

TITLE VII RELIGIOUS DISCRIMINATION AND CONTEMPORARY SOCIO-RELIGIOUS ISSUES IN A POST-9/11 AMERICA: THE SCOPE AND SHORTCOMINGS OF RELIGIOUS DISCRIMINATION PROTECTION UNDER TITLE VII

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INTRODUCTION

Though guaranteed by the Constitution, religious freedom in the United States is by no means absolute. People feel pressure every day to forego their religious practices in favor of practicality, social acceptance, and even safety. Though outright discrimination in the workplace may be illegal, people’s inherent attitudes and biases create significant issues and affect law and social policy. Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits discrimination in the workplace on the basis of religion. However, like any piece of legislation, Title VII is not without its flaws. The source of religious discrimination itself needs to be examined before Title VII can be amended in such a way as to actually combat that discrimination.

Both the advantage and the fault of Title VII can be found in (1) its vagueness and (2) its vulnerability to contemporary social issues. Like any ambiguously worded statute, courts are faced with the problem of interpreting Title VII. Unfortunately, the resulting interpretation often favors employers rather than employees. The burden for an employee to show discrimination under Title VII is exceptionally high, especially given its vagueness.

Title VII is a living piece of legislation, expanding its original protections against racial discrimination in 1964 to include new categories of discrimination as society demands.¹ As more types of discrimination are

1. See EEOC, *Federal Laws Prohibiting Job Discrimination Questions and Answers*, (last modified Nov. 21, 2009), <http://www.eeoc.gov/facts/qanda.html> (discussing the various pieces of federal legislation that protect against discrimination in the workplace, including the Age Discrimination Act of 1967, the Rehabilitation Act of 1973, and the Civil Rights

deemed unreasonable by society, legislatures have responded with amendments to make such discrimination unlawful. Though this leaves room for Title VII to fully expand to protect against all forms of discrimination,² it also leaves room for discrimination that reflects social perceptions and biases. Social attitudes towards religion affect both employer practices and the interpretation and implementation of the law. Because of its vagueness, Title VII allows judges to implement the law in ways that often reflect social sensitivities towards religion and religious discrimination. In modern America, there is significant religious discrimination against perceived Muslims.³ Anti-Islamic sentiment has swept through the country in the past decade, affecting both employer behavior and social perception.

I. CURRENT SCOPE OF RELIGIOUS PROTECTION FOR EMPLOYEES UNDER TITLE VII

Title VII prohibits an employer from “discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, *religion*, sex, or national origin.”⁴ As established by the Equal Employment Opportunity Commission (“EEOC”), the common claims for a religious discrimination under Title VII include a failure to provide a religious accommodation, disparate treatment, hostile work environment, and harassment.⁵

To bring a claim against an employer under Title VII, an individual or his representative must first submit a claim with the EEOC within 180 calendar days of the discrimination.⁶ This deadline may be extended, however, if the appropriate state or local law also prohibits discrimination

Act of 1991).

2. For instance, discrimination towards homosexuals and transgendered individuals has attracted media attention, and it is plausible that Title VII will eventually evolve to prohibit discrimination in that context.

3. See Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, N.Y. TIMES, Sep. 23, 2010, at B1, available at http://www.nytimes.com/2010/09/24/business/24muslim.html?pagewanted=all&_r=0 (discussing the antipathy towards Muslim workers and noting that, though Muslims account for just two percent of the population, they make up one-quarter of all discrimination claims filed with the EEOC).

4. 42 U.S.C.A. § 2000e-2 (2013) (emphasis added).

5. See generally EEOC, EEOC COMPLIANCE MANUAL: SECTION 12: RELIGIOUS DISCRIMINATION (July 22, 2008), available at <http://www.eeoc.gov/policy/docs/religion.pdf> (discussing all the categories of religious discrimination and potential solutions for employers in accommodating them).

6. See EEOC, *How to File a Charge of Employment Discrimination*, <http://www.eeoc.gov/employees/howtofile.cfm> (last visited November 8, 2013) (detailing the process for filing an employment discrimination claim).

on the same basis.⁷ After investigation, the EEOC can choose to dismiss a claim or to pursue it further.⁸

A. *Failure to Provide a Religious Accommodation*

Under Title VII, an employer must reasonably accommodate an employee's religious practices unless those practices would pose an undue hardship.⁹ The Supreme Court has not determined any specific burden-shifting test that is applicable in all cases.¹⁰ Instead, its flexible framework requires that the plaintiff first establish a *prima facie* case, and then the burden shifts to the employer to show either that an accommodation was in fact provided, or that doing so would pose an undue hardship.

The *prima facie* case for a failure to accommodate requires that an employee: (1) "has a bona fide religious belief that conflicts with an employment requirement"; (2) "informed the employer of this belief"; and (3) "was disciplined for failure to comply with the conflicting employment requirement."¹¹ Once a plaintiff has established a *prima facie* case, the employer can either show that it has provided a reasonable accommodation or that doing so would pose an undue hardship. In *Ansonia Board of Education v. Philbrook*, the Supreme Court noted that determining whether an accommodation is reasonable is a matter of factual inquiry and analysis.¹² It can therefore be inferred that there is no steadfast guideline as to what constitutes "reasonable" and what does not. The Supreme Court has made it clear, however, that an employer does not have to provide an alternate accommodation that is preferred by the employee; in fact, it does not even need to analyze the reasonableness of such a request.¹³ Once a

7. *Id.*

8. See EEOC, *Filing a Formal Complaint*, http://www.eeoc.gov/federal/fed_employees/filing_complaint.cfm (last visited Feb. 16, 2014) (discussing how the EEOC addresses a claim).

9. See, e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 72 (1977) ("In 1966 an EEOC guideline . . . declared that an employer had an obligation under the statute 'to accommodate to the reasonable religious needs of employees . . . where such accommodation can be made without serious inconvenience to the conduct of the business.'").

10. See *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 225 (3d Cir. 2000) ("[W]e are mindful that the Supreme Court has declined to accept or reject any particular . . . burden-shifting approach to Title VII religious accommodation cases.").

11. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 65-66 (1986).

12. See *id.* at 66 (stating that "the ultimate issue of reasonable accommodation cannot be resolved without further factual inquiry.").

13. See *id.* at 68 ("Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship.").

reasonable accommodation is offered, the employer has met its burden under Title VII.

Courts have established that an undue hardship is anything greater than a *de minimus* burden.¹⁴ The EEOC's guidelines state that an accommodation may pose an undue hardship if "it is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work."¹⁵

B. Disparate Treatment

Disparate treatment is perhaps the most easily understood of the claims under Title VII and occurs when an employer treats an employee differently simply because of his race, color, sex, national origin, or religion.¹⁶ A disparate treatment claim can be proved with either direct or circumstantial evidence.¹⁷ However, it should be noted that "direct proof of discrimination is highly uncommon."¹⁸ In 1973, *McDonnell Douglas* established a burden-shifting test for disparate impact cases using circumstantial evidence, including claims of religious discrimination.¹⁹ In order to prove a claim for religious disparate treatment, the employee must first prove, by a "preponderance of the evidence," a *prima facie* case of discrimination.²⁰

The *prima facie* case set forth in *McDonnell Douglas* is not concrete and universal; rather, it is a foundation for a court to create a *prima facie* test that is most relevant to the situation at hand.²¹ Accordingly, courts have adopted the burden-shifting framework for cases of religious discrimination. To establish a *prima facie* case, a plaintiff must show:

14. *Hardison*, 432 U.S. at 65 (stating that "more than a *de minimis* cost in order to give . . . [respondent] Saturdays off [for religious purposes] is an undue hardship").

15. EEOC, *Religious Discrimination*, <http://www.eeoc.gov/laws/types/religion.cfm> (last visited November 8, 2013).

16. See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977) (discussing the use of a simple test of racially premised differences in treatment).

17. *Burke-Fowler v. Orange County, Fla.*, 447 F.3d 1319, 1323 (11th Cir. 2006).

18. *Johnson v. AutoZone, Inc.*, 768 F. Supp. 2d 1124, 1141 (N.D. Ala. 2011).

19. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (establishing the *McDonnell Douglas* burden shifting test).

20. *Tex. Dep't of Cmty. Affairs v. Urdine*, 450 U.S. 248, 248 (5th Cir. 1980). See also *Jones v. Gerwens*, 874 F.2d 1534, 1538 (11th Cir. 1989) (requiring the employee to prove by a preponderance of the evidence in a *prima facie* case of employment discrimination).

21. See *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) ("The *prima facie* case method . . . was 'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'").

