

## Comments

### **A CRITICAL HISTORICAL AND LEGAL REAPPRAISAL OF *BHATIA V. CHEVRON U.S.A., INC.*: JUDICIAL EMASCULATION OF THE DUTY OF ACCOMMODATION**

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#### I. INTRODUCTION

Perhaps the most important and commonly cited case by courts and legal commentators that addresses an employer's duty to accommodate an employee's religious beliefs where the employer raises safety issues is the Ninth Circuit's decision in *Bhatia v. Chevron U.S.A., Inc.*<sup>1</sup> Pursuant to what it believed were requirements of California's Occupational Safety and Health Act (Cal/OSHA), Chevron adopted a policy requiring all machinists to shave off any facial hair interfering with the ability to achieve a gas-tight face seal with a respirator.<sup>2</sup> When Bhatia, a machinist and a member of the Sikh religion, refused to shave, he was demoted.<sup>3</sup> Finding that Chevron's safety concerns were legitimate, the court ruled that accommodating Bhatia's request to maintain his bearded appearance would subject the

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1. *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984); *see, e.g.*, *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004) (citing *Bhatia*) ("Such regulations are often justified with regard to safety concerns."); 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION, § 56.10[1] (2d ed. 2008) ("The leading example of this principle, as it pertains to Title VII, is . . . *Bhatia v. Chevron USA*.").

2. *Bhatia*, 734 F.2d at 1383.

3. *Id.*

company to undue hardship, and consequently it dismissed his claim of religious discrimination.<sup>4</sup>

This comment represents a historical and legal critique of this widely accepted decision. The comment is divided into the following sections. First, it will provide an overview of the minority religious groups within our society who are negatively affected by a grooming policy prohibiting beards at the workplace. Second, it will briefly identify the nature of an employer's duty to accommodate under Title VII and critically evaluate the test of undue hardship liquidating that obligation that the Supreme Court established in its seminal decision, *Trans World Airlines, Inc. v. Hardison*.<sup>5</sup> Third, based on a review of documents on record with the California Division of Occupational Safety and Health,<sup>6</sup> the agency that reviewed Bhatia's situation, it will argue that Chevron would not have been in breach of any OSHA requirement had it accommodated Bhatia. Fourth, it will present an alternative legal model of business necessity, first promulgated by the Supreme Court in *Griggs v. Duke Power Co.*,<sup>7</sup> that merits application in religious accommodation cases in order to afford equal employment opportunity to members of our society whose religious beliefs are less widely spread or known. Fifth, it will critically evaluate other no-beard cases to illustrate the current judicial predisposition to ignore the serious disparate impact that a failure to accommodate will have on many religious groups, thereby making diversity in the workplace a difficult goal to realize. Finally, against the background of *Bhatia* and other cases, it will propose legislative action to ensure that the religious beliefs of workers will not unfairly restrict their job opportunities.

## II. BACKGROUND

### A. *Why a Conflict Exists*

The overwhelming majority of Americans identify themselves as adherents of Christianity, with 78.4 percent of adults belonging to some Christian group, primarily Catholic or Protestant.<sup>8</sup> Yet our nation's population also consists of adherents of other faiths followed more predominantly in other parts of the world, including those practicing

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4. *Id.* at 1384.

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

6. The documents referred to are actual case records that California OSHA compiled regarding Bhatia's request for accommodation. The author wishes to thank Michael Horowitz, Senior Industrial Hygienist at California OSHA, for providing these documents.

7. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

8. THE PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY, 5 (Feb. 2008), available at <http://religions.pewforum.org/reports>.

Judaism (1.7%), Islam (0.6%), Buddhism (0.7%), and Sikhism (0.1%).<sup>9</sup> While these religious groups compose only a relatively small percentage of the population, their presence is increasing, as the number of individuals practicing Islam, Buddhism, and Sikhism has doubled between 1990 and 2001.<sup>10</sup>

As the United States becomes more ethnically and religiously diverse, conflicts may arise between an employee's adherence to his faith and compliance with an organization's business policies and practices. One such source of conflict may be a firm's grooming policies. A recent report by the Society for Human Resource Management noted that eighty-nine percent of organizations have some type of policy restricting an employee's personal appearance.<sup>11</sup> Of these, twenty-nine percent may have restrictions on facial hair including an outright ban on the wearing of beards.<sup>12</sup> Employers typically provide a variety of reasons for their grooming policies, including safety,<sup>13</sup> concerns over customer preferences and public image,<sup>14</sup> and a desire to maintain uniformity of employee-appearance to promote discipline and morale.<sup>15</sup>

Policies banning the wearing of beards at the work site may have a severe impact on the employment of Muslim, Sikh, and Jewish workers and job applicants. Within Islam, some religious Muslims consider shaving one's beard to be a violation of the Prophet's command. Thus some Islamic scholars maintain that the wearing of a beard complies with Mohammad's command to wear a beard as a sign of separation from

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9. *Id.* at 12, 21; U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-2005, 55 available at <http://www.census.gov/prod/2004pubs/04statab/pop.pdf>.

10. U.S. CENSUS BUREAU, *supra* note 9, at 55.

11. SHRM Research PowerPoint, *Does your organization have a policy addressing employee personal appearance? - SHRM Poll*, at 3 (2006), available at <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/employeepersonalappearance.aspx>.

12. *Id.*

13. *See, e.g., Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1382 (9th Cir. 1984) (finding that accommodating a worker's religious beliefs that prevented him from shaving facial hair would have caused the employer undue hardship).

14. *See, e.g., Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005) (holding that it would cause an undue hardship for Costco to modify its no-facial-jewelry policy as a reasonable accommodation for an employee who claimed membership in the Church of Body Modification because the exemption would adversely affect the employer's public image that it wanted to cultivate). *But see EEOC v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 798 (8th Cir. 1993) (holding that the employer did not prove there was a business necessity for his employee no-beard policy).

15. *See, e.g., Weaver v. Henderson*, 984 F.2d 11, 14 (1st Cir. 1993) (denying plaintiff's request for an injunction against an employer's "no moustache" policy and accepting defendant's argument that consistency in appearance would help foster a shared pride and cohesiveness between the employees).

adherents of other religions.<sup>16</sup>

Within all major facets of Judaism—Reform, Conservative, and Orthodox—there is no broad general religious requirement to maintain a beard. However, ultra-Orthodox and Hasidic Jews typically wear beards and payot (side curls) as an inherent requirement of Jewish tradition.<sup>17</sup> Additionally, there is a custom among Orthodox Jews of not shaving during the first thirty days of mourning after the passing of an immediate family member.<sup>18</sup> Some Orthodox Jewish men also may wear beards during the seven weeks between Passover and the holiday of Shavuot as a symbol of collective Jewish mourning.<sup>19</sup>

For Sikhs, the wearing of a beard is a cardinal element of their faith, as “*kes*, unshorn hair, is an article of faith and an inviolable vow.”<sup>20</sup> Unlike Judaism and Islam that may recognize different levels of practice and observance, the rejection of the physical principles of Sikhism, which include the wearing of a turban and unshorn hair, signifies a repudiation of the faith.<sup>21</sup>

#### B. *Title VII and the Duty of Accommodation*

Title VII of the Civil Rights Act of 1964 provides that:

[i]t shall be an unlawful employment practice for an employer--

(1) 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 race, color, religion,

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16. THOMAS P. HUGHES, *DICTIONARY OF ISLAM* 40 (Lahore, 1964) available at <http://www.answering-islam.org/Books/Hughes/index.htm>; see also *Potter v. District of Columbia*, 382 F. Supp. 2d 35, 38 (D.D.C. 2005) (noting the plaintiff's declaration that he was wearing a beard as an expression of his religious Islamic faith).

