The Prohibition of Religious Observances in the Workplace

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NOTE

THE PROHIBITION OF RELIGIOUS OBSERVANCES IN THE WORKPLACE

I. INTRODUCTION

Employees who wish to practice their religious observances in the workplace subject themselves to numerous prohibitions throughout various industries. Some restrictions do violate, or tread dangerously close to violating, the First Amendment's Freedom to Exercise Clause and Title VII of the Civil Rights Act of 1964.

The U.S. Supreme Court has recently decided cases involving the denial of unemployment benefits to a discharged employee who refused to work on her Sabbath, the discharge of a High School teacher who wanted to use personal days off for religious observance, and a soldier's claim that our nation's armed forces infringed upon his First Amendment right of freedom to exercise his religion. In addition, the Court and numerous circuit courts of appeal have been faced with various Title VII claims concerning an employer's duty to reasonably accommodate the religious needs of their employees. The results of these cases have raised the question of possible

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1. U.S. Const. amend. I states that "Congress shall make no law respecting . . . religion, or prohibiting the free exercise thereof . . . ."

2. 42 U.S.C. § 2000e-2(a) (1982) states that "it shall be an unfair employment practice for an employer . . . to fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual . . . because of such individual's race, color, religion . . . ."


Establishment Clause violations wherein the government becomes too entangled in religion.

II. RELIGIOUS OBSERVANCES IN THE ARMED FORCES

In March, 1986, by a 5-4 majority, the Supreme Court affirmed a District of Columbia Circuit Court of Appeals decision against Simcha Goldman, an Orthodox Jewish Rabbi, who was forbidden to wear his yarmulke by the United States Air Force. Although Goldman's religious beliefs required him to wear the headgear, the Supreme Court ruled that the First Amendment does not prohibit the action taken by the Air Force.

Rabbi Goldman served as a clinical psychologist at the mental health clinic at March Air Force Base in Riverside, California. He was permitted to wear his yarmulke out-of-doors, but was denied this same freedom while indoors pursuant to Air Force Regulation (AFR) 35-10, which forbids the wearing of any headgear indoors except for on-duty armed security police.

The First Amendment of the U.S. Constitution affords freedom of religious expression to all citizens of the United States without qualification. Even those citizens who serve in the armed forces are entitled to the blanket of rights guaranteed by the Constitution. Although the military has a unique structure of discipline, citizens may not be deprived of their basic rights when they join the armed forces. The Supreme Court, however, has consistently held that the military is a "specialized community governed by a separate discipline from that of the civilian." The Court has invoked this ration-
ale in numerous situations to circumvent First Amendment rights.

Those cases in which the "specialized community" doctrine was proffered can easily be distinguished from the case in which religious freedom is quelled. In *Orloff v. Willoughby*, the Supreme Court held that judicial review of the assignment of a lawfully inducted soldier was prohibited. The Court's holding noted the variance between the military and the civilian world and also the great deference afforded officers assigning duties.

Furthermore, in *Schlesinger v. Councilman*, an Army captain on active duty, charged with the wrongful sale, transfer and possession of marijuana, moved for an injunction of a military court-martial claiming lack of "service-connection." Since Congress created a vast system of military courts and review procedures, the Court will honor the judgment and assume that the military court system will uphold a soldier's constitutional rights. Ultimately, the *Schlesinger* Court concluded that when resolving an accused serviceman's case within the military court system, if no other harm than discipline or discharge is shown, the federal court must refrain from in-
Moreover, when a captain publicly urges enlisted men to disobey orders, his conduct will not be protected under the First Amendment.  Although members of the armed forces are still afforded First Amendment protection, "the different character of the military community and [its] mission requires a different application of [these] protections."

These cases differ from Goldman in that they involve substantial disruption to the proper operation of the armed services. In Goldman, the Court focused on a small fabric snatch while the Air Force presented no evidence which would indicate any substantial interference with discipline. Although the military "must foster instinctive obedience, unity, commitment, and esprit de corps," this goal is unlikely to be accomplished by compelling Rabbi Goldman to remove his yarmulke, a steadfast symbol of his faith. Uniformity of dress does create an atmosphere of discipline and necessary subservience, but an exception is warranted when religious garb creates no danger of undermining discipline.

