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Jordan v. North Carolina National Bank: Abrogation of an Employer's Title VII Obligation to Accommodate His Employee's Religious Preferences

JORDAN v. NORTH CAROLINA NATIONAL BANK: ABROGATION OF AN EMPLOYER'S TITLE VII OBLIGATION TO ACCOMMODATE HIS EMPLOYEE'S RELIGIOUS PREFERENCES

Title VII of the Civil Rights Act of 1964[1] requires an employer to make reasonable accommodations to the religious beliefs of both employees and job applicants, unless he can prove that such accommodations would cause undue hardship to the conduct of his business.[2] In 1977 the Supreme Court in *Trans World Airlines, Inc. v. Hardison*[3] reaffirmed the existence of this affirmative duty[4] and partially delineated the employer's ultimate obligations under Title VII.[5] In another 1977 case, however, the Court of Appeals for the Fourth Circuit in *Jordan v. North Carolina National Bank*[6] undermined some of the policy bases of the Supreme Court's decision in *Hardison*. Applying for a position with the defendant bank, the plaintiff sought a guarantee that she would not be required to work on her Sabbath. The Fourth Circuit agreed with the defendant that the request was unreasonable per se and beyond accommodation.[7] The bank therefore was relieved of its burden of demonstrating either that it had made a reasonable accommodation or, in the alternative, that any such adjustment would cause undue hardship.

This Comment will analyze the reasoning and implications of the holding in *Jordan*, emphasizing the incongruity of that decision with the congressional intent and judicial interpretation of Title VII. It compares the Court's policy espoused in *Hardison* regarding the accommodation of religious observances and secular business practices with the more restrictive position adopted by the Fourth Circuit in *Jordan*. This Comment then concludes that the latter court's misapplication of *Hardison* in its decision in *Jordan* led to an erroneous construction of Title VII.

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1. 42 U.S.C.A. §§ 2000e to 2000e-17 (1974 & Supp. 1977).

2. *See id.* § 2000e(j), which provides in pertinent part: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

3. 432 U.S. 63 (1977).

4. *Id.* at 75.

5. *Id.* at 79-85.

6. 565 F.2d 72 (4th Cir. 1977).

7. *Id.* at 76.

TITLE VII AND RELIGIOUS DISCRIMINATION

EEOC Interpretation and Congressional Intent: Reasonable Accommodation and Undue Hardship

Title VII of the Civil Rights Act of 1964 proscribes employment practices that discriminate against individuals on the basis of race, color, religion, sex, or national origin.[8] The Act was directed primarily at the elimination of patterns of racial discrimination in employment,[9] but the Equal Employment Opportunity Commission (EEOC), the agency created to administer its terms,[10] may prevent any unlawful employment practices, including those that result in an unequal treatment of employees because of their religious differences.[11]

In 1966 the EEOC issued regulations defining the scope of an employer's duty to eliminate job-related religious discrimination.[12] The guidelines required an employer to accommodate the reasonable religious needs of both employees and job applicants, unless such accommodation would create serious inconvenience in business operations.[13] Although the requirement of reasonable accommodation was expected to vary with the circumstances of each situation, the regulations mentioned several nondiscriminatory business practices that required no accommodation. An employer, for example, could establish a normal work week that included paid holidays generally applicable to all employees, even if such a plan would affect inconsistently the religious preferences of the individual employees.[14] Furthermore, the regulations did not require an

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8. 42 U.S.C.A. § 2000e-2.

9. *See* H.R. REP. No. 914, 88th Cong., 1st Sess. 18 (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2393.

10. 42 U.S.C.A. § 2000e-4 (1974 & Supp. 1977).

11. *Id.* § 2000e-5(a).

12. Guidelines on Discrimination Because of Religion, 31 Fed. Reg. 8370 (1966).

13. The regulations provided in pertinent part:

> The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of business.
>
> However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees.

Id.