17. *Beard and Shaving*, in 3 *ENCYCLOPAEDIA JUDAICA*, 235-36 (Michael Berenbaum & Fred Skolnik eds., Keter Publishing House 2d ed. 2007).

18. *Id.*

19. *Id.*

20. *Kesadhari*, in 2 *THE ENCYCLOPAEDIA OF SIKHISM* 465-66 (Harbans Singh ed., Punjabi University, 1st ed. 1996) (“All codes and manuals defining Sikh conduct are unanimous in saying that uncut hair is obligatory for every Sikh. . . . Guru Gobind Singh [was quoted saying]: ‘My Sikh shall not use the razor. . . . [T]he use of [a] razor or shaving the chin shall be as sinful as incest.’”); see also *EEOC v. Sambo's of Ga., Inc.*, 530 F. Supp. 86, 88 (N.D. Ga. 1981) (“This requirement of wearing facial hair, known as Kes or Kesha, is an essential tenet of Sikhism.”); *Five Symbols*, in 2 *THE ENCYCLOPAEDIA OF SIKHISM* 37-38 (Harbans Singh ed., Punjabi University, 1st ed. 1996) (“Of these five symbols (the Five K's), primacy unquestionably belongs to the *kes*.”).

21. See *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383 (9th Cir. 1984) (“[T]he Sikh religion proscribes the cutting or shaving of any body hair.”).

sex, or national origin; or

(2) to limit . . . his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>22</sup>

Religion includes “all aspects of religious observance and practice, as well as belief.”<sup>23</sup> Under Title VII, an employer is required to reasonably accommodate an employee’s religious beliefs, practices, or behavior, unless the accommodation will impose an “undue hardship [on] the conduct of the employer's business.”<sup>24</sup> There is a well-established two-part analysis for religious discrimination claims.<sup>25</sup> First, the employee must establish a prima facie case of religious discrimination.<sup>26</sup> Second, if the employee does so, the burden shifts to the employer to show that it had negotiated with the employee in a good faith effort to reasonably accommodate the employee’s religious observance.<sup>27</sup> In situations where the negotiations do not result in a solution that would eliminate the employee’s religious conflict, the employer must demonstrate that accommodating the employee would cause an undue hardship.<sup>28</sup> Only if the employer can prove that no accommodation would be possible without imposing on itself undue hardship, is the employer excused from making the necessary changes to accommodate the employee’s religious practices.<sup>29</sup>

On its face, the statute does not define “reasonable accommodation”

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22. 42 U.S.C. § 2000e-2 (2009).

23. *Id.* at § 2000e(j).

24. *Id.*

25. *See, e.g.,* *Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir. 1996) (citing *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993)) (explaining the two-part analysis of Title VII religious discrimination claims).

26. *See, e.g., id.* at 1467 (describing the plaintiff’s burden in religious discrimination suits). In order for the employee to establish a prima facie case of religious discrimination, he must satisfy a three-part test. *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 614 n.5 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). The employee must establish the following elements: “(1) [that] he had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer threatened him or subjected him to discriminatory treatment . . . because of his inability to fulfill the job requirements.” *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (1993).

27. *See, e.g., Opuku-Boateng*, 95 F.3d at 1467 (describing the defendant’s burden at trial).

28. *Id.*

29. *Id.*

or “undue hardship.”<sup>30</sup> Therefore, the exact obligation of an employer to his employee must be analyzed by the courts on a case-by-case basis.<sup>31</sup>

### 1. Reasonable Accommodation

The Supreme Court has yet to define “reasonable accommodation,” but it has held that an employer satisfies its duty of accommodation by offering a religious employee a reasonable accommodation, and it is not obligated to choose the reasonable accommodation most favored by the employee.<sup>32</sup> While, “an accommodation is reasonable as a matter of law if it eliminates a religious conflict,”<sup>33</sup> the law does not provide that in order to be reasonable the accommodation “*must* eliminate any religious conflict.”<sup>34</sup> The duty to accommodate should foster “bilateral cooperation” between employers and employees.<sup>35</sup> Accordingly, in a recent Title VII religious discrimination case, the Eighth Circuit held that whether an employer has reasonably accommodated an employee’s religious observance or practice depends on the sum of the circumstances.<sup>36</sup> Keeping in mind that while the statutory burden to accommodate an employee’s religious beliefs falls on

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30. See *Trans World Airlines Inc. v. Hardison*, 432 U.S. 63, 75 (1977) (“[T]he employer’s statutory obligation to make reasonable accommodation . . . short of incurring an undue hardship, is clear, but the reach of that obligation has never been spelled out by Congress or by EEOC guidelines.”).

31. See *Brown v. Polk County*, 61 F.3d 650, 655 (8th Cir. 1995) (quoting *Beadle v. Hillsborough County Sheriff’s Dep’t*, 29 F.3d 589, 592 (11th Cir. 1994), *cert. denied*, 414 U.S. 1128 (1995)) (“[P]recise reach of the employer’s obligation to its employee is unclear under the statute and must be determined on a case-by-case basis.”).

32. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986); see also *id.* at 69 n.6 (finding an EEOC guideline that required the employer to choose the accommodation that least disadvantages the employee to be inconsistent with Title VII); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982) (“A reasonable accommodation need not be on the employee’s terms only.”).

33. *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1031 (8th Cir. 2008) (citing *Ansonia*, 479 U.S. at 71).

34. *Id.* at 1031 (emphasis in original). In *Sturgill*, the Eighth Circuit found that the district court improperly instructed the jury that under Title VII an employer was obligated to eliminate the religious conflict; ultimately, however, the court held that the error in jury instructions was not a reversible error. *Id.* at 1033.

35. See *Ansonia*, 479 U.S. at 69 (quoting *Brener*, 671 F.2d at 145-46 (5th Cir. 1982)) (“[B]ilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee’s religion and the exigencies of the employer’s business.”); R. Ryan Younger, *Recent Developments*, 61 ARK. L. REV. 187, 191 (“[W]hereby the employer makes a serious effort to accommodate sincere religious beliefs and the employee likewise cooperates in the effort for accommodation.”).