The act of wearing a yarmulke does not interfere with the "effective operation" of the military. This can be demonstrated by examining the functioning of the Israeli Army. The Israeli Defense Forces (I.D.F.), a highly effective army, allows military personnel to wear yarmulkes. On the other hand, long beards, another religious

22. Id.
23. Parker v. Levy, 417 U.S. 733 (1974). Captain Levy made public statements on the post which included the following: "I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go . . . they . . . should refuse to fight . . . ." Id. at 737. Levy was charged under articles 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 933, 934 (1982), which prohibit conduct unbecoming an officer and conduct which prejudices discipline in the armed services. Levy challenged these code provisions as being vague and overbroad, but the Supreme Court dispensed with these claims by citing the distinction between the two communities. "[W]ithin the military community there is simply not the same autonomy as there is in the larger civilian community." 417 U.S. at 751. Specifically, the Court found that "the Uniform Code of Military Justice regulates a far broader range of the conduct of military personnel than a typical state criminal code regulates the conduct of civil . . . ." Id. at 750. This broad sweep is permissible since the military takes extra care to provide notice to its personnel regarding the contents of military provisions. Id. at 756.
24. Id. at 758. "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which is constitutionally impermissible outside it." Id.
25. 475 U.S. at 507.
26. Id.
27. In their October 1973 War, Israel, outnumbered by a 2 to 1 margin in men, and a 3 to 1 margin in tanks, repelled the Egyptians, Syrians, Iraqis, and Jordanians who had attacked it from three fronts. Although greatly outnumbered in their three other wars in 1948, 1956 and 1967, Israel won decisive victories in all. Britannica Book of the Year 232-33 (D. Daume & J.E. Davis eds. 1974).
symbol, are prohibited by the I.D.F. because the beard would interfere with the wearing of a gas mask, thus making it a practical and rational limitation. Although it may be argued that Israel does not have similar concerns about separation of church and state as does the United States, the issue presently being addressed is the effects of religious garb on military efficiency.

Furthermore, Air Force Regulations allow soldiers to wear up to three rings and one identification bracelet of "neat and conservative" but non-uniform design. Since religious and secular organizations are permitted to be displayed on jewelry, the prohibition of yarmulkes finds no justification. AFR 35-10 does not call for absolute uniformity, but allows for other manifestations of religion except for the "extreme, the unusual, and the fad," all qualities of which a yarmulke is not.

The military argues that if they were to create an exception for Orthodox Jews, they would have to create an exception for all other faiths. For example, they would be compelled to permit Sikhs to wear turbans or Rastafarians to grow dreadlocks. This line of reasoning appears to be valid on its face, but in reality is tenuous. Before enforcement of a military regulation is upheld, it must be supported by a reasoned basis. For example, in Goldman, the enforcement of the regulation must be based on the following factors: "functional utility, health and safety considerations, and the goal of a polished professional appearance." Thus, the Sikh's turban or the Rastafarian's locks may or may not be found violative of regulations only after an independent and reasoned analysis is performed.

30. AFR 35-10, ¶ 1-12b (1)(b) (1978).
31. AFR 35-10 ¶¶ 1-12a(1)-(a).
33. Id. at 519, 520 (Brennan, J., dissenting). "For example, the Air Force could no doubt justify regulations . . . prohibiting garments that could become entangled in machinery, and requiring hair to be worn short so that it may not be grabbed in combat and may be kept louse-free in field conditions." Id. at 519, 20 n.4.
34. The Air Force may permit yarmulkes, but disallow turbans on the basis of actual interference with uniform military dress. A yarmulke may be worn conveniently under a military cap or helmet. A turban, on the other hand, cannot be worn so discreetly, considering its large size.
addition to neatness, cleanliness, safety and military image, the analysis must address two crucial issues before a First Amendment right of Free Exercise is denied. First, the government must show that an unusually important interest is at stake. Second, the government must demonstrate "that granting the requested exemption will do substantial harm to that interest . . . ." To cast a blanket prohibition on all modes of dress, without a considered basis in support, discriminates and violates the First Amendment.

In addition, commanding officers in their discretion may allow personnel to wear non-visible religious items such as crosses, scapulars and stars. The Air Force argues that this test of visibility is equitable and does not make distinctions among faiths. Justice Stevens agreed with this premise, stating that the rule was "based on a neutral, completely objective standard—visibility." Professor Frank I. Michelman of Harvard Law school, commenting on Justice Stevens' conclusion stated that "[n]eutral' legal standards seem to absolve their promulgators—sometimes the very judges who apply them—of responsibility for their contributions to socially unequal or conflicting outcomes."

Moreover, Michelman surmised that "[o]bjective' legal standards seem to absolve judges of responsibility for the fates of individual parties."

In truth, however, the visibility test discriminates against minority religions whose symbols of faith may be more visible than those of the majority. As Justice Brennan recited in his dissenting opinion, "unless the visible/not visible standard . . . promotes a significant military interest, it is constitutionally impermissible."