14. *Id.* For the pertinent text of the regulation, see note 13 *supra.*

employer to adjust his schedule for an employee who had accepted a position with the knowledge of a conflict between his work times and his religious observances.[15] In contrast, accommodation was mandatory if a change in the employer's work schedule precipitated a conflict, but in making the adjustment, the employer was required neither to incur serious inconvenience in the conduct of his business nor to allocate a disproportionate number of unfavorable assignments to other employees.[16]

One year later, following inquiries as to whether the discharge of an employee or the rejection of an applicant whose Sabbath occurred on a scheduled work day constituted religious discrimination under Title VII, the EEOC issued new guidelines.[17] Substantially increasing the employer's duty to adapt his business operations to the employee's or applicant's religious preferences, the 1967 guidelines placed on the employer the burden of proving that an accommodation would result in undue hardship on the conduct of his business.[18] Although the EEOC failed to define undue hardship, it apparently intended to impose on the employer a greater obligation of accommodation than had been created by the prior serious inconvenience standard. Moreover, in accordance with this stricter approach, the Commission eliminated the examples of nondiscriminatory practices,[19] thus suggesting that they were no longer applicable.

Although the 1967 EEOC regulations purportedly effectuated Congress' intent, the courts rejected them as the authoritative in-

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15. *Id.* Presumably, an employer's accommodation also was unnecessary if an employee, although aware of a conflict between another work schedule and his religious observances, nevertheless requested and received the new assignment. A more ambiguous situation arose if an employee was converted to a new religious belief during the tenure of his employment.

16. *Id.*

17. *See* EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1976).

18. *Id.* The guidelines provide in pertinent part:

> The Commission believes that the duty not to discriminate on religious grounds . . . includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.
>
> . . . Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

Id.

19. *See* notes 13-16 *supra* & accompanying text.

terpretation of Title VII. Construing the statute as merely prohibiting discriminatory employment practices, the judiciary declined to hold that Title VII required reasonable accommodation by an employer to the religious beliefs of his employees.[20] In a 1972 amendment to Title VII,[21] however, Congress enacted the EEOC's position. By expressly directing employers to make reasonable accommodations to employees' or applicants' religious observances, unless such an adaptation would place an undue hardship on the conduct of the business, the amendment provided the EEOC with a congressional mandate to interpret further Title VII requirements.[22] This approval of the EEOC's interpretation, then, suggests a congressional intent not only to place an affirmative duty of accommodation on the employer, but also to require him to bear the burden of proving undue hardship in Title VII litigation.[23]

Judicial Interpretation of Title VII

Pre-Hardison: Conflicting Standards and Indicia of Compliance

The directive of Title VII is clear: absent proof of undue hardship, employers must reasonably accommodate the religious beliefs of an employee or job applicant. Neither the statute nor the EEOC regulation, however, defines the principal concepts. Moreover, although Title VII's enforcement mechanisms exemplify Congress' intent that the courts define the Act's terms,[24] the amorphousness and

20. *See, e.g.,* Reid v. Memphis Publishing Co., 521 F.2d 512, 519 (6th Cir. 1975), *cert. denied,* 429 U.S. 964 (1976); Dewey v. Reynolds Metals Co., 429 F.2d 324, 334 (6th Cir. 1970), *aff'd by an equally divided court,* 402 U.S. 689 (1971); Kettel v. Johnson & Johnson, 337 F. Supp. 892, 895 (E.D. Ark. 1972). Arguably, an adoption of the EEOC interpretation would have abrogated congressional intent. The legislative history of Title VII states that "management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible [and] [i]nternal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices." [1964] U.S. CODE CONG. & AD. NEWS 2355, 2516. This limitation, in conjunction with other statements made during the debates over Title VII, supports the conclusion that the statute prohibits only intentional discriminatory practices. *See, e.g.,* 110 CONG. REC. 13079-80 (1964).

21. 42 U.S.C.A. § 2000e(j) (1974). For the text of § 2000e(j), see note 2 *supra.*

22. *See* 118 CONG. REC. 7166, 7167 (1972) (statements of Senators Williams and Javits).

23. Cummins v. Parker Seal Co., 516 F.2d 544, 547 (6th Cir. 1975), *aff'd by an equally divided court,* 429 U.S. 65 (1976) (citing Reid v. Memphis Publishing Co., 468 F.2d 346, 351 (6th Cir. 1972) and Riley v. Bendix Corp., 464 F.2d 1113, 1116-17 (5th Cir. 1972)); *see* note 18 *supra* & accompanying text.