(1) he is a member of or practices a particular religion; (2) he is qualified to perform the job at issue; (3) he has suffered some adverse employment action; and (4) someone outside the protected class of which he is a member was treated differently.²²

Once a *prima facie* case has been made, the burden shifts to the employer to show that there was a legitimate, non-discriminatory reason for its actions.²³ Finally, the burden then shifts back to the employee to demonstrate that the employer's reasoning is only a pretext for discrimination.²⁴

C. Hostile Work Environment

A cause of action for a hostile work environment or harassment is well established under Title VII. The rationale is that a "sufficiently abusive harassment adversely affects a 'term, condition, or privilege' of employment within the meaning of Title VII."²⁵ However, the application of that doctrine to cases of religious discrimination is a much more recent phenomenon.²⁶ The elements of a *prima facie* case and the burden of proof, however, are the same regardless the type of discrimination alleged.²⁷ The violation of Title VII by means of a hostile work environment "is not limited to 'economic' or 'tangible' discrimination."²⁸ While this might appear beneficial to employees, there are both subjective and objective components to the hostile work environment analysis²⁹ that can make a successful claim difficult to achieve.

To make a *prima facie* case for a hostile work environment claim, the employee must show:

22. Gunning v. Runyon, 3 F. Supp. 2d 1423, 1428 (S.D. Fla. 1998).

23. See *Aikens*, 460 U.S. at 715 (establishing that once a *prima facie* case has been made, the plaintiff creates a rebuttable presumption that the defendant engaged in unlawful discrimination).

24. See *id.* at 717 (Blackmun, H., concurring) (explaining that the plaintiff bears the burden of showing the employer's reason is only pretextual) (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)).

25. Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 (6th Cir. 1996).

26. See, e.g., *id.* (noting that hostile work environment claims have been made for cases of sex, race, and national origin discrimination).

27. *Id.*

28. Harris v. Forklift Sys., 510 U.S. 17, 21 (1993).

29. See *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 583 (11th Cir. 2000) ("[A] plaintiff must establish not only that she subjectively perceived the environment as hostile and abusive, but also that a reasonable person would perceive the environment to be hostile and abusive.").

(1) that he or she belongs to a protected group; (2) that the employee has been subject to unwelcome harassment; (3) that the harassment was based on the religion of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create an abusive working environment; and (5) a basis for holding the employer liable.³⁰

The provisions of the *prima facie* case have been further defined by courts and federal agencies. First, the EEOC notes that: “Title VII is not a general civility code, and does not render all insensitive or offensive comments, petty slights, and annoyances illegal. Offhand or isolated incidents (unless extremely serious) will not rise to the level of illegality.”³¹ Therefore, there is a line drawn as to which comments will be deemed “severe or pervasive”— “[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.”³² Courts have made it clear, however, that though derogatory comments need to be “severe or pervasive,” they do not need to tangibly affect an employee’s ability to work in order to qualify as harassment under Title VII.³³

Even if the existence of severe or pervasive harassment has been established, an employer may not necessarily be liable.³⁴ Employers are liable if a supervisor harasses in a way that tangibly affects an employee’s working conditions (e.g. denial of promotion, lower salary, etc.).³⁵ An employer can attempt to use an affirmative defense to prevent liability by proving that: “(a) the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventive or corrective

30. *Rossi v. Troy State Univ.*, 330 F. Supp. 2d 1240, 1245 (M.D. Ala. 2002).

31. EEOC, EEOC COMPLIANCE MANUAL: SECTION 12: RELIGIOUS DISCRIMINATION 36 (July 22, 2008), available at <http://www.eeoc.gov/policy/docs/religion.pdf>.

32. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786, 788 (1998).

33. *See, e.g., Harris* 510 U.S. at 22 (“Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII’s broad rule of workplace equality.”). *See also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 742 (1998) (“[A]n employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor’s actions . . .”).

34. EEOC, EEOC COMPLIANCE MANUAL: SECTION 12: RELIGIOUS DISCRIMINATION 39 (July 22, 2008), available at <http://www.eeoc.gov/policy/docs/religion.pdf>.

35. *Id.* at 40.

opportunities provided by the employer or to otherwise avoid harm.”³⁶ However, there is difficulty when a co-worker is the source of the harassment. In that case, employer liability is reduced to a negligence-like standard,³⁷ and an employer is liable for harassment if it “knew or should have known about the harassment, and failed to take prompt and appropriate corrective action.”³⁸ With such a low standard, it is somewhat difficult for a harassed employee to prevail.

II. STATUTORY SHORTCOMINGS IN RELIGIOUS DISCRIMINATION LAW UNDER TITLE VII

A. *Vagueness in Failure to Accommodate Framework*

Among the Supreme Court’s first attempts at interpreting the EEOC’s guidelines for religious protection under Title VII was *Trans World Airlines, Inc. v. Hardison*. The Court’s ruling, however, shed very little light on the actual nature of what constituted an “undue hardship” and “reasonable” religious accommodations.³⁹ The Court found that, in light of the vague EEOC guidelines, Trans World Airlines (TWA) had made reasonable accommodations, and that any further accommodation would have posed an undue hardship on the company.⁴⁰ Because of the vague nature of the EEOC guidelines, the Court was not in a position to require any more from the employer than it had already provided. It therefore erred on the side of caution in enforcing religious accommodation law.⁴¹

In an effort to prevent a similar situation of vagueness leading to weak employee protection, the EEOC unsuccessfully attempted to amend Title VII to read “severe material hardship” rather than “undue hardship.”⁴² Ultimately, however, the EEOC’s amended rules simply stated that there

36. *Id.* at 39.

37. *Id.* at 40. *See, e.g.*, Porter v. Erie Foods Int’l, Inc., 576 F.3d 629, 636 (7th Cir. 2009) (discussing that an employee attempting to find his employer liable for his co-worker’s harassment “must show that his employer has been negligent either in discovering or remedying the harassment.”).

38. EEOC, EEOC COMPLIANCE MANUAL: SECTION 12: RELIGIOUS DISCRIMINATION 41 (July 22, 2008), available at <http://www.eeoc.gov/policy/docs/religion.pdf>. The same “negligence” standard applies for harassment by a non-employee. *Id.* at 42-43.

39. *See* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977) (“[T]he employer’s statutory obligation to make reasonable accommodation for the religious observances of its employees, 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.”).

40. *See id.* at 77 (“TWA made reasonable efforts to accommodate . . . within the meaning of the statute as construed by the EEOC guidelines.”).

41. *Id.*

42. Keith S. Blair, *Better Disabled Than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 ARK. L. REV. 515, 526 (2010).

were no set guidelines for the definition of “undue hardship” or “reasonable accommodation,” but that factors such as the employer’s size, the number of employees requiring accommodation, and the employer’s operating costs were to be taken into consideration.⁴³

The problem for most employees who face religious discrimination at work lies not at the first step of making a *prima facie* case, but, rather, combatting and employers’ assertion of reasonable accommodation or undue hardship. Because the terms “reasonable accommodation” and “undue hardship,” have never been properly defined by courts or Congress, judges are left to apply their own reasoning—reasoning that often results in too much deference in favor of the employer. Courts have repeatedly attempted to create a more definite scope of “undue hardship” and “reasonable accommodation,” but have instead exacerbated confusion.

1. The Vagueness of “Undue Hardship”

Often, failure to accommodate claims hinges on a question about when hardship to an employer becomes “undue hardship.” Both the lower courts and Supreme Court in *TWA v. Hardison* faced this very question. In that case, an airline employee who practiced the Worldwide Church of God was unable to work during the Sabbath.⁴⁴ The employee was subject to a “seniority system” in which senior employees had priority in choosing their shifts.⁴⁵ Because the employee had recently moved to a new position, he did not have sufficient seniority to ensure that he would not work on the Sabbath.⁴⁶ After refusing to show up for work on several Saturdays, the employee was discharged.⁴⁷ The District Court found that TWA had done all it could to provide a reasonable accommodation without facing an undue hardship.⁴⁸ The Court of Appeals reversed and stated that TWA ignored three potential reasonable solutions that would have accommodated the employee’s religious needs.⁴⁹ The Court of Appeals did note some challenges that TWA would have faced in making such accommodations, but ultimately concluded that those hardships would not have been “undue” enough to negate TWA’s responsibility.⁵⁰ The Supreme

43. 29 C.F.R. § 1605.2.

44. *Hardison*, 432 U.S. at 63.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Hardison v. Trans World Airlines*, 375 F. Supp. 877 (W.D. Mo. 1974) *aff’d sub nom.* *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975), *rev’d*, 432 U.S. 63 (1977).

49. *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 39-43 (8th Cir. 1975).

