
(UN)REASONABLE RELIGIOUS
ACCOMMODATION: THE ARGUMENT
FOR AN “ESSENTIAL FUNCTIONS”
PROVISION UNDER TITLE VII

LAURA E. WATSON*

ABSTRACT

Title VII of the Civil Rights Act of 1964 requires employers to make reasonable accommodations for their employees’ sincerely held religious practices and beliefs as long as the accommodation does not pose an “undue hardship” on the conduct of the employer’s business. But “undue hardship” is a vague term that has led to unclear, inconsistent, unfair, and even discriminatory precedent. This Note proffers a new framework for religious discrimination law through the incorporation of the “essential functions” provision of a similar law, Title I of the Americans with Disabilities Act, in order to strike a fairer balance between the competing rights and interests of employers and employees.

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* J.D. Candidate, 2017, University of Southern California Gould School of Law; B.A. Political Science, Minors in Philosophy and Civic Engagement, 2012, University of California Los Angeles. Many thanks to Alex Radisich for his unconditional encouragement, Cathy Watson for her thought-provoking dinner conversations, Professor Samuel Erman and Lauren Rank for their continued support and advice, and the members of the *Southern California Law Review* for their expert editing.

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INTRODUCTION

In August 2015, ExpressJet flight attendant Charee Stanley was threatened with termination and placed on unpaid leave for refusing to serve alcoholic beverages to passengers on the basis of her religious beliefs.¹ At the time, Stanley had worked for the airline for three years.²

1. Emanuella Grinberg & Carma Hassan, *Muslim Flight Attendant Says She Was Suspended for Refusing to Serve Alcohol*, CNN, <http://www.cnn.com/2015/09/05/travel/muslim-flight-attendant-feat> (last updated Sept. 6, 2015, 4:07 PM).

2. *Id.*

Two years prior to the conflict, she had converted to Islam.³ In June 2015, when she learned that Islamic law forbids the service of alcohol to others, Stanley approached her superiors at the airline to ask how she could avoid serving alcohol to passengers.⁴ The airline suggested that she coordinate with her fellow flight attendants so that they could provide the alcoholic beverages instead.⁵ Stanley did so, but this arrangement ended abruptly two months later when another flight attendant complained that Stanley's failure to serve beverages like the other flight attendants rendered her delinquent in her job duties.⁶ As a result, ExpressJet revoked Stanley's accommodation and placed her on unpaid leave for twelve months.⁷ Stanley responded by filing a complaint with the United States Equal Employment Opportunity Commission ("EEOC"), alleging that the airline failed to offer a reasonable accommodation for her religious beliefs in violation of Title VII of the Civil Rights Act.⁸ Stanley maintains that the airline should accommodate her beliefs without moving her to another position within the company that does not conflict with Islam's prohibition on alcohol. She says that she specifically applied to be a flight attendant, loves her job, and "should be able to do that if [she] want[s] to" without being forced to choose between her career and her religion.⁹ After the EEOC and ExpressJet failed to reach a satisfactory outcome for the parties via mediation, Stanley sued the airline for wrongful religious discrimination in federal court in August 2016; her case is still pending today.¹⁰

Religious discrimination cases like Stanley's are increasing in both popularity and success. In the past decade, there has been an 87% increase in the number of religious discrimination charges filed with the EEOC.¹¹ EEOC settlements have increased approximately 210% since 1997.¹² The

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Justin Wm. Moyer, *Muslim Flight Attendant Suspended for Refusing to Serve Alcohol Files Federal Complaint*, WASH. POST (Sept. 8, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/08/muslim-flight-attendant-suspended-for-refusing-to-serve-alcohol-files-federal-complaint/>.

9. The View, *Muslim Flight Attendant Charee Stanley on 'The View,'* YOUTUBE (Sept. 10, 2015), <https://www.youtube.com/watch?v=eFNkPEyz0jM> (ABC television broadcast Sept. 10, 2015).

10. Complaint and Jury Demand, *Stanley v. ExpressJet Airlines, Inc.*, No. 2:16-cv-12884 (E.D. Mich. Aug. 5, 2016), ECF No. 1.

11. Andrea J. Sinclair, Note, *Delimiting Title VII: Reverse Religious Discrimination and Proxy Claims in Employment Discrimination Litigation*, 67 VAND. L. REV. 239, 259 (2014).

12. See EEOC Office of Research, Information & Planning, *Religion-Based Charges: FY 1997–FY 2015*, U.S. EQUAL EMP. OPPORTUNITY COMM'N [hereinafter *Religion-Based Charges*],

EEOC has recovered approximately \$4 million in damages, in addition to injunctive relief and specific performance remedies, through the sixty-eight religious discrimination lawsuits it has filed since 2010.¹³ Favorable precedent for employees who were suspended or fired by private employers for refusing to perform occupational duties that conflicted with their religious beliefs is also steadily increasing.¹⁴ In October 2015, two Muslim truck drivers were awarded \$240,000 in damages after they were fired for refusing to deliver shipments of beer due to Islam's prohibition on alcohol service and consumption.¹⁵ In June 2015, seven U.S. Supreme Court Justices upheld a \$20,000 judgment in favor of a hijab-wearing Muslim woman who was denied a sales job with Abercrombie & Fitch, Inc.,¹⁶ a clothing retailer known for its "sex appeal."¹⁷ This was just one of several successful Title VII lawsuits brought against Abercrombie by Muslim employees and prospective employees who were either not hired, or fired for refusing to remove their hijabs in accordance with the store's "Look Policy."¹⁸ In April 2012, a Jehovah's Witness employee was awarded over

<http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm> (last visited Oct. 23, 2016).

13. *What You Should Know About the EEOC and Religious Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/newsroom/wysk/religious_discrimination.cfm (last visited Oct. 23, 2016).

14. In this Note, unless noted otherwise, "religious beliefs" takes the broad definition espoused by current Title VII doctrine, encompassing beliefs from traditional organized religions like Christianity and Hinduism, as well as sincerely held nonreligious ethical or moral beliefs. *See Religious Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/laws/types/religion.cfm> (last visited Oct. 23, 2016) ("The law protects not only people who belong to traditional, organized religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, but also others who have sincerely held religious, ethical or moral beliefs."). Several of the following examples of successful religious discrimination lawsuits, and part of the inspiration for this Note, come from Eugene Volokh, *When Does Your Religion Legally Excuse You From Doing Part of Your Job?*, WASH. POST (Sept. 4, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/04/when-does-your-religion-legally-excuse-you-from-doing-part-of-your-job/>.

15. Press Release, EEOC, Jury Awards \$240,000 to Muslim Truck Drivers in EEOC Religious Discrimination Suit (Oct. 22, 2015), <https://www.eeoc.gov/eeoc/newsroom/release/10-22-15b.cfm>. *See also* Volokh, *supra* note 14.

16. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2030–31 (2015).

17. Ashley Lutz, *Abercrombie & Fitch Employees Describe Its Tyrannical 'Look Policy'*, BUS. INSIDER (Sept. 18, 2013, 5:04 PM), <http://www.businessinsider.com/abercrombie-and-fitch-look-policy-2013-9>.

18. *See, e.g.*, *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 5:10-CV-03911-EJD, 2013 U.S. Dist. LEXIS 51905, at *44–49 (N.D. Cal. Apr. 9, 2013) (finding that Abercrombie could not prove that its "Look Policy" qualified as commercial free speech, and its denial of a religious accommodation therefore violated Title VII); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 966 F. Supp. 2d 949, 965 (N.D. Cal. 2013) (finding that Abercrombie violated Title VII by failing to accommodate plaintiff's religious practice of wearing a hijab because the headscarf would not cause the employer an undue burden); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1287 (N.D. Okla. 2011) (granting partial summary judgment for plaintiff because Abercrombie could not show that granting

\$50,000 after he was fired for refusing to raise a flag, a task which had been assigned to him, because it conflicted with his religious beliefs.¹⁹ Around the same time, a teacher received \$75,000 in back pay, damages, and attorneys' fees when a school board refused her request for a three-week leave of absence to attend the Hajj, or pilgrimage to Mecca, in the middle of the school year, close to the state testing dates.²⁰ Prior to that, a district court required a post office to reinstate suspended postal workers who refused to process draft registration forms on the basis of their pacifist beliefs.²¹ Courts have also ruled favorably for employees with a religious objection to working on the Sabbath, even when Friday and Saturday hours are mandated by the employee's job description.²²

In each of the cases above where an employee's religious beliefs directly interfered with the employee's job performance as required by his or her employer, the religious objectors received an accommodation for their religious beliefs, either in court or as a result of the employer's settlement with the EEOC. This string of legal victories is indicative of a broader trend of increasing national attention on religious-based objections in other predominantly secular spheres by employers and employees alike. For instance, the public sector found itself in the spotlight for its religious accommodation practices last year after Kim Davis, a Kentucky marriage clerk, refused to issue marriage licenses because gay marriage went against her Christian beliefs²³—even though the Supreme Court had legalized same-sex marriage throughout the country in *Obergefell v. Hodges*.²⁴ This controversy came only a year after the Supreme Court granted exemptions

plaintiff a religious accommodation would be an undue burden, given that the retailer had granted numerous exceptions to its "Look Policy" in recent years).

19. Press Release, EEOC, Judge Approves Guam Aircraft Company's Settlement of EEOC Religious Discrimination Suit (Apr. 2, 2012), <http://www1.eeoc.gov/eeoc/newsroom/release/4-2-12a.cfm?renderforprint=1>. See also Volokh, *supra* note 14.

20. Consent Decree at 2, 9–10, *United States v. Bd. of Educ.*, No. 1:10-cv-7900 (N.D. Ill. Oct. 24, 2011).

21. *Am. Postal Workers Union v. Postmaster Gen.*, No. C 83-2880 TEH, 1984 U.S. Dist. LEXIS 15428, at *3, *14 (N.D. Cal. June 28, 1984), *rev'd on procedural grounds*, 781 F.2d 772 (9th Cir. 1986); Volokh, *supra* note 14.

22. See, e.g., *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1083, 1089 (6th Cir. 1987) (finding that a mining company violated Title VII by firing a Baptist employee who was unable to work the requisite eight-day shifts at the mine); *EEOC v. Tex. Hydraulics, Inc.*, 583 F. Supp. 2d 904, 907–08, 912 (E.D. Tenn. 2008) (finding that a Title VII case involving an employee's termination for refusing to work on Saturdays despite a newly imposed requirement to do so could not be dismissed on summary judgment).

23. Scott Neuman, *Kim Davis Back at Work, But Remains Defiant*, NPR (Sept. 14, 2015, 7:59 AM), <http://www.npr.org/sections/thetwo-way/2015/09/14/440215241/kim-davis-back-at-work-but-remains-defiant>.

24. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

for closely held corporations that had religious objections to providing certain forms of birth control to employees as mandated under the Affordable Care Act in *Burwell v. Hobby Lobby Stores, Inc.*²⁵ The healthcare field has also recently received attention for religious-based claims related to controversial medical procedures, such as “nurses who had religious objections to being involved in abortions ([or] even . . . to washing instruments that would be used in abortions).”²⁶ There is no doubt that the movement for religious rights in the workplace is gaining momentum, making it difficult for employers, many of whom strive to maintain predominantly secular workplaces,²⁷ to avoid liability amid increasingly diverse workforces.²⁸

It is not surprising, nor necessarily detrimental, that employers and employees carry their religious beliefs into the workplace considering that religion is, and always has been, an integral aspect of many Americans’ lives.²⁹ Individuals’ rights to religious freedom and expression are protected in the first clause of the First Amendment to the Constitution of the United States, signifying its prominent position among American civil liberties.³⁰ Although private employers are not bound by the Constitution in the same way as government employers,³¹ they do have a statutory duty to

25. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 (2014).

26. Volokh, *supra* note 14. *See also, e.g.*, Verified Complaint at 2–3, *Danquah v. Univ. of Med. & Dentistry of N.J.*, No. 2:11-cv-06377-JLL-MAH (D.N.J. Oct. 31, 2011) (pleading relief under 42 U.S.C. §§ 1983 and 300a-7(c)(1)–(2), provisions regarding discrimination and exemptions to abortion procedures specific to healthcare occupations, in seeking a right to avoid providing care to women before or after their abortions, such as ensuring that patients have a ride home after surgery).

27. Gwendolyn Yvonne Alexis, *Not Christian, but Nonetheless Qualified: The Secular Workplace—Whose Hardship?*, 3 J. RELIGION & BUS. ETHICS 1, 1 (2012) (noting that “business employers generally strive to maintain a secular workplace” with the intent of placing various religious traditions on an equal footing, and reduce clashing viewpoints in employment environments that are “seldom—if ever—religiously homogenous”).

28. America’s religious diversity is steadily growing. Between 2007 and 2014, the percentage of Americans identifying themselves as Christian declined approximately 8%, while the percentage of Americans with nonaffiliated or non-Christian faiths increased by 6.7% and 1.2%, respectively. PEW RES. CTR., AMERICA’S CHANGING RELIGIOUS LANDSCAPE: CHRISTIANS DECLINE SHARPLY AS SHARE OF POPULATION; UNAFFILIATED AND OTHER FAITHS CONTINUE TO GROW 4 (2015) [hereinafter CHANGING LANDSCAPE], <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/>.

29. SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 4–5 (2d ed. 2004); Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y. L. SCH. L. REV. 719, 721–22 (1996).

30. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .” U.S. CONST. amend. I.

31. Indeed, for much of our country’s history of labor laws, the traditional jurisprudence would have deemed as unconstitutional attempts to interfere with a private employer’s control and ownership

respect the religious beliefs of their employees. This duty is imposed by Title VII of the Civil Rights Act of 1964, its various state law analogs, and certain sector-specific regulations.³² For some scholars, the presence of statutory religious discrimination provisions such as Title VII “acknowledges ‘our legal tradition’s judgment that citizens legitimately carry their religious beliefs into the commercial marketplace and should be protected in doing so.’”³³

But the right to religious expression is not the only time-honored legal principle in our country. Over the years, legislation and jurisprudence have identified competing rights and interests, such as equality, autonomy, social harmony, and freedom of contract.³⁴ Though our society values freedom of expression, there have always been limits as to what individuals can do or say under the law in light of other competing interests. Moreover, religion is markedly different from other protected classes in the employment discrimination context, such as race or gender, given that religious-based discrimination derives from differences in personal choices and beliefs,

of enterprise based on its employees’ constitutionally protected rights. See Joseph R. Grodin, *Constitutional Values in the Private Sector Workplace*, 13 INDUS. REL. L.J. 1, 5 (1991) (“An employer’s ownership of the enterprise was formerly thought to carry with it not only the general authority to control the workplace and direct the work force, but also the power to make employment contingent upon whatever conditions the employer might consider appropriate, no matter how deeply these conditions may intrude upon the autonomy, privacy, dignity, or other interests of the worker So entrenched was this notion of presumptive authority that attempts by society to protect against its abuses were deemed unconstitutional . . .”).

32. For instance, California’s Fair Employment and Housing Act (“FEHA”) prohibits an employer from discriminating against or refusing to hire or employ a person based on his or her religious beliefs. CAL. GOV’T CODE § 12940(a) (West 2016).

33. Sinclair, *supra* note 11, at 244 (quoting George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553, 574 (2007)).

34. The line of privacy and autonomy constitutional jurisprudence appears in cases such as *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (recognizing an independent right of privacy within the “penumbra” of the Bill of Rights) and *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”). Commitment to the principle of equality under the law is codified by the Fourteenth Amendment to the U.S. Constitution. U.S. CONST. amend. XIV. The importance placed on social harmony is found in restrictions on expression that would create unnecessary societal disruption or panic, for example, “falsely shouting fire in a theatre.” *Schenck v. United States*, 249 U.S. 47, 52 (1919). And although employers’ freedom of contract was scaled back after the *Lochner* era, the post-1980s evidenced a return to court decisions that allow employers greater freedoms in business-related activities. See, e.g., Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?_r=0 (noting that Chief Justice Roberts’ Court has been “friendlier to business than those of any court since at least World War II . . . allow[ing] corporations to spend freely in elections in the *Citizens United* case, . . . shield[ing] them from class actions and human rights suits, and . . . [allowing] arbitration [as] the favored way to resolve many disputes.”).

rather than innate and immutable characteristics.³⁵ When an employer discriminates against an employee on the basis of race or gender in the pursuit of conducting her business as she sees fit, the balance of interests in such cases easily favors the employee because courts and legislatures have recognized that there “is no constitutional right or human right which extends to the extent of denying another’s humanity on the basis of sex or race.”³⁶ However, such balancing of competing interests is more difficult when an employer and employee disagree about whether a particular exercise of religious beliefs or practices is appropriate in a private workplace environment. In such instances, both the employer and the employee have an equal right to exercise their religious beliefs (or lack thereof), but one or the other will have to give way completely or partially through accommodation to the other in order to resolve the conflict.³⁷ When this happens, whose beliefs should be accommodated? How should we balance the tension between employers’ ability to conduct their businesses in accordance with their own beliefs as to what religious practices are acceptable in their workplaces on the one hand, and employees’ ability to freely practice the religion of their choice on the other?

Our primary legal framework for answering these questions, Title VII of the Civil Rights Act of 1964, is far from ideal. Its provisions for reasonable religious accommodation are at best unclear and inconsistent, and at worst discriminatory among employees and detrimental to the practice of courts and businesses. This Note will suggest that the application of Title VII could be improved by borrowing the “essential functions” provision from a similar accommodations law, Title I of the Americans with Disabilities Act (“ADA”), which gives employers the legal right to refuse employment to someone who cannot perform core aspects of their job duties.³⁸ This Note proceeds by examining the historical developments and the current version of Title VII religious accommodation law, including common critiques about how the law is applied in practice, in Part I. Part II provides an overview of disability accommodation law

35. Jamar, *supra* note 29, at 727. For an interesting argument that religious discrimination is unusual among Title VII’s other protected classes in that it also requires preferential treatment of one’s religious beliefs rather than merely equal treatment under the law, see Jeffrey M. Hirsch, *EEOC v. Abercrombie & Fitch Stores, Inc.: Mistakes, Same-Sex Marriage, and Unintended Consequences*, 94 TEX. L. REV. 95, 95–96 (2016).

36. Jamar, *supra* note 29, at 727 (citing Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1800–06 (1992)).

37. *Id.*

38. 42 U.S.C. §§ 12111(8), 12112(a) (2012).

under Title I of the ADA, including an explanation of its “essential functions” provision,³⁹ and offers reasons why the ADA is a fruitful source of comparison for Title VII religious accommodation law. Part III explores several potential ramifications of incorporating the ADA’s “essential functions” language into Title VII’s religious accommodation law and discusses whether this incorporation is likely to alleviate common concerns regarding its present framework. Ultimately, this Note concludes that religious accommodation law should be interpreted like the ADA in granting employers the ability to fire or not hire individuals whose religious beliefs prove to be incompatible with “essential functions” of their occupations.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: HISTORICAL DEVELOPMENT AND CURRENT CRITIQUES

Religious-based discrimination in private employment is broadly proscribed by Title VII, which forbids employers with “15 or more employees”⁴⁰ to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . religion”⁴¹

As originally enacted, Title VII mandated employers to accommodate an employee’s religious beliefs, but not necessarily an employee’s religious *practices*, “leaving employers and employees to battle over whether, and to what extent, the law required employers to alter work schedules or other conditions of employment for religious employees” who requested such modifications.⁴² This omission became clear in one of the first major cases interpreting this law, *Dewey v. Reynolds Metals Co.*, in which the Sixth Circuit decided, and the Supreme Court affirmed, in favor of Reynolds Metals Co. for firing Robert Dewey for his religious-based objection to working on Sundays.⁴³ The courts strictly construed Title VII as aiming to prohibit “discriminating practices,” and because Dewey’s Sunday absences

39. *Id.* § 12112(a).

40. *Id.* § 12111(5)(A).

41. *Id.* § 2000e-2(a)(1).

42. WORKPLACE FLEXIBILITY 2010, FED. LEGIS. CLINIC AT GEORGETOWN UNIV. LAW CTR., TITLE VII AND FLEXIBLE WORK ARRANGEMENTS TO ACCOMMODATE RELIGIOUS PRACTICE AND BELIEF 1 (2005) [hereinafter WORKPLACE FLEXIBILITY], <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1003&context=regulations>

43. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 330, 334 (6th Cir. 1970) (“Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another.”), *aff’d by an equally divided court*, 402 U.S. 689 (1971), *superseded by statute*, 29 C.F.R. § 1605.1(b)–(c) (2015).

violated compulsory working provisions that applied equally to *all* employees, the courts determined that Reynolds did not discriminate against Dewey in terminating his employment.⁴⁴ Indeed, the courts expressed concern that acceding “to Dewey’s demands [to accommodate his Sabbath observance] would require Reynolds to discriminate against its other employees by requiring them to work on Sundays in the place of Dewey, thereby relieving Dewey of his contractual obligation”⁴⁵ and causing unequal treatment under Reynolds employees’ collective bargaining agreement.⁴⁶ The judges feared that such unequal treatment based on religion could lead to “chaotic personnel problems”⁴⁷ that would undermine the protections Congress intended Title VII to provide.⁴⁸

In 1972, a year after the *Dewey* decision, Congress expanded Title VII’s definition of religion to include protection for religious practices. It now provides as follows:

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.⁴⁹

Today, in order to present a *prima facie* case of religious discrimination based on an employer’s failure to accommodate, a plaintiff must prove: “(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; [and] (3) he or she was disciplined for failure to comply with the conflicting employment requirement.”⁵⁰ Importantly, the employer’s awareness of the employee’s belief does not have to rise to the level of actual knowledge, nor does an employee have to explicitly provide notice of her belief; an employer may be in violation of Title VII “even if he has no more than an unsubstantiated suspicion that accommodation would be needed.”⁵¹ After a plaintiff successfully establishes these *prima facie*

44. *Id.* at 334.