24. The EEOC only has authority to investigate complaints of discrimination and, if reasonable cause is established, to effect settlements through informal methods. 42 U.S.C.A. § 2000e-5(b) (1974). If these informal settlement methods are unsuccessful, the Commission

potential breadth of the provisions impede the formulation of precise definitions operable in all situations. Even the guidance offered by the exemplary applications of the 1966 regulations no longer is available.[25] Consequently, the judiciary has adopted disparate constructions of the extent of the employer's obligation under Title VII to accommodate the religious practices of his employees.[26]

Despite this judicial disagreement, the case law demonstrates some consistency in courts' resolutions of particular religious discrimination issues arising under Title VII. For example, an employee may establish a prima facie case of religious discrimination by showing that he was discharged[27] or denied employment[28] after

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may institute a civil action against the employer. *Id.* § 2000e-5(f). For the rationale of this procedure, see [1964] U.S. CODE CONG. & AD. NEWS 2355, 2515. Furthermore, a finding by the EEOC that no reasonable cause supports the discrimination complaint does not defeat the jurisdiction of the federal courts under Title VII. *See, e.g.*, Beverly v. Lone Star Lead Constr. Co., 437 F.2d 1136 (5th Cir. 1971).

25. *Compare* 29 C.F.R. § 1605.1 (1976) *with* 31 Fed. Reg. 8370 (1966) *and* notes 13-16 *supra* & accompanying text. The EEOC did state, however, that "undue hardship . . . may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer." 29 C.F.R. § 1605.1(b) (1976). The EEOC left further definition of the concepts to its review of "each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to varied religious practices of the American people." 32 Fed. Reg. 10299 (1967).

26. The number of district court reversals reveals the confusion created by the statute's vague concepts. *See, e.g.*, Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877 (W.D. Mo. 1974), *rev'd in part*, 527 F.2d 33 (8th Cir. 1975), *rev'd*, 432 U.S. 63 (1977); Cummins v. Parker Seal Co., No. 2432 (E.D. Ky., filed March 20, 1974), *rev'd*, 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided court*, 429 U.S. 65 (1976); Reid v. Memphis Publishing Co., 369 F. Supp. 684 (W.D. Tenn. 1973), *rev'd*, 521 F.2d 512 (6th Cir. 1975), *cert. denied*, 429 U.S. 964 (1976); Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972); Dewey v. Reynolds Metal Co., 300 F. Supp. 709 (W.D. Mich. 1969), *rev'd*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971). For a discussion of the apparently inconsistent constructions of an employer's Title VII responsibilities adopted by the Sixth Circuit, see 44 FORDHAM L. REV. 442 (1975).

27. *See, e.g.*, Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 143 (5th Cir. 1975); Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937, 944 (M.D. Ala. 1974); Claybaugh v. Pacific Nw. Bell Tel. Co., 355 F. Supp. 5 (D. Ore. 1973); Jackson v. Veri Fresh Poultry, Inc., 304 F. Supp. 1276, 1277 (E.D. La. 1969).

28. *See, e.g.*, Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172 (W.D.N.C. 1975), *rev'd*, 565 F.2d 72 (4th Cir. 1977). The majority of religious discrimination cases have concerned employees who were fired as a result of their religious beliefs. In recent years, however, a series of cases has reached the courts involving employees who have quit jobs with working conditions that interfered with the practice of their religion. The judiciary has granted relief in these situations by relying on the concept of "constructive discharge," a principle developed in unfair labor practice suits arising under § 8 of the National Labor Relations Act, 29 U.S.C. § 158 (1970). *See* Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 143-44 (5th Cir. 1975).

refusing a work assignment that conflicted with his religious practices. In such instances, of course, the employee also must demonstrate the sincerity of his religious convictions[29] as well as his qualifications for the particular employment position.[30] If these conditions are satisfied, however, the burden shifts to the employer to prove "either that he in fact made a reasonable accommodation, or that he was unable to accommodate to [the] employee's religious observances."[31]

In addition, the courts generally have agreed that the concept of reasonable accommodation connotes more than the mere duty to refrain from intentional discrimination: it suggests a good faith undertaking by the employer of some alternative action to resolve the conflict between the employee's religious observances and the former's business schedule.[32] The extent of an employer's responsibility to pursue a solution depends on the facts of each case; each feasible option must be weighed against the relative burden its implementation would impose on the conduct of the business. Although the judiciary has not agreed as to the most appropriate balancing of these concepts, it has enumerated several factors that a court may consider in an analysis of whether an employer fulfilled his obligation of reasonable accommodation. At the very least, the employer may be required to engage in discussions with the employee, to obtain advance employee acquiescence in any work schedule changes, and to agree to an arrangement whereby the affected em-

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29. *See* Hansard v. Johns-Manville Prods. Corp., 5 Fair Empl. Prac. Cas. 707, 708 (E.D. Tex. 1973). Two authors have suggested that challenges to the sincerity of an employee's religious beliefs would be futile. Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 618 (1971). *But see* 5 Fair Empl. Prac. Cas. at 708.