36. See *Sturgill*, 512 F.3d at 1030 (“What is reasonable depends on the totality of the circumstances and therefore might, or might not, require elimination of a particular, fact-specific conflict.”).

the *employer*, the *employee* also has a good faith duty to work with the employer and to accept the employer's accommodation if it is reasonable and does not compromise the employee's religious practices.<sup>37</sup>

## 2. Undue Hardship

In *Trans World Airlines, Inc., v. Hardison*, the Supreme Court established that any accommodation will be considered an "undue hardship" if it causes more than a "*de minimis*" cost to the employer.<sup>38</sup> Significantly, the Court did not define the term "*de minimis*," which suggests that anything more than a minimal economic cost loss would constitute undue hardship. Within this framework, the Court in *Hardison* ruled that replacing Hardison, who was unable to work Saturdays due to his religious observance, would constitute undue hardship, because replacing him with his supervisor would result in a loss of efficiency.<sup>39</sup> Additionally, the Court noted that bringing in an additional worker not regularly assigned to the Saturday shift to perform Hardison's work would constitute undue hardship if it required paying premium wages to the substitute worker.<sup>40</sup>

Since *Hardison*, subsequent courts have held that *de minimis* cost "entails not only monetary concerns, but also the employer's burden in conducting its business."<sup>41</sup> Additionally, according to the Tenth Circuit, "[t]he cost of hiring an additional worker or the loss of production that results from not replacing a worker who is unavailable due to a religious conflict can amount to undue hardship."<sup>42</sup> Furthermore, the Eighth Circuit has stated that any hardship asserted by an employer "must be real rather than speculative,<sup>43</sup> merely conceivable or hypothetical."<sup>44</sup> Moreover, "[a]n

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37. *Brener*, 671 F.2d at 146; see also *id.* at 146 n.3 ("Of course, an employee is not required to modify his religious beliefs, only to attempt to satisfy them within the procedures offered by the employer.").

38. See *Trans World Airlines, Inc., v. Hardison*, 432 U.S. 63, 84 (1977) ("To require [an employer] to bear more than a *de minimis* cost . . . is an undue hardship.").

39. See *Hardison*, 432 U.S. at 84 (disagreeing with the Court of Appeals).

40. *Id.* at 68-69. But see *id.* at 76 (allowing Hardison to work four days a week and replacing him with a supervisor or co-worker would not have amounted to undue hardship according to the Court of Appeals).

41. *Beadle v. City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995), *cert. denied*, 515 U.S. 1152 (1995); see also *Cloutier*, 390 F.3d at 134 (citing *United States v. Bd. of Educ.*, 911 F.2d 882, 887 (3d Cir. 1990)) ("This calculus applies both to economic costs . . . and to non-economic costs, such as compromising the integrity of a seniority system.").

42. *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019, 1023 (10th Cir. 1994); see also *Brener*, 671 F.2d at 144 ("The effect of Brener's absence from work, the court found, was a decrease in efficiency and an increase in the burden on other pharmacists.").

43. *Brown*, 61 F.3d at 655 (citing *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992), *cert. denied*, 508 U.S. 973 (1993)).

44. *Id.* (citing *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981),

employer stands on weak grounds when advancing hypothetical hardships in a factual vacuum.”<sup>45</sup> The Ninth Circuit has clarified that an “[u]ndue hardship cannot be prove[n] by assumptions nor by opinions based on hypothetical facts,”<sup>46</sup> and that an employer must show more than “proof of some fellow-worker’s grumbling . . . [and an] actual imposition on co-workers or disruption of the work routine.”<sup>47</sup> Finally, the First Circuit has declared that an employer does not have to actually attempt an accommodation in order to prove an undue hardship.<sup>48</sup>

### C. Critique of the Utilization of the *De Minimis* Standard

The *de minimis* standard essentially emasculates the duty to accommodate because of the low threshold of cost the employer potentially would have to bear to justify a refusal to accommodate.<sup>49</sup> For example, under current *de minimis* jurisprudence, an organization could dismiss an employee for failing to work on a specific assignment or shift, regardless of the infrequency of the assignment and the firm’s economic capacity to find and pay a replacement if the needed work had to be performed by other employees at a higher rate of pay.<sup>50</sup> The Supreme Court criticized Marshall’s dissent in *Hardison* for ignoring the likelihood that a large company, like TWA, could have many employees whose religious observances might prohibit them from working Saturdays or Sundays.<sup>51</sup> However, the Supreme Court cited no evidence that among TWA’s workforce there were other Sabbath observers like *Hardison*, and consequently the Court negated the company’s duty to accommodate on the basis of a speculative concern. Moreover, the majority seemingly ignored the reality that if a large company, such as TWA, has many religious employees, some who cannot work on Saturdays and some who cannot work on Sundays, coordinating work schedules in order to accommodate the different religious beliefs should be feasible without imposing an undue

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*cert. denied*, 454 U.S. 1098 (1981)).

45. *Id.* (citing *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 960 (8th Cir. 1979)).

46. *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

47. *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

48. *Cloutier*, 390 F.3d at 135 (quoting *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975)).

49. *See Trans World Airlines, Inc., v. Hardison*, 432 U.S. 63, 92 n.6 (1977) (Marshall, J., dissenting) (questioning whether as a matter of law “undue hardship” could even be interpreted under plain English as meaning “more than a *de minimis* cost”).

50. *Id.* at 68-69; *see also supra* II.B.2. (discussing *Hardison* and subsequent appellate court decisions).

51. *Hardison*, 432 U.S. at 85 n.15.

burden on the employer.<sup>52</sup> By establishing the weak evidentiary standard of *de minimis* for proving undue hardship, the Supreme Court set the stage for parallel decisions at the appellate and district court levels in which courts have essentially refused to accommodate religious employees on the basis of speculative considerations.

### III. *BHATIA*

#### A. *Factual Background*

In 1982, Chevron adopted a new safety policy in order to comply with already existing Cal/OSHA's General Industry Safety Orders title 8, section 5144.<sup>53</sup> Chevron's respirator policy required all of its employees who were potentially exposed to toxic gases to shave all facial hair, so that they would have a gas-tight seal when wearing a respirator.<sup>54</sup> Under its new policy, Chevron included all machinists as employees who potentially could be exposed to toxic gases, even those who were not actually required to wear respirators while working.<sup>55</sup> Machinists at Chevron had a wide range of duties. Some machinists did field work that involved real potential exposure to toxic gases and other hazardous substances.<sup>56</sup> In addition, certain machinists were part of a labor pool that was used in emergency situations to fight fires, contain toxic gases, or rescue others.<sup>57</sup> Because the company's assignment of machinists to jobs involving potential exposure to toxic chemicals was unpredictable, all machinists had to be able to wear respirators.<sup>58</sup> As a result, all machinists were compelled to be clean-shaven to achieve a gas-tight seal.<sup>59</sup> As a result of the new policy, Chevron fired three employees who refused to comply and shave.<sup>60</sup>

Complainant, Manjit Singh Bhatia, had been a machinist at Chevron for several years before it adopted its new safety policy.<sup>61</sup> Upon receiving the memorandum of the policy change, Bhatia informed the defendant that

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52. *See id.* at 92 n.6 (Marshall, J., dissenting) (“[T]he likelihood of accommodation being costly would diminish, since trades would be more feasible.”).

