

Religious Accommodation in the Work Place

While it would be inappropriate for The Rutherford Institute to provide you with legal advice at this time and under these circumstances, we are pleased to provide you with the following information.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the work place because of race, color, religion, sex, or national origin.¹ Title VII protects against three types of religious discrimination. First, Title VII requires employers to make a reasonable accommodation for an employee's or prospective employee's religious observances and practices. Second, it protects employees and prospective employees against intentional discrimination. Third, it is designed to prevent employment practices or policies that are neutral on their face, but religiously discriminatory in their application. This brochure addresses the most common of these protections, the employee's right to a reasonable accommodation of their religious observances and practices.

In 1967, the Equal Employment Opportunity Commission (EEOC) adopted the "reasonable accommodation rule." This rule requires employers 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."² While the EEOC promulgates

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¹ 42 U.S.C. § 2000e-1 et seq. (1995).

² 29 C.F.R. § 1605.1, 32 Fed. Reg. 10298, July 13, 1967. Several courts concluded that the Commission exceeded its authority under the statute because while Title VII prohibited discrimination, it did not mandate reasonable accommodation. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971) ("The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted."); *Kettell v. Johnson & Johnson*, 337 F.Supp 892 (D.C. Ark. 1972) ("The EEOC regulation imposing a duty to...accommodate... goes beyond the Congressional mandate..."). But *see*, *Jackson v. Veri Fresh Poultry, Inc.*, 304 F.Supp. 1276 (D.C. La. 1969) (EEOC had authority to adopt reasonable accommodation regulations). The passage of 42 U.S.C. § 2000e(j) and 2000e2(a)(1) (1995), settled the debate regarding the whether the EEOC had exceeded the scope of Title VII by adopting the "reasonable accommodation" guidelines. *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972); *Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972), *later op.*, 369 F.Supp. 684 (D.C. Tenn. 1973).

rules and guidelines, these rules have less weight than administrative regulations declared by Congress to have the force of law.³ However, in 1972, Congress codified the rule, making the reasonable accommodation standard statutory.⁴

A Prima Facie Case of Failure to Accommodate

An employee must establish a prima facie (?on its face?) case of failure to accommodate by showing that he or she:

- X holds a sincere religious belief that conflicts with an employment requirement;
- X has informed the employer about the conflict;
- X was discharged or disciplined for failing to comply with the conflicting employment requirement.⁵

Once an employee makes out a prima facie case, the burden of proof shifts to the employer to show either that:

- X the employer made a good faith effort to accommodate the conflicting religious belief or practice; or

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- X the employer was not able reasonably to accommodate the employee without

³ *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 n. 6 (1986), *appeal after remand*, 925 F.2d 47, *cert. denied*, 501 U.S. 1218 (1991); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944). *See also Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 76, n. 11 (1977).

⁴ 42 U.S.C. ? 2000e(j) (1995).

⁵ *Philbrook*, 479 U.S. at 65-66. While the Supreme Court has so far declined to establish a proof scheme for religious accommodation claims similar to those it has in other Title VII contexts, *Philbrook*, 479 U.S. at 67-68, several federal courts of appeal have accepted the scheme referred to in the accompanying text. *Beaseley v. Health Care Serv. Corp.*, 940 F.2d 1085, 1088 (7th Cir. 1991); *Toledo v. Nobel-Sysco Inc.*, 892 F.2d 1481 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990); *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988); *Protos v. Volkswagen*, 797 F.2d 129, 133 (3d Cir. 1986), *cert. denied*, 479 U.S. 972 (1986); *Proctor v. Consolidated Freightways Corp.*, 795 F.2d 1472, 1475 (9th Cir. 1986); *Ansonia Bd. of Educ. v. Philbrook*, 757 F.2d 476, 481 (2d. Cir. 1985), *rev?d. on other grounds*, 479 U.S. 60 (1986), *appeal after remand*, 925 F.2d 47, *cert. denied*, 501 U.S. 1218 (1991); *Turpen v. Missouri-Kansas-Texas R.R.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979).

