

Safety and security

l) *EEOC v. Kelly Servs., Inc.*, 598 F.3d 1022 (8th Cir. 2010) – A Muslim worker sued a temporary employment agency because it failed to refer her for placement with a commercial printing company due to her refusal to remove her head covering. The printing company's dress policy prohibited headwear and loose-fitting clothing because

of the potential hazard of apparel getting caught in moving parts of the machinery. Although this was a case of disparate treatment rather than religious accommodation, the court included a footnote acknowledging that "safety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer's business."

m) *EEOC v. GEO Grp., Inc.*, 616 F.3d 265 (3d Cir. 2010) – Female Muslim prison security guards brought a claim against their employer over its new dress policy prohibiting the wearing of all headgear, which was interpreted to include headscarves known as khimars. The women continued to wear the khimars and were disciplined as a result. The court affirmed the holding of the lower court granting summary judgment in favor of the employer. The lower court had credited the testimony of two wardens that the khimars posed a security risk for several reasons: they could be grabbed and used to choke the guards, they could be used to smuggle contraband into the facility, and they also made it more difficult to identify individuals on video surveillance. A lengthy and strongly worded dissent criticized one of the wardens' testimony as speculative, but the majority agreed with the employer's argument that the prison "should not have to wait for a khimar to actually be used in an unsafe or risky manner, risking harm to employees or inmates, before this foreseeable risk is considered in determining undue hardship."

Effect on coworkers

n) *Mitchell v. Univ. Med. Ctr., Inc.*, No. 3:07CV-414-H, 2010 WL 3155842 (W.D. Ky. Aug. 9, 2010) – A nurse brought religious discrimination claims under the Kentucky Civil Rights Act (which is analyzed using the same framework as Title VII) alleging that the hospital where she worked discriminated against her by instructing her to stop talking to her coworkers about a religious revelation she'd had, after several of her coworkers complained. The court held that, on the facts of this case, the employer was not required to accommodate the plaintiff's desire to discuss her religion with her colleagues: "Mitchell wants to be able to have religious conversations with co-workers, including conversations about the dates God sent her, and whether they could be the date for the end of the world or the Antichrist. Such conversations, the record shows, were offensive and troubling to other employees. They also violated the Hospital's harassment policies. Any accommodation of Mitchell's behavior would necessarily infringe on the rights of other employees. Therefore, there is no way to accommodate Mitchell's religious beliefs without imposing an undue burden on the Hospital."

o) *Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337 (8th Cir. 1995) – The plaintiff insisted on wearing what the court described as "a graphic anti-abortion button" featuring a picture of an 18- to 20-week-old fetus and anti-abortion slogans. The button "caused immediate and emotional reactions from co-workers" who found it "offensive and disturbing," and the employer asked the plaintiff to cover it up, but she refused. It was undisputed that her wearing of the button caused disruptions in the workplace, and one supervisor noted a 40% decline in productivity since the plaintiff began wearing the button. The employer

proposed three accommodation options: to wear the button only in her cubicle, to wear a different button with the same message but that did not feature the photograph, or to cover up the button while at work. Although the first two options would not have been reasonable because it was the plaintiff's sincerely held belief that she was required to wear that particular button at all times, the court held that the option to cover up the button was a reasonable accommodation, and that the employer successfully showed undue hardship based on the evidence of the impact the button was having on the plaintiff's coworkers. The plaintiff argued in her brief that her supervisors "should have simply instructed the troublesome co-workers to ignore the button and get back to work," but the court rejected that argument, because "To simply instruct Wilson's co-workers that they must accept Wilson's insistence on wearing a particular depiction of a fetus as part of her religious beliefs is antithetical to the concept of reasonable accommodation. … Title VII does not require an employer to allow an employee to impose his religious views on others."

p) *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996) – Plaintiff was terminated after sending two letters to coworkers at their homes, criticizing their conduct and urging them to accept God into their lives. The court found that, even if the plaintiff had told her employer that her religion required her to send such letters, it would have been an undue hardship for the employer to grant her an accommodation: "where an employee contends that she has a religious need to impose personally and directly on fellow employees, invading their privacy and criticizing their personal lives, the employer is placed between a rock and a hard place. If Tulon had the power to authorize Chalmers to write such letters, and if Tulon had granted Chalmers' request to write the letters, the company would subject itself to possible suits from [her coworkers who received the letters] claiming that Chalmers' conduct violated *their* religious freedoms or constituted religious harassment. Chalmers' supervisory position at the Richmond office heightens the possibility that Tulon (through Chalmers) would appear to be imposing religious beliefs on employees."