45. *Id.* at 330.

46. *Id.*

47. *Id.*

48. *Id.*

49. 42 U.S.C. § 2000e(j) (2012).

50. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985) (quoting *Turpen v. Mo.-Kan.-Tex. R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984)), *aff’d*, 479 U.S. 60 (1986).

51. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033–34 (2015) (determining that Abercrombie had adequate knowledge that its employee wore a headscarf for religious reasons based on a district manager’s supposition that the employee wore the headscarf for faith-based reasons).

elements, the employer “must offer the [worker] a reasonable accommodation, unless doing so would cause the employer to suffer an undue hardship.”⁵² This rule has only three exceptions.⁵³ First, Title VII’s restrictions do not apply to government or religious employers or private employers with less than fifteen employees.⁵⁴ Second, employers may discriminate based on religion when religion is a bona fide occupational qualification (“BFOQ”) reasonably necessary to the operation of the employer.⁵⁵ Lastly, courts have generally held that churches have a constitutional right to discriminate based on any criteria they wish—religion, gender, race, et al.—in hiring employees who perform ministerial duties.⁵⁶ But for most private employers, these three exceptions are inapplicable. Thus, the only way most private employers can avoid liability for religious discrimination lawsuits under Title VII is by showing that certain accommodations pose an “undue hardship” on how they operate their business.

“Undue hardship” is a vague term courts have struggled to define with precision. In one of the first cases to interpret the provision, *Trans World Airlines, Inc. v. Hardison*, the Supreme Court held that religious accommodation causes an “undue hardship” whenever an accommodation results in “more than a *de minimis* cost”⁵⁷ to the employer.⁵⁸ As a result, Trans World Airlines’ firing of Sabbath observer Larry Hardison, who missed a sufficient number of his obligatory Sunday shifts to provide the airline with grounds for termination, did not violate Title VII’s prohibition against religious discrimination.⁵⁹ The Court determined that the airline had made sufficient efforts under Title VII to accommodate Hardison by conferring with him in an attempt to resolve his religious conflict with its business needs.⁶⁰ Though Trans World Airlines, a large airline, could have

52. *Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002).

53. EUGENE VOLOKH, *THE RELIGION CLAUSES AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 441 (2005).

54. 42 U.S.C. §§ 2000e(b), 2000e-1(a), 2000e-2(e)(2).

55. VOLOKH, *supra* note 53, at 441. *See also* 42 U.S.C. § 2000e-2(e)(1); *Kern v. Dynallectron Corp.*, 577 F. Supp. 1196, 1202 (N.D. Tex. 1983) (stating that Islamic beliefs are a BFOQ for pilots who must fly into Mecca because Saudi law states that non-Muslims who go to Mecca are to be executed). However, BFOQ is a narrow exception, most applicable to extreme situations such as that in *Kern*. VOLOKH, *supra* note 53, at 441.

56. VOLOKH, *supra* note 53, at 441. *See also* *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461–65 (D.C. Cir. 1996); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166–69 (4th Cir. 1985).

57. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

58. *Id.*

59. *Id.*

60. *Id.* at 77.

conceivably gone a step further to fill Hardison's shifts—for instance, by carving out a special exception to its seniority system to allow Hardison to exert greater control over when he worked, or by mandating (and paying) another employee to work overtime in his stead—the Court reasoned that such behavior was unnecessary under Title VII because it would involve unequal treatment of employees on the basis of their religious beliefs or lack thereof, which was the very sort of discrimination that Title VII was enacted to prevent.⁶¹

Ten years later, the Supreme Court received another opportunity to strengthen Title VII's religious accommodation protections. But it again declined to do so, instead issuing another employer-friendly reading of Title VII in *Ansonia Board of Education v. Philbrook*, which held that Title VII does not require an employer to offer the employee's preferred accommodation—rather, an employer successfully avoids liability when “any reasonable accommodation”⁶² is provided.⁶³ In this case, Philbrook sought an accommodation that would allow him three more days of paid vacation leave for his mandatory religious holidays than the school board's attendance policy generally provided to its employees, or alternatively, an arrangement by which Philbrook would “pay the cost of a substitute and receive full pay for [those three] additional days off for religious observances.”⁶⁴ The Court thought the school board's attendance policy, which required Philbrook to take unpaid leave for holy day observances that exceeded the amount of absences allowed by their collective bargaining agreement, was reasonable because it allowed Philbrook to fully observe his religious holidays while keeping his job, and only required him to forgo compensation on days when he was not in fact working.⁶⁵ The Court's consistent interpretation of Title VII in *Hardison* and *Philbrook*, both of which offer minimal protections to special-needs religious workers, is indicative of the Court's traditional willingness to defer to employers' business judgment when it comes to handling potentially disruptive religious expressions in their own workplaces.

Following *Philbrook*, members of Congress made several attempts to alter the legal standard of Title VII to provide more religious

61. *Id.* at 83–84.

62. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986).

63. *Id.* For instance, offering an employee a different position at a lower rate of pay is a reasonable accommodation if the position transfer eliminates the scheduling conflict between the religious practice and the employment requirements.

64. *Id.* at 63–65.

65. *Id.* at 70.

accommodation protection, but none of these legislative efforts garnered sufficient support to pass.⁶⁶ The first attempt, the Religious Accommodation Amendment, sought to modify *Philbrook* by stating “[i]f there are several reasonable accommodations that may be made without causing such undue hardship, then the employer shall make any of such accommodations that will, in the opinion of the employee, be the least onerous to the employee.”⁶⁷ It was introduced in the House of Representatives in 1989 and sent to a subcommittee, where it languished and eventually died.⁶⁸ At various times between 1994 and 2005, a handful of representatives in the House and Senate introduced versions of the Workplace Religious Freedom Act (“WRFA”), which aimed to overturn both *Hardison* and *Philbrook*; each of these versions was struck down.⁶⁹ No further movements have been made on the WRFA, signifying that most members of Congress, like the courts, are hesitant to further impose the religious protections of Title VII into private, and often secular, work environments.

The standards set forth in *Hardison* and *Philbrook* largely remain good law today, even though the obscure “*de minimis*” standard still fails to clarify what exactly an “undue hardship” entails and leaves today’s courts free to depart from years of precedent to protect increasingly stronger religious expressions in the workplace, like in the cases examined in the Introduction.⁷⁰ Persistent confusion over “undue hardship” is not the only critique leveled against Title VII’s reasonable religious accommodation law as it currently stands. Other critiques include the following:⁷¹

66. WORKPLACE FLEXIBILITY, *supra* note 42.

67. *Id.* (citing Religious Accommodation Amendment, H.R. 2935, 101st Cong. (1989) (sponsored solely by Rep. Stephen Solarz (D-NY))).

68. *Id.*

69. *Id.* (citing the following versions of the Workplace Religious Freedom Act, all proposed by various combinations of the same approximately thirty-five Congressional representatives: H.R. 1445, 109th Cong. (2005); S. 677, 109th Cong. (2005); S. 893, 108th Cong. (2003); S. 2572, 107th Cong. (2002); H.R. 4237, 106th Cong. (2000); S. 1668, 106th Cong. (1999); H.R. 2948, 105th Cong. (1997); S. 1124, 105th Cong. (1997); S. 92, 105th Cong. (1997); H.R. 4117, 104th Cong. (1996); S. 2071, 104th Cong. (1996); H.R. 5233, 103rd Cong. (1994)).

70. *See supra* Intro.

71. Several of the following critiques appear in Eugene Volokh’s *When Does Your Religion Legally Excuse You From Doing Part of Your Job?*, *supra* note 14.

A. RELIGIOUS ACCOMMODATION LAW REQUIRES JUDGMENTS OF DEGREE, WHICH LEAD TO LEGAL INCONSISTENCIES, UNCERTAINTY, AND INEFFICIENCY

Reasonable religious accommodation requires triers of fact to make a judgment of degree—for instance, *how* burdensome must an accommodation be in order to pose more than a “*de minimis*” cost? Because Title VII does not define “undue hardship,” each case turns on its own facts.⁷² The outcome is likely to be different in almost every case depending on the size and resources of the employer and the nature of the religious objection at issue. For instance, a small employer will generally have a much harder time finding alternates to perform religiously objectionable tasks than would a large employer. Finding a substitute to complete a skilled or time-consuming task is likely to be costlier for an employer of any size than finding one for a quick and easy job. Additionally, some religious practices can be more easily accommodated in certain circumstances than others. For instance, a Muslim’s hijab or a Rastafarian’s dreadlocks will generally be more noticeable than a small Christian cross or a Star of David necklace that can be concealed under clothing—and none of these religious iconographies would necessarily pose an issue at work unless an employer had particular codes for employee appearance. Similarly, an African tribal custom mandating that a son lead the burial rites at his father’s funeral is a one-time occasion,⁷³ and therefore poses less of a burden than the custom of observing the Sabbath every week in a job that requires Saturday hours. Furthermore, reasonableness can hinge on each employer’s past practices. For instance, “[a]n employer’s proposed accommodation will not be considered reasonable if a more favorable accommodation [was] given to other

72. See, e.g., *Beadle v. Hillsborough Cty. Sheriff’s Dep’t*, 29 F.3d 589, 592 (11th Cir. 1994) (“[T]he precise reach of the employer’s obligation to its employee is unclear . . . and must be determined on a case-by-case basis.”). Details influencing this analysis include the “type of workplace” at issue, the “nature of the employee’s duties,” the cost of the accommodation compared to the size and operating costs of the employer, “the number of employees who will in fact need that particular accommodation,” and whether an accommodation would conflict with another law or religion. U.S. EQUAL EMP. OPPORTUNITY COMM’N, COMPLIANCE MANUAL SECTION 12: RELIGIOUS DISCRIMINATION § 12-IV(B)(1) (2008) [hereinafter COMPLIANCE MANUAL], <https://www.eeoc.gov/policy/docs/religion.pdf>. Accommodations that diminish employer efficiency, risk workplace safety, or cause coworkers to carry the accommodated employee’s share of “potentially hazardous or burdensome” work are often, though not always, considered unduly burdensome. *Id.* § 12-IV(B)(2).