Furthermore, the courts have not abdicated their obligation of judicially reviewing military regulations. When a regulation burdens

35. Four elements recited in AFR 35-10 itself, as examples of "high standard of dress and personal appearance." 475 U.S. at 519-20.
36. Id. at 530 (O'Connor, J., dissenting).
37. Department of Defense Directive 1300.17 (June 18, 1985) (quoted in Goldman, at 520 (Brennan, J., dissenting)).
38. 475 U.S. at 513.
39. Michelman, The Supreme Court 1985 Term. 100 Harv. L. Rev. 4, 15 (1986). "By neutrality, Justice Stevens evidently means that the standard makes no reference to culturally meaningful personal or social factors that are not obviously and directly related functional, regulatory aims." Id. at 9-10.
40. Id. at 15. "By objectivity in a regulatory standard, Justice Stevens evidently means that the standard's application is relatively automatic and incontestable, calling for no debatable evaluation of the concrete interests appearing in the particular case." Id. at 9.
41. 475 U. at 522 (dissent). Justice Brennan went on to say "that uniformity is illusory, unless uniformity means uniformly accommodating majority religious practices and uniformly rejecting distinctive minority practices." Id.
free exercise rights, a credible rational explanation must be proposed as to possible interference with the agency’s functioning. In fact, the District Court in Goldman found that “[f]rom September, 1977, to May 7, 1981, no objection was raised to Goldman’s wearing of his yarmulke while in uniform,” and no adverse affects on his performance were evidenced. The Air Force offered no justification in the denial of the right of free exercise that would promote the smooth functioning of the military.

The divided Supreme Court result exemplifies the difficulty of predicting how the Court will rule in free exercise cases when the issue turns on the definition of a governmental objective as a compelling state interest. One commentator, Professor Gary Leedes of Williams School of Law, declared that “the unpredictability is caused by the difficulty in articulating the government’s interest with appropriate precision.” In response to the government’s position that it lacks the resources to determine the sincerity of an individual’s religious convictions Leedes concedes, that when “it is difficult to separate legitimate from spurious claims,” the administrative convenience argument will be stronger “when numerous claims for exemptions are anticipated. . . .” However, the Court cannot predict, without being arbitrary, “how many claims for exemptions the national interest can tolerate.” Goldman illustrates the result when “the Supreme Court does not exercise independent judgment, and defers to the balance struck by the bureaucracy.”

III. JUDICIAL TREATMENT OF RELIGION IN THE CIVILIAN WORKPLACE

A. The Free Exercise Clause of the First Amendment

Numerous cases outside of the military spectrum concern the prohibition of religiously motivated conduct in the workplace. The U.S. Supreme Court, focusing on the denial of unemployment com-

42. “The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.” United States v. Lee, 455 U.S. 252, 257-258 (1982). See also Wisconsin v. Yoder, 406 U.S. 205 (1972) (members of Amish religion were allowed to pull children out of school after the eighth-grade even though it contravened Wisconsin’s compulsory school-attendance law); Gillette v. United States, 401 U.S. 437 (1971) (conscientious objector need not specify which particular war he is opposed to).
45. Id. at 347, 349.
46. Id. at 349. “The Supreme Court is becoming more sensitive to the government’s boilerplate, administrative necessity argument.” Id. at 369.
penetration to employees because of their religious beliefs, applied a Free Exercise Clause analysis in numerous cases. For instance, in *Sherbert v. Verner*, an employer discharged a worker who was a member of the Seventh-Day Adventist Church because she refused to work on Saturday, her Sabbath Day. She subsequently was unable to find other employment which did not conflict with her beliefs, and thus filed a claim for unemployment compensation benefits. The Supreme Court held that the disqualification of benefits imposed "[a] burden on the free exercise of appellant's religion." To prevent her discharge, the employee would have had to forego her religious beliefs by working on her Sabbath day. In addition, the Court in *Sherbert* found no evidence of a compelling state interest introduced which would have permitted the substantial infringement of the employee's First Amendment right. Furthermore, when faced with the concern that extending unemployment benefits in this manner would violate the Establishment Clause, the Court held that the decision "reflects nothing more than the governmental obligation of neutrality in the face of religious differences. . ." Eighteen years after *Sherbert*, the Supreme Court in *Thomas v. Review Board of Indiana Employment Security Division*, faced the issue of an employee whose religious opposition to war precluded him from performing his work duties. The Thomas Court held that a discharged Jehovah's Witness may not be denied unemployment compensation because he refused to work in the weapons division of a steel mill for religious reasons. The Indiana Supreme Court found Thomas' position regarding weapons production inconsistent