Image and uniformity

q) *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 2940 (2005) – A cashier refused to comply with her employer's policy prohibiting the wearing of facial jewelry, insisting on wearing an eyebrow ring that she alleged was part of her religion as a member of the Church of Body Modification. The employer had offered her two possible accommodations – covering the eyebrow ring with a band-aid or replacing it with a clear retainer – but she rejected both of those options, arguing that the tenets of her religion required her to display her body piercings at all times. She asserted that the only reasonable accommodation would be to excuse her from the dress code, allowing her to wear facial jewelry to work, but the employer responded that this accommodation would interfere with its ability to maintain a professional appearance, thereby creating an undue hardship for its business. The court affirmed summary

judgment in favor of the employer, describing the purpose behind Costco's personal appearance standards as important to its business goal of customer service, and explaining that granting an outright exemption to the dress code for the plaintiff "would be an undue hardship because it would adversely affect the employer's public image. Costco has made a determination that facial piercings, aside from earrings, detract from the 'neat, clean and professional image' that it aims to cultivate. Such a business determination is within its discretion."

r) *Daniels v. City of Arlington, Tex.*, 246 F.3d 500 (5th Cir. 2001), *cert denied*, 534 U.S. 951 (2001) – A police department did not violate Title VII by refusing to allow a police officer to wear a gold cross pin on his uniform, which would contravene its facially-neutral, generally-applicable no-pin policy. The Police Chief offered three possible accommodations: allowing the officer to wear the pin under his clothing, to wear a bracelet or ring instead of the pin, or to transfer to a non-uniformed position where he could continue to wear the pin. The officer rejected all three options and continued to wear the pin, and was ultimately fired for insubordination. The court upheld summary judgment in favor of the police department, holding that "The only accommodation Daniels proposes is unreasonable and an undue hardship for the city as a matter of law. A police department cannot be forced to let individual officers add religious symbols to their official uniforms."

s) *Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009) – A Muslim police officer requested to wear a headscarf while on duty as a religious accommodation. The request was denied, but the officer continued to wear the headscarf for several days in a row and was subsequently terminated. The Third Circuit affirmed the lower court's grant of summary judgment in favor of the city, holding that granting the plaintiff's request would have imposed an undue hardship on the police department. The court cited several Supreme Court precedents regarding the importance of dress regulations in police forces and the military, and agreed with the city's argument that "the essential values of impartiality, religious neutrality, uniformity, and the subordination of personal preference would be severely damaged to the detriment of the proper functioning of the police department" if officers were allowed to wear religious clothing or symbols.

Speculative hardship

t) *Haring v. Blumenthal*, 471 F. Supp. 1172 (D.D.C. 1979) (Judge Harold H. Greene) – The plaintiff, an IRS tax specialist, was denied a promotion because of his unwillingness to handle tax exempt status applications from persons or groups that advocated abortion or other practices to which he objected based on his sincerely held religious beliefs. The IRS argued that even though the burden of accommodating the plaintiff would be small, involving reassignment of a very small percentage of applications to other employees, it feared that such an accommodation would set a precedent and eventually complicate or undermine its operations to an unreasonable degree if other employees came forward requesting similar accommodations. The court rejected this argument, explaining: "In the

absence of authoritative guidance, it seems to this Court that 'undue hardship' must mean present undue hardship, as distinguished from anticipated or multiplied hardship. Were the law otherwise, any accommodation, however slight, would rise to the level of an undue hardship because, if sufficiently magnified through predictions of the future behavior of the employee's co-workers, even the most minute accommodation could be calculated to reach that level."