73. See *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 455–56 (7th Cir. 2013) (finding in favor of employee who was terminated after taking several weeks off of work to lead his father’s burial rites as mandated by his religion).

employees for nonreligious purposes.”⁷⁴ As applied in *Philbrook*, the Court noted that unpaid leave would not have been a reasonable accommodation if paid leave was regularly provided for all purposes except religious ones.⁷⁵

The consequence of such highly context-based claims is that it is not unusual to have certain religious practices in certain workplaces protected in one instance and not protected in another, making it exceedingly difficult to draw substantive bright-line rules in religious accommodation law.⁷⁶ This in turn makes it difficult for employers and employees to know what accommodations are acceptable under Title VII prior to bringing suit. Many legal scholars, including William Landes and Judge Richard Posner, have posited that increased uncertainty results in increased litigation, which risks more inconsistent outcomes and additional uncertainty, and ultimately results in decreased judicial efficiency for the system as a whole.⁷⁷ It is costly for both sides to litigate these cases, which have grown in number and expense in recent years as courts chip away at existing precedent and create new grey areas expanding the sorts of claims employees can bring.⁷⁸

74. Jennifer Fowler-Hermes & Luisette Gierbolini, *Religious Accommodation in the Workplace: The Devil Is in the Detail*, FLA. B.J., May 2014, at 34, 35 (citing COMPLIANCE MANUAL, *supra* note 72, § 12-IV(A)(3)). “[U]npaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones.” *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986).

75. *Philbrook*, 479 U.S. at 71.

76. For example, one cannot state a bright-line rule that asking employees to use their vacation days to observe religious holidays is a “reasonable accommodation.” Some courts have held that it is. *E.g.*, *Getz v. Pa. Dep’t of Pub. Welfare*, 802 F.2d 72, 74 (3d Cir. 1986) (holding that Title VII does not require that an employee be able to “have her religious holidays and keep her vacation days as well”). Other courts have held that it is not. *E.g.*, *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1379 (6th Cir. 1994) (“[The employee] was faced with the choice of working on the Sabbath or potentially using all of her accrued vacation to avoid doing so. . . . Such an employee stands to lose a benefit, vacation time, enjoyed by all other employees who do not share the same religious conflict, and is thus discriminated against with respect to a privilege of employment.”).

77. See William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 271–73, 293 (1976) (noting that clear precedents reduce the demand for litigation by “creating specific rules of legal obligation”). *Cf.* Anthony D’Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1, 7–8 (1983) (arguing that greater legal uncertainty accentuates parties’ aversion to risk, thereby making settlements more likely). Whether one sides with Landes and Posner or D’Amato, it can be agreed that greater legal uncertainty likely results in more lawsuits filed, which is costly to both parties regardless of whether they ultimately decide to settle or engage in protracted litigation.

78. In one example of this phenomenon, *EEOC v. JBS USA, LLC*, the EEOC filed suit on behalf of 200–300 Muslim meatpackers who sought unscheduled breaks to pray five times each day, and to move the meal break to a time that coincided with their sunset prayer time. *EEOC v. JBS, USA, LLC*, No. 8:10CV318, 2013 U.S. Dist. LEXIS 176963, at *49–53 (D. Neb. Oct. 11, 2013). Even though these accommodations clearly posed more than a “*de minimis*” cost to the employer, because allowing hundreds of its employees to pray at the same time five times a day would have dramatically slowed the production line and therefore the profits (and potentially the USDA rating) of the company’s products, the EEOC managed to proceed to a bench trial, where it ultimately lost after much expense incurred on

Indeed, religious discrimination claims filed with the EEOC have almost doubled since 2000,⁷⁹ and confusion over the “undue hardship” standard has often been stated as one of the prime impetuses for a proposed amendment to Title VII.⁸⁰

B. RELIGIOUS ACCOMMODATION LAW FAILS TO ADEQUATELY CONSIDER EFFECTS ON THIRD PARTIES, SUCH AS OTHER EMPLOYEES

As written, Title VII only considers an accommodation’s burden on an employer. But employers are not the only ones burdened when an employee refuses to perform all of his or her assigned tasks. Consider a salaried professional who is not paid overtime to work on additional nights and weekends so a coworker can leave at sundown on Friday evenings to observe the Sabbath. Or consider lower morale in the workplace when some employees grow bitter because they feel they are required to do more work, or adjust their schedules more often, to accommodate the religious preferences of another coworker—which was likely a substantial motivator behind the ExpressJet stewardess’s complaint about Charee Stanley’s failure to assist with beverage duties in the case discussed above.⁸¹ Situations like these may pose only minor and temporary annoyances for the workers asked to pick up the slack from a coworker’s religious accommodation, but even slight and short-lived inconveniences constitute unwanted impositions of certain employees’ privately held religious beliefs on others.

Troublingly, costs imposed on fellow coworkers are not always considered in a court’s determination of *de minimis* costs to an employer under Title VII. For instance, an employer cannot use a greater-than-*de minimis* costs defense when it is not obligated to pay its workers extra compensation to work overtime, which frequently occurs in salaried professions.⁸² Further, courts are split as to whether bad worker morale

both sides. *Id.* at *54–57. In another example, explained further in this Note, the court equated veganism with a sincerely held religious belief in *Chenzira v. Cincinnati Children’s Hospital Medical Center*, No. 1:11-CV-00917, 2012 U.S. Dist. LEXIS 182139, at *1 (S.D. Ohio Dec. 27, 2012).

79. *Religion-Based Charges*, *supra* note 12.

80. *See* WORKPLACE FLEXIBILITY, *supra* note 42 (citing Senator Jeffords’ remarks at the 1997 Senate Labor and Human Resources Committee Hearing on WRFA that “accommodation claims filed against . . . private employers had increased as a result of courts’ misinterpretation” of Title VII, and Congressman Souder’s remarks at the November 2005 Employer-Employee Relations Subcommittee hearing that “[e]nactment of WRFA would better articulate the [Title VII] standard” and “potentially reduce litigation”).

81. *See supra* text accompanying notes 1–10.

82. Under the federal Fair Labor Standards Act (“FLSA”), “executive, administrative, or

constitutes an “undue hardship” under Title VII.⁸³ In *EEOC v. Firestone Fibers & Textiles Co.*, in which a laboratory technician was fired for requesting time off work from sundown Fridays to sundown Saturdays in observation of the Sabbath, the Fourth Circuit stated that employers were allowed to consider perceptions of fairness among other employees when determining whether to provide religious accommodations because poor worker morale causes “real problems” in the workplace.⁸⁴ Conversely, in *Lambert v. Condor Manufacturing, Inc.*, in which a machine operator requested the removal of other employees’ photographs of nude women as a religious accommodation, the court signaled its skepticism of morale-based hardships, stating that “‘proof of co-workers’ unhappiness’ with a particular accommodation is not enough to cause a hardship.”⁸⁵ Other courts are unclear in their stance as to whether poor morale constitutes a hardship. For example, in *Opuku-Boateng v. California*, the Ninth Circuit acknowledged that in some cases an employer may be able to establish undue hardship based on how an accommodation impacts other workers, but then hedged, questioning whether harm to employee morale warrants the same consideration as more established exempted grounds under Title VII, such as violations of worker seniority agreements or safety considerations.⁸⁶ Such decisions on adverse third-party effects further obfuscate Title VII’s vague legal standards and promote additional confusion over what constitutes an acceptable accommodation under the law.

C. RELIGIOUS ACCOMMODATION LAW IS TOO SUSCEPTIBLE TO THE “SLIPPERY SLOPE” PROBLEM

Once some employees receive a religious accommodation, others are more likely to step forward to claim accommodations as well. Title VII offers a partial safeguard against this “slippery slope” by requiring all

professional” employees paid on a salary basis, and certain other categories of workers, need not be paid overtime. 29 U.S.C. § 213(a)(1) (2012). State analogs to FLSA have similar provisions. *See, e.g.*, CAL. LAB. CODE § 204.2 (West 2006).

83. *See* EEOC v. Rent-A-Ctr., Inc., 917 F. Supp. 2d 112, 119 n.5 (D.D.C. 2013) (acknowledging a circuit split as to how readily courts will recognize employee morale as a legitimate harm). *See also* Dallan F. Flake, *Bearing Burdens: Religious Accommodations that Adversely Affect Coworker Morale*, 76 OHIO ST. L.J. 169, 190–203 (2015).

84. EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 317–19 (4th Cir. 2008) (“[E]venhandedness and fairness are of paramount importance to the functionings of any workplace. Co-workers have their rights, too.”).

85. *Lambert v. Condor Mfg., Inc.*, 768 F. Supp. 600, 604 (E.D. Mich. 1991) (quoting EEOC v. Townley Eng’g & Mfg. Co., 859 F.2d 610, 615 (9th Cir. 1988)).

86. *Opuku-Boateng v. California*, 95 F.3d 1461, 1468 & n.12, 1473 (9th Cir. 1996).

accommodation-seeking employees to possess a “bona fide,” or sincerely held, religious belief of which the employer must have adequate notice.⁸⁷ However, in reality, this is not much of a safeguard because courts rarely question the sincerity or religiosity of a particular belief in Title VII cases. Courts are loathe to step into the role of “arbiters of scriptural interpretation”,⁸⁸ indeed, Justice Ginsburg highlighted such reluctance in her *Hobby Lobby* dissent, proclaiming an “‘overriding interest’ in ‘keeping the courts ‘out of the business of evaluating’ . . . the sincerity with which an asserted religious belief is held.’”⁸⁹ In addition, employers have limited ability to question the sincerity or religiosity of an employee’s beliefs.⁹⁰ Thus, it is not unreasonable to suppose that granting religious accommodations to some employees will encourage others, some with perhaps more dubious religious convictions, to step forward requesting accommodations too. We are already seeing similar “slippery slope” phenomena in other accommodation-based contexts, notably in the case of greater numbers of *employers* seeking religious-based exemptions to contraceptive coverage after the *Hobby Lobby* decision.⁹¹

What will happen when a once-reasonable accommodation becomes

87. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985) (quoting *Turpen v. Mo.-Kan.-Tex. R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984)), *aff’d*, 479 U.S. 60 (1986).

88. Ben Adams & Cynthia Barmore, Note, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, 59 (2014).

89. *Id.* (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting)). According to the Anti-Defamation League, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to be entitled to protection and courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. In short, the fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief.” ANTI-DEFAMATION LEAGUE, RELIGIOUS ACCOMMODATION IN THE WORKPLACE: YOUR RIGHTS AND OBLIGATIONS 4 (2015) [hereinafter RELIGIOUS ACCOMMODATION], <http://www.adl.org/assets/pdf/civil-rights/religiousfreedom/religiousaccommodworkplace/religiousaccommodworkplacerevised07-29-15.pdf>.