48. The relevant state unemployment compensation act provides that a claimant is eligible for benefits if he has failed without good cause to accept available work when offered. S.C. Code tit. 68, §§ 68-113, 114. The Employment Commission disqualified the employee for benefits, and the decision was affirmed by the South Carolina Supreme Court. 240 S.C. 286, 125 S.E.2d 737 (1962).
49. 374 U.S. at 403.
50. Id. at 406. "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." Id. at 404.
52. 374 U.S. at 409. The Court concluded that the decision did "not represent th[e] involvement of religious with secular institutions which . . . is the object of the Establishment Clause to forestall." Id.
54. Id. at 720. Thomas was transferred to the weapons division, specifically a department that fabricated turrets for military tanks, after his original job, fabricating steel for industrial uses, ended when the roll foundary department was shut down. Id. at 710.
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with the beliefs of another Jehovah's Witness who had testified. However, the Supreme Court noted that the determination of a sincere religious belief was a difficult task, and that the resolution of this finding should not "turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable . . . in order to merit First Amendment protection."\(^5\)

Expanding on the Supreme Court's interpretation of religion, constitutional scholar Laurence Tribe wrote that "'religion' must be defined from the believer's perspective, [and e]xcessive judicial inquiry into religious belief may, in and of itself, constrain religious liberty."\(^6\)

Ultimately, the \textit{Thomas} Court concluded that Thomas did end his employment for religious reasons,\(^7\) and applied an analysis which was indistinguishable from the one used in \textit{Sherbert}. The Court held, "where the state conditions receipt of an important benefit upon conduct proscribed by religious faith . . . thereby putting substantial pressure [upon the employee] . . . to modify his behavior and to violate his beliefs, a burden upon religion exists."\(^8\) Since the Court found that neither of the interests advanced by the State was sufficiently compelling to justify the burden imposed upon Thomas, the denial of benefits was held to violate his First Amendment right to free exercise of religion.\(^9\)

Recently, the Supreme Court in \textit{Hobbie v. Unemployment Appeals Commission of Florida}\(^10\) readdressed the issue of denial of unemployment benefits in connection with sabbath observance. Appellant, Hobbie, was baptized into the Seventh-Day Adventist Church after working at employer's jewelry store for over two years. At that time, she informed her supervisor that she would not be able to work on her Sabbath, and her schedule was adjusted accordingly.\(^11\) Two months later, appellant's general manager learned of the adjustment and gave her the option of working "scheduled shifts [which conflicted with her Sabbath,] or submit her resignation to the company."\(^12\)

Following an initial denial of claims for unemployment benefits

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55. \textit{Id.} at 714.
57. 450 U.S. 707.
58. 450 U.S. 717-718.
59. \textit{Id.} at 720.
61. \textit{Id.} at 1047-48. Her supervisor worked Friday nights and Saturdays while she worked on Sundays and evenings.
62. \textit{Id.} at 1048.
by the Bureau of Unemployment Compensation, and denial from an appeal to the Unemployment Appeals Commission, Hobbie challenged the Appeal Commission’s order in the Florida Fifth District Court of Appeal. That court affirmed the Appeals Commission, and Hobbie sought review in the U.S. Supreme Court, which ultimately reversed.64

The Court, following *Thomas* and *Sherbert*, held that Hobbie’s disqualification from receiving benefits violated the Free Exercise Clause of the First Amendment.65 The Court stated that by disqualifying the appellant, the State has “force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning” her religion in order to work, on the other hand.66

The State of Florida tried to distinguish this case from both *Sherbert* and *Thomas*.67 In these cases, the employee’s held their respective religious beliefs at the time of hire and, in both instances, the employer was responsible for the changes in employment conditions.68 In *Hobbie*, however, the appellant converted to her present religion while in the course of her employment. Thus, Ms. Hobbie was argued to be the “agent of change,”69 and should bear the responsibility for the outcome of any conflict. The Court refused to treat a religious convert less favorably than an employee who held her belief at the time of employment, and since no compelling state interest was proved, the Court ruled that Florida had violated the Free Exercise Clause of the First Amendment.70

**B. Title VII and Reasonable Accommodation**

Denying an employee the right to exercise freely his religious observances also violates Title VII of the Civil Rights Act of 1964.71

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63. *Id.*

64. *Id.* The Fifth District Court of Appeal issued a *per curiam* affirmance without an opinion. *See* 475 So. 2d 711 (1985). Under Florida law the affirmance could not be appealed to the State Supreme Court so Hobbie sought review directly in the U.S. Supreme Court. 107 S. Ct. at 1048 n.4.


66. 107 S. Ct. at 1049; *Sherbert*, at 404.

67. *Id.* at 1050.

68. *Id.*

69. *Id.* The Appeals Commission felt it would be “unfair for an employee to adopt religious beliefs that conflict with existing employment and expect to continue without compromising those beliefs.” *Id.* at 1051.

70. *Id.* at 1049.