experiencing undue hardship.⁶

5. The employee must hold a sincere religious belief that conflicts with an employment requirement.

To claim the right to a reasonable accommodation, the religious practice interfered with must be religious in nature. It is insufficient to claim an exemption based upon duties that are "family oriented" or "social in nature."⁷ When Congress amended Title VII in 1972, it added the following definition of religion:

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...religious observance or practice without undue hardship on the conduct of the employer's business.⁸

2. The employee must provide notice of the conflict to the employer.

Employees who fail to provide such notice may waive their rights of accommodation normally available to religious employees.⁹ Yet, the employer's duty to accommodate is triggered even if he receives:

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only enough information about an employee's religious needs to permit the employer

⁶ *Philbrook*, 479 U.S. at 67-68; *Gordon v. MCI Telecommunications Corp.*, 791 F.Supp. 431, 434 (S.D.N.Y. 1992).

⁷ *Wessling v. Kroger Co.*, 554 F.Supp. 548, 552 (E.D. Mich. 1982).

⁸ 42 U.S.C. § 2000e(j) (1995). Although a few district courts have held that this provision violates the Establishment Clause, *Isaac v. Butler's Shoe Corp.*, 511 F.Supp. (N.D.Ga. 1980); *Yott v. North American Rockwell Corp.*, 428 F.Supp. 763 (D.C.Cal. 1977), *aff'd. on other grounds*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *Anderson v. General Dynamics Convair Aerospace Div.*, 489 F.Supp. 782 (S.D.Cal. 1980), *rev'd.*, 648 F.2d 1247 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982), all the circuit courts that have addressed the issue have held that the statute does not violate the Establishment Clause. *EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 119 (4th Cir. 1988), *cert. denied*, 488 U.S. 924 (1988); *Protos*, 797 F.2d at 137; *McDaniel v. Essex Int'l. Inc.*, 696 F.2d 34, 37 (6th Cir. 1982); *Tooley v. Martin Marietta Corp.*, 648 F.2d 1239, 1244-46 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981); *Nottelson v. Smith Steel Workers D.A.L.U. 198806*, *AFL-CIO*, 643 F.2d 445, 453-55 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046 (1981); *Trans World Airlines, Inc. v. Hardison*, 527 F.2d 33 (8th Cir. 1975), *rev'd. on other grounds*, 432 U.S. 63 (1977).

⁹ See e.g., *Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671, 675 (8th Cir. 1985).

to understand the existence of a conflict between the employee's religious practices and the employer's job requirements... Any greater notice requirement would permit an employer to delve into the religious practices of an employee in order to determine whether religion mandates the employee's adherence. If courts may not make such an inquiry, see *Fowler*, 345 U.S. at 70; *Redmond*, 574 F.2d at 900, then neither should employers.¹⁰

As such, courts have neither required formalities nor required that an employee specifically use the term "accommodation."¹¹ However, an employer is under no duty to accommodate where the notice the employee gives "is not in terms of a request for an accommodation of religious practices."¹²

3. The employer must offer and attempt to make a reasonable accommodation.

Since Congress has ordered that employers must try to accommodate their employees' religious practices,¹³ the employer must show "that it has taken "some initial steps to reach a reasonable accommodation of the particular religious belief at issue." "¹⁴ Although neither Congress nor the EEOC has delineated the scope of this obligation,¹⁵ Title VII requires "at a minimum, the employer . . . negotiate with the employee in an effort reasonably to accommodate the employee's

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¹⁰ *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993). See also *Redmond v. GAF Corp.*, 574 F.2d 897, 902 (7th Cir. 1978)(informing employer that "I [am] not able to work on Saturday because of my religious obligation" is sufficient); *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1286 (8th Cir. 1977)(employee must, at least, "inform[] his employer of his religious needs?"), *cert. denied*, 434 U.S. 1039 (1978).

¹¹ *Brown*, 601 F.2d at 959 n. 4; *Redmond*, 574 F.2d at 902.

¹² *Wessling*, 554 F.Supp. at 552.

¹³ *Wright v. Runyon*, 2 F.3d 214, 217-18 (7th Cir. 1993).

¹⁴ *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1512 (9th Cir. 1989), quoting *American Postal Workers Union v. Postmaster General*, 781 F.2d 772, 776 (9th Cir. 1986); *EEOC v. Townley Eng'g. & Mfg. Co.*, 859 F.2d 610, 614-15 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989), *appeal after remand*, 946 F.2d 898 (1991).