90. The EEOC’s Compliance Manual suggests that employers ordinarily assume that an employee’s request for a religious accommodation is based on a sincerely held belief, since Title VII was not meant to give employers the power to determine which beliefs are “religious enough” to qualify for exemptions. COMPLIANCE MANUAL, *supra* note 72, § 12-I(A)(3). According to the EEOC, an employer can only inquire and request additional information from an employee if it has an objective basis for questioning either the sincerity or religiosity of an employee’s belief or practice. *Id.*

91. *See High Court Affirms Religious Rights Apply to All Contraception Coverage*, CBS NEWS (July 1, 2014, 12:34 PM), <http://www.cbsnews.com/news/high-court-affirms-religious-rights-apply-to-all-contraception-coverage/> (“The Supreme Court on Tuesday confirmed that its decision a day earlier extending religious rights to closely held corporations applies broadly to the contraceptive coverage requirement in the new health care law, not just the handful of methods the justices considered in their ruling,” which affects over fifty other corporations interested in seeking religious exemptions). *See generally Hobby Lobby*, 134 S. Ct. 2751.

too impractical or expensive because too many workers start to request it? The answer is likely additional expensive lawsuits. In March 2016, a Cargill meatpacking plant that had agreed to accommodate daily prayer times at a small prayer area on its premises saw 200 Muslim employees walk out in protest because not all of them were allowed to leave work at their desired times to pray.⁹² Cargill's top managers had previously allowed its religious employees one or two religious breaks per shift in ten-minute segments after explicit permission from a supervisor, but the marketplace reality for a large meatpacking facility that processes 4,500 cattle a day meant there were times when staffing limitations required a curtailment of the numerous prayer requests in order for the plant to stay on schedule.⁹³ Cargill responded to the workers' strike by firing all 150 of the workers that had not returned in three days, in accordance with the terms of their union contracts that authorized summary dismissal after three consecutive unexcused absences.⁹⁴ As the Cargill plant struggles to find substitute workers, approximately 130 of the fired workers have filed an EEOC complaint for Title VII religious discrimination.⁹⁵

Another aspect of the "slippery slope" argument concerns increasingly bold legal moves from plaintiffs to push the long-standing boundaries of Title VII law into new territories. In *Chenzira v. Cincinnati Children's Hospital Medical Center*, a woman sued after being discharged from her job due to her refusal to receive flu vaccinations because it conflicted with her "religious and philosophical conviction" as a vegan.⁹⁶ In its decision to deny the employer's motion to dismiss, the court "[found] it plausible that [the p]laintiff could subscribe to veganism with a sincerity equating that of traditional religious views."⁹⁷ This case thereby increased the range of personal preferences, like dietary restrictions, that may be afforded the same protections as traditional religious convictions under Title VII.

92. Julie Turkewitz, *Prayer Dispute Between Somalis and Plant Reshapes a Colorado Town, Again*, N.Y. TIMES (Mar. 7, 2016), http://www.nytimes.com/2016/03/08/us/prayer-dispute-between-somalis-and-plant-reshapes-a-colorado-town-again.html?_r=0.

93. *Id.*

94. *Id.*

95. *Id.* The article also discusses other large companies that have encountered similar struggles in their attempt "to balance prayer and profit." *Id.* For instance, a JBS meatpacking facility in Greeley, Colorado, faced a similar problem in 2008; the company is currently facing federal charges "that it discriminated against workers by failing to provide reasonable religious accommodations." *Id.* Meanwhile, in Wisconsin, Ariens, a lawn mower and snowblower manufacturer, saw dozens of its workers quit when the company told workers they "would have to pray during scheduled breaks, [and] not when their religion so dictated." *Id.*

96. *Chenzira v. Cincinnati Children's Hosp. Med. Ctr.*, No. 1:11-CV-00917, 2012 U.S. Dist. LEXIS 182139, at *1 (S.D. Ohio Dec. 27, 2012).

97. *Id.* at *10.

In another expansion to Title VII law, in *EEOC v. Dynamic Medical Services*, a Scientologist employer moved to dismiss a complaint from employees that requested to be exempt from certain practices because they did not share the employer's Scientology beliefs, by reminding the court that Title VII protects only "those with sincerely held religious beliefs that conflict with a workplace requirement."⁹⁸ The employer argued that the employees' claims were deficient because they merely alleged that the employer's religious practices "conflicted with the employees' sincerely held religious beliefs, their conscience, and/or their religious sensibilities as non-Scientologists"⁹⁹—with no additional factual allegations as to how this conflicted with any of the employees' specific religious beliefs or workplace duties.¹⁰⁰ The parties settled in the amount of \$170,000, so the district court never ruled on the employer's motion to dismiss.¹⁰¹ However, the accommodation claim alleged here fell outside the boundaries recommended by the EEOC's Compliance Manual and existing case law, "which provide that exemption from a religious-based work requirement is required only when there is a direct conflict with an employee's [*specific,*] sincerely held religious belief,"¹⁰² as opposed to vague references to "religious sensibilities."¹⁰³ This broadening of Title VII protections represents a significant departure from years of precedent that signaled hesitation from courts and legislatures to strengthen religious freedoms in the workplace, and again, risks creating a "moving goalpost" for reasonable accommodation that results in increased uncertainty and litigation.

98. Defendant's Motion to Dismiss the EEOC's Complaint at 6, *EEOC v. Dynamic Med. Servs., Inc.*, No. 1:13-CV-21666-KMW (S.D. Fla. Aug. 26, 2013) [hereinafter *Dynamic MTD*].

99. Fowler-Hermes & Gierbolini, *supra* note 74, at 36.

100. *Dynamic MTD*, *supra* note 98, at 7. One of the employees had told her supervisor that she was a Jehovah's Witness, which may have provided the employer with enough notice under the Supreme Court's "knowledge" requirement for the employer to infer that her request to avoid the employer's Scientology practices were religious in nature. *Id.* at 8. *See supra* Part I.

101. Verdict and Settlement Summary, *EEOC v. Dynamic Med. Servs., Inc.*, No. 1:13-cv-21666-KMW (S.D. Fla. Dec. 20, 2013), 2013 WL 8176933.

102. Fowler-Hermes & Gierbolini, *supra* note 74, at 36 (first citing *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988); then citing *Questions and Answers: Religious Discrimination in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://eeoc.gov/policy/docs/qanda_religion.html (last updated Jan. 31, 2011)).

103. *Id.*

D. CURRENT RELIGIOUS ACCOMMODATION LAW PROMOTES
DISCRIMINATORY TREATMENT AMONG DIFFERENT RELIGIOUS AND NON-
RELIGIOUS BELIEFS

For the reasons discussed above, the contextual and fact-intensive nature of religious accommodation cases, and the discretion courts have to consider whether effects like poor morale constitute “undue hardship,” has and will continue to lead to different, and therefore unequal, outcomes. Two employees with the same religious convictions holding the same position could easily find themselves facing vastly different legal remedies depending on the size of their employer and the sympathies of the judge and jury hearing their cases. Perhaps even more problematic is that we all practice different religions in different ways, and inevitably some individuals’ practices will conflict more often, and require more accommodation, than others. In this way, Title VII, a law designed to decrease discrimination in the workplace, serves to perpetuate discrimination and raise issues of unfairness by giving employees with particular religious practices special treatment over those with other religious practices or no religion at all. Under the current law, if a non-Sabbath observer requires accommodations to miss mandatory shifts to spend more time with family, and a Sabbath observer requires accommodations to miss required shifts to observe a weekly religious holiday, employers are obliged to try to make accommodations for the religious observer, but are free to fire the family-oriented worker, even though both workers are, in effect, using strongly and privately held values to demand an exemption from required aspects of their job duties. Preferred practices that stem from a religious or religious-like conviction are treated under the law as “needs,” even though the desire to join a religion and adhere to its practices represent a conscious choice just as much as a choice to prioritize a child’s Little League games over work on Saturday mornings. Why should statutes protect certain privately held convictions of some workers, but not others?

There are fairness concerns from employers’ perspective, too. Right now, employers have limited ability to question an applicant about her religion or the religious holidays she observes, especially during the hiring process. For example, an employer should not ask an applicant during an interview: “[D]oes your religion prevent you from working weekends or holidays?”¹⁰⁴ Employers may instead describe the regular days, hours, or shifts of the job in the hopes that an applicant self-selects for a position for

104. RELIGIOUS ACCOMMODATION, *supra* note 89, at 5.

which she feels she is well-suited.¹⁰⁵ But this system has obvious weaknesses, and an employer could very well end up hiring an applicant for particular job duties for which the applicant will later seek accommodations on account of these duties conflicting with her religious beliefs. This occurred in the *Philbrook* case above, in which the employer was unaware until after *Philbrook* had been hired that his membership with the Worldwide Church of God mandated an unusually high amount of absences to observe religious holidays each year.¹⁰⁶ Or an employee could later convert to a religion that comes into conflict with duties the employee has been performing for years and knows he or she is required to perform, which occurred in Charee Stanley's ExpressJet case and in *Dewey v. Reynolds Metals Co.*, discussed above. In either instance, the employer finds itself legally obligated to make reasonable accommodations for these unexpected religious needs—or risks facing costly litigation.

Religion is undoubtedly an important aspect of many American's lives; a 2015 Pew Research study found that approximately 84% of Americans identify as religious (though this number is expected to shrink to approximately 75% by 2050).¹⁰⁷ But should religious practices, particularly ones invasive enough to require special accommodation in the work environment, be protected in private, predominately non-religious workplaces to the extent that courts and employers no longer have the ability to require their workers to perform key functions of their jobs? Put another way, given that private employers are generally free to hire or fire "at will" employees for most other reasons (or no reason at all),¹⁰⁸ is it fair to constrain an employer's freedom to hire or fire workers who cannot meet the requirements of their job description because of their choice to adhere to privately held religious beliefs, even when such practices infringe on the ordinary business practices of their employer and fellow employees? Given that employees desire an occupation and a workplace that is conducive to their preferred lifestyles, would it not be ideal for all of the parties involved if an employee could instead work in a position in which an accommodation between required job duties and the employee's religion is rarely, if ever, needed?

For many, the manner in which current Title VII jurisprudence

105. *Id.*

106. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 62–63 (1986).

107. PEW RES. CTR., THE FUTURE OF WORLD RELIGIONS: POPULATION GROWTH PROJECTIONS, 2010–2050, 244 (2015), <http://www.pewforum.org/2015/04/02/religious-projections-2010-2050/>.

108. JAY SHEPHERD, FIRING AT WILL: A MANAGER'S GUIDE 4 (Jeff Olson et al. eds., 2011).

adjudicates religious accommodation disputes in the workplace causes concern. Some contend that the law is inconsistent and confusing, some that it is unfairly and discriminatorily applied, and some that it simply amounts to the imposition of some workers' privately held convictions and values on others¹⁰⁹ (for example, a pharmacist could refuse to fill contraception prescriptions because he believes birth control is a sin, and this would be a legally protected practice if the employer can accommodate it with less than a "*de minimis*" cost).¹¹⁰ Given the problems with Title VII, the increasing number of religious accommodation complaints brought before the EEOC, and our country's changing religious landscape, it is time we look for a change to improve our religious accommodation law.