Title VII prohibits discrimination in employment practices, specifically making it illegal for an employer to fire an employee based on his/her religion.\textsuperscript{72} The Sherbert decision, which upheld an employee's free exercise of religion, led to Congress' adoption of section 701(j) of the Act in 1972.\textsuperscript{73} This section defines the term "religion" 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 . . . religious observance or practice without undue hardship on the conduct of the employer's business."\textsuperscript{74}

To decipher the meaning of "accommodation" it is helpful to look to the legislative history of the amendment (section 701(j)) in order to ascertain Congress' intent. The amendment's stated purpose was to protect Sabbath observers whose employers failed to adjust their schedules accordingly.\textsuperscript{75} Sponsors of the amendment explained that the courts consistently failed to follow the provisions of the 1964 Act,\textsuperscript{76} and as one commentator remarked, the amendment was "passed to reaffirm more implicitly that duty to accommodate and . . . to resolve inconsistencies among the courts charged with safeguarding it."\textsuperscript{77}

In Trans World Airlines, Inc. v. Hardison, the Supreme Court handed down a decision citing an employer's reasonable accommodation of an employee's beliefs.\textsuperscript{78} In this case, Hardison, a member of the Worldwide Church of God, which prohibits Saturday employment, sought to change his work schedule. Initially, he was transferred to the night shift which enabled him to avoid working on Saturdays. Following a change in work locations, he encountered problems concerning seniority lists which prohibited him from evading Saturday duties.\textsuperscript{79} He was then discharged on grounds of insubordination for failing to work his assigned shift. The Court found that TWA made efforts to reasonably accommodate Hardison. Notably, TWA tried to solve their employee's problem by holding several

\textsuperscript{72} Id. at § 2000e-2(a)(1).
\textsuperscript{73} Id. at § 2000e(j)(1972).
\textsuperscript{74} Id.
\textsuperscript{75} 118 Cong. Rec. 705 (1972) (statement of Sen. Randolph).
\textsuperscript{76} Id.
\textsuperscript{78} 432 U.S. 63 (1976).
\textsuperscript{79} Id. at 68. "[T]he union was not willing to violate the seniority provisions set out in the collective-bargaining contract, and Hardison had insufficient seniority to bid for a shift having Saturdays off." Id.
meetings with him and by “authoriz[ing] the union steward to search for someone who would swap shifts . . . .” To sum up, the Court held that the duty to accommodate did not require TWA “to take steps inconsistent with the otherwise valid [collective-bargaining] agreement.”

Unless a discriminatory purpose is uncovered, seniority systems “cannot be an unlawful employment practice[s] even if the system has some discriminatory consequences.” In this case, no such discriminatory intent was found and the judgment against TWA was reversed.

In his scathing dissent, Justice Marshall described the majority decision as dealing “a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices.” Justice Marshall felt that TWA did not show that it had used up all reasonable accommodations and it failed to prove that those proposed would cause undue hardship. At a minimum, two other options were available to TWA. First, TWA could have paid overtime to a voluntary replacement for Hardison. Second, TWA could have transferred Hardison back to his old department where he had accumulated abundant seniority. With these two options of accommodation available, Justice Marshall felt that TWA was not placed in a position of “undue hardship.” From a social policy standpoint, Marshall was even more troubled by the case’s outcome, “[f]or a society that truly values religious pluralism cannot compel adherents of mi-

80. Id. at 77; 375 F. Supp. 877, 890-91 (W.D. Mo. 1974).
81. 432 U.S. at 79. “Collective-bargaining [agreements] . . . lie[] at the core of our national labor policy, and seniority provisions are universally included in the[m] . . . we cannot agree . . . that an agreed-upon seniority system must give way when necessary to accommodate religious observances.” Id.
82. 432 U.S. at 82.
83. Id. at 86 (Marshall, J., dissenting).
84. Id. at 91 (Marshall, J., dissenting). Admittedly, TWA met with Hardison several times and authorized the union steward to look for another employee to swap shifts, but “[t]o conclude that TWA, one of the largest air carriers in the Nation, would have suffered undue hardship had it done anything more defies both reason and common sense.” Id.
85. Id. at 95. Although these options would have violated the collective-bargaining agreement, neither would have violated the seniority system nor stripped any other employee of his/her contract rights under the agreement. Id.
nority religions to make the cruel choice of surrendering their religion or their job.

The Court's primary interest in preventing reverse discrimination permits a reading of section 701(j) which would require only minimal efforts by the employer to accommodate his employee's religious observance. One commentator concluded that "only one [holding of Hardison] had carried a clear message to the circuits: the dominance of seniority over religious accommodations." This suggests that courts may remain free to interpret the undue hardship standard to mandate substitute methods of accommodation that do not imperil seniority.