30. *See, e.g.*, Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 143 (5th Cir. 1975); Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937, 942 (M.D. Ala. 1974); Claybaugh v. Pacific Nw. Bell Tel. Co., 355 F. Supp. 1, 4 (D. Ore. 1973).

31. Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937, 941 (M.D. Ala. 1974).

32. *See, e.g.*, Riley v. Bendix Corp., 464 F.2d 1113, 1118 (5th Cir. 1972); Blakely v. Chrysler Corp., 407 F. Supp. 1227 (D. Mo. 1975); Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877, 889 (W.D. Mo. 1974), *rev'd in part*, 527 F.2d 33 (8th Cir. 1975), *rev'd*, 432 U.S. 63 (1977); Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937, 941 (M.D. Ala. 1974); Claybaugh v. Pacific Nw. Bell Tel. Co., 355 F. Supp. 1, 5 (D. Ore. 1973); Jackson v. Veri Fresh Poultry, Inc., 304 F. Supp. 1276, 1278 (E.D. La. 1969). An employer who merely studies the problem and concludes that no solution is possible has failed to fulfill his statutory duty of reasonable accommodation. *See, e.g.*, Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1976); Claybaugh v. Pacific Nw. Bell Tel. Co., 355 F. Supp. 1, 6 (D. Ore. 1973).

ployee himself secures replacements.[33] In some instances, however, the employer's obligation may be even more demanding. In *Draper v. United States Pipe & Foundry Co.*[34] the Court of Appeals for the Sixth Circuit held that the discharge of a Sabbatarian constituted religious discrimination.[35] The company had taken several steps to accommodate the time demands of the employee's religious beliefs: it had discussed the problem with the employee on several occasions, had allowed the employee excused absences for two months to facilitate his search for another job, had transferred the employee to a shift that normally required no Saturday work, and had agreed to transfer the employee to a production job that, although entailing a salary reduction and requiring different job skills, included no Saturday work. Similarly, some courts have required employers to minimize the employee's economic injury until a permanent solution is negotiated by making a temporary accommodation.[36]

The courts also have identified several factors that are relevant in a determination of whether an employer's adjustment to an employee's religious practices would cause an undue hardship on the conduct of the business and, therefore, whether the employer is relieved of his duty to accommodate.[37] These factors include: the importance and extent of specialization necessary for the job in question;[38] the number of employees with skills similar to those of the particular employee;[39] the size of the employer's establishment;[40] the economic impact of a transfer on an employee;[41] the

33. *See, e.g.*, Dewey v. Reynolds Metal Co., 429 F.2d 324, 331 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

34. 527 F.2d 515 (6th Cir. 1975).

35. *Id.* at 519-20. In some situations, the employer may satisfy his obligation by transferring the employee to a production job. *See, e.g.*, Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382 (D. Neb. 1974).

36. *See, e.g.*, Claybaugh v. Pacific Nw. Bell Tel. Co., 355 F. Supp. 1, 5 (D. Ore. 1973).

37. *See* 42 U.S.C.A. § 2000e(j) (1974); notes 1-2 *supra* & accompanying text.

38. *See, e.g.*, Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382, 1386 (D. Neb. 1974) (lack of qualified replacement creates undue hardship).

39. 29 C.F.R. § 1605.1(b) (1976). For the pertinent text of § 1605.1(b), see note 25 *supra*. *See, e.g.*, Hardison v. Trans World Airlines, Inc., 527 F.2d 33 (8th Cir. 1975), *rev'd*, 432 U.S. 63 (1977) (large pool of qualified replacements available but undue hardship caused by cost of overtime compensation paid replacement personnel); Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382, 1386 (D. Neb. 1974) (overtime compensation and lack of qualified replacement personnel creates undue hardship and relieves employer of duty to accommodate).