¹⁵ *Hardison*, 432 U.S. at 75.

religious beliefs.¹⁶

Title VII does not guarantee that an employer will give an employee the accommodation of his choice.¹⁷ There is no obligation on the employer to adopt the accommodation proposed by the employee.¹⁸ The reasonable accommodation need not be one that spares the employee any cost.¹⁹ By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation.²⁰ Once an employer shows that it made or offered a reasonable accommodation the statutory inquiry is at an end.²¹

Simply put, Title VII requires *reasonable* accommodation or a showing that reasonable accommodation would be an undue hardship on the employer.²² To be considered reasonable, an accommodation must actually resolve the conflict between the requirements of employment and the employee's religious obligations.²³ An employer does not fulfill this obligation when he or she is confronted with two religious objections and offers an accommodation that completely ignores one.²⁴ Employers violate Title VII when they do not try to accommodate the employee unless they can prove that allowing those activities could not be accomplished without undue hardship.²⁵ The

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¹⁶ *Hacienda Hotel*, 881 F.2d at 1513 (citing *Hardison*, 432 U.S. at 75).

¹⁷ See *Philbrook*, 479 U.S. at 68; see also *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390 (10th Cir. 1984).

¹⁸ *Philbrook*, 479 U.S. at 70.

¹⁹ *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 145-46 (5th Cir. 1982)(emphasis added).

²⁰ *Philbrook*, 479 U.S. at 68.

²¹ *Id.*

²² *Pinsker*, 735 F.2d at 390.

²³ *Philbrook*, 479 U.S. at 70 (A reasonable accommodation is one that eliminates the conflict between employment requirements and religious practices.); *Wilson v. U.S. West Communications, Inc.*, 860 F.Supp. 665 (D.Neb. 1994).

²⁴ *Cooper v. Oak Rubber Co.*, 15 F.3d 1375 (6th Cir. 1994); *EEOC v. University of Detroit*, 904 F.2d 331, 335 (6th Cir. 1990).

²⁵ *United States v. Board of Education*, 911 F.2d 882, 887 (3d Cir. 1990); See also *Nobel-Sysco, Inc.*, 892 F.2d at 1490; *Hacienda Hotel*, 881 F.2d at 1512; *Pyro Mining Co.*, 827 F.2d at 1086; *Redmond*, 574 F.2d at 903; *Ithaca Indus., Inc.*, 849 F.2d at 118.

employer must offer the employee a reasonable accommodation before the employee suffers adversely for adhering to his religious beliefs.²⁶ If an employer does not propose an accommodation, the employer must accept the employee's proposal or show that the proposal would cause undue hardship.²⁷

4. The employee has a duty to cooperate.

An employee's duty to cooperate [is] triggered by the employer's initial efforts at accommodation.²⁸ Thus, an employee has the duty to make a good faith attempt to accommodate his religious needs through means offered by the employer.²⁹ To put it another way, it is clear that bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business.³⁰ Where there has been no effort by the employer to accommodate, there is no duty on the part of the employee to cooperate.³¹

In a Fourth Circuit case,³² a job applicant demanded a guarantee that she would never have to work on her Sabbath if she were to accept employment.³³ The employee refused several of the employer's offers of accommodation to her.³⁴ [The employee's] prerequisite on its face was so

²⁶ *Boomsma v. Greyhound Food Management, Inc.*, 639 F.Supp. 1448, 1454 (W.D.Mich. 1986).

²⁷ *Hacienda Hotel*, 881 F.2d at 1512.

²⁸ *Nobel-Sysco, Inc.*, 892 F.2d at 1488-89; *Heller*, 8 F.3d at 1436.

²⁹ See *Beadle v. Hillsborough County Sheriff's Department*, 29 F.3d 589, 592 (11th Cir. 1994), cert. denied, 115 S.Ct. 2001 (1995); *Mathewson v. Fla. Game & Fresh Water Fish Comm'n.*, 693 F.Supp. 1044, 1050 (M.D.Fla. 1988), aff'd., 871 F.2d 123 (11th Cir. 1989)(citing *Philbrook*, 479 U.S. at 68, in recognition of the employee's duty of "bilateral cooperation"); see also *Mann*, 561 F.2d at 1285; *American Postal Workers*, 781 F.2d at 777 (citing *Brener*, 671 F.2d at 146); *Heller*, 8 F.3d at 1436.