Recently, in Ansonia Board of Education v. Philbrook, the Supreme Court dealt with the extent of an employer's efforts to accommodate the religious beliefs of an employee. In this case, Philbrook, a high school teacher, brought a Title VII action claiming that the School Board's policy prohibiting the use of paid personal days for religious observance violated his religious beliefs.

Although the sincerity of Philbrook's belief in the Worldwide Church of God was not in doubt, the Board's mode of accommodating his beliefs was disputed. The Court read section 701(j) as requiring "any reasonable accommodation by the employer [as] sufficient to meet its . . . obligation." The School Board offered Philbrook the option of taking his added religious days as unpaid leave. Philbrook proposed two alternatives to the School Board: allow him to use three days of personal leave for religious observance, or allow him to pay the costs of hiring a substitute teacher and continue to receive full salary for additional days off for religious observance.

The Court of Appeals found the extent of the Board's accommodation to be reasonable, but also held that in view of Philbrook's own suggestions of a method of accommodation, "an employer must

86. Id. at 87.
88. Id.
90. The School Board's collective bargaining agreement with the Ansonia Federation of Teachers provides that each teacher receive specific paid days leave for various events. For example, a teacher may use five days' leave for a death in the immediate family, one day for a wedding, three days for observance of religious holidays. Also included in the contract is a provision which requires the use of the three days' leave be reserved for personal business, not specified in the contract. Id. at 369.
91. Id. at 372.
92. Id. at 370.
accept the employee’s preferred accommodation, absent proof of undue hardship.” Disagreeing with the latter, the Supreme Court held that “where the employer has already reasonably accommodated the employee’s religious needs, the . . . inquiry is at an end.” Only in cases where the employer cannot offer his employee any reasonable accommodation will undue hardship become an issue. In conclusion, the Supreme Court considered the School Board’s offer to be a reasonable accommodation of Philbrook’s beliefs.

In cases concerning sabbath observance conflicts, most circuits hold that once an employee establishes a prima facie case of religious discrimination, the burden shifts to the employer to prove that it cannot reasonably accommodate the employee without undue hardship. Courts accept reasonable accommodation in cases where the employer permits employees to trade shifts with others, yet if the employee clearly believes that it would be a sin to ask another employee to work for him/her on his/her sabbath, then a trade-off would not be a reasonable accommodation. In addition, the Fifth Circuit explained that an “employee has a correlative duty to make

93. Id. at 371, citing 757 F.2d 476 (2d Cir. 1985).
94. 107 S. Ct. at 372. “The employer need not further show that the employee’s alternative accommodations would result in undue hardship.” Id.
95. Id. at 373. The Court felt that the precise definition of the “personal leave” provisions in the collective-bargaining agreement was insufficiently clear and should be inquired into by the District Court upon remand. Id. However, in Justice Stevens’ opinion (concurring in part and dissenting in part) remand was wholly unnecessary. Section 783(a) “impose[s] a special duty upon the employer when—and only when—a conflict arises between an individual’s religious observance or practice and the employer’s policy.” Id. at 376. Justice Stevens saw no conflict in the case. Although Philbrook’s beliefs prevented him from working on certain school days, the Board never required him to work on those days; “on three of those days each year it pays him even though he does not work, and on the other days it declines to pay him for the time that he spends discharging his religious obligations.” Id.

Justice Marshall (concurring in part and dissenting in part) wrote that an employer should be required to implement an employee’s offer of “another reasonable proposal that results in a more effective resolution without causing undue hardship.” Id. at 375. Furthermore, on remand, Marshall called for the answer to the same question he posed in his dissenting opinion in Hardison, 432 U.S. at 91: “Did [the employer] prove that it had exhausted all reasonable accommodations and that the only remaining alternatives would have caused undue hardship on [the employer’s] business?” Id.

96. Such a case is established when employee shows that: (1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he informed the employer about the conflicts; and; (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement. See Turpen v. Missouri-Kansas-Texas R.R., 736 F.2d 1022, 1026 (5th Cir. 1984).
97. See, e.g., EEOC v. Ithaca Indus., 829 F.2d 519 (4th Cir. 1987); Smith v. Pyro Mining Co., 827 F.2d 1081 (6th Cir. 1987); Protos v. Volkswagen of Am., 797 F.2d 129 (3d Cir. 1986); Brener v. Diagnostic Center Hosp., 671 F.2d 141 (5th Cir. 1982).
a good faith attempt to satisfy his needs through means offered by
the employer."^99