40. *See, e.g.*, Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 40 (8th Cir. 1975), *rev'd*, 432 U.S. 63 (1977) (accommodation caused undue hardship although business was large); Claybaugh v. Pacific Nw. Bell Tel. Co., 355 F. Supp. 1, 5 (D. Ore. 1973) (size of company

effect of the accommodation on other employees' morale;[42] and the existence of a seniority system for the allocation of job assignments and shift preferences.[43] An employer operating a large business with numerous employees presumably would have difficulty in persuading a court that he could not reasonably accommodate an employee's religious beliefs without incurring undue hardship on the conduct of his business.[44] In practice, this employer's heavy burden of proof may be the equivalent of an absolute presumption that reasonable accommodation is feasible.[45]

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and large work force mandated conclusion that accommodation could be made without undue hardship).

41. *See, e.g.,* Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975) (accommodation of employee's religious needs is no violation of overtime allocation provision when Sabbath observer received no disproportionate overtime allocation); Ward v. Allegheny Ludlum Steel Corp., 397 F. Supp. 375 (W.D. Pa. 1975), *vacated per curiam,* 560 F.2d 379 (3d Cir. 1977) (because employee was adversely affected economically, a transfer to lower paying position was not a reasonable accommodation when accommodation could be made without transfer and without undue hardship).

42. *See, e.g.,* Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975); Reid v. Memphis Publishing Co., 521 F.2d 512, 516 (6th Cir. 1975), *cert. denied,* 429 U.S. 964 (1976); Cummins v. Parker Seal Co., 516 F.2d 554, 550 (6th Cir. 1975), *aff'd by an equally divided court,* 429 U.S. 65 (1976). The EEOC has stated that undue hardship may exist if the accommodation would cause " 'chaotic personnel problems'." 516 F.2d at 550 (quoting EEOC Decision No. 72-0606 [1973] CCH EEOC Dec. ¶ 6310, at 4555 (1971); EEOC Decision No. 71-463 [1973] CCH EEOC Dec. ¶ 6206, at 4350 (1970)).

43. *See, e.g.,* Reid v. Memphis Publishing Co., 521 F.2d 512, 516 (6th Cir. 1975), *cert. denied,* 429 U.S. 964 (1976); Johnson v. United States Postal Serv., 497 F.2d 128, 129 (5th Cir. 1974) (per curiam); Dewey v. Reynolds Metal Co., 429 F.2d 324, 329 (6th Cir. 1970), *aff'd by an equally divided court,* 402 U.S. 689 (1971); Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877, 889 (W.D. Mo. 1974), *rev'd in part,* 527 F.2d 33 (8th Cir. 1975), *rev'd,* 432 U.S. 63 (1977). *But see* Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided court,* 429 U.S. 65 (1976).

44. *See* Claybaugh v. Pacific Nw. Bell Tel. Co., 355 F. Supp. 1, 5 (D. Ore. 1973), in which the court concluded that the telephone company's size and large number of employees required a finding that accommodation could be made without undue hardship. The company previously had established a practice of allowing employees to vary their work schedules for non-religious purposes. *Id.*

45. *See* Edwards & Kaplan, *supra* note 29, who state:

> [I]n the absence of "undue hardship"—which is nearly impossible to demonstrate if the work force is large enough — the employer would be guilty of religious discrimination unless he gave the job applicant a non-Sunday shift, something to which the applicant would not be entitled but for his religious beliefs.

Id. at 628.

Trans World Airlines, Inc. v. Hardison: Reasonable Accommodation and De Minimis Costs

In *Trans World Airlines, Inc. v. Hardison*[46] the Supreme Court suggested the parameters of a definition for religious freedom in a secular business. Trans World Airlines (TWA) employed the plaintiff, Hardison, as a clerk in an airline store that was operated continuously, seven days a week. Although Hardison's religious beliefs required that he refrain from work on his Sabbath, from sundown Friday to sundown Saturday, he lacked the seniority necessary to avoid work assignments during that time.[47] The plaintiff attempted on several occasions to resolve his conflict with the plant management and the union steward, but either TWA or the union rejected all of the alternatives discussed. The union found unacceptable as a violation of the seniority system a proposal that Hardison's work assignment be changed. TWA, on the other hand, rejected a suggestion that the employee work a four day week: because the plaintiff's job was essential to a smooth operation of the business, the substitution of another employee in that position either would create inefficiencies in other departments or would mandate the payment of premium wages. Following his discharge after these unsuccessful attempts at reconciliation, Hardison brought suit against both the employer and the union, alleging religious discrimination in violation of Title VII.

