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Legal Sidebar

Supreme Court Considers Religious Accommodations in the Workplace

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Recent Supreme Court decisions interpreting the Religious Freedom Restoration Act and the Religion and Speech Clauses of the First Amendment have strengthened protections for religious activity. The Court has now taken up the question of what constitutes religious discrimination in employment under Title VII of the Civil Rights Act of 1964 (Title VII). *Groff v. DeJoy* presents the Court with the opportunity to reconsider long-standing precedent regarding requests for religious accommodations in the workplace.

Title VII requires employers to reasonably accommodate their workers' religious needs unless doing so would impose an "undue hardship on the conduct of the employer's business." In 1977, the Supreme Court declared in *Trans World Airlines, Inc. v. Hardison* that an accommodation creates an undue hardship when it imposes "more than a de minimis cost." Some members of the Court, other federal judges, the executive branch, and commentators have critiqued the de minimis standard as wrongly interpreting Title VII's text and inadequately protecting workers' religious rights, particularly those of workers practicing minority faiths. In *Groff*, the Court has granted certiorari to consider what showing employers must make to reject a religious accommodation request; in other words, what is "undue hardship"? The issues in the case are mainly statutory, and Congress has broad latitude within constitutional boundaries to define when employers must accommodate employees' religious practices. This Sidebar reviews Title VII's religious accommodation provision and the Court's interpretation of it, the issues currently before the Court in *Groff*, and considerations for Congress.

Legal Background

Title VII prohibits employers with at least 15 employees from discriminating against employees and applicants on the basis of religion, as well as race, color, sex, and national origin. (Along with private employers, Title VII applies to most federal executive employers, and the Congressional Accountability Act applies it to most federal legislative employers.) Religious discrimination includes the failure to reasonably accommodate an employee or job applicant's religious observance or practice, unless the employer can show that accommodation imposes an "undue hardship on the conduct of the employer's business." An accommodation is a change in the employer's policies, practices, or the work environment to allow an employee to engage in a religious practice or observance. Congress did not define "undue hardship" or "conduct of the business." It has not amended this portion of Title VII since its enactment.

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The Supreme Court has opined on the Title VII undue hardship standard once. In *Hardison*, the Court focused on whether Title VII ever requires employers to violate collective bargaining agreements as part of an accommodation. Acknowledging that Title VII specifies that actions taken "pursuant to a bona fide seniority or merit system" are legal so long as the employer did not adopt or design the system with a discriminatory motive, the Court held that violating an "otherwise valid agreement" as a religious accommodation would be an undue hardship. Although the Court devoted less analysis to when financial costs cause undue hardship, it also declared that requiring an employer to "bear more than a *de minimis* cost" in making a religious accommodation created an undue hardship. To allow the plaintiff to skip Saturday shifts, the employer in *Hardison* would have had to work shorthanded or pay a substitute premium wages. The Court accepted findings that these options would have required the employer to incur "*substantial* costs" (emphasis added).

The *Hardison* majority was concerned that the accommodation the plaintiff wanted—to be excused from working during his Saturday Sabbath—would have distributed the benefit of preferred shifts on the basis of religion, an outcome the Court characterized as itself discriminatory: the plaintiff could have been accommodated "only at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends." "Title VII does not contemplate such unequal treatment," the Court concluded.

The majority opinion drew a dissent from Justice Thurgood Marshall. In Justice Marshall's view, the de minimis standard eviscerated Title VII by excusing employers from granting religious employees "even the most minor special privilege." Justice Marshall decried the pressure he thought *Hardison* placed on religious minorities "to make the cruel choice of surrendering their religion or their job" and critiqued the majority for its "disregard" of Congress's choice to require religious accommodations. Agreeing that a religious accommodation might sometimes result in "unequal treatment," Justice Marshall read the statute to require "preferential treatment" of religious employees in some cases.

While the Court has not returned to the question of undue hardship under Title VII, more recently it has appeared to embrace at least part of Justice Marshall's critique. In 2015, the Court observed that "Title VII does not demand mere neutrality with regard to religious practices." Instead, in the Court's view, it requires "favored treatment" for religious practices by requiring employers to, at times, make allowances for religiously motivated conduct that they would not make for similar secular needs.

Equal Employment Opportunity Commission (EEOC) regulations treat *Hardison* as anchored to its facts: while "costs similar to the regular payment of premium wages of substitutes . . . would constitute undue hardship," "infrequent" or temporary payments of premium wages generally would not. Administrative costs rarely constitute an undue hardship under the regulations. Evaluating an employer's burden, the EEOC considers "the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation." The EEOC also specifies that employers cannot speculate about undue hardship. They must present concrete evidence.