50. *Id.* at, 40 (noting that TWA could have permitted Hardison to work a four-day week and that Hardison was willing to do this, but the company did not agree because it would

Court overruled that decision, stating that the accommodations would have placed an undue hardship on TWA.⁵¹ The Court reasoned that allowing an employee to take off Saturdays to observe the Sabbath would require the employer to bear more than a *de minimus* cost in replacing that employee.⁵²

The discrepancy between the Court of Appeals and the Supreme Court decisions illustrates how subjective judgments about accommodations can be, and demonstrates how difficult it can be to distinguish between appropriate and undue hardship. The Supreme Court itself was divided on the issue. The dissent noted that requiring TWA to pay overtime salary to replace Hardison during the Sabbath shift would not have been more than a *de minimus* cost.⁵³ This position seems reasonable, considering the size of the employer and the cost of one overtime salary in the context of its full operation. However, the Court noted that EEOC guidelines for determining undue hardship are unclear and that the “reach of that obligation [to provide an accommodation short of undue hardship] has never been spelled out by Congress or by EEOC guidelines.”⁵⁴ The Court concluded that, “[i]n the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.”⁵⁵ Because the language of the statute is unclear, the Supreme Court has opted to err on the side of the employers in cases of religious accommodation. This situation will continue until clearer language is established either by Congress or by the EEOC.⁵⁶

2. The Vagueness in the “Reasonableness” of an Accommodation

The problem of vagueness when determining what constitutes an undue hardship resembles the difficulty in determining what constitutes a “reasonable” accommodation. The biggest problem, however, is that a change of position without a pay cut is considered a reasonable accommodation, without consideration of the non-monetary effects of such

have been short-handed during one shift. Another alternative within the framework was for TWA to fill Hardison’s Sabbath shift from other available personnel. TWA contended that this alternative would be an undue hardship because such workers must be paid overtime compensation. A third alternative considered was a swap between Hardison and another employee, either for another shift or for the Sabbath days.)

51. *Hardison*, 432 U.S. at 75.

52. *Id.* at 84.

53. *Id.* at 92 n.6 (Marshall, J., dissenting) (“[T]he costs to TWA of either paying overtime or not replacing respondent would [not] have been more than *de minimis*.”).

54. *Id.* at 75 (majority opinion).

55. *Id.* at 85.

56. *Id.* at 84 (“To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship.”).

an accommodation on the employee.⁵⁷ A problem further arises when what is deemed to be a “reasonable accommodation” fails to *actually* accommodate the employee.

In *EEOC v. Bridgestone/Firestone*, two Baptist employees sought to avoid working on Sundays, which was prohibited by their religious beliefs.⁵⁸ The employer offered the employees various accommodations, including allowing one employee to work in the warehouse.⁵⁹ Though this change in position did not require the employee to work on Sundays, it did involve a pay cut.⁶⁰ Alternatively, the employer allowed the employee to swap his Sunday schedule with other employees.⁶¹ Although the swaps were permitted, there were no employees willing to take those Sunday shifts. The result was that the affected employees were still reprimanded for their missed Sunday shifts. The Central District of Illinois held that the employer’s accommodations were reasonable, despite being ineffective.⁶² In fact, the court noted that a “reasonable accommodation” need not be an “absolute accommodation.”⁶³

It seems senseless to suggest that an accommodation that fails to *actually* accommodate an employee can be deemed reasonable in accordance with Title VII. Courts have consistently found that “voluntary swaps will not always resolve a scheduling conflict, [and yet these] programs are reasonable accommodations.”⁶⁴ It is understandable that an employer should not force other employees to change their times in order to accommodate the religious employee. However, courts should not find such an accommodation “reasonable,” thereby relieving an employer of his duty under Title VII. Such precedent fails to (1) actually resolve anything for an employee who needs an accommodation, and (2) encourage employers to find an accommodation that is actually effective. If every employer were allowed to simply permit time swaps without any further accommodation or oversight, employers would be likely to view this as their go-to response to employee complaints, all the while knowing that it will rarely be an effective accommodation. This would allow the duty of

57. It is not the case that an employee’s position is defined only by the monetary compensation. Factors such as type of work performed, location of work, etc., also have a bearing on the nature of employment. *See infra* note 94.

58. *EEOC v. Bridgestone/Firestone, Inc.*, 95 F. Supp. 2d 913 (C.D. Ill. 2000).

59. *Id.* at 928.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* (stating that “Firestone was not required to provide *absolute* accommodation, only a ‘*reasonable* accommodation.’”) (emphasis added) (internal citations omitted).

64. *Moore v. A.E. Staley Mfg. Co.*, 727 F. Supp. 1156, 1161 (N.D. Ill. 1989); *see also* *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982) (“Although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer.”).

the employer under Title VII to be effectively negated, departing from Title VII's intended protections.

B. Lack of Cooperation Criteria for Employers

The one-sided cooperation requirement further exacerbates the problems caused by the vague language of Title VII. Title VII mandates that an employee must "make some effort to cooperate with an employer's attempt at accommodation."⁶⁵ Such a requirement is fair; an employee should be required to negotiate and make sure that an accommodation poses the least hardship for an employer. However, there is no reciprocal requirement that employers must cooperate with employees when providing an accommodation. Furthermore, there is no clear point when an employee's obligation to cooperate turns into an obligation to compromise his faith.

The legislative history of Title VII suggests the there was an intention for an employer and employee to work together to create the most favorable accommodation.⁶⁶ However, courts have not interpreted the language of the statute in such a way, and generally rule that an employer has no obligation to consider an employee's preferences when it comes to an accommodation.⁶⁷ While an employer's obligation to provide an accommodation can itself be seen as a compromise, the lack of a bilateral cooperation requirement often allows an employer to forego offering an alternative accommodation; such an alternative accommodation would not cause much greater hardship to the employer, but would actually be much more beneficial to an employee.

65. *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987). *See also* *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977) ("An employee cannot shirk his duties to try to accommodate himself or to cooperate with his employer in reaching an accommodation by a mere recalcitrant citation of religious precepts. Nor can he thereby shift all responsibility for accommodation to his employer. Where an employee refuses to attempt to accommodate his own beliefs or to cooperate with his employer's attempt to reach a reasonable accommodation, he may render an accommodation impossible.").

66. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) ("Senator Randolph, the sponsor of the amendment that became § 701(j), expressed his hope that accommodation would be made with 'flexibility' and 'a desire to achieve an adjustment.' 118 Cong. Rec. 706 (1972). Consistent with these goals, courts have noted that bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." (internal quotation omitted)).

67. *Id.* (stating that "[t]his approach [of bilateral cooperation] conflicts with both the language of the statute and the views that led to its enactment.").

III. CONTEMPORARY ISSUES IN RELIGIOUS DISCRIMINATION

A. *The Legality of “Look Policies” Under Title VII*

“Look policies” are a common phenomenon, and many employers have grooming and dressing guidelines for their employees. With the increasing hostility towards Muslims in the last decade,⁶⁸ employers have begun considering customer preferences in mandating what their employees should look like. Though courts have noted that an employer cannot discriminate simply because of public preference, it often becomes difficult to discern the employer’s actual reasoning for enforcing a look policy. This is especially true since there is such a low burden on employers to show a legitimate, non-discriminatory reason for its actions. Furthermore, it seems that the reason that an employer gives does not need to be the actual reason for its actions, just a plausible one. This gives employers the opportunity to create discriminatory look policies based on public expectations and preferences, and mask them behind “legitimate nondiscriminatory reason[s].”⁶⁹ Moreover, it is also troublesome that employers often unevenly enforce their look policies,⁷⁰ seemingly punishing those that violate policy in a way that would clearly be seen as more “offensive” to its patrons.

The Walt Disney Company (“Disney”) has one of the more elaborate look policies, dictating everything from its employees’ hairstyles to jewelry and underwear color.⁷¹ A look policy is understandably necessary for a company like Disney that is trying to sell an experience to its clientele. However, the extreme to which this policy is enforced, especially for positions in which rigidity is not required, is astounding. Imane Boudlal, a Muslim woman employed as a restaurant hostess at Disneyland, recently filed a claim against Disney for a failure to accommodate.⁷² After

68. Omar Karmi, *Islamophobia Increases Since 9/11*, THE NATIONAL (Sept. 11, 2011), <http://www.thenational.ae/news/world/islamophobia-increases-since-9-11> (discussing the increasingly prevalent phenomenon of “Islamophobia”).

69. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983).

70. See, e.g., Press Release, Dep’t of Justice, Justice Dep’t Sues N.Y. Metro. Transp. Auth. and N.Y.C. Transit Auth. Alleging Religious Discrimination (Sept. 30, 2004), available at http://www.justice.gov/opa/pr/2004/September/04_crt_665.htm (discussing findings from a Department of Justice investigation that revealed that though the MTA enforced its “no headwear” policy against Muslims and Sikhs, other workers are routinely permitted to wear baseball caps and non-authorized headwear).

71. Elizabeth A. Rowe, *Intellectual Property and Employee Selection*, 48 WAKE FOREST L. REV. 25, 30 (2013) (discussing Disney requirements that employees only have “natural-looking and well maintained” hairstyles and that “[u]ndergarments are required, but they must not be seen, and cannot be ‘patterned or colored’ if the employee’s costume is light in color”) (internal citations omitted).