Addressing the issue of an employer's obligation to accommodate an employee whose religious beliefs prohibit him from working on Saturday, the district court concluded that TWA's accommodation efforts satisfied the minimum statutory requirements.[48] The Court of Appeals for the Eighth Circuit disagreed, however, stating that the employer had failed to sustain its burden of proving undue hardship.[49] The evidence, according to the appellate court, demonstrated neither that granting the plaintiff a short work week for a temporary period would hamper company operations nor that

46. 432 U.S. 63 (1977).

47. The collective bargaining agreement between TWA and the International Association of Machinists and Aerospace Workers provides in pertinent part: "The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement." 432 U.S. at 67 n.1.

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

49. Hardison v. Trans World Airlines, Inc., 527 F.2d 33 (8th Cir. 1975).

TWA's payment of overtime wages would constitute an undue hardship.[50] Moreover, the court determined that the seniority system established by the collective bargaining agreement did not relieve TWA of its statutory obligation to attempt a shift rearrangement.[51]

The Supreme Court's opinion in *Hardison* partially outlines the scope of the employer's obligation under Title VII. Contrary to the Eighth Circuit's decision, the Court concluded that TWA's attempts to reconcile the plaintiff's work schedule with his religious practices within the confines of the seniority system were sufficient to meet its statutory responsibility.[52] The company had endeavored to assign Hardison to a position that permitted a timetable compatible with his religious preferences and had authorized the union to effect any feasible rescheduling. It also had attempted to secure the employee another job.

In its rejection of both the plaintiff's and the EEOC's argument that TWA's duty to make accommodations took precedence over the collective bargaining agreement, the Court noted that Title VII specifically authorized the routine application of a seniority system that was maintained for other than discriminatory purposes.[53] Moreover, because the Act prohibited discrimination against majorities as well as minorities, Title VII required that an employer neither deny other employees their shift preferences nor deprive them of their contractual rights when accommodating the religious needs of others.[54] To compel a senior employee to replace the plaintiff on Saturdays, the Court stated, would result in a deprivation of the former's rights.[55]

The Court also emphasized that an employer need bear no more than *de minimis* costs in accommodating the religious practices of

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50. *Id.* at 40-41.

51. *Id.* at 41-42.

52. 432 U.S. at 77.

53. *Id.* at 81-82 (quoting 42 U.S.C.A. § 2000e-2(h) (1974) and International Bhd. of Teamsters v. United States, 431 U.S. 324, 352 (1977)). Section 703(h) of Title VII, 42 U.S.C.A. § 2000e-2(h) (1974), provides in pertinent part:

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

54. 432 U.S. at 81.

55. *Id.* at 80-81.

his employees.[56] The implementation of proposals to replace the plaintiff on his Sabbath would have involved greater than *de minimis* costs, either in the form of higher wages or lost efficiency in other departments, and thus would have constituted an undue hardship on TWA. Moreover, in requiring that the company make additional expenditures merely for the benefit of Hardison, the alternative of replacing the plaintiff on his Sabbath, like the proposed abandonment of the seniority system, would have resulted in unequal treatment of employees on the basis of religion.[57]

In *Hardison* the Court prescribed a fair standard for the evaluation of complaints of religious discrimination. At the very least, the duty of reasonable accommodation requires an employer to undertake a good faith effort to resolve conflicts between an employee's religious practices and his work schedule. The employer should consider every alternative, rejecting at the outset only those that would induce undue hardship. If, by creating higher labor costs or a loss of operational efficiency, a proposal's implementation would require more than a *de minimis* expenditure, it may be discarded as unreasonably burdensome. Similarly, an adjustment produces undue hardship if it deprives other employees of legally enforceable rights such as those provided by a valid seniority system or if it discriminates against other similarly situated workers solely on the basis of religion. In these situations, absent any reasonable options, the employer would be relieved of his statutory duty of accommodation.

The decision in *Hardison* may eliminate much of the confusion that has resulted from Title VII's proscription of discriminatory employment practices on the basis of religion, by establishing an equilibrium between the competing interests of an employee's religious freedom and the conduct of a secular business. Unlike several earlier decisions, which had favored small businesses,[58] the Supreme Court's balancing approach underscores the importance of a uniform application of the statutory requirements. It implies that a relatively large business, despite having a substantial number of employees, likewise may experience undue hardship when accommodating employees' religious preferences.[59]

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56. *Id.* at 84.

57. *Id.* at 84-85.