u) *Weber v. Roadway Express, Inc.*, 199 F.3d 270 (5th Cir. 2000) – A truck driver alleged failure to accommodate his religious beliefs based on his employer's refusal to exempt him from driving with women. Under the company's dispatching policy, drivers could be scheduled to make overnight runs in a two-person team, but the plaintiff asserted that as a Jehovah's Witness he was prohibited from making overnight runs with a woman who was not his wife. The court held that granting the employee's requested accommodation would pose an undue burden on the employer because of its potential adverse effects on other drivers, who could have their time off cut short or be required to make shorter and less valuable runs than they would have had otherwise. According to the court, it did not matter that these hypothetical harms were speculative, because "federal law does not require [an employer] to wait until it felt the effects of [an accommodation] proposal" in order to show undue hardship, and in this case the employer's "hypotheticals regarding the effects of accommodation on other workers [were] not too remote or unlikely to accurately reflect the cost of accommodation."

v) *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989) – Where an employer argues undue hardship, the proffered hardship must be "actual," and an employer cannot rely merely on speculation. In this case, the company refused to hire an applicant for a truck driver position because he informed them that as a member of the Native American Church he occasionally used peyote in religious ceremonies. The company argued that it would have been exposed to increased liability if it hired the plaintiff, but the court rejected that argument, explaining that "We are convinced that the risks of increased liability created by hiring Toledo are too speculative to qualify as undue hardship. As the district court found, accommodating Toledo's practices by requiring him to take a day off after each ceremony would virtually eliminate the risk that the influences of peyote would cause an accident or be a factor in subsequent litigation."

5) Cooperation

a) *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024 (8th Cir. 2008) – The intended purpose of Title VII's reasonable accommodation provision is to foster "bilateral cooperation" in resolving an employee's religion-work conflict. "Bilateral cooperation under Title VII requires employers to make serious efforts to accommodate a conflict between work demands and an employee's sincere religious beliefs. But it also requires accommodation by the employee, and a reasonable jury may find in many circumstances that the employee must either compromise a religious observance or practice, or accept a less desirable job or less favorable working conditions."

b) *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220 (3d Cir. 2000) – A nurse alleged that her employer terminated her for refusing to participate in abortions deemed necessary in situations where the mother's life was threatened. She rejected the hospital's offer to transfer her to the NICU, and when the hospital invited her to meet with the Human Resources department to discuss other nursing positions, she refused. The court held that once the employer initiated discussions with that proposal, the employee had a duty to cooperate in determining whether the proposal was reasonable, and by refusing to meet with Human Resources, the employee failed to satisfy her duty. The court also rejected her speculative argument, presented with no evidence, that she refused to discuss any transfers because lateral transfers would lead to long-term economic consequences and career impacts. The court concluded that "Her unwillingness to pursue an acceptable alternative nursing position undermines the cooperative approach to religious accommodation issues that Congress intended to foster."

c) *Porter v. City of Chicago*, 700 F.3d 944 (7th Cir. 2012) – The plaintiff alleged that her employer failed to accommodate her religious practice of church attendance on Sundays. The employer had suggested that she could switch to a later shift that would have allowed her to attend services, but she argued that this suggestion did not satisfy the employer's obligation to reasonably accommodate her because the employer did not formally invite her to apply for the later shift or inform her of how to request such a change. The court rejected this argument, because although "bilateral cooperation" is encouraged in the reasonable accommodation process, employers are not required to provide this type of "hand-holding… for an offer of an accommodation to be sufficient under Title VII."

d) *Virts v. Consol. Freightways Corp. of Del.*, 285 F.3d 508 (6th Cir. 2002) – An employee must actually request an accommodation from his employer; it is not enough to argue afterward that the employer could have provided one. In this case the plaintiff, a born-again Christian truck driver, refused to go on overnight "sleeper runs" with drivers of the opposite sex, but it was not until his motion for partial summary judgment on his Title VII religious discrimination claim that he actually suggested accommodations that he believed the employer could have made. Before holding that all of the accommodations would have posed an undue hardship to the employer anyway, the court pointed out that "the fact that Plaintiff failed to request these accommodations from Defendant is in itself fatal to Plaintiff's claim."