72. Kari Huus, *Muslim Woman Sues Disney Over Wearing Hijab at Work*, NBC NEWS

naturalization, and because of her growing Muslim convictions, Boudlal began wearing a hijab to work along with her usual required uniform. The hijab conflicted with Disney's look policy, and the company offered her other approved headwear that she could wear alternatively.⁷³ Disney also offered her a position in the back of the restaurant, out of the sight of customers.⁷⁴

It may be understandable that Disney needs to enforce its look policy. However, Disney's look policy is unevenly enforced. For instance, Boudlal also claimed that Disney officials often do not crack down on employees whose fingernails, tattoos, and hairstyles violate the look policy.⁷⁵ Further, she alleged that Christian employees are permitted to wear ash on their foreheads for Ash Wednesday in violation of the look policy.⁷⁶ Disney claims that the purpose of the look policy is to create a sense of fluidity without distraction for its guests. However, one might think that tattoos and crazy hairstyles are just as distracting as religious headwear. And if not, then their mere inclusion in the look policy seems to validate the point that the policy is unnecessary and obsolete. Further, Disney caters to an international audience.⁷⁷ Not only would it be a wise business decision to promote the diversity of its employees, but what may be considered distracting to one guest also may be *de rigueur* to another. A family from Pakistan may not look twice at a restaurant hostess with a headscarf, but would be far more distracted by a waiter with ash on his forehead. The question then arises: how much does a violation of the look policy actually hinder business? If the look policy is not being fully enforced, maybe it functions more as a tradition than as a business necessity. Finally, one might wonder why enforcement needs to be consistent for all employees, irrespective of their role. It is understandable that the cast member playing Prince Charming, for instance, should not be

(Aug. 13, 2012), http://usnews.nbcnews.com/_news/2012/08/13/13261567-muslim-woman-sues-disney-over-wearing-hijab-at-work?lite.

73. *Id.*

74. *Id.*

75. *Muslim Ex-Employee Sues Disney, Alleging 'Modern-Day Jim Crow' Bias*, LOSALMITOS-SEALBEACH PATCH (Aug. 14, 2012), <http://losalmitos.patch.com/articles/muslim-former-employee-sues-disney-alleging-modern-day-jim-crow-discrimination> ("Boudlal also alleged Disney has a double standard with regard to its [look policy], noting that some employees had tattoos and wore jewelry and hairstyles in violation of the work code.").

76. *Id.* ("[Boudlal also noted that] 'Christian employees were allowed to wear marks on their foreheads on Ash Wednesday, which would technically violate the [look] policy.'").

77. See, e.g., John Couwels, *Florida's Tourism Gets A Boost From A Brazilian Invasion*, CNN, Jan. 24, 2012, <http://www.cnn.com/2012/01/24/travel/brazilian-tourist-invasion/index.html> (discussing Disney's strategic business moves after a spike in Brazilian tourists).

one who wears a turban. However, this policy does not seem to be equally necessary for non-character employees, such as restaurant hostesses.

Disney's behavior in this situation is very much representative of the behavior of other companies that employ "look policies."⁷⁸ The accommodation of "Disney approved" headwear is insensitive and ignorant. Religious headwear often has deep and meaningful religious connotations. Such headwear cannot simply be costumized and to do so, as Disney attempted, is insulting to the religious beliefs of the employee.

The New York Metropolitan Transportation Authority ("MTA") had a similarly discriminatory look policy that employees challenged. In 2002, the MTA began enforcing its look policy prohibiting its employees from wearing headwear.⁷⁹ Initially, four Muslim women were barred from wearing their hijabs while operating buses, and the policy was later spread to include Sikh men wearing turbans.⁸⁰ It would have to be a great coincidence that a policy targeting Muslims and Sikhs, who are often associated with "terrorists" by Americans, was instituted immediately after the September 11th attacks.⁸¹ The MTA claimed that the policy was needed for safety reasons, so that customers could better identify MTA personnel in the case of an emergency.⁸² After significant backlash, the MTA altered its policy by allowing hijabs and turbans as long as the MTA logo was affixed to them.⁸³ Like the Disney officials who tried giving Boudlala a "specially-designed hijab," the MTA authorities acted in a way that was insensitive to the significance of its employees' headwear. Further, extensive Department of Justice investigations led to the

78. See, e.g., Michael Luo, *M.T.A. is Sued Over Its Policy on Muslim Head Coverings*, N.Y. TIMES, Oct. 1, 2004, at B4, available at http://www.nytimes.com/2004/10/01/nyregion/01turban.html?_r=0 (discussing the MTA's policy prohibiting employees from wearing religiously-mandated hijabs and turbans).

79. Dep't of Justice Press Release, *supra*, note 70.

80. Luo, *supra*, note 78.

81. See *History of Hate: Crimes Against Sikhs Since 9/11*, HUFFINGTON POST (Aug. 7, 2012), http://www.huffingtonpost.com/2012/08/07/history-of-hate-crimes-against-sikhs-since-911_n_1751841.html (detailing the way in which Sikhs have been targeted as "terrorists" since the 9/11 attacks, including the first post-9/11 hate crime); see also Susan Donaldson James, *Wisconsin Shootings: Sikhs Faced Discrimination Since 9/11*, ABC NEWS (Aug. 6, 2012), <http://abcnews.go.com/Health/wisconsin-shooting-hate-crimes-sikhs-rise-911/story?id=16939326#.UL6g4xpdSQ> (noting that "[the Sikh Coalition] reports it logged more than 300 such acts [of anti-terrorist hate crimes] around the country [but that] there are likely 'thousands more' across the country that are never reported.").

82. Editorial, *The M.T.A. and Fairness*, N.Y. TIMES, June 4, 2012, at A24, available at http://www.nytimes.com/2012/06/04/opinion/the-mta-and-fairness.html?_r=0.

83. Lauren Markoe, *MTA Turban Policy: NYC Transit Allows Sikh and Muslim Employees to Wear Turbans Without Agency Logo*, HUFFINGTON POST (May 30, 2012), http://www.huffingtonpost.com/2012/05/30/mta-turban-sikh-muslim_n_1557558.html ("After 9/11, the transit authority required workers wearing turbans to either perform duties where the public would not see them, or place an 'MTA' logo on their headdresses . . .").

conclusion that this look policy was being unevenly enforced.⁸⁴ This uneven enforcement suggested further that the policy was not actually about safety, and this was the crux of a favorable settlement agreement for the employees.⁸⁵

Abercrombie & Fitch has perhaps the most notorious look policy, and one that has landed it in numerous lawsuits.⁸⁶ In fact, in 2005 alone, the company shelled out \$50 million in settlement payments to employees of various protected classes.⁸⁷ In 2009, the EEOC filed a disparate treatment claim for a failure to hire for a Muslim employee who wore a hijab.⁸⁸ A similar disparate treatment claim was brought against Abercrombie & Fitch in 2011 when it fired an employee who refused to remove her hijab and comply with the corporate look policy.⁸⁹ Abercrombie & Fitch uses this look policy to personify their “All-American” brand image—an image that seems disturbingly antiquated.⁹⁰ It is encouraging to see, however, (through the significant amount of litigation against Abercrombie & Fitch) that some look policies are being held unreasonable. It seems that there *is* a line to be drawn, and it is currently being drawn against the sentiment that African Americans, Muslims, Latinos, and members of other protected classes are not “All-American.”

The problem with look policies is two-fold: first, that such policies often exist absent sound reasoning, and second, that social perception plays a large role in the formation of such policies. In fact, it is likely that these policies exist because of public image concerns. This problem is furthered by a lack of social outrage, especially compared to the outrage over racial and sexual discrimination. This lack of public pressure against discriminatory religious policies is further discussed in Part IV.C.⁹¹

B. Segregation as a Means of Accommodation

Segregation by an employer because of an employee’s religious appearance is illegal under Title VII.⁹² Employers cannot intentionally

84. Huus, *supra* note 72.

85. Markoe, *supra* note 83.

86. Jerry Higgins, *Abercrombie & Fitch’s “Look Policy”: Jim Crow Gets a Corporate Makeover*, IMAGINE 2050 (Jul. 8, 2010, 8:00AM), <http://imagine2050.newcomm.org/2011/07/08/abercrombie-fitch%E2%80%99s-%E2%80%9Clook-policy%E2%80%9D-jim-crow-gets-a-corporate-makeover/>.

87. *Id.*

88. Press Release, EEOC, *Abercrombie & Fitch Sued by EEOC for Religious Discrimination Against Muslim Teen Applicant* (Sept. 17, 2009), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-17-09b.cfm>.