58. *See* notes 39-40, 44-45 *supra* & accompanying text.

59. TWA had conceded that more than 200 of its employees could perform the plaintiff's job adequately. 527 F.2d at 39.

Again deviating somewhat from prior case law, in which evidence of employee dissatisfaction or of disproportionate allocations of unfavorable work assignments had been insufficient to demonstrate undue hardship,[60] *Hardison* prohibits discrimination against any employee in order to insure the religious freedom of another. The Court construed Title VII to proscribe all forms of discrimination and emphasized that an employer must treat all of his work force equally, thus reaffirming the principle that "similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin."[61] Reasonable accommodation, therefore, contemplates only the implementation of those arrangements that will not infringe on the rights or preferences of others.

In its definition of undue hardship, the Court in *Hardison* minimized the Title VII burden imposed on employers.[62] Nevertheless, it reiterated the principle of affirmative action,[63] thereby requiring employers to make a good faith attempt at accommodating their employee's religious practices. Most importantly, the equilibrium established in *Hardison* between employers' and employees' competing interests provided lower courts with a framework within which to evaluate consistently claims of religious discrimination under Title VII.

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60. *See, e.g.*, Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided court*, 429 U.S. 65 (1976).

61. 432 U.S. at 71; *accord*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975), *cert. denied*, 429 U.S. 964 (1976); Johnson v. United States Postal Serv., 497 F.2d 128 (5th Cir. 1974); Dewey v. Reynolds Metal Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

62. A requirement that the employer bear more than *de minimis* costs might have violated the establishment clause of the first amendment. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. at 93 n.6 (Marshall, J., dissenting). Title VII previously has withstood first amendment challenges. *See, e.g.*, Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided court*, 429 U.S. 65 (1976); Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir. 1972); Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972); Ward v. Allegheny Ludlum Steel Corp., 397 F. Supp. 375 (W.D. Pa. 1975), *vacated per curiam*, 560 F.2d 379 (3d Cir. 1977); Weitkenant v. Goodyear Tire & Rubber Co., 381 F. Supp. 1284 (D. Vt. 1974). *Contra*, Reid v. Memphis Publishing Co., 521 F.2d 515 (6th Cir. 1975), *cert. denied*, 429 U.S. 964 (1976); Dewey v. Reynolds Metal Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971); Kettel v. Johnson & Johnson, 337 F. Supp. 892 (E.D. Ark. 1972); Dawson v. Mizell, 325 F. Supp. 511 (E.D. Va. 1971).

63. *See* 432 U.S. at 75.

JORDAN V. NORTH CAROLINA NATIONAL BANK: MISAPPLICATION OF HARDISON AND EMPLOYER COOPERATION

The first Title VII religious discrimination case following *Hardison* ignored the balancing approach approved by the Supreme Court. In *Jordan v. North Carolina National Bank*[64] the Court of Appeals for the Fourth Circuit reversed a judgment for plaintiff Jordan, a Seventh Day Adventist who sought employment with the defendant bank.[65] During her initial job interview, the plaintiff told the employment manager that she would accept any position requiring no Saturday work. Rather than investigate for potential openings in the bank's various departments, however, the manager simply told Jordan that no such positions were available. Jordan subsequently brought a Title VII suit against the bank, alleging discriminatory employment practices on the basis of religion.[66]

At trial, the district court concluded that the bank had made no attempt to accommodate the prospective employee's religious needs and consequently entered judgment for the plaintiff.[67] The court found unsupported by the evidence the defendant's contentions that accommodation would impose undue hardship in the form of impaired employee morale and relations.[68] To the contrary, another Seventh Day Adventist employed by the bank testified that the bank's satisfactory resolution of her refusal to work on Saturdays had produced no employee discontent. On appeal, the Fourth Circuit failed to review the plaintiff's evidence of religious discrimination; instead, it determined that, under the circumstances, reasonable accommodation was impossible.[69] Rather than basing its holding on a finding of undue hardship, however, the court of appeals concluded that Jordan's request for a guarantee that she need not be required to work on her Sabbath was so unreasonable as to peclude accommodation.[70]

In addition, the appellate court suggested that the accommodation of Jordan's request would obligate the bank to provide similar