e) *Reed v. Great Lakes Cos.*, 330 F.3d 931 (7th Cir. 2003) – "Title VII imposes a duty on the employer but also a reciprocal duty on the employee to give fair warning of the employment practices that will interfere with his religion and that he therefore wants waived or adjusted." Even where an employer knows that an employee follows a certain religion, "employers are not charged with detailed knowledge of the beliefs and observances associated with particular sects," and so the courts do not assume that employers are aware of employees' needs for particular accommodations.

f) *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989) – The plaintiff filed a Title VII claim alleging that the company refused to hire him as a truck driver after he

informed them that he occasionally used peyote in religious ceremonies. The company argued that the plaintiff did not engage in the cooperative process required for religious accommodation requests. The court disagreed, holding that the employee's duty to cooperate is triggered by the employer's initial effort at accommodation, not the other way around. Therefore, "Because the accommodation offer came after the initial unlawful refusal to hire, we conclude that Toledo did not breach his duty to cooperate with Nobel in reaching a reasonable accommodation."

IV. Miscellaneous

1) Employer knowledge

a) *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) – The employer declined to hire an applicant who wore a headscarf because it assumed – without ever discussing the issue with the applicant – that she wore the headscarf for religious reasons and would need to do so on the job, and the employer believed that wearing the headscarf would conflict with its "Look Policy." The Supreme Court held that if the refusal to hire was *motivated by* the employer's desire to avoid a religious accommodation, then the employer was in violation of Title VII even if it lacked actual knowledge of the applicant's religious practice: "[A]n employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed."

b) *Johnson v. Office of the Architect of the Capitol*, No. 96-AC-25(CV), 1998 WL 35281337 (OOC Board May 22, 1998) – The Board affirmed the Hearing Officer's dismissal of the employee's religious discrimination claim in part because there was "substantial evidence in the record supporting the Hearing Officer's finding that [the personnel staffing specialist] was unacquainted with Mrs. Johnson's color or religion when she found that appellant, along with three other candidates, was 'not qualified' for the position and for that reason did not forward her application to selection officials for further review." The staffing specialist was also unaware of the religion of the successful applicant.

c) *Massey v. Tillerson*, No. 12-1383 (RJL), 2017 WL 1209935 (D.D.C. Mar. 31, 2017) (Judge Richard J. Leon) – A plaintiff who was born into a Muslim family but converted to Christianity alleged, among other things, discrimination based on her religion. The employer carried its burden to show that she was fired for non-discriminatory reasons – falsifying her time sheets and invoice submissions and failing to adhere to her set work schedule – and in response the plaintiff offered evidence that there was tension between Muslims and Christians in the workplace. The court held, however, that "evidence of religious tension at the [office] is not enough to show that the reason for Massey's termination was pretextual and was actually the result of religious discrimination, because the evidence shows that her supervisors (as well as her coworkers) did not know her religion."

d) *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996) – Employee alleged discrimination after she was fired for sending letters to two coworkers' homes criticizing their behavior and urging them to accept God into their lives. The court explained that "Knowledge that an employee has strong religious beliefs does not place an employer on notice that she might engage in any religious activity, no matter how unusual." In this case, even if the employer may have possessed knowledge regarding the plaintiff's religion and beliefs, that knowledge "could not reasonably have put it on that she would write and send accusatory letters to co-workers' homes."

2) Prospective waiver

a) *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988), *cert denied*, 489 U.S. 1077 (1989) – The company's employee handbook informed new hires that they would be required to attend a weekly devotional service. The plaintiff, who was an atheist, signed the handbook but later asked to be excused from attending the service, and when the company refused, he claimed a violation of Title VII for failure to accommodate. The employer argued that the plaintiff waived his right to a religious accommodation when he signed the handbook, but the court rejected that argument, citing Supreme Court precedent that "there can be no prospective waiver of an employee's rights under Title VII."

3) Continuing violation

a) *Isse v. Am. Univ.*, 540 F. Supp. 2d 9 (D.D.C. 2008) (Judge Colleen Kollar-Kotelly) – The refusal of a request for religious accommodation is a discrete act that starts the clock for the statutory limitations period, and does not give rise to a continuing violation.