53. *Bhatia v. Chevron, U.S.A., Inc.*, 734 F.2d 1382, 1383 (9th Cir. 1984). The most pertinent words of the statute for our discussion are: “[r]espirators [when needed to be worn] . . . shall not be worn when conditions prevent a good gas-tight face seal.” CAL. CODE REGS. tit. 8, § 5144(c) (1982).

54. *Bhatia*, 734 F.2d at 1383.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

he would not be able to comply because as a religious Sikh he was forbidden from cutting or shaving any hair.<sup>62</sup> Afterwards, the company processed an application to transfer Bhatia to a new position that would not require him to wear a respirator, but suspended him without pay until it was able to find such a position.<sup>63</sup> Concurrently, to safeguard his employment, Bhatia approached the Board of Executives of the Sikh Center of the San Francisco Bay Area and requested a religious exemption to allow him to shave his beard.<sup>64</sup> The Board refused his request because “facial hair . . . is most essential for a Sikh under Sikh and Khalsa Code.”<sup>65</sup> After being suspended without pay for six weeks, Bhatia was informed that Chevron could not find a position that paid as much as a machinist but that did not require a respirator, and that the company would look for a lower paying position.<sup>66</sup> The employer then offered Bhatia three clerical positions, which he refused.<sup>67</sup> Bhatia asked the employer for an exemption from its new policy, because during his three years as a machinist he never was required to wear a respirator.<sup>68</sup> Chevron refused and instead offered Bhatia a job as a janitor, a position that paid seventeen percent less than Bhatia’s machinist position.<sup>69</sup> Eventually Bhatia accepted the janitorial job offer.<sup>70</sup>

*B. The Court’s Decision*

Bhatia sued Chevron under Title VII for discriminating against him because of his religious beliefs.<sup>71</sup> After both parties filed for summary judgment, the district court awarded summary judgment to the defendant.<sup>72</sup> Upon appeal, the Ninth Circuit affirmed the summary judgment for the defendant.<sup>73</sup> The court held that Bhatia had satisfactorily proven his prima facie case of religious discrimination.<sup>74</sup> It indicated that: 1) the plaintiff had a bona fide belief that shaving his beard would be in violation of his Sikh faith; 2) he had informed Chevron of his religious belief and practice;

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62. *Id.*

63. *Id.*

64. Letter from R.S. Dhalimal, Sec’y, Exec. Comm. of the Sikh Ctr. of the San Francisco Bay Area (May 23, 1982) (on file with the University of Pennsylvania Journal of Business Law).

65. *Id.*

66. *Bhatia*, 734 F.2d at 1383.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1382-83.

72. *Id.* at 1383.

73. *Id.*

74. *Id.*

and 3) as a result of this belief, Chevron removed him from his position.<sup>75</sup> Nevertheless, the court noted that Chevron had sustained its burden of establishing that it made a good faith effort to accommodate Bhatia's religious beliefs.<sup>76</sup> In describing the company's good faith efforts to accommodate Bhatia, the court emphasized that Chevron did not fire Bhatia, but rather just suspended him without pay.<sup>77</sup> In addition, the court underscored how Chevron had offered Bhatia four different replacement positions (albeit all lower-paying than his job as a machinist), and that the employer promised to re-instate Bhatia as a machinist if a new respirator were developed that could safely be worn with a beard.<sup>78</sup>

Furthermore, the Ninth Circuit held that Chevron had fulfilled its duty of accommodation because any further accommodation would have resulted in more than a *de minimis* cost on either the company or Bhatia's co-workers.<sup>79</sup> The court provided two explanations for why further accommodation would have imposed on Chevron an undue hardship.<sup>80</sup> First, the court accepted Chevron's argument that if Bhatia were granted an exemption from use of an airtight respirator while placed in a machinist position exposing him to toxic gases, the company would risk liability for violating a Cal/OSHA safety standard.<sup>81</sup> In the alternative, if the company were to arrange for Bhatia to retain his job as a machinist and allow his supervisors to exempt him from assignments that involved potential exposure to toxic gases, the company's burden would be more than *de minimis* because 1) Chevron would have been required to redo its entire system of work assignments,<sup>82</sup> and 2) Bhatia's co-workers would have been forced to "assume his share of potentially hazardous work."<sup>83</sup>

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75. *Id.*

76. *Id.*

77. *See id.* (contrasting Bhatia's situation with that of his co-workers, who were terminated after refusing to shave).

78. *Id.* The court disagreed with Bhatia's argument that these were insufficient to constitute reasonable accommodation simply because the company refused to allow him to maintain his position as a machinist by exempting him from its no-beard policy. *Id.*

79. *See id.* at 1383 ("[T]o the extent that [Chevron's] efforts [of accommodation] were unsuccessful, further accommodation would have caused it undue hardship.").

80. *Id.*

81. *Id.* at 1384.

82. *See id.* (describing how the company would have had to change its current, unpredictable system to include predictions about whether an assignment would involve potential exposure to toxins).

83. *Id.*; *see also* *Yott v. N. Am. Rockwell Corp.*, 602 F.2d 904, 908 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (explaining that an employer is not required to accommodate a religious employee if the accommodation would constitute preferential treatment over other employees).

C. *Analysis of Bhatia: Why the Court Got it Wrong*

Significantly, other courts often cite *Bhatia* as a precedent for an employer's right not to accommodate because of safety concerns,<sup>84</sup> or because of the need to comply with a state or federal law or regulation, such as the Occupational Safety and Health Act.<sup>85</sup> However, a close inspection of Cal/OSHA's investigation and review of Bhatia's situation reveals that Chevron's respiratory protection policy was overly broad and that Bhatia's ultimate removal as a machinist was not necessary. Chevron's bulletin to all of its employees on May 10, 1982 stated:

It is the policy of the Richmond Refinery to comply with all laws and regulations affecting our business. Cal/OSHA regulation 5144 states that employees may not wear respiratory protection when conditions prevent a good gastight seal. . . .

After an extensive review of our obligation under Cal/OSHA regulation, Richmond Refinery has established Monday 24, 1982 as the effective date for compliance. Beginning on that date, Chevron employees . . . who *may be* required to wear a respiratory protection either in their normal duties or under emergency conditions may no longer wear beards. . . .