II. TITLE I OF THE AMERICANS WITH DISABILITIES ACT OF 1990: AN INSTRUCTIVE PARADIGM

An examination of the ADA's disability accommodation law is instructive for providing a guide for how religious accommodation law could be altered. One reason for the fruitfulness of this comparison lies in the fact that Title I of the ADA was enacted with a similar legislative intent and language to Title VII's reasonable religious accommodation law (namely, that of restricting discrimination of a discrete group on certain protected grounds).¹¹¹ Under Title I of the ADA, employers with fifteen or more employees are obligated to provide a reasonable accommodation for "qualified" employees or prospective employees with disabilities, unless doing so causes the employer an undue hardship.¹¹²

A two-step process is used in determining whether an individual is "qualified" under the ADA. The initial step is to determine whether the employee seeking the accommodation meets the qualifications for the position—meaning that he or she satisfies the skill, experience, education, and other prerequisites of the position.¹¹³ The second step is to determine whether the individual can perform the "essential functions" of the position, with or without reasonable accommodation.¹¹⁴ This second

109. See WORKPLACE FLEXIBILITY, *supra* note 42 (citing remarks from congressional representatives articulating why Title VII needed to be amended through WRFA). See also Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2528–29 (2015) (noting that a religious refusal to perform certain job functions that are then given to another worker is a subtle but sure way of imposing one's own religious beliefs on others—without the other's consent).

110. See *Noesen v. Med. Staffing Network, Inc.*, 232 F. App'x 581, 583 (7th Cir. 2007).

111. 42 U.S.C. § 12101(b) (2012).

112. *Id.* §§ 12102, 12111.

113. *Id.* § 12111(8).

114. *Id.*; 29 C.F.R. § 1630.2(n)(1) (2015).

inquiry is determined by a totality of the circumstances test. Factors relevant to determining whether a job function is essential include: (1) whether the requesting employee is actually required to perform the “essential” functions; (2) the amount of time spent by the requesting employee performing the “essential” functions; (3) the degree of expertise or skill required to perform the “essential” functions; (4) the written description of the job’s responsibilities; and (5) whether removal of that job function would fundamentally change the position.¹¹⁵ This is a fact-specific inquiry that varies depending upon the position, employer, and industry.¹¹⁶ If the requesting employee fails to show that she can perform the “essential functions” of a given job, or if her disability prevents her from maintaining regular attendance at work, the employer has no legal obligation under the ADA to offer reasonable accommodation. Even after an employee shows that she is a “qualified individual” who can perform the “essential functions” of the desired position, an employer has no legal obligation under the ADA to offer reasonable accommodation if doing so would pose an “undue hardship”—specifically, one requiring “significant difficulty or expense”¹¹⁷ on the part of the employer.¹¹⁸

It is worth noting here that although Title I of the ADA and Title VII were both enacted to prevent private sector employment discrimination against vulnerable groups, they contain notable differences that prevent one from being fully comparable with the other. First, certain key terms of the laws—“reasonable accommodation” and “undue hardship”—differ significantly between the two Acts.¹¹⁹ Congress specifically rejected *Hardison’s de minimis* standard for the interpretation of “undue hardship” under the ADA, stating that the ADA requires a significantly higher standard than that created by the Supreme Court for Title VII.¹²⁰ Second, religious beliefs (which reflect a choice) and disabilities (which do not) are fundamentally different “animals,” so a law designed to protect one may

115. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n)(2)–(3).

116. *Beadle v. Hillsborough Cty. Sheriff’s Dep’t*, 29 F.3d 589, 592 (11th Cir. 1994) (“[T]he precise reach of the employer’s obligation to its employee . . . must be determined on a case-by-case basis.”); COMPLIANCE MANUAL, *supra* note 72, § 12-IV(A)(3) (“Ultimately, reasonableness is a fact-specific determination.”).

117. 42 U.S.C. § 12111(10)(A).

118. *Id.* Note the difference in language between this “undue hardship” and the “*de minimis*” standard imposed by Title VII. 29 C.F.R. § 1630.2(p)(1).

119. Compare 29 C.F.R. § 1605.2(c), (e) (defining “undue hardship” with respect to religious accommodation), with *id.* § 1630.2(o)–(p) (defining “undue hardship” with respect to reasonable accommodation).

120. H.R. REP. NO. 101-485, at 68 (1990).

not be a fully appropriate comparative instrument for the other. Thirdly, “disability” carries a certain stigma that we initially may be reluctant to apply to religion, as many people consider disabled individuals to be substantially incapacitated by their disabilities and unable to participate in normal life activities.¹²¹ Lastly, there are those who think that Title VII’s system works well enough as is, and that incorporating provisions of the ADA into Title VII’s interpretation would not serve to remedy Title VII’s commonly critiqued deficiencies, like the ones discussed in Part I.¹²² This last argument will be explored in more detail in Part III, which examines whether the adoption of the ADA’s “essential functions” provision would likely improve the main critiques against Title VII identified above.

However, there are strong arguments for why the ADA is a useful model for improving Title VII’s religious accommodation law. For one, at a broad level, both laws have similar objectives in seeking to reduce private employer discrimination of vulnerable populations. The laws are even worded similarly—indeed, several definitions set forth in Title VII are adopted or incorporated by reference in the ADA.¹²³ Thus, although the terms “reasonable accommodation” and “undue hardship” differ between the two Acts, the Acts’ similar wording and purpose still offers the constructive possibility of comparison. Moreover, the stigma against disabilities that may initially cause reluctance in equating disabilities to religious beliefs reflects an antiquated and erroneous conception of disabilities, which “often affect[] only a discrete life function or a specific aspect of an individual’s existence,”¹²⁴ and do not prevent the disabled individual from otherwise “function[ing] and contribut[ing] fully to society.”¹²⁵ In a sense, disabilities are actually quite similar to religious practices in the employment context, such as Sabbath observance, a refusal to serve alcohol, or a refusal to process draft registrations—all of these practices implicate discrete aspects of one’s job duties, but in no way prevent the individual from making other valuable contributions to the workplace or participating in other normal life activities. Furthermore,

121. Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 423–24 (2000).

122. WORKPLACE FLEXIBILITY, *supra* note 42 (citing remarks from Camille Olsen, Chamber of Commerce Representative, at the November 2005 Employer-Employee Relations Subcommittee Hearing on WRFA Adoption, arguing why Title VII should not be modified by the WRFA). *See supra* Part I.

123. H.R. REP. NO. 101-485, at 54. For instance, the terms commission, employer, person, labor organization, employment agency, commerce, and industry affecting commerce are all incorporated into the ADA from the Civil Rights Act. *Id.*

124. Kimani Paul-Emile, *Race as Disability?* (manuscript at 7) (on file with author).

125. *Id.*

given that Title I was thought to improve the shortfalls of its predecessor, the Rehabilitation Act, which suffered from similar “vagueness” deficiencies to those critics levy at Title VII,¹²⁶ it could prove to be one of the most useful guides we have for making Title VII a clearer, more effective, and more fair law. Indeed, statistics indicate that disability accommodation claims under the ADA are more likely to settle than religious discrimination claims under Title VII,¹²⁷ which suggests that at the very least, the ADA is more “judicially efficient” than its Title VII counterpart. Whether such improved efficiency is a direct effect of its two-step inquiry as to whether an individual is “qualified” and can perform the “essential functions” required of the position is unclear—such an assertion would require further research. In any case, given these observations, it is worthwhile to consider how the incorporation of the “essential functions” provision would likely affect Title VII’s religious accommodation doctrine.

III. THE EFFECTS OF INCORPORATING THE “ESSENTIAL FUNCTIONS” EXEMPTION INTO TITLE VII LAW

This Part explores whether the incorporation of Title I’s “essential functions” provision is likely to positively address the common critiques levied against Title VII’s religious accommodation law that were discussed in Part I.¹²⁸ Here, the focus is mainly on the “essential functions” provision of the ADA’s two-step inquiry, under the assumption that individuals who have been granted interviews or offered job positions are likely to have already fulfilled the initial step of showing that they are adequately “qualified” for their positions.

A. THE EFFECT OF AN “ESSENTIAL FUNCTIONS” PROVISION ON JUDGMENTS OF DEGREE AND LEGAL INCONSISTENCIES, UNCERTAINTY, AND INEFFICIENCY

If Title VII included an “essential functions” exemption for religious accommodations, the result could lead to more consistent and predictable judicial outcomes, thereby promoting judicial and economic efficiency.

126. See Margaret E. Stine, *Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act of 1990*, 37 S.D. L. REV. 97, 116–17 (1992) (noting that the ADA was enacted to set clearer lines and reduce the amount of judicial discretion in determining disability accommodations in order to improve deficiencies of its predecessor, the Rehabilitation Act of 1973).

127. See *Religion-Based Charges*, *supra* note 12; U.S. COMMISSION ON CIVIL RIGHTS, SHARING THE DREAM: IS THE ADA ACCOMMODATING ALL?, JUDICIAL TRENDS IN ADA ENFORCEMENT (2000) [hereinafter SHARING THE DREAM], www.usccr.gov/pubs/ada/ch3.htm.

128. See *supra* Part I.

The “essential functions” provision would carve out a certain subset of key job duties for which an employer would not be legally obligated to make an accommodation, while reserving for the employee the freedom to request reasonable accommodations on other, more tangential aspects of the job description. When an employer and an employee can refer to clearly defined, objective, and quantifiable measures that the “essential functions” test encompasses, such as the qualifications of the job as it was described in advertising materials and how much time an employee generally spends performing a certain task,¹²⁹ there may be less room for disagreement as to the reasonableness of an employee’s accommodation request and therefore, less prolonged and costly litigation on the matter. As discussed above, a higher percentage of disability accommodation cases than religious accommodation cases tend to be resolved during the early stages of litigation. Under the ADA, only 12% of disability accommodation claims filed were resolved on the merits; in the majority of claims filed, cases were resolved summarily without drawn-out litigation.¹³⁰ While there are arguments to be made for the benefits of reaching the merits in certain cases, these statistics do suggest that the ADA’s standards are much more conducive to judicial efficiency and saving litigation costs than Title VII’s standards, which result in nearly 20% of accommodation claims progressing far through the costly litigation process before ultimately being decided on the merits.¹³¹

Of course, it is possible that incorporating the “essential functions” provision may not avoid inconsistency and uncertainty at all—it could just move the inconsistency and uncertainty to a new step in the legal analysis. Instead of debating whether a cost is more than *de minimis*, employers and employees may instead quibble over whether the accommodation-seeking employee was a “qualified individual” who could perform the “essential functions” of a desired position. Importantly, the “qualified individual” and “essential functions” tests are still fact-intensive inquiries that afford fact finders a considerable amount of discretion and are apt to turn out differently depending on the context of each accommodation sought. For instance, the ability to work Saturday shifts would probably not be an essential element of most job positions, but it could be deemed as such if

129. 29 C.F.R. § 1630.2(n) (2015). See *supra* Part II (discussing factors considered under the ADA’s “essential functions” totality of the circumstances test).