4) Unemployment

a) *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) – After working for her employer for several years, an employee was baptized into the Seventh-Day Adventist Church and told her employer that she could no longer work on Saturdays. She was given the choice between working her scheduled Saturday shifts or resigning; when she did neither, she was fired. She filed for unemployment, but the employer contested the payment of the benefit, contending that the employee had been fired for misconduct, and the state refused to provide unemployment compensation. The Supreme Court held that the state's denial of unemployment benefits violated the Free Exercise Clause of the First Amendment, because "the employee was forced to choose between fidelity to religious belief and continued employment; the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice." Further, the Court rejected the state's argument that awarding unemployment benefits in this case would violate the Establishment Clause: "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."

b) *Thomas v. Review Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981) – A Jehovah's Witness quit his job because he was transferred into a position that required the production of parts for military tanks, in conflict with his religious beliefs, which forbade participation in the production of armaments. The state denied him unemployment benefits, reasoning that those benefits were intended for people who were out of work through no fault of their own, whereas the plaintiff had left his job voluntarily. The Supreme Court held that this decision violated the Free Exercise Clause, explaining: "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."

V. Constitutional Issues

Certain aspects of religion in government workplaces raise First Amendment issues, under either the Establishment Clause or the Free Exercise Clause. There are also some cases that apply the Religious Freedom Restoration Act of 1993 (RFRA) in the employment context, although it is not clear to what extent – if at all – the RFRA applies to religious discrimination claims in the legislative branch. There is also some question as to the nature of the interaction between the RFRA and Title VII's prohibition on religious discrimination, as evidenced by the case law discussed below.

The CAA is silent as to the applicability of the RFRA, and we are unaware of any regulations or case law discussing the applicability of the RFRA to the legislative branch specifically. The language of the RFRA itself suggests that it would apply: the statute defines "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity" (42 U.S.C. § 2000bb-2), and elsewhere it states that "this chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993" (42 U.S.C. § 2000bb–3(a)). But we cannot say how the OOC Board or the federal courts might hold if a covered employee attempted to assert a claim under the RFRA.

It is worth noting that this area of the law is constantly evolving, and the upcoming Supreme Court review in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, although it does not arise in the employment context, could nonetheless have important implications for claims involving religion in the workplace.

1) First Amendment

a) *Torcaso v. Watkins*, 367 U.S. 488 (1961) – The requirement of a declaration of belief in the existence of God as test for appointment to public office was deemed unconstitutional.

b) *Lynch v. Donnelly*, 465 U.S. 668 (1984) – Display of a crèche as part of a larger Christmas display did not violate the Establishment Clause. It did not endorse or advance Christianity or create excessive entanglement between religion and government, and thus was not unconstitutional.

c) *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) – The town's practice of opening its monthly board meetings with a prayer given by a visiting "chaplain of the month" did not violate the Establishment Clause, despite most of the prayers being overtly Christian in nature. The prayers did not amount to an endorsement of Christianity, because they touched on universal themes as well as religious ones, and because citizens were not coerced into participating in the prayer. The town did reach out to members of minority faiths, but the predominance of Christian chaplains reflected the fact that the town was comprised of mostly Christian congregations. Citing *Marsh v. Chambers*, 463 U.S. 783 (1983), in which the Supreme Court found that legislative prayer has long been accepted as compatible with the Establishment Clause despite its religious nature, the Court held that prayers delivered at government sessions are not required to be generic or non-sectarian; rather, "Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not 'exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" The Court pointed out that "Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. It acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds."

d) *Lund v. Rowan Cty., N.C.*, 863 F.3d 268 (4th Cir. 2017) (*en banc*) – Relying on the recent Supreme Court decision in *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014), the Fourth Circuit sitting *en banc* determined that the prayers used to open the county's board meetings – which were exclusively Christian and delivered only by the board members themselves, and the language of which crossed the line into proselytizing – violated the Establishment Clause. "By proclaiming the spiritual and moral supremacy of Christianity, characterizing the political community as a Christian one, and urging adherents of other religions to embrace Christianity as the sole path to salvation, the Board in its prayer practice stepped over the line."