Since *Hardison*, Congress has enacted other statutes requiring employers to provide reasonable accommodations, but it has used a different standard for "undue hardship." The Americans with Disabilities Act (ADA), enacted in 1990, defines undue hardship as "an action requiring significant difficulty or expense," considering factors including the resources of the employer and the nature of its operations. The legislative history suggests an effort "to distinguish" the ADA's definition of undue hardship from Title VII's. The Senate committee report states that "the principles enunciated by the Supreme Court in *TWA v. Hardison* . . . are not applicable" to the ADA. The House committee report declares that the ADA's "higher standard is necessary in light of the crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities."

The Fair Labor Standards Act, Uniformed Services Employment and Reemployment Rights Act, and Pregnant Workers Fairness Act also require certain accommodations absent "undue hardship," and each defines "undue hardship" identically to, or closely tracking, the ADA definition.

Groff v. DeJoy: Case Background

Plaintiff Gerald Groff worked as a rural carrier associate for the U.S. Postal Service, a position responsible for covering for absent employees. Groff observes a Sunday Sabbath, during which he does not work. When Groff began working for the Postal Service his position did not require Sunday work, but his district later contracted with Amazon to deliver packages, including on Sundays. Groff avoided Sunday deliveries through a combination of postal policy, transfers, and accommodations, until the Postal Service and Groff's union signed a memorandum of understanding (MOU) establishing a new procedure for assigning Sunday shifts. In 2017, the Postal Service began requiring Groff to work certain Sundays in accordance with the MOU. He missed over 20 Sunday shifts, was disciplined, and resigned in 2019.

Groff sued, alleging that the Postal Service violated Title VII by failing to accommodate him. The district court and Third Circuit ruled for the Postal Service. The lower courts found that exempting Groff from Sunday work caused undue hardship, because doing so violated the MOU and unfairly burdened other employees. The courts indicated that Groff's absences forced the station postmaster to deliver mail and that other employees had quit, transferred, or filed a union grievance as a result of the situation.

Judge Hardiman dissented from the Third Circuit opinion. Judge Hardiman interpreted Title VII to require the Postal Service to show that accommodating Groff would have harmed "its '*business*,' not Groff's co-workers." Judge Hardiman criticized the majority for, in his view, allowing resentful colleagues to veto a religious worker's right to accommodation.

The Supreme Court granted certiorari to determine (1) whether *Hardison* correctly stated that any accommodation imposing more than de minimis costs constitutes an undue hardship and (2) when burdens on a religious employee's coworkers can constitute an undue hardship.

Parties' Arguments

Groff contends that according to the plain meaning of the phrase "undue hardship," an employer must accommodate an employee's religious practice absent "significant difficulty or expense in light of the employer's operations." Although the de minimis standard derives from the Supreme Court's decision in *Hardison*, Groff argues that it is dicta—i.e., language not binding on future courts—that the Court is free to disregard. Groff also contends that statutes like the ADA support his plain-language interpretation of undue hardship. Religious groups should not receive "second-class treatment," Groff contends, compared to employees with disabilities or pregnant workers, whom employers must accommodate absent significant difficulty or expense.

Groff also advocates for Justice Marshall's view that the de minimis standard undermines Title VII's accommodation requirement, and he raises Justice Marshall's critique of *Hardison*'s focus on neutrality between religious and nonreligious employees. Groff and a number of amici emphasize that by making it relatively easy for an employer to claim an undue burden, *Hardison*'s standard tends to particularly disadvantage religious minorities, who are more likely to need accommodations.

As to the second question presented—when a burden on coworkers can be an undue hardship—Groff contends that effects on coworkers, while "relevant," are not *alone* an undue burden overcoming the right to an accommodation. Groff asserts that looking to burdens on coworkers is "atextual" and that courts should focus on the impact of accommodations on the business. So long as workers can continue to perform effectively, Groff argues, there is no undue hardship, and an accommodation is required.

The United States argues that the Supreme Court should continue to follow *Hardison*'s de minimis standard, citing the doctrine of stare decisis, which generally requires the Court to adhere to prior decisions. The United States points out that Congress has repeatedly responded to Supreme Court

decisions by amending Title VII but has never adopted any of the numerous proposed bills responding to *Hardison*. Similarly, the United States argues that judicially adopting the ADA's undue burden standard is inappropriate when Congress expressly distinguished the ADA from Title VII. Furthermore, revising the definition of undue hardship would, the United States argues, render decades of case law interpreting that standard obsolete, leaving employers in doubt as to their obligations.

Nevertheless, the United States concedes that some lower courts have allowed employers to deny religious accommodations too easily and asks the Court to affirm the EEOC's approach, which the United States argues substantially protects religious rights. Reflecting the current EEOC regulations, the United States contends that "more than de minimis" must be understood in the context of *Hardison*'s references to "substantial expenditures" or "substantial additional costs." The United States argues that under *Hardison*, employers cannot reject an accommodation based on "trivial or speculative burdens," and courts have usually properly protected the rights of religious workers.