130. SHARING THE DREAM, *supra* note 127 (citing John W. Parry, 1999 *Employment Decisions Under ADA Title I—Survey Update*, 24 MENTAL & PHYSICAL DISABILITY L. REP., 348, 349–50 (2000)).

131. See *Religion-Based Charges*, *supra* note 12. From 1997 to 2015, an average of 18.99% of cases were decided on the merits per year. See *id.*

the employee was engaged in an occupation—such as working for an airline, like the accommodation-seeker in *Trans World Airlines, Inc. v. Hardison*—that experienced a substantial amount of customer traffic on the weekends.¹³² The ability to work Saturday shifts could also be considered an essential element of a job position if an employee’s task on such shifts was particularly important, such as the responsibility of monitoring an emergency phone line on Friday nights and Saturdays.¹³³ Even if the accommodation-seeking employee rarely, if ever, received an emergency call during those hours, the very necessity of her availability if and when such a call occurred could justify considering an ability to work on weekends to be an “essential function” of the job under these particular circumstances.

The incorporation of an “essential functions” provision could hypothetically reduce uncertainty and litigation by providing more bright-line rules as to whether a desired accommodation is appropriate for a particular occupation, but in order for this to occur, the employer and employee would need to substantially agree on what the “essential functions” of a particular position entail. The highly fact-specific inquiry of the “essential functions” provision is not dissimilar from the current highly fact-specific inquiry of Title VII accommodation cases, and such highly context-based claims are often inapposite for sweeping guidelines as to whether certain accommodations are generally appropriate for certain positions. Employers’ and employees’ disagreement in each case over what qualifies as an “essential function” could even serve to increase rather than decrease the inconsistencies and inefficiencies we see under current Title VII law. In any event, it is unclear whether the mere incorporation of the “essential functions” provision alone would have any mitigating effect on

132. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66–67 (1977). Hardison was hired by Trans World Airlines to work as a clerk in the Stores Department of a large maintenance and overhaul base. *Id.* at 63. Because of its essential role in the airline’s operation, the Stores Department was expected to “operate 24 hours per day, 365 days per year, and whenever an employee’s job in that department [was] not filled, an employee must be shifted from another department, or a supervisor must cover the job, even if the work in other areas may suffer.” *Id.* at 66–67.

133. The facts of this hypothetical are similar to the Sixth Circuit case *Crider v. University of Tennessee*, 492 F. App’x 609 (6th Cir. 2012). In this case, Crider was hired as a Programs Abroad Coordinator for the University. *Id.* at 610. One of the duties of her position was to monitor an emergency cell phone line for students traveling abroad on weekends. *Id.* But four days after she was hired for the position, Crider notified her supervisor that her faith as a Seventh Day Adventist prevented her from performing work-related tasks from sundown on Fridays until sundown on Saturdays. *Id.* Though the Sixth Circuit in this case ultimately ruled favorably for Crider, this result could have been different had the court considered the “essential functions” of the University’s Programs Abroad Coordinators. *Id.* at 616.

the critique that religious accommodation law leads to inconsistencies and judicial inefficiency.

B. THE EFFECT OF AN “ESSENTIAL FUNCTIONS” PROVISION ON THE CONSIDERATION OF COSTS TO THIRD PARTIES

At first glance, it would seem that the “essential functions” provision has little effect in providing for greater consideration of third-party costs. Like Title VII, the language of Title I of the ADA gives no express consideration to “undue hardships” suffered by third parties, such as coworkers and members of the general public, as a result of accommodating someone who regularly cannot perform a job’s “essential functions.” In fact, the ADA’s stricter definition for “undue hardship”—which requires employers to show a “significant difficulty or expense incurred,”¹³⁴ rather than a mere *de minimis* cost, in order to legally refuse to make the accommodation¹³⁵—actually raises the bar to the kinds and amount of costs employers, and by extension third parties like coworkers and customers, are expected to incur on behalf of an accommodation-seeking employee.

But there is good reason to suppose that the “essential functions” test indirectly takes third-party costs into account to a greater degree than Title VII’s current standard. This is because, under the “essential functions” provision, an employer would not be obligated to continue employing a worker who is unable to perform his or her main job duties, so any resulting accommodation employers would need to make for an accommodation-seeking employee (and any burden resulting from the accommodation that is shifted to other coworkers or the purchasing public) is likely to be relatively minimal and unintrusive. Essential functions, by their legal definition, are generally duties that require considerable time or expertise, and which are therefore likely to constitute fairly substantive burdens if shifted to another employee.¹³⁶ Adopting the ADA’s standard could help prevent such considerable burdens from being shouldered by coworkers, at least in instances in which the accommodation would pose less than a *de minimis* cost to the employer, but still constitute a hassle for coworkers.

134. 29 C.F.R. § 1630.2(p)(1).

135. Stine, *supra* note 126, at 103, 107–08.

136. 29 C.F.R. § 1630.2(n). *See supra* Part II (discussing factors considered under the ADA’s “essential functions” totality of the circumstances test).

C. THE EFFECT OF AN “ESSENTIAL FUNCTIONS” PROVISION ON THE
“SLIPPERY SLOPE” PROBLEM

Using the “essential functions” test in religious accommodation law provides another safeguard against the “slippery slope” phenomenon in addition to the “bona fide religious belief” requirement discussed above,¹³⁷ because this provision requires accommodation seekers to overcome an additional hurdle when seeking an accommodation. They would need to prove not only that (1) they have a “bona fide” sincerely held religious belief (which, as discussed above,¹³⁸ is not much of a safeguard given the deference accommodation seekers receive on this point), but also that (2) the practices associated with their sincerely held religious belief do not prevent the accommodation-seeking employees from being “qualified employees” who can perform the “essential functions” of their jobs with or without the accommodation. It is reasonable to suppose that “slippery slope” problems associated with more employees claiming more exemptions would likely diminish if this additional safeguard was in place. As an example, consider the Scientology dispute in the *Dynamic Medical Services* case discussed in Part I, in which the court allowed employees’ claims to proceed despite their failure to allege how the employer’s practices specifically interfered with their work and religious “sensibilities,” in what amounted to a noted departure from the EEOC’s compliance guidelines.¹³⁹ Unless the employees were able to show that their desired accommodations did not implicate the essential duties of their positions, which would have required them to state their case with greater specificity, the court would have erred in allowing their claims to proceed. By mandating a minimum level of specificity in religious accommodation cases, an “essential functions” provision would prevent at least one avenue for the erosion of requirements for pleading a valid Title VII claim.

One notable limitation to the “essential functions” provision is that it would not have any effect on cases that seek to expand Title VII protection for religious practices when the desired accommodation does not concern the “essential functions” of a certain position. For instance, using the veganism example provided in Part I,¹⁴⁰ an accommodation for a customer service employee’s questionably religious-like conviction for veganism that prevents her from receiving a mandatory flu vaccination would not be

137. See *supra* Part I.C.

138. See *id.*

139. See *supra* text accompanying notes 98–103.

140. See *supra* text accompanying notes 96–97.

affected by the incorporation of the “essential functions” exemption because the receipt of a flu shot may not be considered a core tenet of her job as a customer service representative.¹⁴¹

One of the primary concerns of Title VII’s “slippery slope” is its ability to expand Title VII in ways neither the judicial nor legislative branches intended or desired. Adding an “essential functions” provision to protect only the cases in which the core aspects of a job are directly at issue would not affect situations like the veganism case, in which the desired accommodation probably would not implicate a core aspect of one’s job.¹⁴² Still, it would provide an additional safeguard in at least some instances, which demonstrates the utility of incorporating this provision into current religious accommodation law.

D. THE EFFECT OF AN “ESSENTIAL FUNCTIONS” PROVISION ON THE PERCEPTION OF FAIRNESS UNDER RELIGIOUS ACCOMMODATION LAW

Lastly, the “essential functions” provision, if enacted as part of Title VII’s religious accommodation law, would likely help increase the perception of fairness and equality between the competing interests of employers, accommodation-seeking employees, and non-accommodation-seeking employees. It will appear less like discrimination or favorable treatment if all “at will” employees, regardless of religious beliefs, are held to the same basic standard that if they cannot perform “essential functions” of their job, the employer is free to terminate their employment. This is not the case under current Title VII law, which mandates that employers attempt to make accommodations for any employee’s sincerely held religious belief, even if that belief prevents an employee from performing his or her job duties in the same way that is expected for everyone else in the workplace. As noted above, incorporation of the “essential functions” provision would not change current Title VII doctrine as it applies to non-essential functions, which means that accommodation for some religious beliefs will still be mandated by law (and that some “unfairness” and “special treatment” concerns may linger in the workplace for those who feel they are disadvantaged by being a member of a different religion or no religion at all). But surely having in place a system in which employers are

141. *See generally* *Chenzira v. Cincinnati Children’s Hosp. Med. Ctr.*, No. 1:11-CV-00917, 2012 U.S. Dist. LEXIS 182139 (S.D. Ohio, Dec. 27, 2012).

142. However, here, the employee’s refusal to get the flu shot would not result in another employee having to do extra work or change her schedule in any way. The fact that the “essential functions” provision cannot catch all instances of “slippery slopes” does not render it an inadequate remedy when it is the instances that pose only relatively minor third-party burdens that continue to pass through its cracks.

held to the same standard in at least one metric—the ability to perform certain, key elements considered a requisite part of the position—would help eliminate some sense of the discriminatory bias that decreases worker morale and causes people to criticize Title VII for doing exactly what it purports to remedy, discriminating on the basis of religion.¹⁴³

Incorporation of the “essential functions” standard is likely to have beneficial effects on perceived fairness from the employer’s side, too, by allowing employers greater freedom to take action when the workers they hire to fulfill a certain position are unable to do what they were hired to do, which, under virtually any other circumstance, would provide valid grounds for termination. To see this in action, let’s revisit Charee Stanley’s case. Stanley was hired to be a flight attendant, whose duties typically include serving (or these days, selling) food and beverages to passengers on flights.¹⁴⁴ There must be one flight attendant for every fifty passengers on a commercial flight in the United States, meaning there are approximately two to four flight attendants on an average commercial flight.¹⁴⁵ Under Title VII, ExpressJet is legally obligated to accommodate Stanley’s objection to serving alcoholic beverages because it conflicts with her sincerely held and recently developed Muslim beliefs, so long as the accommodation posed the airline less than a *de minimis* cost¹⁴⁶—which, as long as there was at least one other attendant on board to serve beverages, it probably would. But if there was an “essential functions” provision, ExpressJet could make a plausible argument that serving beverages is one of the “essential functions” of a flight attendant’s duties because it fulfills at least four of the five factors in the ADA’s totality of the circumstances test: (1) ExpressJet requires its flight attendants to serve passengers their choice of beverages in flight, (2) serving beverages is part of the written job description of a flight attendant, (3) virtually all of ExpressJet’s flights provide beverage service, so this service constitutes a significant part of a flight attendant’s time in the sky, and (4) an inability to serve drinks to passengers fundamentally changes the job because a flight attendant’s core responsibility is to ensure the safety and comfort of airline passengers, and

143. See, e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79–81 (1977).

144. Grinberg & Hassan, *supra* note 1; U.S. Dep’t of Lab., *Occupational Outlook Handbook, Flight Attendants*, BUREAU OF LAB. STAT. (Dec. 17, 2015), <http://www.bls.gov/ooh/transportation-and-material-moving/mobile/flight-attendants.htm>.