e) *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) – Two state government employees, one a nurse consultant and the other a sign language interpreter, alleged that their employer violated their free speech rights when it prohibited them from evangelizing or discussing religion with their clients. The court held that the state raised valid Establishment Clause concerns. Because the Establishment Clause prohibits the government from appearing to take a position on questions of religious belief, the state had a compelling interest justifying the restrictions on its employees' ability to engage in religious speech while providing state-sponsored services. The courts therefore give government employers some leeway in endeavoring to avoid Establishment Clause violations, and permits them "to place a slight burden on" their employees' religious expression.

f) *Haring v. Blumenthal*, 471 F. Supp. 1172 (D.D.C. 1979) (Judge Harold H. Greene) – An IRS tax specialist was denied a promotion because of his unwillingness to handle tax exempt status applications from persons or groups that advocated abortion or other practices to which he objected based on his sincerely held religious beliefs. The IRS argued, among other things, that allowing an employee to refuse to process applications for religious reasons would involve the IRS in religious affairs in violation of the Establishment Clause of the First Amendment. The court rejected this argument, making a key distinction: "IRS would be engaged in an establishment of religion if it were to allow plaintiff to make decisions on behalf of the government based on his religious beliefs. No such violation of the Establishment Clause occurs, however, when plaintiff is allowed merely to abstain from making decisions on issues which offend his conscience. To do that is to allow him to exercise his religious preference under the Free Exercise Clause without at the same time entangling the government in religious affairs in violation of the Establishment Clause. It thus serves well both aspects of the religious clauses of the First Amendment."

g) *Miller v. Davis*, 123 F. Supp. 3d 924 (E.D. Ky. 2015) – This case, involving a motion for preliminary injunction related to the issuance of marriage licenses, implicated both the Free Exercise Clause and the Establishment Clause of the First Amendment. In the wake of the Supreme Court's decision in *Obergefell v. Hodges* upholding the right of same-sex couples to marry, a county clerk in Kentucky refused to issue any marriage licenses because as an Apostolic Christian she held a sincere religious objection to same-sex marriage. The clerk argued that the state had a compelling interest in "protecting her religious freedom," but the court noted that "the State has some priorities that run contrary to Davis' proffered state interest. Chief among these is its interest in preventing Establishment Clause violations. … Davis has arguably committed such a violation by openly adopting a policy that promotes her own religious convictions at the expenses of others." In such a case the employee's right to free exercise must yield to the governmental employer's interest in avoiding litigation. Moreover, the state's interest in upholding the rule of law trumped the clerk's right to free exercise: "Our form of government will not survive unless we, as a society, agree to respect the U.S. Supreme Court's decisions, regardless of our personal opinions. Davis is certainly free to disagree with the Court's opinion, as many Americans likely do, but that does not excuse her from complying with it. To hold otherwise would set a dangerous precedent." Finally, in analyzing the potential harm to the clerk that would result from granting the injunction, the court determined that because the governor's directive to issue marriage licenses post-*Obergefell* was neutral and generally applicable, and was rationally related to several legitimate government purposes, the directive would not likely be held to infringe on the clerk's right to the free exercise of religion.

h) *Brown v. Polk Cty., Iowa*, 61 F.3d 650 (8th Cir. 1995) – A born-again Christian who was employed as the head of the IT department for a county government was reprimanded for "lack of judgment" for engaging in activities that could have been viewed as supporting or promoting religious activities using government resources, such as having his secretary

type up Bible study notes for him, praying with employees during the workday, and quoting Biblical passages during a meeting. He was also ordered to remove from his office anything with a religious connotation, including a Bible that he kept in his desk and three plaques with references to God. The court noted that "where a government is the employer, we must consider both the first amendment and Title VII in determining the legitimacy of the county administrator's action. … With specific reference to the free exercise clause, we hold that in the governmental employment context, the first amendment protects at least as much religious activity as Title VII does. … Another way of framing that holding is to say that any religious activities of employees that can be accommodated without undue hardship to the governmental employer, *see* 42 U.S.C. § 2000e(j), are also protected by the first amendment." The court held that allowing the employee's secretary to type up his Bible notes would be an undue hardship, while precluding it would not substantially burden the plaintiff's free exercise of religion, so the county was not liable for forbidding that activity. However, the prayers in his office and quoting of the Bible in one meeting "were apparently spontaneous and infrequent" occurrences, and any resulting harm was speculative, so the court held that the employer failed to show an undue hardship with respect to those activities. Finally, although it assumed for the sake of argument that a government employer "has a legal right to ensure that its workplace is free from religious activity that harasses or intimidates," the court cautioned that this does not permit the banning of all religious expression from the workplace: "The defendants would have us hold that their 'interest' in avoiding a claim against them that they have violated the establishment clause allows them to prohibit religious expression altogether in their workplaces. Such a position is too extravagant to maintain, for it gives a dominance to the establishment clause that it does not have and that would allow it to trump the free exercise clause." Therefore, the employer violated the employee's rights when it ordered him to remove all items with religious connotations from his office.