. . . .

I realize that compliance with the Cal/OSHA regulation on respiratory protection will be difficult for some of our employees. This is one of the reasons that we undertook an extensive review of our obligation under the Cal/OSHA regulation . . . .<sup>86</sup>

Chevron was in contact with Cal/OSHA in regards to Bhatia's conflict with its respiratory safety policy. In a letter between Art Carter, Chief of California's Division of Occupational Safety and Health (DOSH), and R.W. Davis at Chevron, Carter explained that the Division had reviewed Chevron's bulletin, but that there was confusion as to whether the

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84. *E.g.*, *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004) (citing *Bhatia*, 734 F.2d at 1382) ("Such regulations are often justified with regard to safety concerns.").

85. *E.g.*, *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830 (9th Cir. 1999) (citing *Bhatia*, 734 F.2d at 1383-84) ("[A]n employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal or state law. . . . [for] the existence of such a law establishes 'undue hardship.'").

86. Bulletin from the Mfg. Dep't of Chevron U.S.A., Inc. to the Employees of Chevron U.S.A., Inc., Richmond, Cal. (May 10, 1982) (on file with the University of Pennsylvania Journal of Business Law) (emphasis added).

company's policy was absolutely necessary under Cal/OSHA.<sup>87</sup> Chief Carter invited Chevron representatives to have a meeting with himself and a fellow staff member to discuss the situation.<sup>88</sup> While careful not to overly assert the Division's authority over Chevron's employment policies, Chief Carter offered Davis the Division's assistance in finding an alternative for those employees who had "only a remote possibility of encountering an emergency situation . . . requiring respiratory protection."<sup>89</sup> The same day, Chief Carter responded to Assemblyman Thomas Hannigan about Bhatia's situation, where he explained that Cal/OSHA "[did] *not* have a regulation that routinely requires that *every* employee who may have some possibility of toxic fume exposure be clean shaven so as to get a good respirator fit."<sup>90</sup> In his letter to Assemblyman Hannigan, before completing his review of the situation, Chief Carter was sympathetic towards Bhatia and somewhat suspicious of Chevron's new policy, believing that it was overly expansive and unnecessary.<sup>91</sup>

On August 16, 1982, Chief Carter and an associate, Dr. Alvin Greenberg, Special Assistant in charge of the Research and Development Unit of Cal/OSHA, met with several Chevron management personnel concerning Bhatia's situation.<sup>92</sup> The Chevron representatives explained the company's position that as a machinist, Bhatia needed to be assignable to any location in the plant, including those that would require respirators because of potential exposure to gases or toxins.<sup>93</sup> The following day, Chief Carter met with Bhatia and four other Sikhs.<sup>94</sup> Bhatia explained to Chief Carter that he was routinely assigned to work in the main machine shop location, which did not involve responding to any emergency situations or performing any routine work that required respirator use.<sup>95</sup>

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87. See Letter from Art Carter, Chief, Cal. Div. of Occupational Safety and Health, to R.W. Davis, Chevron U.S.A., Inc. (June 17, 1982) (on file with the University of Pennsylvania Journal of Business Law) (suggesting the possibility that Chevron's policy could be "going above and beyond" the state regulations).

88. See *id.* ("I feel that a meeting . . . would be most useful.").

89. *Id.*

90. Letter from Art Carter, Chief, Cal. Div. of Occupational Safety and Health, to Thomas M. Hannigan, Cal. Assemblyman (June 17, 1982) (on file with the University of Pennsylvania Journal of Business Law) (emphasis added).

91. See *id.* ("[W]e have reason to believe that the policy of Chevron is much too far embracing, and is totally unnecessary, and impractical.").

92. See, e.g., Letter from Art Carter, Chief, Cal. Div. of Occupational Safety and Health, to Thomas M. Hannigan, Cal. Assemblyman (Aug. 25, 1982) (on file with the University of Pennsylvania Journal of Business Law) (describing his meeting with Chevron representatives).

93. See *id.* ("It is their contention that . . . it [is] critical that they have the ability to assign machinists at any point in the plant to carry out their responsibilities.").

94. See *id.* (discussing his meeting with Bhatia).

95. See *id.* (describing Chevron's plant as being divided into zones, each with its own

According to Bhatia, because of the plant's different zones, each had a specially assigned group of machinists to respond in emergency situations.<sup>96</sup> Consequently, machinists in the main machine room did not need to respond to emergencies that required respirators.<sup>97</sup>

Later that month, Chief Carter sent status report letters to both Assemblyman Hannigan and Governor Edmund G. Brown Jr. of California, as Bhatia had contacted them both with pleas of assistance.<sup>98</sup> Chief Carter described to the public officials the aforementioned meetings and Chevron's pending offer of a janitorial position to Bhatia.<sup>99</sup> While the two letters were for the most part identical, before his closing to Governor Brown, Chief Carter revealed his understanding of the situation after meeting with both sides:

I personally believe that Chevron management, for reasons that relate more to a desire to keep strict control over management prerogatives relating to assignment of employees, is being *very rigid* in not being willing to recognize that Mr. Bhatia has a *legitimate religious reason* for not complying with their regulations concerning shaving facial hair. It does seem to me that *he could be assigned permanently* to the main machine shop, in which case he would not be exposed to either routine or emergency situations in which the wearing of a respirator requiring a close fit is required.<sup>100</sup>

While Chief Carter concluded that the company was unreasonably rigid, the Ninth Circuit accepted Chevron's position that it required the ability to assign employees randomly at any point in time.<sup>101</sup> It is difficult to fathom how a court on summary judgment could accept Chevron's argument that its policy was necessary to avoid violating Cal/OSHA regulations, when Cal/OSHA did not believe so.<sup>102</sup> Despite the absence of any real violation of Cal/OSHA, the court hypothesized the creation of one by concluding that if Chevron were to retain Bhatia as a machinist *and* he were exposed to toxic gas, Chevron could risk liability of violating Cal/OSHA. The court

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specially assigned group of machinists for emergency work).

96. *Id.*

97. *Id.*

98. *Id.*; Letter from Art Carter, Chief, Cal. Div. of Occupational Safety and Health, to Edmund G. Brown, Jr., Governor of Cal. (Aug. 25, 1982) (on file with the University of Pennsylvania Journal of Business Law) (providing a summary of the events to date).

99. See Letter from Art Carter to Edmund G. Brown, Jr., *supra* note 98, at 2 (indicating that Bhatia was still considering the janitor offer).

100. *Id.* (emphasis added).

101. *Bhatia*, 734 F.2d at 1384.