89. *Id.*

90. Higgins, *supra* note 86.

91. See *infra* text accompanying notes 116-123.

92. EEOC, *Religious Discrimination*, <http://www.eeoc.gov/laws/types/religion.cfm>

assign employees a position of non-client contact because of feared customer preference.⁹³ However, employers often attempt to accommodate employees by offering them alternative positions that would resolve any religious conflicts. There is no clear precedent as to whether a change of position that adversely affects an employee is a reasonable accommodation; some courts have said that it is, while others have suggested that it may not be.⁹⁴ However, what many courts fail to note is that an alternative position, even without a change in salary or benefits, can be inherently different; after all, salary is not the only material component of any given job. This is especially relevant in situations where a position change can lead to what is effectively segregation on the basis of religion.

The use of alternate positions as an accommodation is acceptable in situations where there is no other available accommodation that would not cause undue hardship. For instance, in *EEOC v. Bridgestone/Firestone, Inc.*, an employee was unable to work on Sundays due to his religious beliefs.⁹⁵ The employer offered the employee an alternative position that involved a significant pay cut, and the court noted that it need not determine the reasonableness of such an accommodation if all other alternatives would pose an undue hardship.⁹⁶ There was a seniority system in place for employees to select their shifts and altering it would have been an undue hardship under Title VII.⁹⁷ An alternative position in such a situation may be acceptable if there are no other options available in which the integrity of the employer's needs could be met while accommodating the employee's religious needs.

The cases in which this segregation is actually unacceptable are those in which the employee's religious *appearance* is at issue. Islam, Sikhism, and Judaism—among other religions—mandate that their followers maintain a certain appearance, ranging from grooming to headwear. Instead of actually accommodating the headwear and grooming requirements, employers will turn to segregation as a solution. In the case

(last visited November 8, 2013).

93. *Id.*

94. See *U.S. E.E.O.C. v. Bridgestone/Firestone, Inc.*, 95 F. Supp. 2d 913, 923 (C.D. Ill. 2000) (stating that “simply because the proposed accommodation would involve some cost to the employee does not make it unreasonable.”). *But see* *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993) (noting that an inquiry into reasonableness may be necessary if the plaintiff, “in order to accommodate his religious practices, had to accept a reduction in pay or some other loss of benefits.”).

95. *Bridgestone/Firestone, Inc.*, 95 F. Supp. 2d at 923.

96. *Id.* at 923-24 (“Although Firestone’s accommodations resolved the religious conflict, Frazier and Waddell had to accept a significant cut in pay. Accordingly, there is some question as to whether the accommodations were reasonable. The court need not resolve this issue, however, because the undisputed facts show that the only other proposed accommodation would have imposed on Firestone an undue hardship.”).

97. *Id.* at 923.

of Boudlal, for instance, Disney offered her a position in the back of the restaurant while she wore her hijab.⁹⁸ The MTA similarly offered its turbaned and *hijabi* bus drivers positions in the bus depot rather than driving the buses.⁹⁹ However, these new positions were not necessarily equal to the original ones. Aside from potential differences in growth opportunities, type of labor performed, etc., these positions send a clear message to religious employees: if you wear a religious garment that conflicts with our image, not to worry, we'll just stick you in the back.

Most employers argue that the look policy exists for some non-discriminatory reason. Disney justifies its look policy as necessary to create the "Disney magic" that clients pay for,¹⁰⁰ while the MTA argues that its look policy addresses safety concerns.¹⁰¹ The question arises again: how necessary are these look policies to the functioning of the business? For instance, some Muslim MTA bus drivers noted that they had been wearing their headscarves for years without any safety issues.¹⁰² If headscarves did not present a safety concern before 9/11, then arguably, they shouldn't after. As discussed above, Disney's rationale for its look policy is questionable. This leads to the assumption that an employer's waiver of the look policy to accommodate an employee's religious needs would not pose an undue hardship. Therefore, perhaps the look policy is being enforced not for valid business concerns but as a form of segregation.

C. Federal Regulations Preventing Accommodation

Federal regulations can conflict with an employer's ability to accommodate employees. If an accommodation were to violate federal regulations, granting that accommodation would be considered an undue burden. Unfortunately, even willing employers have their hands tied unless they knowingly ignore regulations. Though regulations do exist for a reason, it becomes necessary in some circumstances to examine these requirements, why they exist, and whether there is a possibility to override them with a waiver of some kind.

The Occupational Safety and Health Administration (OSHA), has various regulations in place that conflict with certain religious practices.

98. Huus, *supra* note 72.

99. Luo, *supra* note 78.

100. Rowe, *supra* note 71 (discussing the Disney Look policy as originating due to Walt Disney's micromanagement and continuing today in an effort to preserve that original corporate image).

101. *The M.T.A. and Fairness*, *supra* note 82.

102. See Luo, *supra* note 78 ("Even if the jobs were equivalent in pay and other benefits, reassigning them placed an unfair stigma on them, Mr. Schwartz [the plaintiff's attorney] said, adding that one of the women had been wearing her head scarf while driving a passenger bus for more than 10 years without any problem.").

For instance, Regulation 1910.135 requires protective headwear (e.g. hard hats) in certain work environments.¹⁰³ Many professionals, such as EMTs, are subject to OSHA Regulation 1910.134, which states that employees cannot have “facial hair that comes between the sealing surface of the facepiece and the face” of a respirator mask.¹⁰⁴ Many city police officers are also required to abide by a strict dress code, which generally involves maintaining a certain facial hair length and wearing a helmet. Such requirements pose a hardship for Sikh employees who, for instance, wear turbans and do not cut their facial hair for religious reasons.

There have been strides to change some of these regulations in favor of religious equality. For example, Washington D.C. recently altered its uniform policy to allow for accommodations of Sikh police officers.¹⁰⁵ Similar changes have been made in New York City.¹⁰⁶ Often, accommodating an employee by not complying with federal regulations endangers only the employee himself, and not others. In such a case, an employee should be given the ability to prioritize his religion over his personal safety. However, employers will often not allow this because such an accommodation would expose them to federal liability. Therefore, an exception, or waiver, should be built into federal regulations to allow employers to accommodate employees without exposing themselves to federal or tort liability.

IV. THE ROLE OF SOCIAL CONSTRUCTS IN DISCRIMINATION LAW

Law often reflects social values; this is, in fact, why provisions like Title VII were enacted.¹⁰⁷ Many of the problems associated with religious discrimination law stem from a skewed perception of religious discrimination, as well as from controversy as fundamental as to what constitutes religion.

103. 29 C.F.R § 1910.135 (2013).

104. 29 C.F.R § 1910.134 (2013).

105. See Tara Bahrapour, *D.C. Police to Allow Sikh Officers to Wear Beards, Religious Items on the Job*, WASH. POST (May 16, 2012), http://articles.washingtonpost.com/2012-05-16/local/35455142_1_sikh-officers-sikh-american-legal-defense-punjab (discussing the Washington D.C. police department’s becoming the first major metropolitan police force to allow Sikh officers to wear religious items while working).

106. See *NYPD Turban Ban Will Be Challenged By New Bill*, Sikh Coalition, HUFFINGTON POST (Oct. 18, 2011), http://www.huffingtonpost.com/2011/08/18/nypd-turban-ban-will-be-c_n_930368.html (looking at the legislative challenges to the New York Police Department’s ban on Sikh headwear).

107. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431 (1966) (discussing the enactment of Title VII in the wake of the Civil Rights Act and a need for greater racial equality).

A. Immutability

The way that society views religion and religious discrimination has a direct impact on religious discrimination law. The other Title VII protected classes—race, color, sex, and national origin—are immutable characteristics in that they are not chosen, but rather “born into.”¹⁰⁸ Religion, on the other hand, lies in a murky, gray area, seen by some as voluntary and by others as compelled.¹⁰⁹ After all, you can technically shed yourself of religious faith (or choose a different religion) in a way in which you cannot choose to shed your Indian skin or choose to become East-Asian or Brazilian.

Courts have repeatedly discussed the relationship between immutable characteristics and protection as suspect classes under Title VII.¹¹⁰ Naturally, this leads people to wonder if something that is a choice should actually be protected under Title VII. Such thinking is also representative of the way in which employers treat the religious needs of its employees, as well as the way society views religious discrimination overall. Employers often think that it is not as serious of a concern because it can be compromised, and the public often thinks that religious discrimination is not as serious as racial or sexual discrimination because either they (1) do not share those same religious sentiments or (2) think that religion is a choice.

B. Social Perception of Religion and its Effects on Employer Policies

Though employers are becoming more conscious of their employees’ religious needs, it is a very common perception that religion is chosen and can be compromised for employment. This is exacerbated by the fact that, even within a single faith, followers vary in practice. This leads to both employer policies and statutes assuming that assume believers can make religious compromises.

108. Blair, *supra* note 42, at 547.

109. Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 359 (1997) (“[R]eligion just feels different from the other categories in that it seems both compelled and voluntary and that it is largely about observance.”).