145. Tom Harris, *How Airline Crews Work*, HOW STUFF WORKS (June 14, 2001), <http://science.howstuffworks.com/transport/flight/modern/airline-crew2.htm>.

146. 29 C.F.R. § 1605.2(b), (e) (2015).

providing beverages is an important part of making flights comfortable.¹⁴⁷ Of course, Stanley could counter that serving alcoholic beverages is not an “essential function” under the same test because: (1) the actual time spent serving beverages, especially alcoholic drinks, is minimal relative to the time a flight attendant is on duty, (2) serving alcoholic beverages does not require special expertise or skill, and (3) flight attendants who do not serve alcohol can still ensure the safety and comfort of passengers by performing other tasks, such as demonstrating the use of airline safety equipment, cleaning the cabin, and serving food.¹⁴⁸ ExpressJet could lose this argument, but at least it would have the opportunity to argue that even a low-cost accommodation should not be made when a flight attendant refuses to perform tasks that she was hired to perform, and which led to strife among her coworkers. After all, there are conceivably hundreds of other jobs Stanley could hold where her religious practices do not come into constant conflict with her responsibilities as an employee; if she has the freedom to self-accommodate her beliefs by applying to any of these other jobs, why should ExpressJet and Stanley’s coworkers be the ones required to make an accommodation?

Under Title VII law as it currently stands, employees who are seemingly incompatible for particular jobs still have to be accommodated by employers so long as it does not pose more than a *de minimis* cost to do so, which violates many peoples’ sense of justice and fairness. The “essential functions” test would help reduce unfair outcomes by ensuring that workers whose beliefs render them incompatible for certain positions, just as some people’s disabilities render them incompatible for certain positions, should not have to be accommodated for those positions.

E. THE EFFECT OF AN “ESSENTIAL FUNCTIONS” PROVISION WOULD BE GREATLY ENHANCED IF EMPLOYERS AND EMPLOYEES ARRIVED AT AN *A PRIORI* AGREEMENT REGARDING THE “ESSENTIAL FUNCTIONS” OF A CERTAIN POSITION

Thus far, this Note likely reads as a proponent of employers’ rights. However, a clear conception of what duties employees should be expected to perform without accommodation would greatly benefit both employers *and* employees. Should employers and employees arrive at an agreement as to which “essential” duties are mandated by a certain position before an employee accepts a job offer, the employee can avoid obtaining employment in a job that will clearly conflict with his or her important

147. *See supra* Part II.

148. *Id.*

religious values and practices, and an employer can avoid hiring someone for the purposes of performing certain tasks, only to later discover that the new hire objects to performing those very same tasks. Accordingly, at every job interview, the employer should be encouraged to set forth the expectations and responsibilities of a given position, and make clear which of these duties constitute “essential” parameters of the job. For instance, an employer should be able to specify whether it is “essential” for the prospective applicant to work on Saturdays, to serve customers with the beverage of their choice (even if the beverage is alcoholic), or to refrain from taking more than one consecutive week of vacation off while school is in session (especially on the eve of the state testing dates). If these present a conflict with the applicant’s privately held beliefs, the onus should be on the applicant to refuse the job offer—or risk legal termination of their “at will” employment later on.

To an extent, this exchange already occurs in practice. During interviews, employers may describe the regular days, hours, or shifts of the job in the hopes that an applicant self-selects for a position for which she feels she is well-suited.¹⁴⁹ But, as this Note illustrates, this in no way guarantees that the hired employee will successfully self-select for an appropriate position.¹⁵⁰ Much litigation and costly settlements could be avoided if only the employer and employee had a clearer understanding from the outset of the employment relationship about which aspects of a job an employer views as essential, and for which the employer is unwilling to employ someone who cannot perform said functions.¹⁵¹ Yet, even though employers in many states are legally allowed to ask applicants about their religious practices, most employers decline to do so because of the risk that a denied applicant will assume that she was denied employment based on religious reasons (which *is* illegal).¹⁵² This conception should be changed to encourage greater discourse and facilitate a more comprehensive understanding about whether an employee is able to satisfy the essential requisites of a desired job before he or she is hired for

149. RELIGIOUS ACCOMMODATION, *supra* note 89, at 5.

150. *See, e.g.*, Crider v. Univ. of Tenn., 492 F. App’x 609, 610 (6th Cir. 2012); Chenzira v. Cincinnati Children’s Hosp. Med. Ctr., No. 1:11-CV-00917, 2012 U.S. Dist. LEXIS 182139, at *1 (S.D. Ohio Dec. 27, 2012); Grinberg & Hassan, *supra* note 1; Turkewitz, *supra* note 92.

151. *See* Landes & Posner, *supra* note 77, at 271–73, 293 (noting that clear precedents reduce the demand for litigation by “creating specific rules of legal obligation”).

152. Alison Green, *Is That Interview Question Legal?*, U.S. NEWS & WORLD REP. (Jan. 10, 2011, 9:00 AM), <http://money.usnews.com/money/blogs/outside-voices-careers/2011/01/10/is-that-interview-question-legal>.

that position.

This contention is not without its problems, chief among which is the fact that it could effectively legalize invidious religious discrimination. For instance, an employer could systematically discriminate against Sabbath observers by labeling Saturday shifts as an “essential function,” or systematically discriminate against Muslim workers by maintaining that regular prayer breaks or the wearing of headscarves conflicts with an “essential function.” To counteract this development, the law should require employers to offer a reasonable nondiscriminatory motive, such as worker safety, behind such sweeping prohibitions on certain practices to keep employers accountable and reasonable in the “essential functions” they propose. Another potential concern with this approach is that it is difficult for employers to adequately predict and notify applicants about all of the “essential functions” a position entails before an employment accommodation dispute arises. While it is true that determining a fair and accurate list of “essential functions” for each position is prone to an exercise of trial and error, it is not a bad thing for an “essential functions” list to be revised, updated, and gradually perfected over time. Indeed, an employer may realize over time that a responsibility she once deemed essential, such as the willingness to serve alcoholic beverages to passengers on a plane, is not an essential task for flight attendants after all. Conversely, an employer may come to find that an employee’s ability to regularly work on weekends becomes more important as the employer decides to close the office on slow days (for instance, Mondays) and increase hours of operation on the weekends in order to serve more customers. In such instances, the employer should feel comfortable in communicating the new working requirements to her employees, and to let workers go if they are unable or unwilling to satisfy the new “essential functions” of their job.

Of course, if an employer wishes to make a special accommodation for a worker’s religious practices or beliefs, he or she would be free to do so, regardless of whether such accommodation comes at a cost. But the decision to offer an accommodation for a core tenet of a particular position should be voluntary. Employers should not be compelled to offer accommodations they feel infringe on their own beliefs and practices, as well as the beliefs and practices of their other employees, even if they are unable to show a financial detriment or more than a *de minimis* cost resulting from such an arrangement. As discussed in the Introduction of this Note, employers have as much of a right to exercise their convictions regarding the proper role that religion (or lack thereof) should be expressed

in their workplace as their employees do.¹⁵³ Allowing employers and employees the opportunity to arrive at an agreement as to what “essential functions” an employee is required to perform in order to keep her job respects the parties’ ability to freely contract for an employment relationship in which both parties are comfortable expressing their beliefs in a way that does not unduly impinge on the other’s values.

CONCLUSION

The vast majority of the country identifies as being religious,¹⁵⁴ and much of American religious life now takes place outside of the church. People enjoy the freedom to define their religion and their religious practices as they wish. It is inevitable, even desirable, that their beliefs and practices will follow them into the largely secular sphere of the private sector, which is fine—to a point. Religion in the workplace can be a problem when privately held beliefs begin to dominate the workplace to the point where it starts to interfere with work duties and detract from employee morale and productivity. Just as the separation of church and state is enshrined in our nation’s constitutional conscience as the way to preserve non-discriminatory treatment among different religions, so too should there be some separation of church and business in the private sphere, so that employees and employers are not overtly imposing their privately held beliefs onto others.¹⁵⁵ Where once Title VII’s religious accommodations pendulum arguably swung too far in favor of employers’ rights in cases like *Trans World Airlines, Inc. v. Hardison*, nowadays the pendulum appears to be overcorrecting in the form of ever-broadening protections for religious (and quasi-religious) practices that are disruptive in the workplace.

One way to prevent the pendulum from overcorrecting is to incorporate an “essential functions” provision into Title VII’s religious accommodations law, similar to the provision in Title I of the ADA. Incorporating this provision would not eliminate all of the critiques associated with Title VII law. Its effects on judicial efficiency will likely be tempered by increased litigation as employers and accommodation-seekers

153. See *supra* Intro.

154. CHANGING LANDSCAPE, *supra* note 28, at 3.

155. See Alexis, *supra* note 27, at 1. The author raises a strong argument regarding the “specious nature” of “secular neutrality” practiced by many American employers. *Id.* at 5 (“[R]ather than being a secular state, the United States is a country that has secularized Christianity.”). However, a predominantly secular (or at least, not overtly religious) environment may be the best way for culturally diverse workplaces to place all religious traditions on an equal playing field.

battle over the “essential functions” of a certain position, and it may still fail to adequately account for an accommodation’s effects on third parties in certain situations. It is also hard to tell how much effect the “essential functions” provision would have on the “slippery slope” phenomenon. But in at least one respect, namely promoting fairness among workers, the “essential functions” provision would help improve current Title VII religious accommodation law by holding all workers to the same baseline standard that employees must at least perform core functions of their jobs regardless of their religious, or non-religious, personal beliefs. Accordingly, religious accommodation law should include an “essential functions” provision to better balance the competing interests of accommodation-seeking employees, coworkers, and employers.