³⁰ *Philbrook*, 479 U.S. at 69 (quoting *Brener*, 671 F.2d at 145-46); *Heller*, 8 F.3d at 1440.

³¹ *Heller*, 8 F.3d at 1440.

³² *Jordan v. North Carolina Nat'l. Bank*, 565 F.2d 72 (4th Cir. 1977).

³³ *Id.* at 75.

³⁴ The employment manager for the bank where Jordan sought employment told her that they would try to accommodate her and they had never had a problem with that before. In fact, the bank was already accommodating one employee. Furthermore, the bank had even suggested employment on a trial basis to ascertain if there would be a problem. However, Jordan rejected these offers of accommodation. *Id.* at 76. While this case made it clear that the employer, under these particular circumstances did not need to go further than the offered accommodation, to the extent that courts read the case to say that under all circumstances an absolute refusal to work on the Sabbath is beyond accommodation, this case was later expressly overruled. See *Ithaca Indus., Inc.*, 849 F.2d at 119 n. 3.

unlimited and absolute in scope ? *never* to work on Saturday ? that it speaks its own unreasonableness and [is] thus beyond accommodation. ?³⁵

5. If a ?reasonable accommodation? cannot be made, an employer must show an ?undue hardship? would be imposed by the employee?s preferred accommodation.

An employer need not make an effort at accommodation if it can show that any accommodation would impose an undue hardship.³⁶ Undue hardship is ? not defined within the language of Title VII. Thus, the precise reach of the employer?s obligation to its employee is unclear under the statute and must be determined on a case-by-case basis. ?³⁷ The EEOC has interpreted ?undue hardship? to mean ?costs similar to the regular payment of premium wages of substitutes. ?³⁸ However, the EEOC maintains the position that infrequent or temporary payment of premium wages for a substitute is not an undue hardship.³⁹

In addition, the EEOC maintains that administrative costs, such as rearranging schedules and recording substitutions for payroll purposes, does not create an undue hardship.⁴⁰

?To require [an employer] to bear more than a de minimis cost... is an undue hardship. ?⁴¹ ?The cost of hiring an additional worker or the loss of production that results from not replacing a

³⁵ *Id.* at 76.

³⁶ *Heller*, 8 F.3d at 1435; *Townley Eng'g. & Mfg. Co.*, 859 F.2d at 615.

³⁷ *Beadle v. City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995), *cert. denied*, 63 U.S.L.W. 3891 (U.S. 1995); *Hillsborough County Sheriff's Dept.*, 29 F.3d at 592; *See also Hacienda Hotel*, 881 F.2d at 1512 n. 5.; *Pyro Mining Co.*, 827 F.2d at 1083; *Redmond*, 574 F.2d at 902; *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976), *cert. denied*, 443 U.S. 909 (1977).

³⁸ 29 C.F.R. ? 1605(e)(1)(1995).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Hardison*, 432 U.S. at 84.

worker who is unavailable due to a religious conflict can amount to undue hardship.⁴² De minimis cost, moreover, entails not only monetary concerns, but also the employer's burden in conducting its business.⁴³

Any hardship asserted must be "real" rather than "speculative,"⁴⁴ "merely conceivable," or "hypothetical."⁴⁵ An employer "stands on weak ground when advancing hypothetical hardships in a factual vacuum."⁴⁶ "Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts."⁴⁷ "Undue hardship requires more than proof of some fellow-worker's grumbling.... An employer... would have to show...actual imposition on co-workers or disruption of the work routine."⁴⁸

Courts have found undue hardships when employees ask employers, such as law enforcement agencies and prisons, which have a duty to protect lives and property, to juggle their schedules.⁴⁹

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⁴² *Lee v. ABF Freight System, Inc.*, 22 F.3d 1019, 1023 (10th Cir. 1994); *see also Brener*, 671 F.2d at 144.