110. See, e.g., *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (holding that close relatives are not a suspect class because, “[a]s a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group.”). See also *Dean v. D.C.*, 653 A.2d 307, 330 (D.C. 1995) (discussing constitutional rights by determining “the extent to which sexual orientation is immutable.”). See also *Jacobson v. Dep’t of Pub. Aid*, 646 N.E.2d 949, 953 (Ill. App. Ct. 1994) *aff’d*, 664 N.E.2d 1024 (Ill. 1996) (holding that parents of children, ages, 18-21 who live at home, do not “constitute a suspect class” using the immutable characteristic argument laid in *Lyng v. Castillo*).

This article is not suggesting that employers should completely compromise their business practices in order to accommodate their religious employees. After all, operations need to be streamlined in order for business to properly function. However, the burden imposed by religious accommodation under Title VII on employers is set so low that the burden of compromise falls mainly on the employee. Furthermore, because Title VII only mandates that employers provide one reasonable accommodation and need not consider an employee's reasonable alternatives,¹¹¹ employers can simply take the "easy way out." Though an alternative accommodation could be exponentially better for an employee and would not be unreasonably burdensome to the employer, the employer technically does not need to entertain the idea.

The connection between an employer's perception of religion as disposable and the lack of accommodation in corporate look policies is clear. As seen with the Disney and MTA employees, employers will try to change their employee's religious appearance, or "accommodate" it in ways that forces the employee to compromise his religious beliefs.¹¹² Furthermore, employers are increasingly conscious of their brand image and the way that their employees' appearance affects business.¹¹³ An unshorn beard, for instance, may seem unkempt to some customers, but has significant religious meaning to a Sikh man. If a company wants to portray a polished look, they may require that all male employees be clean-shaven.

The controversy surrounding the immutability of religion is furthered by varying degrees of practice even within one religion. These degrees do not exist when it comes to race, sex, or national origin; this leads to difficulty for employers in easily identifying employees as members of a certain religion, understanding what an employee's religious practices may be, and what the employee can and cannot compromise as a part of their religious faith. Religion itself is defined and understood in various ways. In fact, many religions are separated into classifications dependent on the level of adherence or practice.¹¹⁴ For instance, it is controversial among

111. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 61 (1986) (holding that employers meet legal obligations upon offering a reasonable accommodation to their employees and that they do not need to also show that each proposed alternative accommodation would result in undue hardship).

112. See Markoe, *supra* note 83 (detailing how MTA workers were asked to affix the MTA logo to their headwear, demeaning the significance of each employee's headwear to their religious practices). See also Huus, *supra* note 72 (describing how a Muslim Disney employee was asked to wear headdresses that were specifically designed to match the theme of the restaurant in which she worked).

113. See Sharona Hoffman, *The Importance of Immutability*, 52 WM. & MARY L. REV. 1483 (2011) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680512 (discussing that employers discriminate on the basis on appearance, and the inequities associated with obesity).

114. See, e.g., *Intermarriage Q&A*, JEWISH OUTREACH INSTITUTE,

Muslims whether the *hijab* is a required garment.¹¹⁵ Hence, some Muslim women choose to wear it as a part of their faith while others do not. This can understandably cause confusion among employers, who may have one Muslim employee who willingly forgoes her *hijab* and another who refuses to do so. This may also further the perception in employers' minds that religious elements can be compromised: "If she can take off her *hijab* and abide by our look policy, why can't you?"

C. *Social Views of Religious Discrimination Post 9/11*

Discrimination is cyclical and anti-discrimination laws progress and evolve as social concepts of "suspect classes" change. For instance, Title VII "prohibits discrimination in employment on the basis of race, national origin, sex, or religion."¹¹⁶ Title VII was originally created as a part of the Civil Rights Act of 1964, which originated with the civil rights movement and had the purpose of combatting racial discrimination.¹¹⁷ Similarly, the Age Discrimination in Employment Act and the Pregnancy Discrimination Act were not adopted until social norms necessitated them, in 1967 and 1978, respectively.¹¹⁸ Even the types of discrimination that federal law is used to combat show a distinct progression.¹¹⁹ The clear flow of litigation under Title VII is fairly representative of social issues and the types of discrimination that are most prevalent at different times historically.

Currently, one of the most widespread discriminatory sentiments is the anti-Islamic sentiment that swept the nation after the 9/11 attacks. Domestic terrorism is a concept that once may have been considered absurd and oxymoronic, but it has become increasingly prevalent in the past few decades.¹²⁰ This anti-Islamic sentiment affects not only Muslims, but also

<http://www.joi.org/qa/denom.shtml> (last visited Feb. 25, 2014) (discussing the various branches of Judaism as Orthodox, Conservative, Reform, and Reconstructionist).

115. See, e.g., John Blake, *Muslim Women Uncover Myths About the Hijab*, CNN NEWS (Aug. 12, 2012, 7:54 AM), <http://www.cnn.com/2009/US/08/12/generation.islam.hijab/index.html> (discussing the significance of the hijab to Muslim women and noting that "[t]he Quran is very ambiguous about whether you have to wear the veil or not.").

116. 42 U.S.C.A. § 2000e-4 (2013).

117. EEOC, *Pre-1965: Events Leading to the Creation of EEOC*, <http://www.eeoc.gov/eeoc/history/35th/pre1965/index.html> (last visited Oct. 30, 2013).

118. EEOC, *Timeline of Important EEOC Events*, <http://www.eeoc.gov/youth/history.html> (last visited Oct. 30, 2013).

119. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (showing one of the first cases fought under Title VII and discussing race discrimination in the workplace); *Ulane v. Eastern Airlines*, 742 F.2d 1081 (1984) (showing one of the first cases fighting gender discrimination under Title VII—twenty years after Title VII was enacted); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (discussing same-sex sexual harassment).

120. See, e.g., *The Benefits of Hindsight: The Need for More Monitoring of Domestic*

Sikhs, who are often perceived by many to be Muslim.¹²¹ Just like bias in regards to race, gender, and sexual orientation, religious discrimination need not be obvious or conscious to have an effect on preferences and actions.¹²² Therefore, anti-Islamic sentiment following 9/11 can have a potentially significant impact on consumer preferences—even the preferences of those individuals who do not consider themselves racist. This affects employers’ decisions in two ways: first, employers who harbor these innate biases themselves manifest them in their look and other employment policies, and, second, employers recognize the power of subconscious discrimination and know that customers may prefer buying a car, clothes, or accounting services from someone who does not look foreign. And though outright discrimination is not legal, there are ways in which employers can cover their discriminatory policies with some arbitrary non-discriminatory business interest. This, coupled with the low burden of proof for employers in the various discrimination claims, leads to practices that discriminate against minority employees.

This anti-Islamic sentiment also leads to a lack of contempt for religious discrimination, especially in comparison to racial or gender

Terrorism, THE ECONOMIST (Aug. 18, 2012), <http://www.economist.com/node/21560566> (discussing the extreme political implications of anti-Islamic sentiment and violence). See also Ben Jacobs, ‘Domestic Terrorism’ Kills Six in Oak Creek Sikh Temple, THE DAILY BEAST (Aug. 5, 2012, 9:46 PM),

<http://www.thedailybeast.com/articles/2012/08/05/domestic-terrorism-kills-six-in-oak-creek-sikh-temple.html> (discussing the tragic shooting at a Sikh “gudwara” as an act of domestic terrorism); Stan Wilson, *Producer of Anti-Islam Film Arrested, Ordered Held Without Bail*, CNN NEWS (Sept. 28, 2012, 10:48 AM),

<http://www.cnn.com/2012/09/27/world/california-anti-islam-filmmaker/index.html> (discussing a highly controversial anti-Muslim film that sparked riots all over the world).

121. See, e.g., Paul Raushenbush, *The Difference Between Muslims and Sikhs.. Misses the Point*, HUFFINGTON POST (Aug. 6, 2012, 12:30 PM),

http://www.huffingtonpost.com/paul-raushenbush/difference-between-muslims-and-sikhs-misses-the-point_b_1747311.html (discussing, in the aftermath of the Oak Creek shooting, the way in which Sikhs are often mistaken for Muslims). See also Dinesh Ramde & Todd Richmond, *Wisconsin Temple Shooting: Oak Creek Incident Leaves at Least 7 Dead*, HUFFINGTON POST (Aug. 5, 2012, 11:01 PM),

http://www.huffingtonpost.com/2012/08/05/wisconsin-temple-shooting-sikh-oak-creek_n_1744761.html (“Sikh rights groups have reported a rise in bias attacks since the Sept. 11 terrorist attacks. The Washington-based Sikh Coalition has reported more than 700 incidents in the U.S. since 9/11, which advocates blame on anti-Islamic sentiment. Sikhs are not Muslims, but their long beards and turbans often cause them to be mistaken for Muslims . . .”).