Besides situations in which an employee requests days off be-
cause of interference with his/her Sabbath, cases have arisen in re-
gard to conflicts between the payment of union dues and an em-
ployee's religious doctrine. In *Tooley v. Martin-Marietta Corp.*,^100
the employer discharged plaintiff Tooley, a Seventh-Day Adventist,
for failing to join the union, which was required under the collective
bargaining agreement. The precepts of Tooley's religion prohibited
him from joining a union and from paying a service fee to one. The
plaintiff offered to pay the requisite fee to a "mutually acceptable
charity [but] [t]he union refused."^102 The Ninth Circuit, in *Tooley*,
upheld the trial court's finding that the plaintiff's "substituted char-
ity" proposal was reasonable and should be accepted by the union
and the company.^103

In addition to coverage of sabbath observance and union mem-
bership, Title VII also forbids an employer from preventing a worker
from wearing a religious pin while on duty. In *Karriem v. Oliver T.
Carr Co.*,^104 the district court held that a security guard who wears a
pin^105 associating him with the Islamic religion may not be discrimi-
nated against by his employer who resents him wearing the badge
while on duty. Firing the employee for such a reason was held to be
religious discrimination.^106

Finally, in *EEOC v. Electronic Data Systems*,^107 the district
court granted a preliminary injunction, reinstating an employee who
refused to shave his beard according to company policy because the
employee's religion compelled him to wear it.^108 The court's decision

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[^99]: Brener v. Diagnostic Center Hosp., 671 F.2d 141, 146 (5th Cir. 1982) (Orthodox
Jewish pharmacist failed to make good faith effort to contact nonscheduled pharmacists to
arrange trades, after employer affirmed his willingness to approve any trade obtained).
[^100]: 648 F.2d at 1239 (9th Cir. 1981).
[^101]: "[T]he Martin-Marietta Corporation and [the] Steelworkers Local 8141 executed
a collective bargaining agreement containing a 'union shop' clause, under which the company
was obligated to discharge all employees who failed to join the union." Id. at 1241. Section
8(a)(3) of the National Labor Relations Act also authorizes collection of union dues. 29
[^102]: 648 F.2d at 1241.
[^103]: Id. at 1243. See also McDaniel v. Essex Int'l., 696 F.2d 34 (6th Cir. 1982)(union
dues payment against employee's religious beliefs, court held that Title VII prohibitions
equally apply to unions. Both employer and union failed to accommodate employee's beliefs).
[^105]: Id. at 885. The circular pin was conspicuous but not obtrusive.
[^106]: Id. "Title VII proscribes and enjoins such actions by an employer." Id.
[^108]: Id. at 589.
was based on the defendant company’s failure to offer evidence which showed their attempts to reasonably accommodate the employee’s religious beliefs or that “accommodation would impose undue hardship on its business.” The court also failed to find that a grant of relief in this case would violate the Establishment Clause of the First Amendment.

IV. FREE EXERCISE BY GOVERNMENT EMPLOYEES

Unlike private sector employees, federal employees may only obtain judicial relief from discrimination in federal employment through Title VII. Accordingly, in McGinnis v. United States Postal Service, the district court issued an injunction against the Postal Service for discharging Ms. McGinnis because she failed to tender Selective Service System draft registration materials. As a conscientious objector, Ms. McGinnis opposed conscription and war and therefore could not fulfill this task. The district court found that the Postal Service made no effort to accommodate McGinnis’ beliefs, and concluded that the Service was unlikely to meet its burden of exhibiting reasonable accommodation. Further evidence revealed that postal workers at other locations were accommodated by the Postal Service.

V. RELIGIOUS ACCOMMODATION AND THE ESTABLISHMENT CLAUSE

Accommodation as a requirement under Title VII has often been attacked as violative of the Establishment Clause of the First Amendment since, on its face, the clause favors one religion over another. However, this position has been rejected by both the Su-

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109. Id. at 590.
110. Id.
113. Id. at 523. The government did not even try to work out an agreement in which petitioner could have worked at a window which was not used to handle registration materials. Id.
114. Id.
115. U.S. Const. amend. I.
116. See Cummins v. Parker Seal Co., 516 F.2d 544, 554 (6th Cir. 1975) (Celebrezze, J., dissenting): Section 701(j) defines religion so as to require preferential treatment of employees because of their religion. This not only contradicts Title VII’s secular purpose, it also mandates religious discrimination because “[o]thers are forced to submit to uniform work rules and to bear the burdens imposed by their employers’ accommodation to religious practitioners.” Id. at 558.
The Ninth Circuit in *Tooley*,\(^1\) stated that the government can lawfully enforce accommodation when the accommodation reflects a neutral position regarding religious conflict and does not constitute "sponsorship, financial support," and a high degree of involvement of the body in religious acts.\(^2\) For state legislation to steer clear of contravening the Establishment Clause it must: (1) neither inhibit nor advance religion; (2) reflect a "clearly secular" aim; and (3) shun "excessive government entanglement" with religion.\(^3\)