Concerning burdens on coworkers, the United States emphasizes that the statute directs courts to look at the "*conduct* of the employer's business," which "includes the management or direction of the business." "An accommodation that impairs employees' ability to do their work, or causes them to quit, transfer, or file grievances or litigation, has obvious effects on the conduct of the employer's business," the United States maintains. Actual burdens imposed on others—as opposed to "general disgruntlement, resentment, or jealousy"—are therefore part of the undue hardship analysis, in the United States' view.

Considerations for Congress

Within constitutional limits, Congress has the authority to decide the appropriate standard governing Title VII religious accommodation requests. Several factors may be relevant to that decision.

At oral argument, the United States outlined three types of common accommodation requests: requests for schedule changes (e.g., days off for Sabbath or holiday observance or breaks for prayer); requests for variations from dress or grooming policies (e.g., requests to wear a head covering, beard, or specific clothes); and requests related to religious expression (e.g., displaying religious symbols or engaging in or abstaining from religious speech). Congress may wish to consider how employers might reasonably respond to these or other categories of requests. EEOC regulations, some state laws, and previously introduced federal legislation, for example, address particular requests, such as Sabbath observance, and/or particular accommodations, such as allowing premium pay, substitutes, or leave.

Congress could offer more guidance on what constitutes an undue hardship. Legislation could establish a general standard (such as "de minimis costs" or "substantial costs") or speak to specific kinds of burdens, like financial or efficiency costs, burdens on coworkers, or effects on customers. Congress could enumerate factors employers and courts should consider, such as size of the employer, overall or facility-specific financial and human resources, and nature of the operations.

Substantial briefing in *Groff*, and writing from some of the current Justices, focuses on whether Title VII's standard for undue hardship should match the ADA's. The Court, or Congress, could adopt the ADA standard. The ADA differs from Title VII in ways that may be relevant to that determination.

For one thing, the ADA does not require accommodations that relieve workers of any "essential function" of their jobs. If Congress were to make it more difficult for employers to deny accommodations under Title VII without adopting the ADA's essential-function limitation, courts might find that employers sometimes have to excuse employees with religious objections from essential functions of their jobs. Such an outcome may be more likely if Congress were to decide that impacts on coworkers alone should not constitute undue hardship. Under the ADA, burdens on coworkers can create an undue hardship.

Chief Justice John Roberts commented at oral argument that the ADA and other federal accommodation provisions also "apply to a fairly discrete category of individuals," while "Title VII . . . has a broader scope." Under the ADA, employers generally may verify an employee's disability and need for accommodation. Verifying religious beliefs is more complicated. Congress, courts, and the EEOC define religious belief and practice broadly. Courts only reluctantly inquire into the sincerity of a religious belief. Courts may not inquire into the "reasonableness" of a religious belief or the "centrality" of a religious practice to a belief system. As Justice Amy Coney Barrett's comments at oral argument suggest, this raises the potential for a higher number of claimants (generally or at a particular workplace) than is likely to arise under the ADA.

There is also a distinction in coverage between the ADA and Title VII. The ADA does not protect employees without disabilities—they cannot bring claims that their disabled coworkers received preferential treatment. In contrast, Title VII protects all employees from religious discrimination. As a result, secular employees and those who do not share their coworkers' or management's faith can in some cases bring disparate treatment claims. The Supreme Court recognizes that Title VII allows—indeed, demands—some preferential treatment of religious employees when they need accommodation. However, at some point, as some of Justice Brett Kavanaugh's questions suggested at oral argument, the burden on another employee imposed by accommodation may approach discrimination.

Conflicts may be particularly hard to adjudicate when religious accommodations for some employees cause others dignitary harms—harms that could rise to the level of a Title VII harassment claim. Workers have requested accommodations allowing them to, for example, write evangelizing letters to coworkers; proselytize to clients; refuse to serve certain customers; and refuse to use others' preferred names and pronouns. Under current law, courts have rejected most of these requests. Generally, employers can require disabled employees to engage respectfully with coworkers and clients and do not have to allow rude or abusive behavior even when it is linked to disability. While disability cases may offer guidance if Congress raises the Title VII standard for undue hardship, courts and employers may find it harder to determine what is offensive or harassing when it comes to religious conduct. They may also struggle to determine when offense at religious conduct manifests animus toward religion and should not be tolerated. Congress may decide to clarify these boundaries.

There may even be a point at which requiring employers to accommodate religious employees raises a concern under the Establishment Clause, which prohibits some government support for religion. In *Estate of Thornton v. Caldor, Inc.*, the Supreme Court held that a state statute guaranteeing workers the absolute right not to work on their chosen Sabbath forced employers to run their businesses according to their employees' faith and largely worked to promote a particular religious practice. The Court focused on the absolute nature of the statutory obligation and on employees' ability to choose their Sabbath day. The precedential force of *Thornton* is not clear now that the Court has "abandoned" the test it long used to evaluate Establishment Clause claims, which looked in part to the purpose and effect of government actions. The point at which obligating private employers to provide religious accommodations may violate the Establishment Clause is a subject of ongoing debate.

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