⁴³ *City of Tampa*, 42 F.3d at 636; *see also United States v. Board of Education*, 911 F.2d at 887.

⁴⁴ *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2963 (1993).

⁴⁵ *Tooley*, 648 F.2d at 1243. *See also Toledo*, 892 F.2d at 1492; *Smith*, 827 F.2d at 1086; and *Brown*, 601 F.2d at 961. It is important to note that, after public hearings held in 1978, the EEOC reported that little evidence was submitted by employers which showed actual attempts to accommodate religious practices had resulted in unfavorable consequences to the employer's business. The EEOC report noted that while employers "appeared to have substantial anticipatory concerns," they had "no, or very little, actual experience with the problems" they feared would result from their reasonable accommodation of religious practices. 29 C.F.R. §§ 1605.2, 1605.3 - Appendix A (1995).

⁴⁶ *Brown*, 601 F.2d at 960.

⁴⁷ *Anderson*, 589 F.2d at 402; *see also Draper v. United States Pipe and Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975).

⁴⁸ *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 407 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *see also Draper*, 527 F.2d at 520-21.

⁴⁹ *Hillsborough County Sheriff's Dept.*, 42 F.3d at 637 (police department); *Blair v. Graham Correctional Center*, 782 F.Supp. 411, 414 (C.D.Ill.), *aff'd*, 4 F.3d 996 (7th Cir.), *cert. denied*, 115 S.Ct. 924 (1992) (prison); *Ryan v. U.S. Dept. of Justice*, 950 F.2d 458, 462 (7th Cir. 1991)(FBI).

Courts have held that significant wage expenditures or losses of efficiency cause undue hardships.⁵⁰ Administrative costs or inconvenience can also create an undue hardship,⁵¹ but evidence of such costs must be more than speculative.⁵² The employer's chances of showing undue hardship increase if he can show that other operations depend heavily on that employee's output or if he can show that few qualified substitutes for the employee are available.⁵³ Actively helping an employee find someone to swap shifts with him or her by providing a bulletin board or advertising is not an undue hardship.⁵⁴

Other Materials Available from The Rutherford Institute:

In addition to this brochure, The Rutherford Institute has available information on specific concerns in the area of religious discrimination which employers and employees frequently face. They include:

- X Accommodation of Religious Observances, Holidays and Sabbaths (Freedom Resources Brief D-1);
- X Bible Studies and Other Religious Meetings in the Work Place (Freedom Resources Brief D-7); and
- X Religious Posters, Pictures and Articles in the Work Place (Freedom Resources Brief D-8).

If you would like additional information regarding these, or other religious discrimination related topics, you may contact The Rutherford Institute at P.O. Box 7482, Charlottesville, VA, 22906-7482, (804) 978-3888 or visit our website at www.rutherford.org.

⁵⁰ *Mann*, 7 F.3d at 1370; *Cooper*, 15 F.3d at 1380 (needing to hire another worker for the entire week in order to avoid shutting down an entire machine is an undue hardship); *Cook*, 981 F.2d at 339 (needing to hire a temporary worker or pay a permanent employee overtime pay is an undue hardship).

⁵¹ *Moore*, 727 F.Supp. at 1162.

⁵² *Draper*, 527 F.2d at 1162; *Drazewski v. Waukegan Development Center*, 651 F.Supp. 754 (N.D.Ill. 1986).

⁵³ *Hardison*, 432 U.S. at 68 (employee's job was essential, and on weekends he was the only available person on his shift to perform it); *EEOC v. Chrysler*, 652 F.Supp. 1523, 1526 (N.D. Ohio 1987)(shortage of electricians might result in production delays in plant that is the only production facility for certain automobile parts). *Cf. Redmond*, 574 F.2d 903 (excusal from working overtime on Saturday not an undue hardship because employer's warehouse would not be undermanned, the employer had previously used temporary help, the need to work overtime on Saturdays was relatively rare, and hiring temporary workers would not result in a loss of efficiency because the work was unskilled).

⁵⁴ *Smith*, 827 F.2d at 1089; *Hacienda Hotel*, 881 F.2d at 1512-13; *Boomsma*, 639 F.Supp. at 1455.