Nevertheless, a recent Supreme Court decision, *Estate of Thornton v. Caldor, Inc.*,\(^4\) held that a Connecticut statute violated the Establishment Clause because it gave Sabbath observers an unqualified right not to work on their chosen Sabbath. In interpreting the Connecticut statute, the Court pronounced its most substantial commentary on the subject of religious accommodation since *Hardison*. Chief Justice Burger, writing for the majority, explained that the Connecticut statute "guarantees every employee, who 'states that a particular day of the week is observed as his Sabbath,' the right not to work on his chosen day . . . no matter what burden or inconvenience this imposes on the employer or fellow workers."\(^5\)

The majority's primary concern focused on the statute's absence of any exceptions for special circumstances, such as consideration of an employer's reasonable proposals, Friday Sabbath observers in a Monday through Friday work schedule (school teachers, for example), and consideration of the needs of other employees.\(^6\) Accordingly, the Court ruled that since the statute imposed an absolute

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\(^{17}\) *Ziegel: The Prohibition of Religious Observances in the Workplace*, Published by Scholarly Commons at Hofstra Law, 1988.
duty on employers to accommodate their business to specific religious practices over all secular interests, it would have the effect of advancing a particular religion. As one commentator asserted, the Court's major concern was not directed to the State's promotion of the act of Sabbath observance, "but over the disruptive effect the law would have had in industry and commerce, and the law's mandating that decisions concerning work schedules and policies be controlled by the religious needs of employees. These far reaching effects negated any asserted secular purpose for the Connecticut statute."

Unlike the Connecticut statute, however, Title VII does not provide for absolute deference to an employee's religious practices. Rather it allows for an analysis of the consideration of hardship to the employer and to others. Moreover, it permits consideration of whether or not the employer attempted to accommodate the employee.

In a concurrence in Thornton, Justice O'Connor declared her understanding that Title VII's reasonable accommodation requirement would survive the three-part test set out in the majority opinion. Applying the same three-part test used in Thornton, five courts of appeal have considered the constitutionality of section 701(j) and all have upheld it.

Although accommodations to religion often impose costs on innocent private citizens, the critical issue touches a delicate nerve at the core of our Nation's heritage. As Tribe pronounced, "[e]ach

124. 105 S. Ct. at 2918.
125. Note, Sabbath Observance and the Workplace: Religion Clause Analysis and Title VII's Reasonable Accommodation Rule, 46 La. L. Rev. 1265, 1276 (1986). "The decision also reaffirmed the Court's continued use of the traditional establishment clause test. Nevertheless, the Court should have discussed all of the aspects of the test and applied the relevant facts of the case to each of the criteria." Id. at 1277.
127. Thornton, 472 U.S. at 712 (O'Connor, J., dissenting) "In my view, a statute outlawing employment discrimination . . . has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society." Id. See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (sets out three-part test).
128. See, e.g., Protos, 797 F.2d at 135-36; McDaniel v. Essex Int'l., 696 F.2d 34, 37 (6th Cir. 1982); Tooley, 648 F.2d 1239, 1244-46 (9th Cir. 1981); Nottelson v. Smith Steel Workers, 643 F.2d 445, 453-55 (7th Cir. 1981), cert. denied, 454 U.S. 1046 (1981); Hardison v. TWA, Inc., 527 F.2d 33, 43-44 (8th Cir. 1975), rev'd on other grounds, 432 U.S. 63 (1977). All of these courts held that section 701(j) works to protect freedom of religion and prevent discrimination. Protos, 797 F.2d at 135.
129. See, e.g., Hobble, 107 S. Ct. 1046, 1050 (1987) (where slightly higher costs of unemployment insurance result since benefits are extended to otherwise ineligible recipients) and Thomas, 450 U.S. 707 (1981) (same).
of these rules . . . is backed by principles of religious liberty, and the private burdens that result can be viewed as secondary consequences of those fundamental principles. The point is that respecting religious liberty often imposes costs on innocent bystanders . . . .”  

VI. CONCLUSION

The Free Exercise Clause of the First Amendment and Title VII of the Civil Rights Act of 1964 offer employees substantial protection for the practice of religious observances in the workplace. Although the United States military as a “specialized society” may, at times, elude these shields of liberty, the private and public sectors may not. A nation that values religious pluralism and the safeguard of the freedom to exercise these beliefs, cannot compel minority religions to choose between their faith and their daily bread. Congress has mandated that minority devotees be reasonably accommodated by their employers without undue hardship resulting on the employers.

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