102. See Letter from Art Carter to Thomas M. Hannigan, *supra* note 90 ("Clearly we do not have a regulation that routinely requires that every employee who may have some possibility of toxic fume exposure be clean shaven so as to get a good respirator fit.").

overly emphasized the probability of Bhatia being assigned a position that would expose him to toxic gas, thereby requiring his use of a respirator, when never in three years had Bhatia once been assigned a position that involved even the *potential* exposure to toxic gas. Inexplicably, the court used this hypothetical situation to wrongfully conclude that the employer's accommodation would have imposed on it an undue hardship, when it has been established that "[u]ndue hardship cannot be prove[n] by assumptions nor by opinions based on *hypothetical* facts."<sup>103</sup>

A further component of the Ninth Circuit's finding of undue hardship was based on its determination that the company's need to maintain its system of unpredictable task-assigning would have inevitably placed Bhatia in a position in which he would be exposed to toxic chemicals.<sup>104</sup> However, the court provided no substantive explanation to support its assertion that Chevron had to maintain its system of unpredictable job assignments or that modifying its system for Bhatia would have caused an undue burden. Curiously, the court presumed that if Chevron were to accommodate Bhatia and not assign him to duties that required a respirator, the company would have to "revamp" its entire system of assignments.<sup>105</sup> Yet the court could have entertained the possibility of Chevron maintaining its unpredictable system of job rotation, and simply excluding Bhatia from this system by allowing him to remain in a position that never required the use of a respirator.

Chief Carter was certainly sympathetic to Bhatia; unfortunately, his position at Cal/OSHA did not allow him to grant Bhatia an exemption to Chevron's employment policies.<sup>106</sup> "If the management of a company determines that it is necessary for a worker to wear a respiratory protection as part of that company's safety program . . . it is beyond Cal/OSHA's ability to second guess the need for that type of protection."<sup>107</sup> However, in situations like these, where employees are faced with unwarranted policies that lead to discrimination, it is not only within the capacity of the courts to challenge and overturn discriminatory policies, but their duty to do so

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103. *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979) (emphasis added); *see also Sturgill v. United Parcel Serv.*, 512 F.3d 1024, 1033 n.4 (8th Cir. 2008) (quoting *Brown v. Polk County*, 61 F.3d 650, 655 (8th Cir. 1995) (en banc)) ("Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts.").

104. *Bhatia*, 734 F.2d at 1384.

105. *See id.* at 1384 ("If [Chevron] retained him as a machinist . . . [it] would have to revamp its . . . system of duty assignments.").

106. *See* Letter from Art Carter, Chief, Cal. Div. of Occupational Safety and Health, to Richard A. Uhlar, Indus. Hygienist, Int'l Chem. Workers Union (Sept. 28, 1982) (on file with the University of Pennsylvania Journal of Business Law) (expressing Cal/OSHA's difficulty in the situation).

107. *Id.* at 2.

under Title VII. As a member of the Sikh religion, Bhatia's situation is unfortunately a perfect example of Justice Marshall's expression of concern over the unique difficulties and barriers that religious minorities face in the workplace.<sup>108</sup>

Most significant, courts have ignored the negative class implications of their decisions in religious discrimination cases. In reality, Bhatia was not only defending his right to employment but those of similarly situated Sikh employees and workers belonging to other faiths whose capacity to be employed would be eroded by non-job related policies prohibiting the wearing of a beard. It is therefore reasonable to maintain that when an employment policy has a disparate impact on an entire class of Sikhs or Muslims, the appropriate standard of review should not be the *de minimis* standard, but rather the standard of "business necessity," first applied in *Griggs v. Duke Power Co.*<sup>109</sup> to protect African Americans, and subsequently women in the work force from discrimination.

#### IV. *GRIGGS V. DUKE POWER CO.*

##### A. *Background*

In *Griggs*, African-American employees sued their employer for maintaining personnel policies that had the effect of restricting minorities into inferior and low wage paying positions.<sup>110</sup> At issue were two selection criteria. The first criterion required a high school education for initial job assignments and for transfers from the Coal Handling to the "inside" departments.<sup>111</sup> The second required that all new employees pass standardized general intelligence tests as a qualification for employment.<sup>112</sup> The Fourth Circuit held that the employment policies did not violate Title VII because there was no proof of a discriminatory purpose.<sup>113</sup> Upon review, the Supreme Court reversed the Court of Appeals.<sup>114</sup> It found that these criteria would adversely affect the employment opportunities of racial minorities.<sup>115</sup> Specifically, the Court pointed to census data from North

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108. See *Hardison*, 432 U.S. at 85 (Marshall, J., dissenting) ("Particularly troublesome has been the plight of adherents to minority faiths who do not observe the holy days on which most businesses are closed . . . but who need time off for their own days of religious observance.").

109. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

110. *Id.* at 426.

111. *Id.* at 427.

112. *Id.* at 427-28.

113. *Id.* at 428.

114. *Id.* at 436.

115. *Id.* at 430.

Carolina indicating that while thirty-four percent of white males had graduated high school, only twelve percent of minorities had graduated.<sup>116</sup> Moreover, EEOC records suggested that while fifty-eight percent of whites passed standardized tests, only six percent of African Americans passed.<sup>117</sup> In his decision, Justice Burger declared that “[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment processes.”<sup>118</sup>

*B. The Business Necessity Standard*

In *Griggs*, the Supreme Court established a business necessity standard that would render unlawful employer policies that had a disproportionately adverse impact on minorities, unless the employer could demonstrate empirically that the job requirement had “a manifest relationship to the employment in question.”<sup>119</sup> Finding that neither the completion of high school nor the general intelligence test bore any relationship to an employee’s performance at work, the Court declared Duke Power’s policies to be unlawful.<sup>120</sup>

Subsequent Supreme Court decisions affirmed this new approach. For example, in *Dothard v. Rawlinson*, a case alleging sex discrimination against women seeking employment in a correctional facility, the Court, citing *Griggs*, reaffirmed this standard: “Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet ‘the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.’”<sup>121</sup> In *Connecticut v. Teal*, the Court again applied this standard:

*Griggs* and its progeny have established a three-part analysis of disparate impact claims. To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that ‘any given requirement [has] a manifest relationship to the employment in question,’ in order to avoid a finding of discrimination.<sup>122</sup>

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116. *Id.* at 431 n.6.

117. *Id.*

118. *Id.* at 430.

119. *Id.* at 432.

120. *Id.* at 431-32.

121. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (quoting *Griggs*, 401 U.S. at 432).

122. *Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982) (quoting *Griggs*, 401 U.S. at 432).