64. 565 F.2d 72 (4th Cir. 1977).
65. *Id.* at 76.
66. Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172, 176 (W.D.N.C. 1975).
67. *Id.* at 181.
68. *Id.* at 177.
69. 565 F.2d at 76. The sole case cited by the court in support of its decision in *Jordan* was *Hardison*.
70. *Id.*

concessions to all employees and thereby would result in additional expenses constituting an undue hardship on the conduct of the business.[71] The court's equation of this hypothetical burden of additional costs with the more realistic problem of premium wages presented in *Hardison,*[72] however, was inappropriate. Although an employer occasionally may prove undue hardship without endeavoring to make any adjustments,[73] such proof must have more basis than mere speculation.[74]

Despite its purported application of *Hardison,* the Fourth Circuit in *Jordan* repudiates both the Supreme Court's reasoning and, perhaps more importantly, its philosophical underpinning. The decision in *Hardison* reaffirmed Title VII's principal requirement that an employer affirmatively attempt to accommodate his employee's religious practices. This obligation is discharged only after an employer offers sufficient proof that any concessions to an employee or applicant will impose an unreasonable burden on the conduct of the business.[75] Moreover, no presumption of undue hardship arises in the absence of actual accommodation, and an employer who fails to make reasonable accommodations to the needs of Sabbatarians must assume the burden of proving that any accommodation would cause an undue hardship on the business.

Notwithstanding the district court's determination in *Jordan* that the plaintiff had established a prima facie case of religious discrimination,[76] the court of appeals refused to shift the burden of proof to the defendant,[77] holding instead that Jordan's demand for an exclusion from Saturday work was unreasonable per se. A less adamant position by the plaintiff, however, would have required a compromise of her religious convictions. Moreover, the court's apparent

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71. *Id.*

72. *See* text accompanying notes 56-57 *supra.*

73. *See, e.g.,* Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975).

74. *See, e.g., id.;* Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937, 941-42 (M.D. Ala. 1974); Claybaugh v. Pacific Nw. Bell Tel. Co., 355 F. Supp. 1, 6 (D. Ore. 1973). *Hardison* provides some basis for concluding that the mere possibility of future burdens is sufficient to sustain a determination of undue hardship. The Court stated that "the likelihood [exists] that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working on Saturdays or Sundays." 432 U.S. at 84 n.15. This dictum, however, cannot be considered independently from the Court's conclusion that the payment of premium wages to an employee constitutes undue hardship.

75. *See* notes 2, 23 *supra* & accompanying text.

76. 399 F. Supp. at 178-79. *See* notes 27-30 *supra* & accompanying text.

77. *See* text accompanying note 31 *supra.*

requirement that Jordan be prepared to accept such a compromise during her initial discussion with the employment manager in effect nullified the bank's statutory obligation to make a reasonable accommodation.

Title VII protects only those employees whose religious observances can be reasonably accommodated by the employer without undue hardship. The Fourth Circuit in *Jordan,* however, articulated a judicial exception to the statutory requirements: absent the employee's cooperation, an employer need not attempt to accommodate the former's religious observances, although undue hardship cannot be demonstrated. In relieving the employer of his statutory obligation before he either has attempted to accommodate the employee's religious observances or, in the alternative, has proved undue hardship, this exception will deny employment opportunities to those individuals who, because they are unable to compromise their religious convictions, can accept positions of employment only when the employer will accommodate their beliefs. Further, the exception will enable employers to neglect the assumption of their Title VII obligations until they have ascertained whether an employee will compromise his religious convictions. Because *Jordan* provides an incentive for employers to disregard their duty to accommodate the religious preferences of their employees and also creates an unwarranted hardship on the affected workers, the decision should not be adopted by the other courts of appeals.

Conclusion

Implicit in both the statutory scheme and the judicial interpretation of Title VII is the notion that a reconciliation between an employee's religious beliefs and a secular business's practices is desirable. To facilitate this reconciliation, Title VII obligates the employer to make reasonable accommodations to the religious observances of prospective and current employees. By relieving the employer of both his reasonable accommodation duty and his burden of proving undue hardship in the conduct of the business, the Fourth Circuit in *Jordan v. North Carolina National Bank* undermines Title VII's underlying policy. The decision places an undue burden on those individuals with the most genuine religious beliefs, requiring that they compromise their convictions or jeopardize a position of employment, whether prospective or actual. Moreover,

in denying the Act's coverage to those employees and job applicants most in need of protection, *Jordan* is inconsistent with both the congressional intent and the judicial interpretations of Title VII.