122. See, e.g., Jeff Stone, *Racist, Prejudiced Attitudes Seep From Our Subconscious*, ARIZ. DAILY STAR (Aug. 6, 2010, 12:00 AM), http://azstarnet.com/news/opinion/racist-prejudiced-attitudes-seep-from-our-subconscious/article_dd243e21-c99a-55af-851b-ba004f549c91.html (discussing the subconscious nature of racial discrimination and that “[s]ubconscious biases creep into our responses so quietly that most people do not know when or how to prevent them. Explicitly rejecting racism . . . does not turn off the automatic biases that lurk in our subconscious.”).

discrimination. If an employer were to openly discriminate against an employee for his race or sex, it is likely that more people would be outraged than if the same employer discriminated against the employee for his religious beliefs. There is even likely to be far greater outrage for an employer that does not make his office accessible to the disabled than for one who does not accommodate his employee's religious practices.¹²³ This happens for three primary reasons. The first goes back to the nature of religion and the controversy of immutability. People look at a religious employee and wonder why the employee does not just set aside her beliefs if her job is more important?" Second, more people can associate themselves with gender classifications or racial classifications than religious ones. Finally, as a society we have been conditioned to find certain kinds of discrimination more unacceptable and often tend to sympathize with the victim—for example, discrimination against the disabled. The recent stigma against certain religious practices—and the way that society can view religion in general—creates a lack of sympathy for those facing religious persecution.

V. A DYNAMIC AND EFFICIENT APPROACH TO THE FUTURE OF RELIGIOUS PROTECTION

Like most legislation, Title VII is not static in its interpretation and application. Just as there have been recent rulings regarding Title VII protection for sexual orientation,¹²⁴ the variation in claims arising under the statute will continue to change going forward. As noted earlier, protection under Title VII is often representative of social norms and perceptions; as social views evolve, so does the law.

A. *Potential Backlash to Stricter Protection of Religious Rights*

The potential for backlash with the adoption of stricter religious protection under Title VII is significant. Rulings under the current law show that employers already have a low threshold for the burden they are willing to bear when accommodating employees.¹²⁵ Further, there are other

123. See Blair, *supra* note 42, at 515 (“[I]magine that your employer does not provide a ramp or some other accommodation for you to enter the building. You and most of society would find that unreasonable and, indeed, the Americans with Disabilities Act (ADA) would probably mandate that you be accommodated.”).

124. See EEOC, *Facts about Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, or Transgender (Gender Identity) Status*, <http://www.eeoc.gov/federal/otherprotections.cfm> (last visited Oct. 30, 2013) (detailing EEOC rulings based on sexual orientation).

125. See, e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 63 (1977) (showing a case where the threshold tolerance was very low).

potential concerns regarding employers' rights and the exploitation of a more accommodating Title VII. However, with the adoption of the right kind of framework, it is possible to negate these concerns.

1. Balancing Employers' Rights with Religious Rights

At some point, the need to protect an employee's religious rights may overshadow the employer's right to conduct business efficiently and in the manner he chooses. This is, after all, the crux of the "undue hardship" issue.

As discussed earlier, this becomes an issue with look policies and employers' rights to choose the way their employees present themselves. As in the cases discussed earlier, employers often claim that their look policies are necessary to protect the integrity of their businesses.¹²⁶ For instance, Hooters is a popular restaurant chain with a well-known waitress uniform policy—one that dictates not only the exact clothing to be worn, but also the waitress's hair and makeup.¹²⁷ Hooters restaurants sell a very specific atmosphere, and the look policy is essential to that.¹²⁸ It is expected that a restaurant like Hooters would take issue with a more accommodating Title VII that negated its ability to dictate employee dress. It is plausible that certain employers would find a similar necessity to avoid providing religious accommodations for their look policies.

What needs to be noted, however, is that not all businesses are alike and not all look policies are alike. Title VII's "failure to accommodate" framework should not be seen as black and white, but should rather be approached in an effort to balance the employer's rights with the employee's rights. If courts correctly apply such a balancing approach, they should be better able to distinguish situations in which the look policy is necessary from those that it is not. However, a problem also lies with the low standard of the "undue hardship" for an accommodation. Such a burden is negligible for most employers and leaves many employees without effective accommodations. Instead, the language of Title VII should adopt the phrase "substantial hardship" or something of that nature. Alternatively, the statute should properly define "undue hardship".¹²⁹

126. See, e.g., *The M.T.A. and Fairness*, *supra* note 82 (discussing how a company felt not wearing a turban was integral to maintaining authority).

127. See Diane Bullock, *What it Takes to Work Here: Hooters*, MINYANVILLE (Jun. 15, 2010, 5:00 PM), <http://www.minyanville.com/special-features/articles/hooters-restaurant-hooters-training-work-at/6/15/2010/id/28534> (noting that the Hooters dress policy requires that hair is styled "using the 'best, not the cheapest' products and . . . must be cut every six to eight weeks. No ponytails and for god's sake 'NEVER come to work with wet hair!'").

128. *Id.* (detailing more of Hooter's image requirements).

129. For an example of a different formulation of a heightened standard, see Sadia Aslam, *Hijab in the Workplace: Why Title VII does not Adequately Protect Employees from*

Placing a higher burden on employers would strengthen the requirement that look policies be deemed actually necessary to business operations. In such a situation, an employer who has a genuine fiscal or business concern will not be affected by the higher standard of burden. If it were the case that an employer would be substantially burdened by accommodating a religious practice, they would preserve the right to maintain their look policy. Meanwhile, employers that would not actually be affected would be required to accommodate their employees' religious beliefs and practices.

Objectors to this approach might argue that if the burden for employers to provide accommodations is heightened, the kinds of accommodation that employers are required to make will continue to progress to the point of absurdity. These objectors might point to the *kirpan*, a Sikh article of faith often resembling a small sword, which is often the subject of controversy in religious discrimination disputes.¹³⁰ Many employers might worry that if a greater range of religious accommodations is mandated, then at some point they will lose control over significant issues, such as safety, in their offices. Once accommodations are made for religious attire and grooming, accommodations for articles of faith like *kirpans* may soon be required too.

However, employers need not worry about losing complete authority to the point that workplace safety is jeopardized. Even if Title VII is amended and creates a "substantial hardship" requirement as suggested above, employers would still be able to prohibit items like a *kirpan*. The beauty of a balancing approach requiring a substantial hardship is that an employer's rights would still be maintained to the degree that they are legitimate and necessary. There is no question that safety is a real concern for employers, and a properly laid out balancing test would account for this.

Congress and the courts agree that employers should not have to compromise the integrity of their business practices in an effort to accommodate employees. However, the way the current law stands, this balance of interests is applied in an inequitable manner, favoring employers at the expense of employees. As noted above, amending the burden requirement in the failure to accommodate framework would help resolve

Discrimination on the Basis of Religious Dress and Appearance, 80 UMKC L. Rev. 221, 236 (2011) (proposing a standard of "significant difficulty or expense").

130. See Frank Taylor, *Interpretation of Religious Freedom Restoration Act is Issue in IRS Employee's Lawsuit Over Kirpan*, EXAMINER.COM (Sept. 3, 2009), <http://www.examiner.com/article/interpretation-of-religious-freedom-restoration-act-is-issue-irs-employee-s-lawsuit-over-kirpan> (discussing a recent case in which a Sikh IRS employee was prohibited from bringing her kirpan to the federal building in which she worked).

this imbalance. Undue hardship is an exceptionally minimal requirement¹³¹ and by raising the burden on the employer, more employees can plausibly be accommodated with a negligible effect on the employer.

Another important aspect of this balancing approach is Title VII's cooperation requirement, interpreted by courts such that an employer's "efforts to reach reasonable accommodation [triggers an employee's] duty to cooperate."¹³² Nowhere does it require any such cooperation from the employer's side, as it is likely presumed that the employer's effort to provide accommodation itself is cooperation. However, this one-sided requirement perpetuates this imbalance. It is plausible that providing an employee with an accommodation that he prefers would be no more burdensome to the employer. But the employer does not have to even entertain the idea; once he has offered one "reasonable" accommodation, he has met his responsibility. By creating a dual-cooperation requirement, an employee may be able to receive a fairer accommodation and leave the employer no worse off. This cooperation can be tailored in such a way as not to create an extra burden for the employer (e.g., having to cooperate by providing a more burdensome accommodation) and simply creates a better situation for the employee if all else is equal.

2. Employers' Avoidance of Liability from Backlash Discrimination Claims

There is already concern under existing law of the prevalence of "backlash discrimination claims," and employers' exposure to liability.¹³³ It is plausible that such concerns would only be exacerbated if the burden placed on employers to provide accommodation increased. The numbers don't lie: there has been a leap in the number of claims since the 9/11

131. See, e.g., *Hardison*, 432 U.S. at 63 (finding no violation of civil rights laws where an employer had tried in a variety of ways to accommodate an employee whose religious beliefs prohibited him from working on Saturdays).