When Congress amended Title VII in 1991, it expressly endorsed the principal that employers cannot justify employment practices on the basis of operational objectives that are unrelated to specific job performance. Thus, the legislative history to the 1991 amendments indicates that:

Justifications such as customer preference, morale, corporate image, and convenience, while perhaps constituting 'legitimate' goals of an employer, fall far short of the specific proof required under *Griggs* and this legislation to show that a challenged employment practice is closely tied to the requirements of performing the job in question and thus is 'job related for the position in question.'<sup>123</sup>

Had the court applied a business necessity model in *Bhatia*, it is apparent that a different outcome would have occurred. Within that framework, Chevron would have been required to demonstrate that its requirement that all machinists wear respirators was job-related.<sup>124</sup> This burden would have been impossible to sustain since it was undisputed that Bhatia worked in a position involving no exposure to toxic gases.<sup>125</sup> Furthermore, it is most unlikely that the court would consider job-related a speculative concern that in an emergency situation Bhatia might need to wear a respirator when Cal/OSHA had concluded that there were no safety concerns mandating Bhatia's use of a respirator. As a result, Chevron's policy, which excluded all Sikhs from employment as machinists, would seemingly fail the *Griggs* standard of business necessity.

It is also apparent that had a business necessity standard been applied, the court would not have permitted Chevron to use its haphazard system of job assignments as a mechanism by which to justify the exclusion of workers belonging to particular religious groups. The Eleventh Circuit decision in *Hardin v. Stynchcomb* is illustrative of this argument.<sup>126</sup> Plaintiff Mary Hardin filed a class action Title VII sex discrimination suit after her application for a position as a deputy sheriff was rejected.<sup>127</sup> The defendant County Sheriff's Department maintained that the protection of the inmates' privacy rights justified its policy of only assigning male deputy sheriffs to work in the male section of the jail.<sup>128</sup>

The court noted that the effect of the County Sheriff's policy of job

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123. 137 CONG. REC. H9528 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards).

124. See *Griggs*, 401 U.S. at 431 ("If an employment practice . . . cannot be shown to be related to job performance, the practice is prohibited.").

125. See *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383 (9th Cir. 1984) (noting that never in three years had Bhatia ever been required to wear a respirator).

126. See *Hardin v. Stynchcomb*, 691 F.2d 1364, 1372 (11th Cir. 1982) (requiring the employer to modify its system of job assigning).

127. *Hardin*, 691 F.2d at 1365.

128. *Id.* at 1367.

rotation would have inevitably excluded women from all jobs within the facility, even those not requiring observation of inmates involved in the care of their personal hygiene.<sup>129</sup> Considering the potential discriminatory impact, the court indicated that the “defendants bear the burden of proving that because of the nature of the operation of the business they could not rearrange job responsibilities in a way that would eliminate the clash between the privacy interests of the inmates and the employment opportunities of female deputy sheriffs.”<sup>130</sup> Additionally, the court indicated that since a majority of jobs in the male section of the jail did not require strip searches or observation of inmates’ use of shower or toilet facilities, there was no reason why the Sheriff’s Department could not modify its system of rotating deputy sheriff assignments.<sup>131</sup> As a result, the court found the employer’s failure to employ women in the male section of the jail to be unlawful.<sup>132</sup>

In *Bhatia*, no evidence was presented that the employer could not have modified its policy of haphazard or unpredictable job assignments, which operated to exclude Bhatia and similarly situated religious minorities from employment. Specifically, the company did not have to assign Bhatia to a position that involved exposure to toxic chemicals, when such assignments were outside the scope of his normal job responsibilities. If the Title VII protection of business necessity can be used to protect racial and sexual minorities from policies of total exclusion, it is inexplicable and indefensible that the same protection should not be applied to prevent religious minorities from similar discrimination.

### C. *No-Beard Policies and Their Disparate Impact on Religious Minorities*

There have been other judicial rulings involving no-beard policies that have similarly led to the arbitrary discrimination of religious minorities. In *EEOC v. Sambo’s of Georgia*, the EEOC filed a Title VII claim against the defendant restaurant for failing to accommodate an employee who refused to comply with its no-beard policy because of his religious beliefs.<sup>133</sup> There, Mohan Singh Tucker, a religious Sikh, applied for and was rejected for a position as a restaurant manager.<sup>134</sup> The EEOC argued that Tucker was unlawfully denied the position because of the restaurant’s application

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129. *Id.* at 1369.

130. *Id.* at 1370-71.

131. *Id.* at 1373-74.

132. *Id.* at 1374.

133. *EEOC v. Sambo’s of Ga., Inc.*, 530 F. Supp. 86, 86 (N.D. Ga. 1981).

134. *Id.* at 88.

of its grooming policy, which prohibited any facial hair on restaurant managerial personnel.<sup>135</sup>

According to the restaurant, its grooming standards were justified by its efforts to promote a favorable public image.<sup>136</sup> In addition, Sambo's contended that its standards were based on the public's preference in restaurants for managers and employees who were clean-shaven.<sup>137</sup> The district court agreed with the employer and held that an exception to the defendant's grooming standards would impose an undue hardship. Therefore, the defendant was not obligated to accommodate Mr. Tucker's religious practices.<sup>138</sup> Furthermore, the court concluded, that even if this were a case of religious discrimination, a clean-shaven appearance was a bona fide occupation qualification for a manager in a restaurant that relied on family trade.<sup>139</sup> However, the employer's concerns were speculative in nature, as no evidence was presented that the restaurant would sustain a loss of patronage if a manager were bearded. Noting the negative impact that a decision not to accommodate would have on the capacity of certain religious minorities to work in restaurants, the EEOC argued that the court should apply a disparate impact approach in the case, which would have required the restaurant to demonstrate that not wearing a beard was in fact job-related.<sup>140</sup> The court refused.<sup>141</sup>

In rejecting the application of the disparate impact doctrine, the court noted that there was no evidence that anyone besides the plaintiff was actually adversely affected by the no-beard policy.<sup>142</sup> Yet the Supreme Court long ago established in *Dothard v. Rawlinson* that it is a mistake to rely only on applicant flow data to determine adverse impact:

There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants. The application process might itself not adequately reflect the actual potential applicant

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135. *Id.*

136. *Id.* at 89.

137. *Id.*

138. *See id.* at 90 (“[D]oing so would adversely affect Sambo’s public image and the operation of the affected restaurant or restaurants as a consequence of offending certain customers . . . would impose on Sambo’s a risk of noncompliance with sanitation regulations . . . and would make more difficult the enforcement of grooming standards as to other restaurant employees . . .”); *see also* *McDaniel v. Essex Int’l, Inc.*, 571 F.2d 338, 341 (6th Cir. 1978) (“[Section] 701(j) requires that a reasonable accommodation be made or a showing that to do so would work an undue hardship.”).

139. *Sambo’s*, 530 F. Supp. at 90.

140. *Id.* at 92.

141. *Id.* at 92-93.

142. *See id.* at 93 (“[T]he evidence does not show that the defendants’ grooming standards had actual impact on anyone other than Mr. Tucker.”).

pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.<sup>143</sup>

In *Sambo's*, the court noted that the effect of a no-beard policy “is theoretically total, in the sense that all such members are forbidden to comply with grooming rules such as those of the defendants . . . .”<sup>144</sup> Given this acknowledgment, the court should have recognized that the effect of the restaurant’s policy would discourage all Sikhs from applying for any job involving customer contact, out of the self-recognition of their inability to meet the no-beard grooming policy. Hence, the no-beard policy not only negatively affected the plaintiff, but his co-religionists living in the community serviced by the restaurant.