2) Religious Freedom Restoration Act (RFRA)

a) *Potter v. Dist. of Columbia*, 558 F.3d 542 (D.C. Cir. 2009) –D.C. firefighters and EMS workers who wore beards for religious reasons challenged the government's policy requiring that they be clean-shaven. The RFRA provides that "the federal government and the District of Columbia may not substantially burden a person's exercise of religion unless the government 'demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest'" (quoting 42 U.S.C. § 2000bb-1). In this case the court affirmed summary judgment in favor of the firefighters and EMS workers, because although it was not safe for bearded workers to wear air purifying respirators (APRs), the evidence showed that they could safely wear a different form of respiratory protection, a self-contained breathing apparatus (SCBA), and that in emergency situations where APRs would be required for long-term use, the Department could have redeployed bearded workers out of zones in which APRs would be required,

either into areas where SCBA systems were required or into areas where no protection was needed. Therefore the policy failed because it was not the least restrictive means of furthering the government's interests.

b) *Wilson v. James*, 139 F. Supp. 3d 410 (D.D.C. 2015), *aff'd*, No. 15-5338, 2016 WL 3043746 (D.C. Cir. May 17, 2016), *cert. denied*, 137 S. Ct. 695 (2017) (Judge Amit P. Mehta) – The RFRA prohibits the government from substantially burdening the plaintiff's religious exercise, which means a religious *action* or *practice*, not merely the person's religious *belief*. In this case, the plaintiff was disciplined for using his military email and his Facebook account to express his religious beliefs regarding same-sex marriage, but the discipline imposed did not force him to engage in conduct forbidden by his religion or prevent him from engaging in conduct his religion required, and "Nothing prevented Plaintiff from continuing to maintain his beliefs about same-sex marriage and homosexuality[.]" Moreover, the plaintiff had not asserted that his church's doctrine required him to publicly voice his dissent about homosexuality or same-sex marriage. Therefore, the discipline did not substantially burden his religious exercise and the RFRA was not violated.

c) *Francis v. Mineta*, 505 F.3d 266 (3d Cir. 2007) – A TSA employee brought a religious discrimination claim under the RFRA rather than Title VII after he was fired for wearing dreadlocks in violation of his employer's grooming policy. The court held that Title VII provides the exclusive remedy and that RFRA does not provide an alternative vehicle for federal employees to raise employment-based religious discrimination claims. After analyzing the history and purpose of the enactment of the RFRA, the court explained that "The legislative history that we have discussed demonstrates that Congress did not intend RFRA to create a vehicle for allowing religious accommodation claims in the context of federal employment to do an end run around the legislative scheme of Title VII."

d) *Harrell v. Donahue*, 638 F.3d 975 (8th Cir. 2011) – Although the language of the RFRA "does not precisely explain RFRA's interplay with Title VII, both the House Report and the Senate Report unequivocally state that RFRA was not intended to affect religious accommodation under Title VII. S. Rep. No. 103–111, at 13 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903 ('Nothing in this act shall be construed as affecting religious accommodation under Title VII of the Civil Rights Act of 1964.'); H.R. Rep. No. 103–88, at 7 (1993) ('Nothing in this bill shall be construed as affecting Title VII of the Civil Rights Act of 1964.')." Because the plaintiff's Title VII and RFRA claims relied on the same set of operative facts – his employer's refusal to grant him a requested accommodation of Saturdays off to observe his Sabbath – the court held that Title VII was the exclusive remedy for his claim and that his RFRA claim was therefore barred.