132. *Lee v. ABF Freight Sys.*, 22 F.3d 1019, 1022 (10th Cir. 1994). See, e.g., *Smith v. Pyro Min. Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987) (affirming a district court order awarding plaintiff employee damages for discrimination on the basis of religion in violation of Title VII because plaintiff established a prima facie case, defendant employer's accommodations were not reasonable, and defendant did not show that it would suffer an undue hardship). See also *Chrysler Corp. v. Mann*, 561 F.2d 1282 (8th Cir. 1977) (holding that an employer did not violate Title VII by failing to accommodate the employee's religious beliefs where the employee flouted company policy, ignored readily available means of accommodation, and maintained an intransigent position).

133. Cassandra M. Gandara, Note, *Post-9/11 Backlash Discrimination in the Workplace: Employers Beware of Potential Double Recovery*, 7 HOUS. BUS. & TAX L.J. 169, 169-70, 182 (2006) (seeking to "inform and forewarn employers of a few of the potential causes of action that could be filed against them based on post-9/11 backlash discrimination and the potential extent of their liability for such discrimination.").

terrorist attacks, from 2127 in 2001 to 4151 in 2011.¹³⁴ Cassandra M. Gandara notes that these numbers leave employers too susceptible to litigious claims.¹³⁵ But she alleges that the *de minimus* standard in Title VII “provid[es] a viable defense against any backlash religious discrimination claim.”¹³⁶ She also suggests ways in which employers can take formal steps to defend against the “potentially devastating blow[s] to [their] business[] finances [that would be experienced by having to] pay hundreds of thousands of dollars to one or more employees.”¹³⁷ Gandara, and others like her, would likely believe that creating a higher standard of proof would make employers unfairly vulnerable to overly litigious employees.

This argument is flawed in two primary ways. First, it focuses on the cause of the discrimination rather than its effect on the employment conditions. It is true that the increase in religious discrimination in recent years is the result of backlash and anti-terrorist sentiment.¹³⁸ However, an employer’s first thought in response to this increased discrimination should not be avoiding liability, but rather creating a less discriminatory work environment. Employers overlook the actual issue by focusing on avoiding liability and the intent and source of discrimination.

Second, the argument fails to account for the high percentage of claims that are dissuaded at the agency level itself, thereby preventing the employer from facing claims with no merit. Because all Title VII claims must be filed with the EEOC, the agency can choose to proceed with only those that have some reasonable basis.¹³⁹ For instance, of the 4151 religious discrimination claims filed with the EEOC in 2011, only 303 were found to have reasonable cause.¹⁴⁰ It is evident that these claims are thoroughly screened in order to prevent unreasonable liability and litigation for employers. As for these remaining 303 claims, employers should address the source of discrimination within their workplace and seek to quash the actual discrimination rather than just the liability.

134. EEOC, *Religion Based Charges FY 1997 – FY 2012*, <http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm> (last visited Nov. 23, 2013).

135. Gandara, *supra* note 133.

136. *Id.* at 179.

137. *Id.* at 200.

138. *Confronting Discrimination in the Post 9/11 Era: Challenges and Opportunities Ten Years Later*, U.S. DEPT. OF JUSTICE (Oct. 19, 2011), available at http://www.justice.gov/crt/publications/post911/post911summit_report_2012-04.pdf (discussing the spike in hate crimes and discrimination in the backlash of 9/11).

139. EEOC, *Filing a Charge of Discrimination*, <http://www.eeoc.gov/employees/charge.cfm> (last visited Nov. 23, 2013).

140. EEOC, *Religion-Based Charges FY 1997 – FY 2012*, <http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm> (last visited Nov. 23, 2013).

B. The Ineffectiveness of Legislation Absent a Change in Social Perceptions

The progress made over the past few decades in protecting religious rights in the workplace is laudable; the amendments made to Title VII and related laws effectively protect many employees from discrimination. However, change is not swift enough to keep pace with the rising levels of discrimination and particularly sticky nuances of Title VII. A law like Title VII must be a living document—it needs to evolve to adopt the contemporary issues that Americans face. Religious discrimination in post-9/11 America is a significant issue and the law should evolve to address it. At the same time, such a law needs to survive the biases and backlash that it encounters. After all, progress requires facing inevitable opposition.

However, even progressive religious discrimination laws are often ineffective if social mentality itself does not evolve. As one legislative advocate notes:

Even as Sikhs and other religious minorities celebrate [legislation protecting religious dress], bigots regard it as an abomination. They balk at the specter of turbaned Sikh police officers protecting their communities. They recoil at the thought of Muslim women selling them clothes while wearing headscarves. And they look askance at Jews and Adventists for observing a Sabbath on a day other than Sunday [N]aysayers worry that [this legislation] gives a blank check to religious observers to wear and do whatever they want.¹⁴¹

Laws and society have a somewhat interconnected relationship; the nature of the law affects social perceptions and social perceptions also affect the law. It is much harder to change social views on race and religion than it is to create progressive laws that will pave the way for social acceptance. Fortunately, there have been efforts in creating more equitable employment discrimination laws. The Workplace Religious Freedom Act of 2010 was introduced as amendment to Title VII and proposed stricter requirements for employers in providing religious accommodations.¹⁴² Among other amendments, this bill defined “undue hardship” as “impos[ing] a significant difficulty or expense on the conduct of the employer's business when considered in light of relevant factors” and stated that an accommodation “shall not be considered to be a reasonable accommodation if the accommodation requires segregation of

141. Rajdeep Singh, *Celebrating AB1964, California's New Religious Freedom Law*, WASH. POST (Sept. 18, 2012), http://www.washingtonpost.com/blogs/guest-voices/post/celebrating-ab1964-californias-new-religious-freedom-law/2012/09/18/ad7d07fc-01e1-11e2-b260-32f4a8db9b7e_blog.html.

142. Workplace Religious Freedom Act, S. 4046, 111th Cong. (2010).

an employee from customers or the general public.”¹⁴³ Though it has no co-sponsors, the bill was reintroduced in 2012.¹⁴⁴

Some state legislation has been able to address these social nuances in a way that Title VII hasn’t yet. In fact, many state regulations have more stringent anti-discrimination requirements for employers that not only provide greater protection for employees, but also battle those issues found in federal law. For instance, in the wake of the Oak Creek Sikh Shooting, California passed the Workplace Religious Freedom Act (“AB1964”), amending the California Fair Employment and Housing Act. This law places even stricter requirements on employers when accommodating an employee’s religious practices. The law is said to “eliminate[] confusion between the federal and state definitions of *undue hardship* stating that California has a higher *significant difficulty or expense* hurdle for religious accommodation instead of the *de minimus* standard.”¹⁴⁵

The system is not flawless. Though there is progress towards more perfect legislation at both a state and federal level, there are deeper social issues around religion and religious discrimination. People who have the hateful sentiments like those described above infiltrate the workplace, the legislature, and the courts. Until society as a whole can look at religion in an unbiased way, Title VII will never be able to reach its full and greatest potential.

CONCLUSION

Title VII has three primary flaws. First, the ambiguity of the statute itself, leaving it vulnerable to improper interpretation. Second, the way in which that flawed statutory framework allows for inefficient and improper accommodation, ranging from workplace segregation to ill-enforced look policies. Finally, the social vulnerability of the legislation and way in which it fails to keep up with social norms, and yet, is susceptible to contemporary social biases.

It is possible to amend Title VII to make it more dynamic and efficient in dealing with claims of religious discrimination. If the requirement for an employer to evade providing accommodation remains “undue hardship,” this term needs to be explicitly clarified in the way that California’s Workplace Discrimination Act has done so. Further, “reasonable accommodation” needs to be defined more precisely, taking into account that segregation and alteration of religious practices may not be seen as

143. *Id.* at § 4(a)(3).

144. Workplace Religious Freedom Act, S. 3686, 112th Cong. (2012).

145. Beth Zoller, *New California Laws Address Religious Discrimination, Accommodation and Tolerance*, JDSUPRA (Sep. 13, 2012), <http://www.jdsupra.com/legalnews/new-california-laws-address-religious-di-49933/>.

reasonable. With these clarifications, there is less of a burden on courts to interpret the statute—interpretation that more often than not results in favor of the employer. This clarification would also help resolve many of the issues with look policies and discerning which policies are necessary for business and which can be amended or are simply pretexts for discrimination.

In the end, any evolution in Title VII should aim to strike a balance between religious rights and the rights of employers to conduct business efficiently and cost effectively. By creating the appropriate balancing test, and assuming proper execution by the courts, Title VII can create greater religious freedom without becoming overly burdensome to employers.