Similarly, in *Brown v. F.L. Roberts*, the plaintiff was a practicing Rastafarian who did not shave or cut his hair because of his religious beliefs.<sup>145</sup> Brown worked intermittently at a Jiffy Lube oil change facility from 1999 through May 2002.<sup>146</sup> In July 2001, the plaintiff was hired as a lube technician, which entailed working in both upper and lower bays of the facility.<sup>147</sup> Around a month later, the employer’s Jiffy Lube divisions acquired a new vice president of operations, Richard C. Smith, who hired a consultant to help increase business.<sup>148</sup> Based on the consultant’s advice and data on the success of businesses that had “clean shaven personal appearance policies,” Smith decided to implement a new policy requiring all employees who had customer contact to be clean-shaven.<sup>149</sup> The plaintiff explained to Smith and other assistant managers his religious conflict with the new policy, but once the policy went into effect, Brown was forced to work exclusively in the lower bay, where there was no customer contact.<sup>150</sup> According to Brown, the working conditions in the lower bay were poorer than those in the upper bay; in particular, he asserted that because he was often the only employee working in the lower bay, it was difficult for him to take breaks.<sup>151</sup> Brown also complained of the cold temperature of the lower bay in the winter.<sup>152</sup>

After reviewing these facts for summary judgment,<sup>153</sup> the district court

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143. *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (internal citations omitted).

144. *Sambo's*, 530 F. Supp. at 93.

145. *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 9 (D. Mass. 2006).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 10.

150. *Id.*

151. *Id.* at 11.

152. *See id.* (“[I]t was just like working in a basement without any heat.”).

153. Both parties moved for summary judgment. *Id.*

held that: 1) the employee had established a prima facie case of discrimination;<sup>154</sup> 2) the employer offered the plaintiff a reasonable accommodation;<sup>155</sup> and 3) if required to make any further accommodation, the employer would suffer an undue hardship.<sup>156</sup>

Here too we have a court permitting discrimination against all members of religious minorities whose faith requires them to wear a beard. The effect of the court's decision was not only that Brown was subjected to more onerous working conditions, but also that similarly situated religious minorities would be affected at this particular facility. Interestingly, it is difficult to conceptualize a workplace where it would be more difficult for an employer to justify a policy prohibiting the wearing of beards. No evidence was presented that any member of the public ever complained about Brown or any other co-worker because they wore a beard. Moreover, no empirical evidence was presented that at any particular garage patronage was reduced because some employees wore beards. Also undermining the legitimacy of the employer's no-beard policy was that the policy was not implemented in all of the employer's facilities.<sup>157</sup> Finally, the wearing of a beard certainly had no effect on Brown's ability to perform his job duties. Given these considerations, even within the *de minimis* standard of Title VII, it is difficult to understand why the court did not find a duty to accommodate. Yet, were we to apply the more rigorous business necessity standard because of the class-wide negative impact of the employer's policy, the no-beard policy would certainly be viewed as an unjustified exclusionary barrier that would have to be removed.

## V. CONCLUSION

The proper balancing of bona fide religious practices against an employer's policy decisions remains a difficult issue, as these cases demonstrate. "Still, it is a matter of concern when the balance appears to

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154. *See id.* at 13-14 ("[I]t would be distasteful to suggest that employers can legally single out employees who assert inconvenient but bonafide religious beliefs and isolate them in unappealing work environments without 'adversely' affecting the conditions of their employment.").

155. *See id.* at 15 (transferring the plaintiff to the lower bay allowed the plaintiff to continue his employment and receive a pay increase while maintaining his religious practice). *But see id.* ("[T]he court cannot say with confidence that *no* reasonable jury could find that Defendant, in fact, failed to offer a reasonable accommodation . . . . A ruling that the accommodation offered . . . was reasonable as a matter of law would constitute too drastic a limitation on the protections offered under Title VII . . .").

156. *See id.* at 17 (creating a blanket exemption from the grooming policy for the plaintiff would constitute an undue hardship).

157. *See id.* at 10 ("Other divisions at F.L. Roberts did not . . . implement new appearance policies.").

tip too strongly in favor of an employer's preferences, or perhaps prejudices."<sup>158</sup> An excessive protection of an employer's public image conflicts with and obscures the rich diversity of our work force, and may be exploited as a mechanism for rejecting workers wearing a beard, yarmulke, or veil. Regrettably, it places individuals whose work habits and commitment to their employers may be exemplary in the position of having to unnecessarily choose between a job and a deeply held religious practice.<sup>159</sup> Furthermore, unsubstantiated concerns over safety may be used unfairly to deny equal employment opportunities to workers, like Bhatia, of the Sikh, Muslim, or Jewish faiths.

A change in judicial policy is therefore necessary to promote a more diverse workforce that is more consistent with the current changes occurring within our labor force. The Supreme Court could redefine the statutory term "undue hardship" to better accommodate religious minorities. Yet this outcome is unlikely given the Court's current composition. Recently the civil rights community was successful in persuading Congress to amend both the ADA and Title VII to overturn regressive Supreme Court decisions negatively affecting the handicapped and women subjected to wage discrimination.<sup>160</sup> Similar efforts should be made to amend Title VII, by enacting legislation similar to the proposed Workplace Religious Freedom Act of 2008.<sup>161</sup> Under the proposed amendment to Title VII:

[T]he practice of wearing religious clothing or a religious hairstyle, or of taking time off for a religious reason, imposes an undue hardship on the conduct of the employer's business in accommodating such practice *only if* the accommodation imposes a *significant difficulty* or expense on the conduct of the *employer's business* . . . .

The term 'wearing religious clothing or a religious hairstyle' means . . .

(D) adopting the presence, absence, or style of a person's hair or beard as a religious practice or an expression of religious belief.<sup>162</sup>

By establishing a business necessity standard for religious

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158. *Id.* at 19.

159. *Id.*

160. ADA Amendment Act of 2008, Pub. L. No. 110-325, 22 Stat. 3553 (2008); Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 1, 123 Stat. 5 (2009).

161. Workplace Religious Freedom Act of 2008, S. 3628, 110th Cong. (2008). Because the bill was introduced in a previous congressional session, no more action can occur to it.

162. *Id.* at § 2(D) (emphasis added).

discrimination claims, Congress would secure the proper protection for religious employees that was anticipated in the *Griggs* decision when the Supreme Court outlawed “artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial *or other impermissible classification*.”<sup>163</sup> Only by offering the same legal protection from discrimination to religious minorities as we do to racial and sexual minorities can we establish true equality for all groups in our society.

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163. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (emphasis added).